CASE NO.: CA 91/2010

IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI

In the matter between:

NELLY SHIPIA KAPIA **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: LIEBENBERG, J *et* TOMMASI, J.

Heard on: 10.06.2011
Delivered on: 20.06.2011

APPEAL JUDGMENT

LIEBENBERG, J.: [1] The appellant was arraigned in the Regional Court sitting at Outapi on charges of contravening section 2 (1)(a) of Act 8 of 2000 – Rape; alternatively, contravening section 14 (a) of Act 21 of 1980 – Committing or

attempting to commit a sexual act with a child under the age of sixteen years; alternatively, contravening section 14 (b) of Act 21 of 1980 – Committing or attempting to commit an indecent act with a child under the age of sixteen years. Appellant was convicted on the main count of rape, as charged, and sentenced to fifteen (15) years' imprisonment. The appeal lies against both the conviction and sentence.

[2] Despite the accused (appellant) having pleaded on all three charges, the trial court only pronounced judgment on the main count and not the two alternative counts. Section 106 (4) of the Criminal Procedure Act, 1977 (Act 51 of 1977), hereinafter referred to as 'the Act', contains the important principle that an accused who pleads to a charge shall be entitled to demand an acquittal or to be convicted (see *S v Mphetshwa*[1]; *S v Gwala and Others*[2]). Whereas the exceptions listed in s 106 (1) do not find application, it was irregular for the trial court not to pronounce itself on the alternative charges. This notwithstanding, I am convinced that the appellant was not in any way prejudiced thereby. Neither was it a point in contention in appellant's notice of appeal.

[3] During the trial the appellant was unrepresented, but when the matter came on appeal he was represented by Mr. *Kamanja*, while Mr. *Shileka* appeared for the respondent.

[4] The appeal was noted outside the prescribed period by more than one month and appellant now in terms of s 309 (2) of the Act seeks leave from this Court to extend

[1] 1979 (1) SA 925 (Tk SC).
[2] 1969 (2) SA 227 (N).

the period of fourteen (14) days mentioned in the Magistrates' Court Rules (Rule 67 (1)) due to non-compliance on his part. The application is supported by an affidavit by the appellant and a confirmatory affidavit of his legal representative and meets the requirements as set out in *S v Kashire*[3]. Appellant furthermore applied for condonation of the late filing of the Amended Notice of Appeal. The respondent argued that the explanation given by the appellant, explaining the delay, is not reasonable and that there are no prospects of success on appeal. In view thereof both counsel were requested to address the Court on the application as well as the merits.

[5] Appellant attributed his delay in filing his notice out of time to a conjuncture of circumstances namely: That his conviction came as a shock to him and although the rights of appeal were explained to him at the end of the trial, he did not fully comprehend what it meant; and as he was unrepresented, there was no one who could explain it to him. It was only after a few weeks of his incarceration that fellow inmates explained to him that he could explore an appeal against his conviction and sentence if he was of the view that it was not justifiable. Appellant however remained uncertain where he had to lodge his appeal. He had given up on access to lawyers and decided to note an appeal in person and with the assistance of fellow inmates.

[6] Counsel for the respondent conceded that, in the light of the appellant being unrepresented, he might not have fully understood the import of the explanation of his right to appeal when explained to him by the court at the end of the trial; which explanation seems reasonable. He, however, was of the view that there were no prospects of success on appeal.

[3] 1978 (4) SA 166 (SWA) at p.167.

[7] The explanation given to the appellant as *per* the record of the proceedings in the court *a quo,* reflects that the appellant was informed that, if he was dissatisfied with his conviction and sentence, he could lodge an appeal with the Clerk of the Court within fourteen days from that day onward. Although this explanation did not include the procedure which the appellant should have followed or in any particularity set out the requirements of Rule 67 of the Magistrate's Court Rules, it at least informed him that he could appeal his conviction and that it must be lodged with the Clerk of the Court within a period of fourteen days. Appellant's averment that he did not know where he had to lodge his appeal is simply not true.

