

SOUTH AFRICA / JUDGMENT

Blom v S (A89/2023) [2024]

ZAFSHC 243 (12 August 2024)

[2024] ZAFSHC 243

COURT

Free State High Court, Bloemfontein

BEFORE

Van Zyl, Loubser

CASE / FILE NUMBER

A89/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Reportable:

YES/NO

Of

Interest to other Judges:

YES/NO

Circulate

to Magistrates: YES/NO

Case

number: A89/2023

In

the appeal of:

STEPHANUS

DANIEL BLOM

Appellant

and

THE

STATE

Respondent

CORAM: VAN ZYL, J et LOUBSER,
J

JUDGMENT

BY: VAN ZYL, J

HEARD ON: 12 FEBRUARY 2024

DELIVERED ON: 12 AUGUST 2024

- [1] The appellant was charged with and convicted of rape in the Regional Court sitting in Bloemfontein (“the court a quo”). The court a quo found that the appellant contravened Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007, read with Section 51(1) and Part 1, Schedule 2 of the Criminal Law Amendment Act, 105 of 1997, as amended.
- [2] He was sentenced to 20 years` imprisonment and, in terms of Section 103(1) of the Firearms Control Act, 60 of 2000, automatically declared unfit to possess a firearm.
- [3] The appeal is directed against both the conviction and the sentence, with the leave of the court a quo.
- [4] The appellant is currently on bail.
- [5] The said charge of rape as set down in the (amended) charge sheet entailed the following:
- “IN THAT on or about during 2011 to 2015 and at or near Bloemfontein and within the Regional Division of the Free State, the said accused did unlawfully and intentionally commit an act of sexual penetration with the complainant to wit, A[...] v[...] d[...] W[...] (adult) by: inserting his penis into her vagina (more than once) without the consent of the said complainant and thus raped her.”*
- [6] The appellant enjoyed legal representation throughout the trial in the court a quo. Since I will be quoting from the record of the proceedings in the court a quo, I deem it necessary for the sake of clarity to note that initially the late Mr Terry Price SC appeared on behalf of the appellant in the court a quo. References to his surname will therefore appear on extracts from the record. After his untimely passing, Mr Van Breda appeared on behalf of the appellant as from the application in terms of section 174 of the Criminal Procedure Act, 51 of 1997 (“the Act”), up to the point of the sentencing proceedings. From there onwards till presently the appellant has been represented by Mr Liddell, instructed by Mr Van Breda of Changfoot Van Breda Inc. The State is being represented in this appeal by Ms Mkhabela, instructed by The Director: Public Prosecutions, Bloemfontein.

AD CONVICTION:

- [7] I deem it necessary to record that the words “molested” and “molestation” as used in this judgment, is not meant to be a technical correct description of some of the alleged acts performed by the appellant on the complainant. I am well aware that digital vaginal penetration without the consent of a complainant also constitutes an act of sexual penetration for purposes of rape. I am merely using the terms “molested” and “molestation” since the said terms were used during the trial in the court a quo.

The Notice of Appeal:

- [8] The appellant’s Notice of Appeal was filed late. The appellant duly filed an application for condonation wherein the said late filing of the Notice of Appeal was duly explained.
- [9] The State had no objection to the granting of the condonation.
- [10] We consequently granted condonation for the late filing of the Notice of Appeal at the commencement of the hearing of the appeal.
- [11] The Notice of Appeal is very detailed and comprehensive. The part thereof on the conviction alone comprises 35 pages. I therefore do not intend repeating same herein. We have, however, duly considered the contents thereof and will consider the appeal on the grounds as contained therein.

The appellant’s Plea and Plea Explanation:

- [12] The appellant pleaded not guilty to the charge of rape.
- [13] A lengthy and detailed Plea Explanation on behalf of the appellant was handed in as exhibit “B”. I deem it necessary to repeat the contents thereof herein.
- [14] The appellant stated therein that during or about 1998, Blom Transport Services, of which he was the sole proprietor, employed Ms M[...] v[...] d[...] M[...] as a bookkeeper of the business on a part-time basis.
- [15] It is common cause that Ms M[...] v[...] d[...] M[...] is the mother of Ms A[...] v[...] d[...] M[...] (“the complainant”). The complainant was born in 1989. It is also common cause that the complainant and Ms v[...] d[...] M[...], as well as the appellant, lived at the time in Fort Beaufort, which is a small town in the Eastern Cape.
- [16] In his said Plea Explanation, the appellant stated further as follows:

“9. In the years 2005 to 2013 M[...] v[...] d[...] M[...], my bookkeeper, stole approximately an excess of R1 000 000.00 from my business. When we discovered it, we opened charges against her of fraud and theft and that matter is at present the subject of a criminal trial in the Regional Court in East London.

10. I have known the complainant in this matter from more or less 1998 when she would have been 8 or 9 years old. I knew her, by and large, through the fact that her mother worked for me for a period of time.

11. During this time, I, once a month, would drive one of my trucks to Bloemfontein to deliver goods. I always had someone with me in the 10-ton truck, but on other occasions my own driver [Master Somi] would drive and he too would have someone present with him at all times.
12. I point out that the assistant that always rode with me was Mzwandile Roxa, who is still with me, as is Master Somi. I am ready, willing and able to call these two gentlemen as witnesses should it be necessary.
13. During some of these trips, my employee, M[...] v[...] d[...] M[...], would ask me to take goods up to her daughter in Bloemfontein whilst she was studying at the University of the Free State (UFS). I would usually deliver these goods in a place near or in Curry (sic) Street, Bloemfontein, where she would either come and fetch it herself or, where equipment that had to be delivered (such as a television cabinet) was carried into her apartment by myself and Mr Roxa. I never went into her apartment alone at any point in time.
14. At that time, we travelled once per month to Bloemfontein to deliver these goods (excluding December). So, in the year 2011 (when these charges were allegedly committed) I would have gone up to Bloemfontein on approximately 11 occasions, but as I have stated above, always in the company of Mr Roxa. Never at any point in time was I alone with the complainant when delivering the goods that her mother gave to me to deliver to her.
15. As I have pointed out above, we discovered that M[...] v[...] d[...] M[...], the mother of the complainant was stealing and we commenced an investigation. We requested a bookkeeper to assist us with the investigation and obtained the services of our attorney on 27 February 2014. The investigation took a considerable period in time. A case was opened with the South African Police Services. Up until then, there were no complaints that I am aware of regarding anything that I had allegedly done to the complainant and/or her mother, although there was a wild allegation at some point in time that I was the mother's boyfriend. I emphatically deny that and state that I am happily married and have been so for 36 years.
16. It came as a massive shock to me when I was informed that A[...] v[...] d[...] M[...] had opened charges against me alleging that I sexually molested her and even alleging that I had raped her. Before I proceed to elaborate on these charges, I state immediately and emphatically that it is not true and those are flagrant and quite honestly, defamatory lies.
17. In the meantime, she obtained, ex parte, a Protection Order against me. All my firearms were taken, but later returned to me when she did not attend Court on the return date.
18. A docket was also opened by the complainant, Fort Beaufort CAS52/5/2019, wherein it is alleged that I molested her whilst we were in Fort Beaufort (on her own version this is some 8 years after the charges herein).

