

SOUTH AFRICA / JUDGMENT

Fortuin and Another v S (A17/2024)

[2024] ZAWCHC 244 (5 September 2024)

[2024] ZAWCHC 244**COURT**

Western Cape High Court, Cape Town

BEFORE

V C Saldanha, M Adams

CASE / FILE NUMBER

A17/2024

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record**SAFLII****Note: Certain**

personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII

Policy**FLYNOTES:**

CRIMINAL – Rape – Evidence –
Mental
capacity of victim – Complainant was a competent witness –
Able to explain discrepancies – Contradictions
were not
material – Did not detract from overall version of physical
attack and sexual assaults – Complainants
version remained
unassailable – Poor quality of J88 report – Regional
magistrate correctly rejected appellants'
version as not being
reasonably possibly true – State proved its case beyond
reasonable doubt – Appeal dismissed
IN
THE HIGH COURT OF SOUTH AFRICA
(WESTERN
CAPE DIVISION, CAPE TOWN)
Case
No: A17/2024
In

the matter between: RAYDON
 FORTUIN
 First Appellant
 EBEN
 FORTUIN
 Second Appellant
 and
 THE
 STATE
 Respondent

Coram: Justice V C Saldanha et Acting Justice M Adams

Heard: 03 May 2024
 Delivered
 electronically: 05 September 2024

JUDGMENT

SALDANHA J:

- [1] Mr. Raydon Fortuin and his brother, Mr. Eben Fortuin were convicted in the Paarl Regional Court, held at Tulbagh, of the rape of a 17 year old boy, Mr. JJ. The provisions of the minimum sentence legislation applied to the charges. The appellants were each sentenced by the regional magistrate Mrs. A. Immelman to life imprisonment. They come before this court by way of an automatic right of appeal.
- [2] The incidents occurred on 17 May 2020 at or near Klein Begin, Tulbagh where each of the appellants unlawfully and intentionally committed an act of sexual penetration with the complainant Mr. J.J by each of the appellants inserting their penis into the anus of the complainant without his consent. The appellants were found to have contravened the provisions of Section 3 read together with Sections 1, 55, 56(1), 57, 58, 59, 60 and 61 of the Sexual Offences and related matters (amendment) Act 32 of 2007 read together with Sections 92(2), 94, 256, 257 and 261 of the Criminal Procedure Act 51 of 1977 (Rape) and read with the provisions of Sections 51(1) and/or 52[1] of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended.
- [3] The appellants were legally represented at the trial by Mr. O. Swanepoel, on the instructions of Legal Aid South Africa.
- [4] In dealing with the merits of the appeal or lack thereof, the judgment will, inter alia, do so in the context of the unchallenged evidence led with regard to the intellectual functioning of the complainant, his ability to consent to sexual intercourse and his competence to testify as a witness. In this regard the State tended the evidence of Ms. Jeanine Hundermark, a clinical psychologist in private practice and also attached to Cape Mental Health with regard to her assessment of the complainant and her findings. The judgment will also deal with the

medical examination and report (the J88), by

the authorised medical practitioner, Doctor SW Mukombe a locum doctor on duty at the Ceres Hospital on the night of the incident. On account of Dr. Mukombe not being available to testify in person the State entered the J88 report into evidence through the evidence of Dr. Marisa Crous, medical practitioner employed at the Ceres Hospital and her interpretation and expert opinion in respect of the recordals made by Dr. Mukombe. The judgment will also deal with the admission of the J88 report on the basis that it was both in fact and in law hearsay evidence and the subsequent evaluation of its probative value in terms of Section 3(3)(c) of the Law of Evidence Act 1988[2].

[5] I will also remark on the management of the trial in the court a quo, which in my view, led to a measure of confusion in respect of the evidence of the complainant and which was compounded by the lengthy and at times excruciatingly repetitive and unnecessary cross-examination by the defence of the complainant. The judgment will also deal with remarks by this court with regard to the failure on the part of Doctor Mukombe to have properly filled in the J88 and his failure or neglect to attend the proceedings in the court a quo to personally testify at the trial. The judgment will also refer to directives made by the court to the State at the hearing of the appeal with regard to the need for trauma counselling for the complainant.

[6] The State, as indicated lead the evidence of Ms. Hundermark, that of the complainant Mr. JJ, Ms. Katriena Daniels his foster mother and that of Doctor Crous. Both the appellants testified in their own defence and elected not to call any of the alibi witnesses they sought to raise and rely upon in their defence nor that of a Mr. Eltino Baadjies who they contended would support a part of their version against that of the complainant`s.

[7] The appellants challenged their conviction of the rapes by contending that the regional magistrate erred in finding that the complainant`s evidence was satisfactory in all material respects. They also contended that the regional magistrate failed to exercise caution in the evaluation of not only the evidence of the complainant as a single witness but also that of the evidence of the complainant`s foster mother Ms. Daniels as the first report and so too the shortcomings in the J88 report which the appellants contended did not support the complainant`s evidence. The appellants also contended that the State failed to prove that the complainant had properly identified the appellants as the perpetrators of the offence. The appellants further contented that the court a quo erred in not finding that the appellants version was reasonable possibly true, and for having rejected their version.

[8] The appellants pleaded not guilty to the charges and elected not to disclose the basis of their defence. Their legal representative confirmed that they were informed of the applicability of the provisions of the minimum sentence legislation, that if found guilty of the charges and if they failed to establish substantial and compelling circumstances, they each faced the prospect of life imprisonment. The State indicated that it sought to rely on the basis of a common purpose between the two appellants on the charges of rape alternatively that each

of them had separately committed the offence and as a result of what the State alleged was a mental disability suffered by the complainant.

- [9] Ms. Hundermark was called as the first witness. Her written report was entered into evidence with the consent of the defence. She explained that the complainant was referred to the Cape Mental Health Society by the Sexual Offences Court for the purpose of an assessment to evaluate his level of intellectual functioning, his ability to consent to sexual intercourse and his competence to testify as a witness. The information contained in her report and her findings were obtained in an interview with the complainant and Ms. Daniels. She provided a brief history of the complainant who at the time of

the interview was 18 years old, unemployed and lived with his foster family in Tulbagh. The complainant never knew his mother and was placed in the foster care of Ms. Daniels during the first year of his life. It appeared that the complainant's parents had both abused alcohol, he was neglected as a child and that he sustained burns as his parents had inadvertently set their shack alight while under the influence of alcohol. The complainant was diagnosed as suffering from fetal alcohol syndrome disorder and all his childhood milestones were delayed. He also suffered from breathing problems as a result of the smoke inhalation. He commenced schooling at the age of seven, struggled to cope with the academic demands of school and simply progressed each year without satisfying the minimum requirements of each grade. Unfortunately, the complainant had not been placed in a special school, began bunking and misbehaved. He dropped out at the age of eleven years. Having little to do he was easily influenced and began smoking cigarettes and later used substances. At the age of thirteen he was physically attacked and hit with the flat side of a panga. He sustained a brain injury and remained unconscious for four days. After that, he had to learn to walk again, had weakness on the right side of his body and developed epileptic seizures. In 2020, the complainant's foster mother tracked down his biological father in Beaufort West and the complainant went to live with him for approximately a month. His father, however, was homeless and survived on food found in garbage bins. Ms. Daniels arranged for the complainant to return to her in Tulbagh.

- [10] In respect of his current functioning Ms. Hundermark recorded that the complainant was able to feed and dress himself, but his physical abilities were limited. He sometimes struggled to put his shoes on and at times wore mismatched shoes. He did not bathe properly and needed daily reminding about hygiene practices. He refused to assist with housework at home but would do odd jobs for others. He knew his physical address and his age. However, he did not remember his date of birth or the current day of the week nor the date. He was able to write his own name and part of his nickname and could only copy simple words. He was able to identify some numbers and letters of the alphabet but was otherwise unable to read or spell. He was able to identify basic colours. He was also able to identify coins and notes but not able to work with money. He understood the functions of a clock but could not tell time. He had friends in the neighborhood but was easily manipulated. In respect of his appearance and behaviour in the interview Ms. Hundermark noted that he was of average height and build and had a pleasant smile. He came across as

polite and accommodating and was able to speak for himself. His clothing was clean but shabby and during the formal testing period attention and concentration difficulties were identified. The complainant was given the opportunity to talk to Ms. Hundermark about the alleged rapes and his reactions. She explained that he was also given the opportunity to demonstrate the alleged rapes with the help of anatomically correct dolls. She recorded that the complainant was unable to provide information about the impact on him of the alleged rapes. His foster mother reported that his behavior deteriorated after the alleged incidents and that he was difficult to manage. Ms. Hundermark recorded that persons who abuse substances do so more during stress as a way of self-medication and that was clearly the position with the complainant. She stated that the complainant reported that that he wished to give abusing substances up but did not know how to do so.

