THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Not Reportable

Case No: 333/2018

In the matter between:

JASON NAIDOO **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Jason Naidoo v The State* (333/2018) [2019] ZASCA 52 (1 April 2019)

Coram: Majiedt, Van Der Merwe and Mocumie JJA and Carelse and Matojane AJJA

Heard: 12 March 2019

Delivered: 1 April 2019

Summary: Evidence – single child witness who was under the influence of alcohol at the time of the alleged sexual assault and attempted murder – corroboration and evidential duties in criminal trials.

ORDER

On appeal from: Western Cape Division, Cape Town (Samela and Wille JJ):

The appeal is dismissed.

JUDGMENT

Matojane AJA

Introduction

[1] The appellant was convicted in the regional court, Cape Town (the trial court) on one count of sexual assault in terms of s 5(1) of the Criminal Law Amendment (Sexual Offences and Related Matters) Act 32 of 2007 and one count of attempted murder. He was sentenced as follows, on count 1 (sexual assault) to R10 000 or 36 months' imprisonment, plus a further 24 months' imprisonment which is wholly suspended for a period of five years; and on count 2 (attempted murder) to 3 years' imprisonment wholly suspended for a period of five years on condition that he is not convicted of attempted murder or assault with intent to do grievous bodily harm, and 24 months correctional supervision in terms of s 276(1)*(h)* of the Criminal Procedure act 51 of 1977 (the CPA).

[2] The trial court granted the appellant leave to appeal against his convictions. The appellant's appeal on conviction to the Western Cape Division of the High Court, Cape Town (the high court) was dismissed on 15 December 2017. Special leave was granted by this court in terms of s 16(1)*(b)* of the Superior Courts Act 10 of 2013 to the Supreme Court of Appeal.

[3] The issue in this appeal is whether the trial court erred in accepting the evidence of a single child witness, who was under the influence of alcohol at the time of the alleged incident.

Background

[4] The evidence of the complainant, accepted as credible by the trial court, was, in essence, the following: the appellant, contacted complainant suggesting that the two meet later that evening. The complainant was a part-time waitress at the Spur restaurant. After her shift ended at 21h00 the complainant went home and waited for her mother to fall asleep. At about 01h30 she sneaked out of her bedroom window to meet with the appellant who was waiting outside on his motorbike. The appellant suggested that they go either to his house to swim or to the Pool Lounge bar in the Table View area, Cape Town. The complainant suggested that they go to the Pool Lounge.

[5] It is common cause that the appellant and the complainant were friends. She was 16 years old and the appellant was 18 years old at the time of the alleged incident. The complainant testified that it was the first time that she consumed alcohol. After she drank a litre of beer and two ‘hand grenades’ which consisted of a measure of tequila and jägermeister mixed with an energy drink, Red Bull, she started to feel unsteady.

[6] The appellant acceded to the complainant’s request that they meet up with Liam, her boyfriend, who was at his cousin’s house around the corner. The three of them went to a local park where the complainant started feeling nauseous and began vomiting. While vomiting the appellant rubbed her back and then pressed on her stomach to make her vomit more. Later the complainant's boyfriend left, and the appellant accompanied the complainant to a second park close to the complainant’s residence, where she started vomiting again prompting the appellant to rub her back while she was on her hands and knees and to put his hands on her stomach to make her vomit more. The appellant then moved his hands under her brassiere and touched her breasts. The appellant allegedly tried to kiss her and put his hand down the back of her pants over her underwear. A struggle ensued during which the

appellant allegedly attempted to strangle the complainant. The complainant testified that she thereafter passed out.

[7] When she woke up she discovered that her underwear and pants were pulled down to her ankles. The appellant was then speaking to a member of the neighbourhood watch, Mr Jones. The complainant did not inform Mr Jones that anything was wrong and indicated to him that she was the appellant's girlfriend. The complainant left the park with the appellant and went to her home where she sneaked back in.

[8] She messaged her friend Cayley van Coller and informed her that the appellant attacked and raped her. When she looked into the mirror, she saw dark spots on her forehead, and her left eye was bruised. Her eyes started getting yellow. She messaged the appellant and asked him what she was going to tell her mother. She told the appellant never to contact her again and deleted his number from her phone. For the third time she vomited and noticed blood in the vomit.

[9] The appellant's version of what happened at the second park was that after the complainant started to vomit again, he tried to assist her, but she told him that she did not need help and pushed him away. He then laid on the grass smoking a cigarette and fell asleep. When he awoke approximately 30 to 40 minutes later, he saw the complainant asleep some distance away with her pants and her underwear around her ankles. The appellant saw faeces next to her and a smudge on her thigh.

[10] Mr Jones entered the park before 05h00 and saw the appellant and the complainant sitting and chatting. When he returned at 05h30, the appellant told him that the complainant was his girlfriend which she confirmed. The appellant and the complainant then left the park.

