THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1192/17

In the matter between:

JOEY HAARHOFF	**FIRST APPELLANT**
IAN BAARTMAN	**SECOND APPELLANT**

and

DIRECTOR OF PUBLIC PROSECUTIONS EASTERN CAPE (GRAHAMSTOWN)	**RESPONDENT**

Neutral citation: *Haarhoff & another v Director of Public Prosecutions, Eastern Cape* (1192/17) [2018] ZASCA 184 (11 December 2018)

Coram: Navsa ADP, Mocumie and Molemela JJA and Mokgohloa and Nicholls AJJA

Heard: 8 November 2018

Delivered: 11 December 2018

Summary: Admonition in terms of s 164 of Criminal Procedure Act – procedure to be followed – competence discrete enquiry – whether witness understands what it means to speak the truth – unchallenged evidence of expert and examination by court - test satisfied

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ORDER

On appeal from: Eastern Cape Division, Grahamstown (Brody AJ with Chetty J concurring and Mjali J dissenting, sitting as court of appeal):

The appeals against the appellants' convictions and sentences are dismissed.

JUDGMENT

Molemela JA (Navsa ADP, Mocumie JA and Mokgohloa and Nicholls AJJA concurring)

[1] The two appellants and a third person (C) were arraigned on a charge of rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Sexual Offences Act) in the Eastern Cape Division of the High Court sitting at Graaff Reinet (trial court). They all pleaded not guilty and gave a plea explanation as contemplated in s 115 of the Criminal Procedure Act 51 of 1977 (CPA). In their brief plea explanation, the two appellants admitted having had sexual intercourse with the complainant 'on separate and distinct occasions' but stated that it was consensual. C denied that he had sexual intercourse with the complainant and that he had knowledge of the fact that the appellants had had sexual intercourse with her. At the end of the proceedings, on 2 April 2015, C was acquitted, while the two appellants were convicted and sentenced to 20 years imprisonment, respectively.

[2] Aggrieved by their convictions and sentences, they applied for and were granted leave to appeal against both their convictions and sentences to the full court of the Eastern Cape Division of the High Court, Grahamstown. In a split decision of that court, Chetty J and Brody AJ (the court a quo) dismissed their appeal against

convictions and sentences, while Mjali J delivered a dissenting judgment. Mjali J would have upheld the appeal. After unsuccessfully applying for leave to appeal against the majority decision, the appellants directed an application to this court. This appeal is with leave of this court.

[3] The incident that led to the appellants' prosecution played itself out in the small town of Pearston, situated in the Eastern Cape. The complainant's version, in a nutshell, was that she was returning home in the early evening of 30 April 2013 when she was accosted by the two appellants at the corner of the street. They pulled her into the house of C, which is situated in the same street as the complainant's home. The appellants forced her into C's house. They threw her onto a bed and pulled her pants down. She did not put up a fight because one of them threatened to smack her if she resisted. The two appellants then took turns in raping her, while holding her down and closing her mouth. At some point, her legs were tied to a bed in the house. Although a previous statement given to the investigating officer apparently implicated C, the complainant confirmed that C was present during her ordeal but exonerated him in the rape. She testified that immediately after the first rape incident, she pulled her pants up and tried to go home, but the appellants stopped her from leaving and raped her a second time. She was held hostage at C's house throughout the night. In the morning, the two appellants and C left the house together but prevented her from leaving by locking her inside the house. She remained in the house until she was discovered by Ms N J, referred to as G, who happened to see her through the window. G in turn summoned the complainant's guardian, Mrs S.

[4] In her testimony, Mrs S gave a brief background about the complainant's history and also shed some light on the steps she took when the complainant failed to return home on the night of the incident. Mrs S testified that she became alarmed when the complainant did not arrive home from her aunt in the evening and began looking for her. She phoned relatives and friends to make enquiries about her whereabouts and learnt that she was last seen when she was leaving her aunt's place at approximately 19h00. Enquiries directed at people in the neighbourhood did not yield any fruit. She ended up concluding that the complainant had gone to visit other relatives on a farm. The next day, she was summoned to the street and saw the complainant in the company of G near C's house. G informed her that she had

found the complainant in C's yard, six houses from the complainant's home. When Mrs S questioned the complainant regarding her disappearance the previous night, the complainant told her that she had spent the night with the two appellants and C at the latter's house.

[5] Mrs S testified that she accompanied the complainant to the police station, where rape charges were laid against the two appellants and C. On the same day, the complainant was taken to the hospital for medico-legal examination, during which DNA was taken and subsequently sent to the forensic laboratory for analysis. The medical report was admitted into evidence without oral testimony of the doctor who had conducted the medical examination.

[6] The two appellants testified in their defence and also called witnesses. The first appellant testified that on 30 April 2013, the three of them had consumed a large amount of liquor during the day, as a result of which C had passed out in his house. The two appellants later left C's house together. About thirty minutes later, the first appellant returned to C's house alone. After a while, he saw the complainant passing by and called her. The complainant entered the yard and sat next to him at the door while they conversed. It was during that conversation that he suggested to the complainant that they should have sex and the complainant agreed. They had sexual intercourse on a mattress that the second appellant had put in the room. After that encounter, he told the complainant to go home. He heard the door being opened and then being closed and assumed that the complainant had left. To his surprise, when he woke up the next morning, he noticed that the complainant was sleeping on the same bed as C, but they were facing opposite directions. At about 06h00, the second appellant came to C's house and told them that his cousin, Sous was calling them (i.e. the two appellants). He, the second appellant and C left the complainant at C's house and proceeded to Sous' place, which was about 50 – 70 metres from C's house. As they were leaving C's place, he again told the complainant to go home. When they arrived at Sous' house, he invited them to enjoy liquor with him. They jointly consumed 1½ bottles of sherry, 2 litres of wine and beer. Thereafter, he, C, Sous and one PA went to the town centre. The second appellant did not join them because he had to mend a neighbour's fence across the road. At about 12h00, they purchased a 5 litre box of wine and returned to C's house. The second appellant joined them. They all enjoyed liquor in the lounge section of the house. He noticed that the complainant was still in

the bedroom section of the house. The complainant was asked why she had not gone home and she gave no response. The complainant did not partake in the drinking spree. During this entire period, the door was wide open. They left C's house at about 15h00.