19. It is important for me to draw this Court's attention to the fact that the Senior Public Prosecutor in Grahamstown considered the matter and decided to nolle prosequi the docket. I have not heard anything about the matter since.
20. I then learned that she had also opened allegations of rape and indecent assault against me and that these had been opened at Bainsvlei under CAS 18/4/2019.
21. Herein she alleges that I had sexual intercourse with her, it would appear, on her version on a number of occasions in the year 2011 and that this had happened in her apartment.
22. She, on her own version, first told her mother about the allegations in December 2017:
 - 22.1 This is 20 years after the first allegation;
 - 22.2 Both her mother and she did nothing further until April 2019 (almost two years later).
23. The only occasion that I ever slept in her apartment (at this point in time I cannot even remember where the apartment was) was when, at her and her mother's request, I used my transport company to move all her goods from the hostel at UFS to the apartment. I however point out that her mother also slept in that apartment that night. On no other occasion have I ever slept at that apartment. I always stay with my brother-in-law, Coenraad du Preez, who lives in Bloemfontein. That is the only place that I sleepover when I go to Bloemfontein. Coenraad will confirm this under oath, if necessary.
24. I notice however, that the same statement that A[...] v[...] d[...] M[...] relied on in the Fort Beaufort-case, which suffered the ignominy of a nolle prosequi certificate, was used word for word in the Bainsvlei case.
25. It has also come to my attention that whilst she was working at UFS, she opened false charges of sexual molestation against a lecturer, which of course went nowhere and which did not proceed in the courts. In fact, I was informed that she was suspended from the University.
26. At one point in time, it came to my attention that Aneka was having an extra-marital affair with a married man, who came all the way from Bloemfontein to Fort Beaufort from time to time to continue with this extra-marital relationship.
27. I have no doubt whatsoever and I will lead evidence, if necessary, that these charges were opened by A[...] v[...] d[...] M[...] as a result of us opening charges against her mother and in circumstances where her mother is facing long-term imprisonment if she is convicted of these charges.
28. I emphatically deny the allegations against me.

29. I have been a businessman with my own very successful business for many-many years. I am happily married to my wife and we have a married daughter and a 9-month old grandson, whilst my son is also a successful businessman, who is also married and living in Fort Beaufort.”

The complainant’s evidence in chief:

- [17] The complainant testified that she obtained her Bachelor’s degree in psychology at the University of the Free State (“UFS”) in 2015. She commenced her studies in 2008 when she was 18 years old.
- [18 According to the complainant, Ms V[...] d[...] M[...] (‘the complainant’s mother) and the appellant were involved in an extra-marital affair which started when she was 6 years old and ended in 2015.
- [19] At the time the appellant would come to their house almost twice a day, but he never slept over.
- [20] While the complainant was residing in Vergeet-My-Nie hostel at UFS, the complainant would travel to Bloemfontein with a truck and he would bring her a parcel from her mother. She would normally meet him close to Andries Pretorius Street, Bloemfontein where she would get her parcel and he would “normally either rape me or sodomise me”. The appellant normally phoned her when he was at Reddersburg to inform her that he is nearby and that she should drive to meet up with him.
- [21] She normally drove with her own vehicle to meet the appellant, but on a particular evening she did not have her own vehicle and her boyfriend took her to the meeting place. She was dressed in long sleeved pyjamas with a Vergeet-My-Nie long-sleeved jacket over her pyjamas. When they stopped at the truck, she got out of her boyfriend’s vehicle, while her boyfriend remained in the vehicle, parked in front of the truck, after which she approached the truck. When asked whether she has previously been inside the cab of the truck, she confirmed same. She described that it had two seats in front, with a gearbox in the middle between the two seats and a bed at the back of the two seats. She greeted the appellant who at the time, was at the back behind the two seats, by the bed. The appellant told her that she should get into the cab of the truck as he had a parcel for her. She got into the truck’s cab via the driver’s door. After she entered the truck, the appellant turned her around, threw her on the bed and pulled off her pants. She said “no” and that he should stop. He, however, proceeded and shoved his fingers up her vagina.
- [22] When the appellant “finished”, she got dressed, took her parcel and left the truck. She got into the car with her boyfriend and they left. She did not inform her boyfriend what just happened to her, as she was ashamed and scared that nobody would believe her.
- [23] The prosecutor enquired from the complainant whether there were any other occasions where an alleged rape had occurred. She then testified about a second incident which, according to her, occurred during 2009. The complainant travelled through Bloemfontein to

Johannesburg and on his way back, her mother instructed her to get him some food and take it to him. According to the complainant, it was her duty to take care of the appellant while he was on the road, by taking him food, money and clothing on instructions of her mother.

[24] On this occasion she met the appellant at the place which the record reflects to be “Senbes”, but which probably refers to “Senwes”, where the appellant had to fill the truck with diesel. She was wearing jeans with a hoodie. It was roughly just before 19h00.

[25] The appellant again instructed her to get into the cab of the truck. He ate his meal and thereafter he took her to the back of the seats to the bed and pulled off her jeans. She said “no”, but he continued to pull off her jeans and also his pants and underpants. He then proceeded to shove his penis into her

vagina. Afterwards he took a washcloth, wiped off his penis and took toilet paper which he placed onto her private part. Thereafter, she got dressed, went back to the hostel and took a shower.

[26] According to the complainant, she did not anticipate that the appellant would have sexual intercourse with her when she took him food or attended to him otherwise as may be instructed by her mother.

[27] Again she told nobody, since she was ashamed and was scared that nobody would believe her.

[28] The complainant reiterated that she was certain that this incident occurred during 2009 and whilst she was still staying at Vergeet-My-Nie hostel.

[29] The following incident which the complainant testified about, occurred, according to her, in 2011 after she moved out of Vergeet-My-Nie into a townhouse complex, called Meerlust, which she shared with one Ms G[...]. The unit had two bedrooms.

[30] The complainant testified that it was the norm for the appellant to sleep over at her apartment when he travelled to Bloemfontein. Her mother bought a mattress for this purpose for him to sleep on the floor.

[31] She testified that the appellant raped her on her bed. When he penetrated her with his penis, she looked away and said “no”. He, however, just continued. That particular evening when this incident occurred, Ms Greeff was at her sister’s house. When asked what happened after this particular rape, she testified that he put his shirt between his teeth so as not to dirty or wet his shirt, where after he went to the bathroom and wiped his penis. He then again took toilet paper and put it onto her private part. Thereafter he took a bath and put powder on his genital area and under his arms, after which she complained that the bathroom was full of powder.

[32] The appellant then slept on the mattress which was next to her bed in her room on the floor.

- [33] The next incident the complainant testified about, she explained that she could not recall the year, but that it occurred at Bains Game Lodge Oakleaves complex, where she was staying at the time after she and Ms G[...] had a disagreement and she moved out of Meerlust complex. On this occasion, the appellant's brother-in-law, Mr Coen du Preez, assisted her in transporting her goods.
- [34] In respect of this incident, she met the appellant "somewhere" to fetch him from the truck and they drove to where she was staying. He then raped her again by penetrating her vagina with his penis. She would always say "no" and then turn her head away from him.
- [35] When asked whether there was any conversation between herself and the appellant on their way to Bains Game Lodge, she testified that whilst driving he would "sometimes" take his fingers and put them into her vagina whilst she was driving and fully clothed.
- [36] Those were the incidents which the complainant could specifically recall, although she testified that there were also other incidents when he raped her, but which she could not recall.
- [37] The complainant confirmed that when the appellant travelled to Bloemfontein he would, at times, be accompanied by his assistant, named Zwandile Roxa.
- [38] Although she testified that she cannot remember the exact year when she moved out of Bains Game Lodge, she estimated it to have been 2015/2016. At that stage her mother moved to Bloemfontein and they decided to get a bigger place. As from 2015 she was aware that the appellant and her mother were no longer involved in a relationship. She further testified that the incidents of rape and/or molestation ended in 2015.
- [39] The complainant testified that she came from a very poor house which resulted in her being removed from classes every month because her school fees were not paid. Their lifestyle changed for the better when the appellant came into the picture.
- [40] The first person that the complainant told about the aforesaid allegations of molestation and rape was her boyfriend, who at the time of testifying in this matter, had since become her husband.
- [41] During or about December 2017 she also told her mother, although she could not recall the exact date. She explained that she felt that it became too much for her to carry alone and her psychologist also recommended that she should tell her mother. She told her mother "Oom Danie het my gemolesteer en verkrag", with reference to the appellant. Her mother was very shocked, cried and almost fainted.
- [42] The complainant reported the allegations of molestation or rape to the police at Bainsvlei Police Station, Bloemfontein, during 2019, after the birth of her son.

