

SOUTH AFRICA / JUDGMENT

I.N.M v S (49/2020) [2021] ZAKZPHC 88 (15 October 2021)

[2021] ZAKZPHC 88**COURT**

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Mngadi, Bezuidenhout

CASE / FILE NUMBER

49/2020

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****KWAZULU-NATAL****DIVISION, PIETERMARITZBURG****AR****No: 49/2020****In**

the matter between:

I[...]

N[...]

M[...] APPELLANT

and

THE

STATE RESPONDENT

ORDER

On

appeal from: Regional Court, Ingwavuma (S.H. Mundree sitting as a court of first instance)

1. The

appeal against conviction is upheld.

2. The

conviction and sentence are set aside.

3. The

order of the trial court is
substituted thereof with:

'Not guilty and
discharged.'

JUDGMENT

Delivered on:

Mngadi J: (Bezuidenhout J concurring)

- [1] The appellant appeals as of automatic right by virtue of being convicted and sentenced to life imprisonment by the court of a Regional Division, against both conviction and sentence. The appellant was charged before the regional court with and convicted of rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act) and sentenced to life imprisonment.
- [2] The charge of rape alleged that on or about 1 February 2007 to 20 February 2007 at or near Mathayini area the appellant did unlawfully and intentionally have sexual intercourse with [S....N....G....] (the complainant) aged fifteen (15) years without her consent on diverse occasions. The charge was read with sections 51(1), 52(2), 52A and 52B of the Criminal Law Amendment Act 105 of 1997 (CLAA). The appellant who was legally represented when the charge was put to him pleaded not guilty. He stated as the basis of defence that he never raped the child. The child influenced by his wife is fabricating the case against him.
- [3] The State lead evidence of five witnesses, namely; the complainant, her three (3) maternal aunts and a male nurse. Documents handed in as exhibits were the medical examination report (J88) and the acknowledgement of receipt by the Department of Home Affairs of an application for an identity document. The appellant testified for the defence and he did not call any defence witnesses.
- [4] The learned regional magistrate after hearing evidence convicted the appellant as charged. He found no substantial and compelling circumstances to impose a lesser sentence than the prescribed minimum sentence of life imprisonment in terms of the provisions of the CLAA and he imposed on the appellant a sentence of life imprisonment.
- [5] The document from the Department of Home Affairs depicted the complainant's date of birth as 2 January 1991 and it was dated 22 August 2007. The medical examination report indicated that the examination was conducted at Mosvoldt hospital on 23 February 2007 at 20h00. It records under the section 'relevant medical history and medication' was raped by old father on the 10th and 13th of February. Under clinical findings, it is recorded: 1. No sign of external trauma. 2. No sign of vaginal trauma. 3. Examination done 10 days after the assault. It recorded that the complainant told the doctor that she had never had sexual intercourse before with consent. The gynaecological examination was normal. The hymen was absent, the vagina admitted two fingers, and it was bleeding.

- [6] The complainant testified as follows. She was sixteen (16) years old. In February 2007, she was fifteen (15) years old. She was born on 2 October 1991. She did not have a birth certificate or an identification document. She was not schooling. She had forgotten the name of her last school. She left school due to the problem with the appellant. The highest school standard she passed is grade 6. She now stayed in Johannesburg. Her mother passed away and her mother's sister stayed with her. She knew the appellant. He was the husband of her aunt N[...], the aunt she was staying with in Johannesburg.
- [7] The complainant testified that on 18 February 2007 she was at Emathayini at the residence of her brother Bongani. She was staying with the appellant. They arrived on Saturday. On Sunday, she was sitting outside in the premises. The appellant at about 15h00 called her into the house and he told her to cook, as it was late. She got into the house, which was also used by the appellant to sleep in it. The appellant called her to him. He told her that he loved her. She said she did not love him. The appellant then wanted to have sexual intercourse with her and she refused. He locked the room and he pushed her with his hands on her chest onto the bed. She fell on top of the bed and laid on her side. He undressed her by taking off her skirt. He took off her panty. He removed his trouser and shorts. He closed her mouth with a piece of cloth. He pointed her with a firearm. He did what he wanted to do and he got off. He inserted his penis into her vagina. She did not see what he did with his penis in her vagina because he had covered her face and eyes with a piece of cloth. On top of her, he was moving. She felt movements inside her vagina for a short period. She did not do anything because he was pointing her with a firearm and saying that he will shoot her. The appellant rose up, put on his clothes and he left. She put on her clothes and she went outside. She did not continue cooking.
- [8] The complainant testified that outside she saw the appellant standing. The appellant told her that her aunt N[...] asked him to take her to L[...]’s home. L[...] is her other aunt. He then took her to L[...]’s home. The appellant on the way kept telling her not to inform any person of what happened. He said if she did, he would shoot her. On Monday morning, the appellant arrived at L[...]’s home. He took her to school and he registered her at school. After school, she returned to L[...]’s home. L[...]’s husband told her that the appellant left a message that she must return home to cook because he slept the previous night without food. She slept at L[...]’s home. On Tuesday, she returned to the appellant. She entered the house. The appellant followed her. He asked her whether she wanted them to do what they did the other day. She refused. She started crying. He said it was useless to cry. He pushed her on to the bed. He covered her face with his hand. She saw him taking a condom and putting in his penis. She was sitting on a mat. She did not do anything. He was carrying a firearm and he wanted to shoot her. He covered her eyes with his hand. He inserted his penis into her vagina and he did what he did the other day. She was dressed whilst sitting on the matt and he undressed her. She was dressed in a skirt and panties. He was wearing shorts. He undressed. She was sitting on the matt. He climbed on top of her. He inserted his penis in her vagina. He did what he did and it took a long time. She did not know whether it was five hours or five minutes. She felt him move up and down. His penis was in her vagina. The

