



**REPORTABLE**

CASE NO: SA 12/2017

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**THE STATE**

**Appellant**

and

**PIO MARAPI TEEK**

**Respondent**

**Coram:** DIBOTELO AJA, MOKGORO AJA and NKABINDE AJA

**Heard:** 1 October 2018

**Delivered:** 3 December 2018

**Summary:** This is an appeal against the decision of the High Court/ trial court which acquitted the respondent, a former judge of appeal of the Supreme Court of Namibia, of all the eight charges and the alternative counts, preferred against him. The case against the respondent which has spun approximately 13 years, is that he unlawfully transported the two minor children (complainants) from Katutura to his residence without the authority of their parents; unlawfully supplied them with alcohol to stupefy so as to molest them sexually or unlawfully supplied alcohol to them and performed certain sexual acts or indecent assault or immoral acts with or against them. The State also alleged that, while at his house, the respondent forced the complainants to watch pornographic videos.

In his plea explanation in terms of section 115 of the Criminal Procedure Act, 1977, the respondent reasoned that he did not have an unlawful or nefarious purpose for taking the children to his plot except for the noble intention of feeding them. The complainants had told him that they were hungry and that their mothers were at the Single Quarters. According to the respondent, the complainants appeared dirty and neglected. He stated that his intention was to give the children food and thereafter return them to their homes. The respondent also explained that he only returned the children to their homes the following day because he had taken alcohol and some medication that made him to fall asleep until about midnight on the night in question.

The respondent did not testify at the trial. At the end of the prosecution case he applied to be and was discharged in terms of section 174 of the CPA of all the charges. The State successfully appealed to the Supreme Court. In upholding the appeal the Supreme Court set aside the discharge and remitted the matter to the trial court. At the end of the entire case the trial court found that the State failed to prove the guilt of the respondent beyond reasonable doubt and acquitted him. This is the decision that was the subject matter of the appeal.

The appeal court had to determine whether the trial court misdirected itself on the facts and the law and whether it was entitled to interfere with the trial court's findings of fact. Additionally, the court was asked to decide whether to dismiss the appeal because of the prolonged delay in the prosecution of the case and on the basis of the irregularities which allegedly violated the respondent's fair trial rights.

In deciding this case, both the trial court and the appeal court relied on the evidence adduced by the State witnesses and the respondent's plea explanation as well as documentary evidence that was plagued with serious irregularities.

In the trial court, *it was held* that the State's evidence in relation to the alleged crimes did not measure up to standard. The court *held* that the evidence of the complainants was contradictory and mutually destructive. It *held* that the documentary evidence in the form of the original medical report was highly

suspicious and unreliable because it had been tampered with and no explanation for the tampering was proffered by the State.

*It was further held* that the investigation process was riddled with irregularities - some of which the trial court described as deliberate attempts by the police to fabricate a case against the respondent.

*The Supreme Court, having considered the issues, the law, the evidence, the approach of trial court and its assessment of the evidence, held that* the trial court followed the correct approach by cautioning itself not to approach the evidence on a fragmented fashion but to approach it holistically. It found that the trial court was, correctly, mindful of the dangers attendant upon the uncritical acceptance of the evidence of the complainants because of a number of elements, including their imaginativeness and suggestibility that require their evidence to be scrutinised with care.

*It is further held that* the trial court was correct to conclude that because of the material discrepancies in the evidence of the State witnesses which remained uncorroborated- it could not be faulted in finding that the guilt of the respondent had not been proved beyond reasonable doubt.

On whether the trial court ignored the only reasonable inference to be drawn-that the respondent intentionally removed the complainants from the Single Quarters to violate parental authority-*it is held that* the inference sought to be drawn is not consistent with the facts ventilated during the trial.

*It is further held that* there is no evidence to suggest that the respondent foresaw or ought reasonably to have foreseen the consequences of his action and that, even assuming that his explanation was wanting and that his actions bordered on negligence, his explanation cannot be rejected merely because it was improbable on those grounds. It is sufficient that his version, considered against the evidence as a whole, is reasonably possibly true in substance in which case his version should be accepted.

*It is further held that* as this case concerned the alleged sexual molestations on young children and the supply of alcohol to them, corroboration in the form of DNA testing was vital. The court found that, had the investigative team complied with the forensic science standards mentioned in the evidence of the State witnesses like Dr Behr and Dr Ludik, some form of corroboration might have been established. In the absence of such corroboration, the court *held*, the allegations of an unlawful sexual act or indecent act or indecent assault and the unlawful supply of alcohol against the respondents are devoid of any semblance of the truth.

*It is further held that* the contention that the trial court misdirected itself on the facts and the law is devoid of merit.

*It is further held that*, neither the Constitution of the Republic of Namibia, 1990 nor the Police Act, 1990 empower the police to investigate any crime against any person, whether that person is a judge or any person in a position of authority, in a picky or choosy manner for the purpose of securing a conviction of an accused person.

*Furthermore, it is held* that the importance of the fair trial right in the Constitution is to ensure, among other things, that innocent people are not wrongly convicted. This is so because of the adverse effect which wrong convictions might have on the liberty, dignity and possibly other interest of the accused. Anything short of these constitutional imperatives may not only bring the system of criminal justice into disrepute but may also result in a travesty of justice.

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## APPEAL JUDGMENT

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NKABINDE AJA (DIBOTELO AJA and MOKGORO AJA concurring):

## Introduction

[1] Great challenges facing our communities include the growing sexual violence especially against women and children. The sexual transgressions denude a sexual offence victim of her or his dignity and also violate her or his physical, emotional and moral status. This case shows that, although there are a number of progressive legal policies and legal instruments developed to protect rape or sexual offence victims, the investigative processes are still not up to scratch as police officials seem not to be adequately equipped to deal with the challenges regarding sexual offences more effectively. The systemic failures including those illustrated in this judgment engender the persistent sexual exploitations across gender lines to grow. The case also highlights potential human rights violations and statutory breaches that require the investigative agents, especially members of the police services, to pay more attention in compliance with their constitutional and statutory investigative obligations. Anything short of these constitutional imperatives may not only bring the system of criminal justice into disrepute but may also result in a travesty of justice.

[2] This opposed appeal is against the decision of the High Court of Namibia.<sup>1</sup> Several charges, with their alternatives, were laid against the respondent<sup>2</sup> in January 2005. At the end of the State's case the respondent applied to be and was discharged. The State successfully sought special leave to appeal in the Supreme Court leave having been refused *a quo*.<sup>3</sup> The special leave was not

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<sup>1</sup> *S v Teek* (CC 3/2005) [2016] NAHCMD (16 December 2010) (High Court/ trial court).

<sup>2</sup> The respondent was a Judge of the Supreme Court of Namibia who resigned as a Judge after the charges were laid against him.

<sup>3</sup> *S v Teek* 2009 (1) NR 127 (SC), as per Streicher AJA, Mthiyane AJA and Brand AJA (*Supreme Court/appeal court judgment*).

sought and thus not granted in respect of certain counts relating to one of the complainants.<sup>4</sup> The Supreme Court upheld the appeal, set aside the decision *a quo* discharging the respondent and remitted the matter to the trial court to continue with the trial.<sup>5</sup> At the conclusion of the trial, the trial court found the respondent not guilty on all the remaining charges and acquitted him.

[3] The appeal to this court was with the leave of the High Court of Namibia.<sup>6</sup> The learned judge relied, for the most part, on the findings of the Supreme Court that:

‘[T]here is ample room for the conviction of the respondent on all the charges against him, save perhaps for the crime of abduction. . . . I could not avoid the inference that in the circumstances the [trial court’s] opinion to the contrary was so unreasonable that it could not have properly applied its mind to the matter. . . . Sitting as a court of first instance, I would therefore, in the exercise of my discretion, have refused a discharge. Since the [trial court] failed to exercise its discretion we must do so in its stead on all the charges. . . . I therefore propose to set aside the discharge and acquittal of the respondent on counts 1, 2, 3, 4, 6 and 8, in respect of both the main and the alternative charges.’<sup>7</sup>

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<sup>4</sup> The two counts concerned Q. The appeal court appears to have found that in the course of her testimony Q retracted parts of the statement she had made earlier to the police. Although it was not clear to the trial court whether the finding was an adverse one on the credibility of Q, the court re-evaluated Q’s evidence against the conspectus of all the evidence.

<sup>5</sup> For completeness, the order of the appeal court reads:

- (a) The appeal is upheld.
- (b) The court *a quo*’s discharge and acquittal of the respondent on counts 1, 2, 3, 4, 6, and 8, in respect of both the main – and the alternative charges, is set aside.
- (c) The matter is referred back to the court *a quo* for continuation and finalisation before Bosielo AJ.
- (d) The costs order against the State in its application for leave to appeal is set aside.’

<sup>6</sup> *S v Teek* (CC 3/2005) [2017] NAHCMD 35 (15 February 2017), per Masuku J. (Masuku J’s judgment.) For completeness, the order of Masuku J reads:

- 1. The application for leave to appeal to the Supreme Court is granted.
- 2. There is no order as to costs.’

<sup>7</sup> Supreme Court Judgment para 30 referred to in Masuku J’s judgment para 31.