- [43] From about June 2017 until about 2018, the complainant consulted a psychologist, Ms Visagie, because she started wetting her bed and were having nightmares. Ms Visagie, however, refused to come to court, where after Ms Visagie referred her to a different psychologist, Mr Cooper.
- [44] The complainant also testified, which is common cause, that during 2019 she applied for a Protection Order against the appellant in Bloemfontein. According to her she was afraid that he would hurt her after she had reported the rape case to the police. According to her the appellant had become very angry in the past and she was afraid that he may take that anger out on her, especially since he has firearms as well. She further testified that the Protection Order had “lapsed”, as she was not informed that she had to be at court.
- [45] The complainant also testified that she had laid a criminal charge against the appellant in Fort Beaufort, but that it had been “thrown out”.
- [46] When asked at what age “the alleged rape or molestation started”, she testified at 7 years old.
- [47] The complainant also confirmed that she reported a sexual molestation case against a lecturer at the UFS at a time when she was working as the Marketing Manager, but that they did not want her to be working in the same department as him while the investigation was pending and she was consequently suspended. She eventually resigned. According to her nothing happened to the person whom she accused of molesting her.

Sworn declaration and police statement:

- [48] I deem it apposite for purposes of a proper consideration of all the evidence, that the contents of the aforesaid two documents, at this stage, be set out herein.
- [49] For purposes of exhibit “C”, the Protection Order which the complaint obtained on 9 April 2019, she deposed to a sworn declaration which was commissioned on 8 April 2019. In the said sworn declaration, she stated as follows:

“From 1997 to 2015 Mr Blom repeatedly molested me, this escalated to rape.

I never gave him permission to do so.

On numerous occasions Mr Blom threatened me by reminding me that he carries a firearm and that his police training is very handy.

My fear is that he will threaten/harm myself, my child and family.

He has family that is currently active serving in SAPS in Bloemfontein. I fear that he will use his connections.

Mr Blom has many firearms, as well as his wife. I kindly request that these be removed from him. Mr Blom’s wife has phoned my husband pretending to be a Hawk’s member, further harassing me and my family.

I fear that he or someone he asks hurts me as I have laid a formal charge against him.”

[50] The complainant’s police statement, exhibit “D”, an affidavit commissioned on 3 April 2019 at 14h00, was deposed to by the complainant in support of the formal complaint she laid against the appellant.

[51] In the said police statement the complainant states that she was plus minus 7 years old in 1997 doing Grade 1 when the appellant, who she refers to as her mother’s boyfriend, entered her bedroom and touched her private parts by putting his fingers into her vagina. She did not tell her mother because he told her not to tell anyone. According to the complainant this did not happen only once. He would come to their house, especially when he knew it was her bathing time and then touched her nipples “and touch me”. She stated that it happened continuously.

[52] She also stated that in 2007 when she was 18 years old, her mother sent her to the house of the appellant, where he raped her in his son’s bedroom on the bed by penetrating her vagina with his penis. According to her that was the first time he penetrated her with his penis. She further stated as follows:

“I was crying and he reminded me that I am not allowed to do anything and told me he has a gun.”

[53] She also stated in her police statement as follows:

“8.

“In 2011, I was a student at UOFS Bloemfontein and I was staying at No. [...] Meerlust Complex, Universitas and Stephanus came to my place and he will spend the whole night at my place, sleeping with me in my bed and this did not happen once, sometimes he will come once a week or once a month, it will only depend when he had to come to Bloemfontein for business. (My emphasis)

9.

It kept on happening even when I was staying at No. 3[...] O[...], Bains Game Lodge, in 2012 until 2015.

10.

In 2017 December, I told my mother the whole story, I was already seeing the therapist, and I cut all contacts with him.” (My emphasis)

Cross-examination of the complainant:

[54] During cross-examination the complainant testified that the first truck incident occurred during 2008 and the second one which was the last one according to her, during 2009. However, in her evidence in chief she did not provide a year as to when the first incident occurred and she testified that the second incident occurred during 2009.

[55] The complainant confirmed that it is her version that the appellant had sexually abused and raped her on a number of occasions before the incident when her boyfriend took her to the truck. Mr Price cross-examined the complainant as to why she got into the cab of the truck considering the background that he had molested and raped her before that incident. I deem it necessary to quote from the record in this regard:

“MS V[...] D[...] W[...]: Mr Blom is a physically very strong man and he was known to travel with a firearm in his vehicle.

MR PRICE: Madam your boyfriend was there. You did not have to get into that truck. Why did you get into that truck?

MS V[...] D[...] W[...]: I was instructed to do so.

MR PRICE: Did he threaten you and say if you do not get in I will beat you up?

MS V[...] D[...] W[...]: No.

MR PRICE: Did he say I have got a gun, I will shoot you?

MS V[...] D[...] W[...]: I was aware that he has a gun.

MR PRICE: Listen to me, I am asking you did he tell you he had a gun and he was going to shoot you?

MR PRICE; Why did you get in? You know there is every chance of you being raped if you get into the truck – and you do it. Why?

MS V[...] D[...] W[...]: I do not know.”

[56] It was put to the complainant that there was no double bunk or bed at the back of the two front seats. Both trucks which the appellant owned at that time, had single bunks, although the man trucks bunk was a bit bigger, called a sleeper. The other one is called a semi-sleeper.

[57] The complainant was confronted with the fact that no allegation was made in her police statement with regard to incidents which allegedly occurred during 2008 or 2009. She responded that she probably could not recall the dates at the time and that it could be that she even mentioned the wrong years during her evidence in chief.

[58] She furthermore conceded that she also did not mention in her police statement that she had been raped in the back of the cab of the appellant's truck. She however explained that she could not remember it at that stage, as she has flashbacks where her memories come and go.

[59] When asked whether her boyfriend who was with her at the truck, who is now her husband, will be able to come to court and testify to confirm that, she confirmed same.

[60] According to the complainant she was raped on more than two occasions in the back of the cab of the truck, but testified that she was unable to provide any details with regard to any of those other occasions.

[61] According to her she did tell the prosecutor that she had also been raped in 2008/2009/2010. She was consequently asked whether she can then explain why the prosecution have only decided to prosecute the appellant for rape from 2011, for which she could not give an explanation. She, however, conceded that in her police statement the first date she mentioned as having had sexual intercourse with the appellant without her consent in Bloemfontein, was 2011.

[62] It was put to her that she never mentioned in her police statement or anywhere else before her evidence in chief that she had been sodomised by the appellant. She responded that if it was not in her statement, then she guesses that the statement by Mr Price is correct. When asked why she is raising it at that late stage, she testified that she does not know. The cross-examination then proceeded as follows:

“MR PRICE: Are you serious that he sodomised you?”