appellant then rose and left. She also rose and she went outside. She did not see the appellant outside. She thought of phoning her aunt N[...] but she realised that she had no money.

[9] The complainant testified that on Tuesday, she became sick and she did not go to school. She was dizzy and her eyes were painful, she was bleeding from her vagina and from her nose. She was feeling weak and she could not even stand up to meet her aunt N[...]. N[...] suggested that they go to Jozini to get some grocery. She did not go to school on Tuesday and on Wednesday. N[...] came back on Thursday. On Tuesday when she became sick and she did not go to school, the appellant phoned N[...] and informed her that she was sick and she did not go to school.

[10] She testified that on Tuesday when the incident happened she did not report it to any person. The appellant threatened to kill her if she reported the incident. Her aunt V[...] on Wednesday noticed that she was bleeding from her vagina and from her nose. She asked her what the problem was. She did not tell her because she thought she would question the appellant and the appellant would shoot her. On Tuesday, she slept at L[...]’s home. L[...] did not notice that she was bleeding because she had taken a bath in the afternoon. Nothing happened on Wednesday. She was bleeding from her vagina and nose. Her aunt V[...] noticed on Wednesday that she was bleeding when she saw her skirt stained with blood at the back. She called and asked her what was wrong. She told her that there was something wrong but she would not tell her what it was, she would tell her aunt N[...] because if she told her she would call the appellant and the appellant would shoot her. She did not phone her aunt N[...] in Johannesburg. N[...] (she referred to as her mother) arrived on Thursday afternoon. The appellant called her aunt N[...] and he told her that she was sick. The appellant noticed that something was wrong with her because he saw her sleeping and he asked her what was the problem, she told him she was feeling sick. Her aunt N[...] arrived on Thursday afternoon, she sat with her and she did not get a chance to tell her because the appellant was with them. They then went to Jozini to get some grocery. It was her, aunt N[...], aunt V[...] and the appellant. On Friday aunt N[...] asked her what was the problem, she told her that they made her lie down. She asked her who and she could not answer she was crying. It was in the house and she was standing. The appellant was standing on the door away from her aunt. She was scared to tell her aunt. Her aunt said they must go and look for a traditional medicine for her. Her aunt N[...] is a traditional healer. They all went and they left

her with aunt L[...]. They came back with the traditional medicine. L[...] told her that she sensed there was something

wrong. She explained to her that when she was left with the appellant at home he wanted to sleep with her and she refused. He then forced her to sleep with her. Aunt L[...] after the appellant returned from fetching the traditional medicine asked him what was wrong. She did not recall what he said. When they reached her home, aunt N[...] and the appellant took her to the clinic at KwaMbuzi. .

[11] She testified that at KwaMbuzi clinic a male gave her a card to take to the hospital. She was told to get into an ambulance with her aunt. The appellant wanted to go with them. The male person Sangweni said it was not allowed that two persons that are not sick board an ambulance. Her aunt and appellant argued as to who should go with her in an ambulance. Sangweni suggested that the appellant fetch jerseys for them but the appellant refused. She explained to Sangweni what happened to her. She told Sangweni that the appellant had sexual intercourse with her. The ambulance arrived. She went with aunt N[...] to Ingwavuma hospital. The doctor at the hospital examined her. She was still bleeding in her vagina and nose. She was told that she

suffered from a heart condition and she was given tablets. The police interviewed her and she made a statement on the same day. The doctor asked her but she did not understand some aspects of the questions. She felt confused; she does not know what confused her. If the doctor wrote that she said she was raped on the 10th and 13th it means she said a wrong date because she did not know. The police asked her the date of the incident, she told them that her mind was not well and she could not recall. However, she told them that it happened on Sunday and on Tuesday again. Her statement mentioned 11 February and 13 February, she did not know exactly what she was saying because she was traumatised. She testified that she arrived from Johannesburg on Saturday; the incident took place on Sunday following that Saturday. Nothing happened on Monday and it happened again on Tuesday of the same week and her aunt N[...] arrived on Thursday of the same week. The doctor examined her on Friday of the same week. The first

