Reportable:	**NO**
Circulate to Judges:	**NO**
Circulate to Magistrates:	**NO**
Circulate to Regional Magistrates	**NO**

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

CASE NUMBER: CA17/2019

In the matter between: -

JACOB MJEKULA 1st Appellant

PETRUS MARUMO 2nd Appellant

and

THE STATE Respondent

Coram: Mfenyana J *et* Joubert AJ

This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date for hand-down is deemed to be **10 July 2024.**

ORDER

1) The appeal in respect of both conviction and sentence in respect of appellants 1 and 2 is upheld.
2) The convictions and sentences of both appellants are set aside.
3) The appellants are to be released from prison forthwith.

JUDGMENT

MFENYANA J

Introduction

[1] The appellants in this matter were convicted by the Regional Court, Klerksdorp on a charge of rape read with section 51(1) and Schedule 2 of the Criminal Law Amendment Act[1]. They were each sentenced to life imprisonment on 29 August 2017. They have an automatic right of appeal by virtue of being sentenced to life imprisonment. They appeal against both their conviction and sentence.

[2] The issue that arises in this appeal is whether the court *a quo* misdirected itself with reference to the evidence led, in convicting and sentencing the appellants.

[3] With regard to conviction, the appellants in their notice of appeal contend that the court *a quo* erred in finding that the State had proved its case beyond reasonable doubt, and that the complainant could have been mistaken about the identity of the appellants. They further contend that the court *a quo* erred in overlooking the evidence of the second appellant's witnesses who corroborated his version, and lastly,

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1 Act 105 of 1997.

that the court *a quo* erred in its evaluation of the evidence as a whole.

[4] In respect of sentence, the appellants aver that the court *a quo* erred in finding that there were no substantial and compelling circumstances for it to deviate from the prescribed minimum sentence of life imprisonment. They aver that the court overemphasized the seriousness of the offence over the appellants' personal circumstances. They further contend that the court *a quo* failed to consider other sentencing options, and taking into account the time the appellants had already spent in detention.

Appeal against conviction

[5] In the heads of argument filed on behalf of the appellants, it is contended that although it was not in dispute that the complainant had been raped, the identity of the perpetrators was in dispute. It is worth mentioning that the rape aspect was confirmed by medical evidence. It is also not in dispute that the complainant, who was 10 years at the time, knew the appellants before the incident, as the second appellant is her uncle and the first appellant, an acquaintance of the second appellant. Both appellants are therefore known to the complainant.

[6] What the appellants' contention is, is that the complainant falsely implicated them, as according to them, they are not the ones who raped her. They argue that the identity of the perpetrators was not proved beyond reasonable doubt. In support of this contention, they both aver that they did not see the complainant on the day the rape is

alleged to have occurred.

[7] As far as the second appellant is concerned, his evidence was corroborated by his aunt, M[redacted] P[redacted] M[redacted] (M[redacted]) and his sister, N[redacted] M[redacted] (N[redacted]), both of whom confirmed the pleaded *alibi* by the second appellant, stating that they were at home with the appellant on the day in question. The two witnesses went further to state that the first appellant was not at their house on the day in question.

[8] The record shows that in her testimony, M[redacted] told the court that she is related to both the complainant and the second appellant. She explained that the complainant is her sister's grandchild, whereas the appellant is her sister's child. She further testified that in February 2013 she, together with N[redacted] and their grandfather, I[redacted] M[redacted] lived together with the second appellant at house no. [redacted] in Jouberton. The complainant's mother lived in Jakaranda.

[9] In relation to the incident, she testified that on the Thursday on which the incident is alleged to have occurred, she was at home together with all her other family members including the second appellant. She further testified that the complainant never slept over at their home during that week, nor did she see the complainant that week. She further testified that when they talked to the complainant, as suggested by the social worker, the complainant told them that she was raped by two Shangaan nationals, and again changed her story saying she was raped by two dirty boys.

[10] During cross- examination, M[redacted] testified that the first appellant did not visit their house that Thursday and/or the entire week of the incident. She further testified that although the complainant sometimes visits their home, she does not sleep over as her mother does not live with them. According to M[redacted], she and her sister (the complainant's mother) went to visit the complainant when she was hospitalized, and she told them that her legs were painful as she had been assaulted by a teacher and did not mention anything about the rape.

