THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 370/2023

In the matter between:

CHARLES PHOGOLE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Phogole v The State* (370/2023) [2024] ZASCA 54 (9 May 2025)

Coram: MAKGOKA, MOKGOHLOA and MOTHLE JJA

Heard: 20 May 2024

Delivered: 9 May 2025

Summary: Criminal law and procedure – evidence of a single witness in a rape case – whether evidence was sufficient to sustain conviction despite contradictions in the testimony of a single witness – whether there are substantial and compelling circumstances justifying the imposition of a lesser sentence than life imprisonment.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Khumalo J and Matthys AJ sitting as court of appeal):

1 The appeal against conviction is dismissed.

2 The appeal against sentence is upheld.

3 The order of the full bench in respect of sentence is set aside and replaced with the following:

'(a) The appeal against sentence is upheld.

(b) The sentence imposed by the trial court is set aside and replaced with the following:

"The accused is sentenced to 10 years' imprisonment".'

4 The sentence in paragraph 3 (b) is antedated to 12 February 2015 in terms of s 282 of the Criminal Procedure Act 51 of 1977.

JUDGMENT

Mokgohloa JA (Mothle concurring):

Introduction

[1] This appeal concerns the rape of an 8-year-old girl, which occurred in 2010 or 2011, in a toilet at a tavern. The rape occurred during the day whilst she was playing with her friends.

[2] The appellant was convicted in the Regional Court Johannesburg, held in Alexandra (the trial court) on 26 November 2014. The conviction was for rape, in contravention of s 3 of the Sexual and Related Matters Amendment Act 32 of 2007 (the Act). He was sentenced to life imprisonment on 12 February 2015. In

terms of s 309(1) of the Criminal Procedure Act 51 of 1977 (the CPA), read with s 10 and s 43(2) of the Judicial Matters Amendment Act 42 of 2013, once the regional court imposes a sentence of life imprisonment, the appellant was entitled to an automatic right of appeal to a full bench of the high court. The Gauteng Division of the High Court, Johannesburg, per Khumalo J and Matthys AJ (the full bench), dismissed the appeal on both conviction and sentence. The appeal before us is against the judgment of the high court, with special leave of this Court.

[3] Counsel for the appellant contended that the State did not prove its case beyond reasonable doubt; that the trial court failed to apply the cautionary rule in evaluating the evidence of a single child witness; and that the evidence of the complainant was not satisfactory and reliable and was inconsistent. Counsel contended further, that it was improbable in that the complainant was raped in light of the delay in her reporting of the incident; that she could be raped in the toilet at a tavern with no eyewitness; that she did not initially indicate that the appellant lifted her up during the rape; and that she informed her grandmother that she was bleeding and the grandmother did nothing. According to counsel, the trial court misdirected itself by not accepting the evidence of the appellant as being reasonably and probably true in that the mother of the complainant influenced the complainant to falsely implicate him.

[4] The issues for determination before this Court are whether the appellant was properly convicted on the evidence of a child single witness; whether the trial court was correct to reject the evidence of the appellant as not being reasonably and probably true; and whether the sentence of life imprisonment imposed on the appellant was shockingly inappropriate.

[5] In the trial, the state led evidence of three witnesses, the now 11-year-old complainant, her mother Ms Sara Phalane (Ms Phalane), and Ms Mashudu Nemotanzila (Ms Nemotanzila), a forensic nurse who examined the complainant. The appellant testified in his defence. It is common cause that the appellant is well known to the complainant as her mother's friend. It is further common cause that the complainant was approximately eight years old when the incident occurred, and she testified about an incident that occurred four or five years before.

The facts

[6] The facts of this case can be summarised as follows. During the year 2010 or 2011, the complainant was playing a game of 'hide and seek' with her friends outside her grandmother's house. The appellant approached her at the hiding place, pulled her away and took her to a toilet at a nearby tavern. The appellant undressed her, undressed himself and raped her. According to the complainant, the appellant lifted her and pressed her against the wall and raped her. This happened inside the toilet, and it was daylight. Thereafter, the appellant ordered her to go home.

[7] She went home and did not tell her grandmother about the rape as she was afraid that she will give her a hiding. She only revealed this incident to her mother much later when there was another incident of children being raped in her community.

[8] Ms Phalane, the complainant's mother, testified that, on 5 January 2014, she learnt about the rape of children who had been friends with the complainant. She enquired from the complainant and her sibling if they were ever rape or touched by the person accused of raping the other children. The complainant and her sibling denied being raped or touched. Ms Phalane indicated that she would

take them to the doctor to confirm that they were not raped. It was at that point that the complainant started to cry and informed her mother that the appellant had raped her. Ms Phalane reported the rape to the police and the complainant was taken to the clinic for her to be examined.

[9] Ms Nemotanzila, confirmed that she examined the complainant on 6 January 2014. Upon her examination, she found that the complainant's hymen was not intact and had a cleft. She testified that her findings were consistent with a history of previous penetration. Ms Nemotanzila testified that the complainant reported to her that, during 2011, a man known to her took her to a toilet at a tavern where he undressed and did naughty things with her.

[10] The appellant testified in his defence and denied having raped the complainant. His defence was that he had been in a secret love relationship with Ms Phalane for about ten years. The last time he saw Ms Phalane was on 31 December 2013 when they were at his house. Ms Phalane asked him for money. He told her that the did not have money and this made her angry. The appellant testified that he was arrested on 5 January 2014. He believed that Ms Phalane influenced the complainant to lay false charges against him and falsely implicate him because he refused to give her money that she requested on 31 December 2013.

[11] Both the full bench and the trial court accepted the evidence of the complainant, Ms Phalane and Ms Nemotanzila and rejected that of the appellant. While they found some inconsistencies with the evidence provided by the complainant and Ms Phalane relating to the position the complainant was in when she was raped, both courts were satisfied that the evidence of the complainant was satisfactory and sufficient to convict the appellant of rape.