person she told is aunt L[...]. She informed her aunt N[...] on the way to hospital when she questioned her who did this. She saw on both occasions the appellant inserting the penis into her vagina because he did that before he covered her face. She knew that the appellant carried a firearm. She before the incidents did not have any problem with the appellant. Before the incidents, there was a problem between the appellant and aunt N[...]. N[...] told her in 2000 that the appellant had had slept with N1[...] and K[...] their children. Since the incident, she was bleeding from her vagina. She did not have a boyfriend and she was still staying with aunt N[...] in Johannesburg. She did not know whether the appellant wore a condom in the first incident and she did not know whether on both occasions he ejaculated or not. She felt wet and found a white substance in her vagina.

[12] The complainant undercrosss-examination testified as follows. She started staying with the appellant and aunt N[...] in 2005. Both her parents had passed away. . She first stayed with her grandmother who failed to look after her because she was abusing liquor. She knew Thulani who was her uncle and he was staying with her grandmother. Her mother, before

she died, explained to her about the quarrel between the appellant and aunt N[...]. She herself saw what happened in 2005, the appellant slept with both N1[...] and K[...]. The problem was between aunt N[...] and the appellant. The appellant shot aunt N[...] and the bullet penetrated through a shack. Her mother told her just before she died that she was born in 1991 and the hospital file relating to her birth could not found. Aunt N[...] told her that she was born before N1[...] and N1[...] is fifteen (15) years old that month. She stated that she arrived on Saturday and she slept at the home, her grandmother was present and she was coming to dig a traditional medicine. It is aunt N[...]’s and the appellant’s homestead but it was still under construction. She slept with her grandmother in a rondavel and the appellant slept in another structure. The grandmother left on Sunday at 14h00. The appellant took the grandmother to the station or taxi stop, the incident happened after his return. It was her biological grandmother but not the one who abused liquor. She said the appellant raped her; she would not fabricate a story. She said she saw him undressing himself and then he inserted his penis in her vagina, but she did not know what he was doing, she only felt something, which was just moving. She did not see everything because he closed her eyes. She felt movements inside her vagina. In the first incident, she did not see, she saw him undressing himself. The second occasion he undressed her the panty,

he undressed himself his trousers, climbed on her, and he took the penis and inserted it in her vagina before he covered her face. He put on the condom before he climbed on her. She did not recall whether the doctor asked her whether a condom was used. She cannot

explain why the doctor wrote that no condom was used. When it was put to her that she told the doctor that no condom was used, she said did not remember whether she told the doctor that or not. Asked why did she tell the police in her statement that on the second occasion she was raped on the bed if she was raped on the mat, she said she told the police that she was sitting on the mat, pushed and raped on the mat. She said she did not tell the police to write 'I tried to run to the door. He pulled me and pushed me to the bed'. She said she did try to run away to the door, the appellant pulled her.

[13] The complainant when asked, having been raped and pointed at with a firearm, why did she return to the appellant, said she did not go back, when she came back from school she went to her aunt, when she went there she found the appellant was already there. She said her aunt L[...]’s husband T[...] told her that the appellant said she could go there when she is coming back from school to cook for him because he did not eat the previous night. She said she went there with her aunt’s child but the child left her and the appellant raped her. She said on Saturday they found the grandmother in the smaller homestead and she slept with the grandmother. They, herself, aunts N[...] and V[...] and the appellant went to the clinic and they sat on the benches. Initially the appellant refused to accompany them to the clinic, he said he was not going there because if things happened they do not tell him. Aunt Nomsa persuaded him to accompany them. At the clinic, the appellant was angry with aunt N[...]. he even drew a firearm, and he threatened to shoot her. At home the appellant did not draw a firearm on aunt N[...].

The appellant went with her and aunt N[...] to buy grocery at Jozini. She related the story to L[...] after aunt N[...]

had arrived. Her aunt N[...] when she arrived asked what she was suffering from; she kept quiet because she was scared and afraid to tell her. When the incidents took place, she had not yet started menstruating. It was her first time to have sexual intercourse. It was painful on the first occasion but she did not observe any injuries, she observed blood on the second occasion. She went to the clinic and they gave her tablets for bleeding. She did not have any boyfriend and she knew nothing about Thulani fetching her from a boyfriend. She denied that she was falsely implicating the appellant because of the problems between the appellant and her aunt N[...]. She said V[...] did not stay in the homestead, she stayed with her those few days, she was not watching the homestead, and she is just a member of that homestead. On the days of the incidents, she was present. She did not report to her because when the incident took place she was not present, but when they went to the clinic, she was present. She had gone to her mother. She said she could not recall whether she came back on the same day Tuesday afternoon. She did not report to her when she came back because the appellant had threatened her. When aunt N[...] arrived, she did not see how they slept in the main house, she slept with her aunty in the rondavel. Friday morning, aunt N[...] came to them to find out how she slept. The appellant stood nearby. V[...] arrived after sunset after the appellant had raped her.

