

SOUTH AFRICA / JUDGMENT

S v A.M and Another (CC 27/2022)

[2024] ZAECELLC 31 (29 February 2024)

[2024] ZAECELLC 31**COURT**

Eastern Cape High Court, East London Local Court

BEFORE

T Malusi

CASE / FILE NUMBER

CC 27/2022

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****(EASTERN****CAPE DIVISION, EAST LONDON CIRCUIT)****Case****No: CC 27/2022****In**

the matter between:

THE
STATE
and
A[...]
M[...]
Accused
1
N[...]
N[...]
Accused
2

JUDGMENT

MALUSI J:

- [1] When considering cases involving rape the Supreme Court of Appeal made a profound observation and enjoined role players in criminal trials in the following terms:

“The prosecution of rape presents peculiar difficulties that always call for the greatest care to be taken, and even more so where the complainant is young. From prosecutors it calls for thoughtful preparation, patient and sensitive presentation of all the available

evidence, and meticulous attention to detail. From judicial officers who try such cases it calls for accurate understanding and careful analysis of all the evidence. For it is in the nature of such cases that the available evidence is often scant and many prosecutions fail for that reason alone. In those circumstances each detail can be vitally important.”[1]

- [2] The accused 1 is a 50-year-old male person who faces a charge of sexual assault and rape in contravention of sec 5(1) and sec 3 respectively of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. Accused 2 is a 34-year-old female person who is charged with failing to report a sexual offence committed against a child to a police officer in contravention of sec 54(1) of the Act.

2.1 The allegations are set out in the indictment as follows:

2.1.1 Rape (in respect of accused 1 only)

In that on or about the period of January 2020 to 25 August 2021 at or near House number [...], Police Barracks, Cambridge, East London, in the district of East London, the accused on divers occasions, unlawfully and intentionally committed acts of sexual penetration with M[...] N[...], 14-year-old girl by having sexual intercourse with her per vaginam against her will and without her consent.

2.1.2 Failing to report a sexual offence committed against a child to the police (in respect of accused 2 only)

In that on or about the same time and place mentioned in count 1, the accused, unlawfully and intentionally failed to report to the police her knowledge of the commission of a sexual offence of rape against a child, M[...] N[...].

- [3] Each accused pleaded not guilty to their respective charge. Accused 1 made a statement in explanation of his plea. He denied that he ever sexually assaulted the complainant in any way whatsoever. He further denied that he ever had sexual intercourse with the complainant in any manner whatsoever.

- [4] Accused 2 also made a statement in explanation of her plea. She denied any knowledge of any sexual assault that she allegedly failed to report to the police. She stated the first time she came to know of an alleged sexual assault was when accused 1 was already arrested. She only received a report thereafter.
- [5] The background facts are largely not in dispute or common cause. The principal facts will be set out in an effort for better exposition of the issues for determination.
- [6] The complainant was born on 2[...] September 2007 which made her to be aged eleven (11) to thirteen (13) years at the time of the alleged incidents between December 2018 to August 2021. She is the daughter of accused 2 born from a previous relationship and accused 1 is not her father. Accused 1 and 2 were involved in a love relationship. They later married which fact was kept a secret from the family of accused 2 until they were divorced.
- [7] After accused 2 graduated from police college during December 2017 she cohabited with accused 1 in the police barracks, Cambridge police complex in a flat allocated to the latter. There is a dispute about which time during 2019 she moved to her own flat.

It appears from the evidence that in the subsequent months and years she was moving between her own flat and cohabiting with accused 1. It is further common cause that during the material time in the year 2020 and 2021 both accused together with B[...] who is a sister to accused 2, K[...] a younger sibling of the complainant and a son of accused 1 were all residing in the flat at the police barracks at different times.

- [8] It is not in dispute that a medical examination of the complainant was performed on 26 August

2021. The medical examination found that the complainant had fresh and old injuries which were consistent with genital penetration.

- [9] The complainant testified that during December 2018 she was watching a movie on the television in the lounge of the police barracks flat. She and her aunt were seated on the sofa and accused 1 was seated on a mattress on the floor in front of them. Accused 1 invited both of them to join him on the mattress. B[...] declined the invitation. The complainant joined accused 1 on the mattress and were seated side by side, 1metre to 1½metre

apart. B[...] left for her bedroom shortly thereafter.