Conviction

[12] It is common cause that the complainant was a single witness and a child. For some years, the evidence of a chid witness, particularly as a single witness, was treated with caution. This was because it was stated that a child witness could be manipulated to falsely implicate a particular person as the perpetrator thereby substituting the accused person for the real perpetrator. In *Woji v Santam Insurance Co Ltd* (*Woji*),[1] this Court stated that, to ensure that the evidence of a child can be relied upon, a court must be satisfied that the evidence is trustworthy. The Court noted factors which must be taken into account to come to a conclusion that the evidence is trustworthy. In this regard, the Court held as follows:

'Trustworthiness . . . depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child has to be investigated. His capacity of observation will depend on whether he appears "intelligent enough to observe". Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion "to remember what occurs" while the capacity of narration or communication raises the question whether the child has the "capacity to understand the questions put, and to frame and express intelligent answers" . . . There are other factors as well which the Court will take into account in assessing the child's trustworthiness in the witness-box. Does he appear to be honest – is there a consciousness of the duty to speak the truth? Then also

"the nature of the evidence given by the child may be of a simple kind and may relate to a subject-matter clearly within the field of its understanding and interest and the circumstances may be such as practically to exclude the risks arising from suggestibility" . . .

At the same time the danger of believing a child where evidence stands alone must not be underrated.'[2]

[13] In terms of s 208 of the CPA, it is competent for a court to convict on the evidence of a single witness. However, the evidence of a single witness must be clear and satisfactory in every material respect.[3] This does not mean that such

[1] *Woji v Santam Insurance Co Ltd* [1980] ZASCA 134; 1981 (1) SA 1020 (A) at 1028B-D
[2] Ibid.
[3] *R v Mokoena* 1956 (3) SA 81 (A) at 85 quoting *Rex v Mokoena* 1932 OPD 79 at 80.

evidence must be flawless and beyond criticism. In *S v Saul* (*Saul*),[4] it was held that:

'There is no rule of thumb test or formula to apply when it comes to a consideration of the single witness . . . The trial Judge will weigh the evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 may be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded" . . . It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.'

Section 60 of the Act prevents the use of caution in evaluating the evidence of a complainant because the offence is sexual in nature. However, in respect of a child, the court should not convict unless the evidence is treated with caution especially if the child is a single witness.

[14] With regard to the complainant's age, this Court held as follows in *ICM v The State*:[5]

'[The] court considering the evidence of a child, must be satisfied that the child is credible and reliable witness. The credibility ability relates to honesty and reliability to the child's cognitive ability or brain development. The child's cognitive ability is assessed having regard to factors such as the ability to encode, retain, retrieve and recount information or an event. The "intimidating and bewildering atmosphere" under which the child testified and be evaluated in light of the totality of the evidence.'

[15] There was no psychological evidence adduced relating to the complainant's brain development and the difficulty for such a young child to stare and retrieve traumatic events in sequence. However, the complainant gave her evidence in a coherent manner. Although she could not recount the actual date of the incident, she provided a detailed account of the events. The State prosecutor's

[4] *S v Saul* 1981 (3) SA 172 (A) at 180E-G.
[5] *ICM v The State* [2022] ZASCA 108 para 23.

guidance kept the complainant's testimony focused and to the point. Even during her cross-examination, which was adjourned for almost five months, (cross-examination of the complainant was adjourned from 21 May 2014 until 23 October 2014) her version remained consistent.

[16] The complainant's testimony was not beyond criticism. She testified that she was standing with her back against the wall when the appellant raped her. However, her mother testified that the complainant informed her that the appellant penetrated her from behind. In, my view, this contradiction is not material. Rather, as the full bench stated, it is indicative that the complainant and her mother did not collude with each other in providing their testimony in court.

[17] As regards the position the complainant was when she was raped, she testified that:

'At the toilet he undressed me of all my clothes. He then put his thing and put it on me. The thing was his penis and he placed it in my vagina. When he inserted his penis into my vagina I was standing with my back to the wall, and I was facing Makhaya. As he inserted his penis into my vagina he was making certain movements. At that stage, I felt pain in my vagina. He didn't use a condom. He was also totally naked.'

Under cross examination she stated:

'Makhaya is much taller than you are, how can he rape you if he is also standing? --- He would lift me up and pressed me against the wall.

Why didn't you tell Mrs Reddy that he had lifted you up? --- Yes because she didn't ask me that.'

[18] In this regard the trial court stated:

'The court takes into account that the first State witness didn't testify in chief that the accused, while raping her, threatened her, or that he had picked her up and pressed her against the wall when he inserted his penis into her vagina.

The first witness explained her failure to do so was because the prosecutor in chief did not ask her those questions. It is this court's opinion that the court must take into account that the child

was only 12 or 13 years old, that she would not know that she was supposed to explain in detail what had happened on the said date when the incident took place. Therefore, it is this court's opinion that it is not improbable that she would not volunteer evidence if she was not asked by the prosecutor to do so'.

I fully agree with the trial court.

[19] In my view, this was not a contradiction, but she was merely answering the questions put to her by the prosecutor. Due to her age, and 'the intimidating and bewildering atmosphere' under which she testified, she could not have formed an opinion that she had to tell the prosecutor or the court the details of how she was raped. She did not know that she had to be precise about the position she was in when she was raped. It may well be that, when she stated that 'I was standing', she meant that she was not lying down as many rapes occur.

[20] Counsel for the appellant argues that it is improbable that the complainant was raped in a toilet, at a tavern yet there were no eyewitness. However, there was no evidence regarding the distance between the toilet and the tavern and the position of the toilet. There is no evidence that there were patrons at the tavern or not; whether or not the toilet had cubicles which have doors, such that a person or persons would not be visible in the cubicle. In my view, nothing turns on this argument.

