IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) NOT REPORTABLE

(2) NOT OF INTEREST TO OTHER JUDGES

(3) REVISED.

Case Number: A611/ 11

9/3/2018

In the matter between:

JOHANNES JACOBUS VENTER Appellant

And

THE STATE Respondent

JUDGMENT

POTTERILL J

[1] The appellant was on 31 August 2009 convicted on seven counts of indecent assault and four counts of rape committed during the period August 1998 to June 2002. The appellant is with the leave of the court *a quo* appealing against all his convictions.

[2] In terms of section 14(3) of the Superior Courts Act, 10 of 2013, the matter was deferred to a Full Court.

[3] Due to the inherent nature of sexual assault and rape rarely taking place in

plain sight of eye witnesses, it leaves a complainant vulnerable as a single witness, while on the other hand, it leaves an accused often with only a defence of a bare denial. The nature of these kind of offences, I say without fear of contradiction, leaves a complainant scarred *and* with our legal system requiring *viva voce* evidence and cross-examination causing complainants to suffer secondary victimisation. The Criminal Law Amendment Act 32 of 2007 has however provided protection to complainants in sexual related cases in dispersing with another cautionary rule.

[4] Coming to the front more and more are complainants mustering up the courage to speak out long after they were victims of such offences. This is one of those matters. The complainant laid a complaint at the police only on 20 August 2004 and the trial commenced on 18 August 2006 with the conviction following three years later on 31 August 2009.

[5] The record reflects an arduous trial interspersed with countless objections by counsel for the appellant, often to protect his client, but at instances with merit. The prosecutor' s cross-examination was tedious and not always on point. Witnesses were recalled and cases reopened. Suffice to say, the prosecution and the appellant were afforded a fair trial in being afforded ample opportunity to put all evidence before the court.

[6] The crux of the appeal is whether the court *a quo* correctly found upon evaluation of the totality 9f the evidence that the *"complainant impressed the court as a person whose evidence may actually be believed':* The court *a quo* thus found the complainant to be a credible witness, despite contradictions. The court also made a finding that there were no inherent improbabilities in the evidence of the complainant.

[7] A court's power to interfere on appeal with the findings of fact of the trial court are limited.[1] Bearing in mind the advantage that the trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that a Court of Appeal will interfere with a trial court's evaluation of oral testimony. [2] In fact in the absence of demonstrable and material

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[1] ***S v Hadebe and Others* 1997 (2) SACR 641 (SCA)** a t 655e-f
[2] ***S v Monyane and Others* 2008 (1) SACR 543 (SCA)**

misdirection by the trial court the court *a quo's* factual findings are presumed correct and will only be disregarded if the recorded evidence so shows the finding to be wrong.

[8] This court, as the court *a quo* did, accepts that it could not have been easy for the complainant to be called upon to remember in detail, and to recount, what occurred many years ago, taking into account the nature of the alleged incidents and the effect it had on the complainant. Due to this and the time span, it is therefore to be expected that there will be certain contradictions, discrepancies and inconsistencies in the complainant's evidence. What has to be determined, however, is whether the nature and extent of any such contradictions, discrepancies and inconsistencies are material and if so to what extent it affects the reliability and credibility of the complainant and the witnesses. The ultimate test is, before accepting the evidence of the complainant, that the court has to be satisfied that the complainant told the truth and that the version of the accused should have been rejected as not being reasonably possibly true.

A summary of the evidence

[9] The complainant, Ms. D ("D") took up employment at the Head Quarters of the [….], Pretoria Central in May 1998. She was the professional assistant to the appellant, then Chief Operating Officer of the [….] and she carried out the duties of a "PA" like typing, managing the appellant's diary etc. She was in the office directly adjoining the appellant' s office. Within three months of her taking up employment, August 199 8, the appellant called her to his office to bring him documents. After she entered, he closed the door. This was not denied by the appellant as he said that they often discussed confidential matters and the door needed to be closed. He grabbed her by the wrist and held her with her back to him, unbuttoned her trousers and fondled her vagina under her underwear. She managed to pull away and asked him to not do that again. She did not report that to anybody because she was scared and terrified. She had also realised that the work environment was very white Afrikaner male dominant and the appellant was top of this white male kingdom. Her account as to why she

did not report any of the further incidents referred to below was exactly the same; in that she was scared, terrified and did not know to whom to report this conduct in this white male dominant environment where everybody went hunting together, watched rugby together at the losie at Loftus, and was very friendly with the appellant. She also could not confide in her family or her husband as in Hindu religion sexual harassment and rape is treated as a taboo rendering her an outcast. Her husband would take her three children from her and her own family will disown her and would not communicate with her. Dr. Kollapen corroborated the complainant's evidence in this respect. He testified that he is a general practitioner doing obstetrics and gynaecology. He was born into the Hindu faith and is a scholar of Hinduism. He is the spiritual head of an organisation called PTA Bhajania Mandram. He performs ceremonies and rituals according to the Hindu rites. The Hindu marriage is a sacred sacrament and therefore there is no divorce or concept of divorce because marriage is believed to be the evolving tool that you need to qualify for the second, third and fourth stages of life. If a woman is sexually assaulted or raped -she would not bring it up because her role is to keep the family name as pure and as protected as possible. In telling she would bring the family name into disrepute. In particular her own family would find it a terrible disgrace. Nobody would believe her and family and extended family would withdraw from her. The Hindu way of life is the most conservative way of living. The family would believe she is partly to blame for what happened to her. Family rejection is why there is so little reporting of abuse amongst Hindu people. The power in the extended family places the victim in a very difficult position and she could stand to lose her children. Her husband will have an immediate change of attitude towards her.

[10] During August to December 1998 the appellant called D into his office and told her he wanted to hug her for her good work and before she could say anything he grabbed her, held her from the back with one hand around her and his other hand on her breast. She asked him to stop but he said, *"what is the problem is this not nice."* He also simulated *"the act of sex"* thus movements against her buttocks indicating that he would like to have

sex. She was protesting and asking him to stop. She did not report his incident as once again she was scared and terrified.

[11] She did not think it necessary to go with him to look at renovations at the losie of Loftus, but she did as she was told because everybody was scared of the appellant and if he told you to do something, you did it. She noticed Loftus was deserted and asked where the people that were doing the renovations were. He replied that they would be inside the losie. He opened the losie with his own key. There was nobody inside and she was sceptical. She again asked where is the people and he said the *"television guy" was* supposed to be around. She noticed two wine glasses on the counter and he offered her a glass of wine. She did not drink at all, because she suffers from epilepsy and takes medicine conflicting with the intake of alcohol. Mr. V, a co-worker, corroborated her that she did not drink at all and he knew this because they often spoke about her not drinking. Dr. Van Schalkwyk, Ms.D's general practitioner denied telling Ms. D not to use alcohol, because as a rule he would not talk to Indian patients about alcohol. He however never ever thought that alcohol played a role with Ms. D. She was a patient that knew what medicine she was taking and what the consequences would be. He confirmed that drinking alcohol with her prescription medicine would have a bad influence on her, although the exact influence he could not testify to. Mr. G, also a co-worker, testified that he never saw Ms. D taking alcohol. The accused handed in a photograph wherein D had a wine glass in her hand. Mr. L testified that he saw D on more than one occasion with a wine glass in her hand but would not testify thereto that he ever saw her drinking; only that she had a wine glass in her hand. Ms. D testified that to be social she would have a wine glass in her hand, but would never drink wine.