MS V[...] D[...] M[...]: Yes.

MR PRICE: Do you know what sodomy is?

MS V[...] D[...] W[...]: [No audible answer].

MR PRICE: Do you?

MS V[...] D[...] W[...]: Yes.

MR PRICE: What is it?

MS V[...] D[...] W[...]: It is when someone touches your private parts without your consent.

MR PRICE: No, I am afraid you are wrong. Sodomy is anal intercourse. Did Mr Blom ever have anal intercourse with you?

MR PRICE: Okay, so we can say that sodomy was a mistake on your part?

MS V[...] D[...] W[...]: Yes.”

[63] She was confronted about the fact that she would rather go to the truck and be sexually assaulted than telling her mother that she cannot go and pick up the parcel, because the appellant’s abuses her. The complainant testified that she was afraid that her mother would not believe her.

[64] When questioned as to why she took the appellant back to her house when he, in the past, continuously sexually assaulted her, she responded that it was an instruction of her mother.

- [65] During further cross-examination the complainant was asked when the appellant had vaginal sexual intercourse with her for the first time. She responded that it was when she was 18 years old when he raped her in his son's bedroom in Fort Beaufort in his house when nobody else was in the house. She tried to "wiggle" away but she was unsuccessful in doing so. This incident, according to her police statement, occurred in 2007, hence, whilst she was in matric. Her evidence in this regard, however, changed during later cross-examination when she stated that the incident actually happened when she was already at university and not when she was in matric.
- [66] When questioned as to what makes her say that her mother and the appellant were in a relationship, she testified that she once overheard the appellant and her mother having sex and also that the appellant came to their house every single day in the morning and night. She repeated for a second time that he came to visit at the house every morning and every night. When confronted with the fact that the appellant often had to leave Fort Beaufort on business and for purposes of driving his trucks, she changed her version and said "not every single day... most mornings and most evenings". When asked when it started, she testified from as little as she could remember, and then coupled the age of 7 years old to her averment. She gave further explanations why she believed that there was a relationship between them.
- [67] It was put to the complainant that the appellant wanted to hand the accounting books of the business to his wife to do the books since the complainant's mother was caught "with her fingers in the till". The complainant responded that those were mere allegations. The evening when her mother was arrested was the first time she found out that there were allegations that she had stolen money.
- [68] Mr price duly put the version of the appellant in respect of all relevant allegations to the complainant.
- [69] The complainant's police statement was handed to the complainant to read in court. The following questions were then posed to her:

"MR PRICE: Is that the statement you made?"

MR PRICE: Did the police officer read it back to you?

MR PRICE: And you confirmed that that it was correct?

MR PRICE: So you confirm inter alia that there was nothing left out that you told them and there was nothing that she put in there that she should not have put in?

....

MS V[...] D[...] W[...]: That is the contents that I know at that I could remember at that stage.

MR PRICE: Listen to me, you are jumping around. I am asking you a simple question.

MS V[...] D[...] W[...]: Okay.

MR PRICE: You read it and you confirm to her that she had written it down as you said.

MR PRICE: So you did not say anything to her about trucks.

MS V[...] D[...] W[...]: Not at that stage, no.”

The evidence of the complainant’s mother:

- [70] The complainant’s mother testified that she was employed by the transport business of the appellant to take care of the bookkeeping and other paperwork. It was also her task to send out invoices, to see to it that salaries get paid and to do the normal day to day paperwork. She also had to tend to the drivers and see to it that the appellant and the drivers had enough food for the road.
- [71] According to her evidence in chief she started her employment with the appellant’s business between 2005/2007, “somewhere around there”, although she testified that she could not remember the exact date. She was previously working at a bank. In cross-examination she agreed that she started her employment with the appellant during or about 1998 already.
- [72] She could not remember the exact date she left the employment of the appellant, but testified that it was around February 2013/2014. According to her she was not dismissed, but the appellant advised her that his wife was going to do the bookkeeping and paperwork in future.
- [73] The complainant’s mother testified that she had an intimate sexual relationship with the appellant for 17 years. He used to come to her house every morning and then they would have sexual intercourse. She also testified that she once travelled with the appellant in the truck to Cape Town to go and see her brother in jail. According to her she once also travelled with the appellant in the truck to Swellendam, when they had sex in the back of the cab of the truck in the parking lot at a truck stop. According to her they were traveling alone without an assistant.
- [74] On a question of the court whether the appellant is a violent or aggressive person, the complainant’s mother confirmed same. However, in her explanation as to why she says so, she gave an explanation that he could get very angry. When asked whether the appellant has ever assaulted her, she responded in the negative, but then indicated that the appellant had sexually assaulted her. This was quite in the face of her having testified over and over about their consensual sexual relationship over a period of 17 years.
- [75] The complainant’s mother testified that he often drove the trucks himself as a driver. When asked whether he would travel alone, she testified that when he went to Cape Town, he always had an assistant because it was a heavy load. The assistant would normally have been Mr Mzwandile Roxa, who was a general worker in the employment of the business. Sometimes Mr Msomi travelled with him. However, she testified that to Bloemfontein he would mostly travel on his own. During cross-examination she conceded that she assumed

that he drove to Bloemfontein on his own, as she did not see anybody with him in the truck at the times when she last saw him before he left for Bloemfontein, but testified that he may have picked up his assistant around the corner.

[76] The complainant's mother testified that the appellant drove to Bloemfontein once a month.

[77] An important aspect in this matter is the money which the complainant testified her mother paid over to her. The complainant's mother, having earlier testified that she was responsible to make the food for the appellant and the other drivers for their trips, testified that she "...made the vetkoeks, braai meat, made roosterkoek, bought sandwiches, bought the sweets and everything, I packed it, packed the ice packs in the cooler box...". When it was put to her that there was therefore more than enough food to cover a trip, she gave the answer "...no, sometimes the sandwiches would go soggy...". According to her the appellant would phone her from the road and ask her to send him money for food. When it was indicated to her that the appellant denies same, she hesitated but then persisted that it did happen. When Mr Price questioned the complainant's mother as to how she would send the money to him, she responded that it depends on where he was. If he was in Bloemfontein, she used to send the money to the complainant. Mr Price then enquired from her what the situation was when he was, for instance, in Johannesburg, whereupon she gave the nonsensical answer that he would get it from the complainant in Bloemfontein. She was questioned whether the appellant did not have a credit and debit card with which he could draw money, to which she gave the answer that he kept on losing the bank cards. Immediately thereafter, however, she conceded that he did have a credit card and a debit card on him when he travelled. The complainant's mother then testified that he could not use the credit and debit card in Johannesburg to buy himself food, since parking of the truck was a problem which caused him not to be able to get to an ATM. It was then posed to her that the big garages situated along the roads all have ATM's,

which she conceded.

[78] Mr Price further questioned the complainant's mother whether she ever sent amounts of R5000.00 to the complainant with instructions that she must withdraw it and give it to the appellant. The complainant's mother confirmed same. She explained as follows:

"Mr Blom had, sometimes had a shortage of fuel when he came back, sometimes he had a breakdown, sometimes he had popped a tyre then we had to see that and the dealership wanted immediate payment."

[79] When questioned about the round figure of R5 000.00 and whether that was the amount which was paid over to the complainant every time, the complainant's mother struggled to answer the question. She did, however, testify that it was not every trip that this happened. When again pressed for an answer whether she always sent precisely R5 000.00, she responded as follows:

"MS V[...] D[...] M[...]: Most often it would be R5,000.00."