- [11] Ms. Hundermark administered two separate tests with regard to the intellectual quotient (IQ) ranges of the complainant according to the international classification of diseases by the World Health Organization. Two tests were used to assess ability.
- [12] She testified that in respect of the application of the Vineland Adaptive Behaviour Scales (2nd edition 2005) which evaluated everyday adaptive functioning through information obtained from the complainant and his foster mother. The scales covered three areas; communication, daily living skills and socialization. On assessment of the complainant the communication and daily living skills he fell in the range of moderate intellectual disability (IQ 35 to 49). His score on the socialization domain fell in the range of mild intellectual disability (IQ 50 to 69). His adaptive behaviour is composite, or average was likewise in the range of moderate intellectual disability.
- [13] In respect of the test related to his individual scale for general scholastic aptitude, the complainant obtained an aptitude score in the range of moderate intellectual disability. His test age was determined as six years and 11 months.
- [14] In respect of the complainant's understanding of sexual matters, the complainant learned about sex at school, but his understanding of sexual matters was found to be limited. He could however recall the correct names of the male and female sexual parts. He had no knowledge of conception, contraception or sexually transmitted illness. When asked about his opinion of sex between men he replied that it was not normal. Ms. Hundermark found that the complainant was legally unable to give or to withhold consent to sexual intercourse in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007).
- [15] In respect of his competence as a witness the complainant was found to have had no knowledge of court proceedings and the role players. He had a concrete understanding of the concept of truth, falsehood and the making of a promise. He was unable to provide a simple narrative and but could answer some clarifying questions. He was able though to demonstrate the alleged rape with the help of anatomically correct dolls. She found that the complainant was nervous and afraid of the court process, but he nonetheless had the

potential to be a competent witness in court under the following conditions: he should receive court preparation counselling, he should testify outside of an open court with the assistance of an intermediary as he would suffer undue mental stress if he testified in an open court. She was further of the view that in court the problems he would experience

with attention and concentration and his general lack of functioning would need to be taken into account.

- [16] There was nothing of any significance that arose during the cross-examination of Ms. Hundermark other than her reiterating the explanation given to her by the complainant of the manner in which the incidents were alleged to have taken place and with use of a knife by the appellants in subduing him. She conceded that the complainant himself did not have any strong features that characterised his fetal alcohol syndrome.
- [17] The trial was thereafter postponed and upon its resumption the State sought the leave of the court to formally amend the charge sheet to reflect that the application of the minimum sentence was applicable on the basis that the rapes occurred by multiple offenders, a so-called gang rape and that the complainant was mentally disabled. The court questioned the necessity of such an amendment or whether the legal representative of the appellants would confirm that the application of the minimum sentence legislation on the basis of the mental disability and their being allegedly multiple offenders was explained to the appellants in the context of the application of the minimum sentence legislation. The legal representative for the appellants confirmed that he had in fact explained that to each of the appellants and they too confirmed that to the court.
- [18] The State sought in terms of Sections 170A of the Criminal Procedure Act for the complainant to testify via an intermediary on the basis of the evidence of Ms. Hundermark in that he would be exposed to undue mental stress if he testified in the presence of the appellants of who he felt extremely intimidated by. There was no opposition to the application by the defence.
- [19] During the course of his testimony both in chief and in cross-examination and while testifying through the use of an intermediary it was noted from the typed record of the proceedings there were repeated problems experienced with the quality of the sound recording that led to an immense amount of frustration experienced not only by the regional magistrate, the intermediary, the prosecution and also by the defence. The regional magistrate repeatedly raised her concern about the inadequacies and the malfunctioning of the microphones and a recurring disturbing noise in the feedback of the testimony of the complainant and the relay of the evidence of the intermediary through the speakers. The regional magistrate even resorted to having the record typed in order to report the poor state of functioning of the microphones and speakers to the South African Human Rights Commission. While I am sympathetic to the frustration experienced by the trial court of the mechanisms of the court equipment, it was, in my view, a matter that should have been immediately referred to and promptly dealt by the Court Manager, who had ample

opportunity of resolving the problem over the period of almost three months over which the complainant had to testify. I will revert to this concern and the consequence of the repeated malfunctioning of the equipment. Needless to say, having the intermediary and the complainant himself repeat answers via the malfunctioning sound equipment, no doubt and unnecessarily impacted on the complainant's anxiety about testifying in the matter.

[20] The testimony of the complainant is set out no more than briefly and by way of no more than a background to the incidents itself. He was found by the regional magistrate to have understood the difference between right and wrong and the importance of the truth despite his mental disability. He was formally sworn in. He testified that at the time of the incident he was seventeen years old and lived at 2[...] J[...] Street in Tulbagh. He explained that on 17 May 2020, a Saturday evening, he initially stated after 22h00, thereafter stated after 21h00 thereabout, and later stated that it was about 20h30 that

he walked home from a shop that he described as from the Small Prins shacks in Klein Begin, Tulbagh. He explained that that it was then where the two appellants initially attacked him with the first appellant kicking him from under his feet and as a result of which he fell to the ground. The second appellant thereupon pulled him across the road to the side of the shop. The second appellant pulled down his pants while he lay on his stomach. The first appellant held his hands from the front of him while the second appellant got on top of him and as he stated, "he made me clever". He explained that the second appellant then inserted his penis into his anus. As already indicated much of this evidence had to be repeated by the complainant on account of the poor functioning of the sound equipment used by the intermediary and also on account of the complainant's voice not being picked up by the microphone. He demonstrated to the court how he was held from the front by the first appellant with the use of his two fists in front of him. He explained that when the second appellant was done with him, the first appellant did the same to him. He described the first appellant by his nickname "Tambaai". Again, after several questions, he had to clarify that Raydon was Tambaai and Eben (the second appellant) was the other "black" brother. There was again confusion caused with regard to the complainant's testimony and Mr. Swanepoel pointed out and claimed that the intermediary had incorrectly "translated"

the questions to the complainant. The complainant was eventually able to explain that he understood that "Tambaai" was Raydon (the first appellant). He explained that the second appellant's nickname was that of "Rib". When asked if he was sure that it was the first and second appellant who did these things to him his response was that he was sure about it. He also explained that he had known both the first and the second appellant. He claimed, and again after some repetition and confusion, that it was the second appellant who had a child with a cousin of his. He claimed that he knew the appellants from where they lived. After the sexual assaults on him, both of the appellants walked away. He went home and immediately told his foster mother what occurred. She thereupon phoned the police, and he was thereafter taken to a doctor. When asked if he was hurt as a result of what was done to him, he claimed that "I was bleeding from the back by my buttocks". The interpreter at this stage stated "it was hurting at the back of my buttocks" to which the intermediary pointed out that was not what the complainant had testified.

The complainant explained that he bled from between his buttocks. The complainant was then shown a set of four photographs which were entered into evidence with the consent of the defence. The photographs depicted the scene at which the incidents were alleged to have taken place, under a tree near his uncle's yard from which an informal shop was run. He was asked a question of clarification by the court as to what he did in response to the attack on him. He claimed that he was "carrying on". When asked what he meant by it, he said that "they must stop".

[21] The trial was thereafter postponed on account of the court time having run out. It resumed several weeks later, and the complainant was once again assisted in testifying through an intermediary but this time by a different social worker as the previous social worker was unavailable. At the commencement of the complainant's cross-examination, he was asked about various people who he was required to describe. There was some confusion in the manner in which the questions were posed by the defence and in the answers given by the complainant. It was put to him that people by the names of Ellen and Taka, and that he, the complainant, had on a previous occasion assaulted the first appellant. The first appellant therefore laid a charge of assault GBH against him and the others. The complainant readily admitted that he had personally assaulted the first appellant

and that it was correct that the first appellant had laid a charge of assault against him. He confirmed that incident occurred prior to the sexual assaults for which both the first and second appellant were charged. It was put to him by the defence that the charges of rape which he had laid against the appellant was because the first appellant had laid the charge of assault against him and the others. The complainant flatly denied it. He was also cross-examined about whether prior to the alleged incidents he testified about, he was found by the second appellant near the shop at his uncle's premises under the tree where he and a Mr. Eltino Baadjies were busy smoking mandrax. He admitted to having smoked mandrax in the company of Mr. Baadjies. He also explained that when he smoked mandrax "it would tip me over then I fall on the ground" and that he became confused after smoking mandrax. He denied though that when the incidents took place he was confused as a result of having smoked mandrax on the night. He also denied that he was confused in his evidence about the incident and his identification of the appellants as the persons who sexually assaulted him. He explained that he was able to identify the appellants as one of them who he identified as the first appellant had spoken to him while he and Eltino smoked mandrax under the tree. It was disputed by the defence that it was the first appellant who had spoken to Eltino Baadjies and who had found them under the tree but rather the second appellant.