[14] N[...] testified as follows. She stayed in Johannesburg. The appellant who is her husband stayed at Emathayini with V[...] and the complainant. On 22 February 2007, the appellant phoned her and told her that the complainant was sick. She borrowed money and after a day on Thursday, she arrived. She found the appellant sitting under a small tree. She went passed to the house. The children came to meet with her. They took out a mat and they sat in a shade under the tree. The children advised her that they were well. She asked the appellant to go and sit with her in the shade of the house. She then requested the appellant to accompany her to Jozini to buy tile cement. They proceeded to Jozini. They bought tile cement and the appellant went with her to buy some groceries. It was she, the appellant. V[...] and the complainant. They came back. She questioned the complainant

about how she was feeling; the complainant told her that she was losing power. She told her that her uterus was painful and she was bleeding from her nose and from her private part. They were all sitting in the dining room. She had noticed blood coming from her whilst they were at Jozini when she saw bloodstains. She boiled water and told the complainant to drink it. They cooked, ate and slept. She slept with the appellant. The complainant slept alone. In the morning, she woke and went to wake up the children to prepare to leave to take the complainant to hospital. The appellant woke up with her. She knocked and V[...] opened for her. V[...] told her that the complainant did not sleep because she was crying at night. The appellant was with her. The complainant told her that she was losing power and she had a headache. The complainant said they had let her lie down and it was painful. She asked her who are they. The complainant did not explain. She entered the room in which they were sleeping. She found on the kitchen sink a piece of paper with phone numbers. She asked the complainant to whom the telephone numbers

belonged. The complainant did not respond.

[15] She stated that they prepared tea. They then went to dig the traditional medicine. They went with the appellant and the children in his vehicle. They stopped at L[...]’s place. L[...] came and greeted them. She told L[...] about the complainant’s condition. She asked L[...] to remain with the complainant. They went to the forest and dug the traditional medicine. They returned. L[...] asked the appellant what was wrong with the family because she found that something was happening. The appellant asked whether they were now accusing him of abusing the complainant. They proceeded to their home. She asked the appellant to take the complainant to the clinic since she had to return to Johannesburg. The appellant said he was tired to be controlled by women because if the children are sick, they did not tell him. He said if he shoots himself, he would shoot them too. He went to the house and he took a firearm. She told the children to board the vehicle because she did not know who was fighting with the appellant. The appellant came to the vehicle and he drove them to the clinic. The male nurse Sangweni attended to the complainant at the clinic. Sangweni called her and the appellant went with her. Sangweni told them that the complainant is to be taken to hospital but in the ambulance, one person can accompany the complainant. The appellant told Sangweni that he needed to be present when the doctor examined the complainant because since 2000, he is in conflict with her and he is accused of all sort of things. The appellant was angry and he pointed her with a firearm. Sangweni said that was the hospital policy. She accompanied the complainant in the ambulance. It took them to the hospital. The appellant was left behind.

[16] She testified that the doctor at the hospital examined the complainant. Police arrived with the appellant. In the ambulance, the complainant explained to her what happened. She told her that the appellant said he wanted to sleep with her because he had already slept with others. She said it happened on Sunday. She said he let her lie on the bed on their bedroom. He had followed her when she went to cook. She said she had told the complainant not to sleep there but to sleep at L[...]’s homestead as she was alone with the appellant. The complainant told her ‘the appellant pushed onto the bed. He massaged her and he undressed her of her panty. She refused and he threatened to shoot her and that she must not tell anyone about the matter. He

had a firearm in his possession. He closed her eyes and climbed on her. He took out his penis and he inserted it into her vagina. After that, he told her to go to L[...]’s home. In the morning, the appellant came to L[...]’s home and took the complainant to look for a school for her. She came back and she was afraid to sleep in the house. T[...] woke her up to go and cook for the appellant. She spent the night at L[...]’s place. She woke up at 20’clock in the morning, woken by T[...] L[...]’s husband to go and cook for the appellant. She went to the home of the appellant. She went to the house wherein she had to cook. The appellant followed her. He let her lie down. He put on a condom. He took out his penis and he inserted it into her vagina. She started to bleed and she was unable to walk’.

