SA 2/99

S v MICHAEL KATAMBA 1999/12/07

Strydom, C.J., Silungwe, A.J.A., O'Linn, A.J.A.

EVIDENCE

Cautionary Rule in Sexual Cases

The State appealed to the Supreme Court against a decision of the High Court acquitting the accused on all charges - being rape, abduction, alternatively kidnapping.

The Supreme Court upheld the appeal and substituted the above order with an order that the accused is found guilty on the charges of rape and abduction and remitted the case to the Court a *quo* for consideration of and imposition of an appropriate sentence.

The Supreme Court further held:

1. That the cautionary rule in sexual cases should not apply in Namibian Courts *inter alia* because:

    1. The rule has outlived its usefulness and there are no convincing reasons for its continuation.

2. The rule is difficult to apply because of its inherent vagueness.

    3. The principles relating to a fair trial, such as the burden on the State to prove the case against an accused beyond reasonable doubt, relating to the evidence of single witnesses and youthful witness, are sufficient to ensure that an innocent accused shall not be convicted.

    4. The additional burden imposed by the cautionary rules on alleged victims, may adversely infringe on the fundamental rights and interests of victims which, include a fair trial also in regard to their rights and interests. The Courts also have a constitutional duty to protect such rights and interests. In this regard the Courts are also required to consider and give some weight to the contemporary norms, views and opinions of Namibian society. So e.g. the Courts must take into consideration that serious crime is prevalent in Namibia, if not escalating. Society is outraged by this phenomenon. It is a notorious fact that many Namibians believe that the Courts among others, overemphasise the rights of the perpetrators of crime and under-emphasise those of the victims, including those of the women and child victims in sexual crimes.

        The cautionary rule in sexual cases, in particular, is perceived by many, including leaders of society, academics and other informed persons as an example of a rule in practice, which places an additional burden on victims in sexual cases which is not only

unnecessary, but may lead to grave injustice to the victims involved.

5. The Court reiterated and confirmed however, the remark in SvD, that "this does not mean that the nature and circumstances of the alleged offence need not be considered carefully" and the remark in S v Jackson, that "the evidence In a particular case may call for a cautionary approach, but that Is a far cry from the application of a general cautionary rule".

6. The Court also adapted the rule laid down in R v Makaniuola, R v Easton and adopted its as a general guideline in the following form:

> "In some cases it may be appropriate for the judge to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant in a sexual offence, nor will it necessarily be so because a witness is alleged to be an accomplice. There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestions by cross-examining counsel.

7. The court did not find it necessary to express an opinion on whether or not the aforesaid cautionary rule is also "unconstitutional".

8. It was a misdirection for the trial Court not to have taken into consideration the conflicting defence of the accused in the s. 119 proceedings.

9. The Court also misdirected itself by holding it against the version of the child complainant, that she had failed to point out to the police the point where she had been raped when this alleged deficiency was never put to the complainant in cross-examination or in questions by the Courts.

The Court further misdirected itself by holding it against the version of the complainant and the State, that an allegation by the accused first made by the accused when he testified, was not contradicted by the complainant or the State, notwithstanding the fact that neither the defence counsel nor the accused had mentioned the alleged fait before the accused testified and furthermore, defence counsel had never put it to the complainant in the course of cross-examination.

It was pointed out that even if state counsel had failed in his/her duty to recall the complainant, it was the Court's duty as administrator of justice, to have done so - to enable her to deal with alleged facts raised in the accused's evidence.

In this regard the Court reiterated the guidelines for Courts set out in State v Van den Bereh and the need to follow them in respect of the Courts role as "administrator of justice".

The Court also re-emphasised the need for counsel in criminal cases to put to a witness in cross-examination any alleged specific circumstance or omission on the part of the witness, on which counsel intends to rely to discredit that witness.

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CASE NO.: SA 2/99 IN

THE SUPREME COURT OF NAMIBIA

In the matter between

APPELLA

THE STATE

And

RESPONDEN

MICHAEL KATAMBA

CORAM: Strydom, C.J.; Silungwe, A.J.A, et O'Linn, A.J.A. HEARD

ON: 1999/10/04 DELIVERED ON: 1999/12/07

APPEAL JUDGMENT

O'LINN, A.J.A.:

A. INTRODUCTION:

This is an appeal by the State against the judgment of Mtambanengwe, J in the High

Court of Namibia, in which the learned Judge found the accused, the Respondent in

this case, not guilty on the following charges:

"Count 1: Rape Count 2: Abduction, alternatively, kidnapping."