[22] In the course of his cross examination he was also confronted with the statement that he had made to the police in which he mentioned that the appellants had a knife which they used to threaten him with. He had not mentioned that in his evidence in chief. His response was that he had simply forgotten to do so. I should point out that the statement he had made to the police, which was eventually entered into evidence was not co -signed by his foster mother. It also appeared from the record that at that stage of his testimony the intermediary pointed out to the court a quo that his concentration had waned, and that he had indicated

to her that he had not eaten since breakfast that morning and that he was hungry. It also appeared that there was confusion in respect of the questions asked of the complainant and the answers given with regard to who of the two appellants had found him and Eltino Baadjies smoking under the tree. The complainant maintained that it was the first appellant despite it

repeatedly put to him that it was the appellants version that it was in fact the second appellant who had spoken to Eltino Baadjies. The matter was again postponed, this time as a result of the lack of concentration on the part of the complainant and upon its resumption again proceeded with the use of an intermediary, this time with the first social worker who had assisted the court a quo.

[23] Upon resumption of his cross-examination, it was put to the complainant by the legal representative of the defence that at the last occasion prior to the proceedings been adjourned, he testified about being at the shop near the tree where he and Eltino Baadjies smoked and “they spoke to you”. That was clearly incorrect. The complainant never claimed that both appellants spoke to him as he maintained that it was the first appellant who had spoken to him. During the further course of the cross-examination of the complainant the proceedings were interrupted by the court having to adjourn to deal with an attorney concerning a different matter. On resumption there was also a mechanical interruption and once again repeated requests by the regional magistrate and Mr. Swanepoel for the complainant to repeat his testimony on account of them not being able to hear because of the malfunctioning audio equipment.

[24] It was also put to the complainant that at the shop in the yard of his uncle’s premises people had walked up and down at the time at which he claimed the incidents were alleged to have occurred. He flatly denied that there were any people in the vicinity at the time the incidents occurred. He was again cross-examined about his identification of the appellants near the shacks where he claimed the two of them initially attacked him. He maintained that he was able to have clearly seen them and again described that it was the second appellant who had kicked him to the ground. He was once again tasked

in cross examination to explain how he was dragged across from the area of the shacks across the road to where the sexual assaults on him were alleged to have taken place. He also claimed that while being dragged and accosted by the appellants he shouted out for help. He was yet again asked to explain what happened under the tree after they dragged him there and at this point it appeared that the complainant become emotional and asked to go to the toilet. The proceedings were thereupon adjourned for a short while. Upon its resumption he was again cross-examined at length about how the incidents took place under the tree, who of the appellants he claimed held him down in front and the penetration of his anus by the appellants. He was even asked in cross-examination by Mr. Swanepoel as to “what is a penis?” to which he explained that its “your private part”. He was asked as to what was a penis used for to which he explained “to go to the toilet”. He was also asked “what was the use of one’s anus?” to which his response was “to sit on it”. He again explained that when the first appellant inserted his penis into his anus his pants had

been pulled down and so too his underpants to his legs. He again explained that when the first appellant inserted his penis into his anus, he was lying flat down on his chest. And so too, he was again and, in my view, wholly unnecessarily and tediously cross-examined about how the sexual assaults took place by each of the appellants on him. It was also put to him that Ms. Hundermark explained that he was not familiar with sex related topics and yet he was able to explain “a lot about sexual acts and so forth”. He was asked whether someone had told him what to say. His response was that no one had told him to do so.

[25] There were various contradictions pointed out in the statement that he made to the police and in his testimony in particular that no mention had been made of the knife and that in the statement he had said that both appellants had pushed him to the ground. The complainant explained that “I forget a lot of things”. He nonetheless maintained his version with regard to the attack on him by both of the appellants near the shack area and the sexual assault under the trees. It appeared from the record that the complainant began crying in the course of his testimony. He also explained how he attempted resisting the attack on him under the tree by the appellants and recalled that while holding him down and sexually assaulting him the appellants were “laughing in my face”. During further cross-examination, the regional magistrate noted that the complainant’s concentration had virtually diminished. The proceedings were brought to a halt and postponed for further cross-examination.

[26] On resumption he again maintained that it was the first appellant who had confronted him and Eltino Baadjies while they were busy smoking mandrax under the tree. He also maintained that when the first appellant spoke to Mr. Baadjies, he also addressed him which was denied by the appellants. The version of the appellants was put to him to which he confusingly responded to. It had to be repeated as a result of the intervention of the regional magistrate to ensure that the complainant fully understood what was required of him to respond to. He disputed the version of the appellant’s denial of having attacked him and having sexually assaulted him.

[27] The foster mother of the complainant, Ms. Daniels, had indicated to the State that she did not wish to testify in the presence of the appellants on account of her fear of them. The State, however, eventually did not proceed with an application for her evidence to be given through an intermediary but the court a quo allowed for her evidence to be heard while the court proceedings was done in-camera. I should indicate that the parents of the appellants attended the trial, and the State initially sought to exclude the mother from being present on account of the role she and the appellants apparently played after the bail application was heard in the Magistrates Court when they unsuccessfully applied for bail. They apparently threw dominoes in the court room and broke a window.

[28] Ms. Daniels explained that she had brought the complainant up since he was a baby. With regard to the incident, she explained that the complainant was then seventeen years old. On the night of the incident, she was home when he arrived. She asked him why he looked so “bland, why is he looking pale”. It appeared to her that his clothing had been pulled to the

one side and it looked like he had been pulled about. She also noticed that there were tears running down his face and that when she looked at his pants it appeared to be red, stained with blood. He told her that it was merely mud. She explained that he had on a green long tracksuit pants. She responded to him that it was blood that was on his pants and that he had marks on him that looked like “knife stabbings”. She claimed that she immediately went inside the house and phoned the police. Mr. John Jones, a police officer, answered and informed her that she should properly examine the complainant and that he would arrange for an ambulance. She then pulled down the pants of the complainant and observed that there was “blood coming from his anus”. At that stage Ms. Daniels broke down in tears. She claimed that when she saw the blood she again phoned the police. She claimed that all the complainant had said to her was that it was Rib and Tambaai and that he was going to get them. She explained further that the whole of his pants at the back was full of blood and that it ran down his legs. She had given his pants to the police. She identified in court the appellants as being Tambaai and Rib respectively. She also explained that her baby son had a child by a cousin of theirs and that the appellants did not live far from them. When asked about the impact of the incidents on

the complainant she explained that he had become aggressive and that he had a scarred wound on his anus. She explained how hurt she felt by it all and the fact that his dignity had been “taken away and how people had shouted at him” about the incident. She likewise became emotional during her testimony. In cross-examination she stated that the complainant did not have any bleeding problems in his anus prior to the incident. She also explained that there was blood not only on the pants but also on both of his legs. The complainant did not tell her initially what happened. She was asked whether he did so afterwards to which she explained that he did and said it was both Tambaai and Rib who had pulled him across the road where they pulled his pants down and that Tambaai first and thereafter Rib sexually assaulted him. The appellants version of their denial of the sexual assault on the complainant was put to her. She also explained what she referred to as “knife stabbings” on the complainant’s buttocks. It appeared that the marks had been caused by the manner in which he was dragged by the appellants.

[29] At the resumption of the hearing on the postponed date the State applied for the court to make an exception to the best evidence rule for the J88 report to be accepted into evidence as Dr. Mukombe was not available to testify. He was no longer based at the Ceres Hospital and had relocated to the rural Eastern Cape. The prosecution had been in contact with him. Initially, it appeared that he was unable to attend court because his wife had given birth but had since not been available at all. She claimed that he had stopped replying to emails sent to him from the State. The State claimed that it had also been unable to obtain an address for him in order to serve a subpoena on him. The prosecutor informed the court that she had also sent further e-mails to him requesting certain information, but he had not been forthcoming, and that the State had gone as far as to

motivate for an airline ticket for him to travel from the Eastern Cape. She claimed that he had simply not responded at all. The State sought to hand up its unanswered email correspondence sent to Dr. Mukombe, but the defence had not been given copies of it prior to the proceedings for them to consider their position. The State however indicated to the court a quo that it intended calling Dr. Crous in the place of Dr. Mukombe as she had studied the J88 and she would give an expert opinion on its content and conclusions. The regional magistrate invited Mr. Swanepoel to consider his clients position and to advise whether they needed more time to do so or whether the court could provisionally hear the evidence of Dr. Crous. The regional magistrate noted though that if the appellant's legal representative was "uncomfortable with it, he would give him the opportunity to go and study the law and see what he could come up with". Mr. Swanepoel thereupon indicated that the evidence of Dr. Crous could provisionally be entered into evidence. The court did so on that basis and that argument on the admissibility of the J88 and that of Dr. Crous would be dealt with later by the defence.