[12] After she refused a glass of wine from him he pushed her on a wooden bench with cushions on and lay on top of her. Mr. V corroborated her evidence that there was a wooden bench at the losie. She pushed him and tried to get away from underneath him. She was unsuccessful. She ascribed this to the fact that she at that stage weighed 45 kilos and he was bigger built than her. He then raped her by lifting up her skirt, removing her

underwear and forcefully inserting his penis into her vagina. This caused her pain. He then drank another glass of wine and threatened that if she told anybody he would kill her with a shotgun. She believed him because he was a hunter and she had at the office seen a rifle. She was scared and terrified and phoned his supervisor Mr. L. She said she needed to speak to him, because Mr. Venter was sexually harassing her. Mr. L said he could not talk to her at that point in time, but would call her back. He however never returned her call. She did not inform him that she was raped, because he was a close friend of the appellant and she was scared of losing her job. The rest of the day she spent mostly in the ladies room as she was nauseous and vomiting quite a few times. She could not urinate as the walls of the vagina on the outside were torn and her urine burnt her. She also had cramps in her lower stomach. She also noticed little blood spots on her panty. She phoned the chemist and asked something for infection with terrible burning. The following day she went to see a psychologist, Trudie van der Westhuizen. Ms. Van der Westhuizen corroborated the complainant consulted with her. She could however from the first consultation ascertain that the complainant was hiding something. She told D that D was paying her and because D was hiding the truth D is not getting value for her money as Ms. V was then not really helpful. She told D this only after seeing the complainant for months. In response D broke down and told her **that** she is being sexually harassed at work and was raped. She told D that D should have reported it immediately. D was however very emotional and told her that she is dependent on money and due to her religion her family will ostracize her out of her community. D told her that it started three months after she started working there. She confirmed the version of the complainant of all the indecent assaults. She also told her the detail of the ri3pe at the losie including the wine drinking and her refusal because she was on medication. This witness knew that the appellant had organised a social worker for the complainant, because her husband had caused bruises on Data ' s arms. She knew that after the divorce the appellant told D that she need not look for sex elsewhere. She confirmed the evidence of D that in 2000 he went on extended hunting

trips and she was not harassed or assaulted. D also told her that she was admitted to hospital and was very thin. D also confirmed to her that he felt her breast to feel in what condition she was and whether she was gaining weight. D was also forced on two occasions to give him oral sex which the complainant refused.

[13] D testified that she had seen Van der Westhuizen before, about problems at home, but wanted to see her this time because the emotional stress of the sexual assault and rape was getting too much for her. She only in December 199 9 told Van der Westhuizen about the rape.

[14] D tried to escape her work environment by looking for other work. She contacted the same recruitment agency that obtained her this job. The lady from the recruitment office phoned back, but Mr. Venter answered the phone and told the agent that she was unprofessional and that she should not call the office again. The appellant then called her into his office and told her that she would not get a job elsewhere; he would ensure that she would get a bad referral. After this transpired she asked the psychologist for an anti-depressant. It was also at that point that she broke down and told Van der Westhuizen that she was sexually harassed and that she was raped.

[15] The calling of her into the office and then grabbing her and touching either her breasts or vagina continued on numerous occasions between March and December 1999. It worsened in January 2000 after the appellant realised that D was divorced. She and her three kids were at that stage living with her mother.

[16] One day in January 2000 he asked her to work overtime as he urgently needed to finish a project. This was an unusual request. He grabbed her arm and pulled her up from the chair. She asked what he was doing, but he just smiled and lifted her up from the chair and started to play with her private parts. He said he needed her to come. She protested and tried to wriggle away. She asked him to stop and said she would scream. He reminded her that there was nobody there. He then pushed her to the side of the table and struggled to undress her, because she had pantyhose on

under her pants. He asked her why she wore so many clothes. He then raped her and wiped himself with his handkerchief. He told her that since she is not married anymore, she need not look for sex anywhere else. The next day she did not want to go to work and felt trapped, but she needed to support herself and her three children. She could also not forget the serious death threats he made to her. She then asked Mr. Van S that sat directly opposite Mr. Venter' s office if he would stay on when she needed to work overtime. She did that because he could then hear if she were to scream. She told him that Mr. Venter had touched her leg. Mr. V had become a good friend to her, but she was embarrassed and emotional and did not tell him about the sexual harassment and assault. She also did not trust him fully. Mr. V corroborated the fact that he and D had a professional friendship during work hours. He corroborated that she told him that Venter had touched her leg. He also knew that the accused and D were going to the losie. The following day he saw her and he asked her how the losie was and she answered *"nogal moot:* but immediately changed the subject. He also J<new that she suffered from epilepsy. He could also see that she was stressed and depressed. He knew that she was scared of Mr. Venter. He himself took her to the doctor and psychiatrist. She asked him to stay with her when overtime was required, because she was scared to stay behind alone with Mr. Venter. He testified that they seldom had to work overtime; it was maximum six to seven times and not longer than 30 minutes at a time. In the period from 2000 to 2003 it was about three to four times that they worked half an hour overtime. He moved offices in 2000 and later he again moved further down the passage. D informed him that the appellant had a problem with him moving about in the passage that much and taking up time in D's office. He saw the appellant playing games on the computer of D and in that time D would stand next to him. He knew that D manipulated Mr. Venter' s diary so that he would be out of the office as much as possible. D had informed him that she had to endure the poor working relationship and that the appellant had told her that he would not give her a good reference. She also informed him that the appellant had threatened to shoot her with his own gun and he himself

also had seen the appellant with a hunting rifle walking down the work passage. He was not at all surprised that she never told him about the rape and sexual assault, because she would never tell a man because as a rule they would never talk about sex, religion and politics. He volunteered that this was confirmed by the fact that the moment a woman took over as the Head of the institution D had the courage to tell all. The day they went to the losie he saw D and the appellant drive off in one vehicle. In cross- examination much was made of the fact that in fact Venter and D had left in two vehicles, and that V would not be able, from the position that he was standing, to see that there were two people in the vehicle. However the evidence of Mr. J corroborated his evidence that from where V stood he could from the bathroom window in fact see the identity of two people in a vehicle. Mr. J is an official photographer.

[17] From February to June 2000 the appellant mostly went on hunting trips. In September 2000 she was admitted to the Louis Pasteur Hospital for two weeks for depression and migraines. It was caused by stress and being underweight from the sexual harassments and rapes. When she returned she only weighed 39 kilos and the sexual harassments stopped for a while. Between the end of September to December the appellant would touch her breasts on top of her clothing, saying he would want to feel is she is gaining weight so that she could be ready for him. She stopped eating because she thought he would stop if she stayed underweight. In December he told her that she was still underweight and he would wait for her for in the new year. However the pattern of sexual assault continued the next year despite her being underweight. The pattern consisted of him calling her into the office to bring him documents, him closing the door, and pressing her against him with him standing behind her and fondling her private parts.