Masuku J remarked that because the Supreme Court had regard to all the evidence led against the respondent, it had said that it was unequivocal that the respondent had a case to answer and that there was sufficient basis to convict the respondent on the evidence tendered up to the application for and granting of a discharge, the matter had to be decided by this court.<sup>8</sup>

[4] The primary issue for determination is whether the trial court misdirected itself on the facts and the law and whether this court should interfere with its findings of fact. The additional issue, as I understand the respondent's submissions, is whether the plain irregularities in the record adversely violated his right to a fair trial and whether this court should dismiss the appeal on that basis alone.

[5] The most disquieting feature of this case is the prolonged delay in bringing it to finality.<sup>9</sup> Relying on *Phillips*,<sup>10</sup> the respondent urged us to dismiss the appeal on the basis that the delay adversely violated his right to a speedy and fair trial.<sup>11</sup> It took roughly 12 to 13 years for this case to reach this court.<sup>12</sup> The delay is regretted but not much turns on this submission as the respondent did not cross-

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<sup>8</sup> Judgment of Masuku J para 51.

<sup>9</sup> Needless to say, justice delayed is justice denied. Nonetheless, I consider that it is not necessary to decide whether such delay may have violated the respondent's right to a speedy and fair trial.

<sup>10</sup> *DPP and Minister of Justice and Constitutional Development v Phillips* [2012] ZASCA 140 (SCA). In this case the High Court, per Satchwell J, was satisfied that Mr Phillips' right to a fair trial had been infringed by the delay in finalising the appeal. She took the view that the delay in prosecuting the appeal serves inevitably and irremediably to taint the overall substantive fairness of the trial. She reasoned that an appeal may be struck from the roll in exceptional circumstances and that it is a measure to be resorted to with due caution. She ordered a permanent stay and struck the appeal from the roll. On appeal the SCA found nothing faulty in the reasoning on the High Court in finding that the delays were inexcusable.

<sup>11</sup> Although we are not deciding this issue, it bears mentioning that the respondent has been on bail pending the finalisation of the appeal processes.

<sup>12</sup> Being conscious of the inordinate delays, the trial Judge considerably expressed his apologies to all concerned at the resumption of the case after the decision of the appeal court.

appeal. The point raised is, therefore, not properly before us and little need be said about it. But even if we are not deciding this question, it needs to be stressed that the disposition of a criminal trial as reasonably expeditiously as possible is a hallmark of a civilised criminal justice system.<sup>13</sup> Fortunately here, the respondent has not suffered prejudice in the form of incarceration because he has been on bail. However, one cannot discount a mental strain he has had to endure over the period of almost 13 years. To this end, the following remarks in *Dzukuda* by Ackerman J find resonance here:

‘Of particular importance in the pre-conviction stage of the trial is the prejudice suffered by the accused to their liberty and security (dignity) interest features . . . Despite being presumed innocent, the accused is subject to various forms of prejudices and penalty merely by virtues of being an accused, because many in the community pay little more than lip service to such presumption of innocence. “Doubt will have been shown to the accused’s integrity and conduct in the eyes of family, friends and colleagues.”<sup>14</sup> (Footnotes omitted.)

### Background

[6] This appeal is a sequel to certain events that allegedly took place between 28 and 29 January 2005. Irrefutably and as mentioned above, it has a prolonged history. The events, alleged to have taken place at the house of the respondent, resulted in eight charges – both in the main and in the alternative – being laid against him. They concern two young girls, T and Q, collectively referred to as the complainants. The case has been widely publicised in the media and, as evident from the record, was regarded by Deputy Commissioner Visser<sup>15</sup> as high profile.

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<sup>13</sup> *S v Dzukuda & others; S v Tshilo* 2000 (2) SACR 443 (CC) (*Dzukuda*).

<sup>14</sup> *Id* para 52.

<sup>15</sup> Deputy Commissioner Visser was stationed at the regional headquarters for the Khomas region in Windhoek and was appointed as the Regional Crime Investigation Coordinator. He was a police officer for 37 years.



[7] The proceedings were held in camera when the complainants testified on condition that no disclosure of their names should be made. Nonetheless, as manifest from the record of the proceedings, their names have been made known. This is unfortunate. In this judgment, however, I have withheld their full names and referred to them as 'T' and 'Q',<sup>16</sup> or collectively as 'complainants'. Although this may practically not undo the damage, I think that it will prevent any possible further damage to the children's persona.<sup>17</sup>

[8] The somewhat convoluted charges, including alternative counts,<sup>18</sup> against the respondent are set out in detail in the trial court's discharge judgment<sup>19</sup> following an application for a discharge in terms of s 174<sup>20</sup> of the Criminal Procedure Act<sup>21</sup> (the CPA). It is not necessary to set them out in details. Suffice it to mention that the remaining charges include kidnapping, rape or indecent assault and the unlawful supply of alcohol to underage children. Certain charges, in

<sup>16</sup> This is consistent with the order of the Constitutional Court of South Africa in *MEC Health and Social Development Gauteng v DZ* [2017] ZACC 37; see <http://www.saflii.org/za/cases/ZACC2017/37.pdf>.

<sup>17</sup> There can be no doubt that the publicity of the children's names has, as the record illustrates, had a negative impact to their images, particularly of T who, according to the testimony of her mother, has been called 'Pio Teek' by her play mates. It would have been desirable to use their initials to conceal their identities.

<sup>18</sup> The law requires charges to be formulated with great care in order to protect an accused's constitutional right to a fair trial. Charges that are compositely drafted, in a manner that may be suggestive of a fishing expedition, may be confounding. Although the law does not prohibit composite charges (see in this regard section 83 of the Criminal Procedure Act 51 of 1977), the inclusion of charges and many alternative counts as is the case here, for an example: in respect the main charge of rape in contravention of section 2(1)(a) of the Combating of Rape Act 8 of 2000, where three alternatives counts are included may inadvertently cause an overlap to such an extent that conviction on all or on some of the counts may amount duplication. That places a burden on a court trying the accused to make sure that an accused is not convicted of more than one offence or even acquitted on certain counts in respect of which a conviction ought to have been made. The burden on trial court may be assuaged by a less convoluted charges.

<sup>19</sup> *State v Pio Marapi Teek* (CC 3/2005) unreported judgment delivered on 8 July 2006 (discharge judgment).

<sup>20</sup> Section 174 reads:

'If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.'

<sup>21</sup> Criminal Procedure Act 51 of 1977.

relation to Q, are not the subject matter of this appeal. This is so because Q retracted parts of her earlier statement to the police.<sup>22</sup>

[9] Quintessentially, the State case against the respondent is that he unlawfully transported the complainants from Katutura to his residence without the authority of their parents, unlawfully supplied them with alcohol to stupefy so as to molest them sexually or unlawfully supplied alcohol to them, performed certain sexual acts or indecent assault or immoral acts with or against them. It is also alleged that, while at his house, the respondent forced the two children to watch pornographic videos.

[10] At the trial, which commenced more than a year later after<sup>23</sup> the respondent denied all the allegations levelled against him. He tendered a plea explanation in his defence in terms of s 115 of the CPA which provides, in relevant parts, that '[w]here an accused at a summary trial pleads not guilty to the offence charged, the presiding judge . . . may ask him whether he wishes to make a statement indicating the basis of his defence'. The respondent explained, among other things, that on the night in question and at about 21h00 he was in the vicinity of the Single Quarters. He was looking for his labourer, Roger Kami. He stopped the

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<sup>22</sup> For completeness the charges are as follows:

- i. Abduction, alternatively, kidnapping (counts 1 and 2);
- ii. Contravening section 2(1)(a) of the Combating of Rape Act, 2000 (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 sixteen, alternatively contravening section 14(b) of Act 21 of 1980 – Committing or attempting to commit an immoral or an indecent act with a child under sixteen, alternatively, Indecent Assault (Counts 3 and 8);
- iii. Contravening section 16 read with Act 21 of 1980 – Use of means to stupefy a female for unlawful carnal intercourse, alternatively Contravening section 71(s) of the Liquor Act, 1998 (Act 6 of 1998) – Supplying liquor to a person under the age of eighteen (count 4);
- iv. Contravening section 14(b) of Act 21 of 1980 – Committing or attempting to commit an immoral or an indecent act with a child under sixteen alternatively Indecent Assault (count 6).

<sup>23</sup> The trial commenced on 28 April 2006.

car and was approached by children (boys and girls) who admired his car and asked for a ride. After the ride he drove away but one of the girls ran after his vehicle, asking him to stop and told him that they were hungry.

[11] The respondent explained that he asked the girl what they were doing in the street late at night and about the whereabouts of their parents. One of the complainants replied that their mothers were at the Single Quarters and that their fathers were not at home. They told him that their mothers always beat them. He stated that he felt pity on them as they looked dirty and thin. He took T and Q to his house to feed them but the third girl, M, refused to board the car. According to him, the complainants ate, swam and watched Channel O on television. He stated that he had intended to return the complainants and speak to their parents but he fell asleep following his earlier consumption of alcohol and medication in the form of periactin tablets. When he woke up at about 00h00, he found the complaints sleeping on the sofa. They did not want to wake up and he left them to sleep. In the morning he found two empty beer bottles and two glasses on the lounge table. The glasses smelled of brandy. He drove the complainants back to Katutura. At the Single Quarters one girl asked him to stop because her home was nearby. When he stopped the complainants got out of the car and ran away.<sup>24</sup>

[12] In the notice of appeal the State challenged the High Court's decision on the premise that it misdirected itself on the facts and the law. It is therefore necessary to give a somewhat detail of the evidence concerning the charges, particularly the evidence of the complainants.

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<sup>24</sup> The complete plea explanation appears in the discharge judgment.

