REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 35/2014

In the matter between:

GERSON NAWESEB **APPELLANT**

And

THE STATE **RESPONDENT**

Neutral citation: *Naweseb v State* (CA 35/2014) [2014] NAHCMD 239 (11 August 2014)

Coram: GEIER, J and UEITELE, J

Heard: **28 JULY 2014**
Delivered: **11 August 2014**

Flynote : **Criminal procedure** - *Evidence* — Evidence of single witness — Sufficiency of — Accused can be convicted on evidence of single witness — Though court must exercise caution, common sense should prevail — Evidence of single witness need not be perfect in every respect — Court must be satisfied that truth was told.

Criminal procedure - *Evidence* — Circumstantial evidence — Inferences to be drawn from circumstantial evidence — Inference must be consistent with proved facts — Inference must exclude any other inference — Law not requiring court to act upon absolute certainty — When dealing with circumstantial evidence, court must consider cumulative effect of all the evidence.

Criminal procedure - *Evidence* — Assessment of — Witnesses — The accused — Untruthfulness of accused — False evidence by accused not meaning that accused is guilty — Circumstances of each case must be considered in the light of other evidence — General principles for dealing with false statements by accused, set out.

Criminal procedure - *Evidence* - Of children - Proper approach to a consideration thereof.

Summary: At the conclusion of a trial (on 12 August 2011) in the Otjiwarongo Regional Court (sitting at Khorixas) the appellant was convicted of contravening section 2 read with sections 1, 3, 4 ,5, 6 and 7 of the Combating of Rape Act, 2000. On the same date (i.e. on 12 August 2011) he was sentenced to 18 years' imprisonment. On 01 September 2011 the appellant's Notice of Appeal was received by the Respondent. The appellant's appeal was initially against both the conviction and the sentence. On 14 July 2014 the appellant filed an amended Notice of Appeal in which he abandoned the appeal against sentence. So what is serving before the Court now is his appeal against the conviction.

In essence his grounds of appeal can be summarized as follows, that the court *a quo* erred in relying on the medical report (the J88), that the court *a quo* erred by not warning itself of the inherent dangers of the evidence of a single witness particularly when such a witness is a young child and that the court *a quo* erred when it considered the question whether the respondent had discharged the onus resting on it to prove that the appellant's guilt has been proven beyond a reasonable doubt.

Held that the J88 is admissible as *prima facie* proof of the fact that MH suffered the injuries recorded in that document.

Held further, that the court *a quo* was conscious of the inherent dangers of the evidence of a single witness and that it approached that evidence with caution, it therefore did not misdirect itself on the dangers inherent in the evidence of young children.

Held furthermore, that the court *a quo* investigated the defence case with a view to discerning whether it is demonstrably false or inherently so improbable as to be rejected as false and that it applied its mind not only to the merits and the demerits of the State and the defence witnesses, and that it was justified in reaching the conclusion that the appellant's evidence was false and had to be rejected.

Held furthermore, although the complainant was a single witness on the actual rape, her evidence was corroborated by witnesses and the J88 and that the guilt of the appellant was proved beyond a reasonable doubt.

ORDER

The appeal is dismissed.

JUDGMENT

UEITELE, J (GEIER, J concurring):

A INTRODUCTION

[1] At the conclusion of a trial (on 12 August 2011) in the Otjiwarongo Regional Court (sitting at Khorixas) the appellant was convicted of contravening section 2 read with sections 1, 3, 4 ,5, 6 and 7 of the Combating of Rape Act, 2000[1]. On the same

[1] Act 8 of 2000.

date (i.e. on 12 August 2011) he was sentenced to 18 years' imprisonment. On 01 September 2011 the appellant's Notice of Appeal was received by the Respondent. The appellant's appeal was initially against both the conviction and the sentence. On 14 July 2014 the appellant filed an amended Notice of Appeal in which he abandoned the appeal against sentence. So what is serving before us now is his appeal against the conviction. I deem it necessary to start this judgment by considering the point *in limine* raised by the respondent and the application for condonation as submitted by the appellant.