In an unreported judgment of this Court recently delivered in *Sakeus Kornelius v The State*[4] the Court raised its concern over the manner in which prospective appellants are required to comply with the rules in circumstances where they are unrepresented and unfamiliar with the import of the rules as these were not fully explained to them by the trial court. In paragraph [6] of the judgment (page 3) it was said that it has now become imperative that the issue of assistance to the unrepresented accused as to how an appeal should be lodged after conviction and sentence, should be addressed. The Court in paragraph [10] gave clear and helpful guidelines on the nature of the assistance to be provided to the unrepresented accused by the presiding judicial officer at the end of the trial. There is no need to restate in this judgment the guidelines listed therein and it will suffice to say that, not only does the administration of justice require that prospective appellants are properly informed of their rights to appeal, but also that such practice would simultaneously relieve the burden on this Court to deal with a large number of appeal cases in which the applications for condonation and the appeals itself, are not in order and not in compliance with the

[4] Case No. CA 103/2009 delivered on 08.04.2011.

rules, due to ignorance on the part of the appellants. More so where this Court firmly holds the view that the rules equally apply to represented and unrepresented appellants and must, as a matter of principle, be adhered to by all litigants.[5] Presiding officers in the lower courts are accordingly encouraged to give serious attention to these guidelines and to take it into account when explaining the right of appeal to unrepresented accused.

[8] Whereas the explanation given in the present instance falls short from what the court ought to have informed the appellant about his right to appeal and the respondent's concession made in this regard, I am satisfied in the circumstances of this case, that the explanation is reasonable.

[9] However, the prospects of success, being part of the application for condonation, will be considered on the merits.

[10] In the original Notice of Appeal (dated 27 August 2008) appellant listed twelve grounds on which the appeal against conviction and sentence is based. Not all of these grounds meet the requirements set by Rule 67 (1) of the Magistrate's Court Rules, as it lack particularity. The 'grounds' falling in this category are those generally dealing with the court's finding that the State proved its case beyond reasonable doubt (1st ground); that appellant was convicted without any 'technical evidence' such as a blood sample of the appellant (3rd and 10th ground); that the court failed to consider the possibility of false incrimination of the appellant (4th and 9th grounds); and, that the magistrate was bias (7th ground). Grounds 11 and 12 are

[5] *S v Mantsha*, 2006 (2) SACR 4 (CPD); *Kalenga Iyambo v The State*, (unreported) Case No. CA 165/2008.

nonsensical and can safely be ignored. These so-called grounds are accordingly not considered for purposes of the appeal.

[11] The remaining grounds are the following: That there was no evidence before the court which linked the appellant to the commission of the offence of rape; that the trial court misdirected itself by giving insufficient weight to the medical examination report adduced as evidence during the trial; that the trial court erred by failing to assist the appellant (during cross-examination of the State witnesses); and, that the court relied on hearsay evidence in order to convict the appellant.

Additional eight grounds were raised in appellant's Amended Notice of Appeal (dated 20 January 2011) of which the seventh and eighth grounds will not be considered due to its generality, clearly not satisfying the requirements set in the rules. Whereas the amended grounds of appeal largely incorporate those (valid) grounds raised in the original notice, the Court will focus on these grounds as dealt with by the appellant's counsel in the heads of argument, as amplified in his submissions.

[12] Additional reasons were furnished by the presiding magistrate in respect of the original, as well as amended notices of appeal, and form part of the record.