[13] Broadly, albeit not sequentially, the complainants' evidence is that on 28 January 2005 and at about 21h30 they, including their friend, M, were on their way to a party. While in the street, the respondent's car passed and stopped. They approached it. The boys who were in their company admired the car and asked to be taken for a ride and the respondent obliged. There are divergent versions about whether the complainants were also taken for a ride.

[14] It is not in dispute that when the respondent drove away after taking the children on a jolly ride T, followed by Q and others, ran behind the vehicle. One of the complainants was screaming at the respondent to stop. When the car stopped T and Q embarked the vehicle. T sat on the front seat while Q sat on the rear seat behind T. Under cross-examination Q remained steadfast that T went directly to the car, opened the door and simply got in. She followed her, did the same and sat on the rear seat. When asked questions by the trial Judge, Q testified that when they boarded the car the respondent promised to buy them new clothes. She said that M knew the story about the new clothes but when M testified she made no mention of this. When questioned, Q confirmed that this evidence was new as she did not mention it in her evidence-in-chief. The version about the complainants boarding the vehicle without invitation by the respondent was confirmed by the boys who were in their company.<sup>25</sup>

[15] Under cross-examination Q confirmed that she boarded the vehicle because the respondent offered to go and give them some food at his house

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<sup>25</sup> These boys included TK, RH, and T's brother- A.

where they watched a music Channel-O on television. She denied ever having gone to the respondent's house before but later said she did not recall having been there. Q testified that she did not know if the respondent was related to her family. She confirmed that at the respondent's house they ate because they were hungry. Regarding the alcohol, she testified that at the house the respondent gave them each a bottle of Tafel beer. She denied that they had themselves taken the beer from the fridge. Q made no mention of being offered beer or any kind of alcohol on their way to the respondent's house contrary to the version of T.

[16] According to Q nothing happened to her while sitting on the respondent's lap. She testified that if anybody says differently that would be a lie. Q testified that the respondent went to the bedroom and called T. He was dressed in dark blue clothes. Later, she said, T returned from the bedroom and the respondent emerged from the bedroom in the nude. Subsequently, under cross-examination, Q denied the allegation of nudity.

[17] When questioned about the divergent versions Q acknowledged that what she told the police (her statement) was different from what she told the trial court. She inexplicably testified that what she told the police was not correct. Q's mother testified that when Q told her that nothing happened to her while at the respondent's house she felt that the matter should be withdrawn but the police said that only the complainant (referring to Q) has the right to do so, not the parents. It needs to be mentioned, while on this point, that Q only signed the first page of her statement and that her mother actually signed as the deponent or complainant. The police officer who wrote the statement, Warrant Officer Hilma

Simane Mpuka - working at the Women and Child's Protection Unit in Katutura, could not explain why Q signed part of the statement. She however accepted under cross-examination that Q could not be a complainant but her mother was. In re-examination she testified that if the complainant does not want to go ahead with the case the State has to stand back. The standard procedure, she explained, was for her to make an entry and cause her to make a statement under oath for the prosecution to see.

[18] T also testified in camera. She confirmed much of Q's testimony regarding what happened in the street, including the joy-ride, the respondent giving the money to the boys and that when the respondent drove away they ran after the vehicle shouting at him to stop. She said that when the car approached and stopped, the respondent inquired about a certain man and the whereabouts of their older sisters. Q however said that the respondent only inquired about their parents. T confirmed in-chief that the boys were given money and that when they went to the shop to change their N\$5, Q and her 'climbed into the car' and sat on the front seat while Q sat on the rear seat. According to T, the respondent gave M N\$1 to placate her not to report to the parents. She testified that she was given beer by the respondent on their way to his house and that she passed the beer to Q.

[19] Under cross-examination she explained that when offered the beer in the car she passed it to Q who drank and gave it back to her. She consumed the beer and gave it back to the respondent. In re-examination she testified that there were small bottles of castle beer in the car. T testified that while in the car the

respondent touched her thighs. It was only under cross-examination when she testified that the respondent stopped the vehicle and asked them to go with him, have beer at his house and celebrate. Q feigned ignorance about this piece of evidence. T said the respondent told them to hide when approaching a police road block.

[20] On arrival at the house, T said, the respondent opened the doors and held them by 'their necks' into the house, but this version was refuted by Q. T confirmed that at the house, the respondent offered them food to eat. Under cross-examination she testified that there were things she forgot to mention in-chief. She said that after swimming, while still wearing a panty the respondent called her and put his left hand index finger on her private parts. T testified that she was in pain. They went into the house and the respondent offered them one castle beer. When she refused to drink it he forced her mouth open and forcibly poured the beer into her mouth. T said that after drinking she 'put down the beer' then the respondent told her to give it to Q who drank and finished it. According to T, she refused to drink the brandy that was poured in three cups but Q drank it. This allegation was denied by Q.

[21] T was questioned about the truthfulness of her story. She answered in the positive. She said she sometimes tells the truth but not always. T testified that maybe what she told the court was not true. She could not however explain which parts of her evidence were untruthful but later, when asked by the trial Judge, said that she could not remember which parts were untruthful.

[22] Under cross-examination, T testified that when narrating her story to the police woman, the latter was writing but at some stage after writing what she was told she repeatedly tore the paper, threw it away and started afresh to write. T said that both herself and the police woman were confused. She testified that what she told the police was different from what she told the court because the incident happened long time ago. T denied having told the police that the boys were asked by the respondent to go home. She said that they went on their own. When asked why she boarded the respondent's car, T said that the respondent asked them to do so to go and drink beer at his house to celebrate. She said that Q and M heard what the respondent said because they were standing next to her. Neither Q nor M confirmed this. T testified that Q wanted to go to the respondent's house to drink beer because she often stole beers from her sister.

[23] When confronted with a question why she did not tell this to the police she repeated that the police woman who was writing down the statement repeatedly tore papers and re-wrote the statement because she was making mistakes as she, T, was explaining. T testified that she lied to her mother to avoid being beaten up. T was asked whether she would rather allow a strange man put his finger into her private parts, hurt her, force her to drink alcohol and later lie to her mother rather than tell her the truth and she answered in the positive.

[24] According to T, the respondent put his finger in her private parts whilst sitting on the veranda near the swimming pool. She said she was in pain. However, when the complainants accompanied the police to the respondent's house T pointed at the photograph in the photo plan depicting the scene of the



crime. That photograph depicted a chair inside the house where the respondent was allegedly sitting and where, on his thighs, T was sitting when he allegedly inserted a finger into her private parts. She testified that this was the only incident when the respondent played with her private parts.

[25] T's mother, testified in chief and was cross-examined at length. Under cross-examination she told the court that her daughter told her that the respondent gave her beer to drink. She said that T did not say anything about the respondent forcing her to drink beer as illustrated under oath. T's mother testified that T told the police that she only drank a little bit of the beer then she put it down. She said that her daughter never mentioned anything to her about brandy. T's mother was one of the people who visited the house of the respondent together with the complainants including Q's mother. She mentioned new evidence, among other things, that while at the respondent's house, Q's mother approached the respondent and asked him 'is it you who took our children without consent and brought them to your house?' She said the respondent answered: 'I took them'. According to her the respondent further said 'I did not touch them' and then the children instantaneously said 'he did'.

[26] It is common cause that the complainants were returned to Katutura in the morning and were dropped off in the vicinity of the Single Quarters. T's mother saw them and when she inquired where they had been they persistently lied that they had been at the party. It is undisputed that the complainants told the truth only after being beaten up.

[27] The boys who were in the company of the complainants on the night in question also testified. These children were in the company of the complainants when the respondent allegedly kidnapped them. One of the boys, TK, testified that the complainants told them that they were going to a party of the [Born Again Believers]. While going to the side of the Single Quarters they saw a car and they shouted 'uncle, uncle'. He said that the girls wanted the driver to take them to the party. They went to the car and talked to the respondent. The children admired the car and the boys were taken for a ride for a short distance.

[28] TK testified that when they disembarked the car, the respondent drove away. He confirmed that the girls 'chased and ran behind' the car screaming 'Woo, hoe hoe' and 'Tate, tate, kurama'. The car stopped and the boys were given N\$5 and M received N\$1. He told the court that T and Q got into the car and T sat on the front seat while Q sat at the rear seat. The boys tried to open the door but it was locked. In cross-examination TK denied that the girls ever said that they were hungry. He later admitted that he might not have heard everything because he had followed T's brother to the shop when he went to cash the money.

[29] The second boy who testified was RH. On the whole, he confirmed the evidence of TK. According to him it was Q who shouted words 'Tate, tate, kurama'. He denied that they (the boys) were hungry but said that they just asked for money. M, is one of the girls who was with the complainants on the night in question. She confirmed much of the evidence regarding what happened in the street. According to M, when the respondent's car stopped, T exclaimed 'Oh our car'. She denied that anyone shouted the words 'Tate, tate, kumara'. When

questioned by the court she confirmed that the complainants are the ones who stopped the respondent's car that night. She told the court that she received N\$2 from T and Q which was meant to buy her silence.