[11] Mr Jones was called by the court as a witness in terms of s 186 of the CPA. He testified that while patrolling the area, he came across the appellant and complainant sitting on the bench chatting before 05h00. When he returned to the area again at 05h30 he noticed that the complainant was naked from her waist down. He did not gain the impression that anything was wrong. At that stage, the

complainant was getting dressed. She did not make any report to him and was only concerned about the time and wanted to go home. The appellant and the complainant left the park together.

[12] An appellate court's limited powers to interfere with a trial court's finding of fact is well established. In the absence of a demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will be disregarded if the recorded evidence shows them to be wrong.[1]

[13] In *Minister of Safety and Security & others v Craig & others NNO*[2] Navsa JA stated that although courts of appeal are slow to disturb findings of credibility, they generally have greater liberty to do so where a finding of fact does not essentially depend on the personal impression made by a witness' demeanour, but predominantly upon inferences and other facts and upon probabilities. In such a case a court of appeal with the benefit of a full record may often be in a better position to draw inferences.

[14] The trial court, in the present case, stated correctly that the evidence of the complainant, who is a single child witness, must be treated with caution. It, however, failed to critically evaluate the discrepancies and inconsistencies in the complainant's evidence, but merely accepted her evidence based on the good impression she made on the court long after the incident. The trial court ignored the evidence of the complainant under cross-examination when asked that somebody must have told the doctor that she was unsure whether she was strangled. The complaint's reply was:

'Yes, I am sure that I have, that I did speak to him. As I say, I don't recall everything I say. The reason why I would have said unsure is because I wasn't telling the truth to the doctors or my mom about what happened.'

[15] Dr Liang confirmed the evidence of the complainant that she told him that she was unsure if she was strangled . He testified as follows:

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[1] *S v Hadebe* & others 1997 (2) SACR 641 (SCA) at 645; *S v Kekana* [2012] ZASCA 75; 2013 (1) SACR 101 (SCA) para 8.

[2] *Minister of Safety and Security & others v Craig & others NNO* [2009] ZASCA 97; 2011 (1) SACR 469 (SCA) para 58.

'Sorry. Ja, sorry. What you have done in your notes, was question marks in front of this strangled. - - -Question - she said, she was not sure.
Oh, I see. Okay, that is why . . . (Intervention).- - - I have on all these- going down the pub, getting to the pub, being strangled, none of that is clear. Everything is hazy.
Oh, I see.- - - That is her own words.
So, as a result of that - we go back to your J88 now. You have written there, unsure if she was strangled. - - - Correct.
Was that as a result of the report that she made or as a result of the examination that you wrote it down there? - - - Well, the J88 was only brought to me three days after this examination.
Oh.- - - So, the J88 is completed using my clinical notes and obviously on what I recalled. So, basically, it is transposing what is on my notes onto the J88.
Okay. So, but your conclusion was, she was unsure whether she was strangled? - - - She was unsure. Yes.'

[16] Contrary to the complainant's evidence above and that of Dr Liang, the trial court concluded that the only way the complainant could have told the doctor of the alleged strangulation is if it indeed happened. The court reasoned that the doctor who filled in the J88 form after three days could have made a mistake when he recorded that the complainant was unsure that she was strangled. In failing to treat the evidence of the complainant with caution in the particular circumstances of this case where the complainant was heavily intoxicated, the trial court committed a material misdirection in the evaluation of the evidence which error constituted an infringement of the appellant's fair trial rights and a failure of justice.

[17] The trial court also overlooked the evidence of the complainant that she was told when photos of her were taken that the red and black spots on her face were caused by burst blood vessels which could have been caused by strangulation.

[18] The magistrate accepted the complainant's explanation that she did not disclose the appellant's name to her mother and the doctor because she wanted to protect him as she knew that he had a short temper and that he was suicidal. This explanation is contradicted by her 'first report' to her friend, Kayley in which she accused the appellant of rape.

[19] The trial court gave two reasons for ignoring the rest of the evidence of Mr Jones. That court stated that contrary to the evidence of the complainant and the appellant, Mr Jones testified that when he arrived at the park for the second time, the complainant was partially naked.Her pants and underwear were entangled and was about a metre from the complainant. Secondly, Mr Jones testified that the complainant was awake on his arrival.

[20] The trial court failed to consider the improbabilities inherent in the complainant's version, in particular, the absence of evidence of distress and emotional agitation on the part of the complainant after the incident. The court never took into account the fact that the complainant had consumed an excessive amount of alcohol that clouded her memory of what happened on the day of the alleged incident.

[21] The finding by the trial court that the complainant's evidence was credible is untenable. The complainant made contradictory statements to the police and contradicted other witnesses. According to her when she got back to her room, she smsed her friend Kayley and informed her that she thinks that the appellant raped her. Cayley testified that complainant never texted her but rather phoned her. The complainant ended the call when she heard her mother waking up. She testified that from the hospital they went directly to the police station, whereas her mother testified that she was worried about her state and decided rather to go home and tuck the complainant in.

[22] In evaluating the evidence, the court must account for all the evidence tendered irrespective of the nature and quality of such evidence. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. Nugent J in *S v Van der Meyden*[3] said the following:

'A court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence. The conclusion which it arrives at must account for all the evidence. . . .The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is

[3] *S v Van der Meyden* 1999 (1) SACR 447 (W) at 449G-450B.

appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable, and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored.'