The charges were set out as follows in the indictment: "COUNT 1:

IN THAT on or about 1 October 1995 and at or near GROOTFONTEIN in the district of GROOTFONTEIN the accused unlawfully and intentionally had sexual intercourse with FLORIEDA NARUBES, a female person, under the age of consent, namely 11 years old. COUNT 2:

IN THAT on or about 1 October 1995 and at or near GROOTFONTEIN in the district of GROOTFONTEIN the accused did unlawfully and intentionally take and abduct FLORIEDA NARUBES, a minor female, out of the control and against the will of JONAS GAESEB, her lawful guardian, with the intention of having sexual intercourse with the said FLORIEDA NARUBES."

In the summary of substantial facts provided in terms of section 144(3)(a) of the Criminal Procedure Act, 41 of 1977, the State set out the facts on which it relied, as follows:

"On Sunday 1 October 1995, the complainant a 11 year old girl arrived in Grootfontein and walked to the school hostel. On the way she met with the accused. The complainant walked with the accused but when she became suspicious she screamed. The accused produced a knife and eventually overpowered her. The accused assaulted her by beating and kicking her and

then had sexual intercourse with the complainant. He forced her to accompany him and sleep with him that night. The next morning he took the complainant with him to a place at Berg Aukas where they stayed for another two days."

I will in the course of this judgment for the sake of convenience, continue to refer to the parties as the State and the accused respectively.

Ms. Lategan appeared for the State in this appeal and Mr. Grobler for the accused. Mr. Grobler also appeared for the accused in the Court *a quo,* but Ms. Sauls appeared for the State in that Court.

The State appeals essentially on three grounds set out as follows:

" 1. The Honourable Court erred in law in holding that it was not bound bv S. v D and Another 1992(1) SACR 143 (Nm) such being a judgment on appeal which held that the cautionary rule relating to sexual offences 'has no rational basis for its existence and should therefore not form part of our law and is probably contrary to the provisions of the Namibian Constitution'.

2. The Honourable Court erred in law when subsequently applying the said cautionary rule.

3. The Honourable Judge erred in law and/or fact in holding that on the totality of the evidence the accused's version was not improbable and thus reasonably possibly true in the light of all the circumstances of the case."

Mtambanengwe, J gave leave to appeal but indicated that leave was granted on the legal ground. He expressed the view however, that there were no reasonable prospects of success on the facts.

On appeal Ms. Lategan persisted in arguing the appeal on all the aforestated grounds.

Ms. Lategan contended that the Court a *quo,* sitting as a single judge, erred in law in that the Court had failed to follow the decision of two judges of the High Court in S v D and An[1], in which decision the Namibian Court had held that the cautionary rule relating to sexual offences "has no rational basis for its existence and should therefore not form part of our law and is probably contrary to the provisions of the Namibian Constitution." (My emphasis added.)

S v D and An will hereinafter be referred to as S v D.

The Court a *quo,* according to Ms. Lategan, "erred in law" because it was bound to

/; *1992(1) SACR and also in 1992(\) 5A513 (Nm)* jnd *1991 (NK)37t* HC

follow the decision in S v D, being a decision of two judges, unless it could be said that the judgment in S vD on this point was given *per incuriam.*

Mr. Grobler on the other hand contended that the *dicta* referred to in S vD amounted to *obiter dicta* and that the Court *a quo* was consequently not compelled by the doctrine of *stare decisis* to follow the judgment in S v D on this point. It appears to me to be quite clear that the words relied on by Ms Lategan in S v D are in fact *obiter dicta* as contended for by Mr. Grobler. I say this because the Court in S v D per Frank J, first analyzed the evidence against accused No. 1 on the first charge and found that "the State cannot be said to have discharged the onus, resting upon it".

Then the Court analyzed the evidence in regard to accused No. 2 on the second charge and found that the complainant in the case was a truthful witness.

The Court then dealt with the cautionary rule and after setting out its nature and ambit said:

> "Considering the evidence relating to the incident involving the second complainant and in view of the said cautionary rule and even taking the stunningly imaginative approach adopted in the *Balhuber* case into consideration, I am of the view that the State did prove its case bevond reasonable doubt against the second appellant." (My emphasis added)

The Court consequently actually applied the cautionary rule and even took into consideration the approach in S v Balhuber, when it found that "the State did prove its case beyond reasonable doubt". It was only thereafter that Frank, J commenced his criticism of the cautionary rule.

When he summed up his criticism of the rule by saying "... in my view, the cautionary rule evolved in case of Rape has no rational basis and is probably contrary to the provisions of the Namibian Constitution", he clearly regarded it as a probability that the rule is unconstitutional, envisaging a future occasion when the full bench of the High Court or the Supreme Court will consider the issue anew and will then probably decide that the rule is unconstitutional.

It is furthermore clear from these passages quoted *supra,* that aforesaid criticism of the rule was not necessary for the purpose of coming to a decision. It was certainly not part of the *ratio decidendi* of the acquittal of accused No. 1 and the conviction of accused No. 2 that the cautionary rule was inapplicable.