B POINT *IN LIMINE* AND APPLICATION FOR CONDONATION

[2] The respondent raised a point *in limine* relating to the time of noting the appeal. Ms. Esterhuizen who appeared for the respondent argued that the notice of appeal did not comply with the Magistrates' Court Rules[2] in that the appellant was sentenced on 12 August 2011 but only filed his notice of appeal on 01 September 2011, which is more than the 14 days contemplated in the Rule. At the hearing of this appeal we pointed out to Ms Esterhuizen that the Notice of Appeal was filed pursuant to the Rules of the Magistrates' Court and that Rule 2(2) of the Magistrates Court Rules in material terms provides as follows:

> '(2) A Saturday, Sunday or public holiday shall not, unless the contrary appears, be reckoned as part of any period calculated in terms of these rules.'

If one counts the days between 12 August 2011 and 01 September 2011 and exclude Saturdays, Sundays and Public Holidays the 01 September 2011 will be the thirteenth day. We are therefore satisfied that the original Notice of Appeal was filed within the 14 days stipulated in Rule 67(1) and the point *in limine* on that score fails.

[3] The appellant, however, faced other procedural difficulties in that certain time limits set in the Magistrates' Court Rules and in this Court's Rules were not complied with and he accordingly applied to this Court that his failure to timeously comply with some rules of court be condoned. There were three aspects to that application, namely:

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2 Rule 67 (1) of the Magistrates' Court Rules.

(a) The late filing of the Amended Notice of Appeal;

(b) The delayed filing of the appellants heads of arguments; and

(c) The failure to serve the amended notice of appeal on the presiding magistrate as contemplated in rule 67(4) & (5) of the Magistrates' Court Rules.

[4] Generally, a court may condone non-compliance with the time limits set out in its rules or in the relevant legislation. The authorities in this regard are well-known, it is required of an applicant who has failed to comply with the time limits set in the court rules or in the applicable legislation to satisfy the Court of appeal that there is a reasonable explanation for the non-compliance with the time limits required by the rules or the relevant legislation and that there is reasonable prospect of success on appeal[3]. In *Pietersen-Diergaardt v Fischer*[4] Manyarara, AJ said the following:

> 'In considering an application for condonation for the late prosecuting of an appeal, the court will take several factors into account. These include the degree of the delay, the reasonableness of the explanation, the prospects of success and the importance of the matter. The list is not exhaustive and the court has discretion, but there should be some flexibility when exercising such discretion.'

[5] In order to avoid duplication in argument with regard to the aspect of reasonable prospects of success which in any event entails a consideration of the merits of the appeal, we allowed Mr Kamanja who appeared in this Court on behalf of the appellant, to argue the question of condonation as well as the appeal.

[6] The application for condonation was supported by affidavits of the appellant himself and his legal practitioner. In those affidavits the appellant and Mr Kamanja, the appellant's legal representative only explained the difficulties they faced in July 2014. In this matter the appellant was sentenced on 12 August 2011 and the Notice

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[3] De Villiers v De Villiers 1947 (1) SA 635 (A); S v Van Niekerk 1967 (4) SA 269 (SWA); S v Ntskoane 1976 (2) SA 401 (O); Pen dock and Another v Attorney-General, Natal 1958 (3) SA 875 (N) at 880C-D; S v Ackerman 1965 (4) SA 740 (O). S v Ngombe 1991 (1) SACR 351(Nm) at 352B-C; Pietersen-Diergaardt v Fischer 2008 (1) NR 307 (HC).

[4] Supra at 3.

of Appeal was served on the respondent on 01 September 2011. Both the appellant and his legal practitioner did not explain what they did between September 2011 and July 2014 in the prosecution of the appeal, this is a delay for a period of over thirty six months. Mr Kamanja (he was not the legal practitioner representing the appellant at the trial in the Regional Court) at the hearing of this appeal attempted to outline the difficulties that he allegedly encountered in obtaining the record of proceedings in the trial court, but those difficulties ought to have been set out in the affidavit supporting the application for condonation.

[7] As regards the filling of the heads of arguments Mr Kamanja conceded that he had not acquainted himself with the provisions of the new Rules. In a very recent judgment[5] the Supreme Court has stated that:

> 'As a matter of fact a court-bound lawyer is considered to be incompetent if he/she does not know the rules of procedure. Moreover, in law schools for learner legal practitioners they normally place a high premium on learning rules of procedure whether in criminal or civil matters. Furthermore, one expects that in every law firm of court practitioners there will be a library inclusive of rules of procedure. That stresses the pivotal role the rules play in litigation.'

[8] It thus follows that if, counsel in this case had cared to peruse the rules of the Magistrates' Court and the rules of this Court he would have accessed them and then discovered that he had fourteen days after receiving the Magistrate's reasons to file an amended notice of appeal and as regards the heads of arguments he would have discovered that had to file his heads of arguments fifteen days before the appeal is heard. It follows that counsel's excuses for the mistakes he committed are unacceptable.