- [30] Dr. Crous placed her qualification as a medical doctor and expertise in family medicine on record. She explained that Dr. Mukombe was stationed as a locum doctor at Ceres Hospital in 2020 through an agency. She confirmed that she had studied the J88 completed by Dr. Mukombe. She was requested by the State to read it into the record and also to express her expert opinion with regard to the findings and conclusions contained therein.
- [31] The examination by Dr. Mukombe of the complainant had taken place on 17 May 2020 at approximately 23h30 at the Ceres Hospital. The details of the complainant were entered on the document and his gender as male. His date of birth however was not recorded. Under the heading; General history of the complainant; it was recorded that he was a "defaulter epileptic drug user," his clothing was recorded as normal, and his general body built also as normal. Part 5 of the J88 dealt with the clinical findings where Dr Mukombe stated "small bleeding anal lacerations". In respect of the complainant's mental health and emotional status, the abbreviation "NAD" was noted which in medical terms referred to "No Abnormalities Detected". In respect of clinical evidence of drugs and alcohol, Dr Mukombe noted; "none". He concluded under Item 8 "normal clinical examination" which according to Dr. Crous contradicted what he had stated at point 5 of having noted "small bleeding anal lacerations." She explained that the lacerations were an indication of a blunt force injury. She claimed that the presence of the laceration or the injury to the peri-anal area could "thus not be a normal finding on examination". On the second page of the J88 he crossed out the whole of part D which dealt with "History in the case of alleged sexual offence" and part E; "Gynaecological examination." On the third page of the J88 under part F, he recorded that samples were taken for investigation and recorded the seal number of the evidence collection kit. The specimens were handed to a Sergeant Hopley. Dr. Mukombe crossed out the part that dealt with "Conclusions." Part G dealt with; "Anal examination", the first item related to "skin surrounding the orifice". In respect of item 1, "hygiene", Dr. Mukombe recorded "good," item 2; "pigmentation" he recorded "none" item 3; "fissures or cracks" he recorded "none," and under "abrasions", Dr. Mukombe's handwriting appeared illegible. Item 5; "scars" he recorded "none" and item 6, "swelling/thickening" he recorded "none"

Under item 7; “redness/erythema” he recorded “none.” Item 8, “bruising/hematoma” he recorded “none” and he drew a line through item 9; “tags.” Tags relates to pieces of skin. Dr. Crous was of the view that the examination of the skin surrounding the orifice contradicted the recordal in item 5 of the J88 where Dr. Mukombe had noted the “small lacerations.” The State also pointed out that item 4, “abrasions” was likewise illegible and should have correlated with item 5 under “general examination” in respect of the lacerations found.

- [32] The following section under the heading “Anal Examination” related to the “Orifice” where item 10 “tears/fissures” also appeared to be illegible, item 11, “swelling/thickening of rim” was recorded as “none,” item 12; “funnelling” was recorded as “none,” item 13; “reflex dilation”

was recorded as “none,” item 14; “shortening/eversion of anal canal” was recorded as “none,” item 15; “cupping” recorded as “none” item 16, twitchiness or winking was recorded as “N and a line”

item 17, under “discharge;” “blood” was recorded. Dr Crous explained that cupping referred to an indent on the inside of the anus. In respect of item 18; “digital examination,” related to the presence of hard faeces in rectum, of which none were recorded. Item 19; “laxity” (pressure on anal orifice) “none” was recorded, item 20; “thickening of anal verge” the recordal was illegible. Item 21; tone, sphincter grip, “none” was recorded.

- [33] In respect of item 21, where Dr. Mukombe recorded that the sphincter grip was “none” Dr. Crous was of the view that on performing a digital examination of the rectum one would in layman's terms examine how tightly the anal canal grips around one's finger. Dr. Crous was of the view that the recordal of “none” was not an appropriate answer. Under item 22; “conclusions” Dr. Mukombe recorded “small lacerations” the rest of Dr Mukombe's writing was again illegible. Under H; “male genitalia” Dr. Mukombe crossed out the entire subsection. Under “conclusions,” he again recorded “NAD” Dr. Crous was likewise of the view that the “NAD” recordal did not correlate with the previous findings as once there were signs of trauma seen it could not simply be recorded as no abnormalities detected. Dr. Mukombe had signed each of the pages of the J88 report with his practice number inscribed at the bottom.

- [34] On the last page of the J88 were diagrams. The first section of the diagrams was that of the perineum of both a male and female on which Dr Mukombe noted nothing at all on the diagram and appended his signature below it. Dr. Crous was again of the view that this recordal did not correlate with the previous findings of Dr. Mukombe. There was a second set of diagrams in which he had simply drew a circle in the centre of the buttocks with a line drawn that stated, “small lacerations”. He again signed the bottom of the page with his initials.

- [35] When asked by the State as to the cause of the trauma noted in the J88 report her view was that the injuries noted by Dr. Mukombe were indicative of a blunt force injury to the peri-anal area. In respect as to how such an injury could have occurred, she indicated that she

was unable to speculate. She was however of the view that an object was used to inflict the injury. Such an object could in her view have been either be an inanimate object or bodily force. She explained that the blunt force trauma was caused as a result of the object coming into contact with the peri-anal area. When asked by the regional magistrate, that looking holistically at the J88 report whether there had in fact been a proper digital examination by Dr Mukombe of the complainant, Dr. Crous` s response was that she did not wish to speculate but as she read the J88 report it appeared to be unlikely. In further questions of clarity from the court, with regard to whether the injuries noted could have been caused as a result of constipation, Dr. Crous discounted it. However, Dr. Mukombe had not indicated that the trauma was in the peri-anal area. As already indicated, with regard to tears and fissures he indicated that there were none and it therefore appeared to Dr. Crous that there was no physical trauma on the sphincter itself but there was a possibility of surrounding trauma. Dr. Crouse also noted that Dr. Mukombe noted that there were abrasions on the skin surrounding the orifice although his writing was not entirely legible. Dr. Mukombe did however note in the J88 report that there was a laceration in the anal area and that there had been bleeding.

[36] In cross-examination Dr Crous was asked as to whether the peri-anal area included the buttocks to which she explained that it did not as it related only to the skin surrounding the anus. She indicated that it appeared from the anal examination recorded in items 1 to 21 that nothing abnormal or no trauma was indicated. She explained the relationship between points 21 and 13 (reflex dilation) where “none” was indicated. In Dr. Crous’s view, if the tone was decreased

one would have had a reflex dilation and the cause of the dilation would according to her knowledge be as a result of trauma or a spinal cord injury. She was also questioned with regard to item 5 of the general examination where the wording was not entirely legible. It was put to Dr. Crous that it could not be assumed that there was an indication of trauma to the anus but rather to the buttocks. Her response was that she was unable to comment on exactly what Dr. Mukombe meant.

Dr. Crous also indicated that a doctor would normally make notes in the hospital file of the patient. She however had not read the file of the complainant. She confirmed that there were no other injuries recorded in the J88 report, such as scarring or trauma to the legs or the back of the complainant. When questioned with regard to the bloodstains that were found on the pants of the complainant Dr. Crous explained that Dr Mukombe had recorded in the J88 with regard to the examination of the orifice and item 7 indicated that there was a discharge of blood. She was of the view that blood would have originated from the orifice itself. She conceded that without the use of instrumentation it would have been difficult to have determined the wound that caused the bleeding but that it was possible for an injury that originated inside the anus to have caused the bleeding to the extent that the person’s underwear was soiled with blood. Dr. Crous refused though to speculate on the extent of the bleeding. She was also asked whether the injuries indicated that the complainant had been injured/penetrated more than once. The court clarified

the question by indicating that the complainant had testified that he had been unlawfully penetrated more than once in his anus. Dr. Crous's response was that based on her knowledge and experience if somebody bled from his anal canal it was a "serious

injury". She stated though that it would be difficult to speculate whether penetration occurred more than once.