In the circumstances it is crystal clear that the criticism of the rule in S v D amounted to *obiter dicta* and Mtambanengwe,] was consequently not bound by the said *obiter dicta.* Frank, J of course was fully entitled to express *obiter dicta* in the judgment. Such *obiter dicta* may constitute valuable guidelines which should be considered by any other Court considering the issue and particularly when deciding the issue in a binding judgment.

Mtambanengwe, J was correct in holding in the Court *a quo* that he was not bound by the *dicta* in SvD. Mtambanengwe, J was also entitled not to follow an *obiter* opinion if he felt it was not properly argued and researched, but if it was not *obiter,* he would have been bound by it because it was then a judgment of two judges, whether he agreed with it or not. In that case the only legal ground for not following the *ratio decidendi* of such judgment would have been if it had been given *per incuriam.*

Although Ms. Lategan was correct in contending that the doctrine of *stare decisis* bound a judge sitting alone to follow a two-judge decision of his own division, unless the High Court acted *per incuriam,* she erred in not realizing that Frank,]'s criticism constituted *obiter dicta,* not forming part of the *ratio decidendi* of the judgment in S_y D_and as such it did not bind the Court *a quo,* but only had persuasive authority.

The Court in Namunjepo and Others v Commanding Officer, Windhoek Prison and Others, per O'Linn, A], as he then was, dealt with Article 81 of the Namibian Constitution and explained that:

> "The binding force of the decisions of the Supreme Court on all other Courts in Namibia is termed the rule of *stare decisis.*
>
> The decision referred to in the aforesaid article is by the clearest implication only a valid decision, i.e. not a nullity vitiated by illegality or given *per incuriam.*

> What is binding on other Courts is only the *ratio decidendi* of the decision on a point which was in issue and on which it was necessary to give a decision. *Obiter dicta,* however weighty, is not binding."[2]

Both the Court in State v D as well as the Court a *quo* in this matter had the opportunity to decide whether or not the cautionary rule in sexual cases should continue to apply in Namibia. In the case of the Court a *quo,* the court applied the cautionary rule as part of its *ratio decidendi* for acquitting the accused.

Although the Court a *quo* was not bound by the *obiter dicta* in SvD[f] the issue was raised and argued before it. Furthermore the application of the rule was part of its *ratio decidendi.* The Court a *quo* could therefore not evade actually deciding as part of its *ratio decidendi,* the issue of the constitutionality of the rule measured against the Namibian Constitution, irrespective of the existence of the rule since times immemorial and notwithstanding the fact that the matter had up to the date when the matter came before the Court a *quo,* not been decided authoritatively by the Namibian High Court or Supreme Court.

2) Namunjepo And Ors v Commanding Officer, Windhoek Prison « Ors, Namibia High Court, unreported, p 30 - 31.

State v Vries, 1996(2) SACR, 638 (Nm) the judgment of 0"Linn, A.), at 654 d - h and the authorities therein referred to.

See also authorities referred to by State counsel in this case:

Hahlo and Kahn, The SA Legal System, 1968, Juta, page 251 • 252

Kahn, SALJ, 1967, Vol LXXXIV, page 310

Van Zyl en Van der Vyver, Inleiding tot die Regswetenskap, 2[ftd] edition, 1982, page 307 - 308.

In my respectful view, the High Court as well as the Supreme Court would even be duty-bound to raise the issue *mero motu,* if it appears to that Court as a reasonable possibility that the application of an existing rule of procedure or evidence may adversely affect the fairness of the trial, or the outcome of the appeal irrespective of whether it is fairness in regard to the rights and interests of the accused or fairness in regard to the rights and interests of the victim or both. If a binding decision on the point is necessary to enable the Court to come to a just decision in the case, such High Court or Supreme Court will also be duty-bound to decide the issue.

Where a single judge is however confronted with a rule such as the cautionary rule which has been applied by all the Courts in South Africa and Namibia since their inception and the issue is not strictly one of constitutionality of the rule, but merely that the rule should no longer be applied as a matter of policy because it is e.g. "based on an irrational and outdated perception", such single judge should rather apply the rule until the Supreme Court has decided the issue definitively in a binding decision.

The Supreme Court however, cannot in this appeal evade deciding the issue raised in both State v D and in this case in the Court a *quo* and on appeal before us, unless the appeal can be decided on the merits without having to decide the legal issue whether or not the cautionary rule aforesaid should continue to be applied in our Courts. In the latter case, it would however, be in the interests of justice for the Supreme Court to lay down clear guidelines on the issue.

B. THE CAUTIONARY RULE IN SEXUAL CASES:

1. The decision in State v D[f] even though it was an *obiter dictum,* is persuasive authority also for this Court, particularly because it was a decision of a bench of two judges of the Namibian High Court, given in 1991, after the Namibian Constitution, being the Supreme Law of Namibia, had come into force.