[23] The magistrate ignored the crucial evidence of Mr Jones that he did not observe any injury to the complainant when he met the complainant and the appellant at the park at 05h30. Mr Jones testified that it was already daylight and he had a good look at the complainant's face. He was a metre or two from her and did not observe any unusual marks or spots on her face. There was no physical indication that something had happened to her which she did not consent to. He was shown the photos of the complainant and asked if he saw the bruises and 'blueness' around the complainant's eyes. He was adamant that the complainant did not have any marks on her face. All he could say was that the complainant was very dazed and half-asleep.

[24] The trial court did not account for the evidence of Mr Jones which supported the appellant's version. Mr Jones testified that he was under the impression that the appellant had just woken up when he saw him at the park at 05h30 and that he saw faeces close to the complainant.

[25] If the complainant was strangled at the park, and accepting Dr Liang's evidence, that the trauma would have been immediate, one would have expected Mr Jones to have seen the symptoms.

[26] The evidence of the complainant's mother shows that the injuries became evident in her presence, not at the time of the alleged strangulation. She testified that she observed the complainant vomiting, holding her neck with one hand as if struggling to swallow, that the complainant was rubbing her eyes which filled with blood within minutes in front of her. By the time they got to the hospital, she testified that there was bruising on her eye and her neck. Her eyelids became swollen later on. She testified that:

'Ja.— and then I was thinking Ebola, what the hell, you know, this is weird; that's what came into my head, seriously, like where did she get this. Have you seen the outbreak?'

[27] The trial court misdirected itself by ignoring or failing to recognise the obvious relevance and significant probative value of such evidence in evaluating her oral evidence. The magistrate did not seek corroboration extraneous to the complainant's evidence regarding the sexual assault. The effect was to compartmentalize the complainant's evidence and this materially affected the trial court's evaluation of the reliability of her evidence. As a result, the evidence as a whole was never fully considered.

[28] The trial court regarded as improbable that the appellant would fall asleep while the complainant, whom he was concerned about, was violently sick next to him. I do not find the appellant's entire version including the possibility of how the complainant could have sustained injuries as far-fetched (as the trial court did). I find nothing "inherently improbable" in the evidence of the appellant to the effect that having consumed alcohol until the early hours of the morning, he fell asleep at the second park and when he woke up he saw the complainant, who had also consumed an excessive amount of alcohol, asleep some ten metres away with her pants and her underwear around her ankles with faeces next to her and a smudge on her thigh. Corroborating the appellant's version, Mr Jones said that the appellant had just gotten up when he saw him in the park at around 05h30. Further corroborating the appellant, he said that he saw faeces close to the complainant who was not wearing pants or underwear.

[29] The trial court reasoned that if the appellant strangled the complainant, he must also have pulled down her pants. Such reasoning is problematic. The trial court does not refer to any evidence corroborating the complainant's specific allegation that the appellant touched her breast and buttocks and put his hands down the back of her pants without her consent. He makes no reference to the appellant's state of excessive intoxication but makes a factual finding, with no evidence, that the appellant pulled down the complainant's pants and stated that this in itself constituted sexual assault.

[30] The two cardinal rules to be observed when seeking to draw inferences from circumstantial evidence were set out by Watermeyer JA in the following often cited passage in *R v Blom*[4], as follows:

'(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.

(2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.'

[31] The complainant testified that she did not know how her pants and underwear were pulled down. The appellant testified that when he woke up he saw that her pants were pulled down and there was faeces close to her. His evidence was corroborated by that of Mr Jones from the neighbourhood watch. The trial court misdirected itself in finding that the only inference that could be drawn was that the accused was the one who pulled down the complainant's pants to her ankles. The proved facts do not exclude the possibility that the complainant in her drunken state could have pulled down her underwear and pants to relieve herself.

[32] The trial court found sufficient corroboration in the testimony of Dr Liang on the charge of attempted murder. In doing so, the trial court ignored the evidence of Dr Liang under cross-examination that the complainant consumed a substantial amount of alcohol and did not have a clear idea of the events of 5 January 2014. Dr Liang went on to explain that the complainant was not sure if she was strangled. He testified as follows:

'All right. The patient is verbalising that she went out to a pub and that is about one o'clock in the morning on 5th January and she went alone. She said that she consumed a lot of alcohol there. That she stayed until the pub was about to close.

Just hang on. Yes? --- Thereafter, she says that everything was hazy after that. So, it was bits and pieces – some of what she recalled. She recalls walking down the steps of the pub. She recalls being in a park.

[4] *R v Blom* 1939 *A*D 188 at 202-203.

Just hang on. Just hang on doctor. I am sorry. She remembers bits and pieces … Yes? --- She said in her own words: Everything was hazy after that.
You said, she remembered bits and pieces. --- Yes. She said, basically, she – everything was a bit blurry, but she remembers going down the steps of the pub.
Yes? --- Then she recalls being in a park. Then she says, she thinks she was being strangled, but it was hazy. She does not know by who.
. . . .
Okay. So, but your conclusion was, she was unsure whether she was strangled? --- She was unsure. Yes.'