[21] As regards the delay in reporting the rape, counsel for the appellant did not, correctly so in my view, pursue this argument. This is because the offence of rape has no prescription period. Furthermore, s 59 of the Act is specific that no inference can be drawn from the delay between the commission and the reporting of the rape. Therefore, the delay in reporting the rape could not be decisive in the adjudication of the veracity of the allegation of the complainant.

[22] Applying the principles in *Woji* and *Saul* to this case, I find that the complainant's evidence is reliable and trustworthy and, thus, satisfactory in all material respects. Despite her age, her evidence was consistent and clear. She was able to respond to questions appropriately. During cross-examination, the complainant broke down in tears and the cross-examination was adjourned for almost five months. Despite this, she resumed her testimony and remained adamant and consistent that the appellant was the one who raped her.

[23] The complainant's evidence was supported by independent medical evidence. The forensic nurse who examined her noted that her hymen was not intact and had a cleft. According to the forensic nurse, her finding was consistent with a history of previous penetration. The forensic nurse further found that the complainant had a vaginal discharge, and the complainant would scratch her private parts. It was put to the forensic nurse during cross-examination that the injury on the hymen could have been caused by the complainant scratching herself. This, the forensic nurse disputed. According to her, the hymen is deep in the vagina, and it is also protected by the *labia minora* and therefore, the complainant could not scratch herself far or deep enough to reach the hymen and cause it to be injured.

[24] Coming to the appellant's version, it is trite that the proper approach to evidence is to look at the evidence holistically to determine whether the guilt of the accused has been proved beyond reasonable doubt. In *Tshiki v S*,[6] this Court explained this approach as follows:

'In a criminal trial, a court's approach in assessing evidence is to weigh up all the elements that point towards the guilt of the accused against all that which is indicative of their innocence taking proper account of inherent strengths and weaknesses, probabilities and improbabilities

[6] *Tshiki v S* [2020] ZASCA 92 para 23.

on both sides and having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. . .'

[25] The appellant's suggestion that the complainant was couched by her mother to falsely implicate him in the allegation of rape is improbable. To do so, the complainant and her mother would have had to conspire about what they would tell the court. The detail and consistency in the evidence of the complainant disproves this contention. Furthermore, it is highly improbable that the complainant's mother would protect the real perpetrator and subject her child to police investigation, medical examination and testifying in court, merely to execute her intention to falsely implicate the appellant for R50. Having regard hereto, the trial court was correct to reject the appellant's version.

[26] Having stated the above, I find, undoubtedly so, that the trial court was correct to accept the evidence of the complainant as satisfactory in all material respects to justify a conviction. And, thus, the appellant was properly convicted on the evidence of a single witness. As a result, and taking the evidence in its totality, I am satisfied that the guilt of the appellant has been proved beyond reasonable doubt.

Sentence

[27] It is trite that sentencing is pre-eminently a matter of discretion of the trial court. An appeal court cannot, in the absence of a misdirection by the trial court interfere with this discretion merely because it would have imposed a different sentence. To do so would be to usurp the sentencing discretion of the trial court.

[28] The starting point regarding sentence in these circumstances is in the Criminal Law Amendment Act 105 of 1997 (the CLAA). Section 51 prescribes a minimum sentence of life imprisonment on an accused who has been found guilty

of an offence which falls under Part 1 of Schedule 2. A court may deviate from imposing such a sentence only when it finds that there exists substantial and compelling circumstances justifying the imposition of a lesser sentence. Rape of a minor child falls within the offences under Part 1 of Schedule 2.

[29] When considering the sentence imposed by the trial court, it appeared that the trial court failed to warn the appellant of the applicability and the consequence of the CLAA. Counsel were requested to file supplementary heads of argument relating to, amongst others, this issue. Counsel complied with this request, for which we are grateful.

[30] In his supplementary heads of argument, counsel for the appellant conceded to the submission that the provisions of the minimum sentence were mentioned in the charge sheet. He however argued that the appellant's right to a fair trial was infringed in that he was not warned of the applicability of the minimum sentence at the time when he tendered his plea. This, according to counsel, resulted in a serious misdirection that vitiated the proceedings and rendered the trial unfair in respect of sentence.

[31] Counsel for the respondent, on the other hand, submitted that the record of this appeal was reconstructed from the magistrate's notes. The reconstructed record was accepted by both the appellant and the respondent. She conceded that there was no indication, on the reconstructed record, that the appellant was warned of the applicability of the minimum sentence at a stage when he tendered his plea. She however submitted that this did not infringe the appellant's right to a fair trial as the provisions of the minimum sentence was explained to him on his first appearance date in court.

[32] The rule that the accused person should be informed of the minimum sentence that is applicable in the case, owes its genesis to *S v Legoa*,[7] where this Court held that it was desirable that the facts which the State intended to prove the sentencing jurisdiction, under the CLAA, should be clearly set out in the charge sheet. The Court concluded by stating that the matter is one of substance and not form, and a general rule could not be laid down that the charge sheet in every case had to recite either the specific form of the scheduled offence with which the accused was charged, or the facts the state intended to prove to establish it.[8]

[33] In *Khoza & Another v S*,[9] this Court stated:

'As a general rule, fair-trial rights require that an accused person should be informed at the outset of the trial of the provisions of the Minimum Sentence Act . . . that the state intends to rely upon or which are applicable. The accused person should generally be so informed in the indictment or charge sheet; by notification by the presiding officer or in any other manner that effectively conveys the applicable provisions to the accused before or at the commencement of the trial.'