[7] The second appellant testified that on 30 April 2013 he had consumed liquor with the first appellant and C at C's house. He left C's house in the afternoon and did not return to C's place on that day. He cohabited with his partner at her parental home but would sleep over at C's place whenever his mother-in-law had thrown him out of her house. He spent the night of 30 April 2013 with his partner. The next morning at about 06h00, his neighbour Sous, asked him to call the first appellant and C. He went to C's place and knocked at the door. C opened the door. He was in the lounge area and did not see the complainant. After conveying Sous' message to C, he proceeded to Sous' place. The first appellant and C joined him there. Sous offered them liquor, which they all shared. He left Sous' place at about 08h00 as he had to go and mend a neighbour's fence. At some point while attending to the fence, he saw the first appellant and C heading in the direction of the town centre. He finished mending the fence at about 09h00 and decided to go to C's house in order to have a bath.

[8] When he arrived there, he noticed that there was someone sleeping in C's bed. He assumed it was C and remarked aloud that C had passed out very quickly. As he was busy running the bath, he was surprised to see that it was actually the complainant who had been sleeping in C's bed. The complainant told him that she was hungry. He told the complainant that there was no food in the house and pointed out that he normally had his meals at his partner's home. He decided to go and buy bread and polony, which he shared with the complainant. He then proceeded to undress and started to wash himself. It was at that stage that the complainant started touching him. He reprimanded her but she continued to seduce him, after which she told him that she wanted to have sexual intercourse with him. He succumbed to her temptation and had consensual intercourse with her. He then left and did not go back to C's house again that day. On his way back from town he heard rumours that he, the first appellant and C were being accused of having raped the complainant. They

were arrested and prosecuted, which culminated in the two appellants being convicted and sentenced as set out earlier in this judgment. As stated before, they lodged an appeal with the court a quo. The appeal was directed against the convictions and sentences.

[9] Before the court a quo, it was argued on behalf of the appellants that although the complainant had the ability to differentiate between truth and falsehood, it was evident from her responses to the trial court that she did not understand the moral obligation of the necessity to speak the truth. It was also argued that the veracity of her evidence was questionable. The majority decision of the court a quo found that the trial court had properly admitted the complainant's evidence. It found that the criticism against the trial court's evaluation of evidence was unfounded. It considered the complainant's evidence, being that of a single witness, to be credible and reliable. It found that the trial court had correctly rejected the appellants' version as false beyond reasonable doubt as it was riddled with improbabilities, inconsistencies and contradictions.

[10] The issues for determination before this court are: whether the complainant's evidence was properly before the trial court, whether her evidence was sufficiently reliable to sustain a conviction and whether the sentence imposed by the trial court was appropriate.

[11] It appears that some months prior to the commencement of the proceedings in the trial court, the complainant had been referred to a clinical psychologist, namely Ms Andrews, for assessment. Ms Andrews furnished the prosecution with her report, in which she recorded that the reason for the referral was for purposes of assessing the complainant's mental ability and her ability to testify in court. Also recorded in her report was that there was a considerable discrepancy between the complainant's biological and mental age. At the commencement of the proceedings, the state advocate apprised the court about Ms Andrews' report and indicated his intention to adduce her evidence so as to lay a basis for his application for the proceedings to be held in camera and for the complainant to testify via close circuit television and through the services of an intermediary.[1] Ms Andrews' evidence sketches a full

[1] Section 170A (1) of the Criminal Procedure Act provides:

picture that serves as a background against which the complainant's evidence must be viewed.

[12] Ms Andrews' evidence revealed that prior to assessing the complainant, she had interviewed the complainant and her guardian for purposes of obtaining her history. She was informed that during her childhood, the complainant was unable to learn that swearing and aggressive behaviour were inappropriate. Her behaviour was extreme to the point that she was temperamental and was unable to progress at school. She dropped out of school at grade one level. She suffered from epilepsy, which also contributed to her cognitive impairment. Ms Andrews pointed out that the complainant presented as a woman who was normal in physical appearance and possessing the physical maturity consistent with her biological age of 24. However, her childish voice alerted one to the presence of an anomaly. The complainant lacked intelligence, emotional and social maturity. Ms Andrews stated that when she questioned the complainant about dropping out of school, she personally informed her that this was due to the fact that she was rude, she stole other learners' belongings, was always fighting them and was causing problems.

[13] Ms Andrews stated that she also conducted some tests. She formally assessed the complainant's cognitive functioning and her thinking with psychometric tests. She assessed her intellectual functioning using the *Carpets Draw a Person* test, a universal test that determines whether a person's performance is average, above average, below average or whether he or she is mentally disabled. Ms Andrews also used the *Good Enough* calculation which accurately determines a person's mental age. That test indicated that the complainant's mental age was that of a 10 year old. She also used the standard *Bend-a-guess* test to assess the complainant's performance on the copying of nine designs. This test revealed that although there were errors indicative of cognitive impairment, the complainant's errors were not consistent with mental retardation. She explained that if one is

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'Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological or mental age of eighteen years to undue mental stress or suffering if he or she 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 or her evidence through that intermediary.'

mentally retarded, he or she would get the worst errors on that test, but the complainant's test performance was just above that.

[14] Ms Andrews also conducted the *Raven's Progressive Matrices* test, which is a classic standard test used by psychologists in assessing persons who cannot read and write. The results of that test placed the complainant's intellectual functioning on the borderline, between mild mental retardation and borderline intellectual functioning. Her score was 70. Mild mental retardation ends at 69 and borderline intellectual functioning starts at 70. She also conducted the *Ray Auditory Verbal Learning test*, which is a reliable test that distinguishes between mental disability and low IQ. As somebody who is mentally retarded cannot learn new information, this test assesses his or her ability to learn new information. It tests how much new information a person can learn over a number of tries. The complainant was able to learn a 7-item list over three tries. Her conclusion was that the complainant was able to learn new information albeit at a level well below her chronological age.

[15] According to Ms Andrews, the complainant was able to testify in court and had the cognitive capacity suitable to being admonished by the court. Ms Andrews also expressed the view that despite the complainant's intellectual challenges, she did not fall within the definition of mentally disabled person as stipulated in s 1 of the Sexual Offences Act, because she understood what it meant to have sexual intercourse and was able to appreciate the nature and reasonably foreseeable consequences of sexual intercourse. She was, accordingly, able to express her consent, or otherwise, to sexual intercourse. Ms Andrews was cross-examined extensively by the defence counsel, but the focus of that cross-examination was confined to Ms Andrews' recommendation that the complainant be allowed to testify through the services of an intermediary. Having considered Ms Andrews' evidence and both counsel's arguments, the trial court ruled in favour of the state and the complainant was allowed to testify in a separate room through an intermediary.