[33] The J88 form completed by Dr Liang from his clinical notes indicate that he observed bruising around the complainant's neck, petechial spots on the complainant's forehead, bruising of the eyelids and bilateral sub-conjunctival haemorrhages. The form further indicates that these injuries were in keeping with the above-alleged assault.

[34] Dr Liang testified that the bruising on the complainant's neck could have been caused by her holding her throat while vomiting. Her mother testified that she was awakened by the complainant's vomiting and found her holding her throat while vomiting. The doctor conceded that the petechial spots might have many different causes, including, in exceptional circumstances, vomiting. The sub-conjunctival haemorrhage could be caused by strangulation but also by vigorous rubbing of the eyelids and excessive coughing. The doctor testified that while this haemorrhage would not normally be caused by vomiting, it may result from a combination of vomiting and, for example, vigorous rubbing of the eyes.

[35] When the doctor was asked whether the bruising of the eyelids could be caused by strangulation he answered as follows:
'You would not get bruising of the eyelids just by strangulation. You will also get particular haemorrhages or spots there. Bruising of the eyes can be due to other trauma. It can also be caused by forcefully rubbing your eyelids.
Oh, I see.- - - In my notes here, she does testify which is on my J88, as well. Further down here. Basically, after her memory of maybe being strangled, waking up later, going home and specifically saying, she was rubbing her eyes a lot. So, the bruising could be caused by that, which is not on the record.

By the rubbing of her eyelids. - - - Correct.'

[36] The high court and the trial court failed to properly appreciate the significance of the onus which rested upon the State to prove its case beyond a reasonable doubt. In its reasons the high court stated:

'The ultimate test is whether a court is satisfied beyond all reasonable doubt that in its essential features the version given by the witnesses is a truthful one.'

[37] The high court stated further that:

'The crisp issue in this appeal is whether in these circumstances, it is reasonably possibly true that the complainant had an interest in creating a false impression and giving false testimony in order to falsely implicate appellant.'

[38] A court is not entitled to convict unless it is satisfied, not only that the accused's explanation is improbable, but that beyond any reasonable doubt it is false. The dictum of Brand AJA, in *S v Shackell*[5] is helpful in explaining the standard of proof in criminal cases. It reads as follows:

'It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version it true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course, it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.'

[39] The high court is incorrect when it states in its judgment that Dr Laing recorded the words 'was being strangled'. The doctor recorded in the J88 that the complainant thought that she was being strangled. The high court again incorrectly stated that Miss Du Toit, who appeared for the appellant 'did, however, concede that an alternative to strangulation was exceptional'. This is a misdirection as there is no such evidence on record.

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[5] *S v Shackell* 2001 (2) SACR 185 (SCA) para 30.

[40] The high court further misdirected itself in holding that 'Sabrina, immediately, once in the safety of her home, made a "first report" to Kayleigh' implying that this amounts to corroboration of the alleged sexual assault. The so-called first report is admitted only as evidence of consistency in the account given by the complainant it does not corroborate the allegation of sexual assault. (see *S v Hammond.)*[6] It cannot be argued that because the complainant complained shortly after the incident, it is probable that the incident took place without her consent.[7] Corroboration is independent evidence that shows that the commission of an act charged or that shows the existence of some essential element in dispute. (see *S v V).*[8]

[41] In all of the circumstances I find that there was a misdirection by the trial court and the high court in accepting the uncorroborated evidence of a single child witness, who was under the influence of alcohol at the time of the alleged incident. The high court should have found that the State had failed to prove its case beyond reasonable doubt.

[42] For these reasons I would have allowed the appeal.

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K E Matojane

Acting Judge of Appeal

[6] *S v Hammond* 2004 (2) SACR 303 (SCA) at 308J-309A, 309C and 310C-E.
[7] *S v Gentle* [2005] ZASCA 26; 2005 (1) SACR 420 (SCA).
[8] *S v V* 1995 (1) SACR 173 (T) at 177G-I.

Majiedt JA (Van der Merwe and Mocumie JJA and Carelse AJA concurring):

[43] I respectfully disagree with my colleague, Matojane AJA. I am of the view that the appeal should be dismissed. My colleague has given a comprehensive exposition of the facts and my narrative will consequently be limited to aspects which require further elucidation or which bear repetition.

[44] At the outset, three important observations must be made: first, the complainant and the appellant had a strong platonic relationship at the time of the incident. Second, both of them were heavily inebriated at the time. And third, the complainant initially found herself having to perpetuate a lie when she had to make reports regarding the incident to her mother, the police and Dr Liang.