[30] The further relevant evidence tendered on behalf of the State was that of Dr G Behr, who was called only to communicate to the court what was contained in the reports compiled by Dr Eilleen Auguste. The latter had since returned to Cuba. Dr Behr told the court that she neither examined the complainants nor completed the two medical reports. The medical report (contained in form J88), in relation to Q, revealed that she had sustained no injuries. But in relation to T the two medical forms, which were introduced as exhibits showed that there were small abrasions to her vestibule. She testified that the abrasions might have been caused by anything such as touching, rubbing where there is unhygienic conditions especially in small children, including children playing on the sand, in the grass or when they explore each other. The doctor said using a finger could also be one of those instances. It is noteworthy that a copy of one of the medical reports had been tampered with. The words '[m]y opinion because fingers put in the zone' had been added in the copy of the medical report but same did not appear in the identical form.

[31] Dr P S Ludik also testified for the State. He is a registered specialist pharmacologist and is also a qualified forensic scientist.<sup>26</sup> He led the team of forensic scientists that attended the scene on 29 January 2005 with a view to conduct a crime scene examination and compile a report. He was cross-examined

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<sup>26</sup> He is registered as a forensic scientist with the Forensic Science Society and also registered as a professional forensic scientist with the American Board of Forensic Scientists.

at length and testified about the effect of a product called periosteum, explaining that if someone had taken it as a medication to prevent, for instance, hay fever, eczema, itching, etcetera, that person will feel extremely drowsy and sleepy because of the sedative effect of the tablets.

[32] Dr Ludik testified also about the effect of beer especially on young children like the complainants. He said that because the complainants were young and thinly build, the capacities of their livers to metabolise ethanol would be diminished. He said that the synergistic effect, if the beer consumption is coupled with that of brandy, would be worse hours later. The children, he explained, would experience deficiency in judgment and coordination as well as stimulation that would go hand in hand with possible auditory or even visual hallucination and distortion of memory. Dr Ludik confirmed that alcohol tests were not conducted on the complainants because the scientific application forms submitted to them by the police did not require them to do it.

[33] Dr Ludik testified about certain investigative irregularities regarding the exhibits that were identified at the house of the respondent. Regarding the alleged sexual wrongdoing – i.e. the allegations of being touched in the private parts and the finger being inserted into the private parts, he said that scrapings would have been taken from underneath the respondent's fingernail through the utilisation of the sexual assault evidence collection kit that normally contains comprehensive instructions for the collection on those scrapings.<sup>27</sup> The doctor testified that the kit was not submitted to them by the police.

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<sup>27</sup> The kit consists of two components: for the complainant and for the accused.

[34] As to the fingerprints on the alcohol bottles, in relation to the allegation of the unlawful supply of alcohol to the complainants, Dr Ludik explained that they arrived at a crime scene that was almost a day old and that was visited by various parties. He testified that the beer bottles could have been contaminated. The uncontested evidence reveals that the beer bottles had been held with unprotected hands. According to the doctor, apart from traces of human DNA being found on the beer bottles, there was nothing of forensic value that was found on them. Logically, he said, such crime scene rapidly faded because many of the standard analysis and other things would have been negated by the interferences with the crime scene.

[35] Additionally, the evidence of Detective Inspector Haraes, who investigated the case, revealed a number of irregularities that were not disputed by the State. I revisit some of these irregularities later in this judgment.

#### High Court

[36] At the close of the State's case, the defence closed its case without testifying. The trial Judge set out the standard of proof required of the State at the end of the entire case: whether the State had adduced sufficient, credible and reliable evidence to prove the guilt of the accused beyond reasonable doubt. The court correctly emphasised that there is no duty on the part of the accused to prove his innocence.

[37] Consciously and fittingly the trial Judge acknowledged, from the outset, that it was dealing with the evidence of young witnesses which had to be approached with the necessary caution. Rightfully, as the record demonstrates, the trial Judge was cautious and vigilant. He created a welcoming and reassuring court environment for all the young witnesses especially the complainants. The following comments by the trial court are illustrative:

‘[A]t all material times during this trial, I was vigilant and mindful of the fact that I was dealing with young children, who according to the charge sheet had been sexually molested. I appreciated that due to their position and young age ... they may not have been exposed to a Courtroom situation in the past. And that the atmosphere of a Courtroom may possibly have a negative effect on them and unnerve them to a certain extent. As a result I ordered that they testify from a separate room, through a close circuit TV and through an intermediary. In addition, I also ensured that they were at all times during the appearances in Court accompanied and supported by their mothers/guardians. The record will show amply that whenever they appeared to be tired, to be absent minded, to be stressed or uncomfortable, I duly adjourned the proceedings to afford them the opportunity to recover. All these was an attempt on my part to ensure that they were kept in the right frame of mind and emotional state and further, that the atmosphere was such that, they felt free to speak and tell the truth.’

Before evaluating the evidence the trial court emphasised that:

‘A point of great importance which refers emphasis is that it is clear from the evidence that both [T] and [Q] *were in the presence of each other at all material times, in the course of that night*. From the moment when they boarded the Accused’s vehicle at the Single Quarters, through their travel with him to his home, the arrival and stay at his house, and their return the next day up to when they went to the police, and later to the offices of the Women and Child Protection Unit on 29<sup>th</sup> January 2005, [T] and [Q] were together and in the company of each other.

Whatever the Accused is alleged to have done to them, happened in the presence and within the full view of each other. It is therefore important in my view that their evidence be understood in this context. Quite critically, whatever contradictions and inconsistencies, which might appear in their evidence must therefore be considered and evaluated against this background.'

I raise these latter remarks by the trial Judge because, given the evidence as a whole, it highlights, ostensibly, an incorrect observation given certain nuances in the complainants' evidence that are apparent from the reading of the record. For example, Q had remained in the pool when T was allegedly called by the respondent when he was sitting at the veranda. Another instance is when T was allegedly called to the bedroom by the respondent.

[38] Additionally, regarding the correct approach to be followed when assessing the evidence, the trial Judge correctly cautioned himself not to approach the evidence on a fragmented fashion but, following the established legal principles, to approach the evidence of the State holistically.<sup>28</sup> Having considered and applied the relevant legal principles along with the evaluation of evidence in its totality, including documentary evidence and the 'evidence which had not been contradicted' the trial judge made the following finding(s) and remarks:

'I am [constrained] to find that the State evidence is so interspersed with serious contradictions and inconsistencies that I am unable to find that the truth has been told. In particular I find that the evidence of [T] and [Q] is so seriously contradictory that it is mutually destructive. *It will be too risky for this Court to accept such evidence in the absence of independent corroborative evidence. . . [T]he evidence of [Q] and [T] is so inexplicably bound together, that it would be too risky to attempt to separate [it].* This is because both of them have shown

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<sup>28</sup> *S v Kapika & others* (2) 1997 NR 290 (HC) and *S v Gqozo & another* 1994 (1) BCLR 10 (Ck).

themselves to have lied and to have contradicted each other. During argument before me, Mr Small on behalf of the State made some crucial concessions. Firstly, he conceded that there is no evidence that the Accused took the children away for purpose of having sexual intercourse with them, which is an essential requirement for the crime of abduction. He therefore conceded that the crime of abduction in respect of count 1 and 2 has not been proved. I agree with him. However he added in the alternative that as the Accused did not testify notwithstanding having admitted that he took the children from the Single Quarters to his home where they slept for a night, he should be convicted of kidnapping because he did not have the consent and or authority of the parents [of] [Q] and [T] to take them away. With respect I do not agree with him. Given the uncontradicted statement by [Q] that they went with the Accused and they went to get food and that they did in fact eat because they were hungry, I am of the view that the submission is without merit. Counsel for the State tried to draw a distinction or rather urged me to draw the distinction between [T] and [Q] based on the fact that whilst [Q] admitted that she went because she wanted to eat food and she was hungry, [T] did not admit this. To my mind this distinction is false and fallacious.' (Emphasis added.)

[39] Remarking on the count of rape (count 3) which allegedly took place in the respondent's vehicle *en route* to his house, the trial Judge said that the State correctly conceded that this charge cannot be sustained as T herself testified unequivocally that the accused did not put his finger in her vagina while travelling with her to his home. As to count 4, concerning the supply of alcohol to under-aged children to stupefy and enable them to have carnal intercourse with him, the trial Judge drew attention to the further concession made by the State that there was no evidence to support this charge. The trial Judge agreed with counsel for the State. He said that the State persisted that the respondent should be found guilty on the alternative charge to count 4, regarding the unlawful supply of alcohol of more than 3% by volume to T.



[40] In relation to the 6<sup>th</sup> count, in respect of which the respondent is alleged to have unlawfully committed or attempted to commit any indecent or immoral act with T by sitting her on his thighs and private parts and simulating a sexual act by making movements thereby gratifying himself, the trial court pointed out that the State submitted that there was no evidence to prove beyond reasonable doubt that the respondent put T on his lap with the intention to commit or attempt to commit an indecent or immoral act. The court held that the State thereby conceded that an essential component of this charge had not been proved. The court mentioned that the State however maintained that there was sufficient evidence to sustain a conviction on the alternative count of indecent assault. The trial Judge concluded that because of the serious defects and demerits in the State case as well as material discrepancies, he could not find that the guilt of the respondent had been proved beyond reasonable doubt.

[41] As regards the submissions, on behalf of the respondent, that the cumulative effect of irregularities committed by the police when investigating the case – some of which the court described to be deliberate attempts to make up a case against the respondent – resulted in a failure of justice and therefore that the respondent be acquitted on that basis, the trial judge declined to accede to the request but expressed its displeasure and dismay in the manner in which the case was investigated. Consequently, the trial court concluded that the guilt of the respondent had not been proved beyond reasonable doubt. The respondent was therefore acquitted on all counts, hence this appeal.