The Namibian decision in State v D has been referred to with approval in a judgment of the South African Supreme Court of Appeal in the case of State v Jackson[3].

It is apposite consequently to set out at this stage the relevant critique of the cautionary rule as it appears in the aforesaid report of the decision in S v D[4]:

> "Why cases of sexual assaults which are 'easily laid and difficult... to disprove' should be treated on a different footing is not clear. There is no empirical data to support the contention that in cases of this nature more false charges are laid than in any other category of crimes. Indeed, the evidence that is available indicates the contrary. D Hubbard A Critical discussion of the Law of Rape in Namibia states at 34 of her discussion that '(a) US study found that the incidence of false reports for rape is exactly the same as that for other felonies - about two per cent'. Why should the Court not speculate as to possible defenses in other cases as well? Why is the ordinary burden of proof applicable to all other criminal offences not applicable to cases such as the present? Surely, whatever the offence, the trial court must take the nature of the evidence into account, i e reliance upon the evidence of a single witness, an accomplice or a child. The trial court must, of course, consider the nature and

10. *1998(1) SACR, 470 (SCA) Jt 474, footnote, and 476 b*
11. *SvD,supn,pp 1451- I46g*

circumstances of the particular offence, but why must a different ultimate test be applied as suggested in RvW, *supra?*

While it is true that different motives may exist for laying false charges, this surely applies to any offence and not only to offences of a sexual nature. Of what relevance is the reference to the biblical story of Potiphar's wife except to indicate male bias? If the wife laid a false charge against Joseph, so what? False charges are laid in respect of all types of offences. I would have thought that the moral of this particular story was that one should stand by one's principles irrespective of the consequences. It would appear, however, that the reasoning in this regard is as follows. As the story appears in the Bible it is the truth. As it is the gospel truth it does not relate to a single incident but is of universal application. Thus all women are *prima facie* deceitful and act with hidden motives and all men are *prima facie* incorruptible and act without hidden motives. Hence one can speculate about motives of complainants in cases such as rape even without any evidence to suggest hidden motives. The question whether such hidden motive will be found by the trial court would depend, it seems to me, to a very large extent upon the fecundity of the presiding officer's imagination.

The cautionary rule relating to cases of sexual assault applies to all cases of this nature irrespective of the sex of the complainant (S_v C 1965(3) SA 105 (N)).

This, however, does not alter the fact that in the overwhelming majority of cases the complainants are female. Given the social fabric of society in Namibia this state of affairs is hardly likely to change. In this Court, for example, there were 31 cases involving sexual assault during 1990 with not a single one involving a male complainant. In my view one can safely assume that in at least 95% of the cases of this nature the complainants are female. Taking this factual situation into consideration, I am of the view that the so-called cautionary rule has no other purpose than to discriminate against women complainants. This rule thus probably also is contrary to art 10 of the Namibian Constitution which provides for the equality of all persons before the law regardless of sex.

To sum up, in my view, the cautionary rule evolved in cases of rape has no rational basis for its existence and should therefore not form part of our law and is probably contrary to the provisions of the Namibian Constitution.

> In conclusion, I must emphasise, however, that this does not mean that the nature and circumstances of the alleged offence need not be considered carefully."

2. J Kriegler, the author of the 5th Ed, of Hiemstra, Suid-Afirkaanse Strafproses, 5de Uitgawe, comments that the criticism in S v D of the cautionary rule, "is not deserved" (onverdiend). (My free translation from the Afrikaans.)

Kriegler is presently still an eminent judge of the Constitutional Court of South Africa. In view of his lucid exposition of the rule followed by his comment on S_y_D, it is appropriate to quote the whole of his comment in regard to these aspects:

> "Sexual acts - Because of distinctive considerations, a peculiar cautionary rule applies in the case of alleged sexual offences. Complaints of a sexual nature are distinguished for several unique characteristics which distinguish such offences from other offences against the person. Sexual offences, being inherently intimate, normally take place in seclusion; consequently direct corroboration is exceptional. Unlike the case of most other impairments of the person, there often are no recognizable effects of such actions. Even those which are recognizable are often just as reconcilable with participation with consent, as participation obtained by force. As in the case of an accomplice, the participant in an alleged sexual offence is obviously also extraordinarily capable of bending the truth without it being possible to detect the distortion. Allegations of sexual crimes are consequently not only easily made but often difficult to counter.
>
> The problem does not only lie with malicious incrimination. The human sexual urge is by its very nature irrational, and are often distinguished by deep-seated emotions and passions of which the person himself/herself is unaware; therefor the versions of the participants are afterwards often unreliable without them being aware of it; Moreover, judicial credibility findings and weighing up of probabilities by Courts are in such instances more fallible than ever. Rational criteria can only be applied to irrational material with great circumspection. When you deal with crimes