[13] The State case was based on the evidence of the complainant and four other witnesses, whose evidence was circumstantial. The evidence before the court *a quo* and on which the appellant was convicted, can be summarised as follows:

[14] Complainant was seven years old when she gave evidence, but at the time of the alleged rape, she was merely four years old. It is common cause that at that stage she was temporarily staying with her grandparents at Ongozi village while her mother attended a workshop elsewhere. Although the appellant was not related to the complainant's grandparents, he was staying with them, from where he attended school. He had his own room standing separately but which was part of the homestead where, according to the complainant, the appellant had sexual intercourse with her. She said she was at home with her grandparents when the appellant took her to his room and after he removed her clothes, he laid her on her back and inserted his penis into her vagina and anus. During this she experienced pain and started crying whereafter the appellant handed her a book with pictures. When asked by the prosecutor whether this was all that happened to her inside the room, she answered in the affirmative. From the complainant's evidence it would appear that after she stood up "two grannies" examined her private parts. She furthermore denied that she used to enter the appellants room with the other children – as he claims. Her evidence on this point is not supported by that of her grandmother, Selma Palema.

[15] After the magistrate duly explained to the appellant his right to cross-examine the State witnesses, he questioned the complainant about an allegation earlier made of him having licked the complainant's genitals; which allegation is contained in the rape charge set out in the indictment but was not testified on by the complainant in her evidence in chief. In re-examination she testified that the sequence of events was that the appellant first inserted his penis into her vagina and anus and thereafter he licked her vagina.

[16] The evidence of the remaining State witnesses is as follows: Penny Jonas is also a minor of the same household and she said that the complainant related to her one afternoon that she was "done" and licked by the appellant between her legs in his room; and that she thereafter was paining when urinating. This was said in the presence of the appellant who reacted by threatening to beat and kill them if they were to report it to the elders. Because of these threats she did not make a report to anyone.

[17] Selma Pelema is the grandmother to the complainant and she testified that she and her husband were sitting together outside under a tree when they heard the complainant crying. She later on noticed that the complainant was having a book with pictures which complainant said was given to her by the appellant. The following morning the complainant reported to her that the appellant had "done" her and pointed at her genitals. Complainant, on the witness' questioning, confirmed that the appellant had undressed her. She examined the child's genitals and observed that it was reddish. She then summoned her neighbour, Selma Ananias, to come and look and after she narrated the story to her, she also examined the complainant. They decided to clean the complainant by wiping her with a cloth, soaked in warm water. She went on to say that she and her husband then called the appellant and asked him what he had done to the complainant the previous day, but that he denied having done anything wrong. When asked why the complainant was crying the previous day the appellant explained that it was because he had put her outside through the window. Complainant's explanation to them however, was that she cried because the appellant was "doing" her. When the complainant's mother returned (one week after she had left) they made a report to her and after she examined the complainant herself, she called the appellant and inquired from him what he had done to her child. Appellant replied by saying that he wanted to tell them the truth which is that he had only "licked the victim" but denied having inserted his penis into her vagina.

[18] Selma Ananias confirmed having been called by her neighbour and told to examine the complainant's genitals. She observed that on the inside of the labia it was reddish and "some white things like sperms" between the legs. At that stage the

grandmother remarked that the child had been raped. She was the only one who mentioned about the "white things" observed on the complainant.

[19] The testimony of Josephine Kanadunge, complainant's biological mother, confirmed the complainant's age as being four-and-a-half years old at the time of the alleged rape incident. She is a teacher by profession and had left the complainant with her parents when she had to attend a workshop. Upon her return one week later she was informed that her daughter was raped by the appellant. She examined the complainant and noticed that the labia minora was swollen and reddish. When she questioned the complainant she told her that the appellant had licked her "between her vagina and then he put his penis and he was moving"; that she was crying and was given a book with pictures inside by the appellant. Josephine then called the appellant and asked him whether he was responsible for what has been reported to her, to which he replied that he had only removed the complainant's panty and licked her on her vagina. In cross-examination appellant put it to the witness that he did not make such admission but she was adamant that he did. What he denied is that he had sexual intercourse with her. Josephine proceeded to the police and from there she went to Okahao hospital that same day.