## Supreme Court

[42] The appellant appeals against the decision *a quo* on the ground that the trial court misdirected itself on the facts and the law. I have already dealt with the respondent's first submission where he sought to persuade us to dispose this appeal on the basis of a violation to his fair trial right, particularly because of the protracted delay in finalising the case.<sup>29</sup> I have also referred to the remarks made by the trial Judge<sup>30</sup> – to the effect, among other things, that the complainants were in full view of each other and that their evidence had to be understood in that context. I mentioned certain nuances appearing in the record which the trial Judge might have lost sight of. However, I take comfort in the subsequent remarks by the trial Judge when he recognised that 'it would be unrealistic . . . for any court to expect witnesses who observed a single event at the same time to give an account which is exactly the same on every detail'. The following further observations by the trial Judge are correct and bear mentioning:

'Every day human life experience teaches, that people observe, record and recall things that either interest them or shock them. Furthermore, the capacity of people to observe, record, recall and relate events differ infinitely from person to person. That human memory is [fella] admits of no doubt. I will therefore make room in my assessment of their evidence for such differences on the versions of both [T] and [Q]. For instance, I do not expect them to say exactly the same thing with regard to trivial matters like who stopped the Accused's vehicle; who boarded first between [T] and [Q], or whether the vehicle was a Mercedes Benz or not. This is precisely because things may have been so insignificant to them that they simply never took note of them. However, there are very important and crucial aspects, which relate directly to the core of the charges against the Accused. Where notwithstanding the patent immaturity, naivety, low intellect and inexperience, I do

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<sup>29</sup> See para [5].

<sup>30</sup> See para [37].

not expect them to differ, unless they can proffer an eminently reasonable and acceptable explanation.’ (Emphasis added.)

#### Appellate court’s power on findings of fact

[43] The first issue for determination is whether there are factual misdirections which entitle this court to interfere and come to its own conclusion on the facts as they appear on the record. I hasten to mention that the evidence of many witnesses of the State, especially of the complainants, was confusing and difficult to comprehend.

[44] I pause a little to mention disturbing features that heightened the confusion. They relate to the complainants’ statements to the police. Generally, statements are important pieces of evidence especially in sexual offense cases. They form part of the docket and the court record. Invariably, a victim would have made the first report to the police, when the happenings were still fresh in her or his mind.

[45] The complainants made statements to the police the following day after the alleged sexual transgressions but disavowed certain contents of the statement when testifying under oath.<sup>31</sup> The statement of the narrative of T was tailored. For example, Detective Inspector Haraes<sup>32</sup> own words, such as ‘*per anum*’ were used to describe what she believed T to have meant. She could not, however, explain the reason for using her own words in the statement. The use of T’s exact words

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<sup>31</sup> Interestingly, additional statements by the complainants were also used as exhibits. In Q’s statement mention is made of the details of the content of the pornographic video and that she was sitting on the floor watching the movie and the man picked her and put her on his thighs and thereafter the three of them went to swim. T testified that the respondent was sitting on the veranda while they swam.

<sup>32</sup> She was employed by the Ministry of Home Affairs, Police Department, in the Women and Child Protection Unit and had been assigned by Deputy Commissioner Visser to assist in the investigation of the case.

would have ensured accuracy and minimised the tailoring of her narrative. Detective Inspector Haraes could not explain the obvious inconsistency except explaining, when pressed, that these things happened a long time in the past and that she could not remember.

[46] It is important to remember that T made it clear, and her evidence in this regard was not gainsaid, that the police woman who wrote the statement repeatedly tore up the papers and re-wrote her story and made mistakes. She said that both herself and the police woman were confused. She mentioned that some of the things she related to the police were untruthful but was unable to identify the parts of her statements that were false. It follows, in my view, that reliance on the police statements in this case – when determining the guilt or otherwise of the respondent – would be inappropriate in the circumstances, particularly when assessing the reliability of the youthful complainants.<sup>33</sup> I now revert to the issues.

[47] On the first issue, regarding an appellate court's power to interfere with a trial court's findings of fact, it is necessary, first, to restate the established legal principles. In *Dhlumayo*<sup>34</sup> the South African Appellate Division commented about the deference an appellate court should pay to the factual findings made by a trial court. The Appellate Division remarked that 'an appellate court should not seek anxiously to discover reasons adverse to the conclusion of the trial [j]udge' for 'it

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<sup>33</sup> In *S v Xaba* 1983 (3) SA 717 (A) at 730B-C, also cited with approval in *S v Teek* 2009 (1) NR 127 (SC) para 21. As was the case in this matter, the Appellate Division correctly remarked, among other things, that 'police statements are, as a matter of common experience, frequently not taken with the degree of care, accuracy and completeness which is desirable'.

<sup>34</sup> *R v Dhlumayo & another* 1948 (2) SA 677 (A) (*Dhlumayo*).

does not necessarily follow that because something has not been mentioned, therefore it has not been considered'.<sup>35</sup>

[48] In *Hangue*,<sup>36</sup> this court, per Maritz JA, confirmed that the approach in *Dhlumayo* has been cited with approval in this jurisdiction on numerous occasions.<sup>37</sup> However, referring to the observations of the South African Supreme Court in *Hadebe*,<sup>38</sup> this Court sounded a caveat:

‘This approach is not intended to relieve this Court from [its] obligation to carefully consider the evidence because, as a court of appeal, it has other advantages that the trial court does not have in considering the evidence.’<sup>39</sup>

This court also referred to its earlier decision in *Jonker*,<sup>40</sup> in which the evidence was carefully considered by Chomba AJA.

[49] In *SARFU III*<sup>41</sup> the South African Constitutional Court addressed the appropriate level of deference to be afforded to a trial court’s credibility findings. It made the following observations:

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<sup>35</sup> Id at 706.

<sup>36</sup> Reported as *S v Hangue* 2016 (1) NR 258 (SC) (*Hangue*) para 60.

<sup>37</sup> Id where the Supreme Court compares *Vermeulen & another v Vermeulen & others* 2014 (2) NR 528 (SC) para 17; *S v Ameb* 2014 (4) NR 1134 (HC) para 43 and *S v Slinger* NR 9 (HC) at 10D-E, to name but a few.

<sup>38</sup> *S v Hadebe & others* 1997 (2) SACR 641 (SCA) at 645 e-f. In this case the SCA remarked:  
‘Before considering the submissions it would be as well to recall yet again that there are well-established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.’

<sup>39</sup> *Hangue* para 61.

<sup>40</sup> *S v Jonker* 2006 (2) NR 432 (SC).

<sup>41</sup> *President of the Republic of South Africa v South African Rugby Football Union (SARFU) & others* [1999] ZACC 11; 2000(1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) (*SARFU III*).

'The advantages which the trial court enjoys should not, therefore, be over-emphasised 'lest the appellant's right of appeal becomes illusory'. The truthfulness or untruthfulness of a witness can rarely be determined by demeanour alone without regard to other factors including, especially, the probabilities. . . [A] finding based on demeanour involves interpreting the behaviour or conduct of the witness while testifying. The passage from Kelly . . . correctly highlights the dangers attendant on such interpretation. A further and closely related danger is the implicit assumption, in deferring to the trier of fact's findings on demeanour, that all triers of fact have the ability to interpret correctly the behaviour of a witness, notwithstanding the witness may be of a different culture, class, race or gender and someone whose life experience differs fundamentally from that of the triers of fact.'<sup>42</sup> (Footnote omitted.)

[50] In *Makate*<sup>43</sup> the Constitutional Court of South Africa restated the approach to be employed by an appeal court in respect of factual findings by a trial court. The court explained the reluctance of appeal courts to intervene in such cases because of the advantages enjoyed by the trial court. That court said that the trial courts are steeped in the matter; they are able to observe the witnesses and they are able and required to assess probabilities as they manifest within the circumstances prevailing and as they apply to the testifying witnesses. The Constitutional Court said that such findings should not be overturned unless they are clearly wrong or a court has clearly misdirected itself.<sup>44</sup>

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<sup>42</sup> Id para [79].

<sup>43</sup> *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) (*Makate*) paras [37]-[41].

<sup>44</sup> Also see *Likando v The State* (CA 70/2016) [2016] NAHCMD 379 (02 December 2016) para 11; *Musewa v S* (CA 34/2017) [2018] NAHCNLD 10 (08 February 2018) para 3.

### Alleged factual misdirections

[51] In addressing the factual misdirection the appellant's counsel, made much of what the trial court said in its discharge judgment where it remarked about the State not having made out a *prima facie* case. Counsel seemed to have misunderstood what the trial court sought to convey regarding the standard of proof at the end of the case for the prosecution as compared with the standard at the end of the whole case. Seemingly, she lost sight of the significant difference between the tests applicable at the different stages of the criminal proceedings which the court sought to illustrate when it said the following:

'... I have given a detailed and reasoned Judgment in this matter at the time when I discharged the Accused in terms of Section 174 of the [CPA] after I had considered, analysed and evaluated the evidence of all the witnesses in particular the evidence of [T] and [Q]. I do not therefore deem it prudent to repeat what I have already stated in my Judgment referred to above. As the Accused closed his case without leading evidence, there is no evidence. Before me to consider. However, the most significant difference is that the test applicable now at this stage to the evaluation of the evidence that is at the end of the case, the entire case, as opposed to, at the end of the State case is different. The test now to be applied is not whether the State has proved a *prima facie* case against the Accused. But whether it has adduced sufficient, credible and reliable evidence to prove the guilt of the Accused beyond any reasonable doubt.' (Emphasis added.)