[45] The events leading up to the incident at the second park were mostly common cause. The two different versions concerning events at the second park are mutually destructive. Only the complainant and the appellant testified about it. But, as a single witness, the complainant's testimony was required to be satisfactory in all material respects, or there had to adequate corroboration for it. The corroboration required is evidence implicating the appellant, not merely confirming what the complainant had reported.[9] Such evidence must support the complainant's version and render the appellant's conflicting version less probable on the issues in dispute.[10]

[46] As an appellate court it is essential that we remain cognisant of the strictures on us as far as the trial court's factual findings are concerned. Absent demonstrable, material misdirections and clearly erroneous findings, we are bound by the trial court's factual findings.[11] It is not for an appellate court 'to second-guess the well-reasoned factual findings of the trial court'.[12] We are not the triers of fact at first instance. I briefly recap the events as narrated by the two main protagonists, restricted to the latter events which have a bearing on the issues in dispute.

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[9] *S v Hammond* [2004] 4 All SA 5 (SCA) paras 11 – 17.
[10] *S v Gentle* [2005] ZASCA 26; 2005 (1) SACR 429 (SCA) para 18.
[11] *S v Hadebe & others* 1997 (2) SACR 641 (SCA) at 645E-F; *S v Modiga* [2015] ZASCA 94; [2015] 4 All SA 13 (SCA) para 23.
[12] *Mashongwa v PRASA* [2015] ZACC 36; 2016 (3) SA 528 (CC) para 45.

[47] It appears as if the mood at the first park was convivial and light-hearted. The complainant testified that the three of them enjoyed themselves and 'had fun'. She and the appellant playfully ran through the sprinklers (there is a dispute as to whether she did so dressed only in her underwear or not). After she vomited there for the first time, the complainant expressed a desire to go home. Liam left them to go to his cousin's house which was close to the first park.

[48] The evidence suggests that it was the appellant's idea to go to the second park. The complainant adhered to his request to sit there for a while to smoke and to talk. According to the complainant, when she vomited again, the appellant rubbed her stomach and thereafter allegedly moved his hands under her brassiere and touched her breasts. She pushed him away, but he managed to pin her down and allegedly pushed his hand under her pants and touched her buttocks. When afterwards she started walking away, heading home, the appellant allegedly threw her down on the ground and choked her until she lost consciousness. When she regained consciousness, her bottom was completely exposed, with her pants and panties around her ankles. She saw the appellant speaking to a man, Mr Bobby Jones.

[49] The appellant's version is completely different – he did not touch her on her breasts or buttocks, nor did he strangle her. During the complainant's vomiting spell at that second park, he laid down, gazed at the stars and fell asleep for around 30 to 40 minutes. He suggested that her semi-nakedness from the waist down was as a result of her having defecated there. The appellant's account of events glaringly leaves the injuries to the complainant unexplained. As I see it, the J88 medical report, the clinical notes and Dr Liang's evidence are decisively against the appellant's version. But before I deal with that, it is necessary first to consider the trial court's factual and credibility findings.

[50] The Regional Magistrate gave a detailed judgment. He was mindful of the cautionary rules which applied to the complainant's evidence as a single, child witness. He was acutely aware of the shortcomings in her testimony – as he said: 'it cannot go [unscathed]'. He enumerated the various contradictions between her

evidence and her police statements and between the evidence of other witnesses and hers. But he found her truthful, reliable and credible. He held as follows:
'The quality of her evidence was of a high standard. She impressed with her demeanour. She did not shy away in answering questions no matter the nature and she was equal to the task at hand.'

[51] The Regional Magistrate was justifiably subjected to trenchant criticism by appellant's counsel for not having mentioned in his judgment the complainant's undoubtedly high level of inebriation. But a careful reading of her evidence portrays a coherent, detailed and consistent narration of events. There is not a single part of her version which warrants outright rejection. There certainly were a number of contradictions between her evidence and her statements and between her evidence and that of other witnesses. Most of these had been satisfactorily explained by her and those that remained unexplained, do not impact so adversely on the quality of her evidence that it renders her testimony as a whole unreliable or untruthful.

[52] The complainant made her first statement to Constable Nangu at the Table View police station after 18h00 on the day of the incident (the statement was commissioned at 18h50). Constable Nangu's first language is Xhosa, that of the complainant, English. The complainant herself observed under cross-examination in relation to the contents of the first statement that '. . . I see there is quite a language barrier here'. By that time the complainant must have been awake for more than 30 hours, as a conservative estimate. It will be recalled that she sneaked out of her house through a bedroom window during the early hours of the morning. Before that, she was working at the Spur restaurant as a waitress until nine pm. She was clearly very tired and emotionally drained after the day's events – first the traumatic encounter in the second park, then having to explain to her mother, the police and Dr Liang. Through it all she had to maintain her initial false version of what had happened.

[53] The evidence of the investigating officer, warrant officer August, is striking in this regard. He saw the complainant at around 11 o'clock that evening. He described the complainant's condition as 'very drowsy' ('baie lomerig') and that she appeared to him as if she was under the influence of drugs or alcohol. Whenever her mother

roused her from her intermittent sleeping bouts, the complainant would start crying. She was unable to sit up straight and was slouched forward. When it was explained to him that the complainant had already made a statement earlier at around 18h50, warrant officer August was adamant that he would not have taken a statement from her, given her condition. In his view she was not in her sound and sober senses.