MR PRICE: But why R5,000? Let us say the damage was R1,800, why would you pay R5,000?

MS V[...] D[...] M[...]: That is what he requested.

MR PRICE: He requested R5,000 every time? Is that what you are saying?

MS V[...] D[...] M[...]: Yes.”

[80] It was then put to the complainant’s mother that the appellant strongly denies every calling her during any of his trips to request her to send money.

[81] The complainant’s mother testified that she always sent parcels with the appellant to the complainant in Bloemfontein and that he would sometimes sleepover with his brother-in-law, Coenraad du Preez, and sometimes at the complainant’s place. She, however, did not mention anything about him sleeping on a mattress on the floor next to the bed of the complainant.

[82] The complainant’s mother confirmed in her evidence that when she sent a parcel with the appellant to the complainant in Bloemfontein on a monthly basis, the complainant had to fetch it from the appellant at his truck.

[83] It was the evidence of the complainant’s mother that the complainant told her in November/December 2017 that the appellant molested her as a child and raped her. The complainant’s mother was very shocked and burst out crying. She enquired from the complainant how she could help her, but the complainant responded that she would handle the matter in her own way.

[84] From the evidence of the complainant’s mother it appears to be common cause that the appellant laid criminal charges against the complainant’s mother for theft and fraud from his business and that the complainant’s mother was arrested and appeared in the Regional Court. At the time when the complainant’s mother presented her evidence, the amount mentioned was “well over a million rand”.

[85] The complainant’s mother confirmed that she was angry when she was locked up and put in a police cell and she was also angry when she found out that the appellant laid a charge against her for theft and fraud. However, she testified that she is not angry anymore.

[86] When questioned as to why the complainant’s mother did not confront the appellant after the complainant told her that the appellant molested and raped her, she testified it was because the complainant indicated that she will handle it in her own way.

[87] The complainant’s mother confirmed that the appellant never carried a gun on him in the open, but testified that when he went on road trips, he hid the gun under the seat. Mr Price thereupon put it to the complainant’s mother that the appellant never took a firearm with him on the road.

The evidence of Mr SJ Cooper:

- [88] Mr Cooper is a clinical psychologist who treated the complainant for depression and anxiety after another colleague referred the complainant to him. At the time she was experiencing anxiety symptoms like bedwetting and she was cutting herself.
- [89] During the treatment it came to the fore that the complainant had allegedly been sexually abused which made her to be very uncomfortable and distraught.
- [90] The complainant started consulting Mr Cooper in December 2018.
- [91] According to Mr Cooper's memory it was only during the second session or later that the complaint divulged to him about the alleged sexual abuse.
- [92] Mr Cooper testified that the sexual incidents, according to the complainant, occurred when she was between the ages of 21 and 24 years.
- [93] Mr Cooper conceded during his evidence that the complainant's anxiety and depression could also have been caused by the fact that she lost her grandfather, her father and her uncle in a very short period of time, as well as the fact that the mother had recently been arrested for and charged with serious criminal charges of fraud and theft.
- [94] That concluded the State's case. The defence applied for the acquittal of the appellant in terms of Section 174 of the Criminal Procedure Act, 51 of 1977, which was dismissed.

The appellant's evidence in chief:

- [95] The appellant denied the allegations against him. He confirmed his plea of not guilty, as well as the correctness of the contents of his Plea Explanation, under oath.
- [96] The appellant testified that he was self-employed as the owner and manager of Blom Transport. In addition to managing the business, he is also a driver and fixes mechanical problems on the trucks. At the time of his evidence he employed twelve permanent employees and operated ten trucks.
- [97] The appellant testified that the complainant's mother was employed at his business, where she did the bookkeeping and paid salaries, and was also responsible for all issues relating to the Receiver of Revenue. She had access to the business bank accounts. He trusted her at the time.
- [98] On 31 August 2013 the appellant informed the complainant's mother that her services will no longer be required with effect from January 2014. The reason was due to the fact that the appellant's wife took over the bookkeeping of the business.
- [99] In January 2014 the complainant's mother reported the appellant to the CCMA and the documents in relation thereto was handed in as exhibit "E". The appellant, in response, addressed a letter to the CCMA, dated 10 February 2014, which letter forms part of exhibit "E". In the said letter he stated, inter alia:

1. The complainant's mother failed to deliver the business accounting books, despite numerous requests to do so.
2. The documentation eventually received only stretched from 1 March 2013 up until middle January 2014.
3. The business accounting books have been handed over to an auditor for auditing.
4. No documentation had been submitted by her to SARS, on behalf of the business, since 2005.

[100] The charge sheet in relation to the criminal case against the complainant's mother was handed in as exhibit "F".

The charge sheet reflects, inter alia, the following information:

1. The charges against the complainant's mother were already laid in September 2015 at the Fort Beaufort police station.
2. The date of arrest was 1 December 2018.
3. The date of first appearance was 3 December 2018.
4. The charge is one of theft, although committed on diverse occasions and dates.
5. The total amount of the alleged theft is R4 359 411.76.
6. Paragraphs 12 and 13 of the pre-amble to the charge sheet read, inter alia, as follows:

"12. The accused unlawfully transferred various amounts of money from the business account and savings account of Blom Vervoer into:

- (a) Her own personal accounts as mentioned in point 9 above and using the internet to effect the transfers;
 - (b) The account of A[...] (sic) v[...] d[...] M[...].
13. When the accused effected payments into the bank accounts ... some of them were disguised as payments to SARS."

[101] The appellant testified that he travelled to Bloemfontein once a month, except for Decembers. Every time he travelled to Bloemfontein he would be accompanied by an assistant.

[102] From time to time the complainant's mother would request him to deliver a parcel to the complainant in Bloemfontein when he travelled to Bloemfontein. The parcels were normally the size of approximately 30cm x 30cm. He would call the complainant when he was approximately thirty minutes away from Bloemfontein to meet him at an area where the truck was allowed to stop, which was normally at Curie Avenue when he was on his way to his brother-in-law, in order to collect the parcel from him. His assistant was always with

him when she collected the parcel.

[103] The appellant denied that the complainant ever entered the cab of the truck when she collected any of the parcels.

[104] The appellant testified that he assisted with the transportation of the complainant's furniture from the UFS to her new apartment. That night he slept over at her apartment, but the complainant's mother also slept over.

[105] The appellant denied that he at any other stage slept over at the complainant's place of residence in Bloemfontein.

According to him he slept over at his brother-in-law, Coenraad du Preez.

[106] The appellant denied that he ever requested the complainant's mother to pay money over to the complainant's bank account in order to buy food or fuel or anything else for him when he travelled through and back and/or to Bloemfontein.

[107] The appellant explained that the cab of the truck that he used to drive to Bloemfontein was not spacious. The two front seats were separated by a huge gearbox and gear-lever. The bunker bed in the cabin is approximately half a metre to six hundred centimetres broad. It was difficult to move from the front seat onto the bunker bed, due to the limited space in the cab and the presence of the gearbox and gear-lever.

[108] Although the appellant is the owner of firearms, he keeps the firearms in his safe at home.

[109] The appellant denied ever having an intimate relationship with the complainant's mother.

[110] During the year 2007/2008 his wife was a full-time housewife and they had a domestic servant in the house who also worked full day – when his wife was not at home, the domestic servant would have been there.