[34] The charge sheet in this matter states that '. . . the accused is guilty of the crime of contravening the provisions of Section 3 read with Sections 1, 56(1), 57, 58, 59, 60 and 61 of Act 32 of 2007. Also read with Sections 256 and 261 of the Criminal Procedure Act 51 of 1977 – RAPE (read with the provisions of Sections 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended). It further states that 'the said accused did unlawfully and intentionally commit an act of sexual penetration with the complainant . . . (A MINOR FEMALE by INSERTING HIS PENIS IN HER VAGINA . . .' The record of proceedings states that, on the appellant's first appearance in court, the 'minimum

[7] *S v Legoa* [2002] ZASCA 122; [2002] 4 All SA 373 (SCA); 2003 (1) SACR 13 (SCA) para 21.
[8] Ibid.
[9] *Khoza and Another v S* [2018] ZASCA 133; 2019 (1) SACR 251 (SCA) para 10.

sentence legislation' was explained to him.

[35] It is indeed desirable that the charge sheet refers to the relevant provisions of the CLAA. Further desirable that this should also be explained to the accused at the time when he tenders his plea. This would enable the accused to appreciate and understand the nature and seriousness of the charge he is facing. It is not sufficient to state that this was explained to the appellant, the record of the proceedings has to show that he was indeed so warned. The reconstructed record does not state that the appellant was warned of the penal provisions of the minimum sentence. In my view, this is a serious misdirection which warrants this Court to interfere and consider the sentence afresh.

[36] Rape is a serious, cruel and heinous offence. It is degrading, humiliating and a brutal invasion of a person's most intimate privacy. What I find more aggravating is the fact that the appellant took advantage of the age and vulnerability of the complainant. He abused the trust the complainant had in him as her mother's friend. His conduct, in my view, was sufficiently reprehensible to fall within the category of offences calling for a sentence both reflecting the court's disapproval and hopefully acting as a deterrent to other like-minded people who satisfy their canal desires with helpless children.

[37] I turn to personal circumstances of the appellant. There is nothing exceptional about the appellant's personal circumstances. He is a first offender, 37 years old (in 2015), single with two children. The appellant was self-employed and enjoyed good healthy life. As Nugent JA stated in *S v Vilakazi* (*Vilakazi*),[10] '[i]n cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background'. I agree. In my view, the

[10] *S v Vilakazi* [2008] ZASCA 87; [2008] 4 All SA 396 (SCA); 2009 (1) SACR 552 (SCA); 2012 (6) SA 353 (SCA) para 58 (*Vilakazi*).

personal circumstances of the appellant pale into insignificance when weighed against the seriousness of this offence.

In the result, the following order is granted:

1 The appeal against both conviction is dismissed.

2 The appeal against sentence is upheld.

3 The order of the full bench in respect of sentence is set aside and replaced with the following:

'(a) The appeal against sentence is upheld.

(b) The sentence imposed by the trial court is set aside and replaced with the following:

"The accused is sentenced to 10 years' imprisonment".'

4 The sentence in paragraph 3 (b) is antedated to 12 February 2015 in terms of s 282 of the Criminal Procedure Act 51 of 1977.

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F E MOKGOHLOA

JUDGE OF APPEAL

Makgoka JA (dissenting):

[38] I have read the judgment prepared by my Sister, Mokgohloa JA (the first judgment). Regrettably, I disagree with the conclusion it reaches and the reasoning underpinning it. In my view, the appeal against the conviction must be upheld. Below, I set out my reasons for that conclusion. The first judgment has summarised the basic facts. However, to give context to this judgment, I set out the facts as follows.

[39] The complainant testified through an intermediary in terms of s 170A of the Criminal Law Amendment Act.[11] In chief, she testified that during the time of the incident, she was living with her grandmother in a flat. Her mother did not live with them but occupied a backroom shack in proximity of the flat. The complainant had known the appellant for about 8 years as a person who often visited her mother.

[40] On 'on a certain day', she was playing with three of her friends, whom she identified by name. The appellant 'pulled' her away and took her to a toilet situated at a tavern. Once inside the toilet, he undressed her completely naked, and he also took off all his clothes. Thus, both were completely naked. He then took out his penis and inserted it into her vagina and made certain movements. They were both in a standing position facing each other. In her own words, '[w]hen he inserted his penis into my vagina I was standing with my back to the wall and I was facing [the appellant]'. The complainant testified that the appellant 'didn't use a condom'. After he had finished, he told her to go home. She went home and did not tell anyone because she was afraid '*they will give me a hiding*'. (Emphasis added.)

[41] Under cross-examination, the complainant testified that the distance between where the appellant pulled her from and the tavern, was about 50 meters. When the appellant dragged her, she resisted, and was crying softly. She did not scream as she was afraid because she 'didn't know what he was going to do'. When it was put to her that, that was more the reason to scream, she testified that the appellant had placed his hand over her mouth. Despite this, she was still able

[11] Section 170A(1) of the Criminal Law Amendment Act 135 of 1991 (as amended), provides:
'(1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the age of eighteen years to undue mental stress or suffering if he testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his evidence through that intermediary.'

to scream. She was asked whether she had mentioned to the police that the appellant had closed her mouth with his hand, which she confirmed. It was then pointed out that this was not in her witness statement. She persisted in her answer that she did inform the police.

[42] The evidence of the complainant's mother mirrored that of the complainant about the first report. However, she parted ways with the complainant about what the latter told her about the alleged rape. She testified that the complainant told her that the appellant had made her face the wall and penetrated her from the back. The forensic nurse who examined the complainant completed the State's case and testified about the clinical findings upon such examination. I will revert to her evidence later.

[43] In his defence, the appellant denied the charges against him and speculated that the complainant was influenced by her mother who had begrudged him because he had previously refused to give her money. The regional court was satisfied with the State's case, and accordingly, convicted the appellant and subsequently sentenced him to imprisonment for life. On appeal, the high court dismissed the appellant's appeal on the basis that the factual findings of the trial could not be faulted.