[11] She described the complainant's relationship with the whole family as 'good', stating that the complainant would sometimes visit them even though her mother was not staying with them. When asked why the complainant would accuse her uncle and the first appellant of rape in those circumstances, the witness testified that she does not know the reason. The following extract from the record bears relevance:

> CROSS - EXAMINATION BY PROSECUTOR:
>
> " ….So she had a good relationship with this whole family. She would even come and visit when her mother is not there. --- Yes.
>
> Yes so why on earth would this child no (sic) accuse accused one and accused two of raping her? --- I do not know.
>
> Yes maybe, have you ever thought about the fact that you may be telling the truth? --- No.
>
> Hmm. The reason why am asking you this is Mdm. the Doctor that examined the child testified in this Court. That child was raped the

injuries suggested that she was raped. The only question is who raped her. --- Yes.
Hmm. And she says it is these two. --- I do not agree.

[12] It appears from the above extract that the issue of who raped the complainant remained unresolved and was not proved beyond reasonable doubt. This aspect was not canvassed further by the State, save to say that there was conclusive evidence that the complainant had been raped.

[13] Regarding the sleeping arrangements, at their house, M[redacted] testified that although they live in the same RDP house, she slept in her shack, separated from the RDP house, and the second appellant slept alone in his own shack adjoining the RDP house. When it was pointed out to her that there was a contradiction between her version and that of the second appellant, as he testified that they all slept in the same shack, she testified that the second appellant was lying. She further changed tune and stated that she lived in her own shack and that N[redacted] was the one who lived with the second appellant in the same house. M[redacted] further testified that they never leave the house without anyone looking after it. In our view, these contradictions are not material.

[14] N[redacted] testified that at the time in question the second appellant was residing with them. She further testified that the complainant did not visit them that day. Regarding the rape, she testified that the complainant told them that she was raped by two dirty young men but

also said she was raped by two Shangaan nationals.

[15] In cross- examination, N[redacted] testified that she never saw the first appellant at their house that day, and the complainant never slept over at their house that day or the next day.

[16] She further testified that the shack in which the second appellant slept in, adjoins the RDP house and there are two entrances leading to the shack, one through the RDP house and the other directly into the shack. In this regard, she testified that it is possible for a person to enter the shack and go out without being seen by people in the RDP house.

[17] It is apposite to state at this stage, that it is common cause that the complainant's mother lived in Jakaranda, and not in Jouberton where the rape is alleged to have occurred. Save for the version of the complainant, there is no evidence that the appellants were in Jakaranda at the complainant's mother's house. The picture that has been painted throughout the trial is that the rape was perpetrated at the second appellant's house. In our view, it is a material misdirection which has a bearing on the place where the complainant was when the rape took place.

[18] It is trite that there is no duty on an accused person to prove his alibi. It is for the State to prove the accused's guilt beyond reasonable doubt.

In *Maila v The State*[2] the Supreme Court of Appeal (SCA) had the following to say on this issue:

> " …(A)n accused person is entitled to raise any defence, including that of an alibi – that at the time of the commission of the crime, they were not at the scene of the crime but somewhere else. They can also lead evidence of a witness(es) to corroborate them on their whereabouts at the critical time. Nevertheless, it is trite that an accused person who raises the defence is under no duty (as opposed to that of the State) to prove his defence. If the defence is reasonably possibly true, they are entitled to be discharged and found not guilty."[3]

[19] It is on the strength of this evidence, that the appellants contend that the State failed to prove their identity beyond reasonable doubt. They both deny that they are the perpetrators or even seeing the complainant or each other on the night in question.

[20] Lastly, the appellants contend that the court *a quo* provided no reason or justification for rejecting the evidence of the appellants and their two witnesses who testified and corroborated the evidence of the second appellant, and in accepting the evidence of the complainant who is a single child witness. They argued that because the rape was common cause, the trial court merely accepted this evidence which they further aver is problematic. They rely on the judgment in *S v Scott-Crossley*[4] for the proposition that common cause facts cannot be used to prove facts that are in dispute.

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2 (429/2022) [2023] ZASCA 3 (23 January 2023).
3 Para 20.
4 (677/06) [2007] ZASCA 127; 2008 (1) SA 404 (SCA).