- [37] Upon the conclusion of Dr. Crous's testimony the regional magistrate inquired from Mr. Swanepoel whether the evidence could be finally admitted into evidence or whether he first wished to consult with the appellants and consider the testimony of the doctor. Mr. Swanepoel's response was "I am not sure your worship". The regional magistrate indicated that she would make a note of the issue and that it would be dealt with at the resumption of the proceedings. The J88 was marked "provisional" at that stage and the trial was postponed for further evidence.
- [38] At the recommencement of the proceedings the regional magistrate pointed out that the State had not yet closed its case, and that the court had still to make a final decision with regard to the admission of the evidence of Dr. Crous and the J88. Mr. Swanepoel on behalf of the appellant stated, "I've got no objection for the J88 to be handed in and form part of the record...". The State's responded by asking whether that included the evidence of Dr. Crous being admitted. Mr. Swanepoel thereupon advised the court, that it would still have to address the court on its "probative value I will address the court later". Mr. Swanepoel nonetheless was of the view that the J88 could be handed in as "as a final exhibit".
- [39] It was apparent that Mr. Swanepoel on behalf of the appellants admitted the hearsay evidence in the form of the J88 but reserved the appellant's right to address the court on the probative value of the J88 and that of the evidence of Dr. Crous. In that regard the regional magistrate recorded "exhibit D" (J88) as entered as final subject to the address as regards to evidentiary value and the evidence of course. The State thereafter closed its case.
- [40] The first appellant thereafter testified. He confirmed that he knew the complainant as the complainant was the person that had assaulted him prior to the complainant laying the charges of rape against him and the second appellant in this matter. He claimed that incident occurred on 9 February 2020. In respect of the incidents for which he and the appellant had been charged with, he claimed that he was at his mother's house on the day and recalled that it was a Sunday. He claimed that he was in the company of his girlfriend, Hajunay, and that they were in a relationship at the time. He claimed that she has since moved on to another boyfriend. He did not know where she was located as she no longer resided in Tulbagh. He explained that he and his girlfriend were at the premises the whole day as they had slept for the better part of the day and at about 5:00pm commenced watching television until the night. He claimed that when it got dark the second appellant's "wife" arrived and said that there were people looking for him. She said that the people brandished pangas and knives, and they claimed that he and the

second appellant had “raped someone”. He explained that his brother was not married but it was his girlfriend. He claimed

that she then asked where his brother was, and he informed her that he was at the back of the shack in which he lived. He and his brother thereafter decided that they would go down to the police station. He claimed that on their way to the police station they came across a police officer a Mr. Adjura Makala and they said to him they had just heard that the complainant had laid charges of rape against them. Mr. Makala apparently said to them that the complainant was at the police station to open a case, but that he would first be taken to the hospital by the police. Mr. Makala apparently said to them that they should go home and that when the police sought them, they would find them at their home. The version of the complainant was put to him with regard to the incidents to which the first appellant denied any knowledge. In cross-examination it was put to him that the complainant could have elected to implicate any persons in the area in which they lived but had fingered him and his brother. The first appellant responded that the reason was that “him and his people are plotting against me because of the case that I have opened against him, and the plot is against myself and my brother”. He added that the complainant had “even come to me with money and wanted me to withdraw the matter but I refused”. He was unable though to give any explanation or reason as to why the complainant would implicate the second appellant in the matter. The first appellant also claimed that “there are also people that are behind him helping him to do what he is doing, these American people”. He claimed in response to a question from the State. He stated that he was not speculating about it but that it was their leader a person by the name of Elderin who was an American (gangster)

that had influenced the complainant to make up the false claims against him. When pressed by the prosecutor as to why this was the first time the version about Elderin was raised his response was that “I am not going to answer that question”. He claimed further that in the incident in which he was assaulted by the complainant it was “when Elderin told him hit him and then he hit me”. When asked what Elderin had against him he explained that Elderin and the JCY’s were fighting and that his cousins were JCY’s (members of the Junior Cisco Yakkies gang).” The first appellant claimed that that he was a member of the 28’s gang and also of the (HL) Hard Livings gang. The first appellant claimed that the reason why the complainant had laid a case against

him was because he and the second appellant often spoke to the JCY’s who were his cousins and because they (the JCY’s) had stabbed the complainant and the complainant thereafter assaulted him. The first appellant claimed that the complainant had also laid charges against members of the JCY and he thereafter together with Elderin and the mother of Elderin assaulted him. The first appellant therefore laid the charges of assault against all three of them. The prosecutor put it to him that he was literally grasping at straws in his explanations. The first appellant maintained though that he had no idea as to why the complainant had laid the charges of rape against the second appellant and that the second appellant would himself explain when he testified. The first appellant accepted that the complainant had been examined by a doctor and that bleeding was found as well as cuts (the lacerations) on his body. The first appellant claimed though that he bore no knowledge as to how the injuries were caused.

[41] The first appellant was cross examined about his version of having been in the company of Hajunay during the course of the day. The State undertook to assist the defence in subpoenaing her for the defence.

[42] The State put to the first appellant that his evidence was that when they met the police officer, Mr. Makala, while apparently on their way to the police station, they had said to him that they were being accused of rape by the complainant. It was pointed out that in his earlier testimony he had not claimed that the second appellant's girlfriend had mentioned the name of the complainant at all. Yet they were able to give his name to police officer. The first appellant claimed that he did in fact mention the name of the complainant as relayed to him by the second appellant's girlfriend but that the prosecutor may not have heard it as he stammered while speaking. The regional magistrate thereupon confirmed from her own notes that no mention was made of the complainant's name in the report by the second appellant's girlfriend. The second appellant

thereupon stated that he had forgotten to say that the name of the complainant was in fact given by the second appellant's

girlfriend. He also maintained that it was as a result of his stuttering that it may also not have been heard by the regional magistrate. While the regional magistrate noted that the first appellant did have a stutter when he previously testified, the stutter had completely abated in his further testimony. When being pressed by the State as to why he had not mentioned that the second appellant's girlfriend had mentioned the complainant's name he claimed that it was because he did not understand high

Afrikaans and later claimed that it was because he had been in custody for so long and that he had endured much pain and also as a result of the throat cancer suffered by his father and that he was responsible for raising three kids, all of which, caused him to have forgotten to have mentioned that his girlfriend had informed them that it was the complainant who had made the allegations against him and the second appellant in his earlier testimony. The prosecutor eventually put to him that the reason why he and his brother had accosted and sexually assaulted the complainant was to exact revenge on the complainant for having assaulted him. The first appellant disputed that. He also claimed that he did not know the date on which the incident was alleged to have taken place but that his alibi was that he was with his girlfriend the entire day when the complainant alleged that he had been raped by him. He explained that all he could recall was that it was on a Sunday that his brother's girlfriend informed him that there were people looking for him and his brother because of the alleged rape by them of the complainant.

[43] The defence closed the first appellant's case after his testimony.

[44] The second appellant thereafter testified in his defence. He confirmed that he knew the complainant but only by sight as they were not friends. He claimed that there were no problems between him and the complainant. On the night of the incident, he had gone to what he referred to as the "tuck shop" which was situated on the premises of the complainant's uncle. The window through which the public was served at the tuck shop was

closed. He thereupon saw the complainant and Eltino sitting under a tree smoking “drugs”. He confirmed through pointing out on the photographs where he saw the complainant and Eltino smoking under the tree. He claimed that he asked Eltino if he could take a puff from the pipe that they were smoking and that he would purchase half a mandrax for them in return. Eltino’s response was that he did not smoke “buttons”.

He then said to him that he was merely making a joke and asked where he could find a shop that was open. Eltino pointed out a shop across the road to which he proceeded. The shop was also closed, and he claimed that he thereafter walked directly home. He claimed that upon arriving at home he went through the front door to the backyard where there were shack dwellings. He went to sit at the shack that was occupied by the children of his sister. He claimed that he waited for his sister’s child’s boyfriend to come home as the two of them were meant to discuss the roof that he was to have repaired for them. Upon the boyfriend’s arrival, they discussed holes in the roof that he would repair. He remained there for a while. He then heard people speaking loudly. His brother, the first appellant, came to the back of the house and told him that he should listen to what his girlfriend had to say. She told him that there were people armed with pangas that were looking for them as they claimed the appellants had raped the complainant. They decided they would walk to the police station whereupon they came across Mr. Makala as the first appellant testified. They however did not see any of the people that were apparently after them. They returned home after Mr. Makala had told them that the complainant was at the police station. He denied any knowledge of the rape. He claimed that when he had come back from the shop, he found the first appellant in the front room with his girlfriend watching television. In cross-examination he confirmed that he knew the complainant merely from sight. He claimed though not to have had any problems with the complainant. He claimed that in 2019 his friends had fought with friends of the complainant. He could not give any explanation as to why the complainant had involved him in allegations of rape as there were no problems between them. He claimed though that he did agree with the first appellant that it could be a plot by the complainant against them. In response to questions with regard to what he had said to Eltino when he found him and the complainant under the tree smoking, he claimed that he had not spoken directly at all to the complainant. He was however unable to say whether the pipe which the two of them had been smoking may have belonged to the complainant as opposed to Eltino. Yet he had not asked both of them if he could share in smoking the pipe. He also claimed that he had no intention of smoking from the pipe and that it was merely a joke. He also claimed that he was unable to recall the name of the boyfriend of his sister’s child whom he had spoken to about repairing the roof. He had known him for some time though. He claimed that the child and the boyfriend no longer lived there, and they had been unable to trace them to come and testify on his behalf and to confirm his version. He claimed that he did not intend calling them as alibi witnesses as he was certain of his innocence. He also claimed that he did not wish to call any other witnesses in support of his defence. He claimed though that he would want Eltino to be called as a witness in support of his version against that of the complainant. He claimed that he was unaware that the complainant had a disability and “a head problem” as it was put to him by the State.