[44] In my view, the appeal should succeed because both the trial court and the high court failed to consider adequately, or at all, issues which were crucial in the determination as to whether the State had proved its case against the appellant beyond a reasonable doubt. The issues, which I consider in turn, are:

(a) evidence arising only in cross-examination;

(b) material contradictions in the evidence;

(c) the evidence of the forensic nurse;

(d) failure to call other witnesses and impact on corroboration;

(e) probabilities; and

(f) the cautionary approach to the evidence of a single and child witness.

The evidence which emerged during cross-examination

[45] In her evidence-in-chief, the complainant testified that when the alleged rape took place, she and the appellant were standing face-to-face. In cross-examination, it was pointed out to her that it was impossible for penetration to occur in that position, given the appellant's height and her small stature. Only then, a very different version emerged. The complainant testified that the appellant had lifted her up and pressed her against the wall. When confronted with why she only mentioned this discrepancy in cross-examination, the complainant said that she was not asked about it by the prosecutor, and that she did not know that she was expected to give a detailed explanation.

[46] The trial court accepted the complainant's explanation. In addition, the court reasoned that because of her age, the complainant would not know that she was supposed to explain in detail what had happened to her. On that basis, the court concluded that 'it [was] not improbable that she would not volunteer evidence if she was not asked by the prosecutor to do so'. The first judgment agrees with the trial court, and adds that 'this was not a contradiction, but she was merely answering the questions put to her by the prosecutor'.

[47] I disagree. A careful analysis of her evidence-in-chief shows that the prosecutor asked her only two questions, one in chief and another in re-examination. In her evidence-in-chief, she asked the complainant whether she knew why she was in court. The complainant then narrated her evidence without any interruption whatsoever, during which she volunteered detailed information. No one asked her about how: (a) she was pulled away from where she was playing; (b) she was forced into the tavern toilet; (c) she was undressed by the

appellant. Similarly, she testified without prompting that (a) both she and the appellant were completely naked; (b) she was standing against the wall facing the appellant; and the appellant did not use a condom.

[48] Viewed in this light, the court's acceptance of her explanation that she did not mention those issues because she was not asked about them, does not bear scrutiny. She *did* provide detailed information without being asked. The first judgment concludes that the complainant 'could not have formed an opinion that she has to tell the prosecutor or the court the details of how she was raped. She did not know that she had to be precise about the position she was in when she was raped. . .'. The question is: how did she know she had to provide the details she provided in the first place, eg the position she was penetrated in; the fact that they were both naked; the fact that he did not use a condom? The trial court and the high court overlooked these issues, and so, with respect, does the first judgment.

[49] What is more, the first judgment concludes that the discrepancy might have been due to '. . . "the intimidating and bewildering atmosphere"' under which the complainant testified'. The complainant testified through an intermediary. There is no evidence on record that she found the environment 'intimidating and bewildering'. That assertion would more readily apply to a child who testifies in an open court, and not through an intermediary.

[50] This Court has drawn a negative inference from the fact that some of the points in a complainant's evidence arose only in cross-examination. In *S v Smit* (*Smit*),[12] it was held that had the events occurred as the complainant alleged in cross-examination, it was surprising that she only volunteered this information at

[12] *S v Smit* [2010] ZASCA 84; 2010 (2) SACR 467 (SCA) (*Smit*).

that stage. Her failure to testify about them in her evidence-in chief, said the Court, 'smacks heavily of an attempt to gild the lily'.[13] In *S v Gentle*,[14] as is the case here, there was an attempt to explain such discrepancy. This Court had this to say about it:

'[T]he complainant did not give more detail in cross-examination, nor did she clarify what she had said in her evidence in chief. She gave contradictory versions. These contradictions in the complainant's evidence were simply ignored by the magistrate.'[15]

[51] This is an apt observation in relation to the present case because the complainant's version that she had been picked up during the alleged rape, as opposed being in a standing position face-to-face with the appellant, was not an explanation of the latter, but a deviation from it. The trial court's failure to give due weight to the contradiction amounts to a material misdirection.

[52] Equally not borne by the evidence, is the reasoning by the trial court that because of her age, the complainant could not have known that she would be expected to give a detailed explanation. This is especially so of her unsolicited evidence that the appellant 'didn't use a condom' during the alleged rape. The complainant would have been about 7 or 8 years old then, and 11 years old when she testified. Ordinarily, the use of condoms would be beyond the comprehension and grasp of a child of that age. This explains why, in many cases of child rape, a child witness would be carefully led and guided by the prosecutor with age-appropriate questions. But not this child witness. Thus, in the light of this unsolicited evidence, the reasoning by the trial court loses its force.

[53] The first judgment also posits that the discrepancy in the position the complainant was in when she was penetrated, 'may well be that when she stated

[13] Ibid para 15.
[14] *S v Gentle* [2005] ZASCA 26; 2005 (1) SACR 420 (SCA).
[15] Ibid para 16.

that "I was standing" she meant that she was not lying down as many rapes occur'. We do not know. We would not be in an invidious position to resort to speculation had this been clarified with the complainant. This is typical of the many issues left hanging in the air in the evidence of the complainant. Had the prosecutor done her job by seeking clarity from the child on this issue in re-examination, this speculation would not arise.

Contradictions

[54] The complainant's evidence was contradicted by her mother's. It also suffered internal contradictions. I set out those instances below, and how they were treated by the trial court. The complainant's evidence contradicted that of her mother as regards how the appellant allegedly penetrated her. According to her, she was penetrated from the front, irrespective of whether in standing position (as she testified in chief) or in a lifted position (as testified in cross-examination). However, the complainant's mother testified that the complainant had told her that the appellant had made her face the wall and penetrated her from behind. This is how the trial court dealt with this material contradiction:

'[The complainant] testified that when she was raped her back was facing the wall, and according to what she told her mother, the accused penetrated her from behind. In the light that the third state witness confirmed that there was penetration, it is this court's opinion that the contradiction is not sufficient to reject her evidence as false.'