- [17] She testified that the dates mentioned in the medical report the 10th and 13th means that the complainant is confusing dates. She did not believe it happened on those dates. She did not agree that the doctor examined the complainant 10 days after the last incident. She had a problem with appellant in 2000. She found him in the house or in a room sleeping with a child. The name of the child is K[...]. He had undressed her of her panty and he had let her lie down, he was on top of her with a firearm under the bed. The matter was resolved. The charge was laid and it was withdrawn. The appellant after he assaulted some children, there was a gathering and some sort of compensation agreed where he bought some cattle or cows. He was just apologising saying what happened is a mistake. She said she did not accept the apology and she told him that she was not forgiving him.
- [18] N[...] under cross-examination stated as follows. The appellant and the complainant reported to her that from Johannesburg to Emathayini they travelled well. The appellant told her that they found aunty Botha Sibiya, the complainant's grandmother. The complainant to her knowledge on the day they arrived spent the night in the big house in the rondavel with her grandmother. It is correct V[...] came on the Tuesday. The appellant came from Johannesburg to Emathayini to install tiles. The tile cement was finished hence going to buy it at Jozini and she bought 11 bags. She left the complainant with L[...] and she asked L[...] to question the complainant because L[...] saw that she was angry. L[...] questioned the appellant and she said what was going on because it appeared there was violence between him and the children. It was put to her that L[...] said to the appellant the complainant suspected that he was the cause of her condition. The appellant said 'oh they are going to say it is me'. She said he quarrelled with her when she said he must take the child to the clinic. She said she saw the appellant with her own eyes on top of a child. She did not lay a charge against him because he intimidated her with a firearm. N1[...] laid a charge, the case got finished because there was no follow up. The police did not arrest the appellant. She said three herd of cattle were slaughtered. She did not know the age of the complainant but the complainant told her that she was fifteen (15) years old. She denied that the appellant and her had a conflict about her healing trip to Empangeni. She said at the hospital, it was said the bleeding of the complainant is because she was raped and that her eyes were damaged inside because she was raped. The appellant pointed her with a firearm on five occasions. He intimidated her and she did not lay criminal charges against him.
- [19] V[...] testified as follows. The appellant was her sister N[...]’s husband. They stayed together with the appellant at Emathayini. She was not present on Saturday 17 February 2007. She arrived at home on Tuesday 20 February
2007. She was from Makhayana. She arrived at 17h00. She found the appellant and the complainant at home. The complainant was from school and she was supposed to prepare to go to school the following day. On Wednesday, the complainant did not go to school. She was crying. She called her behind the house and asked her what was wrong. She said she was sick suffering from a headache and feeling dizzy, and her uterus was painful. She reported the condition of the complainant to the appellant. The appellant said he knew

nothing about that. He stood up and he phoned her sister N[...] who was in Johannesburg. N[...] asked the appellant what was wrong with the complainant because when he left with her she was well. N[...] did not say that she would come but they saw her arriving on Thursday. She ran to meet N[...] but the complainant was unable to stand up she said she felt pain in the uterus. N[...] sat with the appellant in the shade. The complainant told N[...] that she had a headache, felt dizzy, and pain in her uterus. The appellant told N[...] that there was no food in the house. N[...] asked him to accompany her to Jozini to buy some grocery. They proceeded to Jozini. They bought bags of cement leaving her and the complainant in the vehicle. They returned with cement. N[...] asked her to go with her to buy grocery. The appellant followed them and the complainant went with them. They finished and they went home. They arrived at home, cooked, ate and went to sleep. She slept with the complainant. In the morning, N[...] came to where they were sleeping and she asked how they slept. The appellant came with N[...].

She told N[...] that the complainant did not sleep well, she was crying. She woke up and she prepared tea. The appellant drank the tea but N[...] did not drink the tea because the complainant had told her that she had been raped. She, the complainant told N[...] when she questioned her, that she had been let to lie down. She told N[...] when the appellant was standing next to N[...].

[20] V[...] testified that after they finished drinking tea, N[...] said they must go to dig traditional herbs. It was she, N[...] and the appellant. They left the complainant at L[...]’s place. She was left behind because she could not walk and she was bleeding on her private part. N[...] requested the appellant to buy water for her in a nearby shop. The appellant turned at the door and he said there was no water. N[...] again asked the appellant to go and buy cold drinks to be drunk at the forest. The appellant went and bought the cold drinks. They did not drink cold drinks at the forest but they drank it at home. On return from the bush they went via L[...]’s place and to take back the complainant. L[...] asked the appellant by saying what was going on my brother-in-law it seems as if you were not in good terms at home. The appellant became furious; he said every time he is left with children he is accused of abusing them although he had done nothing. They proceeded home.