[18] During January 2001 to June 2002 on two occasions he tried to force her to have oral sex with him. When she refused to do so he raped her. In July 2002 nothing happened as he was setting up new offices at the Waterkloof Air Force Base. When he tried to force her to have oral sex he would put

his finger inside her vagina but he never put his finger inside her vagina during the sexual assault. His *modus operandi* with the oral sex was that he would fondle her vagina by putting his fingers inside her vagina and would then unbutton his trousers and take out his penis. He would push her downwards towards his erect penis. She however pulled her mouth stiff and kept her teeth clenched. He would then grab her and push her to the side of the table, undress her and rape her from behind. Dr. Van Schaklwyk was, ironically, the house doctor of the appellant and his wife, as well as D. He confirmed that he treated Data for epilepsy, migraines and depression. He thought that the depression and epilepsy treatment started after a motor collision that D was involved in. He did not find it strange that Ms. D would not tell him about the sexual assault as an Indian patient would not always have the courage to talk to him. Besides that, he was not the only doctor that she was seeing and perhaps she discussed it with another doctor. He also did not think that she would discuss it with him because she knew that the appellant and his wife were also his patients.

[19] In Trudie van der Westhuizen's statement she recorded that D came to her in 1998 for trauma counselling due to being harassed. This was contra-distinct to her *viva voce* evidence. She however testified that the statement was totally incorrect and this was so because the complainant struggled to communicate and only a year later told her of the sexual assault; so her *viva voce* evidence was correct. In her second statement her lack of detail was due to the fact that it was two men taking down her statement and she did not know how much detail to give. In her statement the averment that D at Loftus was penetrated anally was totally incorrect. The reason for this was that she interwove all the instances together and thus expressed herself as she did. It must be borne in mind that she made this statement next to the road, where the investigator had met her halfway.

[20] Dr. Spies compiled a report. She is clearly an expert with 22 years' expertise in research and counselling of sexual assault and trauma. Her conclusion was that D was exposed to some trauma, that can be

compared with that of sexual abuse. She testified that there is a vast difference between sexual trauma in the marriage and sexual trauma out of the marriage.

[21] Mr. K testified the date on the civil summons was wrong and was amended without objection. Confusion rose from the disciplinary hearing wherein the date of 2004 also featured. He inspected the losie and there was in fact a wooden bench.

[22] Ms. Grobbelaar testified that she attended a day course that inform workers what to do if there was some form of sexual harassment taking place. She corroborated the evidence of Ms. D that Ms. D did not attend the course. She found it strange that Ms. D was not on the course because she thought that as Mr. Venter's secretary, him being the executive, she should have attended the course. This was especially so as it was not a voluntary course. She was sexually harassed and at the same institution, although reported, nothing came thereof. Her managers decided not to take it any further. She also recalled a wooden bench in the losie.

[23] Mr. Venter explained his position as the Executive Manager of [....] and [....] was a labour brokerage for the [….]. D was appointed as his secretary and despite the wording on the contract he did not employ her as a personal assistant, but only as a secretary. There was an induction process and that took the first two weeks of August. Later on he acknowledged that he made a mistake and that it was in fact the first two weeks of May. He did not agree with D that the induction only took one day. He denied any sexual assault or rape of D. He denied that he ever had to work overtime. He took the complainant to the losie to familiarise herself with the surroundings. They drove in two vehicles because of her jealous husband of whom she was scared. He had to physically take her to the losie to show her where to stand when she had to receive guests. He conceded that she would only need to go to the losie if six other people at the same time were unavailable. For the whole period that she worked there the need in fact never arose for her to receive guests in the losie. He

denied that there was a wooden bench in the losie, but an L-shaped bench made from bricks.

[24] He testified that in the working environment he had a problem with D. She confronted him saying she earned too little but he informed her that it was market related. She was thus upset with this answer. He refused to grant her a loan from the company because she was paying off other loans and she was unhappy about the refusal. He often had to address her because she was arriving late for work. She was also very unhappy because he told her that V must not come in her office anymore. He also prohibited her from selling linen, lingerie and tableware during office hours. Mr. V was also correcting her minutes and he stopped that because there was sensitive information in the minutes to which Mr. V was not privy. She misused the telephone for private calls. He did not refuse to send her on a course relating to sexual harassment and assault. He knew that there was marriage problems and saw blue marks on her arms and he referred her to Trudie Lourens, a probation officer working for [....]; D confirmed this referral.

[25] He did hunt with Mr. L and had good working relations with him. L was also charged with disciplinary hearings. He himself was found guilty in the disciplinary hearing, but then Denet contacted him and they settled with him with the terms being that he would retire from service before pension and benefits.

[26] He testified that he saw D using alcohol more than once.

[27] In cross-examination he conceded that he had to accept that the signature of Ms. D always had a line under it.

[28] He confirmed that there was an incident between him and D where all the personnel were present. Ms. D was late and he requested D to fetch his cellphone so that he could enquire about Ms. D’s whereabouts. D refused and said she had called her prior to their meeting in the boardroom. D in front of all the personnel apologised to the appellant for her behaviour.

[29] Mr. L was called and he denied that D phoned him to report Mr. Venter. He saw D on more than occasion with a wine glass in her hand but expressly

stated that he only saw a glass in her hand and he never saw her drinking. He confirmed that he would also find it strange that D did not attend the sexual harassment course. He confirmed that he and Venter watched rugby together, hunted together, went to Dullstroom together and had a week holiday together with their respective families.

[30] Ms. Button testified that as the payroll administrator of Denel she was in control of all personnel files and contracts therein. She noticed that D signed with a line under her signature but not on all the documents.

[31] Mr. H testified that there was no wooden bench in the losie.

[32] Mr. Cloete was previously in the South African Police Services and he inspected the signature of Ms. D on all the documents and compiled a report. He had no doubt that the disputed writings on exhibit "EE" and "B" were written by the same person who wrote the genuine specimen writings; i.e. D. The line is known as a decorating stroke and the exclusion thereof is not a fundamental difference, but a habit of people. In his first report he opined that the small differences led him to not make a positive conclusion that it was not forged. In his second opinion he decided that the slight differences were in fact natural variations. This was because he received additional specimens, although he could not deny that he received enough specimens with his first report.

[33] The state then called the expert witness Esterhuizen, who testified that Van Coller was not objective. Van Coller should not have come to a definitive conclusion. His own finding is inconclusive and that should also be the conclusion of Van Coller.

Analysis of the evidence

[34] The court *a quo* accepted the evidence of the complainant as reliable and truthful. The magistrate did approach the evidence with caution. In respect of the cautionary approach of evidence it is of importance to heed the *dictum* in ***Jackson***[3] and ***S v Sauls and Others* 1981 (3) SA 172 (A)** at 180E-G:

[3] ***Supra*** at 341b

"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness ... The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told."