[16] I now turn to deal with whether the trial court complied with the relevant provisions of the CPA. In argument before us, counsel for the appellant was at pains to point out that the appellants had no issue with the complainant's general

competence to testify in court and indicated that the thrust of the appellants' argument was that the trial court had failed to comply with the provisions of s 162 read with s 164 of the CPA. These are provisions that deal with examination of witnesses in court. She contended that the complainant ought not to have been admonished and allowed to testify, as it was clear that although she could understand the difference between the truth and falsehood, she could not understand the importance or moral obligation of speaking the truth. She considered the questioning of the complainant by the court prior to admonishment of the complainant to have been inadequate. However, during the exchanges before us, counsel repeatedly made submissions directed at the complainant's general competence to testify in court as contemplated in s 192 of that Act. I therefore deem it prudent to canvass both the general competence of the complainant to testify and whether the enquiry preceding her admonition had demonstrated that she was cognisant of the duty or moral obligation to speak the truth.

[17] Indeed, an enquiry into a witness' competence to testify as contemplated in s 192 of the CPA and his or her ability to understand the nature and import of the oath or affirmation, as contemplated in s 164 are two discrete enquiries.[2] Logic dictates that where the competency of a witness is at issue, that would be a question falling to be determined by the trial court at the outset. It is self-evident that if that court were to find that witness to be incompetent to testify in court, that would be the end of the matter. However, where such a witness is found to be competent to testify, the provisions relating to the examination of witnesses in court, as stipulated in s 162 -164 of the CPA would kick in. I therefore propose to start with the complainant's general competency to testify.

[18] Section 192 of the CPA provides that 'every person not expressly excluded by this Act from giving evidence shall, subject to the provisions of s 206, be competent and compellable to give evidence in criminal proceedings.' Section 206 in turn provides that the law pertaining to the competency, compellability or privilege of witnesses, which was in force in respect of criminal proceedings on the 30th day of

[2] *S v Katoo* [2006] 4 All SA 348; [2004] ZASCA 109 at para 13.

May 1961, shall apply in any case not expressly provided for by this Act or any other law. Expressed differently, every person not expressly excluded by the Criminal Procedure Act or by the English law of evidence as at 30 May 1961 is presumed competent and compellable to give evidence in criminal proceedings.[3]

[19] A case that elucidates the provisions of s 192 and simultaneously highlights that a person's mental affliction does not, without more, impact on his or her competence to testify in court is *S v Katoo*.[4] In that matter, this court had to determine a reserved question of law pertaining to the trial court's finding of incompetence in relation to a witness. It also had to interpret the provisions of s 15 of the Sexual Offences Act 23 of 1957,[5] which made it an offence to have sexual intercourse with a male or female 'idiot' or 'imbecile' (that is the outdated terminology that was used in that Act) and s 194 of the CPA.

[20] In the process of interpreting the provisions of s 194, this court expressly stated that that section has to be read with the provisions of s 192 and s193, respectively. What had transpired in the trial court was that the prosecution had sought to adduce the evidence of the complainant, who was said to be 'severely mentally retarded to the point where she may be described as an imbecile.' The trial court, relying on the provisions of s 194 of the CPA, had ruled that the complainant was not competent to testify as the evidence of a clinical psychologist had stated that the complainant suffered from severe mental retardation and that she could consequently be described as an 'imbecile'. The psychologist had indicated that he was unable to opine whether the complainant could distinguish truth from falsehood. On appeal, this court having noted that the psychologist's evidence did not indicate

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[3] LAWSA (1978) Vol 5 *a*t 451 para 626.
[4] *Katoo* fn 2 para 13.
[5] Section 15 provided as follows:
'Any person who-
(a) has or attempts to have unlawful carnal intercourse with any male or female idiot or imbecile in circumstances which do not amount to rape; or
(b) commits or attempts to commit with such a male or female any immoral or indecent act; or –
(c) solicits or entices such a male or female to the commission of any immoral or indecent act, shall, if it be proved that such person knew that such male or female was an idiot or imbecile, be guilty of an offence.' (This section was a substitution effected by s 6 of the Immorality Amendment Act 2 of 1988). This section was repealed by s 68 of the Sexual Offences Act, 2007. The protection it used to give vulnerable victims who were mentally challenged is now embodied in s 57(2) of the Sexual Offences Act, which is to be read with s1 thereof.'

that the complainant suffered from any mental illness, stated that imbecility was not a mental illness and did not, *per se*, disqualify a potential witness from testifying in court. As stated before, it concluded that s 194 of the CPA must be read with s 192 and s 193, respectively. Regarding the general competence to testify as contemplated in s 192 of the CPA, it remarked as follows:

'In the past courts in this country have permitted persons suffering from mental disorders as well as imbeciles to testify subject to their being competent to do so. See S v Thurston (supra); S v J 1989 (1) SA 525 (A); R v K 1957 (4) SA 49 (O) and S v Malcolm 1999 (1) SACR 49 (SE). *That approach is in harmony with the presumption contained in s 192 to the effect that every person is a competent witness*. (Own emphasis).

[21] It is therefore clear from that *dictum* and the cases cited therein that the law applicable in this country before 30 May 1961 did not equate a person's infirmity of mind with incompetence to testify in court. Reverting to the facts of this matter, I have already alluded to the unchallenged evidence of the clinical psychologist who had assessed the complainant. She stated that the complainant had a mild mental retardation and was competent and able to distinguish between truth and falsehood. It is worth mentioning that as such, the complainant in this matter was in a better position than the witness referred to in *S v Katoo,* who was severely retarded.

[22] In this matter, Ms Andrews expressed the view that the complainant was competent to testify and advanced her reasons for that conclusion. The appellants' counsel did not challenge that evidence at all and merely expressed misgivings about the recommendation that the complainant testify through an intermediary. The appellants were in court and knew the complainant very well[6] and would have been able to instruct their counsel to dispute some of the findings made by Ms Andrews pertaining to the complainant's history or general competence. This was not done.

[23] It is evident from the record that Ms Andrews' finding that the complainant was not mentally disabled within the meaning of s 1 of the Sexual Offences Act, is what prompted the State Advocate to amend the indictment by deleting reference to s

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[6] Under cross-examination, it was put to the second appellant that he knew that the complainant was intellectually challenged. In his response, the second appellant, stated, inter alia, that he had noticed and knew that the complainant was not well.