[9] In order to decide whether we must condone the appellant's failure to comply with rules of both the Magistrates' Court and this Court I will now turn to consider the prospects of success upon appeal. In that process I will first set out the allegations against the appellant and briefly summarize the evidence tendered at

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[5] Ugab Terrace Lodge CC (Now known as Ugab Terrace Lodge (Pty) Ltd) v Damaraland Builders CC Appeal Judgment SA 51/2011 (delivered on 25 July 2014) at para [3].

the trial, the finding by the Magistrate and thereafter restate the appellant's grounds of appeal and finally evaluate the cogency of the grounds of appeal.

C THE ALLEGATIONS AGAINST THE APPELLANT

[10] In brief, the allegations against the appellant were that during the month of March 2005 on various occasions and at or near Khorixas in the regional division of Namibia, the appellant did unlawfully and intentionally and under coercive circumstances, by use of physical force against the complainant who is under the age of 14, (namely 9 years old) and accused is more than three years older than the complainant, (namely 24 years) commit or continued to commit a sexual act with the complainant. The sexual act consisted in accused inserting his penis into the complainant's vagina.

[11] The facts (based on the evidence led by the State) of the case may be summarised as follows: During the month of March 2005 a certain Ms Helga Shikuru who was the class teacher of the complainant (I, will in this judgment refer to the complainant simply as MH) and whilst teaching got a bad smell from the complainant (MH). MH always sat in front in the class. Ms Shikuru went to the storeroom and summoned MH. When it was only the two of them in the storeroom Ms Shikuru asked MH whether she bathed and the reply was in the affirmative. Ms Shikuru continued to question MH and asked her whether she was perhaps troubled by a man or whether there was a man staying at their house. MH's reply was in the negative. Ms Shikuru then reported the matter to her Head of Department a certain Ms Olga Haradoes. Ms Haradoes took MH to the storeroom and asked her what her problem was and why she was having that bad smell. She testified that she requested MH to be open and to talk openly, about her problem. After approximately ten minutes of questioning by Ms Haradoes MH stated that a certain //aimab had sexual intercourse with her.

[12] After the report of the sexual intercourse, the teachers summoned an enrolled nurse and midwife from the Khorixas State Hospital to the school. The nurse who examined MH detected a bad smell, a very strong smell and the smell was coming from her vagina, a smell like an adult woman would smell, but MH was a very small

child and when she looked at MH's vagina, there was a whitish dirty something or discharge outside and inside. The white thick discharge is normally associated with a woman who is having an infection. MH's female genitals and the vagina were reddish, like an area that was rubbed. MH said that whenever she was urinating she felt like burning and it was painful and that she has had the discharge and pain for approximately seven days. After her discoveries the nurse decided to refer MH to a doctor for further examination.

[13] As part of its case the State called a certain Dr. Jacques who handed up a document purporting to be a medical report (the J88) which was completed by a doctor (a certain Dr Oyesovo) who was absent from the country and was not available to testify. Dr. Jacques read out the findings made in that medical report. The findings were that the medical examination was painful, discharge from the complainant's vagina, bruising and absence of hymen. In the document (the medical report) the doctor who examined MH concluded as follows, *'In my opinion, the injuries fit into the circumstances vaginal penetration.'*

[14] The complainant MH also testified. She testified that she was staying with her aunt and grandmother and sister in the location called !Naub. She further testified that during March 2005 while she was playing at the neighbour's house with her friends the appellant came there and called her. When she went to him, he held her on the arm and took her to the room of Dalene. In Dalene's room he threw her on the bed, lifted up her dress, took off her panty. From there he started raping her, she was resisting him, trying to stop him and she wanted to scream and he said if she screamed he will stab her to death. She furthermore testified that he inserted his penis in her vagina. After he finished he put on all his clothing and he left, so she went back where she was playing and continued to play with her friends. She testified that she did not tell anyone because the accused person said if she tells anyone he would kill her.

[15] MH further testified that on another day (i.e. after the first incident) she went to visit the accused's grandmother who was sick. Accused asked her for water, she took the water to him in his room when she entered accused's room he pulled her to the bed as he was in the bed. He then lifted up her dress and inserted his penis into her vagina. She testified that while he was doing that he was also inserting his finger

in her vagina. She testified that she only informed a teacher at school about the incidence after the teachers got bad smell coming from her and questioned her.