[54] The complainant's first statement must be viewed in this context. Tellingly, as the complainant herself pointed out in her testimony, the statement contains details which she would not have been able to furnish herself. These include street names and a description of the appellant's motorcycle's make and model ('red Honda 125'). Her second statement, made some five months later, is consistent in all material respects with her oral evidence.

[55] Many of the contradictions and inconsistencies between her version and that of her mother and Dr Liang can be ascribed to her initial false version regarding the events. The Regional Magistrate accepted the complainant's explanation for these falsehoods, in particular why she did not mention the appellant's name at the outset. She said that she did not want to get him into trouble, given their strong bond of friendship before the incident. In my view the Regional Magistrate cannot be faulted in this regard.

[56] The Regional Magistrate rejected appellant's version as false beyond reasonable doubt. He said that it militated 'against the possibilities' (he may have meant the probabilities) and that '(h)is version does not make sense.' The Regional Magistrate was aware of the fact that he had to make a choice between the two conflicting versions before him. In making that choice in favour of the complainant's version, he understood that it meant he had to accept that version in its entirety:

'. . . if I accept the complainant's version and reject the accused's version which I am going to do then it means that I need to accept the evidence of her in its entirety . . .'

Citing authority, the Regional Magistrate pointed out that a finding that an accused's version is reasonably possibly true must be based on positive evidence, not on conjecture or far-fetched possibilities.

[57] Save for the omission to deal with the complainant's state of intoxication as a factor weighing against the reliability of her evidence, I cannot fault the Regional Magistrate's approach. As stated, the complainant gave a detailed, coherent account of the events. And most of it up until the crucial events at the second park, accorded anyway with that of the appellant. It is, as the Regional Magistrate correctly found, highly improbable that the appellant, despite his alleged concern for the complainant's well-being, would simply saunter away and casually lie down and fall asleep at the second park. The probabilities and the inherent strengths and weaknesses of the two conflicting versions had to be considered in weighing up the elements which point towards the appellant's guilt as against those indicative of his innocence.[13] I am not persuaded that the trial court was wrong in accepting the complainant's version and rejecting that of the appellant as false beyond reasonable doubt. I can find no material misdirection or clearly erroneous finding on fact in his judgment. But, in any event, the medical evidence in my view puts the matter beyond reasonable doubt.

[58] Photographs of the complainant's injuries, taken at the hospital during the morning of the incident, were handed in as exhibits. The photographs in the record are of poor quality and not very clear. They do, however, depict blotches all over the complainant's face (particularly her forehead), blue and purple bruising around both eyes, bruising on her neck and the whites of her eyes had turned red. All of these, said Dr Liang, were consistent with strangulation.

[59] Dr Liang saw the complainant at the Netcare Blaauwberg hospital at around 08h10 on the day of the incident. He first made contemporaneous clinical notes on a standard form apparently used by that hospital. He completed the official J88 medical report three days later, using his clinical notes. Counsel for the appellant placed much emphasis on the inscription in the J88 which reads 'unsure if she was strangled', relating to the complainant's report to Dr Liang. But that entry does not accord with the contemporaneous clinical note which reads:

'?? Was being strangled'.

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[13] *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15.

The doctor explained that the question marks depicted the context in which the narrative was made – the complainant had indicated to him that after she left the pub events were 'hazy' and 'everything was blurry'. Where there is a difference between the two documents, the clinical notes, as a contemporaneous recordal, must plainly take precedence. After all, as Dr Liang himself testified:

'Well the J88 was only brought to me three days after this examination. . . . So, the J88 is completed using my clinical notes and obviously on what I recalled. So, basically, it is transposing what is on my notes onto the J88'.

It must, of course, be borne in mind that at the time of the examination the complainant was still maintaining the initial falsehood of omitting the appellant's name as the perpetrator. In his judgment the Regional Magistrate correctly summarized the position as follows:

'I am in possession of both the clinical notes as well as the J88 and on the clinical notes it states that she indicated she was strangled. So from the first instance she saw him, she made the allegation that she was strangled by this assailant who was then still unknown to everybody and I place great emphasis on the clinical notes due to the fact that the clinical notes were filled in the morning of the examination and the J88 only afterwards.

So indeed and I come to the conclusion that there is some independent corroboration for the complainant's version of the strangulation and how she sustained the injuries and the support she finds is that in Dr Liang's evidence and as well as EXHIBT E and then EXHIBIT D *inter alia* the J88 and the clinical notes. So there is some independent support there.'

[60] Dr Liang was extensively cross-examined on the injuries sustained by the complainant, visible on the photographs. Several notional causes for them were postulated during cross-examination. Chief amongst these was that the complainant's vomiting, combined with her coughing and the rubbing of her eyes could have caused these injuries. Despite the frequent exhortation by our courts that evidence be viewed holistically, appellant's counsel sought to compartmentalize the injuries to conjure up reasonable doubt as to the origin of such injuries.