57(2) of that Act[7] in terms of which a person suffering from a mental disability is considered incapable of giving consent to sexual intercourse. In response to the trial court's question, the defence counsel indicated that he had no objection to that amendment. The self-evident risk for the appellants challenging Ms Andrews' findings obviously lay in the fact that a conclusion that the complainant suffered from a mental disability as defined in s 1 of the Sexual Offences Act would in turn result in the applicability of the provisions of s 57(2) of the Sexual Offences Act. The uncontested DNA evidence linking the two appellants to the offence could therefore have been sufficient to sustain the appellants' conviction. It is apposite to echo the sentiments expressed by this court in *Rex v Hepworth* 1928 AD 265 at 277 where it said:

'a criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed. . .'.

[24] The trial court, in its judgment, alluded to the expertise of Ms Andrews and concluded that there was no reason why it could not accept such evidence. Having perused the record, I cannot see any reason why the trial court was not entitled to accept the unchallenged views of an expert, expressed on the basis of such expert's scientific knowledge and experience. This justified a conclusion that the complainant was competent to testify as envisaged in s192 of the CPA. As I will demonstrate, nothing, as the trial progressed, indicated the contrary.

[25] The next enquiry is whether the admonition of the complainant meets the requirements of the law as elucidated by various authorities. As correctly stated in *S v Katoo*,[8] the fact that someone is a competent witness does not mean that the person can be sworn in as a witness. That raises a discrete issue of whether the witness understands the nature and import of the oath. It is convenient to preface that discussion by quoting the exchange that preceded the complainant's admonition

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[7] Section 57 of the Sexual Offences Act provides:
'Inability of children under 12 years and persons who are mentally disabled to consent to sexual acts
(1) Notwithstanding anything to the contrary in any law contained, a male or female person under the age of 12 years is incapable of consenting to a sexual act.
(2) Notwithstanding anything to the contrary in any law contained, a person who is mentally disabled is incapable of consenting to a sexual act.'
[8] *Katoo* fn 2 para 13.

verbatim. It is as follows:

'COURT: Please ask her name?

WITNESS: S. P.

COURT: How old are you?

WITNESS: She does not know how old she is M'Lady.

COURT: S. do you know the difference between what is true and what is not true, that is the difference between truth and lies?

WITNESS: Yes M'Lady.

COURT: If I say to you are a boy am I telling the truth?

WITNESS: No.

COURT: Do you know what happens to someone who does not tell the truth?

WITNESS: No M'Lady.

COURT: Is it good to tell lies?

WITNESS: Yes M'Lady.

COURT: Do you know what happens, okay you have already answered that, now we have asked you to come here today because we want you to tell us the truth. Are you going to tell us the truth?

WITNESS: Yes M'Lady.

COURT: Any questions, I have asked those questions just to establish whether she understands the difference between the truth and lies, I don't know if either of you want to pose any further questions before I swear her in?

PROSECUTOR: M'Lady can we ask one or two questions just to.....?

COURT: Okay.

PROSECUTOR: S you indicated earlier that if a person says you are a boy that person would be telling a lie.

WITNESS: Yes.

PROSECUTOR: And if a person says you are a girl, is he telling the truth or is he telling a lie?

WITNESS: He is telling the truth.

PROSECUTOR: That is all M'Lady.'

[26] Following that exchange, the defence counsel submitted that given the responses given by the complainant, it could not be concluded that the complainant was 'competent to take the oath'. Thereafter, the state advocate proposed that the complainant be admonished. The defence counsel expressly agreed. The following exchange then followed:

'COURT: I am now warning you that we expect that you are going to tell us only what is true and you are not going to lie to us, do you understand that?
WITNESS: Yes, M'Lady.
COURT: You are going to be asked questions and you are going to be asked what happened on a day you are going to be told about, and when you give answers and when you explain things to court you must please raise your voice, do you understand?
WITNESS: Yes, M'Lady.'

[27] I mention *en passant* that the fact that the trial court did not make a specific finding that the complainant did not understand the nature and import of the oath or affirmation before deciding to admonish her was not raised as an issue in this appeal. In any event, it is settled law that an express finding is not a pre-requisite to admonishing a witness.[9]

[28] Section 162(1) of the CPA provides that 'subject to the provisions of sections 163 and 164, no person shall be examined as a witness in criminal proceedings unless he is under oath'. Thus, where there is no objection raised to taking the oath, the oath would be duly administered. Where the witness raises an objection against the taking of the oath, such a witness will, in terms of the provisions of s 163, be required to affirm that he or she will speak the truth.[10]

[29] Section 164(1) of the CPA caters for circumstances where a potential witness is unable to take an oath or affirm on account of a lack of understanding of the oath or the affirmation. It matters not whether such a witness is an adult or a child. It provides as follows:

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[9] *S v B* 2003 (1) SA 552 (SCA) para 15.
[10] See also the dictum in Du Toit et al *Commentary on the Criminal Procedure Act* (2018) at 22-29 et seq.

'Any person, who is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth.'

[30] I agree that the purpose of the enquiry prior to admonition is not to merely determine whether a witness can understand the abstract concepts of truth and falsehood or can give a coherent and accurate account of the events but to determine whether he or she can distinguish between truth and falsity. It must be evident that the witness recognises the danger and wickedness of lying.[11] In *DPP v Minister of Justice*,[12] the court stated that it is implicit in the proviso that the person must understand what it means to speak the truth. It further stated that if a child cannot understand what it means to tell the truth, that child cannot be admonished to speak the truth and is therefore an incompetent witness. The court stated that the reason for the requirement that evidence be given under oath or affirmation or admonition to speak the truth is to ensure that the evidence given is reliable. It is indeed a pre-condition for admonishing such a witness that he or she must be able to comprehend what it means to tell the truth. Accordingly, the evidence of a person who does not understand what it means to tell the truth is by its nature not reliable and therefore inadmissible. Admitting such evidence would undermine the accused's right of a fair trial.