[16] The appellant testified and denied that he ever had sexual intercourse with MH. He raised the defence of *alibi,* he testified that on 11 April 2011 when he was arrested by the police at farm Renoster Berg Pos he was staying at the said farm. He also denied that he had a grandmother as his grandmother died whilst he was still a child. He further testified that the house where he resided when he was in Khorixas was a two roomed house consisting of a kitchen and a bedroom only. He however admitted that they later moved to a four roomed house which had two bedrooms a kitchen and a sitting room. The appellant could however not advance any reason why MH would falsely implicate him. In cross-examination he had difficulties to explain why he gave his residential address as P-23 Khorixas when he was arrested.

D THE FINDINGS BY THE MAGISTRATE.

[17] After hearing the evidence the Magistrate convicted the appellant of the offence of contravening the Combating of Rape Act, 2000. I will, verbatim, quote part of her reasoning below, she amongst other said:

> 'What is common cause in this case is the fact that it is quite clear that the Complainant or the victim the child was sexually assaulted .The question that the Court must now decide on is whether it was indeed the Accused person who raped the victim. In order to make that conclusion or in order to make the decision or Judgment the Court must look at the credibility of the witnesses, the Court must also look at the evidence as a whole and not as in isolation. It is correctly pointed out by the Defence counsel that the Court is confronted with the evidence of a single Witness with regard to the incidence. I refer to Section 208 of the Criminal Procedure Act that an Accused person may be convicted of any offence of a single or the evidence of a single witness as long as that is a competent witness. It is also stated in the case of *S versus Stevens* a 205 case volume I SA1 SCA, that such evidence is to be approached with caution. And it is further said that a cause (most probably court) must thus make a credibility finding … in the case of *S versus Artman and Another* 1968 (3) SA 339 SCA stated by Judge Holmes that, the single witness the evidence of a single witness must be satisfactory, clear in all material aspects in order for the evidence to be accepted by the court. However it is stated in the case

of *S versus De Villiers* that the execution of common caution is not to be displaced by the exercise of common sense by the court.

The court looked at the credibility of the witnesses starting with the complainant. The complainant at the time of the incident was very young, she was 10 years old, now in court today she is 15 years old. The incident happened six years ago. However the complainant have a very clear recollection of what happened during that period and she could state to the court very clearly step by step what happened. She did not contradict herself at any stage and she could answer during cross-examination each and every question put to her. Her version and that they was at the first incident she was playing with friends, she was removed by the accused person and then pulled into the house where the accused person had force for sexual intercourse with her. He threatened to kill her, she resisted him but he continued the sexual act. The second incident when she took water to the accused person where his grandmother according to her was sick the accused person once again pulled her, removed he underwear and had sexual intercourse with her. She indicated under cross-examination or under a question by the court she resisted but the accused person continued. When the victim was asked why she only informed the second teacher Ms Haradoes she said in her evidence that, she wanted somebody to ask her. And she informed that teacher that it was the accused person who raped her. I refer you now to the writings of a well-known writers Doctor Karen Miller and Professor Karen Holley. The citation of this book is Introducing the child witness, the book was issued in June 2009. I refer you to page 191… it is stated on page 190 that, children rarely if ever have delusions of a type involving a false immutable conviction of having physically or sexually been abused. Such a symptom would be more feasible during adolescence as part of her *suitafrimium*, paranoid or mainly psychosis, and it does not appear in child between the age of seven and 10 years old. I also refer you to the case of *R versus S* Judge Bok said at page 422, I hardly think that a child of his age it was a child involving a boy of 10 years old that was sexually molested. I hardly think the child of his age could on the spur of the moment make up a story and told his mother on the 12th of June and then come to Court and then tell the same story in detail it is not possible for the child to make up a lie if he tells the story in detail …The court finds that the State proved beyond reasonable doubt that the accused person is guilty of the offence of rape.'

E THE GROUNDS OF APPEAL

[18] As indicated above the appellant appeals against the above finding by the Magistrate the grounds of appeal are formulated as follows: (I quote verbatim the said grounds of appeal I first quote the original grounds of appeal.)