Correctly in my view, the trial court emphasised that there is no duty on the part of the respondent to prove his innocence and that at all material times the onus rests on the State to prove the guilt of the accused beyond reasonable doubt. The trial court cannot be faulted on the approach it adopted and its observance of the rules regarding the onus of proof.

[52] During argument, counsel for the State was asked to pin-point the specific factual misdirections she contended the trial court made. Spiritedly, she submitted that the trial court failed to weigh the merits and demerits of the case both for the State and the respondent. To determine the merit of this submission one has to have regard to the correct test(s) enunciated by courts over the years in relation to the approach by the trial court. The observations by Brand AJA in *Shackel*<sup>45</sup> are apposite:

'It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course, it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.'<sup>46</sup>

[53] In my view, the approach and reasoning of the trial Judge satisfy the principles enunciated above. In fact, the trial Judge cautioned himself when he said that he is 'bound by established judicial tradition to approach the *evidence* of the State holistically and not on a piecemeal fashion'. (Emphasis added.) It must be remembered that the respondent did not testify. There was, strictly speaking, no *evidence* tendered by the respondent *a quo*. What was before the trial court in

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<sup>45</sup> *S v Shackel* 2001 (2) SACR 185 (SCA); 2001 (4) SA 1 (SCA) (*Shackel*).

<sup>46</sup> *Id* para 30.



his defence was stated in his plea explanation. The appeal court did<sup>47</sup> accept, without deciding, that the exculpatory parts of the respondent's plea explanation formed part of the evidential material. Likewise, I accept without deciding that the exculpatory parts of the respondent's explanation formed part of the evidence even if it cannot be described as evidence *stricto sensu*. I do so because of its probative value.<sup>48</sup>

[54] Although the trial court could not disregard the respondent's plea explanation, it was constrained to make an assessment of the evidence of the State to determine whether the truth had been told. In my view, the trial Judge meticulously analysed and assessed the evidence of the State, given that the onus rested on it, particularly in relation to the evidence of T and Q pertaining to certain central and contentious issues. Of course, the trial Judge could not do the same in respect of the respondent who had only tendered a plea explanation and exercised his right not to testify. As the record demonstrates, the trial court was also mindful of the dangers attendant upon the uncritical acceptance of the evidence of the complainants because of a number of elements, including their 'imaginativeness and suggestibility', that require their evidence to be 'scrutinised with care amounting, perhaps, to suspicion'.<sup>49</sup> Again, I am unable to find fault with that approach in the circumstances of this case.

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<sup>47</sup> Relying on *S v Tjiho* (2) 1990 NR 266 (HC) at 271 E and *S v Shivute* 1991 NR 123 (HC) at 127C. See also *S v Teek* 2009 (1) NR 127 (SC) para 15.

<sup>48</sup> See *S v Shivute* 1991 NR 123 (HC) and *S v Malebo en Andere* 1979 (2) SA 636 (B).

<sup>49</sup> *R v Manda* 1951 (3) SA 158 (8) at 163C. See also *S v S* 2000 (1) SACR 453 (SCA) para 2 where commented: 'In view of the nature of the charges and the ages of the complainants it is well to remind ourselves that while there is no statutory requirement that a child's evidence must be corroborated, it has long been established the evidence of young children should be treated with caution'. See also *S v Mpuka* 2005 (4) NCLP 94 at 102.

Did the trial court disregard consistencies in the evidence of the State?

[55] Counsel for the State submitted that the trial court had no regard to the consistencies in the evidence of the complainants. I struggled to understand the submissions by counsel in this regard. When she was asked to identify the specific areas in the record demonstrating that the trial court disregarded the consistencies in the evidence for the State, she referred us to the appellant's notice of appeal and heads of argument.

[56] There are indeed certain consistencies in the evidence of the complainants on one hand and a number of material discrepancies on the other, when one has regard to the record as a whole. However, it needs to be emphasised that no onus rested on the respondent. In any event, assuming for a moment that the State is correct, the fact that the court did not specifically mention each and every consistency does not mean that it did not consider them.<sup>50</sup> What is more, I did not understand the State to contend that the findings of the trial court, regarding the consistent facts, were erroneous. My understanding of the State's submission is simply that the trial court overemphasised certain aspects of the consistent evidence and overlooked others.

Did the trial court ignore the 'only reasonable inference' in relation to the charge of kidnapping?

*Elements of the offence of kidnapping*

[57] The State contended that the trial court 'totally' ignored the 'only reasonable inference' to be drawn from the facts, that even if the respondent took the girls to

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<sup>50</sup> See *Dhlumayo* above, n 35.

feed them, he had the intention to deprive the custodians of their custody in the form of *dolus directus*<sup>51</sup> or *dolus eventualis*.<sup>52</sup> It is contended that if the respondent had a noble intention he should have taken the complainants to the proper authorities.

[58] It is important, first, to identify the elements of the offence of kidnapping. This offence consists of an unlawful and intentional deprivation of a person's freedom of movement and/or, if such person is a child, his custodians of their control over her or him.<sup>53</sup> In *Dimuri*<sup>54</sup> the High Court of Zimbabwe held that the *mens rea* for the offence is actual or 'constructive intent' to bring about the deprivation of liberty or of custody. This case was cited with approval by Mainga AJ in *Mouton*<sup>55</sup> where the High Court remarked about the principle of 'constructive intent' and said that this form of intent need not be actual, but can be implied where a person acts reckless or negligently and where a person ought to have reasonably foreseen the outcome of his actions. Mainga AJ said that the act must be voluntary but need not be performed with malice. In *S v F*<sup>56</sup> the South African High Court remarked that in regard to the manstealing (kidnapping) of a young child, as *soon as there is an intention to violate the parental authority and effect is given to that intention by removing the child, with or without the consent of the child, the offence is committed*'.

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<sup>51</sup>Loosely translated to mean an actual intention.

<sup>52</sup> Loosely translated to refer to what is called a legal intention. That is to say an intention imputed because of an awareness of a possibility.

<sup>53</sup> See Snyman, *Criminal Law* 3 ed at 437. According to Hunt, *South African Criminal Law and Procedure* Vol 2 3 Ed at 547, 'X' must intend (actually or legally) to deprive Y of liberty or his custodian of control.

<sup>54</sup> *S v Dimuri & others* 1999 (1) SACR 79 (ZH) (*Dimuri*).

<sup>55</sup> *S v Mouton & another* 1999 NR 215 (HC) (*Mouton*).

<sup>56</sup> *S v F* 1983 (1) SA 747 (O) (*F*).

Should the inference be drawn?

[59] The law with regard to the drawing of inferences is well established. The following two cardinal rules of logical inference, which have been restated in our case law, were laid down in *Blom*<sup>57</sup> as follows:

- ‘(1) The inference sought to be drawn must be consistent with all the proven facts. If it is not, the inference cannot be drawn.
  
- (2) The proven facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct.’

[60] Differently put, and borrowing from the language used by Landsdown and Campbell,<sup>58</sup> the second rule is said to be a statement of the criminal standard of proof: simply another way of saying that where the inculpatory facts are as compatible with the innocence of the accused as with his guilt, the inference of guilt should not be drawn. To illustrate the point, the authors use certain examples.<sup>59</sup> In light of the constitutional guarantee to fair trial, the South African

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<sup>57</sup> *R v Blom* 1939 AD (*Blom*) 188 paras 202-3. Also see *S v Kalukumwa* (CC 26-2012) [2015] NAHCNLD 27 (30 June 2015) para 36, *Hamupolo v State* (CA 40/2013) [2014] NAHCMD 258 (28 August 2014) para 19 and *State v Ditshabue* (CC 26/2012) [2013] NAHCMD 261 (20 September 2013).

<sup>58</sup> *South African Criminal Law and Procedure, Criminal Procedure and Evidence*, Vol V at p 940.

<sup>59</sup> Including the following: The proof that an accused, a pauper, was sudden in possession of money does not set up even a *prima facie* case that he was a thief, in the absence of further evidence that he alone had had the opportunity to steal, or the evidence linking the number of the stolen banknotes with those in the accused’s possession as was the case in *R v Smith* 1932 OPD 150; Similarly, the authors said, the fact that stock is missing does not prove that it was stolen unless the possibility that it strayed has been excluded, as was the case in *S v Dlamini* 1965 (1) SA 859 (N). Again, the authors point out, the mere presence of the accused’s fingerprints on the car he was alleged to have stolen and stripped was held not to justify conviction since the print might have been placed on the car in a number of ways of which the possibility that he was unlawfully working on the car was only one – as was the case in *R v Du Plessis* 1944 AD 314 at 321.

Supreme Court Appeal, in *Heslop*,<sup>60</sup> restated the second principle enunciated in *Blom*<sup>61</sup> as follows:

‘It goes without saying that it is a requirement of a fair trial guaranteed by section 35(3) of the Constitution of the Republic of South Africa, 1996, that if a court intends drawing an adverse inference against an accused, the facts upon which this inference is based must be properly ventilated during trial before the inference can be drawn.’<sup>62</sup>

[61] The trial judge disagreed with the submission by the State to support a conviction on the alternative count of kidnapping. He referred to ‘the uncontradicted statement by Q that they went with the respondent to get food and that they did in fact eat because they were hungry’ and found that the submission by the State was without merit. I agree. In regard to the distinction the State sought to draw between the evidence of T and Q – based on the fact that whilst Q admitted that she went because she wanted to eat and was hungry, T did not admit that. The trial court found the distinction to be fallacious. I agree.