[55] With respect to the learned regional magistrate, this is circular reasoning. It begs the question: how was the complainant penetrated? Was it from the front or from behind? By glossing over an issue which it had identified as a contradiction, the trial court committed a material misdirection. The first judgment, with respect, commits a similar error, by holding that 'this contradiction is not material'. In my view it is material. The first judgment also holds that this contradiction is indicative that the complainant and her mother did

not collude with each other in providing their testimony in court. With respect, this does not resolve the material difference in their evidence.

[56] A court faced with a contradiction between the evidence of two witnesses must resolve it by critically examining the differences, with a view to establishing whether the complainant's evidence was reliable.[16] If the court prefers one version, it must explain why that version is preferable to the other, and what impact the contradiction has on the overall evidence. Simply put, the two versions cannot live side by side.

[57] In addition, the complainant's evidence suffered two internal material contradictions. First, she testified in-chief that when she was dragged to the tavern toilet, she was crying softly. She did not scream because she was afraid as she did not know what the appellant was going to do. In cross-examination, it was put to her that, that was more the reason for her to scream. She changed tune and proffered a new reason: she, in fact, screamed, but the appellant had closed her mouth by putting his hand over it, to mute her screams. In my view, this amounted to the tailoring of her evidence by the complainant under cross-examination.

[58] Second, the complainant testified she went home after the alleged rape. Her grandmother asked her where she was. She told her that she had been out playing. She was afraid to tell her grandmother about her ordeal as the appellant had 'threatened her not to tell anybody'. This contradicted the reason she proffered in-chief. There, she gave as a reason for not informing her grandmother and her mother about the alleged rape, the fact that she feared getting a hiding. This part of the complainant's evidence is troubling. It escapes me why she would be given a hiding for having been raped. That is, unless in her mind, the real reason for

[16] Ibid para 18.

where she had been that evening would call for a hiding. This is one of the issues which were never investigated during the trial. It was simply left hanging.

The evidence of the forensic nurse

[59] The trial court placed much store on the evidence of the forensic nurse as corroboration of the complainant's evidence about being penetrated. As I demonstrate below, such evidence is far from satisfactory. The forensic nurse testified that all was normal upon the examination of the child, except for two things: there was a cleft in the child's hymen, and a vaginal discharge. The cleft was an old injury which was consistent with previous vaginal penetration by a blunt object like a penis or finger. She could not indicate how old the injury was.

[60] In cross-examination, it turned out that the nurse did not ask the complainant whether she had been aware of the discharge before the examination, and if so, when the discharge started. The witness fairly conceded that she 'made a mistake' in failing to ask this of the child. When pressed why she did not do so, her answer elicited something she had not stated in her evidence-in-chief. This is what the record reflects:

'[Legal representative]: [D]id you also ask her whether she was aware of this discharge before the day you examined her?

[Witness]: I didn't record [it] here, because she said she was scratching, scratching, scratching on the private parts. I didn't document it here.'

[61] Further, in cross-examination a proposition was put to her that since a finger was one of the blunt objects she had identified as having penetrated the child, it could well be the child's own finger which had caused the cleft. This was relevant in the light of her evidence that the child told her that she had been scratching her private parts. She answered that the hymen was too far to be reached by a finger. It was pointed to her that this was a material deviation from

her earlier testimony in which she testified that a finger could be a possible cause of the cleft.

[62] The record is not clear in this regard, but it seems that the witness suggested that *only* the finger of 'the suspect' could have caused the cleft, and not of the complainant. When pressed to explain this, she immediately withdrew her absurd proposition. Having correctly done so, one would have expected that it would follow that the complainant's own finger could not be ruled out as a possible cause of the cleft in the hymen. But that was not to be. When that proposition was put to her, the nurse obstinately refused to concede the point.

[63] Apart from these difficulties, some of the nurse's answers were plainly nonsensical. For example, when asked by the court what could have caused the discharge, she answered:

'There [are] a lots of things, My Worship, that can cause the discharge in the child. *According to my examination, I find the cleft to the child, and the child didn't tell the mother what happened, that can also cause the discharge to the child.'* (Emphasis added.)

[64] How a failure to inform the mother about the alleged rape could be the cause of the discharge is difficult to fathom. Again, no one asked her to clarify this glaringly ludicrous statement. Overall, one gets an impression that the nurse was bent on ensuring a conviction against whomever the child accused of rape, instead of assisting the court as an independent forensic witness. This is demonstrated in her illogical reasoning that while a finger could be a possible cause of the clef on the hymen, this excluded the complainant's own finger but included a suspect's finger.

[65] There are rarely cases with similar facts. *Maemu v S* (*Maemu*),[17] comes eerily close to the present case. There, the appellant had been convicted of rape of a child. The latter had alleged that she was walking home, after playing with the other children, when the appellant grabbed her and dragged her into the house where he raped her. The medical examination, made after two months after the alleged rape, indicated that there was a small cleft on the upper edge of the vaginal wall and that there was possible penetration with an object. This Court held that the presence of a cleft did not corroborate the child's version, observing as follows: 'If anything the medical report shows inadequate proof of penetration at best the evidence of penetration is neutral. The doctor who testified was unable, to say whether the cleft was old or fresh, natural or inflicted. The child was taken to a doctor for examination about two months after the event. Her mother did not examine her private parts after she arrived home.'[18]

[66] The situation in the present case is worse as the medical examination on the child was done after three or four years after the alleged event. In my view, this case is not distinguishable from *Maemu*, and we are bound by the latter case. As pointed out in *Patmar Explorations (Pty) Ltd and Others v Limpopo Development Tribunal and Others*,[19] this Court does not depart from its own previous judgments unless it is satisfied that they are clearly wrong. There is no suggestion that *Maemu* is clearly wrong. We are thus bound by it.