> ‘1 The learned Regional Magistrate erred and thereby misdirection herself by accepting and relying the medical evidence against the accused (appellant herein) whilst such evidence was not relevant or corroborative to the evidence of the State;
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> 2. The learned Regional Magistrate erred and thereby misdirected herself by convicting the accused (appellant herein) on evidence which was not beyond reasonable doubt. Therefore the State failed to place sufficient evidence which proves beyond reasonable doubt that the accused (appellant herein) committed the offence;
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> 3. The learned Regional Magistrate erred and thereby misdirected herself by accepting medical report evidence by a purported ‘affidavit’ which did not comply with the legal requirements for an affidavit. Such medical evidence was adversely used against the accused (appellant herein) to sustain the conviction.’

[19] In the amended notice of appeal the grounds of appeal were formulated as follows:

> ‘Retaining grounds 1 and 2 below:
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> 1. That the learned Regional Magistrate erred and thereby misdirected herself by accepting and relying the medical evidence against the accused (appellant herein) whilst such evidence was not relevant or corroborative to the evidence of the State;
>
> 2. That the learned Regional Magistrate erred and thereby misdirected herself by convicting the accused (appellant herein) on evidence which was not beyond reasonable doubt. Therefore the State failed to place sufficient evidence which proves beyond reasonable doubt that the accused (appellant herein) committed the offence.

Rephrasing grounds 3 to read as follows:

3. That the learned Regional Magistrate erred and thereby misdirected herself by accepting as conclusive proof of medical report in terms of Section 212(4)(a) when the evidence was not of a conclusive nature. She failed to appreciate the anomalies in the medical report and failed to appreciate that the state had not proved the medical repot as reliable and beyond reasonable doubt.

Adding grounds 4 and 5 below:

4. The learned Regional Magistrate erred and failed to caution herself on single witnessed evidence and more so in the case of single witness of a child. The learned Regional Magistrate misconstrued the law on the susceptibility of suggestion towards children witnesses.

5. The learned Regional Magistrate did not apply the correct test in assessment of evidence of corroborative circumstantial evidence, and instead chose the evidence of the state and rejected the evidence of the accused on the wrong test.'

F CONSIDERATION OF THE GROUNDS OF APPEAL

[20] Although the appellant lists the grounds of appeal as being five there in essence are only three grounds of appeal which can be summarized as follows, that the court *a quo* erred in relying on the medical report (the J88), that the court *a quo* erred by not warning itself of the inherent dangers of the evidence of a single witness particularly when such a witness is a young child and that the court *a quo* erred when it considered the question whether the respondent had discharged the onus resting on it to prove that the appellant's guilt has been proven beyond a reasonable doubt.

[21] The attack on the reliance by the court *a quo* is in essence that that court erred by relying on the medical report admitted into evidence without such report being classified as to whether it is an affidavit or a certificate. Mr Kamanja who appeared for the appellant argued that Exhibit B (i.e.J88) purports to be an affidavit

(declaration) and was tendered into evidence by the respondent as an affidavit and not a certificate. He further criticised the medical report as being commissioned prior (the report indicates that the declaration was deposed to on 06/04/2005) to the date on which the examination of MH took place (the report indicates that MH was examined on 07/04/2005. This is an extremely suspicious anomaly in the declaration which the learned Regional Magistrate failed to exercise due caution upon, so argued Mr Kamanja. Mr Kamanja further took issues with the fact that the medical examination as depicted in the medical report was only conducted one month or thirty days after the alleged rape was first reported and when MH was referred to a doctor.

[22] This ground of appeal is without merit for two reasons. The first reason is that Mr Kamanja appears not appreciate the fact that the Legislature has (way back in 2003) intervened and relaxed various strict provisions in our criminal, procedural and evidential systems, one such intervention was the relaxation of the stringent evidential provision contained in s 212(4)(*a*). Section 212 of the Criminal Procedure Act, 1977[6] was amended by s4 of the Criminal Procedure Amendment Act, 2003[7] by inserting s 7A which provides as follows:

> '(7A)(a) Any document purporting to be a medical record prepared by a medical practitioner who treated or observed a person who is a victim of an offence with which the accused in criminal proceedings is charged, is admissible at that proceeding and prima facie proof that the victim concerned suffered the injuries recorded in that document.'

[23] In a line of cases[8] this court has held that the admissibility of a document purporting to be medical report need not first be commissioned for it to be accepted in evidence This line of reasoning was recently approved by the Supreme Court in

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6 Act 51 of 1977.