against women, particularly in tradition-bound communities cultural beliefs (e.g. that the male person must be seen as the 'hunter) often plays an unexpressed role which should not be underestimated. External factors such as current moral norms or communal or family sanctions often play a role which makes the function of the judes facti more difficult. Known internal factors such as feelings of guilt, shame, disappointment or frustration is even more difficult to establish or to evaluate. Furthermore, experience has learnt that there are sometimes psychosexual factors which even common sense cannot detect. Our practice insists that the judicial officer who has to decide the facts, must at all times be aware of the problematic nature of this type of case and that must be recognizable from the evaluation by the said judicial officer of the facts of the case that he/she was aware of the said problematic nature of the case and duly considered it. (fi v Rautenbach 1949 1 SA 135 (A) 143; R v W 1949 3 SA 772 (A); R v D and Others 1951 4 SA 450 (A) 456; R_vJ *supra* 92A-D; S v Snvman 1968 2 SA 582 (A) 585 C-G; S_v Balhuber 1987 1 PH H22 (A), which is found more fully reported in S v F 1989 3 SA 847 (A) 852H-855B; S v S 1990 1 SASV 5 (A) 8). In S v F *supra,* there appears two illuminating quotations from Glanville Williams The Proof of Guilt 3rd Ed., 158- 159 en 160.

Because the witness of sexual crimes are mostly women, the cautionary rule is sometimes called sexistic. (See eg. The strong criticism on what is regarded as the origin and effect of the rule in S v D 1992 (1) SACR 143 Nm. This reproach is not deserved because the rule is based on strong grounds of principle which do not specifically relate to the gender of the victim.

This notwithstanding, the criminal procedure is ■ especially in practice - not wholly to be exonerated from aloofness and even prejudice against women complainants in sexual offences. The cautionary rule is no pretext and not a license for discrimination or for personal views on gender roles ." S

(My emphasis added. The above is my free translation from the Afrikaans.)

There is much to be said for the views of Kriegler. The logic behind the rule and the special factors involved in sexual cases are set out in a manner which

5) Hiemstn, Suid-Afrikunse Strafprose$, Sde Ukgiwe, J Kriegler, at 506 • 507, under heading "sekstundelinge".

are understandable and which contradict the argument that the rule is aimed at discriminating against women because they are women.

I do not however, agree with Kriegler's equation of a women victim in a sexual case with an accomplice where he says:

> "As in the case of an accomplice, the participant (deelnemer) in an alleged sexual crime is of course also exceptionally capable of bending the truth without it being possible to detect such bending of the truth". (My free translation from Afrikaans)

The point is that the victim in the alleged sexual crime is not a participant, except perhaps in cases of minors and persons under age who have consented to the sexual deed.

Kriegler sets out the gist of the rule as follows: "the adjudicator of the facts must throughout be cautious of the special problems in this type of case and that it must be clear from the Courts evaluation of the facts that the evidence was approached and considered in this manner". (My free translation and emphasis.)

It is clear from Kriegler's explanation that the evil guarded against is not restricted to the greater risk of false incrimination, but the greater risk of "wrong" incrimination, which may even be *bona fide.*

The rule is unfortunately difficult to apply because of its inherent vagueness. Even if it is conceded that the rule does not require "corroboration" as such, how then does a Court distinguish it from corroboration? Some Courts consequently simply require corroboration, whilst others merely warn themselves to be alert to the special problems that may arise in sexual cases, not being that women complainants are prone to lie, but that it is often more difficult to establish the truth in sexual cases compared to cases where crimes such as theft are involved.

The cautionary rule becomes even more complicated where the complainant is a child and/or a single witness where the Court has to apply in effect three cautionary rules which are overlapping to some extent.

Although both the Namibian decision in S v D and the South African decision in S v lackson, *supra,* amount to strong persuasive opinion for this Court on this issue, the following reservation must be made.

In S v D it was accepted as a fact that:

> "There is no empirical data to support the contention that in cases of this nature more false charges are laid than in any other category of crimes. Indeed, the evidence that is available indicates the contrary. D. Hubbard, A Critical Discussion of the Law of Rape in Namibia, states at 34 of her discussion that 'a U.S. Study has found that the incidence of false reports for rape is exactly the same as that for other felonies - about two percent'." (My emphasis added.)

In S v lackson - Olivier, JA said:

> "... what proof is there of the assumptions underlying the rule? The fact is that such empirical research as has been done refutes the notion that women lie more easily or frequently than men, or that they are intrinsically unreliable witnesses."

As authority for this statement the learned judge refers *inter alia* to S v D and the aforesaid paper by Dianne Hubbard referred to above and the LLM-thesis, University of Cape Town, of one Collean Helen Hall.