[20] From the testimony of Josephine Kanadunge it would appear that the complainant was examined by a doctor on the 24th of October at Okahao hospital but no medical report to that effect was introduced as evidence during the trial. The medical report (Exh. 'B') which was handed in by agreement reflects that the complainant was examined at Oshakati State hospital on the 31st of October 2005, (and not Okahao) *one week* <u>after</u> her being examined at Okahao. The prosecution did not lead evidence explaining why there is no medical report pertaining to the examination done on the complainant at Okahao on the 24th; neither what circumstances gave rise to a second examination conducted at Oshakati one week later. In fact, this discrepancy was never addressed during the trial.

[21] The medical report reflects the following: There were no visible injuries on the complainant; the labia (majora/minora) were normal; the hymen was intact; there was no haemorrhage detected; and the anus and perineum were normal. In conclusion the

doctor remarked that the gynaecological examination was normal and that no injury was found.

[22] The appellant elected not to testify in his defence and had no witness to call. In an elaborated plea explanation given at the commencement of proceedings, he denied having had sexual intercourse with the complainant as alleged and said he was lying in his room when she entered. When he wanted to study he put her outside through the window, causing her to start crying. He let her back in and gave her a book with pictures inside and she left when he told her to go. The following day he was asked by the elders whether he had slept with the complainant and why she had been crying the previous day. When the neighbour came she observed "white sperms between the legs". When asked by the complainant's mother what he had done to her child he replied that he had not done anything to her. He was subsequently arrested.

[23] A reading of the trial court's *ex tempore* judgment shows that the court in its evaluation of the evidence found that the complainant was *"very consistent in her evidence even when she was cross-examined by the Accused person"*; that her evidence was corroborated by Penny Jonas, to whom the first report was made and whom the court also considered to be consistent in her evidence; and that there was evidence of the complainant's vagina being reddish, testified on by the two witnesses who examined her. Despite finding that the mother was not present during the commission of the alleged offence, the court *a quo* found that her evidence *confirmed* the date on which the incident occurred i.e. the 17th of October 2005. This is clearly wrong and is not borne out by the evidence, as Josephine's evidence, pertaining to dates, was that she had brought the complainant to her grandparent's home on the 17th and again came to fetch her on the 24th of October. There was no evidence before the trial court that the alleged incident took place on the same day the complainant was dropped off at her grandparents' place either. Her evidence therefore cannot be seen as confirmation or corroboration of an alleged incident which took place in her absence and which she had no independent knowledge of.

[24] The court had regard to the appellant's plea explanation and found that he had put himself on the scene; and his admission of having handed a magazine to the complainant, "is consistent" with the complainant's evidence. It then concluded that

in view of the complainant's testimony, she could not have fantasised something beyond her imagination as to what happened to her; and in the absence of rebutting evidence the court had no reason to reject the evidence of the State witnesses.

[25] In the first ground in the Amended Notice of Appeal, the appellant addresses, what are referred to as cautionary rules and which, it is submitted, the court *a quo* failed to invoke when evaluating the evidence of the complainant (victim) namely, the cautionary rules applicable to the evidence of a minor child and the single witness. Regarding the first mentioned, it was said that, due to the inherent possibility that a minor child is susceptible to suggestions, the trial court ought to have treated the evidence of the complainant with due caution.

[26] The magistrate's response to this ground of appeal was the following:

> *"It is indeed so that a court must be cautious when it comes to child witnesses as well as in cases of single witnesses. However the cautionary rule has been abolished by the Combating of Rape Act."*

(It should be noted that the magistrate has incorrectly cited the Combating of Rape Act instead of the Criminal Procedure Amendment Act, 2003.)

[27] I do not fully comprehend the magistrate's explanation because on the one hand he seems to say that the court *must* be cautious when considering the evidence of child witnesses, but on the other hand states that "the cautionary rule" has been abolished by legislation. Furthermore, to which one of the rules was reference made as being abolished?