- [10] The complainant testified that thereafter accused 1 placed his hand on her vagina and rubbed it. He also took her hand and made her to touch his penis. The complainant later joined her aunt in the bedroom as they shared a bed. When her aunt enquired what had happened to her, she informed her in accordance with her allegations. They were communicating by short message service (SMS) on the same mobile phone.

- [11] She left with her aunt for the N[...] rural home in Tsolo on the following morning. She was not scheduled to leave with her aunt that day. Sometime after her arrival in Tsolo she told her grandmother what had happened to her.
- [12] The complainant testified that in the beginning of the year 2020 whilst she was in her bedroom making up the bed accused 1 arrived from work during the morning session. He had apparently forgotten a document. He entered her bedroom and approached her from behind. He hugged the complainant from behind such that his arms were around her waist and pulled her tightly closer to him. She tried to free herself and accused 1 assured her that she must not worry trying to move away as 'he will not sex her'. After a struggle the accused simply released her from his grip.
- [13] The third incident occurred during the lockdown period in 2020. The complainant testified that she was in the bedroom of accused 1 together with him. Her younger sister was watching cartoons in the lounge. Accused 1 started touching her upper body. He placed her on the bed. He continued touching the complainant and made a comment about how beautiful her breasts were. He took out his penis and undressed her. He placed his penis on and rubbed against her vagina. She felt pain as he was attempting to penetrate her. He did not succeed. The complainant had a startled response as she just lay on the bed, frightened and unable to move. Her voice would not come out.
- [14] The complainant testified that the next incident was also during the year 2020 when her mother and her aunt had visited their sibling who was ill. The complainant was together with the accused in his bedroom scrapping dandruff off his head. He got up closed the door and came back to the bed where she was now seated. He touched her breasts and took out his penis after undressing her. He initially rubbed his penis on her vagina before penetrating her. She asked him to leave her alone as it was painful. Accused 1 ejaculated on his hand and left to finish off in the toilet.
- [15] The complainant testified about the fifth incident during 2020 when she was watching cartoons in the lounge and accused 1 called her to his bedroom. He placed her on the bed, touched her breasts and commented about how beautiful they were. He was kissing her on the chest and neck area. After he had rubbed his penis on her vagina, he penetrated her and ejaculated on his hand. He left to finish in the bathroom. The complainant dressed up in his absence and left for the lounge. Accused 1 followed her into the lounge and left shortly. He then called her into the passage where they stood opposite each other. Accused 1 told her he is not going to do anything more to her. After a brief conversation the complainant cried. He hugged her, placed her on his chest comforting her by patting her on her back.
- [16] The complainant testified that the sixth incident arose after a routine grocery shopping trip. Accused 1 had communicated how much he admired the complainant when she was asleep. The day after this conversation the accused was in the lounge with the complainant while B[...] was washing some items in the bathroom. B[...] ended up going to bed as it was in the evening.