[61] The prosecutor, probably anticipating this line of cross-examination, explored the possible causes with Dr Liang in his evidence in chief. Dr Liang explained that the red blotches on especially the complainant's forehead were petechial spots. These are caused by tiny capillaries which leak blood. The two most common

causes of petechial spots are strangulation and a viral infection. In the latter instance, petechial spots would appear all over the body, but with strangulation, these would be mostly in the area of the forehead, as is the case here. The reason for this is that blood which flows in the arteries up to the head cannot return down to the body, as its flow is obstructed by the constriction in the throat area. This exerts pressure on the blood vessels, causing them to burst, leak blood and form the petechial spots.

[62] The next set of injuries was what is described in lay terms as 'the whites of the eyes turning red'. Dr Liang testified that this bilateral subconjunctival haemorrhage (both eyes had blood under the conjunctivae) can be caused by extensive rubbing of the eyes, blunt force to the eyes or by strangulation. Given the extent of the haemorrhage, Dr Liang excluded vomiting as a possible cause. When asked by the prosecutor, he also excluded vomiting as a cause for the petechial spots. In concluding his examination in chief, Dr Liang was asked:

'Now, if you take the petechial spots and you take the blood in the eye and you take the bruising on the neck. What would your conclusion be? Well, the clinical findings are in keeping with the patient that has been strangled.'

[63] Under cross-examination Dr Liang explained that in severe cases of strangulation, one may encounter fractured bones, fractured cartilage and voice changes. The bruises on the complainant's neck, as seen on the photographs (which were shown to the doctor) by themselves are inadequate to determine the severity of the strangulation. As he put it – one 'can have quite severe strangulation with minimal [bruising]'. Dr Liang conceded that bruising in the neck area may occur if a person holds her neck while vomiting. I must point out that there was no such evidence in this case, nor was such a suggestion made to the complainant or any other witness in cross-examination. And there was no such evidence from the appellant himself. On the evidence, the complainant vomited thrice – once each in the two parks and lastly at home. The complainant's mother testified that after she heard the complainant vomiting, she went to investigate. She saw the complainant holding her neck and it appeared as if she had difficulty swallowing. She also saw the complainant's eyes turn red. When asked under cross-examination whether she thinks the complainant was holding her neck because she felt nauseous, her mother

answered ‘No, no she touched her neck because she’d been strangled’. Asked to explain she said ‘[b]ecause if you think about it why else would she stand there and touch her neck, no other reason. If you’re nauseous and you puke, what do you hold? You hold your stomach’. When the appellant’s denial of having perpetrated the offences were put to her in cross-examination, she stated:

‘Well Sir she didn’t strangle herself and she did not put blotches and punch herself in the face and two years later I can’t even touch her on her neck. It’s actually ridiculous.’

This notional cause for the bruising around her neck was thus a mere hypothesis and no more.

[64] The next area of exploration under cross-examination was the bilateral subconjunctival haemorrhage. It was suggested to Dr Liang that vomiting causes increased pressure in the abdominal cavities which, in turn, can cause the tiny blood vessels in the membranes of the eyes to burst (ie bilateral subconjunctival haemorrhage). I deem it necessary to repeat Dr Liang’s response in full:

‘With vomiting, generally, the amount of pressure that you have results in none of the above. However, in certain cases of severe vomiting you do get small haemorrhages in the subconjunctival haemorrhages, but generally it is just one small vessel that could – that would burst or get a small area of the white of the eye that would be red. You would never get what we see in the pictures here, bilateral and almost entirely the entire white part of her eye. So, to answer your question more directly. You can get sub-conjunctival haemorrhages, with vomiting. However, it is only – it would be localised, normally the one side only. Normally a small area of the white is red’.

[65] When asked if one were to ‘combine the vomiting with coughing and things like that, can that be more severe’, Dr Liang replied ‘not to this extent . . . ‘ He was pressed repeatedly on this, but remained adamant that ‘(y)ou will not get anybody vomiting and coughing with this type of subconjunctival haemorrhage’. He emphasized that in such instances the haemorrhage would normally be localized and not be as extensive as in this case where virtually the entire conjunctivae had haemorrhaged. He summed it up as follows:

‘The majority of cases of people that vomit, result in no haemorrhage. No petechial haemorrhages. No sub-conjunctival haemorrhages. So nothing happens. In very few cases, you get unilateral, small, tiny haemorrhages on one side of the eye, but that is an exception.

Did it clarify . . . (indistinct)? It is in exceptional cases you will get a minor (?) sub-conjunctival haemorrhages.'

[66] With regard to the haemorrhaging in the eyes, Dr Liang explained that extreme vomiting can in exceptional cases be the cause thereof. And then, vigorous, prolonged rubbing of the eyes would also play a role. He said this occurrence is not impossible, but 'highly unlikely'. When asked if excessive vomiting can cause petechial spots on the face, Dr Liang agreed, adding '[a]gain, it is an exception. It is not commonly seen'. There was no evidence at all of excessive vomiting, let alone in conjunction with prolonged vigorous rubbing of the complainant's eyes.