The Supreme Court of Appeal in ***S v Jackson*** **1998 (1) SACR 470 (SCA) at** 476e found the following:

"In my view, the cautionary rule in sexual assault cases is based on an irrational and outdated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the state to prove the guilt of an accused beyond reasonable doubt - no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule."

[35] D was subjected to lengthy, vigorous and thorough cross-examination . This is expected where an accused is facing extremely serious charges, but with the reservations previously raised. The appeal lies in main against the contradictions in D' s *own* evidence and specifically contradictions pertaining to the dates of the offences. Although there were contradictions, experience has shown that to expect any witness to flawlessly testify about such incidents, and more so as to what happened many years ago would be totally unrealistic. The appellant contradicted himself as to when the induction took place and often would not commit himself to dates for this very reason; it happened a long time ago. That having been said, the court had to determine whether the nature and extent of the contradictions

affected the credibility and reliability of D.

[36] The first contradiction related to count 12 and whether the offence occurred in June 2002 or July 2002. An amendment of the charge sheet was allowed to reflect the date of the offence as June 2002. The court *a quo* however found that the state did not prove beyond reasonable doubt the appellant's guilt on count 12. The contradictions relating to whether in June 2002 she was raped or whether she was sexually assaulted and her confusion pertaining thereto was thus addressed by the appellant being found not guilty. The other contradiction relating to time frames was that she testified during the period August 1998 to December 1998 there was one offence of sexual assault, but later testified that there was indeed two instances of sexual assault as reflected in the charge sheet. Did the magistrate err in accepting that this contradiction did not affect the reliability and credibility of D? I think not; the finding of not guilty on count 12 did not render the balance of D' s evidence to be untruthful. D herself told the court from the outset that the events traumatised her and that she was still traumatised. Despite days and days on end of cross- examination pertaining to the offences itself the only further contradiction related to what period two further sexual assaults took place. As stated earlier confusion **as to** what dates in 1998, eight years earlier, what offences was committed is not indicative of untruthfulness, but of mistake. D never wavered on what offences were committed, just exactly when those offence were committed.

[37] The appellant also made much of the averred contradiction as to whether the appellant during the sexual assault just fondled her vagina or inserted his fingers into the vagina. There was no contradiction. In her evidence in chief she testified that sometimes he fondled the vagina and sometimes would put his finger into her vagina.[4] There simply was no contradiction, touching the vagina included on occasion inserting his fingers into her vagina. She confirmed this in cross- examination.[5]

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[4] Page 60 lines 6-7

[5] Page 164 lines 10-25

[38] The other contradiction the appellant relied on was whether D attended a sexual harassment course or not. This was relevant as she testified that the appellant specifically did not send her on a sexual harassment course; thereby not empowering her. She testified that she attended other courses, but nothing containing information pertaining to sexual harassment. She was then shown a document dated 8 July 1999 with her signature on it. She testified it was her signature, but then shook her head as reflected on the record and stated the following:

> *"No I, what I can do Your Honour is to bring in the certificates tomorrow of which I attended courses at [....]. I think that will sort out the problem better regarding the issues surrounding the courses attended."*

When after a further 505 pages of cross-examination she was again referred to this course and the fact that when she saw the signature she in court confirmed that she did attend this course, she denied that she in court admitted that she attended the course. She explained the contradiction by saying *"No, I did not understand you at first, I thought during the employ at Dene/, not in court."* This is a reasonable explanation. But, in any event, Ms. Grobbelaar confirmed that Ms. D did not attend the course on 8 July 1999. She recalled it specifically because she found it strange that the boss' secretary did not attend this compulsory course. The evidence of D must thus be accepted that the appellant did not send her on a course explaining procedure to follow when sexually harassed.

[39] The handwriting expert of the defence insisting that the signature on the document was that of D's, was unreliable. No court could follow the guidance of this expert. This witness was, besides as reflected on the record, a rude, biased and sarcastic witness, was also unreliable. The court *a quo* thus correctly did not rely on the evidence of this witness. Although the court' s non-reliance on the evidence of this witness was a ground of appeal, this point was not, rightly so, argued on appeal. The

handwriting expert of the state, Esterhuizen, gave convincing reasons as to why the defence' s expert witness was biased and his conclusion should not have changed from his first report to his second report. The conclusion of inconclusiveness should have prevailed.

[40] To summarise, this *"contradiction" did* not affect D' s reliability and credibility. The court *a quo* correctly accepted that she was not on the course. Her name on the bottom of the list, out of alphabetical order is another factor to consider. The rejection of the appellant' s expert witness, her own evidence that she was not on the course and the corroboration thereof by Ms. Grobbelaar in fact renders her version reliable. Ms. Salome Pienaar, who the defence said would testify that D was on the course, was never called by the defence.

[41] D testified that after the rape at the losie she reported it to L. Much was made of the fact that she did so while not reporting the sexual assault committed before the rape incident to any other white male boss. It does not take much logic to accept that rape is a big step up from sexual assault and that she bit the bullet and reported it then. Mr. L did not return her call as expected; confirming her strong voiced suspicion that the white males would protect each other. Contrary to her *viva voce* evidence this was not mentioned in her statement to the investigator. Once again she gave a very reasonable explanation as to why it was not there:

> *"It was, he was rushing to take my statement and he said, that is why I put it in the beginning I have mentioned only the important aspects and he said he would come back to me if he needed any further questions and nobody had come back to me for additional information."*

She was also criticised for not in the disciplinary hearing testifying that she contacted Mr. L after the rape. She explained that she testified in that hearing from her statement [6] , wherein of course this call was not

[6] Page 122 line 8

mentioned. It must be remembered that the appellant chose not to attend the disciplinary hearing and she just had to put the basis of the facts before that hearing. She did however explain that what she did testify to was that before the second rape she had heard that Mr. L had an issue with the previous personnel assistant and this is why she did not contact him any further.

[42] Mr. L testified that D never called him. The court *a quo* correctly on the totality of the evidence rejected this version as not being reasonably possibly true. Once again the fact that the statement did not contain this averment is explained. Furthermore the court *a quo* correctly referred to the trite case law that statements rarely contain every detail because they are not taken with as much care, accuracy and competency and that therefore it is not unusual nor surprising that discrepancies occur between the evidence and a statement. It is also not done on the basis of questions. This contradiction did not affect the reliability and truthfulness of D' s evidence.

[43] D testified that the appellant was very powerful at [....]; when he ordered, you obeyed. She testified that it was a very white Afrikaner male kingdom and that the appellant was the king of this kingdom. This could not be disputed. The environment was one of rugby and hunting to keep clients happy. She also testified that Mr. L and the appellant were good friends. The appellant and L denied this. D's evidence must be accepted on this point, because the appellant's version is just not reasonably possibly true. It is accepted that they had a good working relationship, but it was clearly also a friendship as testified to by D. Working colleagues, without any friendship, do not go on fishing trips to Dullstroom together with no obligation to entertain clients. Neither do their families holiday together for a week. These factors give credence to the version of D. In this matter the devil is in the detail; nobody can fabricate a version spanning four years in such detail, cross-examined to this extreme, with the only contradictions being immaterial.