[21] In opposing the appeal, the respondent submitted that the complainant was raped by more than one person, and that she was below the age of sixteen. The offence thus falls within the ambit of section 51(1) of the Criminal law Amendment Act[5], and carries a prescribed minimum sentence of life imprisonment.

[22] It was contended on behalf of the respondent that the trial court did not err, as the totality of evidence proved that the complainant was raped by the appellants, which the State proved beyond reasonable doubt. There was no evidence before the court *a quo*, that having proved that the complainant had been raped, the rape had been perpetrated by the appellants. The evidence of the complainant falls far short of proving this. That evidence is that she went to her mother's place, retrieved the key and opened the door which was locked. Behind the locked door she found the appellants, who without uttering a word, took turns to rape her. Ultimately the offence was perpetrated at the second appellant's house. No evidence or explanation was provided for this discrepancy.

[23] It is trite that the proper approach to evidence is to look at the evidence holistically to determine whether the guilt of the accused has been proven beyond reasonable doubt.[6]

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5 Act 105 of 1997.

6 *Tshiki v S* [2020] ZASCA 92 (SCA); Also: *S v van der Meyden* 1999 (1) SACR 447 (447).

[24] In *S v Mafaladiso and others*[7] the SCA considered the approach to be adopted by a court to contradictions. The court held that the mere fact that there are self-contradictions must be approached with caution by a court. The cautionary rule regarding single child witnesses exists because of the inherent risks associated with accepting such uncorroborated evidence. The trial court must consider the contradictions and evaluate them holistically. In this case, the trial court did not do this.

[25] It is further worth stating that the issue of the rape is common cause. The respondent avers that the second appellant's *alibi* stands to be rejected as the complainant knows the second appellant well as he is her uncle. She could also identify the first appellant and gave a detailed account of the role played by each of the appellants during the rape.

[26] The trial court in its judgment stated the following:

> "With regard to identity I am satisfied that the complainant could not have been mistaken about the identity she knew accused 2 as an uncle, she knew Dodo she even called him Dodo as a friend or an acquaintance of accused 2."

[27] This is not the point, in our view. That the complainant knows the appellants fairly well is common cause. The issue is whether there was sufficient, reliable and admissible evidence before the court *a quo,*

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7 2003 (1) SACR 583 (SCA).

linking the two appellants to the offence. This was not appropriately and/or reliably canvassed in the evidence of the witnesses on behalf of the State. To our considered views, this highlights the essence of the cautionary rule relating to single child witnesses in sexual offences cases. The trial court did not pay any particular attention to this and convicted the appellants solely on the say- so of the complainant.

[28] It was further argued on behalf of the State that the complainant stood her ground during cross-examination and testified that she was accompanied by her aunt to the second appellant's place where she was to sleep over, and that this was corroborated by her aunt. However, the record indicates that both Ms H[redacted], the complainant's aunt and the complainant testified that the complainant went to her mother's place, and not the residential place of the second appellant.

[29] Ms H[redacted]i testified that two days after of returning from her mother's place the complainant complained that her knee was sore as her teacher hit her. This evidence accords with the evidence of the second appellant's witnesses. Ms H[redacted] further told the court that when the complainant refused to be bathed from the waist down, she and her sister, D[redacted], asked her what was wrong and she told them that the appellants had raped her, and threatened to kill her if she told anyone. Ms H[redacted] and D[redacted] called their neighbour Ms M[redacted], to assist in examining the complaint. She further testified that the complainant told them that the appellants found her at her mother's place. They undressed her and raped her the whole night. This evidence is at odds

with the complainant's evidence that she found the appellants at her mother's house after she unlocked the door. D[redacted] and Ms M[redacted] did not testify. The complainant's mother was also not called to testify.

[30] The record reveals that in her testimony, the complainant stated that on the morning of 21 February 2013, she went to visit her mother. On her arrival she found that her mother was not there. She looked for the key where her mother usually leaves it and found it. She unlocked the door and found the appellants inside the house. The first appellant took her and placed her on top of the bed, undressed her and raped her. She started to cry, and the first appellant took a *knobkerrie* and hit her on her knee to such an extent, that she was unable to walk. Thereafter, the second appellant also raped her while the first appellant was watching. She reiterated that when the rape ended it was during the day.