[28] The correct position is that s 164 of the Act (CPA) was amended by the Criminal Procedure Amendment Act, 2003 (Act 24 of 2003) by the insertion of subsection (4) which reads:

> *"A court shall not regard the evidence of a child as inherently unreliable and shall therefore not treat such evidence with special caution only because that witness is a child."*

In *The State v Moses Vapuleni Nghitewa*[6] I occasioned to say at p. 14 para [28]:

> *"The earlier view held by the courts that there are inherent dangers in the acceptance of the evidence given by children (Manda (supra)) and that "the liberal rules governing the acceptance of children's evidence imposed a duty on the court to be cognisant of potential objections to the evidence of children" no longer finds application since the amendment of s 164 of the Criminal Procedure Act ……. The effect of the amendment is that as regards the acceptance of children's evidence, the trial court is no longer under a duty to adopt a cautious approach when evaluating the evidence of children merely because of youthfulness; but must approach such evidence in the same way as that of other (adult) witnesses."*

[29] Although the application of a general cautionary rule has been abolished by s 164 (4) of the Act, the evidence in a particular case may still call for a cautionary approach to be followed when considering the evidence of a witness – irrespective whether or not that witness is a child. To adopt this approach will largely be determined by the facts and circumstances of a particular case. The need for the trial

[6] Unreported Case No. CC 24/2010 delivered on 09.06.2011.

court to approach such evidence with caution (in the light of the evidence adduced at the trial) might increase where the accused faces mandatory custodial sentences. This approach is a far cry from the application of the general cautionary rule that used to exist in respect of the evidence of child witnesses and which are no longer applicable. The approach is the same as that followed in *S v Katamba*[7] where it was stated that the cautionary rule in sexual offences, as it had been traditionally applied, should be abolished, however, that the evidence of any witness, especially a single witness, *should be regarded with caution*. In my view, the need for, and the extent of, such caution, will largely depend on the evidence adduced during the trial.

[30] However, the cautionary rule applicable to the evidence of a single witness has not been affected by the amendment of the Act; so, when the court has to evaluate the evidence of a single witness it must approach such evidence with caution (see *S v Noble*[8]). What is required by the courts for the acceptability of single evidence is that it must be credible.

[31] I have alluded to the fact that the magistrate in his additional reasons stated that the court must follow a cautious approach when assessing single evidence and that of a child witness; however, there is nothing in the analysis of the evidence as reflected in the judgment, that a cautious approach was indeed adopted. As earlier stated the magistrate's additional reasons do not clarify the ambiguity created therein and which approach the court actually followed when assessing the single evidence of the complainant.

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[7] 1999 NR 348 (SC)
[8] 2002 NR 67 (HC) at 71G-I.

[32] Complainant gave single evidence as regards the alleged sexual act committed with her and it is trite that the evidence of a single uncorroborated witness must be treated with caution and should only be relied upon when credible. The trier of fact will decide whether the single evidence, despite the fact that there are shortcomings or defects or contradictions in the testimony, is satisfied that the truth has been told.[9] In the present case the complainant's evidence is uncorroborated and the trial court had to follow a cautious approach when evaluating her evidence. In addition thereto, the court had to give consideration to the nature and circumstances of the charge against the appellant and decide whether it called for a cautious approach to be adopted when evaluating the evidence given by the complainant – not as a general cautionary approach, but whether the circumstances of the case required that a cautious approach be adopted. For the reasons set out hereinafter, I believe that the circumstances of this case did call for a cautious approach to be followed by the trial court when evaluating the complainant's evidence. From a reading of the court's judgment there is nothing showing that this was the approach the trial court followed when assessing the evidence.

[33] The court was alive to the fact that the complainant was a mere four years old when the incident occurred and seven when she testified. It was furthermore satisfied that her testimony was consistent – the only finding the court made pertaining to the evidence of the complainant. The same finding was made regarding the evidence of the witness Penny, to whom the first report was made. These findings formed the basis of a further ground of appeal in which it is said that the magistrate erred in his findings, as none of the State witnesses gave direct evidence, and that the complainant was a single witness.