[62] The evidence in the record clearly shows that the complainants were offered food upon their arrival at the respondent’s house. In fact, the undisputed evidence of Q was that they were first given food to eat when they arrived there. In any event, the complainants had proffered contradictory versions as to why they went there. Q testified that they were promised new clothes while T said that they went there because the respondent asked them to go, drink and celebrate. The probative value of the respondent’s evidence must thus be understood against these mutually destructive versions which were not corroborated and could not be

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<sup>60</sup> *S v Heslop* 2007 (4) SA 38 (SCA).

<sup>61</sup> Above n 57.

<sup>62</sup> *Id* para 22.

relied upon because of their untrustworthiness. I cannot thus find any fault in the trial court's rejection of the appellant's submission to draw the distinction.

[63] The taking of the girls to the proper authorities could not have been the only possible avenue in the circumstances of the case. In my view, this must also be considered in conjunction with what the respondent said in the plea explanation concerning his intention to return the complainants home that night but for his falling asleep after taking medication with serious sedative effect. It is not insignificant, albeit not conclusive, that this part of his explanation remained undisputed. The testimony of T's mother regarding what Q's mother said about the reaction of the respondent and the children when they were at the house is curious. This must be a fabrication because it was mentioned for the first time under-cross examination and none of the witnesses including the complainants mentioned it.

[64] A criticism may be levelled against the respondent as to why he did not make means to phone the parents of the complainants when he realised that it was too late to return them. Sight should, however, not be lost first of the fact that, first, this aspect was not ventilated during trial particularly in light of what was said in *Heslop*.<sup>63</sup> Second, and at the risk of repetition, there was no onus on the respondent to prove his innocence.

[65] Besides, there is no evidence to suggest that the respondent foresaw or ought reasonably to have foreseen the consequences of his actions. Even

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<sup>63</sup> See *Heslop* n 60.

assuming for a moment that the explanation of the respondent is found somewhat wanting and that his conduct borders on negligence, his explanation cannot be rejected merely because it is improbable on those grounds. In any event, this Court need not be convinced that every detail of the respondent's version is true. It is sufficient if his version, considered against the evidence as a whole, is reasonably possibly true in substance in which case that version must be accepted particularly because no onus rests on him to prove his innocence.

[66] I have accepted, without deciding, that the exculpatory parts of the respondent's explanation in terms of s 115<sup>64</sup> form part of the evidential material because of their probative value.<sup>65</sup> The explanation regarding the kidnapping charge is, in my view, consistent with proven facts: the complainants were offered food and they ate upon their arrival at the respondent's house. In any case, the respondent's explanation why he did not return them is more probable: it was supported by the evidence of Dr Ludik who explained the effect of alcohol and medication. Importantly, that evidence was not disputed. At the risk of repetition, the evidence of T and Q regarding why they went to the respondent's house remains contradictory and mutually destructive.

[67] In my view, the so-called 'only reasonable inference' that the State implored us to draw is not consistent with the proven facts. As a matter of fact, the record amply shows that his intention was not to violate the parental authority or even to deprive the custodians of the custody either in the form of direct intention or legal intention. In the circumstances, there is doubt that the inference sought to be

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<sup>64</sup> Described in relevant parts above para [10].

<sup>65</sup> Above, para [53].

drawn is the only reasonable inference that may be drawn in the circumstances of this case. The submission by the State in this regard must be rejected.

[68] I conclude that the State has failed to prove that the respondent intentionally removed the complainants from the Single Quarters with the intention to violate the parental authority. Accordingly, I would not find the respondent guilty also on the alternative count of kidnapping.

Did the trial court disregard any facts?

[69] The general contention was made by the State to the effect that the trial court disregarded facts that were undisputed in cross-examination when it concluded that the State did not prove the case against the respondent beyond reasonable doubt in respect of the remaining counts 1, 2, 4, 6 and 8. It is important to remember that the State made certain concessions at the trial in relation to specific counts. To recap, it conceded, that the offence of the crime of abduction in respect of counts 1 and 2 has not been proved.<sup>66</sup> Furthermore, the State conceded, in respect of count 3 relating to rape, that allegedly took place in the respondent's vehicle *en-route* to his house, that the charge cannot be sustained as T herself testified unequivocally that the respondent did not put his finger in her vagina while travelling with her to his home. The trial Judge shared the sentiment.

[70] In relation to count 4, relating to the administering of intoxicating liquor to the complainants to stupefy them so that he could have unlawful carnal intercourse with them the State, save for the alternative counts thereto concerning the unlawful supply of a drink containing more than 3% of alcohol by volume to

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<sup>66</sup> High Court judgment.



underage children (in relation to T) also conceded that the offence in the main count could also not be sustained. More importantly, it is not the State's case that the concessions were not well made. On the issue raised, counsel for the State was at pains to pin-point or identify the said material undisputed facts.

### Material contradictions

[71] As the trial Judge correctly found, the evidence of T, particularly regarding the alleged sexual improprieties constituted the evidence of a single witness. He found that the evidence of the State is interspersed with serious contradictions and that it will be risky to accept such evidence in the absence of independent corroborative evidence. I could not agree with him more. The dangers inherent in relying on the uncorroborated evidence especially of young children should not be underestimated. This is so because of the imaginativeness and suggestibility of children. In this case one cannot discount such factors on the complainants' part. The undisputed expert evidence by Dr Ludik regarding the effect of alcohol on them cannot also be ignored. The children's imaginativeness and suggestibility are said to be 'only two of a number of elements that require their evidence to be scrutinised with care amounting, perhaps to suspicion'.<sup>67</sup> To this end Schreiner JA went on to set out the duty of the trial court when dealing with the evidence of children:

'The trial [c]ourt must fully appreciate the dangers inherent in the acceptance of such evidence and where there is reason to suppose that such Application was absent, a Court of Appeal, may hold that the conviction should not be sustained. The best indication that there was proper appreciation of the risk is naturally to be found in the reasons furnished by the trial [c]ourt.'<sup>68</sup>

[72] These salutary principles were adopted by Hannah J in *Mpuka*.<sup>69</sup> In *V*<sup>70</sup> somewhat similar sentiments were echoed by Zulman JA that 'in view of the

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<sup>67</sup> Per Schreiner JA in *R v Manda* 1951 (3) SA 158 SCA at 163C (*Manda*).

<sup>68</sup> *Id* at 163E.

<sup>69</sup> *S v Mpuka* 2005 (4) NCLP 94 at 102.

<sup>70</sup> *S v V* 2000 (1) SACR 453 (SCA) para 2.

nature of the charges and the ages of the complainants it is well to remind ourselves that while there is no statutory requirement that a child's evidence must be corroborated, it has long been established that evidence of children should be treated with caution'. This court, per Maritz JA, in *Vivier*<sup>71</sup> affirmed the consistent application of the cautionary rules in Namibia not –

' . . . as a formalistic procedural requirement to which mere lip service must be paid, but as an intrinsic part of a broader logical and reasoned inquiry into the substance of the evidence against the accused: after due appreciation and assessment of the peculiar and inherent dangers of convicting the accused on the evidence of the single or child witness who testified at the trial, is the evidence of that witness, when considered in the context of and together with all other evidence adduced at the trial, sufficiently credible and reliable to prove the guilt of the accused beyond reasonable doubt.'

[73] Demonstrably, the reasoned judgment of the trial judge in this case amply shows that he fully appreciated the dangers inherent in accepting the evidence of the young children. Put differently, he did not pay lip service to the substantive requirement of the cautionary rule. As the complainants had persisted in their patent lie and had thus been beaten to disclose the truth about where they had spent the night, the trial Judge was also not oblivious of the danger or relying on their narrative following the beatings as well as the possible impact of such beating on the veracity of the story eventually told in court.

[74] The trial court correctly heeded the *dictum* by this court in *Monday*<sup>72</sup> where it appositely remarked:

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<sup>71</sup> *Minister of Basic Education, Sport and Culture v Vivier NO & another* 2012 (2) NR 613 (SC) para 17.

<sup>72</sup> *S v Monday* 2002 NR 167 (SC) per O'Linn AJA.

‘Children are mostly also dependant on adults, particularly on their parents and consequently they are more vulnerable than adults to coercion and other forms of undue influence by such parents or adults. The court should have identified a danger sign when the testimony showed that the alleged victim, Ms. L. never complained on her own initiative until she was repeatedly coerced “to tell the truth”, failing which she will be beaten. The court failed to refer to and consider this coercion and its possible impact on the “complainant” and the veracity of the story eventually told in court. Consequently I hold that courts must still abide by the cautionary rule relating to the testimony of young children as contained in our existing law of evidence and laid down and implemented in authoritative decisions of the South African and Namibian courts.’<sup>73</sup>

[75] The evidence of T, in relation to the alleged unlawful sexual act or indecent immoral act or indecent assault, is not satisfactory. It is contradictory and mutually destructive: For example, T’s evidence in relation to the finger story is that the respondent put his finger in her private parts whilst sitting on the veranda near the swimming pool. However, when the complainants accompanied the police to the respondent’s house, T pointed at a photograph depicting the scene of the alleged transgression. The photograph depicted where the respondent was allegedly sitting when T was allegedly sexually violated. At that stage of the investigation T indicated that this was the only incident when the respondent played with her private parts. That was incorrect because she had mentioned, during cross-examination, that the respondent inserted his finger in her vagina whilst *en route* to his house. Besides, her mother testified that T had told her that whilst they were driving, the respondent fondled her on her thigh.