- [45] The matter was thereafter postponed to enable the State to assist the defence with securing the attendance of the witnesses. At the resumption of the proceedings, Mr. Swanepoel indicated that he had discussed the matter with the mother of the appellants who was in contact with their family members who were meant to have been called as witnesses. They indicated to her they had no financial means to attend court. His clients therefore elected not to call any of the alibi witnesses. The witness, Eltino Baadjies had also not responded to a subpoena issued against him by the State. The appellants elected not to pursue his evidence any further despite his failure to respond to the subpoena and closed their case.
- [46] In his address on the merits on conviction Mr. Swanepoel referred, amongst others, extensively to the evidence of Dr. Crous and that of the records made by Dr. Mukombe in the J88 report. He criticized Dr Crous for not having read the file notes made by Dr. Mukombe other than the J88 report. He pointed to the various contradictions contained in the J88 report and submitted that the report held very little evidentiary value. Needless to state, the State for its part contended to the contrary and asked the court a quo to accept the evidence of Dr. Crous and in particular her interpretation of the notes and records made by Dr Mukombe in the J88 and her expert opinion in relation thereto.
- [47] The regional magistrate in her judgment dealt in detail with the evidence tended on behalf of the State and that of the appellants. She referred at length to the evidence of Dr. Crous with regard to the J88. She pointed out that in the light of the “atrocious” quality of the clinical examination by Dr. Mukombe as reflected in the J88, Dr Crous was unable to testify as to the direction of the blunt force trauma which had been administered to the anus of the complainant. Nonetheless, Dr. Crous had testified that blood was present in the anal area which she herself described as indicative of a serious injury. The regional magistrate also set out at length what was common cause in the evidence of the State and that of the defence. It bears no repetition. She pointed to the fact that she had to consider the evidence of the complainant with both caution and care. She noted that he had become confused at times during the course of his testimony. She also noted that the matter had, as a result of the complainant experiencing a lack of concentration on a number of occasions, to be postponed and that his testimony was in fact heard on no less than four occasions over a period of three months. The regional magistrate was satisfied that the complainant was not only a competent witness but that he had made a positive impression on her. She also noted that he made several concessions which was indicative that the complainant did not seek to unnecessarily prejudice any of the appellants. The complainant

readily conceded that he had assaulted the first appellant prior to the charges of rape being laid against them. He also conceded that he was a drug abuser which led him to become confused at times. The regional magistrate was of the view that the complainant was able to explain the discrepancies in his version, in particular that which was contained in his statement to the police that he had been threatened with a knife. He claimed that he had forgotten the presence of the knife. I should indicate that he did mention the use of the knife in his interview with Dr. Hundermark when she obtained details of the incident from him.

- [48] The regional magistrate was of the view that the discrepancies in the testimony of the complainant, was in part, indicative of the extent of his confusion. She was of the view though that when the evidence of the complainant was considered in its totality, the contradictions were not material and did not detract from his overall version of the physical attack on him by the appellants and the sexual assaults. She pointed out that the exercise of caution of the evidence as required by law did not detract from the exercise of common sense in the evaluation of the complainant's testimony. She also referred to the fact that in the light of the assessment of Ms. Hundermark of the complainant. His evidence had also to be treated as that of a child. The regional magistrate noted that despite Ms. Daniels having been distressed and traumatised during the course of her testimony, her evidence supported the first report made by the complainant to her. Importantly, Ms. Daniels gave a description of the clothing of the complainant and the blood she observed in his anal area. The court a quo found her evidence to be both credible and trustworthy. In her assessment of the evidence of Dr. Marisa Crous the regional magistrate referred to the relevant case law when dealing with expert testimony. She was satisfied that Dr. Crous provided independent assistance to the court by way of her objective opinion in relation to matters that were in her area of expertise. Having considered her testimony she was of the view that no doubt could be cast on her expertise or independence. The court a quo was also of the view that the clinical findings recorded in the J88 correlated with the observations by Ms. Daniels about the blood-stained clothing and bleeding from his anus. The regional magistrate noted that Dr. Crous had also readily conceded to several aspects in the J88 report on which she was unable to express an interpretation or offer any opinion because of the poor quality of the report. She thereupon carefully considered the credibility and version of each of the appellants and noted the contradictions in their evidence which were visibly apparent from the record of the proceedings. She pointed to what she regarded as the sheer coincidence of the injuries which were suffered by the complainant on the very night that he claimed to have been accosted and sexually assaulted by the two appellants, all of which were confirmed in the medical examination and in the observations by Ms. Daniels. She dismissed the contention by the appellants that it was no more than a plot against them by the complainant and that he had been influenced by others to make false claims against the two of them. She found that both appellants had impressed her as dishonest and rejected their versions as not reasonably possibly true. She found that the State had proved its case beyond reasonable doubt.
- [49] I have already indicated that the assessment of both the credibility and reliability of the complainant's testimony and the quality of his evidence which appeared at various parts of the record to be confused and at times inconsistent had to be assessed in the context of the diagnosis of him by Ms. Hundermark. Her findings and evidence was that the complainant's functioning was assessed at the range of a moderate intellectual disability. Ms. Hundermark assessed his functioning as that of a child of six years and 11 months. It is through that prism, inter alia, that his evidence had to be assessed and the apparent confusion that was elicited not only in chief but also during a lengthy and in the excruciating cross-examination

by the defence. In my view, the examination of the complainant would have contributed in no small measure to the secondary trauma he was exposed to. As already indicated, the evidence of the complainant also had to be considered within the context of him testifying through an intermediary and where the sound equipment did function properly and that on numerous occasions, he was required to repeat his answers at the instance of the regional magistrate, the defence and the State. Needless to say, that would have compounded his anxiety and contributed to the at times confused answers that he gave. In considering the evidence of the complainant one need only

step back, carefully look at the complainant's version in context and mindful of his limited functioning, determine whether on the conspectus of all the evidence including that of Ms. Daniels, the medical evidence of Dr. Crous and at times the incoherent recordals in the J88. In my view, his testimony could not be rejected. He maintained a highly probable version and the circumstances in which the initial assault took place on him in the area of the shacks of Klein Begin, being dragged across the road and there sexually assaulted by each of the appellants. Despite the repetitive cross-examination by the defence legal representative he maintained his version on these crucial aspects of his testimony. That version of his remained unassailable, despite the confusion in the narratives that surrounded the incidents.

- [50] Importantly, his version was supported by Ms. Daniels who made the observation of his rugged appearance and the blood-stained clothes and when physically examining him observed that there was still blood emanating from his anus. She explained that when she saw it, she again called the police who promised to send an ambulance to attend to the complainant.
- [51] It is apparent that Dr. Mukombe had paid scant regard to the complainant in his examination of him. He had not even taken down his age and had not even bothered to fill in large parts of the J88 including item D, "History in the case of alleged sexual offence". His handwriting was moreover illegible and seriously compromised the efficacy of his report. On the face of it, his recordals, demonstrated that he had simply failed to have appreciated the seriousness with which he was required to have conducted the examination of the complainant and to have filled in each of the items on the form. His recordals as already indicated in the evidence of Dr. Crous were contradictory, in particular with regard to his clinical finding of "small bleeding anal lacerations" where he simply concluded the examination as "normal." Dr. Crous had systematically dealt with each of the items in the J88 and pointed out inconsistencies in the observations and recordals made by Dr. Mukombe. He had not even bothered to depict on the diagram of the perineum where the small lacerations were and did so only on the second diagram with reference to the buttocks. The regional magistrate, in my view, was correct in her acceptance of the expert testimony delivered by Dr. Crous and her interpretation of the "atrociously" filled in J88 report of Dr. Mukombe. She correctly noted that Dr. Crous had correctly conceded when required and desisted from any speculation in the light of the poor quality of

the J88 report. More importantly was her finding that the bleeding emanated from the anus that was indicative of a “serious”

condition. I have no hesitation in accepting the expert testimony of Dr. Crous.

[52] I should point out that the evidence of the J88 report was, in my view, not properly considered by the court a quo as hearsay evidence which it was both in fact and in law. Neither the State nor the regional magistrate and most of all, the defence failed to deal with it as hearsay evidence that had to be dealt with in terms of the prescripts of Section 3 of the Law of Evidence Amendment Act 45 of

1988. The State merely sought to have the J88 admitted as an exception to the best evidence rule.

[53] In considering the J88 report, I am mindful of the approach adopted by *Cameron JA S v Ndhlovu and Others* 2002 (6) SA 305 (SCA) in the evaluation of hearsay evidence and its admissibility in terms of the factors set out in subsection 3(1)(c) of the Act.