Olivier, }A further relies for the same alleged statistic on a publication by D J Birch, "Corroboration in Criminal Trial: A Review of the proposals of the Law Commission's Workshop Paper" for the alleged fact that the New York Sex Crimes Analysis Unit has "carefully analysed all allegations made to them over a period of two years" and that "...they found that the rate of false allegations for rape and sexual offences was around two percent, which was comparable to the rate for unfounded complaints of other criminal offences".

The ease with which the courts have accepted in their judgments, statements of fact regarding the statistics involved, contained in "papers" by authors, without having heard testimony of such authors in the course of the trial, surprises me.

This tendency is seen mostly in cases dealing with alleged breaches of fundamental human rights and freedoms and where the issue in question, has become an emotional issue.

1 do not suggest for a moment that the "authors" relied on are not credible and that the alleged facts or statistics are not the truth. The problem is rather that if the Courts relax their rules as to the requirements for the admission of hearsay evidence or of the opinions of experts in such cases, it will be difficult if not impossible, to draw the line when the courts deal with any other issue of fact or opinion. Such a tendency will not strengthen the search for the truth, but will frustrate it/

I will consequently assume for the purpose of this judgment that there is no empirical evidence properly placed before this court to support the contention that in cases of this nature more false charges are laid than in any other category of crime but will on the other hand not assume "that the evidence available, indicates the contrary."

4. The South African Supreme Court of Appeal decision in State v lackson. overruled the decisions of the South African courts given in a long line of cases dating from the inception of the Courts up to and including the decision of the Appellate division of the Supreme Court of South Africa in S v F.[7] The

6~) See e.g. *Schmidt, Bewysreg, 2* Ed p 432 • 436. Sduth* Afr/an Lnv Evidence, *4th Ed, 97 ■ 104*

7) Sure *v F, 1989(3) SA 847 (A) it 8S3* et *seq.*

decision in S v lackson, being the later decision, is binding on all other Courts in South Africa, except perhaps on the Constitutional Court.

The decisions of the Appellate Division of the Supreme Court of South Africa were binding on Namibia up to the date of its independence in March 1990. As from that date decisions of the said Appellate Division and the subsequent Supreme Court of Appeal, only have persuasive authority.

There is also in principle, no preference in Namibia for one decision of South Africa's highest appeal Court over another of the same Court. The weight of the authority would vary with the persuasiveness, judged from the reasons given and to what extent these reasons are based on constitutional provisions and other laws identical or similar to the provisions of the Namibian Constitution and other legislation which may be applicable.

The decision in S v lackson, even though not binding in Namibia, has strong persuasive force. It is justified in the circumstances to refer in some detail to that part of the judgment in State v lackson which sets out the reasons of that Court, per Olivier JA, for striking down the rule in South Africa.

> "In this Court it was argued on behalf of the appellant that the trial court misdirected itself in not truly applying the cautionary rule in respect of the evidence of complainants in sexual cases. It was argued that the magistrate merely paid lip service to the rule. Counsel for the State gainsaid this, but also argued that the basis, meaning and ambit of the cautionary rule should be revisited. She argued that the rule, as it now applied in practice, is discriminatory towards women, should not be countenanced, is

unnecessary, and unfairly increases the burden of proof resting on the State in cases involving sexual offences.

The rule was expressed by the Court in S v Snyman 1968 (2) SA 582 (A) at 585C - H per Holmes J A as follows:

'Unlike an accomplice in a criminal trial, a complainant in a sexual case is not ex *hypothesi* a criminal. Nevertheless in respect of both of them there exists an inherent danger in relying on their testimony. First, various motives may induce them to substitute the accused for the culprit. Second, from their participation in events which actually happened, each has a deceptive facility for convincing testimony, the only fiction being the deft substitution of the accused for the real culprit. Hence in sexual cases there has grown up a cautionary rule of practice (similar to that in accomplice cases) which requires -

12. the recognition by the Court of the inherent danger aforesaid; and

13. the existence of some safeguard reducing the risk of wrong conviction, such as corroboration of the complainant in a respect implicating the accused, or the absence of gainsaying evidence from him, or his mendacity as a witness...

Satisfaction of (a) and (b) will not per se warrant a conviction, for the ultimate requirement is proof beyond reasonable doubt; and this depends upon an appraisal of the totality of the evidence and the degree of safeguard aforesaid... In this connection 1 respectfully agree with the observations of Macdonald AJP, in the Southern Rhodesian Appellate Division case of R v 1 1966 (1) SA 88 at 90, to the effect that, .while there is always need for special caution in scrutinising and weighing the evidence of young children, complainants in sexual cases, accomplices and, generally, the evidence of a single witness, the exercise of caution should not be allowed to displace the exercise of common sense.[1]

The academic and legal literature on the history, *raison d'etre* and justification of the said rule is extensive and impressive. I have considered these contributions, but in view of the clear conclusions to which I have come, it is not necessary to review them in detail. I shall summarise my conclusions as follows:

The notion that women are habitually inclined to lie about being raped is of ancient origin. In our country, as in others, judges have attempted to justify the cautionary rule by relying on

'collective wisdom and experience' (see the judgment of this Court in S v Blabber 1987 (1) PH H22 (A) as discussed in JLE 1989 (3) SA 847 (A) at 853 etseq.; 854F-855B. See also S v *M* 1992 (2) SACR 188 (W)). This was also the justification, before the reform of the law, in the UK (see R v Hester 1973 AC 296 at 309; Director of Public Prosecutions v Kilbourne [1973] AC 729 at 739 et seq.). This justification lacks any factual or reality-based foundation, and can be exposed as a myth simply by asking: whose wisdom? whose experience? what proof is there of the assumptions underlying the rule?

The fact is that such empirical research as has been done refutes the notion that women lie more easily or frequently than men, or that they are intrinsically unreliable witnesses. An English Law Commission Working Paper (No 115, 57-58) also found no evidence to substantiate the cliche that the danger of false accusations is likely to exist merely because of the sexual character of the charge, and the Supreme Court of California, in P v Rincon - Pineda (14 Cal 3d 864), despite a detailed examination of empirical data, found no evidence that complainants in sexual cases are more untruthful than complainants in other cases. It concluded that the rule was one without a foundation; that it was unwarranted by law of reason; that it discriminates against women, denies them equal protection of the law and assists in the brutalisation of rape victims by providing an unequal balance between their rights and those of the accused.

The New York Sex Crimes Analysis Unit carefully analysed all allegations made to them over a period of two years. They found that the rate of false allegations for rape and sexual offences was around two percent, which was comparable to the rate for unfounded complaints of other criminal offences (see D] Birch, * Corroboration in Criminal Trials: A Review of the Proposals of the Law Commission's Working Paper'f Criminal Law Review (1990) 667 at 678 note 69).

The oft quoted statement by Lord Hale C] in the seventeenth century that it is easy to bring a charge of rape (and difficult to refute it) is, with respect, insupportable.

Few things may be more difficult and humiliating for a women than to cry rape: she is often, within certain communities, considered to have lost her credibility; she may be seen as unchaste and unworthy of respect; her community may turn their back on her; she has to undergo the most harrowing cross-examination in court, where the intimate details of the crime are traversed ad nauseam; she (but not the accused) may be required

to reveal her previous sexual history; she may disqualify herself in the marriage market, and many husbands turn their backs on a 'soiled' wife.

It is also sometimes said that the rule does not affect the State's burden of proof. This is not correct. In RvW 1949 (3) SA 772 (A) Watermeyer C] at 783 said that had the case been one of theft, the evidence would have satisfied the test of proof beyond reasonable doubt; but because the case was one of sexual assault, the same evidence would not suffice, in that case the accused was found not guilty because the case against him had not been proved beyond reasonable doubt although the trial court found strongly in favour of the truthfulness of the complainant and against that of the appellant.

In comparable modern systems, the cautionary rule and its variations have been abolished.

In Namibia, this was effected by the judgment of Frank J in S v D and Another (supra) and in Canada by s 8, chap 93 of the Criminal Law Amendment Act, 1974-75-76. (See Jeffrey G Hoskins 'The Rise and Fall of the Corroboration Rule in Sexual Offence Cases' vol 4 Canadian "Journal of Family Law 1983: 173-214.)

In the UK the obligatory nature of the rule was abrogated by s 32(1) of the Criminal Justice and Public Order Act, 1994. (Discussed by Peter Mirfield 'Corroboration after the 1994 Act' in Criminal Law Review (1995) 448 *etseq.)*

In New Zealand the rule was abolished by the Evidence Amendment Act (No 2) of 1985 (See John Hatchard in "Journal of African Law 1993: 97 at 98 note 9), and in Australia by s 62(3) of the Crimes Act (see Law Reform Commission of Victoria: Report on Rape and Allied Offences: Procedure and Evidence (March 1998) 39 par 94).

In California it was held in P v Rincon - Pineda *(supra)* that the rule was unwarranted by law or reason (see also the discussion by John Hatchard *(supra* at 98 *etseq.)).*

In my view, the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In bur system of law, the burden is on the State to prove the guilt of an accused beyond reasonable doubt -no more and no less. The evidence in a particular case may call

for a cautionary approach, but that is a far cry from the application of a general cautionary rule.

In formulating this approach to the cautionary rule under discussion I respectfully endorse the guidance provided by the Court of Appeal in R v Makaniuola, R v Easton [1995] 3 All ER 730 CA), a decision given after the legislative abrogation of the cautionary rule in England. Although the guidelines in that judgment were developed with a jury system in mind, the same approach, mutatis mutandis, is applicable to our law.