7 Act 24 of 2003.

8 See *Joel Kambala v The State,* Case No CA 74/2010, unreported judgment, delivered on 18 January 2011, paras 6 and 10, per Liebenberg, J, Tommasi, J concurring, *State v Hangula Simson Mwanyangapo*, Case No CC 21/2010, unreported judgment, delivered on 17 October 2012, para 50, per Shivute, J; *Shilunga Thomas v The State*, Case No CA 67/2010, unreported judgment, delivered on 26 November 2012, para 27, per Liebenberg, J, Tommasi, J, concurring; *The State v Herbert Cimu Nkasi*, Case No CC 02/2010, unreported judgment, delivered on 24 March 2010, para 65, per Liebenberg, J. *Teofelus Taanyaanda*, Case No CA 43/2009, unreported judgment, delivered on 30 July 2010, para 22, per Liebenberg, J, Tommasi, J concurring.

the case of *Eiseb C v State* [9] where Mainga, JA (with Shivute, CJ and Damaseb, AJA) said at paragraph [9];

> '[9] It is clear from subsec 7A(*a*) that the Legislature omitted the word 'affidavit' from the subsection, in the process relaxing the strict evidential rule that only a 'document purporting to be an affidavit shall, upon its mere production at . . . proceedings be *prima facie* proof of such fact . . . '. Any document purporting to be a medical record, is since the 2003 amendment, also admissible in evidence…'

[24] It is therefore clear that in this matter Exhibit "B" the J88 is admissible as *prima facie* proof of the fact that MH suffered the injuries recorded in that document. The second reason why that ground of appeal is meritless is the fact that at the trial counsel for the appellant (accused at the trial) did not object to the admission of the Exhibit B. In the *Eiseb* case[10] the Supreme Court held that:

> '[15] The failure of appellant's legal representative to object to the medical report was a clear indication to the State and the court that she was not objecting to the admissibility of the medical report as evidence. In *Wolfgang Hans Hufnagel v The State*, Case No CA 28/2001, unreported judgment, delivered on 15 October 2001 per Levy, AJ, Manyarara, AJ concurring, it was alleged by the appellant that the affidavit of the forensic analyst relied on by the State where she analysed one blood sample of the appellant was invalid for the reason that it was commissioned by the head of the National Forensic Science Institute.
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> [16] Levy, J stated in relation to the lawyer who represented the accused in that case: 'Mr Brandt's statement that he had no objection was a clear indication to the State and the Court that he was not objecting to the admissibility of the affidavit in evidence. *If the affidavit was invalid, his failure to object does not make it valid. However, by reason of his specific statement and conduct, appellant is estopped from raising this point on appeal. A litigant is bound by the decision of his legal adviser when the latter handles his trial*'. See also *SOS Kinderdorf International v Effie Lentin Architects* 1993(2) SA 481 Nm HC at 490C-D. (Italicized and underlined for emphasis)

[25] I now proceed to consider the second ground of appeal namely that the court *a quo* erred by not warning itself of the inherent dangers of a single witness

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[9] An as yet unreported Appeal Judgment No. SA 33/2012 delivered on 21 July 2014.
[10] *Supra* at paras [15] &[16].

especially a young child. In the written heads of arguments and in oral evidence Mr Kamanja elaborated on this ground by arguing that the learned Regional Magistrate accepted the authority of work of a Doctor Karen Miller and Professor Karen Holley without providing an opportunity to the appellant to argue against it and that this work is not law, but conjecture and should not be accepted as facts without giving an opportunity to an accused person to challenge same. He further criticised the learned Regional Magistrate for not making an effort to ascertain whether the minor child (MH) was able to appreciate the oath and particularly the duty to tell the truth. He referred us to the case of *Gabriel Boois v. The State*[11], where this Court per Hannah, J stated that:

> 'Again there is no fixed age at which children become competent witnesses. In each case the judge or magistrate must satisfy himself that the child understands what it means to tell the truth. If the child does not have the intelligence to distinguish between what is true and false, and to recognise the danger and wickedness of lying, he cannot be admonished to tell the truth – he is an incompetent witness.'

[26] This court has in the case of *Joel Kambala v The State*[12], articulated the approach to the evidence of a single witness as follows:

> '[14] Because of the inherent danger of relying exclusively on the sincerity of the single witness, *this has evoked the judicial practice that such evidence should be approached with caution and only be relied upon where such evidence is clear and satisfactory in material respects.* Thus, although the court in terms of s 208 of the Act may convict the accused on any offence on the single evidence of any competent witness, such evidence should be treated with utmost care and may only safely be relied upon where it is supported by some satisfactory indications that it is trustworthy. However, it need not be satisfactory in every respect and it may safely be acted upon even where it has some imperfections – provided that the court at the end is satisfied that the truth has been told. (*S v Sauls and Others* 1981 (3) SA 172 (A); *S v Monday* 2002 NR 167 (SC); *S v Haihambo* 2009 (1) NR 176 (HC)).'