- [17] The complainant testified she pretended to be asleep on a couch. The accused picked her up from that couch and placed her on another. He undressed the complainant whilst she still pretended to be asleep. She felt his penis penetrating her vagina. He then pulled it out and rubbed it on her vagina. At this stage she grabbed his testicles and squashed them with her hand. When she looked at accused 1 he appeared distressed and his eyes were red. She expected him to assault her. She then told him never to repeat what he was doing. Accused 1 nodded his head. After she repeated her words and he said ok, she let go of him. Accused 1 later went to bed and the complainant did likewise after washing her hands.
- [18] According to the complainant the penultimate and last incidents both occurred on 25 August 2021 during the morning. Accused 1 had returned from work ostensibly to collect a work document. He found the complainant in the kitchen after he had been to his bedroom. He approached her from behind, hugged her tightly and fondled her breasts. He was breathing heavily. He then released her and left for work.
- [19] The complainant reported this incident per sms to A[...] M[...] with whom she was involved in a development programme for girls called Empress.
- [20] Accused 1 returned to the flat later that morning and went to his bedroom. The complainant changed from her pyjamas to a pair of jeans. She approached his bedroom and only put her head through the door. She enquired about his wellbeing since he was back early. Accused 1 called her into the room. She only stood next to the door though he repeatedly asked her to get closer to him. He then pulled her onto the bed. He lay on top of her kissing the complainant on the face and neck area. He stood on the edge of the bed and pulled her closer. He fondled her breasts and undressed her. After taking out his penis and rubbing it against her vagina he penetrated her. He later ejaculated on his hand and left the bedroom to finish off in the toilet. The complainant ran out of the bedroom after collecting her clothes. This entire incident was before 12 noon. The complainant got dressed in the lounge.
- [21] She pretended she was going out to throw away the household garbage. She ran to her aunt's workplace in Vincent. She made a report to her aunt that accused 1 had raped her. Accused 1 called her on her mobile phone to ask that she must return home. She was later taken to IPID offices where a case was registered against accused 1. She was turned back on the way to hospital after being informed that there was no doctor available. She was examined by a forensic nurse on the following day, 26 August 2021.
- [22] The complainant testified that after the sixth incident she reported to accused 2 about the fourth and the sixth incidents. Accused 2 had exclaimed and said to her she should have squeezed his testicles even harder. They were in a vehicle on the way to fetch her younger sister from school. Accused 2 had asked her what was to be done. She gave complainant two options, either reporting to the police or accused 2 talks to him. The complainant indicated to her that she was scared of going to the police. She agreed that accused 2 could speak to him. To the best of her knowledge her mother did not do anything about the report.

- [23] Under cross-examination it became clear that the complainant cannot recall the exact dates of the various incidents except for the last incident. She was taken to task about contradictions, some of the incidents not being in the police statement and those that were contained therein not as detailed as her evidence in court.
- [24] B[...] N[...] who is an aunt to the complainant gave evidence. She confirmed the complainant's testimony regarding the invitation to join the accused on the mattress. She further confirmed that as she had gone to bed earlier than the complainant, she looked up when the latter entered the room. The room was lit and she could see the distressed condition of the complainant. She confirmed that she made enquiries regarding the change she noticed in the complainant. She testified that the complainant told her that accused 1 was touching the latter inappropriately even on her private parts. The complainant also related that accused 1 had made her touch his private parts. She confirmed that the complainant was distressed and on the verge of tears. She decided that she was to leave with the complainant to Tsolo the following morning. She was scheduled to leave two (2) days later but had brought her departure forward and took the complainant with her. She stated that she had not told accused 2 about the report from the complainant because B[...] was afraid of accused 1. She did not tell the complainant's grandmother because of the old lady's fragile health. She only told the grandmother in January 2019.
- [25] Regarding the August 2021 incident B[...] testified that the complainant arrived at her office in a distressed state after 11h00. She confirmed that the complainant reported to her that accused 1 had raped her.
- [26] Under cross-examination she was taken to task about aspects of her evidence which were not in her police statement. She stated that she was in a state of shock at the time of deposing to the police statement. She confirmed that after the complainant's grandmother was informed of the 2018 sexual assault allegations the latter came to East London. She testified that the complainant was about a metre to 1½ metre while seated on the mattress with accused 1 during December 2018 incident. She testified that the relationship between the two accused broke down after accused 1 was charged with rape.
- [27] N[...]o N[...] is the grandmother to the complainant. She confirmed B[...]’s evidence that she reported the 2018 sexual assault incident to her during January 2019. At the time accused 1 was a stranger to her. She testified that she was neither aware of the relationship nor that accused 2 was cohabiting with accused 1.
- [28] Mrs N[...] testified that she came to East London to meet accused 2 before Easter 2019. She informed her about the report she had received of sexual assault on complainant by accused 1. Accused 2 hurriedly left the flat and said on her return that she had gone to confront accused 1. Accused 2 reported on her return that she had confronted accused 1. Accused 1 had stated that he was playing with the complainant and had denied the sexual assault allegation. Mrs N[...] woke up on the following day and left accused 2 in the bed.