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<sup>73</sup> Id at p 195.

[76] Another example is in respect of the alternative count regarding the supply of alcohol (the alternative to count 4).<sup>74</sup> T's evidence was to the effect that while at the house, the respondent brought a bottle of beer and forced her mouth open and forcefully poured the beer into her mouth, down her throat. This begs the question, if the beer was forced down her throat as she described, at what stage did she get hold of the bottle to drink and put it down? She had earlier mentioned that the respondent gave them beer to drink while *en route* to his house. T's testimony was to the effect that they were each given a bottle of beer by the respondent, but Q vehemently denied the allegations. The evidence of T and Q, in relation to why they were taken to the respondent's residence, is also contradictory and unreliable to say the least. I have already mentioned this aspect of the State's case<sup>75</sup> and to avoid prolixity, it is not necessary to repeat it.

#### Submission regarding the alleged consistent evidence

[77] The fact that there was consistent evidence or correct evidence, as counsel for State put it, does not necessarily suggest that there was corroboration. By corroboration is meant other evidence which supports the evidence of the witness and which renders the version of the respondent less probable on the issue in dispute.<sup>76</sup> Such corroboration provides safeguard that the truth has been told.<sup>77</sup>

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<sup>74</sup> To recap, this alternative relates to T. It is couched in the following terms: That the respondent wrongfully and unlawfully supplied a drink of substance which contains more than 3% of alcohol by volume to a ten year old complainant and that is under the age of eight years.

<sup>75</sup> Above para [62].

<sup>76</sup> See *S v Gentle* 2005 (1) SACR 420 (SCA) para 27.

<sup>77</sup> *Swanepoel v S* [2008] 4 All SA 389 (SCA) (*Swanepoel*).

[78] As demonstrated above, there can be no doubt that there are many major shortcomings in the State case. For example: First, the evidence in relation to the alleged sexual act or indecent or immoral act or indecent assault, as the record demonstrates, is insufficient and thus not conclusive as T contradicted herself in material respect. Besides, her mother's oral testimony that while at the police station the complainants were examined by a doctor who confirmed that T 'was touched with a finger underneath' is dubious. This was mentioned for the first time in court and was never mentioned to the police. The evidence of T and Q, in relation to the sexual act or indecent assault, was wanting and ought to have been corroborated. It was not.

[79] Second, the documentary evidence in the form of the original medical report is also highly suspicious and unreliable: Firstly, the State's own medical expert, Dr Behr, conceded in court that the small abrasions in T's vestibule could have been caused by a number of things. This evidence was not gainsaid. Secondly, the medical report had been tampered with. The words 'my opinion because finger putting in the zone' – jotted in the copy of the medical report were not contemporaneously recorded in the original or identical report. Disconcertingly, no explanation was proffered by the State for such a material discrepancy.

[80] A medical examination of a victim is an important part of the police investigation in a sexual offence case and must be done as soon as a complaint is made. When the examination is done and the forensic specimen are collected the investigating officer needs to ensure that the chain of evidence is not broken-down or destroyed. Here, the record is peppered with evidence showing that certain

standards regarding forensic investigation had not been followed. As this case concerned the alleged sexual molestations on young children, corroboration in the form of the DNA evidence was vital. Had the investigative team complied with the forensic science standards mentioned in the evidence of Dr Behr and Dr Ludik, some form of corroboration might have been established. The discrepancies, in the absence of corroborative evidence, raise suspicion. In my view, the allegations of unlawful sexual act or indecent act or indecent assault and the unlawful supply of alcohol against the respondents are devoid of any semblance of the truth.

[81] Accordingly, I am satisfied that the trial Judge properly, cautiously and correctly approached the evidence of the complainants. His reasoning regarding contradictory evidence in material respect cannot thus be faulted. The suggestion that the trial court materially misdirected itself on the facts and the law is therefore devoid of merit. As a result, the conclusion that the guilt of the respondent was not proved beyond reasonable doubt is inescapable.

#### Irregularities

[82] The respondent submitted that the irregularities committed during the investigative processes violated his right to a fair trial and vitiated the proceedings. He implored us to dismiss the appeal on this ground alone. In the view I take of this case, it is not necessary to decide this issue. Nonetheless, it is important to mention but a few of the irregularities to demonstrate how the sub-standard investigative process by the police may be destructive to the criminal justice system. Often, such sub-standard investigation does, in and by itself, result in innocent people being wrongly convicted or guilty people being wrongly acquitted.

[83] The irregularities in this case concern evidence of the video recordings made during the search at the respondent's house and his judicial chamber as well as the recording made during his arrest on 30 January 2005 while detained at a mental hospital. The evidence of the searches exculpated the respondent. It was deliberately withheld from the trial court and the defence despite that the video recording contained exculpatory evidential material favourable to the respondent. This was confirmed by Deputy Commissioner Visser under oath and the concealment of the exculpatory evidential material is telling.

[84] It is not insignificant that the respondent was cooperative and in fact assisted the police during the search of his premises. The police however tailored the investigation: For example, the police never disclosed that they took the children again to the respondent's house; that the respondent was asked during the search<sup>78</sup> whether he had any pornographic material to which question he responded in the negative; that he gave them a *carte blanche* to search his house at which point no pornographic material was found; that he had handed the camera to Detective Inspector Haraes which only contained family photographs; that he had allowed the police to search for the clothes he was wearing on the night in question; that he had given them a go-ahead to look inside the laundry basket where they found the towel that was used by the complainants before they left his house and had given them the clothes he was wearing.

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<sup>78</sup> Notably, there were defects in the search warrant in the form of tampering. There were different handwritings – at least two different hand writings. Inexplicably, the residential address in respect of which the search warrant was issued.



[85] Oddly, the clothing referred to in the search warrant were never taken for DNA testing to detect the presence of semen and were not used as exhibits. Under oath, Deputy Commissioner Visser shockingly explained that—

‘ . . . the clothes the respondent was wearing and the description of the clothes which the children described to me did not fit and I was not interested in that clothes. I was looking for specific clothes.

. . .

I was looking for certain clothes and I could not find [them].’

[86] Not only that. The police officials who investigated the case were selective in the investigative processes. Deputy Commissioner Visser confirmed that the police did not take the scrapings from underneath the respondent’s nails for the DNA testing, following the allegations of his finger having been inserted into T’s private parts. Unequivocally, Deputy Commissioner Visser admitted that the police failed to follow the standard procedures when dealing with physical evidence in crime investigations. Clearly, the failings by the investigative authorities are not only deplorable but are also telling.

[87] The further objectionable conduct on the part of the police officials relates to the evidence of Detective Inspector Haraes. She was responsible for video recording the searches at the respondent’s house, his judicial chamber at the Supreme Court Building (Room G15) on 30 January 2005 and, seemingly, of his arrest at the mental hospital in Windhoek. No evidence of the existence of the pornographic material was either found at the house and chamber during the search or in the film of the camera that was voluntarily handed by the respondent

to the police. Notably, only a video entitled '[t]he prayer of a wise man' was found during the search. Demonstrably, this video was a far cry from a pornographic material alleged to have been shown to the complainants on the night in question. When questioned about this Detective Inspector Haraes said that she did not check the contents of the video but never denied that it contained the 'prayer of the wise man'.

[88] More disconcertingly, the video recording that was taken during the search and arrest was never presented before the court seemingly because it was 'irrelevant' and 'of no use for the conviction of the [respondent]'. This is yet another instance of an unacceptable selective investigative shortcoming.

[89] Article 118 of the Namibian Constitution establishes the police force and enjoins the police to 'maintain law and order'. It provides that an Act of Parliament shall establish a National Police Force with prescribed powers, duties and procedures. In terms of s 13(c) of the Police Act,<sup>79</sup> the police are enjoined, among other things, to investigate any offence or alleged offence. Neither the Namibian Constitution nor the Police Act, empower the police to investigate any crime against any person in a selective manner for the purpose of securing a conviction of an accused person. Any person accused of having committed any offence, whether that person is a Judge or is holding a position of high office, should not be treated differently because of his or her public status.

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<sup>79</sup> Police Act 19 of 1990.

[90] The importance of the fair trial<sup>80</sup> right in the Constitution is to ensure adequately, among other things, that innocent people are not wrongly convicted because of the adverse effect which a wrong conviction might have on the liberty, dignity and possibly other interest of the accused. Anything short of these constitutional imperatives may not only bring the system of criminal justice into disrepute but may also result in a travesty of justice.

### Conclusion

[91] Consequently, I would dismiss the appeal and confirm the order of the High Court, finding the respondent not guilty and acquitting him.

### Order

[92] In the result I make the following order:

1. The appeal is dismissed.
2. The order of the High Court acquitting the respondent is confirmed.

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<sup>80</sup> In relevant parts, Article 12 of the Namibian Constitution reads:

'Fair Trial

- (1) (a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.
- (b) A trial referred to in Sub-Article (a) hereof shall take place within a reasonable time, failing which the accused shall be released.'

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**NKABINDE AJA**

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**DIBOTELO AJA**

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**MOKGORO AJA**

APPEARANCES:

APPELLANT:

I M Nyoni

Of Office of the Prosecutor-General

RESPONDENT:

In Person