[54] The J88 report was with the consent of the defence entered into evidence provisionally subject to them considering their position. At the resumption of the hearing Mr. Swanepoel on behalf of the appellant’s admitted the J88 into evidence effectively accepting the hearsay evidence and only reserving the appellant’s right to deal with the probative value of the report and the cogency of the expert testimony of Dr. Crous. In my view, the regional magistrate ought to have been alive to the fact that she was in fact dealing with hearsay evidence and that it had to be dealt with in terms of Section 3 of the Law of Evidence Amendment Act 45 of 1988. Fortunately, the defence admitted the hearsay evidence and obviated the need for the regional magistrate to have made a detailed finding as to its admissibility prior to the State closing its case. In my view, it would in any event, have met the stringent requirements for its admissibility in terms of the Act.

[55] In the consideration of the evidence of the complainant I am particularly mindful of the oft quoted dicta in *S v Dhlumayo* 1948 (2) SA 677 (A) that the court a quo was steeped in the atmosphere of the trial and was thereof best suited to determine the demeanour and the credibility of the evidence of the witnesses before it. Neither of the appellants impressed as credible witnesses. That was correctly pointed out by the State during the course of their testimony, particularly the first appellant. He was quite happy to

chop and change his testimony whenever it suited him. While the State is not required in law to demonstrate and to prove any motive on the part of the complainant to falsely implicate the appellants it was clear beyond any doubt that they had sought revenge against the complainant for him having previously assaulted the first appellant. Notwithstanding that, criminal charges had also been laid by the first appellant against the complainant. What the appellants had opportunistically appeared to do was that one of them had observed the complainant smoking with Eltino Baadjies earlier that evening and they later came upon him amongst the shacks in Klein Begin. They floored him, dragged him across the road and there each of them in turn sexually assaulted him by penetrating him in his anus with their penises. They did so with the

utter abuse of their power in having found the complainant in a vulnerable condition, alone in the dark in the shack area. Their conduct was predatory as the complainant was literally at their mercy, having been threatened with a knife and unable to provide any real resistance against the two of them.

[56] Their versions about having only been alerted to the incidents by the second appellant's girlfriend who apparently heard that there were people with knives and pangas out to get them because of their alleged rape of the complainant was in my view, hopelessly lacked any credibility. As pointed out in the cross examination of the first appellant he was not informed by the second appellant's girlfriend as to who they were alleged to have raped but yet they were able to inform the police officer who they encountered on their way to the police station that it was the complainant who had laid the charges against them. The appellants carried no onus to prove their alibi. They, however, had simply made little or no attempt to

find their alibis and it was only at the behest of the State that any attempt was made by their legal representative to inquire about the whereabouts of their alibis. Moreover, it was not even clear that the appellants or their legal representative had consulted with Mr. Eltino Baadjies with regard to the version that he would have proffered to the court. It was therefore of little surprise that no effort was made by the defence to secure his attendance upon his failure to heed the subpoena.

[57] I am equally satisfied that the regional magistrate had correctly rejected the version of the appellants as not being reasonably possibly true. I am more than satisfied that the State has proved beyond reasonable doubt the rape by each of the appellants of the complainant.

[58] In respect of sentence, the appellants faced the prospect of life imprisonment unless they were able to demonstrate substantial and compelling reasons for the regional magistrate to have deviated therefrom. The State proved previous convictions against each of the appellants, which they admitted. The first appellant had been convicted of housebreaking in 2009 and sentenced to a period of 24 months imprisonment. In 2011 he was convicted of the unlawful possession of drugs. The first appellant was again convicted of the unlawful possession of drugs in 2018 and fined. In 2013 he was convicted of theft and in terms of sections 276(1)(i) of the CPA, was sentenced to 24 months imprisonment. In 2018 he was likewise convicted of theft and sentenced to three years imprisonment of which 18 months were suspended. In May 2019 he was convicted of having absconded, having been on correctional supervision and was sentenced to six months imprisonment. The second appellant was convicted of housebreaking in 2001, and the sentence was postponed for five years. In March 2001 he was convicted of two counts of housebreaking for which on the first count he was sentenced to four months wholly suspended for five years and on the second count the sentence was postponed for a period of five years. In November 2002 he was convicted of robbery and sentenced to 24 months imprisonment. In November 2002 he was convicted of robbery and sentenced to nine months imprisonment. In March 2007 he was convicted of the possession of items of which he was unable to give an explanation and

sentenced to 18 months imprisonment, wholly suspended for four years. In April 2008 he was convicted for the possession of drugs and sentenced to a fine.

[59] I should at this stage indicate that for the purposes of sentence the regional magistrate generously regarded each of the appellants as first offenders other than to record their history of previous convictions.

[60] The appellants tended the evidence of their mother Ms. Rachel Skippers in mitigation. She testified that she was sixty four years of age and her husband who had been diagnosed with throat cancer was sixty two years of age. Both, received a state pension. She has had to leave her temporary employment as a result of her husband's condition. She explained that she supported and looked after two of the second appellant's minor children. She also had to look after the female child of her deceased daughter. All the children resided with her. The second appellant's children were ten years and fourteen years respectively. She claimed that their schoolwork had suffered as a result of the incarceration of the second appellant. Her husband was in and out of hospital and she really did not know what to do as she was literally unable to sleep at night. She claimed that the first appellant had worked with her in Saron as a grape packer. The second appellant worked on a farm in the Tulbagh area where they also harvested grapes. She has lost that financial assistance from the appellants to support her family and the children. They also had debt which they had to service. She maintained that the appellants were not guilty because she claimed they were "at home on that night".

[61] When asked by the prosecutor as to what her request was of the court in respect of the sentencing of her children, Ms. Skippers maintained that the appellants were at home on the evening of the incident together with the first appellants girlfriend and "with me the whole day and that evening we were sitting, singing choruses". The regional magistrate appropriately pointed out that she did not wish to hear evidence from her with regard to her version as to where the appellants were at the time of the incidents. In cross-examination she further explained that the first appellant had completed school in Grade 6. She claimed the reason was that he felt he did not want to continue with his schooling. He was probably at the age of 15 years at that stage. She claimed that the first appellant wished to go and work in order to assist her. In respect of

the second appellant who was the youngest of her children she explained that he attended school in Paarl and continued up to Grade

7. He did not wish to attend school any further and she was unable to force him to do so. She explained that the appellants had lived with her, together with the young children as there was no other accommodation for them. It was pointed out to her that both

appellants claimed that they were members of gangs. She denied any knowledge thereof. She was even unable to explain the presence of a tattoo on the forehead of the second appellant with the inscription "RIP." She claimed not to know the reason why he had done so. She was also asked

about the incident in court after the bail application where the appellants, in her presence, had thrown dominoes around, in which the window of the court was broken. She claimed not to have known why they did it. She also explained that she received a grant in respect of each of the second appellant's children of R460 per month each. The mother of the second appellant's children lived in Durbanville with her own family. The granddaughter born of her deceased daughter lived with them and she also received a state grant. She testified that she spoke from a broken heart as a mother whose children were facing lengthy sentences.

[62] The defence thereafter addressed the court ex-parte on sentence and with reference to the oft quoted cases relating to sentence and the application of the prescribed minimum sentence Act. Mr. Swanepoel pointed out that the first appellant was 30 years old, he was not in any relationship as after his incarceration his girlfriend broke up with him and had found a new lover. The appellants had for the past twenty two years stayed in the four-roomed brick house of his family in Tulbagh. The first appellant worked on a farm in De Hoek where he earned between R1500 to R2000 per fourth night. He claimed that the first appellant contributed towards their household expenses. He also claimed that the instructions from the appellants was that from a young age they were exposed to the use of drugs. In respect of the second appellant, he was the father of two children, and he had worked as a general worker on farms and received an income of R1800 per fourth night.

[63] The defence contended that the appellants had from a young age been exposed to drug and alcohol abuse and violence in the community of Tulbagh. They also belonged to gangs in the area. Mr. Swanepoel contended that although rape was a serious offence the incident relating to the complainant was not one of the worst incidents of rape. He contended that from the evidence in the J88 report there were no life-threatening injuries sustained by the complainant during the incident. He contended that the court a quo should not simply bow to the dictates and demands of the community with regard to the seriousness of the offence. He addressed the court with regard to the dicta in the oft quoted decision of *S v Malgas* 2001 (1) SACR 469 SCA with regard to the determination of an appropriate sentence and whether there were any substantial and compelling circumstances.

He contended that there were, given what he considered, that the complainant had not sustained any life-threatening injuries and more so that both appellants had spent over twenty months in custody awaiting trial. He also addressed the court at length with regard to other cases in which accused persons were sentenced to life imprisonment, but were on appeal, reduced to lengthy periods of imprisonment.