- [29] Mrs N[...] testified that she was informed about the rape incident in August 2021. At the time she was nursing accused 2 who had recently been discharged from hospital after a serious illness.
- [30] Under cross-examination Mrs N[...] stated that she had asked the complainant about the details of the 2018 incident after B[...] had reported it to her. She could not recall the complainant informing her about the incident. She confirmed that accused 2 was forgetful. She testified that accused 2 appeared shocked when Mrs N[...] told her of the 2018 incident. She stated that early 2019 before Easter she had come to East London for the sole purpose of informing accused 2 about the 2018 incident. Accused 2 was not ill at the time. She had noticed a change in the behaviour of the complainant after August
2021. The complainant seemed to be angry most of the time and was banging dishes. She was isolating herself from her family and appeared to be reclusive. She was demanding or expecting to get things provided to her immediately. She had left East London a day after accused 2 informed her that accused 1 was denying the allegations regarding the 2018 incident.
- [31] Nomvuyo Makinana is a forensic nurse stationed at Cecilia Makiwane hospital. She testified that on 26 August 2021 she examined the complainant. She found the para-urethral folds were bruised. These are outside the vaginal orifice. She found abrasions and lacerations with minimal bleeding on the posterior fourchette. The fossa navicularis was bruised and red. These were all fresh injuries meaning they had been inflicted less than 72 hours from the time of the examination. These injuries had been inflicted using blunt force.
- [32] Sister Makinana had also found old healed cleft injuries on the hymen. The injury had completely healed. The hymen was also not intact. The hymen injuries contradicted the complainant's report to her that she was not sexually active. She had also found a whitish discharge. In her opinion the old and the fresh injuries were consistent with old and fresh genital penetration of the complainant. The fresh injury supported the complainant's allegations that she was sexually penetrated on 25 August 2021.
- [33] Under cross-examination Sister Makinana indicated that she was unable to state the age of the old injuries other than that it was beyond 72 hours.
- [34] That was the State's case.
- [35] At the close of the State case accused 2 applied for a discharge. The application was refused and it was indicated at the time that the reasons will be provided in this judgment. The reason for refusing the discharge was that the evidence at the close of the State case was such that this court would convict accused 2 if she did not testify in her defence. It appeared to me the evidence was clear and overwhelming from both the complainant and Mrs N[...]. The latter gave evidence that she had informed accused 2 about the 2018 incident and the complainant told accused 2 about the fourth and sixth incidents.

- [36] Accused 1 called Lusanda Booï who is a deputy director for investigations at the Independent Police Investigation Division (IPID). She testified about how her unit obtained a statement from the complainant. She stated that the complainant had mentioned only two (2) occasions when she was raped by accused 1 and there were more incidents of sexual assault. The complainant had alluded that accused 1 was touching her breasts and making her touch his manhood. She denied that she did not read the statement back to the complainant before she signed and initialled it.
- [37] Under cross-examination she indicated that the complainant was withdrawn and exhausted at the time police statement was taken. The complainant initially considered the IPID members as part of the police who were colleagues of accused 1. She indicated that when the complainant was interviewed by the public prosecutor, she provided details of her sexual assault. However, these notes from the public prosecutor's consultation were not converted to a statement. She further stated that the complainant had recalled other incidents after the initial interview.
- [38] Accused 1 testified that he does not recall being alone with the complainant watching television during December
2018. He also could not recall the incident details as alleged by the complainant and B[...]. He was never confronted with the allegations regarding the December 2018 incident. Regarding the first incident where he is alleged to have hugged the complainant accused 1 stated that he hugs everyone in the house when he departs for work and upon his return. He denied the second and the third incidents ever took place. He also denied the fourth and the fifth incidents. On the incident of 25 August 2021 he testified that he left for work before B[...]. He did not see the complainant that day. He denied going back home during the day. He admitted that he went back to the flat after fetching the children from school. He was supposed to take the complainant and her younger sister to a doctor's consultation on accused 2's instruction as they both had flu at the time.
- [39] He testified that he received information that a charge was being laid against him in the private offices at the police station. He denied that he sexually assaulted the complainant between 2018 and August 2021. He testified that it was the first time for him to meet the complainant during December 2018. He denied the various incidents of sexual assault and rape during year 2020. He confirmed that the SAP15 duty register was an obligation to be signed by members. He denied the incident on 25 August 2021 had taken place and said he was at work at the time though he had nothing in writing to support the denial.
- [40] Accused 1 called Luxolo Mhatu who is a retired Lieutenant Colonel who was the crime prevention unit commander at the Cambridge police station during August 2021. He gave evidence that accused 1 was a member of the social crime prevention subcomponent within the unit he commanded. His office and that of accused 1 were in the same passage and diagonally opposite each other. He stated that the SAP15 was essentially an attendance register where it was recorded when members reported on duty and off duty. Attendance