[31] In this matter, the complainant had a mental age of a 10-year old child. In *Gealall Raghubar v The State,*[13] Tshiqi JA stated as follows:

'If a child does not have the ability to distinguish between truth and untruth, such a child is not a competent witness. It is the duty of the presiding officer himself or herself that the child can distinguish between truth and untruth. The court can also hear evidence as to the competence of the child to testify. Such evidence assists the court in deciding (a) whether the evidence of the child is to be admitted, and (b) the weight (value) to be attached to that evidence. The maturity and understanding of the particular child must be considered by the presiding judicial officer, who must determine whether the child has sufficient intelligence to

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[11] *S v Henderson* [1997] 1 All SA 594 (C).
[12] *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & others* 2009 (4) SA 222 (CC); 2009 (2) SACR 130 (CC); [2009] *ZACC 8* para 164-167.
[13] *Gealall Raghubar v The State* 2012 ZASCA 188.

testify and a proper appreciation of the duty to speak the truth. The court may not merely accept assurances of competency from counsel.'[14]

[32] Unlike the circumstances described in *Raghubar*, in this matter, the court received evidence of an expert, namely Ms Andrews. While it is indeed so that the prosecutor's objective in calling the Ms Andrews was to motivate for the complainant to testify in a separate room through an intermediary, it is undeniable that the psychologist went much further than that. Not only did she give an opinion about the general competence of the complainant to testify, she went on to opine that the complainant was able to understand what it meant to tell the truth, what it meant to lie, and could be admonished like any 10 year old child. Granted, it was the duty of the trial court to establish whether the complainant could, in fact, distinguish between truth and falsehood and comprehend the obligation to tell the truth. The Constitutional Court in *Director of Public Prosecutions v Minister of Justice and Constitutional Development*[15] put the bar no higher than establishing whether the child in question 'can comprehend what it means to tell the truth'.

[33] The criticism that the trial court's enquiry preceding the admonition was cursory or inadequate is without merit as it fails to take into account the proper context in which the questioning was embarked upon. This critical context is that the court's questioning was preceded by detailed testimony of an expert who had not only interviewed the complainant but also evaluated her mental capabilities by performing recognised IQ tests. What has to be borne in mind in this case is that Ms Andrews's conclusion that the complainant was able to distinguish between the truth and falsehood and would be able to understand what it meant to relate what happened and nothing else, was based on scientific tests and was uncontroverted.[16] The court's later questioning of the complainant must be seen in that light. It is of significance that the complainant's independent explanation for dropping out of school, as related to the court by Ms Andrews, was that she stole other learners' things, was rude and caused problems. That is part of the evidence to which the trial court was privy. That self-criticism, in my view, demonstrates that the complainant

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[14] Supra para 5.
[15] *Director of Public Prosecutions v Minister of Justice and Constitutional Development* 2009 (2) SACR 130 (CC); 2009(4) SA 222 (CC).
[16] *Rex v K* 1951 (4) SA 49 (O) at 54B-C.

understood the importance of being honest even if it meant portraying herself in a dim light. To my mind, that is a clear demonstration of someone who understands the moral obligation of telling the truth. That must have weighed heavily with the trial court.

[34] Significantly, prior to admonishing the complainant the trial court gave both the State and defence an opportunity of directing further questions to the complainant. The defence counsel did not ask any questions. Clearly, Ms Andrews' uncontested evidence weighed heavily with the trial court and it was satisfied that the complainant comprehended the difference between truth and falsehood and comprehended the duty to speak the truth. She was clearly too immature to appreciate the significance of the oath. The later extracts of the complainant's answers to questions by the trial court before she was admonished, referred to above must be seen in proper perspective. First, her answers to the initial questions showed an ability to distinguish between truth and falsehood. Her subsequent answers appeared to indicate the contrary. It must be appreciated that this was apparently her first time in a court and this must have made her nervous. Her susceptibility to nervousness and its effects are aspects I will revert to later in this judgment. Seen against that background, the trial court's decision to admonish the complainant to speak the truth was correctly made. Having considered the trial court's questioning in the context of the psychologist's evidence, I am satisfied that the court a quo rightly admonished the complainant. The argument that the complainant's evidence was not properly taken therefore has no merit.

[35] That brings me to the issue whether the evidence presented on behalf of the state was reliable enough to sustain a conviction on the charge of rape. It is trite that the state bears the onus of proving the guilt of an accused person beyond reasonable doubt. This being a rape charge, the remarks made by this court in *S v Vilakazi*[17] are apposite. Nugent JA said:

'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

[17] *S v Vilakazi* 2009 (1) SACR 552 (SCA); [2008] ZASCA 87 para 21.

accurate understanding and careful analysis of all the 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.'

[36] In *S v Mlambo,*[18] Malan JA stated that, while it was not incumbent on the State to close any avenue of escape which may be said to be open to an accused, it would be sufficient, in order to procure a conviction, 'to *produce evidence by means of such* a *high degree of probabilities raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused had committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.*'

[37] It is settled law that evidence of a child must be approached with caution.[19] The same principle applies to the evidence of a single witness. The court has to satisfy itself that the evidence given by the witness is clear and substantially satisfactory in material respects. The court is to look for features, in the evidence, which bear the hallmarks of trustworthiness to substantially reduce the risk of wrong reliance upon the evidence of a single witness. The judgment of the trial court demonstrates that it was alive to the application of the cautionary rule on account of the complainant being a single witness to the rape and also on account of her youthful mental age.

The following dictum in *S v Van der Meyden*[20] is apposite:

'The passage seems to suggest that the evidence is to be separated into compartments, and the "defence case" examined in isolation, to determine whether it is so internally contradictory or improbable as to be beyond the realm of reasonable possibility, failing which the accused is entitled to be acquitted. If that is what is meant, it is not correct. 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 derives at must account for all the evidence.'

That dictum was referred to with approval by this court in *S v van Aswegen.*[21]

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[18] *S v Mlambo* 1957(4) SA 727 at 738A.
[19] *Woji v Santam Insurance Co* LTD, 1981(1) SA 1020(A) at 1028 –E.
[20] *S v Van der Meyden* 1999 (1) SACR 447 (W) at 449A.
[21] *S v van Aswegen* 2001 (2) SACR 97 (SCA) para 8.

[38] In a nutshell, the state's version was a simple one, narrated in simple terms by the intellectually challenged complainant. During her testimony, she struggled to verbalise a clear explanation of how she was pushed into the house and opted to give a demonstration which, unfortunately was not captured on the record. Nothing turns on this. It must be understood that the account of events was related by someone with a mental age of 10. Under cross-examination, she was confronted with two statements that she had allegedly given to the police prior to the trial. The first statement taken by the South African Police officer was taken in circumstances where the officer did not understand Afrikaans and the complainant did not understand English. The following passage of the record demonstrates the difficulties that were experienced when that statement was taken.