[21] She testified that they arrived at home. N[...] asked the appellant whether they could take the complainant to the clinic. The appellant said he was tired of being controlled by women. He stood up and he went to his house. He put a firearm on his waist. He took the key and he got into the vehicle. They also boarded the vehicle. They drove to the clinic. The complainant was attended to at the clinic. They called N[...] and the appellant went with N[...]. N[...] and the appellant returned and said V[...] and the appellant could go back home. The appellant drew a firearm and pointed it at N[...]. He also pointed the firearm at himself. He said he would be buried outside the premises of the homestead. He then got into the vehicle and he drove away. N[...] asked a lift for her in the ambulance to Emathayinin where she was dropped. In the ambulance, the

complainant did not say anything to N[...].

- [22] V[...] under cross-examination testified as follows. She left the homestead on Saturday early in the morning. She left nobody behind. She stayed alone when the appellant and N[...] were in Johannesburg. The grandmother did not arrive that weekend when she left. When she arrived the grandmother had gone, the complainant told her. When she arrived, the complainant did not report anything to her. The complainant said a traditional healer in a taxi gave the piece of paper with telephone numbers to her. She did not hear Sangweni saying only one person can accompany the complainant in an ambulance to the hospital. She said the appellant was not waiting on the road with jerseys when the ambulance drove passed.
- [23] L[...] testified as follows. On 23 February 2007 she was where she traded. The appellant came with N[...], V[...] and the complainant. The appellant went to buy something from the shop. She saw that N[...] was not in a good mood and the complainant too. She asked N[...] what was wrong. N[...] said she must ask the complainant. N[...] followed the appellant to the shop. The appellant, N[...] and V[...] left to dig the traditional medicine. Before they left, she saw bloodstains on the back of the complainant and she told N[...]. N[...] gave her R7. 00 to buy sanitary pads for the complainant. She gave clothing to the complainant to cover herself and she went and bought sanitary pads for her. The complainant told her what happened. She told her that the appellant pointed a firearm at her and let her to lie down. She did not tell her when it took place, but she said it took place at the appellant's homestead in his room on his bed. She understood that the complainant was saying that the appellant raped her. She told her it took place on Sunday or Monday after the departure of the aunty. The aunty is MaSibiya. She did not tell her how many times it occurred. She said N[...] and the appellant returned. She told him that the complainant reported some sort of abuse taking place at his home. The appellant said he had already seen that he would be accused. He became angry and he left. They drove away.
- [24] L[...] under cross-examination testified as follows. She did not tell N[...] what the complainant told her because they were in a hurry. She made the statement to the police on the same day she testified. She remembers that it happened on Friday, 23rd. although the dates are confused. She became confused and surprised when the complainant told her. She did not ask the complainant how it happened because she was confused. Her home is near the home of the appellant. The complainant spent two nights at her home, it was on a Sunday.. She did not remember when the complainant returned with the appellant from Johannesburg. However, she remembers that the appellant came to her home with the complainant. She knows that there was aunty at the homestead when the appellant and the complainant arrived. She saw her leaving on Sunday. The complainant spent the two nights at her home because she would have been alone with the appellant at his home. Initially, when the appellant brought to her home the complainant, he had to come the following morning to register the complainant at school.

[25] Bonginkosi Sidwell Sangweni testified as follows. He was employed as a nurse at KwaMbuzi clinic. On 23 February 2007, he was on duty. At about 15h 00, he attended to the complainant. She was feeling dizzy and had pains in her uterus. The complainant explained to him that there was a male person who had raped her. He therefore had to transfer the complainant to the hospital to be examined by the doctor. She said she knew the person who raped her. She told him that it was her father, the appellant. He did not tell N[...] that the complainant said she was raped by the appellant to avoid a conflict. He advised N[...] that warm clothes must be fetched for the complainant. A misunderstanding ensued because the appellant did not want to go and fetch warm clothes. He said he could see that N[...] and the complainant were fabricating a case against him. He then arranged for an ambulance to take the complainant and N[...] to hospital. He said it is correct that the ambulance takes the person who is sick and one companion, but that was not the issue, which caused the conflict. He noticed that the complainant was in deep pain

and shock. He did not see the appellant pointing a firearm at any person. He could not recall any problem of bleeding to the complainant.

[26] The appellant testified as follows. The complainant was his child although not a biological child. Her mother passed away and he did not know her father. She was found in a sugarcane field near the home of his wife. She had no place to stay. They took her and stayed with her. They were staying with her in Johannesburg. He did not know how old the complainant was. . On 18 February 2007 he was at Emathayini. They had a home in Johannesburg and at Emathayini. He came to Emathayini with complainant on Saturday. There was nobody. He phoned N[...]. N[...] told her to take the complainant to her aunt L[...]. He took the complainant to L[...]. He sent a message with T[...] to tell the complainant to come back and cook. The complainant came in the late afternoon to start cooking. He had never raped the complainant. He suspected that it was planned between N[...] and the complainant to falsely accuse him of raping the complainant. He did not try to ensure that the complainant did not get an opportunity to report anything to N[...]. N[...] wanted him to go with her in his vehicle when he is going to do the

healing, but not pay for the transport costs. No charges were ever laid against him for abusing his children because he did not abuse any child. He did not refuse to take the complainant to the clinic. He said they must wait for him to finish the tile mix he had mixed. He always carried his firearm on him but he did not point N[...] or any person with a firearm. He wanted to go with those accompanying the complainant to the hospital but he was told that one person could accompany the complainant. His sister-in-law told him that the complainant was sick and he phoned N[...]. He was told that the complainant was menstruating and feeling pain in her uterus.