[111] The complainant's mother accompanied him once to Cape Town in the truck in order to visit her brother who was in prison. She did not at any stage accompany him to Swellendam.

[112] With regard to the Protection Order, the appellant testified that not only did he attend at the Magistrate's Court, Bloemfontein, on the return date of the Protection Order, but he also instructed attorneys to draft affidavits in answer to the application for a Protection Order. He denied the allegations filed in support of the Protection Order. The matter was struck from the roll as the complainant did not attend the court proceedings.

[113] The appellant denied that he ever sexually molested or raped the complainant in any manner whatsoever.

[114] The appellant also confirmed that at one point in time the complainant was having an extra-marital affair with a gentleman whom he met when the said gentleman came to visit the complainant in Fort Beaufort.

Cross-examination of the appellant:

- [115] During cross-examination the appellant was once again confronted with the time when the complainant's mother travelled with him in his truck to Cape Town, but the appellant persisted with his version provided during his evidence in chief.
- [116] During further cross-examination the appellant explained that he met the complainant's mother in 1998 in Fort Beaufort when she was working at the bank. When she lost her job at the bank, she starting assisting the appellant with the bookkeeping of his business on a part-time basis. Since she had another job that she was doing at the time with regard to catering and later with regard to a different business, she worked for the appellant after hours, remotely from her home, as he did not have an office.
- [117] The appellant testified that the complainant's mother had authority to do transactions on his bank account, in that she had the power to withdraw or deposit money. She was also entitled to withdraw money for wages, as the appellant would sometimes not be available on Fridays to pay the wages, since he was away driving trucks. She was also entitled to make payments to SARS.
- [118] The appellant testified that there was a good relationship between himself and the complainant's mother and that there were no problems between them during the period of employment.
- [119] In further cross-examination the appellant testified that he had a normal relationship with the complainant and he only had contact with her, before she moved to Bloemfontein, at her mother's house when he had to take documents in relation to the business to the complainant's mother.
- [120] It was put to the appellant by the prosecutor that on an occasion he penetrated the vagina of the complainant with his penis, which the appellant denied. The prosecutor also put it to the appellant that there was also an occasion when he pulled off the complainant's pants, which the appellant also denied.
- [121] The appellant also denied ever having been with the complainant at his house.
- [122] The appellant testified during cross-examination that the reason or motive why the complainant's mother falsely accused him of having had an affair or sexual relationship with her, was due to the fact that she had stolen money from his business which she transferred into her account and that she was aware that criminal charges had been opened against her.
- [123] When the appellant was questioned as to why the complainant would make such serious allegations against him, he explained that it all had to do with the money which her mother had transferred into her, the complainant's, bank account and that the complainant was aware what was lying ahead, meaning that the complainant was aware that her mother was facing serious criminal charges for having stolen money from the appellant's business.

- [124] The appellant was again asked why the complainant and her mother would make false allegations against him, whereupon he explained that it was because he had opened a criminal case against the complainant's mother due to the theft of the money and they retaliated by laying false charges against him. According to the appellant, their life standard would have dropped as a result of the complainant's mother no longer being in the employment of the appellant's business and further due to the charges which he laid against the complainant's mother.
- [125] During questions posed to him by the court, the appellant confirmed that at the time when the allegations of rape were made against him he had already opened the criminal case against the complainant's mother.

The applicable legal principles and analysis of the judgment of the court a quo:

- [126] It is common cause that the complainant was a single witness and therefore, the cautionary rule applicable to single witnesses applies to her evidence.
- [127] As early as in 1932 the following remarks were made in respect of a single witness in *R v Mokoena* 1932 OPD 79 at 80:

"Now the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by [the section], but in my opinion that section should only be relied on where the evidence of a single witness is clear and satisfactory in every material respect. Thus the section ought not to be invoked where, for instance, the witness has an interest or bias averse to the accused, where he has made a previous inconsistent statement, where he contradicts himself in the witness box, ..." (My emphasis).

- [128] In the unreported judgment of *Pitsa v S* (A) 253/2012

- [2013] ZAGPJHC 283 (8 November 2013) at para [48] the evidence of a complainant in a rape case was rejected on the following grounds:

"[48] The evidence of the Complainant must be approached with great circumspection because it is of a single witness and is not satisfactory in all material respects. The numerous intrinsic improbabilities, omissions and contradictions in such evidence and the lack of corroboration by the witnesses fortify this court's resolve to reject the Complainant's evidence as most improbable. See S v Teixeira 1980 (3) SA 755 (A) at 761 where the following was stated:

'I think I am stating the obvious in saying that, in evaluating the evidence of a single witness, a final evaluation can rarely, if ever, be made without considering whether such evidence is consistent with the probabilities.'"

[129] It is evident from the record that the charge sheet originally referred to an offence which allegedly occurred during 2011, where the alleged act of sexual penetration was described as “inserting his penis into her vagina more than once”. However, on the day the charge was put to the appellant, namely 25 January 2021, the charge sheet was amended as far as the time period was concerned to read “on or about during 2011 to 2015”.

[130] In addition, a short request for further particulars in terms of section 87(1) of the Criminal Procedure Act, dated 30 April 2020, had been filed at court on 22 May 2020, in which the following further particulars were requested:

“1. According to the Charge Sheet, the alleged offence(s) was committed during the year 2011. On which date(s) with reference to day and month were the alleged offences committed?”

2. According to the Charge Sheet, the alleged offence(s) was committed in Bloemfontein. Exactly where in Bloemfontein did the alleged offence(s) take place?”

[131] The aforesaid request for further particulars were not responded to by the State. Immediately after the appellant pleaded to the said charge, Mr Price stated the following on record:

“So at this point in time as you can see from the present charge sheet, we have no idea what month it occurred, what time of the week it occurred in, either in 2011, 2012, 2013, 2014 or 2015. I will address you at the right time on the vagueness of the charges and the failure to answer, for the State to answer a very simple question”.

The request for further particulars was marked exhibit “A”.

[132] During cross-examination of the complainant, she testified that she had informed the Prosecutor that she was raped in 2008/2009/2010, yet the Prosecutor amended the charged sheet to refer to 2011 to 2015. Immediately subsequent to the aforesaid amendment, and in stark contrast therewith, the complainant presented the evidence about the two truck incidents, which according to her, actually occurred during 2008/2009/2010.

[133] The court a quo dealt with the last mentioned evidence by completely excluding it in its consideration of the evidence. In this regard the court a quo stated as follows at p. 477 line 23 to p. 478 line 3 of the judgment:

“Complainant went further to explain that whilst she was staying in the hostel which was period 2008 until 2010 or 2011 certain incidents happened to her which were not in the timeframe referred to in the annexure. And for the sake of this judgment I have excluded that portion of her evidence because it is not relevant”.

[134] It is trite that in order to consider the guilt, or not, of an accused, all the evidence must be accounted for and given appropriate consideration and weight. None of it may simply be ignored.

[135] The aforesaid evidence which the trial court completely ignored, is very relevant. In fact, the court a quo misdirected itself when it failed to draw a negative inference regarding the complainant's credibility from that part of the complainant's

evidence when she referred to incidents which allegedly occurred during 2008 to 2010 in Bloemfontein, whilst the charge sheet was

specifically amended to refer to alleged incidents having occurred during 2011 to 2015.

[136] The aforesaid is moreover so considering that the complainant also failed to mention any incidents that allegedly occurred during 2008 to 2010 in Bloemfontein in her police statement, exhibit "D".

[137] The court a quo therefore erred when it disregarded the material contradictions between the viva voce evidence of the complainant, the amendment of the charge sheet and the contents of her police statement.