'As the court pleases M'Lady. Constable I do not understand you really, one minute you say that you understand Afrikaans the next minute you say I don't understand Afrikaans so well. What is it?
--- I am not fully conversant in Afrikaans, there are some portions that I understand and there are some that I do not understand.
Okay, now tell me did you do Afrikaans at school?
--- Yes I did.
From which Grade until which grade?
--- What I know is I completed my matric still doing Afrikaans.
So I believe you understand the street Afrikaans, Afrikaans spoken on the street, that you must understand, correct?
--- I can just understand Afrikaans here and there I cannot fully understand it.
Can you write?
--- No my spelling is very poor.
If you are given an Afrikaans newspaper will you be able to read it?
--- I would be able to read it but I would read it very slowly.
. . .
In other words everything that you wrote in this statement it was translated to you by Mieta James?
--- Not everything not every portion, there are some portions that I understood myself.
So this paragraph one is not entirely true when it says that she spoke in Afrikaans and Mieta James acted as an interpreter? Do you agree?
--- Mieta James took part.
No sir don't be evasive, we don't have time so don't be evasive. Do you agree that this paragraph is incorrect if it reads that she spoke in Afrikaans and Mieta James interpreted in English, it isn't correct?
--- I am not being evasive, Mieta James did take part in translating.

Okay, why this paragraph then not say that I could understand some of the Afrikaans but Mieta James assisted me with what I did not understand?

--- If it was my own statement then I would have written that down but it is the statement of the complainant and Mieta James played a role in it.

From this statement, from page 1 to page, the last page of the statement are you able to pin point paragraphs or sentenced that Mieta James translated to you in English?

--- It would be very difficult M'Lady.

MR McCONNACHIE [DEFENCE COUNSEL] M'Lady I am not sure if I heard correctly M'Lady but I thought I heard a question that my learned friend was referring to any portion that she translated in English, I don't believe that it was translated to the witness in English, that the question related to portions translated by Mieta into English.

--- Mieta James only stated, assisted in Afrikaans, but she made it very simple for me.

MR MGENGE [STATE COUNSEL] But then why did you write translated in English by Mieta James why did you write that if she didn't speak English?

--- I am sure that she used some English words in portions where I did not understand but not in full sentences.

But why did you write here that she translated it in English? Sir you are the one who wrote that paragraph on this statement, paragraph 1 in the statement, it is you who is saying this, just answer me?

--- I could not even recall this day even very well M'Lady.

What is it that you can't recall now?

--- I cannot remember very well which language she spoke the most when she explained to me, but she explained portions that I did not understand.

So when you said she spoke Afrikaans, simple Afrikaans, you were not entirely honest with me when she said she spoke simple Afrikaans?

--- I was honest.

But now you say you don't even recall which language did she use?

–-- Which language she used the most.

What do you mean with that, do you mean English or Afrikaans?

--- She only assisted me where I could not understand we did not engage in a full conversation she only assisted me where I could not understand, some portions I understood myself.

You see Mieta testified here to the effect that she does not even understand English. She has never been in school? What do you say to that?

--- Yes she affixed her thumbprint here on the statement because I did not read the statement to them back in Afrikaans, I read it in English.

And was it interpreted to them?

COURTSorry?

--- No it was not translated to them.'

[39] Clearly, there was a language barrier between the person who authored this statement and the complainant. Whereas the trial court admitted this statement and held the view that little reliance should be attached to it, I am of the view that it should not have been admitted into evidence, given its poor quality, especially relating to the procedure followed in taking it. It's admission into evidence only served to confuse the complainant. It is worth lamenting that the afore-mentioned statement acutely illustrates and pointedly brings to the fore a systemic problem regarding the taking of statements from complainants. The deplorable manner in which the complainant's statement was taken by the police officer in question is a far cry from the victim-centred approach that is to be followed when dealing with rape victims.

[40] The circumstances under which the second statement was taken are somewhat different. The statement was taken by a female Afrikaans speaking police officer and there was no language barrier as the complainant's mother tongue is Afrikaans. The police officer in question was called as a defence witness. She mentioned that due to the difficulties she encountered when trying to administer the oath to the complainant, she abandoned the idea of having the statement attested and deleted the part that would have been completed by a commissioner of oaths. The statement-taker conceded that she had read the first statement prior to interviewing the complainant but stated that it would not have influenced her to repeat any of the information contained therein. The major discrepancy between this statement and the complainant's evidence pertains to the complainant's averment, in that written statement, that C also participated in her rape. It is undeniable that this contradiction is material. The court a quo attributed the discrepancy to the pronunciation of one of the appellants' nicknames, which it considered to be similar to the name of C and speculated that the similarity in the names could have led to a mistake on the part of the statement-maker. I would rather not speculate. The statement is what it is. The fact that a witness has contradicted himself or herself should not, in and of itself, warrant that the proverbial baby be thrown out with the bathwater.

[41] The correct approach to be followed by a court evaluating evidence that bears contradictions was laid down as follows in *S v Sauls & others:*[22]

'The trial Judge will weigh his evidence, 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.'

[42] In *S v Mafaladiso,*[23] this court emphasized that the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there may be language and cultural differences between the witness and the person taking down the statement which can stand in the way of what precisely was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail. It behoves the courts to keep in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Contradictory versions must be considered and evaluated on a holistic basis. Furthermore, the circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions, the quality of the explanations and the connection between the contradictions and the rest of the witness' evidence are among other factors to be taken into consideration and weighed up.

[43] In this matter, the complainant was confronted with the contradiction between what is contained in the written statement and her oral evidence pertaining to C's alleged role in the perpetration of the rape. She steadfastly maintained what she had stated under examination in chief, that C had not played a role in the incident but was present at his house when the incident happened. C's presence at his house on the night of the incident and the next day was never disputed. If the complainant was bent on falsely implicating the appellants, she would have remained adamant that C was also involved. This would have been the easiest way out for her, especially since C had also been charged together with the two appellants. She attributed the

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[22] *S v Sauls & others* 1981 (3) SA 172 (A) at 180F.
[23] *S v Mafaladiso* [2002] 4 All SA 74 (SCA); [2002] ZASCA 92.

discrepancy to her confusion at the time of taking the statement. The police officer who took the second statement corroborated her evidence that she was nervous at the time when the statement was taken. Her guardian had also testified that the complainant had been very nervous on the day she was found and during the days that followed. She stated that the complainant normally scratched herself when she was nervous, but during that period, the scratching had worsened. The evidence of the distressed state of the complainant is not without significance in the consideration of her version.[24]

[44] During cross-examination, the complainant was also asked why she had mentioned the fact that her feet had been tied to a bed for the first time under cross-examination, whereas she had mentioned this aspect in her written statement. She simply repeated that she had indeed been tied to the bed in the morning but had later managed to free herself. The bed is depicted in the photo album which was admitted as an exhibit in the proceedings. It is clear from the record that all the witnesses referred to it as a bed and distinguished it from a mattress. It is also clear from the photo album that the bed in question has some form of a small base and the mattress thereof has not been placed directly on the floor. The defence counsel was meticulous in his cross-examination of the complainant and I accept that if it were impossible for anything to be tied to the bed, he would have put this to the complainant in his cross-examination. He did not do so. The mattress of the bed in any event depicts exposed coils. It is not impossible for a person to be tied to the exposed coils of a mattress. I therefore cannot agree that the court a quo misdirected itself when it's stated that the structure of the bed was such that the complainant could have been fastened to it.