[44] The other contradiction relied on is between the evidence of D and that of Mr. V. Both of them testified that D asked V to stay late if she needed to work late because she was scared of the appellant. D testified that V only had to stay late once whereas V testified that at most they worked late six to seven times. He however emphasised that it was never more than 30 minutes at a time. The submission that V testified that they worked overtime four times but then changed his evidence to then working six to seven times overitme and then changed it again to ten times is simply not true. He testified that between 2000 and 2003 staying late was three to four times, but in the year 199 9 it was five to six times. But, he persisted with his version that he included periods that they stayed 15- 20 minutes later, not like working overtime for an extra two or so hours.[7]

[45] The point is V corroborated the evidence of D that she was scared of the appellant and asked him to stay behind if she had to stay later. This corroborates her version that she was scared of further sexual assault or rape when left alone after hours with the appellant. The amount of times that V had to stay behind is not material. This is the only contradiction between him and D and it does not render his evidence untruthful. The court *a quo* was correct to find corroboration in his evidence of D's credibility.

[46] The only other contradictions that can reflect on the evidence of D is that between her and Ms. Van der Westhuizen. Ms. Van der Westhuizen could four years, after the fact, inform the court of the manner of sexual assault corroborating what the complainant told her. She recollected that D told her that she was raped five times, but D had testified that it was four times. She knew the detail that two of the rapes occurred after D refused the appellant oral sex. She also recalled that D told her that the first two sexual assaults on her private parts was over her clothes whereas D had testified that his hands were under her clothes. She also made two statements, one in 2004 and one in *2007.* In her one statement it was recorded that D came to her in 1998 for trauma counselling because of the

[7] Page 247

appellant's sexual assault. She testified that this was totally incorrect because D struggled to communicate and only a year later told her of the assault. Much was made of the fact that in her statement she said D was raped from the back and front at the losie. She explained that she condensed all the evidence in one and actually meant that the rape method was from the back and the front, i.e. always the vagina but the appellant's position being either at the back or the front. The statement in 2007 was hand written next to the road where the investigator met her. She also did not understand why she had to make another statement as she had made one in 2002. The statement in *2007* was thus just a summary of what D had told her. The one in 2002 was translated from Afrikaans to English and she did not read the English version thereof.

[47] The court *a quo* was correct in finding that statements under those circumstances did not affect the credibility of the witness or that of D.[8] The court was correct in accepting that the second statement was in fact a summary of what D told her; exactly as the case law describes the circumstances under which statements are taken. Her explanation that the appellant raped D from the front and back on different occasions was supposed to be reflected in her statement is not far-fetched but plausible. Once again the devil is in the detail; Van der Westhuizen recalled that the appellant called D a "koelie"; D was scared of him and he threatened to shoot her; she knew due to D's religion she could not tell her family without severe consequences and she also knew that D could not afford to lose her job. She corroborated the fact that in that time D was losing weight at an alarming rate. She knew that D was depressed It was never suggested that Van der Westhuizen would recall all this detail because as D's therapist she colluded with D. Just as it was never suggested that V came to court to help his work colleague. Van S, on record, stated that testifying was an unpleasant experience and he was threatened in writing by the appellant that he would be sued. D's version that she was so thin, which was in any event never denied, renders her version that she hoped that

[8] ***S v Xaba* 1983 (3) SA 717 (A)** 7308 -C

the appellant would leave her alone as truthful. The deep humiliation she had to endure to be felt up to see if she was fattening up, is shocking and exceedingly distasteful.

Corroboration of the evidence

[48] Corroboration may usually be found in independent evidence which confirms the evidence of a complainant. For instance corroboration that a complainant was raped may be found in medical evidence confirming possible injuries sustained by the victim to her private parts. Secondly the fact that a complainant promptly reported a rape, although not proving the rape, serves to show the consistency of the complainant's conduct. In this regard the requirement is that the complaint had to be made at the first opportune moment that reasonably offers itself. It follows in the event of the complainant not having reported the rape promptly, or at all, it may reflect negatively on the reliability and credibility of the complainant. However, the failure to report the incident at the first opportune moment should be considered taking into consideration all relevant facts, and does not, without more, or automatically, militate against the complainant's credibility.

[49] In this matter there is no independent medical evidence of a sexual assault or rape. Furthermore D only reported it to Van der Westhuizen long after the first sexual assault and rape and to the police only after being prompted to do so.

[50] Does the lack of independent corroboration of the offences render the state's version not to be accepted and did the court *a quo* err in accepting the state's version? A lack of corroborative evidence is not fatal after having applied any cautionary rule in order to determine whether the evidence should be accepted or not. In the *South African Law of Evidence,* 4th Edition, Hoffmann & Zeffert at *577- 578* the following is said:

> *"Corroboration is only one of the factors that may reduce the risk of a wrong conviction."*

This lack of corroboration was argued as being "inherent improbabilities" in the version of D.

[51] The reasons provided for not promptly reporting the incidents are not inherently improbable. The fact that your husband and own family will ostracise you and take your children away from you is real and will have a great influence in enduring these terrible acts. This reason provided by D was corroborated with independent evidence of an Hindi expert Mr. Kollapen. D was requested by the state to consult Professor Spies for a forensic assessment. Professor Spies confirmed that Data is stiff not able to disclose the sexual abuse to her family members due to the Hindi religion. This made her healing process so much more complicated as she has to carry this secrecy of the offences adding to her trauma. As an expert she did not at all find it strange that D did not want to report the sexual assault and rape to white males, although reporting it to L. She found it 100 % in accordance with practise: *"want al se sy dat sy bang is om dit aan blanke mans wat die hoofposte daar beklee het op daardie stadium, dit aan hulle te gaan meedeel kom hulle regtig op 'n punt waar dit net te veel raak arguments onthalwe en dan neem hulle die risiko om dit uiteindelik te gaan doen. Wanneer daar vir arguments onthalwe niks gebeur nie sal hulle nie maklik weer die risiko neem nie."*

[52] She testified that there is a vast difference between sexual trauma in a marriage and outside of the marriage. She opined that D could escape sexual trauma in the marriage by moving to her mother, but she could not afford to lose her job; *"So ek kon die trauma hier hoor in die huweliksverhouding, maqr ek kon ook die verskil in trauma hoor hier waar ek afhanklik is van 'n situasie (werk)."*[9]

[53] As an expert she also did not find it at all strange that D went to the police station to report it, but because they took long to attend to her she left without reporting it. In fact she testified that it made sense to her:

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[9] Page 495

"En my eNaring met hierdie persone is hulle wend pogings aan om te doen en doen presies sulke goed as wat mev. D doen, kom by die poliestasie en hoop eintlik iets gebeur dat ek dit nie doen nie en wanneer hulle haar nie vinnig genoeg gaan help nie is dit 'n geleentheid vir haar om weer daar te 'escape' want onmiddelik is dit geweldige blootstel/ing. So dit is glad nie vir my vreemd dat hierdie persone dit doen nie, dit is dieselfde met gesinsgeweld ook." [10]

[54] D gave good reasons why she did not promptly report the assault and the rape. Her reasons are corroborated by independent expert witnesses and this lack of reporting does not render her version improbable. In fact both Professor Spies and Mr. Kollapen confirm the reasons for the lack of reporting.