[27] In the case of *R v Manda*[13] the Schreiner, JA, (with Centlivres, CJ, and Hoexter, JA concurring) argued that:

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11 2004 NR 78.
12 Case No CA 74/2010, unreported judgment, delivered on 18 January 2011, paras 14 and 15, per Liebenberg, J, Tommasi, J concurring.
13 1951 (3) SA 158 (A).

'The imaginativeness and suggestibility of children are only two of a number of elements that require their evidence to be scrutinised with care amounting, perhaps, to suspicion. It seems to me that the proper approach to a consideration of their evidence is to follow the lines adopted in the case of accomplices (*Rex v Ncanana*, 1948 (4) SA 399 (AD)) and in the case of complaints in charges of sexual assault (*Rex v W*., 1949 (3) SA 772 (AD)). *The trial court must fully appreciate the dangers inherent in the acceptance of such evidence and where there is reason to suppose that such appreciation was absent a court of appeal may hold that the conviction should not be sustained. The best indication that there was proper appreciation of the risks is naturally to be found in the reasons furnished by the trial Court.'* (Italicized and underlined for emphasis)

[28] In the present case the trial Court gave reasons for convicting the appellant and in the reasons the Court does refer to the dangers of relying upon the evidence of a single witness and that such evidence is to be approached with caution. The court a quo further stated that the court must thus make a credibility finding and that the evidence of a single witness must be satisfactory and clear in all material aspects. Despite the fact that the court *a qou* made reference to the works of Doctor Karen Miller and Professor Karen Holley I am satisfied that the court *a quo* was conscious of the inherent dangers of the evidence of a single witness and that it approached that evidence with caution, it therefore did not misdirect itself on the dangers inherent in the evidence of young children. As regards the criticism that the court *a quo* failed to ascertain whether the minor child (MH) was able to appreciate the oath and particular the duty to tell the truth, there is a simple answer to that criticism and the answer is simply whether MH was a competent witness or not. Section 164 (1) & (4) of the Criminal Procedure Act, 1977 in material terms provides as follows:

'**164 When unsworn or unaffirmed evidence admissible**

(1) Any person-

(a) …

(b) who is younger than 14 years shall be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall in lieu of the oath or affirmation be admonished by the presiding judge or judicial officer to speak the truth, the whole truth and nothing but the truth.

(2) …

(4) A court shall not regard the evidence of a child as inherently unreliable and shall therefore not treat such evidence with special caution only because that witness is a child.'

[29] In the present matter MH was fifteen years when she testified. From the above quoted section of the Criminal procedure Act, 1977 it is clear that a child who is over the age of fourteen years is regarded as competent and there was therefore no need for the court *a quo* to admonish her. The second ground of appeal must therefore also fail.

[30] The third ground of appeal is that the court *a quo* applied the wrong test. It was submitted that the court *a quo* did not apply the correct test in the assessment of evidence of corroborative circumstantial evidence, and instead chose the evidence of the State (the respondent in this Court) and rejected the evidence of the accused on the wrong test. Mr Kamanja argued that the trial court drew an inference of guilt from the evidence gathered out of the circumstances, without having established that such inference was the only reasonable inference available. He argued that the inference that the appellant may not have been around was reasonably possible as, crucial persons had not been called as witnesses which might have exonerated the appellant and that the victim may have been suggested to could not been excluded. He further submitted that it was not correct for the learned Regional Magistrate to simply reject the appellant's evidence on the basis that the State witnesses were reliable.

[31] The test applied to establish whether the prosecution has established an accused person's guilt beyond reasonable doubt was stated as follows in the matter *State v Jaffer:*[14]

> This approach by the magistrate was incorrect. It is, of course, always permissible to consider the probabilities of a case when deciding whether an accused's story may reasonably possibly be true (see *S v Singh* 1975 (1) SA 227 (N); *S v Munyai* 1986 (4) SA 712 (V) at 716B). The story may be so improbable that it cannot reasonably be

[14] 1988 (2) SA 84 (C) at 88.

true. It is not, however, the correct approach in a criminal case to weigh up the State's version, particularly where it is given by a single witness, against the version of the accused and then to accept or reject one or the other on the probabilities. This approach was considered by Van der Spuy, AJ in *S v Munyai* (supra) where he said at 715G:

'There is no room for balancing the two versions, i.e. the State's case against the accused's case and to act on preponderances.'