[27] The appellant under cross-examination testified as follows. He came with the complainant to Emathayini because N[...] had arranged for her to come and stay with her aunt. He had to register her at school. She respected him as her father. He took her to school on a Monday. On a Wednesday morning she told him she was not going to school, she was sick. The school started at 14h00 and ended at 17h00. She told him she had stomachache. V[...] told him that

the complainant was sick, the Wednesday the following week. N[...] arrived on Thursday the following week. The complainant said he raped her on the 11th and 13th and he was arrested on 23rd. The complainant's mother N[...] did not arrive in the week the complainant first reported to be sick. He took her when she said she was sick to her aunt's place for her to explain everything to her aunt. V[...] told her on Wednesday the week N[...] came that the complainant was menstruating. He did not know why if the complainant is fabricating a false case against him with N[...] would tell L[...] that he raped her. At the clinic, Sangweni told him that the complainant said she was raped at home. He did not know why the complainant said on the first occasion no condom was used and said a condom was used on the second occasion. The complainant would sleep at L[...]'s place, go to school, come and cook and go back to L[...]'s place.

- [28] The trial commenced before the regional magistrate on 25 February 2008. It was finalised on 16 April 2008. The record indicates that the matter went through an application for leave to appeal and a petition for leave to appeal. The application for leave to appeal was filed on 22 February 2012; the regional magistrate heard it on 1 February
2016. Sections 10 and 11 of the Judicial Matters Amendment Act 42 of 2013 deemed to have come into operation on 1 April 2010; grants to everybody sentence to life imprisonment by a regional court an automatic right of appeal. It is regrettable that it has taken so long to have the appellant's appeal heard. The head of each magistrate's court must have processes in place to ensure that applications for leave to appeal and matters taken on appeal are processed without unnecessary delays. It must be borne in mind that a sentence imposed is executed pending the outcome of an appeal. If the appeal succeeds, there is no recourse for the sentence served. It is a serious dereliction of duty to fail to avoid delays in the processing of applications for leave to appeal and matters going on appeal.
- [29] The learned regional magistrate stated that in his final analysis of all the evidence before the court he was satisfied that all the witnesses gave evidence in a clear and satisfactory manner and they explained the contradictions. He found no reason why N[...] the wife of the appellant would falsely implicate the appellant. He found that the evidence of the complainant is clear that she was very afraid of the appellant. He referred to a discrepancy relating to the use of a condom and that the doctor was told that the incidents took place on 10 and 13th. He held that the discrepancies are explained by the fact the complainant was traumatised. He found that the State version was more probable than the appellant's version.
- [30] The hearing of an appeal against findings of fact is guided by the principle that in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. See *S v Hadebe and Others* 1998
- (1) SACR 422(SCA) p426b; *R v Dhlumayo and another* 1948 (2) SA 677(A).

[31] The conviction of the appellant, whether he had sexual intercourse with the complainant, and if so, whether it was without the consent of the complainant, is founded on the evidence of the complainant. It was the evidence of a single witness and a child. The age of the complainant was unknown but it can be accepted that she was around fifteen (15) years old, which means she was a child. The evidence of the complainant as evidence of a child is required to be approached with great caution. See *R v Manda* 1951 (3) SA 158 (A) at 162H it was held that the evidence of young children should be accepted with great caution. A child may not understand the nature or recognise the obligation of an oath or affirmation and yet may appear to the court to be more than ordinarily intelligent, observant and honest. It was held that the danger inherent in reliance upon the uncorroborated evidence of a young child must not be underrated. The imaginativeness and suggestibility of children are only two of a number of elements that require their evidence to be scrutinised with care amounting to perhaps suspicion. The trial court must fully appreciate the danger inherent in the acceptance of such evidence, and where there is a reason to suppose that such appreciation was absent, a court of appeal may hold that the conviction should not be sustained. See *Manda* at 163E. See also *S v Dyira* 2010

(1) SACR 78 (EGHC) at 82.