may also be recorded in an occurrence book or a pocketbook. In his view a pocketbook was more reliable as an officer carried it in his person and recorded his movements. He stated that he had seen accused 1 at work in the early morning of 25 August 2021. He saw accused 1 walking past his office. He thereafter left his offices to conduct crime prevention patrols in the townships. Lieutenant Colonel Mhatu then returned to the police station at about 13h00. Whilst he was at the carpark with other officers who were more senior

to him they met accused 1 who reported to him that a charge was laid against accused 1. He could not recall if accused 1 had provided details of the charge or the complainant. He did not see accused 1 again that day.

- [41] Under cross-examination he stated that he was not the immediate supervisor of accused 1. He stated that he left the police station at about 9h30 and returned at 13h00. He could not dispute that accused 1 may have attended work on the morning of 25 August 2021 but then returned to the barracks to commit the offence and later went back to work. He was not in a position to account for the movements of accused 1 between 9h30 and 13h00.
- [42] That was the case for accused 1.
- [43] Accused 2 testified that the complainant relocated to East London in January 2020 so that she may attend the local schools. She testified that the first time she heard about the incident in December 2018 was during August 2021 after a rape case had been registered against accused 1. She denied that her mother had visited in January 2019 as she was still residing with accused 1 at the time. She stated that her mother only came during May or June 2019 when she had moved back to her flat. In her view if the 2018 incident had indeed occurred both the complainant and B[...] had an opportunity to report it to her. She could not provide a reason why they failed to do so. She recalls being woken up during the morning session after she had returned from her night shift duties to transport the complainant and B[...] to the taxi. The departure for Tsolo at that particular time was unexpected. She stated that en-route to the taxi rank she berated them and specifically rhetorically asked what would the complainant and her aunt would have done if she did not have money for the taxi fare as they were surprising her with an early departure.
- [44] Accused 2 testified that one of the consequences of her prolonged illness was that she tended to be forgetful. She forgot even a basic chore like fetching a child from school. She stated that her forgetfulness was not consistent and ongoing. It would surface only when she was ill.
- [45] Regarding the events of 25 August 2021 she confirmed that she had spoken with accused 1. She stated that their telephone discussion only concerned the complainant's younger sibling, K[...] who was to be fetched from the house and bought a cake by a friend of accused 2. Accused 1 informed accused 2 that he had already dropped K[...] at home. Accused 2 stated that she would have opened a case with the police if a report had been made to her about the December 2018 incident.

[46] That was the case for accused 2.

[47] The correct approach in assessing the evidence in a trial is for the court to consider the evidence holistically by having regard to the mosaic of proof as a whole (S v Hadebe and Others 1998 (1) SACR 422 (SCA) at 426 f.) Nugent J (as he then was) in S v Van der Meyden 1999 (2) SA 79 (W)) held that it is wrong to adopt a mechanical, compartmentalised approach of examining the state case in isolation and thereafter consider the defence case discreetly. This may likely result in the illogical conclusion that the state case is acceptable and at the same time the accused version is possibly true. The conclusion whether to convict or acquit depends on the totality of the evidence and must account for all of it. The Supreme Court of Appeal endorsed this approach in the case of S v Aswegen 2001 (2) SACR 97 (SCA).

[48] In this case more than one cautionary rule applies on the complainant as a witness. She is both a single witness and a child witness. In such a case, a court must have a proper regard to the danger of uncritical acceptance of the evidence one who is both a single witness and a child witness. In dealing with such evidence our courts have laid down certain general guidelines which are of assistance when warning themselves of the danger of relying upon a single witness who is also a child witness.