[138] A further highly relevant contradiction between the viva voce evidence of the complainant and the averments in the charge sheet, is that the complainant testified that the appellant would sometimes,

when they were driving back to Bains Game Lodge for the appellant to overnight at her residence, put his fingers into her vagina whilst she was driving. Considering the reference to Bains Game Lodge, this must have occurred within the timeframe mentioned in the charge sheet. Despite this, the charge sheet makes no mention of this alleged conduct by the appellant and only refers to vaginal penetration. It was also not mentioned in the complainant's police statement. Once again, this aspect is directly relevant to the credibility of the complainant, which the court a quo completely failed to take into consideration.

[139] A further reason why the alleged incidents of molestation and rape of the complainant before 2011 is highly relevant, is that it provides essential background for purposes of considering the complainant's credibility. For instance, if it is to be accepted that the appellant commenced molesting the complainant since she was six or seven years old, eventually raped her by penetrating her vagina with his penis in his son's bedroom during 2007 and that other incidents of molestation or rape occurred in the cab of the truck before the one when her boyfriend took her to the truck, it is highly improbable that she would have worn pyjamas when she went to fetch a parcel from the appellant at his truck, well knowing that she was probably going to be raped in the one way or the other. It is further highly improbable that she would have entered the cab of the truck in the circumstances. Had she previously been molested or raped as alleged, she surely would also have requested her boyfriend

to accompany her up to the truck. She further testified that when he appellant put his fingers into her vagina, she said “no” and turned her head away, but did nothing else about it. She did not even attempt to scream, despite the fact that the car of her boyfriend was parked in front of the truck. This reminds of the following quote from S v BM 2014 (2) SACR 23 (SCA) at 36:

“Yet she said that Mr BM kissed her, removed her clothing and she feared he would rape her, in circumstances where a single cry or scream would have brought people running into the room.”

[140] This brings me to the principle enunciated in the judgment of S v Teixeira 1980 (3) SA 755 (A) at 763:

“In the judgment of the Court a quo there is no reference whatsoever to the State’s failure to call either Sithole or Tshabalala to testify on behalf of the State, nor to the question whether an inference averse to the State was justified. The burden of proof rested on the State to prove its case. Counsel for the State must have realised how unsafe it is to rely on the evidence of a single witness. I will disregard the fact that he failed to call Sithole. In the case of Tshabalala, however, counsel for the State must surely have realised that, if Sarah’s version is to be accepted as truthful, Tshabalala’s evidence could have corroborated her evidence in regard to a matter very much an issue – namely the number of incidents... in my opinion, the failure by the State to call Tshabalala to testify as a witness justifies the inference that in counsel’s opinion his evidence might possibly give rise to contradictions which could reflect adversely on Sarah’s credibility and reliability as a witness.”

[141] The State did not provide any reason why the husband of the complainant was not called to testify. The complainant

testified that he was available to testify. He could have corroborated her version that he took her to the truck to fetch a parcel from the appellant and, most importantly, that she actually entered the cab of the truck. Moreover, he was the first person

to whom the complainant allegedly reported the alleged molestation and rape by the appellant.

[142] When the abovementioned legal principles are applied to the failure by the State to have called the complainant’s husband as a witness, it justifies the inference that the reason why he was not called, is due to the fact that his evidence could have impacted negatively on the complainant’s credibility and reliability as a witness.

[143] One of the cases the court a quo highlighted in its judgment, was S v Mafaladiso 2003 (1) SACR 583 (SCA) at 593 E – 594 H regarding the approach to be followed when there are discrepancies or contradictions between the evidence of a witness and his/her statement.

[144] Almost immediately subsequent to the aforesaid quotation, the court stated as follows at p. 498 line 21 to p. 499 line 1 of its judgment:

“She also explained, the complainant, that she is not good with dates. There are indeed discrepancies between the complainant’s

evidence and her affidavit which were handed in as exhibit. As I have highlighted, the case of Mafaladiso earlier are there various reasons why viva voce evidence and affidavit are verbatim not the same.”

[145] As correctly pointed out by Mr Liddell, the court failed to distinguish between the circumstances described in the dictum in *S v Mafaladiso* and the present matter. In the present matter the complainant specifically testified that she was in therapy to prepare herself to lay a charge against the appellant. In this regard she responded as follows to a question by the court:

“COURT: Okay. Come back to my question again. 2017 you told your boyfriend, you told your mom but still you only reported the matter in 2019?”

MS V[...] D[...] W[...]: I was in therapy to prepare myself to make the case.”

[146] Considering that the complainant had almost two years to prepare herself and to remind herself of details of dates, particular incidents and relevant facts, the quality of her evidence in this regard was, to say the least, of a very poor and unacceptable standard.

[147] Further contradictions and discrepancies in this regard are the following:

1. In her police statement the complainant stated that the appellant sometimes slept over at her place “once a week”, whilst that was never her version in her viva voce evidence. In fact, it was common course between the complainant’s mother and the appellant that the appellant drove to or through Bloemfontein only once a month, excluding Decembers.
2. In her police statement the complainant stated that the appellant would sleep with her in her bed when he slept over at her place, whilst it was her specific version in her viva voce evidence that the appellant slept on a mattress on the floor next to her bed.
3. In her police statement the complainant stated that she told her mother “the whole story” about the appellant, but in her viva voce evidence she testified that she only told her mother that she had been molested and raped by the appellant.

[148] The most startling evidence of the complainant in respect of her police statement was when she was confronted with the dates in the “Particulars of Offence” which forms part of exhibit “D” where the relevant police official indicated that the relevant offence(s) occurred between 1 May 1997 and 1 July 2015. The said document had also been signed by the complainant. The complainant ended up testifying that the police official chose the relevant dates himself/herself. In this regard the record reflects the following.

“MR PRICE: Okay. Now here at the particulars of offence, it says that:

‘It started on the 1st of May 1997.’

Is that accurate?

MS V[...] D[...] W[...]: I cannot remember the date, ...[intervened]

MR PRICE: But where did the police officer get the date from?

MS V[...] D[...] W[...]: She asked me roughly, it was a very emotional day. She just asked me how old I was and we entered the dates from there.

MR PRICE: Did she choose the dates?

MS V[...] D[...] W[...]: Yes.

MR PRICE: Oh alright. So these are not your dates?

MS V[...] D[...] W[...]: No.”

[149] In the circumstances the court a quo erred in not taking the stark differences and contradictions between the complainant’s viva voce evidence and her police statement into consideration in determining her credibility.

[150] The complainant testified that she stayed at Bains Game Lodge until 2015/2016, she was unsure of the date. She was asked by both the prosecutor and later in cross-examination by Mr Price when the “rape or molestation” ended, to which she responded that it was in 2015. On the version of the complainant’s mother, as reflected in the CCMA documents, exhibit “E”, the complainant’s mother was no longer in the employ of the appellant since January 2014. This also corresponds with the evidence of the appellant. The court a quo, however, failed to consider that it was therefore highly unlikely that the appellant would have transported any parcels for the complainant after January 2014 and therefore it is also highly improbable that the alleged incidents of rape or molestation of the complainant by the appellant would have endured until 2015.