[31] Dr Phakwana who examined the complainant four days after the incident, testified that the complainant informed him that she was raped by two men with the third man holding her down. This is also contained in the J88 which was admitted into evidence. However, in her testimony, the complainant did not mention a third person having been present. In her testimony, the complainant stated that it was only herself and the two appellants who were present at the time the rape occurred. Notably, the court *a quo* noted this contradiction in its judgment. Nothing further is said about it.

[32] In its judgment the court *a quo* further stated that the complainant was raped the whole night. This is inconsistent with the complainant's testimony. This discrepancy, the appellants contend, was overlooked by the court *a quo* and appears to be based on a note contained in the J88 that "she was raped on Thursday throughout Friday".

[33] The above are some of the material contradictions and discrepancies in the State's case. The evidence relied on by the court *a quo* in giving its judgment is awash with contradictions, all of which are material in our considered view. These material contradictions are not explained in the judgment by the court a quo. The issue does not end there. The J88 makes no mention of a knee injury. Dr Phakwana's evidence in this regard was that the complainant never mentioned that she was assaulted with any other object. He further testified that she stated that her legs were painful. According to Dr Phakwana, the explanation given to him by the complainant for the pain on her legs was that she had been raped by two people while the third person held her down.

[34] It is further common cause that the evidence involving sexual allegations is also treated with caution and as was stated in *S v Snyman*[8], where the Court recognized that the risks inherent in relying on the testimony of witnesses who give evidence with regard to sexual offences fall into the following three categories:

34.1. The presence of various motives that might induce a complainant to substitute the accused for a culprit;

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8 1968(2) SA 582 (A) at 585C.

"[C]harges of immorality said by Milne AJ in **R v M 1947(4) SA 489 (N) at 493** are 'easy for a woman to formulate but difficult for a man to refute' and as a mode of obtaining vengeance for any affront to a woman's pride or dignity, the bringing a charge of this kind is probably without equal at (494)"

34.2. The danger that a frightened woman, especially if inclined to hysteria (might) imagine that things (had) happened which did not happen at all – see ***R v Rautenbach* 1949(1) SA 135 (A) at 143**; and

34.3. The deceptive facility such a complainant had for convincing testimony. Because such a person had actually participated in the event he or she described, there was a danger that a deft substitution of the accused for the real subject would be difficult to detect. See *S v Snyman (supra)* at 585(d).

[35] We are also acutely appreciative of the decision of ***S v Jackson***[9] and the remarks by the SCA regarding the approach to the cautionary rule involving a single witness, (a child who is 10 years old in this instance), and point out it was further held in ***S v M***[10] that the factors which induced the Supreme Court of Appeal to dispense with the cautionary rule in sexual assault cases applied with equal force to all cases in which an act of sexual assault was an element as such, for instance, the crime of incest.

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9 1998 (1) SACR 470 (A).
10 1999 (2) SACR 548 (SCA) at 554-5.

[36] The Court in *S v M*[11] applied what had been said by the Court of Appeal in *R v Makanjuola, R v Easton*[12], a decision referred to with approval in *Jackson (supra)*, in holding that the fact that the complainant had been shown to be an unreliable and, in some respects, an untruthful witness, was a factor that might prompt a Court to adopt a cautionary approach and to look for some supporting material for acting on the impugned witness' evidence[13]. *S v Jones*[14] the complainant was a single witness and there were unusual features in her evidence which, in the Court's view, cried out for the exercise of caution.

[37] In *S v Hammond*[15] the court found that aspects of the complainant's evidence were unsatisfactory, she had lied about the state of her sobriety and the appellant's evidence was beyond reproach.

[38] In *S v K*[16] the learned Judge pointed out and emphasized that the fact that complainants in sexual cases happen to be the most vulnerable members of our society, *"should not be allowed to be a substitute for proof beyond reasonable doubt or to cloud the threshold requirement of proof beyond reasonable doubt"*, and further pointed out that *"judicial officers ought to and are expected to evaluate evidence properly and objectively as a whole and against all probabilities in order to arrive at a just and fair conclusion, and anything falling short of this test is nothing*

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11 2000 (1) SACR 484 (W).
12 (1995) 3 All ER 730 (CA).
13 See also *S v Van Der Ross* 2002 (2) SACR 362(C).
14 2004 (1) SACR 420 (C).
15 2004 (2) SACR 303 (SCA) at 313-4.
16 2008 (1) SACR 84 (C) at paragraph [6].

other than a miscarriage of justice".