[9] *S v Sauls and Others*, 1981 (3) SA172 (A) at 180D-E

[34] Consistency in a witness' version should not be equated with corroboration, for corroboration must come from an independent source. A previous consistent statement generally has insufficient probative value.[10] The evidence of a complainant's complaint to another witness, therefore, cannot be regarded as corroboration and such evidence is only admissible as an exception to the general common law rule against self-corroboration. The self corroborative statement will be allowed to show consistency in the complaint and to rebut a suggestion of recent fabrication. The exception applies where the *bona fides* of the witness is attacked when it is suggested that the evidence is not what the witness had seen, but something he or she was told, or something that was made up at a later stage. General cross-examination which is aimed at showing that the witness is unreliable or untruthful will however, not open the door for a previous consistent statement to be admitted in evidence. Appellant in this instance did not suggest that the complainant's evidence is a recent fabrication and the issue of consistency did not arise during the trial. Hence, it would appear that by referring to "consistency" in the judgment, corroboration was actually meant.

[35] As stated, evidence of previous consistent statements made by the witness is not to be regarded as corroboration as it is not independent testimony showing that the crime charged has been committed, but is rather aimed at showing the truthfulness of the complainant and to repel any suggestion that the evidence was a recent fabrication.[11] Therefore, by relying on the complainant's previous statements when assessing her credibility, the court *a quo* clearly misdirected itself. The same applies

[10] *S v Mkohle,* 1990 (1) SACR 95 (A) at 99d.
[11] *De Beer v Rex,* 1933 NPD 30 at 34; *R v Bell,* 1929 CPD 478.

as far as it relied on the evidence of the complainant having cried at a specific time and that she was seen with a magazine, handed to her by the appellant. Firstly, the evidence does not support the inference drawn by the court that the time the complainant was heard crying was the same time the alleged rape took place. Secondly, by corroboration is meant other evidence which supports the complainant's evidence and which renders the evidence of the appellant less probable, *on those issues in dispute.*[12] The Court in *S v Gentle*[13] at 431a-c said the following:

> *"If the evidence of the complainant differs in significant detail from the evidence of other State witnesses, the Court must critically examine the differences with a view to establishing whether the complainant's evidence is reliable But the fact that the complainant's evidence accords with the evidence of other State witnesses on issues not in dispute does not provide corroboration."* (Emphasise provided)

[36] Counsel for the appellant particularly took issue with what he described as "suggestibility" and argued that what the complainant, being a young child, eventually testified about in court, could largely have been influenced by what she was told; and that the trial court should have warned itself against such possibility. This was based on the evidence that Selma Pelema asked the complainant whether the appellant undressed her and that she, in the complainant's presence said to her neighbour that the child was raped.

I do not believe that this in itself could have had any influence on the complainant's testimony. A more worrying aspect of the complainant's evidence is what she had said at different stages about what had happened to her. To the witness Penny she

[12] *R v W,* 1949 (3) SA 772 (A) at 778 – 9.
[13] 2005 (1) SACR 420 (SCA).

mentioned that she was “done” and licked; to her grandmother only that she was “done”, while pointing at her genitals; and to her mother, that she was licked and that the appellant had “put [his] penis and he was moving”. What the witnesses Penny and Selma (the grandmother) understood by the word “done” was not clarified with them; while the use of this word by the complainant was neither clarified. To none of these witnesses was anything mentioned about anal penetration; which obviously explains why she was not examined there by any of the witnesses. Whereas the licking of her genitals featured from the outset, it seems surprising that it only came out in cross-examination after the appellant had put it in issue.

[37] In my view these discrepancies might have been brought about due to the young age of the complainant and the time lapse; factors the trial court ought to have considered when analysing the evidence and the effect thereof on the complainant’s credibility. It however should not be necessary for this Court to speculate on possible reasons for any uncertainty should have been clarified during the trial, and not thereafter. In the absence of these discrepancies having been satisfactorily explained, the trial court should have adopted a more cautious approach in its assessment of the single evidence given by the complainant, instead of simply accepting that she could not have fantasized these events in all its detail. It is not suggested that the complainant fabricated her evidence. The test is whether her single evidence is reliable to the point that it can be said that the truth has been told.