Failure to call other witnesses and lack of corroboration

[67] There were four potential witnesses whom the State could have called, namely the three friends she was playing with when she was allegedly dragged to the tavern toilet, and the complainant's grandmother. Her friends could have been

[17] *Maemu v S* [2011] ZASCA 175.
[18] Ibid para 13.
[19] *Patmar Explorations (Pty) Ltd and Others v Limpopo Development Tribunal and Others* [2018] ZASCA 19; 2018 (4) SA 107 (SCA) para 3.

called to testify, not necessarily that they had seen her being dragged, but that she suddenly disappeared while they were playing with her on the day of the alleged rape. This would have corroborated her evidence about being dragged away, and in a crucial manner, added weight to her evidence that she was taken into a tavern toilet where she was raped.

[68] The complainant's grandmother was the first person to encounter the complainant shortly when she arrived home after the alleged rape. She would have given her own impression about the complainant's emotional state when she arrived home. Evidence of the victim's distressed condition can, in appropriate cases, serve as corroboration. See, for example, *S v S*[20] and *S v Hammond*.[21] In the latter case, this Court considered the distressed condition of the complainant as capable of amounting to corroboration where this was required, and such evidence was also admissible to show that sexual contact had taken place where this was denied.[22]

[69] Therefore, by failing to call the grandmother as a witness to testify about the complainant's emotional state when she arrived home, the State denied itself a crucial building block in its case against the appellant. Tellingly, and in any event, the complainant did not say in her testimony that she was in a distressed condition when she arrived home. There is also nothing in her testimony that her grandmother noticed that there was something amiss about her emotional state. On the contrary, it appears that she had a normal conversation with her grandmother, who merely asked her where she had been.

[70] For these reasons, one cannot exclude the possibility that the prosecutor had considered that the grandmother would not have testified that the complainant

[20] *S v S* 1990 (1) SACR 5 (A) at 11A–C.
[21] *S v Hammond* [2004] ZASCA 71; [2004] 4 All SA 5 (SCA); 2004 (2) SACR 303 (SCA).
[22] Ibid paras 21 and 22.

was in a distressed condition when she arrived home. Hence, she was not called. In *Smit,*[23] this Court considered, among other things, the fact that the complainant showed no signs of distress at school the next day.

[71] There was a more compelling reason to call the complainant's grandmother. The complainant testified that later the night of the alleged rape, she was bleeding. She told her grandmother about it, who kept quiet and did nothing about it. This was crucial because, had the grandmother testified and confirmed the complainant's evidence that she was bleeding, it would have added potent credence to her testimony about the ordeal she had allegedly gone through earlier that evening. It must be borne in mind that, where there is a measure of corroboration, even if it is small, one is no longer dealing with a single witness on the issue.[24]

[72] The prosecutor placed nothing on record as to whether the grandmother was available, and the reason why she was not called. Such conduct was deprecated in *S v Kubeka*.[25] The court remarked that it was an 'unsatisfactory state of affairs for matters simply to be left in the air without any material being placed before the [c]ourt, whether by way of testimony from the investigating officer or otherwise, indicating whether any efforts were made by the police to find these witnesses'.[26] In *S v Teixeira,*[27] it was held that where the State's case rested on the evidence of a single witness, the failure of the State to call other witnesses – who had been identified and were available, justified the inference that in State counsel's opinion their evidence could have given rise to

[23] *Smit* para 22.
[24] *S v Letsedi* 1963 (2) SA 471 (A) at 473F.
[25] *S v Kubeka* 1982 (1) SA 534 (W).
[26] Ibid at 538F-G.
[27] *S v Teixeira* 1980 (3) SA 755 (A) at 763D-764B.

contradictions adversely affecting the credibility of the single witness. This must be the case here.

Probabilities

[73] In evaluating the evidence of a single witness, a final evaluation can hardly be made without considering whether such evidence is consistent with the probabilities. In the present case, I identify the five improbabilities in the evidence of the complainant. First, that she was dragged for about 50 meters, crying, with her mouth closed, without a member of the public noticing such a suspicious and strange conduct. Second, I find it highly improbable that the complainant's grandmother kept quiet and did nothing when she informed her that she was bleeding the night of the alleged rape.

[74] Third, like Leach JA in *Smit*,[28] I find the complainant's description of the sex act itself unconvincing and improbable. In the first version, she mentioned that she was standing face-to-face with the appellant during the alleged rape. This is almost impossible, as the complainant conceded in cross-examination, and suggested a new version, which is similarly improbable. It is difficult to comprehend how the appellant would lift her up, press her against the wall, manage the penetration, and rape her, especially for as long as the complainant testified the alleged rape lasted. According to the appellant, the rape took 'a long time, because when he took me [it was] during the day and when I left it was night'.

[75] Fourth, it is highly improbable that a rape could take place in a toilet of a tavern for as long as the complainant testified it took, without someone noticing the extra-ordinary length the toilet would have been occupied. Ordinarily, one

[28] *Smit* para 20.

would expect a toilet of a tavern to be a busy place. With patrons drinking, they would need to frequent it. The first judgment says that nothing turns on this argument. It holds so because there was neither evidence regarding the distance between the toilet and the tavern and the position of the toilet, nor that there were patrons at the tavern or not. That is correct. But that is a weakness in the State's case, rather than a difficulty for the appellant. The answers to the questions raised in the first judgment could simply have been elicited from the one and only witness who was able to provide them, namely, the complainant. Yet the prosecutor failed to do so. The result is these lingering questions. In a criminal trial, any doubt in the evidence must redound to an accused.