[49] In emphasizing the need for caution, it is necessary to remember that the cautionary rule is a rule of practice and not a rule of law. In applying the cautionary rule, it is well to have regard to the warning of Holmes JA when he said:

“ . . . while there is always a need for caution in such cases, the ultimate requirement is proof beyond reasonable doubt; and courts must guard against the reasoning tending to become stifled by formalism. In other words, the exercise of caution must not be allowed to displace the exercise of common sense . . . ”[2]

I have also kept in mind the accepted guidelines when applying the cautionary rules in evaluating the evidence of a single witness who is also a child. See: S v Dyira 2010 (1) SACR 78 (ECG) at para 10; S v Hannekom 2011 (1) SACR 430 (WCC) at para 15.

[50] The complainant is a single child witness regarding the actual act of sexual assault during December 2018 incident. However, on the circumstances surrounding that incident, B[...] is a corroborating witness. They both state that the complainant was invited to join accused 1 on the mattress. She accepted the invitation and sat more or less a metre to a 1½ metre from the accused. After the conclusion of the movie they were watching at the time B[...] went to the bedroom. The denial by accused 1 of this evidence is without merit and must be rejected. He claims not to recall as there have been many instances he would watch a movie with the complainant. However, the evidence clearly establishes that this was the complainant's first holiday visit to the police barracks. She had been visiting for a few days at the time of the incident. Whether it was seven

- (7) or fourteen (14) days is of no consequence. Most importantly, the overwhelming and convincing evidence is that B[...] and the complainant abruptly left the day after the alleged incident. In such circumstances accused 1 ought to recall clearly what had transpired on the night.
- [51] The further aspect is that on her return to the bedroom the complainant appeared distressed to B[...]. I find it implausible that the complainant in this distressed state would be alert to fabricate an allegation that accused 1 had shortly before sexually assaulted her. A court is entitled to take into account the distressed condition of a complainant in determining whether she has been raped or not. Our Appellate courts have recognised that the distressed and traumatized state of a complainant immediately after an incident of alleged rape lends credence to her allegation.[3] That reasoning applies with equal force to sexual assault.
- [52] Both the complainant and B[...] testified that the complainant immediately gave a first report of the sexual assault by accused 1. In my view the first report immediately after the incident shows consistency on the complainant's part in regard to her allegation which is a factor that serves to rebut any suspicion that she may have fabricated the allegation.[4]
- [53] The further aspect that lends credence to the allegation of sexual assault is that the complainant and B[...] prematurely left the police barracks flat for Tsolo before their respective scheduled times for such a departure. The denial by accused 1 that the departure was premature is without merit. Much was made during the trial whether the complainant and B[...] left before or after Christmas. That issue is of no consequence. The material issue is whether they left as scheduled or planned alternatively abruptly or prematurely. The complainant, B[...] and accused 2 all state that the departure was premature. The question arises, why would that be so? The ineluctable

conclusion from the evidence before court is the reasons provided by the complainant and B[...], namely, the sexual assault on the complainant made any further stay, even for a day longer, intolerable. The evidence indicates they had to depart immediately for the safety of the complainant.

- [54] The criticism by Mr Skade, who appeared for accused 2, on the evidence regarding this incident is without merit. A failure by the complainant and the first report to mention a particular incident when the allegation is one of ongoing sexual abuse can never be the basis of rejecting credible and reliable evidence. There is no requirement in our law that before a conviction may ensue the State must prove with precision the exact date on which the incident took place. As already indicated that issue is of no consequence when the evidence is considered holistically. Both the complainant and B[...] have testified that accused 2 was not informed of the allegations of sexual assault due to the fact that B[...] wanted to protect accused 2's relationship with accused 1. The fact that the complainant relocated to the police barracks in 2020 cannot be a basis to reject credible and reliable evidence. The complainant who was a young child did not have much say in the matter as her mother took the decision for her to go and stay in the police barracks during 2020. She