[64] The State did not obtain an impact assessment report in respect of the complainant for the purpose of sentence. Nonetheless, the report of Ms. Hundermark was indicative of the impact of the incident on the complainant and so too was the evidence of the complainant's foster mother during her testimony at the trial. The State subsequently provided what was referred to as an impact statement which the police had taken of the complainant. In the statement, when asked about how the incident had impacted on him, he claimed that "his dignity had been taken away" from him. He gets very cross and heart sore and he was also

now more aggressive. He indicated that he was scared to walk around alone at night. He indicated that there were no injuries that remained as a result of the incident. He stated that he had left his employment as a result of his aggressive behaviour towards others. He also claimed that he found it difficult to trust other people and to get along with others. He claimed that the faces of the persons who committed the acts of rape act against him recurred and that at times, he felt like taking the law into his own hands.

[65] The State pointed out there was nothing in the evidence on behalf of the appellants that indicated that they were the products of any dysfunctionality in their upbringing by their parents. It appeared though, that their upbringing was permissive and that their parents enabled them and had no control over them in leaving school, which they simply chose to do so. The State, likewise, referred to the legion of authorities with regard to the minimum sentence legislation and that the court could not deviate therefrom for flimsy or fanciful reasons. The State also contended that the emphasis by the defence that there were no remaining injuries suffered by the complainant was no more than a myth in as much as it simply ignored the serious trauma caused as a result of the sexual assault on the complainant. The State likewise lamented the manner in which Dr. Mukombe dealt with the examination of the complainant and the lack of a proper recordal of his injuries. The State, however, pointed to the evidence

of Dr. Crous who stated that on the evidence, the injuries sustained by the complainant were serious. The State also pointed out that the time spent incarcerated awaiting trial by the appellants trial were not relevant to the consideration of a life sentence. The State also contended in line with case law that life sentences did not detract from the potential for the rehabilitation of incarcerated persons.

[66] The regional magistrate in her judgment on sentence set out the personal circumstances of each of the appellants, referred to the various provisions of the minimum sentence legislation and that the appellants were required to establish substantial and compelling circumstances in order for the court to deviate therefrom. The court was satisfied that the State had established the basis for the imposition of the minimum sentence legislation by the fact that each of the appellants had perpetrated the act of rape against the complainant. The court, however, gave the appellants the benefit of the doubt with regard to the mental and intellectual ability of the complainant. The court a quo also regarded each of them as first offenders for the purposes of sentencing. The court noted that although it may not be held against any of the appellants no remorse was displayed by them, neither in the testimony of their mother Ms. Skippers who lamented more her own personal predicament as a result of the conviction of her sons. The court was also mindful of the decisions in respect of the minimum sentence legislation, especially that of Malgas. The court noted that the State provided proof of the age of the complainant during the course of sentence that he had not yet attained the age of 18 years old at the time of the incident. The court a quo was unable to find any substantial and compelling circumstances to have deviated from the application of the minimum sentence legislation.

- [67] In their challenge on the sentence imposed by the Magistrate on appeal the appellants contended that the magistrate had erred in having not found any substantial and compelling circumstances. They contended that the appeal court was therefore at liberty to impose an appropriate and fair sentence. On appeal the appellants did no more than reiterate their personal circumstances which were already on record and offered little else in supporting their contention that substantial and compelling circumstances had been established before the court a quo. The State for its part on appeal dealt extensively with the provisions of the minimum sentence legislation that was applicable to the appellants. The State emphasised that the importance of the Malgas judgment referred to earlier was that the substantial and compelling circumstances envisaged need not be exceptional but “must provide truly convincing reasons or weighty justification for imposing less than life imprisonment or they must induce the conclusion that the prescribed sentence would in the particular case be unjust and disproportionate to the crime, the offender and the legitimate needs of society”. The State also referred to the oft quoted dicta in *S v Matyityi* 2011 (1) SACR 40 (SCA) in which it was emphasised that the courts are obliged to impose the minimum sentences ordained by the legislature unless there were truly convincing reasons for departing therefrom.
- [68] The State pointed out that the court a quo considered all of the evidence led with regard to the personal circumstances of the appellants which was taken into account and the seriousness of the offence, the socio-economic circumstances of the appellants, and that of the complainant which by all accounts appeared to have been far worse than that of the appellants. More importantly, the appellants had abused the complainant’s vulnerability. The State, with reference to similar authorities emphasized the fact that the complainant was for all intents and purposes a child at the time of the incident, suffered severe disabilities as indicated in the testimony of Ms. Hundermark and was particularly vulnerable to the brutal and predatory conduct of the appellants. The State contended that the court a quo had considered all the relevant facts and circumstances of the matter and correctly found that there were indeed no substantial and compelling circumstances to have deviated from the prescribed sentence of life imprisonment. I agree. It was apparent from the record that the appellants, despite the testimony of their mother, did not establish any substantial and compelling circumstances for the trial court to have deviated from the minimum

sentence. It need not be repeated here. All of the personal circumstances have already and extensively been placed on record. The

circumstances under which the offence took place and what was clearly the reason for having sexually assaulted the complainant in such a brutal manner was no more than their revenge against him. The appellants displayed not an iota of sympathy towards the complainant in the manner in which they dealt with him. They simply abused their power over him and sought to humiliate him in the most gruesome and brutal of ways by the sexual assault on him. The complainant remains scarred for life.

[69] I indicated earlier that I will in this judgment deal with what I consider may be the apparent lack of professional conduct on the part of Dr. Mukombe. The manner in which he filled in the J88 and his examination of the complainant at the hospital left much to be desired. He appeared to have seriously compromised the State's case, and had it not been for the credible and expert testimony of Dr. Crous, the State would have been left with little more than an unintelligible J88 filled in by Dr Mukombe. He moreover failed and/or refused to attend court to testify. No plausible reason had been provided by him to the prosecutor as to why he was not able to do so. The State indicated that it had even offered to provide an airplane ticket for him to attend the trial. In my view, the concerns raised about his conduct is of such a serious nature that the State is directed by this court to refer the concerns to the Health Professionals Council of South Africa for a thorough investigation. The court therefore directs that a copy of the J88 together with this judgment and the record be provided to the Health Professionals Council for their consideration and investigation of Dr. Mukombe's conduct. In fairness to Dr. Mukombe, he should be provided with the fullest opportunity of responding to the concerns raised by this court and that of the regional magistrate.

[70] It was also not apparent to this court that the complainant received any trauma counselling as a result of the rapes. Ms. Galloway who appeared on behalf of the State on appeal, very graciously and willingly undertook to investigate whether he was in fact receiving any counselling and to ensure that processes were put in place for him to receive the necessary support. She has since the hearing of the appeal provided the court with a report that the complainant was presently receiving counselling and will continue to do so for as long as it is needed by him. The court is indebted to her for the assistance provided and the alacrity at which she attended to the court's directive. The court notes that, very often, especially complainants in rural areas, literally fall through the cracks and do not receive the necessary trauma counselling post incident and more so even after the conclusion of the trial and conviction of the perpetrators.

I must add, that the court manager at the Tulbagh Court is directed to ensure that the mechanical equipment functions properly, that is used when evidence is dealt with through an intermediary.

[71] In the result I propose to dismiss the appeal and to uphold the convictions of both appellants and confirm the sentences of life imprisonment imposed on each of them.

It is ordered that:

1. The appeal against the convictions of rape by each of the appellants is dismissed. The convictions of rape of each of them is confirmed.
2. The sentences of life imprisonment imposed on each of them by the court a quo is confirmed.

V C SALDANHA

JUDGE OF THE HIGH COURT

I agree.

M ADAMS

ACTING JUDGE OF THE HIGH COURT

[1] Section 51(1) and/or 52 And Schedule 2 Part 1 of the Criminal Law Amendment Act 105 of 1997, as amended is applicable in that: Rape as contemplated in sec. 3 of the Criminal Law (Sexual offences and Related matters) Amendment Act, 2007 when committed: (a)(i) in circumstances where the victim was raped more than once, whether by the accused or by any co-perpetrator.

[1] Section 51(1) and/or 52 And Schedule 2 Part 1 of the Criminal Law Amendment Act 105 of 1997, as amended is applicable in that:

Rape as contemplated in sec. 3 of the Criminal Law (Sexual offences and Related matters) Amendment Act, 2007 when committed: (a)(i) in circumstances where the victim was raped more than once, whether by the accused or by any co-perpetrator.

[2] Hearsay evidence may be provisionally admitted in terms of subsection (1)(b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAWCHC/2024/244.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/fortuin-and-another-v-s-unknown-topic-awchc-2024>

Prepared on 9 October 2026 · Esheria