[39] In *S v De Villiers and Another*[17] it was specifically pointed out that the failure of the complainant to make a complaint at the first reasonable opportunity is a factor that may militate against acceptance of the complainant's evidence in a case where the delay of approximately one year and the implausibility of the explanation offered for the delay led to a rejection of the complainant's evidence by the Court. In this matter there was an unexplained delay of four days.

[40] The respondent contended that the complainant had no motive to falsely implicate the appellants and that the aggravating factors far outweigh the mitigating factors, and the trial court correctly found that there were no substantial and compelling circumstances to deviate from the prescribed minimum sentence of life imprisonment. This however is not the required test[18].

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17 1999 (2) SACR 297 (O).

18 See *S v Ipeleng* 1993 (2) SASV 185 (T) on p189B-I where the court stated as follows:

> "Even if the Court believes the State witnesses, it does not automatically follow that the Appellant must be convicted. What still needs to be examined is whether there is a reasonable possibility that the evidence of the Appellant might be true. Even if the evidence of the State is not rejected, the accused is entitled to an acquittal if the version of the accused is not proved to be false beyond reasonable doubt. (see *S v Kubeka* 1982 (1) SA 534 (W) at 537E; *R v M* 1946 AD 1023 at 1027). **It is dangerous to convict an accused person on the basis that he cannot advance any reasons why the State witnesses would falsely implicate him. The accused has no onus to provide any such explanation. The true reason why a State witness seeks to give the testimony it does is often unknown to the accused and sometimes unknowable. Many factors influence prosecution witnesses in insidious ways. They often seek to curry favour with their supervisors; they sometimes need to placate and impress police officers, and on other occasions they nurse secret**

Appeal against sentence

[41] Having found that there was no justified basis for the conviction of the appellants, it follows that the sentence stands to be set aside on that basis.

Order

[42] In the result the following order is made:

4) The appeal in respect of both conviction and sentence in respect of appellants 1 and 2 is upheld.
5) The convictions and sentences of both appellants are set aside.
6) The appellants are to be released from prison forthwith.

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ambitions and grudges unknown to the accused. It is for these reasons that the courts have repeatedly warned against the danger of the approach which asks: 'Why should the State witnesses have falsely implicated the Accused?' The case of *S v Makobe* 1991 (2) SACR 456 (W) is instructive on this point. At 459 of the judgment, reference is made to certain earlier authorities. The learned Judge refers to the case of *R v Mtembu* 1956 (4) SA 334 (T) at 335-6 where Dowling J. said the following:

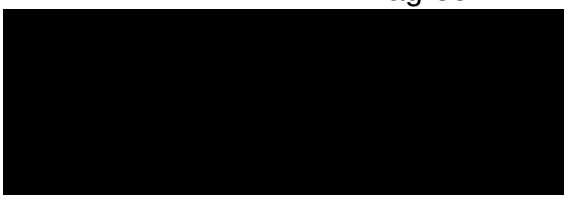
> **'The Magistrate in his reasons for judgment obviously takes the view that if the evidence of the traffic inspector is accepted then the accused was guilty of driving to the danger of the public. In coming to the conclusion that that evidence is to be accepted he said that the inspector either saw the accused drive as he says or he has come to court to commit perjury. That is not the correct approach. The remarks of the late Millin J. in *Schulles v Pretoria City Council,* a judgment delivered on 8 June 1950, but not reported, are very pertinent to this point. He says: 'It is a wrong approach in a criminal case to say, 'Why should a witness for the prosecution come here to commit perjury?' It might equally be asked: 'Why does the Accused come here to commit perjury?' True, an accused is interested in not being convicted, but it may be that an inspector has an interest in securing a conviction. It is, therefore, quite a wrong approach to say 'I ask myself whether this man has come here to commit perjury, and I can see no reason why he should have done that; therefore his evidence must be true and the accused must be convicted.' The question is whether the accused's evidence raises a doubt.'**

S MFENYANA

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

I agree.



DJ JOUBERT

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

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Date reserved:	28 November 2023
Date of judgment:	10 July 2024