[38] The trial court found the evidence of Penny Jonas to be corroboration that the appellant threatened the two girls. Penny’s evidence was that when the complainant narrated the alleged rape incident to her in the presence of the appellant he became

"annoyed saying that if you mention that I will beat you and kill you. If you mention that to the elder people." The magistrate did not indicate in his judgment or reasons the value given to this evidence and whether or not it was seen to be an admission of guilt by the appellant. Although such reaction might be indicative of an incident which had to be kept under covers, it does not have the effect of an admission by the appellant to committing the offence. The reliability of that evidence will obviously depend on the totality of the evidence and the credibility of the witnesses.

[39] The court *a quo* found corroboration for the complainant's version in the evidence of the witnesses Selma Pelema and Selma Ananias as regards their observations made on the complainant's genitals i.e. that it was reddish. It was reasoned that this was due to an injury inflicted to the complainant's body and the court then raised the question as to how the complainant sustained this injury (other than being raped). What was not dealt with in the judgment is the value the court attached to the conclusions reached by the two witnesses on their observations (that the complainant's vagina was reddish); but, more importantly, nothing was said about Josephine's evidence, who claimed to have also observed *one week later* that the complainant's vagina was reddish and the labia minora swollen. Furthermore, why these findings were not noted in a medical report if the complainant was taken to Okahao hospital that same day where she was medically examined by a doctor.

[40] The court in its judgment also did not refer to the medical report handed into evidence – possibly because it does not support the State case and as such is neutral. The complainant testified that penetration of the vagina and anus took place and although penetration to the slightest degree would constitute a sexual act, the medical

report as such does not support that evidence. If the State intended to prove that the complainant was not deeply penetrated (as the hymen remained intact), then this should have been clarified through the testimony of the complainant – whose testimony was that the accused's penis was *inside* her vagina and anus.

[41] The contradictions in the evidence of the State witnesses could not simply have been brushed aside and ignored when considering the credibility of the complainant. In this regard the court *a quo* clearly misdirected itself in its evaluation of the evidence by concluding that, in the absence of evidence rebutting the State case, the evidence of the State witnesses could not be rejected; therefore, the State has proved its case beyond reasonable doubt. Despite the appellant electing not to give evidence, the court must still decide whether the State has proved the commission of the offence *beyond reasonable doubt.* In *S v Miles*[14] it has been stated that an accused's failure to testify can be used as a factor against him *if the State has* ***prima facie*** *discharged the onus that rests on it*. The *prima facie* case must also be sufficient in itself to justify, in the absence of an explanation or answer by the accused, the inference of guilt. When regard is had to the discrepancies in the evidence of the witnesses and the shortcomings in the State case, I am convinced that the circumstances of this case are not such that, when left uncontradicted, it becomes proof beyond reasonable doubt.[15]

[42] Besides those grounds on which the conviction has been attacked, there is also a further ground and that is that the trial court failed to render assistance to the unrepresented appellant which, in my view, is not without merit. The result of such failure, so it was argued, is that (i) the appellant failed to meaningful cross-examine

[14] 1978 (3) SA 407 (N) at 424A-B.
[15] *S v Boesak,* 2001 (1) SACR 1 (CC) at [24].

the State witnesses; and (ii) the appellant failed to controvert the evidence of the State by not putting his version of the events to the witnesses (which was before the court in the appellant's comprehensive plea explanation). The magistrate's response to this ground was in the following terms:

> *"There is a duty on a court to assist an undefended accused. This is what I have done, by explaining the rights to cross-examination to the accused, which he understood. I therefore assisted the accused with the proceedings in court. <u>There is no duty upon a court to help the accused in cross-examining a state witness</u>."*

(Emphasis provided)