[67] I have quoted extensively from the record to demonstrate the following. First, the cross-examination was largely directed at extracting concessions based on scientific, not legal, exactitude, on the separate injuries. This court has cautioned that courts must remain mindful of the cardinal difference between the scientific and the judicial measures of proof.[14] In this instance it is beyond reasonable doubt that strangulation was the cause of the complainant's injuries. Dr Liang's evidence was very clear on that. At the end of his evidence Dr Liang stated that, as an emergency unit doctor since 2009, he has seen hundreds of cases where drunk patients (including teenagers) had vomited. His evidence must in my view be accepted without hesitation or any reservation. The Regional Magistrate was right in doing so.

[68] Secondly, the medical evidence as a whole, is what is to be considered. The overall picture is, as Dr Liang said, consistent only with strangulation. Early on during examination in chief, the following exchange occurred between the prosecutor and Dr Liang:

'Now doctor, I suppose here in Court we always look at the evidence as a whole. There is totality. We do not look at that specific and that specific. I suppose you do that as well? . . . Right. To get to a conclusion. Whatever conclusion. . . .Yes'.

This passage conclusively demonstrates why the doctor was able to state immediately thereafter that the clinical findings as a whole (the petechial spots, the bilateral subconjunctival haemorrhage and the bruising on the neck) were consistent with strangulation.

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[14] *Michael & another v Linksfield Park Clinic (Pty) Ltd & another* [2002] 1 All SA 384 (A) para 40.

[69] My colleague makes reference to the 'concessions' made by Dr Liang and to the observations of the complainant's mother and Mr Jones regarding the lack of injuries. With respect, my colleague makes the same mistake as appellant's counsel by compartmentalising the various injuries and elevating what Dr Liang described as being possible in 'exceptional' cases, to a level of reasonable possibility. The 'concessions' must be properly understood – I have already cited the various passages where Dr Liang stated that these injuries can possibly occur in exceptional cases. It is, with respect, improper to transfigure those exceptional occurrences into reasonable possibilities. And, as stated, one must not lose sight of the complete, overall picture. In *S v Hadebe*[15]*,* Marais JA cited the following passage in *Moshepi & others v R* (1980 – 1984) LAC 57 at 59F–H:

'The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.'

[70] The evidence of the complainant's mother that she saw her daughter's eyes suddenly turn red does not appear to me to be a reliable observation. It can, in any event, not disturb Dr Liang's clear evidence on this aspect. Mr Jones did not have any need to pay close attention to the complainant's face. He saw nothing untoward on the second occasion – to him they were just two teenagers in a park, albeit at an unusual hour. He did not get up close to the complainant because of her semi-nudity. He said he felt awkward approaching her and wanted to respect her dignity. Again, Dr Liang's evidence must hold sway over that of Mr Jones on this aspect. It is not

[15] *S v Hadebe* and others 1998 (1) SACR 422 (SCA) at 426E–H.

strictly correct to say that Mr Jones corroborated the appellant on the aspect of the human faeces close to the complainant. Mr Jones was unable to state whether that was human faeces or not, and he pointed out that many people walk their dogs in that park. And, unlike the appellant, he did not see a smudge or a smear on the complainant's thigh.

[71] Lastly, there is the evidence of Ms Cayley van Coller. My colleague is critical of the high court's finding that 'Sabrina (the complainant), immediately, once in the safety of her home, made a "first report" to [Cayley]' (the words first report were placed in inverted commas by the high court). My learned colleague understands this to imply that the high court regarded this as corroboration of the alleged sexual assault. But the high court did not say so at all; in fact, when read in context, it seems to me that the high court interpreted that evidence correctly for what it was – a mere "first report". The Regional Magistrate evaluated the purpose of this evidence correctly, ie not to corroborate the complaint's version, but to enhance her credibility. The Regional Magistrate stated as follows:

'I am also mindful of what was said in *S v Gentle* matter *supra,* I also referred to it. It is a Supreme Court of Appeal matter where it is very important to know that first reports never serves as corroboration for the complainant's version. That is not the purpose of first reports in the law. The purpose of first reports is there and it contributes to the credibility of the complainant, never to confirm a version, but rather it contributes to the credibility and one must keep that in mind when you deal with sexual offences and the purpose of first reports, because a first report is in any [event] hearsay evidence which in all other instances would have been inadmissible, but it is only allowed in sexual offences, because it contributes to the credibility of the complainant *per se* and that is the purpose of first reports and that was confirmed by the Supreme Court of Appeal in *S v Gentle*.'

[72] The Regional Magistrate therefore correctly rejected the appellant's version as false beyond reasonable doubt. In my view he was also correct in drawing the ineluctable inference that the appellant, having been the only other person in that park, was the one who had strangled the complainant. Mr Jones testified that he did not see any other persons on either of the two occasions in that park. One must therefore also accept the complainant's evidence regarding the sexual assault perpetrated upon her by the appellant. It was contended, without much vigour it must

be said, that an unknown passerby could have perpetrated these offences while the appellant was asleep. The submission can be rejected without more. The law does not require the prosecution to close every possible loophole, even more so those based on sheer conjecture and which is utterly fanciful.[16]

[73] The appeal is devoid of merit. The following order issues:

The appeal is dismissed.

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S A Majiedt

Judge of Appeal

[16] *S v Sauls & others* 1981 (3) SA 172 (A) at 182G–H.

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