[55] Much was made about the fact that after the averred rape at the losie at Loftus D got in the car with the appellant and did not report it at the security guards when leaving the premises at the gate. The appellant's version on the totality of the evidence relating to the visit to the losie is not reasonably possibly true and was correctly rejected by the court *a quo.* It defies all logic, that if D was to receive people at the losie posted on a specific spot to induct her and prepare her for this, it would be done in an empty losie. This absurdity was amplified by the fact that she would only ever have to fulfil this duty if six other people simultaneously were not in a position to do so; in other words close to never would she ever have to fulfil this duty. This is corroborated by the common cause evidence that in the six years she worked there she never needed to fulfil this duty. The losie was simply a convenient private spot. The common cause fact is that there was a bench on which the appellant could force her down; whether it was a wooden bench or built-in bench is simply not material. do however find that the magistrate's finding that it was in fact a wooden bench to be correct. It is not improbable that D would not report it to security people at

[10] Page 490 lines 12 and further

the entrance to Loftus that she was raped by the man driving the car. What would the scenario be? He simply denies it and drives off, but, more importantly, the undisputed evidence of Professor Spies must be accepted that:

> *"Want ek kan vir u redelik baie uit die literatuur gee, daar is nie 'n goeie tyd om hierdie goed te rapporteer nie, da r is nie 'n beste tyd om dit te rapporteer nie, gewoonlik word dit gerapporteer wanneer niks meer oorbly op die ou einde nie."*

D herself testified that it was the first time that she had ever been raped, she was totally in shock, and besides that after the rape he had threatened her not to tell anybody. The reportings of rape will most definitely not be done to security guards opening a boom.

[56] Much was also made of the fact that Mr. Van Coller testified that D was introduced to him after the losie incident and she looked fine and friendly. It is incorrect that the state did not address this evidence. It was put to Van Coller that this rape incident took place in 2000 and not in 1998 as Van Coller testified.[11] The mere fact that a court, despite summarising of Van Coller's evidence, does not refer to it, does not mean.the court did not consider it. D in fact testified that after arriving back from the losie the appellant left work shortly thereafter. Furthermore, D was never in her evidence in chief cross-examined on the fact that she was taken to Van Coller after the rape.

[57] The appeal is also against the court *a quo's* rejection of the motives testified to by the appellant as to why D would fabricate false charges against the appellant. The court *a quo* correctly rejected these motives as not being reasonably possibly true. No court of law expects an accused to provide motives and certainly no negative inference can be made if an accused can't provide a motive as to why a complainant would lay false

[11] Page 1317 lines 5 and further

charges. If an accused, himself voluntary testifies about motives and sets up motives it is part and parcel of his version. If these motives are then rejected as part and parcel of his version he cannot raise the appeal ground that it cannot be expected of a defence to provide motives.

[58] The fact that the appellant addressed D's averred private abuse of the phone, the refusal of a loan and V spending too much time in her office, did not individually or cumulatively set up motives that are reasonably true for D to trump up 12 detailed charges of sexual assault and rape. The appellant was suspended; she reported it thereafter, so it c n never be for *"labour relationships'* It was argued that it was for financial gain. I agree with the finding of the magistrate; this is not reasonably possibly true. Exposing herself to a criminal matter and to evaluation by Professor Spies is too high a price to pay for financial gain. She could institute a civil claim without a finding of guilty in a criminal matter, simply because the onuses differ dramatically. To trump up these charges she would have had to with premeditation over a long period lose weight, influence V, Van der Westhuizen, Spies and the Hindu priest, and mislead the doctor to corroborate her version.

[59] The court *a quo* found that the state proved its case beyond reasonable doubt and rejected the appellant's version as not being reasonably possibly true. I cannot find that the court *a quo* erred in any manner.

[60] I accordingly make the following order:

The appeal against all the convictions is dismissed.

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S. POTTERIL

JUDGE OF THE HIGH COURT

I agree

T.A. MAUMELA

JUDGE OF THE HIGH COURT

VAN NIEKERK AJ

[61] I have had the benefit of studying the j 1dgement of my learned colleague Potterill J, but respectfully disagree with her finding that the appeal against all the convictions should be dismissed and the reasons therefore as appears from the judgement of Potterill J.

[62] As referred to in paragrapl1 [8] of the judgement of my learned colleague Potteril J., there are contradictions, discrepancies and inconsistencies in the Complainant's evidence. Whereas the general cautionary rule in the approach to evidence in sexual offences had been disposed of by the judgement of ***State v Jackson 1998 SACR 47Q (SCA),*** the evidence of a single witness, where no corroborative evidence was advanced by the State, should be approached with caution where there are inconsistencies and/ or discrepancies and/or contradictions in the Complainant's evidence, and this principle is established in our law.

Vide: State v Jones 2004 (1) SACR (420)(C) on 427 F - H

State v M 2000 (1) SACR 484 (W), p. 486 F - H

State v Gentle 2005 (1) SACR 420 (SCA), p. 430, par. [17]

[63] ***In casu,*** no corroboration was provided on the Complainant's version regarding any of the charges against Appellant, and on all of these material issues, the only available direct evidence was namely that of the Complainant which was denied by the Appellant during the trial. For a definition of corroboration, ***Vide: State v Gentle 2005 (1) SACR 420***

(SCA), par. [18].

[64] In my view, the approach of this matter on appeal should be as follows:

[64.1] Having regard to the fact that the Complainant was a single witness and no corroborative evidence was advanced on the material issues in dispute, the Court should determine whether or not a cautionary approach to the Complainant' s evidence is warranted in the circumstances, with regard to the authorities quoted ***supra;***

[64.2] Having regard to the inconsistencies and/ or contradictions and/ or discrepancies referred to in paragraph [8] of the judgement of my learned colleague Potteril J. referred to ***supra,*** to which more reference will be made ***infra,*** a cautionary approach should be followed in evaluating the Complainant' s evidence;

[64.3] In evaluating the Complainant's evidence against the evidence of the Appellant the approach should be as follows:

> " *The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonable possible that he might be innocent. The process of reasoning which is appropriate to the application of that* ***test*** *in any particular case will depend on the nature of the evidence which the court has before it. But what must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored."*

Vide: State v Van der Neyden 1999 (1) SACR 447 (W) as approved in State v Van Aswegen 2001 (2) SACR 97 (SCA) at 101 A - E

After citing the aforesaid passage in ***State v Krynor 2003 (1) SACR 35 (SCA)*** Nafta JA held as follows:

> *"A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must be of necessity be evaluated, as must be corroborative evidence, if any. Evidence, of course, must be evaluated against the onus on any particular issue or in respect of the case in its entirety. The compartmentalised and fragmented approach of the Magistrate is illogical and wrong'*

[64.4] Applying the aforesaid principles, the issue to be determined on appeal is therefore whether or not the Court ***a quo,*** on the available evidence and following a cautionary approach, correctly found that the available evidence proved beyond reasonable doubt that the Appellant is guilty of the offences as charged;

[65] Put otherwise, the aforesaid approach entails that the evidence of the Complainant should be scrutinised with a measure of attention to detail, especially on material issues, to determine whether or such evidence could reasonably possibly be true to such an extent that the Appellant's version on such issues could be summarily rejected as being improbable or simply a fabrication.