was a twelve

- (12) year old child and the evidence does not indicate that she was a rebellious child who would have run away from home or done something like that.
- [55] The proper approach in evaluating the evidence regarding the second to the sixth incidents or put otherwise the year 2020 incidents is that each and every one of those incidents must be evaluated individually and the merits of each incident considered. It is only after such an exercise that one may step back and consider the 2020 incidents as a group or holistically to identify any pattern or whatever the evidence indicates. I have performed such an exercise. However, due to the conclusion I have reached it is not necessary to set out in detail the evaluation of the evidence on each of the incidents.
- [56] In each of these 2020 incidents the complainant is a single witness. On each of these incidents she impressed me as a good witness who gave consistent, clear and persuasive evidence. But that is not the end of the evaluation. When I exercised the necessary caution in determining whether the standard of proof has been established, I found that the evidence fell short. In my view, this was unfortunate as it was not due to any fault of the complainant. It appears to me that these incidents were not properly investigated. By that I mean corroborating evidence may have been found somewhere else. An example would suffice. An investigation may have been conducted with the assistance of the complainant's schoolteachers and an evaluation of her performance at school. A decline in performance correlating with a particular allegation may have assisted the State in reaching the legal standard of proof. Some of the valid criticism against the evidence in these counts has been set out by Mr Skade in his heads of argument. I am satisfied that the benefit of doubt redounds to accused 1 for lack of corroboration of the allegations.
- [57] The incident on 25 August 2021 is on a different footing. There are two offences that were committed on that day. The complainant testified that she was sexually assaulted by accused 1 on the morning of that day. She stated she made a report to an age mate of hers involved in the Empress development programme. This testimony about the first report was not challenged. It is regrettable that the Empress friend of the complainant was not called as a witness. However, even without that evidence and having exercised the due caution, I am satisfied that the complainant was sexually assaulted. The evidence she gave on this sexual assault incident was coherent, credible and reliable.
- [58] The complainant gave evidence on the manner in which the accused had raped her on this day. The evidence does not stand alone. She found corroboration from Sister Makinana who concluded that the complainant's vagina had been penetrated in the previous 72 hours from 26 August 2021. The medical evidence stands unchallenged. Her distressed state on arrival at B[...]s workplace lends credence to her allegation that accused 1 had raped earlier that day. Her report to B[...] is consistent with her allegation of rape. I find it implausible that the complainant in her distressed and shocked state

of mind would be alert to embellish her version when she gave the report to B[...]. In my assessment of the complainant, she appeared to be a normal child of average intelligence. Her first report serves to rebut any suspicion that she may have fabricated the allegation.

[59] Accused 1 raises an alibi as a defence to this rape and sexual assault allegation. It has been held that ‘the correct approach is to consider the alibi in the light of the totality of the evidence in the case and the courts’ impression

of the witnesses.’[5] It is not in dispute that accused 1 had gone to work at the normal time on the morning of 25 August 2021. The issue in dispute is limited. The complainant alleges that he had returned during that morning and committed the sexual assault. He again left for work. She alleges that before noon he came back again to commit the rape.

[60] The testimony in support of the alibi was provided by accused 1 and Lieutenant Colonel Mhatu. Accused 1 alleges that he went to work at the normal time and was at work until he had to go and fetch the complainant’s younger sibling from school. The evidence is corroborated to a limited extent by Mr Mhatu who confirms that he saw accused 1 passing his office earlier that morning before 9h30 and again at about 13h00 at the carport.

[61] Mr Mgenge, who appeared for the State submitted, correctly in my view, that between 9h30 and 13h00 the accused had the opportunity and the time to go back to the flat. Both his office and the flat were within the same complex and less than a five

(5) minute walk apart.

[62] In my view the totality of the State’s evidence is so overwhelming that it can be concluded that accused 1’s alibi when placed in the context of the evidence as a whole cannot be reasonably possibly true. When it is considered that accused 1 was a poor witness who had no qualms in fabricating his evidence, I am satisfied that his version must be rejected as false beyond reasonable doubt. If it is accepted that the complainant was sexually penetrated on 25 August 2021 and accused 1 is not the perpetrator, then the only conclusion is that the complainant is substituting the real perpetrator with accused 1. Such a conclusion is farfetched and improbable as correctly submitted by Mr Mgenge. Accused 1 has not produced a shred of evidence regarding what he was doing at work before 13h00 on 25 August 2021.