[32] The question is whether the evidence of the complainant was approached with the necessary caution. Related to the said question is whether it was clear and satisfactory in all material respects. There is no indication on the record that the learned regional magistrate warned himself of the need to approach the evidence with caution. The following unsatisfactory features in the evidence were not noted and no weight given to them, namely;

1. The charge alleges that the complainant was raped on diverse occasions during the period 1 February 2007 to 20 February 2007. It was not explained why the charge was framed in this manner if there was certainty that the complainant was raped on two occasions on 18 and 20 February 2007.
2. The regional magistrate convicted the appellant in that he raped the complainant on 18 and 20 February 2007. The doctor who examined the complainant on 23 February 2007 was told and recorded that the complainant was raped on the 11th and the 13th February 2007. The complainant and the appellant arrived from Johannesburg on Saturday 10 February 2007. On the evidence of the

complainant, she was raped on the following day on Sunday and the Tuesday following that Sunday. Therefore, all the evidence accepted

by the regional magistrate pointing to the rape being committed on 18 and 20 February was materially contradictory to the complainant's

evidence and the report to the doctor. Despite the prosecutor trying his best to determine the dates on which the complainant was

allegedly raped it remained confused.

3. The first report L[...] understood that the complainant was reporting that she was raped in the week of the report on either 18 or 20 February 2007. Sangweni also understood that complainant was reporting a rape that took place in the same week he saw the complainant. That is the reason both L[...] and Sangweni say the complainant appeared traumatised and shock. The complainant made false reports to both L[...] and Sangweni.
4. The complainant wanted to explain her sickness found on Wednesday of the week N[...] arrived as caused by rapes, which occurred in the course of that week. If the rapes occurred the previous week it is inexplicable why the complainant was creating the impression that they occurred in a different week.
5. The complainant in her police statement said she was raped on both occasion on the bed but in court she claimed that the second rape took place on the floor on a matt.
6. The complainant to both L[...] and Sangweni did not report that she was raped on two different occasions,
7. If the complainant a virgin was raped on 18 and 20th and seen by the doctor on 23 February, 2007 it is inexplicable that the doctor found no evidence of forceful sexual penetration.
8. The complainant was sleeping away from the appellant at her aunt L[...]’s place. There is no explanation why if she could report to L[...] as she did, why she did not report when the rapes occurred.
9. The complainant if she was raped on Sunday it is not explained why she was prepared to return to the appellant when she knew that the appellant was alone and he would probable rape her again.
10. The complainant stated that V[...] returned in the afternoon of the Tuesday on which she was raped and thereafter she was with V[...] and sleeping with her. She did not explain why she did not report the rapes to V[...].
11. The complainant was found with telephone numbers of other people. It is not explained why she did not phone N[...] and report the rape, the delay in reporting it suggests that it was a fabrication. In *S v De Villiers en Ander* 1999 (1) SACR 297(O) at 306b it was held that the longer the delay, the greater the prospect of fabrication and the more likely the possibility of untrustworthiness

or unreliability.

- [33] The onus was on the State to prove the guilt of the appellant beyond reasonable doubt. It relied on the evidence of the complainant to prove the commission of the offence and that the appellant committed it. An established rule of practice requires the evidence of a single witness to be approached with special caution. The danger is that evidence of a single witness cannot be checked against other evidence, a fact known to the single witness.

[34] The learned regional magistrate although he found that the evidence of the complainant was clear, he did not deal with the inconsistencies in the evidence of the complainant. He overlooked that her evidence was required to be approached with caution. Had he done so, he would not have found that her evidence was clear and satisfactory in all material respects. It is not the labels that are given to the evidence by a judicial officer that count. Evidence as it appears on record must be clear and satisfactory in all material respects. The exercise of caution entails scrutiny of the evidence, noting discrepancies and attaching due weight to the discrepancies that are found. See *R v Mokoena* 1932 OPD 79 at 80; *R v Mokoena* 1956

(3) SA 81 (A) at 85-86; *S v Webber* 1971 (3) SA 754 (A) at 757-759; *Stevens v S* [2005] 1 All SA 1 (SCA) para 17; *S v Artman & another* 1968 (3) SA 339 (A) at 340H;

[35] The evidence looked at holistically and approached with caution exhibited numerous unsatisfactory features. It fell short of proving the guilt of the appellant beyond reasonable doubt. The appellant had no onus to prove his innocence. Even if his version is improbable, if it is reasonably possible true, he is entitled to be acquitted. The appellant's conviction falls to be set aside.

[36] I propose the following order:

1. The appeal against conviction is upheld.
2. The conviction and sentence are set aside.
2. The order of the trial court is substituted thereof with:

'Not guilty and discharged'.

Mngadi, J

I agree, it is so ordered.

Bezuidenhout, J

APPEARANCES

Case Number: AR

49/20

For the Appellant: Mr.

X. Sindane

Instructed by: Pietermaritzburg

Justice Centre

PIETERMARITZBURG

For the respondent: Mr. Mcanyana

Instructed by: Deputy

Director of Public Prosecutions

Heard on: 14

May 2021

Judgment

delivered on:

With the consent of the parties, the matter disposed of without oral arguments.

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Prepared on 11 October 2026 · Esheria