[66] I am further of the view that, in considering the version of each and every separate alleged event of sexual assault and/ or rape as testified by the Complainant, measured against the Appellant' s denial of these

allegations, it must be considered that a salient feature of the case as advanced by the State is namely that there was no independent corroborative evidence advanced on any of the charges. Each witness called on behalf of the State either expressed an opinion based on allegations made by the Complainant, and/ or gave evidence relating to circumstantial issues. The ***onus*** of proof is on the State, and it therefore follows that the Appellant could be convicted on one or more of the charges only in the event that the version of the Complainant is accepted, and the version of the Appellant thereon is rejected, after following a cautionary approach to the evidence of the Complainant and applying the principles as set out in paragraph 4.3 ***supra.***

[67] Having studied the record of the proceedings in the Court ***a quo,*** I not only agree with the finding of my learned colleague Potteril J. that there are certain contradictions, discrepancies and inconsistencies in the Complainant' s evidence, but I am also further of the view that on various material issues the Complainant gave evidence on issues which are improbable to such an extent that it may be rejected ***in toto.*** Although there are numerous examples of the evidence of the Complainant which may be categorised as falling within one of the categories referred to ***supra,*** I will deal ***infra*** with specific examples thereof on issues which goes to the root of the factual matrix upon which reliance was placed for the conviction of the Appellant.

[68] I deal firstly with the Appellant's inability to recall dates of occurrences, and the inconsistencies in her evidence in this respect. Although, as a general sweeping statement, it can be stated that a complainant in a sexual offences trial may not be able to recall the exact dates of occurrences as a result of various factors such as trauma, lapse of time or lack of mental capacity due to age or other factors, when it appears that a complainant is apparently unable to recall such facts the reasons advanced by the complainant for an inability to recall such facts should be scrutinised and tested by the Court to determine, objectively , whether such reasons are more probable than not, as the specific date and time of

an alleged offence is often of crucial importance to establish guilt.

[69] According to the evidence in chief of the Complainant the last alleged occurrence of rape was committed by the Appellant owing June 2002. Subsequent to this evidence, the State Prosecutor requested an amendment of the charge sheet in which it was alleged that the last incident took place: during July 2002. Although this inconsistency in itself may be insignificant, the issue regarding the occurrence of the last incident of rape gained substantial more importance during the course of the trial, as it later transpired that the Complainant previously gave instructions to an attorney acting on her behalf, a certain Mr Girpal, who instituted civil proceedings against the previous employer of Complainant and Appellant, based on the same facts as were germane in the trial Court ***a quo,*** that the last occurrence was during the year 200 4. Not only did the Complainant instruct her attorney that the last occurrence was in 2004, but this was also the Complainant's case during disciplinary proceedings instituted against the Appellant by such employer.

[70] This issue of whether the last incident of alleged rape took place during 2002 or 2004, was the subject of evidence given by Mr Girpal, the Appellant's attorney referred to ***supra,*** and in cross-examination of the nature of instructions given by the Complainant to Mr Girpal, the issue became, to say the very least, extremely clouded. Not only the Complainant, but also Mr Girpal gave unsatisfactory explanations for these discrepancies, and on the record it appears, to say the very least, that Mr Girpal attempted to place misleading evidence in this regard before the Court. When Complainant was confronted with this issue, and especially her inconsistent version thereof, she became hostile, unco-operative, and generally gave evidence which could be described as unsatisfactory and questionable.

[71] It should be considered that the Complainant' s version as to the last occurrence of alleged rape was recorded in pleadings filed on behalf of the Complainant, as testified by Mr Girpal, and was part of the charges against the Appellant during the disciplinary proceedings at Denel which

commenced late in 2004. The Complainant's inability to recall the fact whether or not the last alleged rape occurred during 200? or 20 0 4, at the time when she instructed her attorney and filed a complaint resulting in disciplinary proceedings against the Appellant towards the end of 2004, can therefore not be ascribed to a memory loss due to the lapse of time. No acceptable explanation was provided for this discrepancy, which, in my opinion, is of a material nature. If the Complainant alleges that she was raped in 2004 and instructs her legal representatives as such at the end of 2004, and persist in such an allegation leading to disciplinary proceedings against the Appellant at the end of 2004 , the fact that she then testifies that the last occurrence was in 2002 should raise the proverbial red flag. In the Court ***a quo,*** however, Complainant persisted in her evidence that the last occurrence was 2002, and both the Complainant and Mr Girpal's attempts to explain away the reference to 2004 during the disciplinary proceedings and the pleadings initially filed by the Complainant, is so unsatisfactory as to be dismissed as being simply untrue. I find it highly improbable that Complainant would not be able to recall whether or not the last alleged rape occurred during 2002 or 2004.

[72] Secondly, the evidence relating to the alleged first occurrence of rape which, according to the Complainant' s evidence was at Loftus Versfeld, also raise serious questions upon close scrutiny. The Complainant testified that she was forcefully penetrated by the Appellant, resulting in injuries in her vagina and subsequent bleeding. The graphic detail of this alleged occurrence as testified to by the Complainant, leaves the impression of a brutal sexual assault culminating in injuries with long term effects for the Complainant. However, considering this evidence against the totality of all the available evidence, the following should be considered:

[72.1] There were clearly no visible signs of the severe alleged trauma which the Complainant must have suffered shortly before when the Complainant and the Appellant left the premises where such occurrence allegedly took place, with reference to the evidence in this regard concerning the security guards at the

premises. A certain Mr Marius van Coller testified that the Appellant, accompanied by the Complainant, arrived at his office at the Air force base Waterkloof and he was informed then that they were at Loftus Versfeld earlier that morning. Mr van Coller did not notice anything untoward regarding the Complainant. This evidence was never challenged by the State. Considering the nature of the alleged incident as testified by the Complainant, it is highly improbable that she would present without any visible signs of the alleged traumatic incident. Furthermore Mr Gerhard van Staden, who was called as a witness by the State, also testified that he saw the Complainant upon the return of the Complainant and Appellant from Loftus Versfeld. Mr V also did not notice anything untoward regarding the Complainant and when he enquired from her as to the trip that morning, she only remarked that the place was *"pretty'.* The Complainant did not then report the alleged injuries to any medical doctor, and for that matter, to anyone else. In my view, when the graphic evidence of the Appellant regarding that incident and her subsequent trauma and injuries is considered against the background of the evidence of other persons with whom she spoke on the same day, returning from the alleged proverbial scene of the crime, coupled with her lack of any immediate medical attention or report in this respect, it raises a proverbial red flag.