[151] The further very crucial evidence which the court a quo ignored, was the timeline as testified to by the complainant as being indicative of the complainant and her mother’s motive to falsely implicate him:

1. The appellant already in his Plea Explanation, at paragraph 27, set forth the said motive.
2. The money was stolen from the appellant between 2005 and 2013. Both the complainant and her mother benefitted from the said money.
3. The appellant terminated the services of the complainant’s mother with effect from January 2014. This led to a complaint by the complainant’s mother against the appellant at the CCMA at the end of January 2014.
4. In the appellant’s response letter to the CCMA, dated 10 February 2014, he stated that the books of the business had been handed over to an auditor for auditing. The complainant’s mother therefore knew at that stage already that an audit was to be done.

5. Pursuant to the auditing of the books, the complainant laid a criminal charge of fraud and theft against the complainant's mother during September 2015.
6. On 1 December 2018 the complainant's mother was arrested and appeared in court on 3 December 2018.
7. During the very same December 2018 the complainant started consulting the psychologist, Mr Cooper, and did not initially tell him about the alleged sexual incidents. This was after she had already been in therapy with Ms Visagie. In the meantime, as previously stated, the complainant prepared herself to open a case against the appellant until April 2019 when she laid the complaint against the appellant.
8. On 8 April 2019 the complainant deposed to the sworn declaration in support of her application for a Protection Order, which she based on her alleged fear that the appellant will threaten or harm herself or her family, considering that he owns firearms. On the return date of 30 April 2014 the complainant did not attend court, despite the fact that the return date was reflected on the application and the Protection Order was struck from the roll. During the cross-examination of the complainant about this alleged fear of hers, the following transpired:

"MR PRICE: So it was not as a result of him threatening you or telling you he is going to shoot you or pointing a gun at you. It was merely because you believed that if you opened this case he would do something?"

MR PRICE: Okay. So that was your own subjective view – you had no grounds for that view, correct?

MS V[...] D[...] W[...]: Hmm – hmm.

MR PRICE: Sorry, hmm - hmm does not help.

MS V[...] D[...] W[...]: Yes."

[152] The appellant's version that the complainant and her mother retaliated by laying false charges against him, therefore constitutes a reasonable inference in the circumstances.

[153] The appellant finds him in the same position as was explained in *S v BM*, supra, at para [30]:

"[30] As regards Mr BM's evidence, there are again few objective facts against which the likelihood of it being truthful or untruthful can be measured. He said that there had been no such incident. If he were telling the truth, what else could he say? On his version, SM had gone to watch television in the bedroom and, a short while later, he went to bed, taking his younger daughter with him, without seeing her again that evening. If that were correct there was nothing else that he could say to support his version. ..."

[154] However, in the present matter the appellant was never cross-examined on the contents of his Plea Explanation which he confirmed under oath to be correct. He was also not really and properly cross-examined on his pertinent viva voce evidence, nor was he properly

confronted with the version of the State. I must say, the Prosecutor was in an unenviable position, because he was not the Prosecutor during the presentation of the State's case. This, however, does not change the applicable legal principles. Mr Liddell referred to the judgment of *S v Manicum* 1998 (2) SACR 400 (N) at 405 E

- H:

"In my view that was a wrong decision. The fact that the appellant was not cross-examined is something which must enter the scales. It has been said time and time again that if evidence is not challenged in cross-examination, it may be accepted without further ado. I refer to a judgment in the case of S v Xoswa and Others 1965

(1) SA 267 (C) at 273C - E where his Lordship, Van Winsen J, as he was then, said:

'The prosecutor left the statement unchallenged. I agree with the remarks of the Full Bench of the Transvaal Provincial Division in the case of *R v Ngema* 1960

(2) SA 263 (T), that where the State intends to discredit the evidence of an accused it should cross-examine to that end in order to enable the accused to meet the State's attack. ... While it does not follow in every case that the failure to cross-examine would necessarily be fatal to the State's case, nevertheless I agree with the attitude taken up by the State representative, which was that in the particular circumstances of this case the absence of any challenge in cross-examination by the prosecutor of appellant No 5's denial of his membership of Poqo leaves the appellant's guilt in some doubt."

[155] Exactly the same principle applies in the present matter.

[156] At the end of the court a quo's judgment, the court found as follows:

"So when I consider all the above is the question I need to ask myself is whether it can be said that the complainant is an unreliable witness even though discrepancies are present. I am of the view that it is highly improbable that a person would go to such an extreme to falsely implicate an accused person, relive something that has not happened or a fictitious incident, endure testifying and being cross-examined for a few days because that is what happened in this case, and is my question to that question, no.

I cannot find the complainant to be an unreliable witness. So in conclusion when I consider all the evidence before me which means the state case and that of the defence, I am of the view that there is no doubt in my mind that the accused had committed the offence as charged, for reasons as highlighted earlier."

[157] The aforesaid is not the test. The test is as, once again, reiterated in *S v Jaffer* 1988 (2) SA 84 (C) at 89 C - E:

"In S v Kubeka 1982

(1) SA 534 (W) at 537F - H, Slomowitz AJ said in regard to an accused's story:

'Whether I subjectively disbelieve him is, however, not the test. I need not even reject the State case in order to acquit him. I am bound to acquit him if there exists a reasonable possibility that his evidence may be true. Such is the nature of the onus on the State.'

Referring to this passage Van der Spuy AJ said at 715G:

'In other words, even if the State case stood as a completely acceptable and unshaken edifice, a court must investigate the defence case with a view to discerning whether it is demonstrably false or inherently so improbable as to be rejected as false.'

I agree. The test is, and remains, whether there is a reasonable possibility that the appellant's evidence may be true. In applying

that test one must also remember that the court does not have to believe her story; still less has it to believe it in all its

details. It is sufficient if it thinks there is a reasonable possibility that it may be substantially true (R v M 1946 AD 1023 at 1027)."

[158] Ms Mkhabela supports the conviction. I can, however, not agree with her.

[159] The court a quo clearly erred in finding that the complainant was a reliable witness. The court also erred in accepting the evidence of the complainant's mother where it was in conflict with that of the appellant. The court a quo did not apply the cautionary rule relating to a single witness sufficiently, or at all, although it referred to it in its judgment.

[160] The present matter is similar to that of S v BM, supra, also in the following respects as stated at paras [34] and [36] of the said judgment:

"[34] There are many other respects in which the prosecution case was inadequately presented. It started with the deficiencies in

formulating the charges. ... The cross-examination of Mr BM was inept, canvassing none of the material facts and pursuing an approach that assumed his guilt. There was no explanation for the failure to call Mrs M, whose evidence on the events of that day and that evening could have clarified many issues

[36] In the result, I am satisfied that there was no proper basis for the rejection of Mr BM's evidence, and that it could reasonably possibly be true. He was accordingly entitled to his acquittal. ..."

[161] In the totality of the circumstances the court a quo ought to have found that the version of the appellant is reasonably possibly true and should have acquitted him.

[162] The appeal against the conviction is therefore to be upheld.

AD SENTENCE:

[163] Considering the success of the appeal in respect of the conviction, it is consequently not necessary to deal with the sentence.

Order:

[164] The following order is made:

1. The appeal against the conviction is upheld.
2. The court a quo's order convicting the appellant is set aside and replaced with the following:

"The accused is found not guilty and is acquitted."

C. VAN ZYL, J

I Concur:

P.J. LOUBSER, J

On behalf of the Appellant: Adv R Liddell Instructed by: Changfoot Van Breda Inc. C/o Blair Attorneys BLOEMFONTEIN e-mail: hvanbreda@cvblaw.co.za vanbreda1@cvblaw.co.za On behalf of the State: Adv L Nkhabela Instructed by: Office of the Director: Public Prosecutions BLOEMFONTEIN

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