[45] The weaknesses in the complainant's evidence must be considered against the totality of evidence. It is of great significance that many aspects of her evidence are either undisputed, corroborated by objective facts and the appellants' own version. Irrespective of how the complainant got to C's place, it is undisputed that she arrived there at approximately 19h00 on 30 April 2013. What is of significance is that although the defence counsel had repeatedly put to the complainant that the first

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[24] *S v Hammond* 2004 (2) SACR 303 (SCA); [2004] ZASCA 71 para 22.

appellant's version would be that the complainant left C's house immediately after she had had consensual sexual intercourse with him, the first appellant disavowed this under cross-examination and his counsel later put it on record that he is the one who had put the wrong version to the complainant. This meant that the complainant was correct when she testified that she spent the night at C's house.

[46] The complainant's evidence that she was found by G at C's house the next day is confirmed by G, who is C's sister, even though G claimed to have found her playing marbles alone outside C's door. This confirmed the complainant's version that she remained at C's house for the entire night until the next afternoon when she was found by C. Furthermore, one of the state witnesses, namely B, testified that she lived close to C's house. She described the location of her house in relation to C's house and stated that she would have been in a position to see the complainant if she (the complainant) had been outside C's house at any stage before she was found on 1 May 2013. That evidence was not disputed. This is corroborated by the guardian's evidence, who also lives in the proximity of C's house and had searched for the complainant in the area the next day. That the complainant was reported as missing the next morning was confirmed by G. It transpired that on that day, G had also gone home during lunchtime but had, at that stage, not seen the complainant at C's house. The first appellant testified that when they returned to C's house at around midday on 1 May 2013, the complainant was still present in the room. He left again at about 15h00 and the complainant was still there. All this evidence conclusively proves the correctness of the complainant's version that she remained at C's house from the evening of 30 April 2013 until she was found by G at about 16h00 the next day.

[47] It is evident from the medical report that was received as an exhibit in the proceedings that the complainant was taken for a medical examination the same day on which she was found at C's house. Although it states that there were no visible injuries, it confirmed the presence of a discharge on the complainant's genitals. It also confirmed that specimen were obtained from her genitalia and her clothes and were dispatched to the forensic laboratory for analysis. DNA evidence identified the appellants as the donors of the DNA found in the complainant's specimen. All this is uncontested objective evidence.

[48] The appellants in any event admitted having had sexual intercourse with the complainant and this was obviously borne out by the DNA evidence. The appellants' admission that they had had sexual intercourse with the appellant, albeit independently of each other corroborates the complainant's version that the two appellants had sexual intercourse with her at C's place. The complainant testified that none of the appellants used a condom during the sexual intercourse and mentioned that both of them ejaculated. This is confirmed by the presence of the two appellants' DNA on the swabs taken from the complainant's genitalia. The complainant testified that only her pants were pulled down during the rape and stated that at some point, the second appellant sat on top of her chest. The second appellant's DNA was found on the complainant's tracksuit top. This is a further confirmation of the complainant's version. To the complainant's credit, when it was put to her under cross-examination that she had previously consented to sexual intercourse with the first appellant, she readily conceded it but remained steadfast that she had not consented to the sexual intercourse that formed the basis of both appellants' prosecution. When it was put to her that the appellants would say that they did engage in sexual intercourse with her at the said house but with her consent, she emphatically refuted this. She also refuted the appellants' versions that the sexual intercourse did not occur in the presence of one another. Although the complainant was not an intelligent witness, she was a demonstrably honest, credible and reliable witness.

[49] Turning to the appellants' evidence, the court a quo correctly described it as false beyond reasonable doubt. It was indeed riddled with improbabilities and inconsistencies. There were many self-contradictions and the two appellants contradicted each other in material respects. Furthermore, material aspects of their version were not put to the complainant during her cross-examination and came to light for the first time during their evidence in chief.

[50] The first appellant was adamant that the door of C's house was always open and therefore nothing precluded the complainant from leaving. The exchange on that aspect was as follows:

'*Okay, when you left this particular, when you left accused number 3's house, did you close the door of the house or what?*

--- No my Lady.

Why?

--- Because it is always kept open.

24/7?

--- When accused number 3 passes out he does not close the door, he just goes to sleep maybe on his bed or even on the sofa.

Even during the evening he will do that, if he is drunk, sleep with an open door? --- He just pushes he door open. If it is just slightly open he just goes and throws himself on the bed and he sleeps.

Okay, then you said after about 30 minutes you came back and you found the door open? --- That is correct.'

[51] This evidence is contradicted by his own evidence that during the night, he had heard the complainant opening the door and then closing it again. This can only mean that the door was closed during night. The second appellant testified that he had to knock on the door of C's house when he went there at 06h00 to deliver Sous' message. The first appellant's later addition, to the effect that entry into C's house is gained by merely pushing the door open, is also refuted by the second appellant's evidence that after he had knocked at the door, C went to open for him. The ineluctable inference is that that door was closed for the entire night and could not be opened by merely pushing it.

[52] The layout of C's house was captured in the photo album. It is evident that C's house is a one-room structure which has been partitioned into two sections, namely the lounge area and the bedroom section. This was also confirmed by the police officer who took the photographs. Insofar as it is suggested that nothing prevented the complainant from leaving that house as the door was open while C and his companions were consuming liquor there, two things are important. Firstly, there is only one door through which access can be gained into the house. Access through that door leads to the lounge area of the house. On the appellants' own version, the

complainant was sitting in the bedroom section of the house. According to the evidence of the first appellant, one could see someone who was in the bedroom section only if they pulled the partitioning curtain to the side in order to have a peek inside. Clearly, any visitors would not have been able to see the complainant unless they peeked into the bedroom section of the house. Secondly, it must be borne in mind that the complainant had been threatened with assault the previous night. Given her intellectual immaturity, she could have believed that the threat would be carried out if she attempted to leave during the drinking spree.