[73] Thirdly, the Complainant's failure to report the alleged incidents of sexual harassment, rape and indecent assault should be closely scrutinised and the Complainant's explanations why such occurrences were not properly and/ or timeously reported, should be carefully considered in the light of the available evidence and the explanations in that regard proffered by the Complainant. In my opinion, this issue raises numerous questions on all the available evidence, but I will deal with what I regard as the most important issues as follows:

[73.1] The Complainant testified that, shortly after the alleged rape incident at Loftus Versfeld, she telephonically contacted Mr Langer to report the alleged incident to him. Mr Langer was in a senior position to the Appellant. According to her evidence, he undertook to call her back but never called. Mr Langer denied this during his evidence and the issue of whether or not the Complainant telephonically contacted Mr Langer and made a complaint in this regard, was therefore in dispute at the trial. I respectfully disagree with my learned-colleague Potteril J. that the evidence of Mr Langer in this regard could summarily be dismissed solely on the principle that Mr Langer and the Appellant, as well as their respective families, knew each other and went on weekends together. The mere fact that a witness is familiar to an accused, ***per se*** does not render such a witness's evidence as unreliable where it is contradicted by any evidence of the Complainant. It must further be considered in the light of the fact that certain of the witnesses called on behalf of the State referred to Mr Langer as a "fair" person and, on all accounts, there is no reason on the evidence as a whole to expect Mr Langer to commit perjury for the benefit of he Appellant. Apart from this it appears from the available evidence that it was only during the trial in the Court a quo that Complainant averred for the first time that she attempted to report to Mr Langer;

[73.2]However, the Complainant's evidence that she reported the incident to Mr Langer in itself carries a measure of inconsistency in that, insofar as she was criticised by Counsel for the Appellant during cross-examination for not initially complaining about the alleged conduct of the Appellant, which was of an extremely serious nature, she attempted to explain away her failure to report on the basis that she would be subjected to victimisation by her immediate family and community, based on their religious principles and that she

feared losing her employment should she report the matter, and that she feared victimisation by the Appellant based on her evidence that he threatened her with murder should she complain. Considering these reasons as advanced by the Complainant, the fact that she, on her own version, contacted Mr Langer to report the incident carries a measure of contradiction;

[73.3] The Complainant testified that she (3ventually reported to Trudie *van* der Westhuizen, a psychologist, that she was sexually assaulted by the Appellant. A scrutiny of the evidence of the Appellant regarding her interaction with Mrs van der Westhuizen, and the evidence of Mrs Trudie van der Westhuizen, again disclose various discrepancies. During the evidence of Mrs *van* der Westhuizen, it transpires that she made two different statements pertaining to the reports made to her by the Complainant which statements were inconsistent. She further testified that the Complainant initially consulted her relating to marital problems and ***inter alia*** complained to her that the Complainant's husband submitted the Complainant to forceful intercourse. Considering the fact that this witness conceded during cross- examination that she provided contradictory *evidence,* and the various discrepancies between her evidence and the evidence of the Appellant, the evidence of Mrs van der Westhuizen can hardly the described as supportive of Complainant' s version. However, considering the nature of the relationship between the Appellant and Mrs *van* der Westhuizen, and the intimate nature of discussion between them since the Inception of their interaction with each other, the fact that the Appellant failed to report the serious incident which allegedly took place at Loftus Versfeld to Mrs van der Westhuizen, either immediately after the occurrence thereof or at least within a reasonable time thereafter, again raise serious questions on the issue of probability;

[73.4] The Complainant's evidence that she failed to report the Appellant's alleged conduct for fear of victimisation based on religious considerations should also be carefully considered in the light of the available objective evidence. The Appellant testified that she would be regarded in her community as someone who elicited this alleged kind of conduct by the Appellant, and that she feared that her children will be taken away from her. I have great difficulty to accept that the Complainant, who grew up in South Africa and resides in an open society, would believe that her children will be *"taken away"* by her husband in such circumstances. Save for this fact, according to the evidence the Complainant and her husband in fact did get divorced during the period of time whilst the Appellant was allegedly sexually assaulting the Complainant which leads to the inevitable conclusion that this factor could therefore not have been a ground for her silence after the divorce. Yet the Complainant persisted in her failure to report.

[74] On the Complainant' s version, she was not only raped at Loftus Versfeld during the occasion referred to ***supra,*** and other occasions as testified, but over a protracted period of time sexually assaulted at the offices of the Appellant. An analyses of the evidence of the Complainant shows that most of these alleged incidents, according to the Complainant, took place during office hours whilst there were other personnel present. A number of the previous colleagues of both the Complainant and the Appellant were called as witnesses, some on behalf of the State and others on behalf of the Appellant. Not one of these witnesses, either in their evidence in chief or cross-e examination, could provide any corroboration of these alleged occurrences.

[75] In summary, the Complainant's evidence is that she was sexually assaulted and raped by the Appellant on various occasions during a time period which span from August 1988 until June 2002, (June 2002 being

her version during the trial in the Court ***a quo),*** one occasion being at Loftus Versfeldt resulting in injuries and bleeding, the other occasions being at the offices of the Appellant. Notwithstanding this, and all the evidence which the Complainant gave relating to these incidences, the places where it occurred, the ***sequelae*** thereof, and the persons she consulted thereafter including Mrs van der Westhuizen as well as Dr van Schalkwyk, no corroborative evidence of any nature whatsoever was presented to substantiate any one of the alleged incidents. I find this somewhat remarkable.

[76] What further transpired during the course of the proceedings in the Court ***a quo,*** was namely that the Complainant was the victim of a traumatic marriage relationship, subjected to forceful sexual intercourse by her husband, was previously involved in a motor vehicle accident of a serious nature, that she suffered from depression, migraines and epilepsy, and consulted Mrs van der Westhuizen primarily and initially for the emotional problems she experienced in her marital relationship. However, on a perusal of the Record of the proceedings in the Court ***a quo*** it appears that towards the end of the trial, the Complainant was reconciled with her estranged husband and again living with him. These facts warrant, in my opinion, an inference of an emotionally fragile person whose evidence should be considered with caution.

[77] The Appellant denied the allegations. The Appellant was cross-examined and remained consistent with his denial. There is no basis upon which the evidence of the Appellant can be held to be inconsistent or improbable or simply untrue. The Appellant' s efforts of ascribing a motive to the accusations of the Complainant is not a factor to be considered in summarily dismissing the remainder of the Appellant' s version.

Vide: State v Lotter 2Q08 (2) SACR 595 (CJ par [38] and [39]

[78] Considering the aforesaid I am of the opinion that the State failed to prove beyond reasonable doubt that the Appellant is guilty of the charges and that the appeal therefore should succeed.

P. A. VAN NIEKERK

ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

CASE NO: A611/11

HEARD ON: 24 November 2017

FOR THE APPELLANT: ADV. J.J. STRIJDOM SC

INSTRUCTED BY: Rianie Strijdom Prokureur

FOR THE RESPONDENT: ADV. C. PRUIS

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 9 March 20 18