[43] That the appellant's right to cross-examine was duly explained to him – inclusive of the duty to dispute all issues with which he disagrees and to put to the witnesses what his version is – is borne out by the record (p.19). Besides reminding the appellant throughout that he should put questions to the respective witnesses, there was no other assistance given to the unrepresented appellant as to how he should present his case. This Court in *S v Soabeb and Others*[16] as *per* Hannah, J at 287C-D said the following regarding the explanation of rights to an unrepresented accused:

> *"It must also be emphasised that the judicial officer must not pay mere lip-service to the duty to explain. He must do his best to ensure that the explanation is understood and if it should appear during the trial that the accused has not understood he should come to his assistance. (See **S v Sebatana** 1983 (1) SA 809 (O).)"*

And at 287E-F:

[16] 1992 NR 280 (HC).

"The magistrate should have reminded him of the sergeant's evidence …. and asked him if he was challenging it."

[44] In *S v Rudman; S v Johnson; S v Xaso; Xaso v Van Wyk NO and Another*[17] at 378B-E Cooper J had the following to say:

"During the State case a presiding judicial officer is at times obliged to assist a floundering undefended accused in his defence. Where an undefended accused experiences difficulty in cross-examination the presiding judicial officer is required to assist him in (a) formulating his question, (b) clarifying issues and (c) properly putting his defence to the State witnesses.

Where, through ignorance or incompetence, an undefended accused fails to cross-examine a State witness on a material issue, the presiding judicial officer should question – not cross-examine – the witness on the issue so as to reduce the risk of a possible failure of justice."

This passage was cited with approval by the Appellate Division in *S v Rudman and Another; S v Mthwana*[18] and I fully endorse the sentiments expressed therein.

[45] The right to a fair trial is guaranteed in the Constitution and what is required is that criminal trials be conducted in accordance with notions of basic fairness and justice; and that content be given thereto by the courts. In the case before us the record indicates that the trial court did not comply with the obligation to assist the appellant. For example, the complainant's evidence that the appellant had penetrated

[17] 1989 (3) SA 368 (E).
[18] 1992 (1) SA 343 (A) at 381E-382C.

her twice was left unchallenged by the appellant despite his denial of the charge; the evidence about an alleged licking of the complainant's vagina was first raised by the appellant in cross-examination and the court should have clarified the uncertainty pertaining thereto in light of her evidence given in chief. Furthermore, the appellant's alleged admission made to the witness Selma Pelema about him having licked the complainant testified on by Selma, was left unchallenged; an admission which was fatal to his defence and which the witness should thoroughly have been cross-examined on. The same was required during the cross-examination of the witness Josephine Kanandunge who also testified about the same alleged admission made for the second time.

[46] In the circumstances the magistrate was not required to cross-examine the witnesses on the appellant's behalf, but where it was clear that the appellant was not capable of properly formulating the questions or failed to clarify or address crucial issues; or simply failed to put his defence to the State witnesses at relevant stages of the proceedings, assistance ought to have been given to him by the presiding magistrate. Where such assistance in the present case is lacking, in my view, it impacted on the ensuing result where the appellant was convicted. This is an irregularity which vitiates the entire proceedings; as it cannot be said that the appellant was given a fair trial.

[47] In view of the conclusion reached herein, the application for condonation must be granted as there are indeed prospects of success. In the light thereof there is no need to consider the appeal against sentence which, in any event, does not meet the requirements set by Rule 67 (1) of the Magistrate's Court Rules.

[48] In the result, the following order is made:

1. The application for condonation is granted.
2. The appeal against conviction and sentence is upheld.

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LIEBENBERG, J

I concur.

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TOMMASI, J

ON BEHALF OF THE APPELLANT	**Mr. A. Kamanja**
Instructed by:	**Sisa Namandje & Company**
ON BEHALF OF THE RESPONDENT	**Mr. R. Shileka**
Instructed by:	**Office of the Prosecutor-General**