[76] Fifth, the complainant is young and was allegedly a virgin when the alleged rape occurred. She had just been raped for 'a long time', in a tavern toilet. It must be assumed that she would have been extremely traumatised, and in a distressed emotional state. She went straight home after the alleged rape, and therefore while trauma was still raw. But it appears that when she arrived home, she had a normal conversation with her grandmother, who merely asked her where she had been. Her evidence did not suggest that she was traumatised. If she was not in a distressed emotional state upon her arrival home, it would be highly improbable that she had, shortly prior to her arrival home, been raped. Unfortunately, the prosecutor failed to lead her on this normally crucial question.

The cautionary rule

[77] The complainant was both a child witness, and a single witness. As a single witness, the complainant's evidence had to either be: (a) substantially satisfactory in every material respect,[29] or (b) corroborated.[30] Her evidence had to be

[29] *R v Mokoena* 1932 OPD 79 at 80.
[30] *S v Gentle* [2005] ZASCA 26; 2005 (1) SACR 420 (SCA) para 18. See further *R v Mokoena* 1956 (3) SA 81 (A) at 86; *R v T* 1958 (2) SA 676 (A) at 676; *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E–H; and *S v Banana* 2000 (2) SACR 12 (ZS); 2000 (3) SA 885 (ZS) at 892H-893A.

approached with caution. In its judgment, the trial court did not refer, at all, to the cautionary rule and related authorities. Of course, the fact that something was not mentioned in a judgment does not mean it was not considered.[31] But here, even a textual analysis of the judgment does not suggest otherwise. Instead, the trial court slavishly accepted the evidence of the State witnesses as satisfactory without any critical analysis. As I have demonstrated, the complainant's evidence was riddled with inconsistencies, improbabilities and material contradictions. This calls to mind what this Court said in *S v Heslop*:[32]

'It is cause for concern to find laudatory epithets applied by a trial court to witnesses when the record shows that their performance, judged by the written word, was obviously far from satisfactory. In such a case an appeal [c]ourt will more readily interfere with the findings of the trial court as to the weight to be attached to the witnesses' evidence and its ultimate conclusion based on such findings.'

[78] The high court did not fare any better. It misconstrued the application of the cautionary rule. This is what it said:

'Evidently the learned magistrate adopted a cautionary rule approach to the child's witness' single evidence (sic) with regard to her identification of the appellant as the perpetrator who raped her. She observed that the complainant's recognizing of the appellant as well as the perpetrator was with clear certainty and without hesitation. The appellant was well known to her for 8 years. The incident happened during the day and rape being an offence that involves contact and intimacy it could never have imposed any difficulty for the complainant to recognise the perpetrator.'

[79] This is emblematic of the many defects in the high court's judgment. Identification was never an issue in the case. At the heart of the case was whether it was the appellant who allegedly raped the complainant on the day. It was that

[31] *Mahlangu and Another v S* [2011] ZASCA 64; 2011 (2) SACR 164 (SCA) paras 23-24.
[32] *S v Heslop* [2006] ZASCA 127; [2007] 4 All SA 955 (SCA); 2007 (4) SA 38 (SCA); 2007 (1) SACR 461 (SCA) para 13.

part of the complainant's evidence which had to be approached with caution, and not the complainant's identification of the appellant.

Conclusion

[80] In view of these difficulties, I conclude that the appellant's evidence, being that of a single witness, was not satisfactory in all material respects. It follows that the State had failed to discharge the onus resting upon it.

[81] As I conclude, it remains to observe how the trial was handled. This Court cautioned in *Vilakazi*:[33]

'The prosecution of rape presents peculiar difficulties that always call for the greatest care to be taken, and even more so where the complainant is young. From prosecutors it calls for thoughtful preparation, patient and sensitive presentation of all the available evidence, and meticulous attention to detail. From judicial officers who try such cases it calls for accurate understanding and careful analysis of all evidence. For it is in the nature of such cases that the available evidence is often scant and many prosecutions fail for that reason alone.'

[82] This caution was not heeded in the present matter. The prosecutor did not demonstrate the necessary conscientiousness and forensic skill in presenting the State's case. She failed to properly lead the child complainant by canvassing relevant and crucial issues. Most of them were left in the air or were canvased on behalf of the appellant in cross-examination. I have demonstrated several difficulties which arose in the cross-examination of the complainant, which called for clarification in re-examination. Surprisingly, the prosecutor did not deem it necessary to do so. She asked only one tangential and peripheral question in re-examination about where the complainant's mother lived. But the ultimate duty to see to it that justice is done, rests with the presiding officer. The regional

[33] *Vilakazi* para 21; see also *S v Stevens* [2004] ZASCA 70; [2005] 1 All SA 1 (SCA) para 1.

magistrate in the present case failed in this duty. She allowed issues to hang without clarification. I have pointed out those instances in this judgment.

[83] Rape is a stubborn scourge in our country. It is an affront to the values we hold as a nation. Its victims and survivors are, in the main, the vulnerable members of our society – women and children. The natural inclination is therefore one of sympathy for those who claim to have been sexually violated. However, this does not lessen the onus resting on the State to prove the guilt of those accused beyond reasonable doubt. This is especially in the light of the heavy sentences prescribed in the Criminal Law Amendment Act [34] upon conviction. The duty remains with trial courts to ensure, by proper evaluation of the evidence, and the application of proper forensic skills, that the onus which rests on the State, is met before conviction. A wrong conviction, especially one which results in a sentence as heavy as one of imprisonment for life, is the highest form of injustice.

[84] Had I commanded the majority, I would have upheld the appeal against the conviction, and set aside the sentence of life imprisonment.

T MAKGOKA
JUDGE OF APPEAL

[34] Section 51(1) of the Criminal Law Amendment Act 105 of 1997 provides for the imposition of a minimum sentence of life imprisonment for a conviction of rape of a person under the age of 16 years.

Appearances:

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	Legal Aid, Bloemfontein
For the respondent:	N Kowlas
Instructed by:	Director of Public Prosecutions, Johannesburg
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