He knew on that very day that he was accused of rape. It was a simple matter for him to produce the work he was doing in

substantiation of his alibi. I must hasten to add I am alive to the fact that he does not have to prove his alibi. In the circumstances of this case, his mere say so that he was at work from the morning until 13h00 is wholly insufficient in light of the evidence tendered by the State.

- [63] The criticism of the evidence against the accused relating to the sexual assault and the rape on 25 August 2021 is without merit. It selectively considers the evidence instead of taking a holistic approach to the entirety of the evidence before court regarding the events of that day.
- [64] Turning to accused 2, the complainant and her grandmother both testified that they had informed her about the December 2018 incident. The complainant states that she reported the fifth and the sixth incident during the year 2020 to accused 2. I am satisfied by the complainant's testimony that she had indeed informed her mother about the December 2018 incident. I am likewise satisfied that the grandmother had come to East London for the sole purpose of informing accused 2 about the December 2018 incident. If accused 2's denials were to be believed the grandmother, Mrs N[...] never visited East London between December 2017 until May/June 2019 when accused 2 was afflicted with blindness. I say so for the reason that accused 2 has maintained throughout that Mrs N[...] never visited while she was cohabiting with accused 1.
- [65] When the evidence is considered holistically accused 2's testimony is highly improbable. All the witnesses who are members of the N[...] family were unanimous that Mrs N[...] visited accused 2 when she was seriously ill. The uncontested evidence is that accused 2 had been ill from her discharge at police college in December 2017 throughout the material time.
- [66] I find the denials by accused 2 to ring hollow. I was very impressed with Mrs N[...] as a witness who was clear, honest and credible. I could only imagine the emotional turmoil she went through testifying against her own daughter whom she clearly loves and cares deeply about. But to her credit she testified truthfully and honestly. The denials by accused 2 are without merit.
- [67] In the alternative, accused 2 stated that even if she were told about the sexual assault and the rape she suffered from a medical condition which caused her temporary mental incapacity in the form of forgetfulness. In these circumstances she could not be able to report to the police what she had been told as she would have forgotten it. The alternate defence only needs to be stated for its flaws to become apparent. The underlying medical condition was not disclosed to the court, as it is her right to decide. However, such an election has consequences. The court is not able to properly assess whether the forgetfulness really constituted temporary mental incapacity which would excuse her failure to report the offence.
- [68] The forgetfulness, as I understood it, was a symptom of the underlying medical condition. This type of defence required a medically qualified person to explain to the court what exactly the symptom entailed. Was this a permanent or temporary amnesia? Was memory regained at any stage? None of the required evidence was tendered ostensibly due to Dr Mgwedli being recalcitrant to come to court. In my view it was a simple matter of having a subpoena prepared for Dr Mgwedli. Such was not done to compel an otherwise available

witness. As a result, the evidence before court regarding the forgetfulness falls woefully short of the required standard for the court to determine that indeed it constituted temporary mental incapacity which would excuse her failure to report to the police. In the circumstances her defence cannot be sustained.

[69] In the result the following verdict will issue:

Accused 1:

69.1 He is found guilty of the sexual assault of the complainant during December 2018 and 25 August 2021.

69.2 He is found guilty of the rape of the complainant on 25 August 2021.

Accused 2:

69.3 She is found guilty for failing to report a sexual offence committed against a child to the police in contravention of sec 54(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

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JUDGE OF THE HIGH COURT

Appearances: For the State: Advocate Mgenge instructed by Director of Public Prosecutions MAKHANDA For the Accused 1: Mr Skade instructed by Workerslife PGC House 273 Paul Kruger Street PRETORIA For the Accused 2: Mr Nokhwali instructed by Private instructions TSOLO
Heard: 13, 14, 15 & 16 February 2023 15, 16, 17, 18 & 19 May 2023 12, 13 & 14 June 2023 18, 19, 20 & 21 September 2023 26, 27 & 28 February 2024 Delivered: 29 February 2024

[1] S v Vilakazi 2009

(1) SACR 552 (SCA) at para 21.

[2] See S v Artman 1968

(3) SA 339 (A) at 341C.

[3] S v Kruger 2014

(1) SACR 647 (SCA) at para 9.

[4] S v Kruger ibid.

[5] S v Hlongwane 1959

(3) SA 337 (A) at 341A.

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