[53] I find it highly improbable that the complainant, who liked to play with children, would have willingly decided to remain alone at C's place for the better part of the next day despite being hungry and having been repeatedly ordered to leave. Equally improbable is G's version that she found the complainant playing marbles outside C's house. If the complainant had indeed chosen to play marbles alone outside C's house, members of the community would have seen her much earlier and taken her home, as she had already been reported as missing. Rather, the probabilities favour the complainant's version that G saw her in C's house and that the reason why she had not been able to leave that house prior to that was because the appellants had made it impossible for her to do so.

[54] There are many other improbabilities in the appellants' version. For example, when the first appellant was asked why he decided to spend the night at C's place instead of going back to where he lived with his partner, which is in the same neighbourhood, the first appellant alleged that it was better to do so rather than fight with his partner. As correctly pointed out by the court a quo, that explanation simply made no sense. What was also odd was that, having previously insisted that the complainant should leave C's house because he was worried that people would start spreading stories, the continued unexplained presence of the complainant at C's house no longer bothered him.

[55] The first appellant stated that when he woke up in the morning, he saw the complainant sleeping with C in C's bed. I find it highly improbable that the complainant, would, after having consensual sexual intercourse with the first appellant, go and share a bed with C notwithstanding the presence of the first

appellant in the same room. It is equally unthinkable that the very next morning, the childish complainant would choose to seduce the second appellant in C’s house, knowing that either the first appellant or C could return at any moment. Any possibility of that sexual intercourse having been motivated by the complainant’s hunger is ruled out by the fact that, on the second appellant’s own version, the complainant had already finished eating the food he had bought her by the time the alleged seduction took place.

[56] The second appellant’s evidence that he lived with his partner but took a bath at C’s house is highly improbable. He tried to lend it some credibility by stating that he kept his clothes at C’s house so that he could have a bath there whenever his partner or mother-in-law had thrown him out. On his own evidence, he had spent the night at his partner’s place and had had his meals there. He had not been thrown out on that occasion, so there would have been no need for him to go and wash himself at C’s place. On his own version, C and the second appellant walked past him while he was busy mending a fence and headed in the direction of the town centre. It was therefore highly unlikely that so soon thereafter, he would, when entering C’s house, be under the impression that it was C who was sleeping in his bed. It is undisputed that the complainant’s family had asked members of the community to assist in looking for the complainant. Furthermore, it is common cause that the appellants lived in the same neighbourhood. It is also undisputed that the streets were vibrant since that day happened to be a public holiday. Given the various places the appellants allegedly visited on that day, it is rather strange that they had not heard that people were looking for the complainant.

[57] Another disconcerting aspect about the appellants’ evidence is that they materially departed from the version put to the complainant by their counsel. It was put by the appellants' counsel that after the first appellant and the complainant had had sex, they both fell asleep on the mattress. However, the first appellant testified that after the conclusion of the sexual intercourse, he asked the complainant to leave. Whereas it had been put to the complainant that the second appellant had consensual sexual intercourse with the complainant on a mattress and not on the bed, the second appellant testified that the sexual intercourse took place while they were standing next to the wardrobe. Although it was put to the complainant that the

appellants and C had, on the afternoon of 1 May 2013, enjoyed liquor together at C's place, the second appellant testified that after having sexual intercourse with the complainant in the morning, he left C's place and never went back there again that day. This, notwithstanding that the first appellant had stated that he, the second appellant and C were drinking together at C's house from 12h00 until approximately 15h00. It is evident from the record that the appellants gave instructions to their counsel while the witnesses were testifying. If their counsel had put the wrong version to the witnesses, they would have drawn this to his attention. Save for the error conceded to by their counsel, it can be accepted that the statements that he put to these witnesses were in accordance with their instructions.

[58] The appellants tried hard to give an account that showed that when sexual intercourse with the first appellant occurred, the second appellant was not present and vice versa. They were individually confronted with the various improbabilities and contradictions in their evidence. Furthermore, both of them significantly departed from a version that was put to the complainant under cross-examination. They did not provide a plausible explanation. The first appellant resorted to asserting that he had knocked his head sometime in the past and sometimes became confused. It became clear that they had tried to adjust their evidence with the progression of the trial.

[59] All the improbabilities, inconsistencies, and contradictions in the appellants' evidence point to extreme mendacity that warrants the rejection of the appellants' evidence as false beyond reasonable doubt to the extent that it differs from that of the complainant. The credibility findings made by the trial court are borne out by the record and this court, being a court of appeal, is bound by them. I am satisfied that the appeal against the appellants' convictions and sentences has to be dismissed.

[60] With regards to sentence, it is trite that sentencing is within the discretion of the trial court, the Court of Appeal interfering only if there is a clear misdirection on the part

of the trial court or the sentence is shockingly severe. In *S v Pillay*,[25] the nature and the extent of misdirection was explained as follows:

'. . . mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercise it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the court's decision on sentence.'

[61] I am satisfied that the trial court correctly applied the principles relating to sentencing. It took the triad of sentencing into account and analysed the relevant circumstances and considered both aggravating and mitigating factors. There appears to be no expression of remorse, and the serious psychological harm caused to the complainant. It also falls to be considered that up to two years after the rapes, the complainant had recurring nightmares about the rapes. It was also reported that her epileptic seizure activity also worsened for a period of at least six months after the rapes. She also started having more episodes of running away. It is clear that the rapes had a devastating impact on the complainant.

[62] C's sister, G, conceded that it was well-known in the community of Pearston that the complainant had mental challenges, which corroborated the evidence of the state witnesses. The first appellant had known the complainant for three years, while the second appellant confirmed that he had known the complainant for the previous ten years. Both appellants must have known about the complainant's mental challenges, as described by Mrs Andrews in her report and evidence. They obviously took advantage of her vulnerability. This is a serious aggravating factor. The courts must demonstrate that the vulnerable members of society enjoy equal protection of the law. The small community in the Pearston district was also outraged by the actions of first and second appellants, which explains the mob that gathered at C's house after the complainant was found. This community is interested to see justice being meted out to the appellants.

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[25] *S v Pillay* 1977 (4) SA 531(A) at 535.

[63] I am satisfied that the trial court did not err in finding there to be substantial or compelling circumstances and that it sufficiently took into account the totality of the facts in ordering a 20-year sentence of direct imprisonment. The court a quo correctly dismissed the appeal.

[64] For all the above reasons, the appeals against the appellants' convictions and sentences are dismissed.

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M B Molemela

Judge of Appeal

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