[32] In the case of *S v Kubeka*[15], Slomowitz, AJ said in regard to an accused's story:

'Whether I subjectively disbelieve him is, however, not the test. I need not even reject the State case in order to acquit him. I am bound to acquit him if there exists a reasonable possibility that his evidence may be true. Such is the nature of the *onus* on the State…In other words, even if the State case stood as a completely acceptable and unshaken edifice, a court must investigate the defence case with a view to discerning whether it is demonstrably false or inherently so improbable as to be rejected as false.'

[33] This Court per Liebenberg, J, in the matter of *S v HN*[16] said:

'The State thus carries the burden of proving the allegations contained in each charge against the accused beyond a reasonable doubt and in *Miller v Minister of Pensions* [1947] 2 All ER 372 at 373 Denning J (as he then was) stated it in the following terms: 'It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt.'

The law does not require from a court to act only upon absolute certainty, but rather upon just and reasonable convictions. When dealing with circumstantial evidence, as in the present case, the court must not consider every component in the body of evidence separately and individually in determining what weight should be accorded

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15 1982 (1) SA 534 (W) at 537F – H.
16 2010 (2) NR 429 (HC).

> to it. It is the cumulative effect of all the evidence together that has to be considered when deciding whether the accused's guilt has been proved beyond reasonable doubt. In other words, doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation, but those doubts may be set at rest when it is evaluated again together with all the other available evidence (*S v Hadebe and Others* 1998 (1) SACR 422 (SCA) at 426e – g).'

[34] In the present matter the court *a quo* said the following about the evidence of the State and that of the appellant:

> 'Now I find the evidence of the complainant to be trustworthy, reliable, I found *(sic)* the complainant being a young girl a minor to be a very credible witness. The court finds the other witnesses to be also credible and reliable witnesses that did not contradict themselves on material points I also find the medical doctor to be reliable witness, he could answer to the best of his ability on all the questions that was posed to him and also the nurse who examined the child. I accept the evidence of the nurse of the child also. The accused person on the other hand did not make a very good impression to the court, the accused person was very evasive, and the accused person informed that court of a version that was not put to the complainant, therefore the complainant evidence could, or that part of the evidence could not be tested. He opted to for an *alibi* to the court which could not be tested because the complainant already left the court at that stage. It is quite clear then, when the court have to make a decision between the two versions that of the accused and that of the complainant, the court must either find whether the accused person's version is totally false or whether it can be possibly reasonably true or whether complainant's version is totally false or a fabrication. The court accepts the evidence of the State witnesses of the complainant, the court finds the version of the accused to be false and rejects this version.'

[35] Given the above quoted paragraph I am not convinced that the court *a quo* simply weighed up the State's version, against the version of the appellant and then simply accepted the State's version and rejected the appellant's version on the probabilities. I am of the view that the court *a quo* investigated the defence case with a view to discerning whether it is demonstrably false or inherently so improbable as to be rejected as false and that it applied its mind not only to the merits and the demerits of the State and the defence witnesses, and that it was justified in reaching the conclusion that the appellant's evidence was false and had to be rejected.

[36] I furthermore do not agree with Mr Kamanja that the trial court drew an inference of guilt from the evidence gathered out of the circumstances. I say so for the following reason, the evidence of MH that the appellant had inserted his penis into her vagina is not circumstantial, it is direct evidence, and there was evidence (the evidence by the Nurse that MH had a white discharge in and around her vagina, and that her female genitals the vagina was reddish like an area that was rubbed) which corroborates the allegations of vaginal penetration. That is similarly direct evidence. The argument by Mr Kamanja that the Court *a quo* should have called the playmates of MH and the grandmother of the appellant is tantamount to require the court to act on absolute certainty.

[37] On the evidence before the trial court, the appellant's denial that he had sexual intercourse with MH was not reasonably possibly true and can safely be rejected as false. I am therefore not convinced that the trial court misdirected itself in any of the respects alleged by the appellant. The appellant therefore cannot show reasonable prospects of success. The condonation application thus fails

[38] In the result, the appeal is dismissed.

SFI UEITELE

Judge

GEIER H

Judge

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