At 732f-733a Lord Taylor C] stated:

> 'Given that the requirement of a corroboration direction is abrogated in the terms of s 32 (1), we have been invited to give guidance as to the circumstances in which, as a matter of discretion, a judge ought in summing up to a jury to urge caution in regard to a particular witness and the terms in which that should be done. The circumstances and evidence in criminal cases are infinitely variable and it is impossible to categorise how a judge should deal with them. But it is clear that to carry on giving "discretionary" warnings generally and in the same terms as were previously obligatory would be contrary to the policy and purpose of the 1994 Act. Whether, as a matter of discretion, a judge should give any warning and if so its strength and terms must depend upon the content and manner of the witness's evidence, the circumstances of the case and the issues raised. The judge will often consider that no special warning is required at all. Where, however, the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence. We stress that these observations are merely illustrative of some, not all, of the factors which judges may take into account in measuring where a witness stands in the scale of reliability and what response they should make at that level in their directions to the jury. We also stress that judges are not required to conform to any formula and this court would be slow to interfere with the exercise of

> discretion by a trial judge who has the advantage of assessing the manner of a witness's evidence as well as its content.'
>
> Lord Taylor C] then formulated eight guidelines, the third of which is particularly important for our purposes. It reads as follows (see at 733c-d):
>
> '(3) In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant of a sexual offence nor will it necessarily be so because a witness is alleged to be an accomplice. There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential bais doesn not include mere suggestion by cross-examining counsel.' (My emphasis.)
>
> It follows that the magistrate was not oblighed to apply such a rule."

Further to the comments made earlier in this judgment on the issue whether or not certain facts accepted by the court in both S v D and S v lackson were properly put before those Courts, the following additional observations need be made:

4.1 The Court in S v lackson, wrongly held that the abolition of the cautionary rule was effected in Namibia by the judgment of Frank,] in SvDs A."

The remarks in S v D criticising the rule, were, as already shown *supra, obiter dicta* and consequently the rule was not abolished in the said judgment.

4.2 It seems that the Court in S v D suggested two possible bases for the abolition of the rule - namely:

(i) the rule has no rational basis for its existence and should therefore not form part of our law;

and/or (ii) It is contrary to the provisions of Art. 10 of the Namibian Constitution, which provides for equality of all persons before the law regardless of sex. In S v Jackson, the Court appears not to have based its decision on the "unconstitutionality" of the rule. The ratio for not applying the rule is expressed in the following words:

> "In my view, the cautionary rule in sexual assault cases is based on an irrational and outdated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of an accused beyond reasonable doubt - no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from a general cautionary rule."[8]

4.3 The Court in S v lackson in my view also correctly summed up some of the hardships that complainants in rape cases have to endure in criminal trials. Olivier JA, referred to this ordeal in the following terms:

8) Sv Jackson, p 476 e

> "Few things may be more difficult and humiliating for women than to cry rape; she is often, within certain communities, considered to have lost her credibility; she may be seen as unchaste And unworthy of respect; her community may turn their back on her; she has to undergo the most harrowing cross-examination in Court, where the intimate details of the crime are traversed *ad nauseam;* she (but not the accused) may be required to reveal her previous sexual history; she may disqualify herself in the marriage market, and many husbands turned their backs on a soiled wife."

The above quotation of course also underlines the fact that sexual crimes must be distinguished from crimes such as theft, where different factors have to be considered. This distinction also underlies the cautionary rule in sexual cases. But the intention of Olivier]A, was to argue against the rule because of the heavy burden laid on victims in sexual cases, in addition to that imposed by the cautionary rule.

In my respectful view, the rule has outlived its usefulness. These are no convincing reasons for its continued application. The constitutional requirement contained in Article 12 of the Namibian Constitution that the accused is presumed innocent until proved beyond reasonable doubt to be guilty, once again reiterates and reinforces a fundamental principle of our criminal law and procedure. This principle, together with cautionary rules regarding the evidence of youthful witnesses, particularly children and the evidence of single witnesses, would in the normal run of cases, afford sufficient protection to the innocent accused. The additional burden of the

application of the cautionary

rule, may adversely infringe on the fundamental rights of the victims to the protection of their fundamental rights, which include a fair trial also in regard to such victims' rights and interests. Serious crime in Namibia is prevalent, and probably escalating. Society is outraged by this phenomenon. It is a notorious fact that many Namibians believe that the Courts, among others, over-emphasize the rights of the perpetrators of crime and under-emphasize those of the victims including those of the women and child victims in sexual crimes.

The cautionary rule in sexual cases, in particular, is perceived by many, including leaders of society, academics and other informed persons, in addition to women's-rights activists and the victims themselves, as an example of a rule in practice, which places an additional burden on victims in sexual cases which is not only unnecessary, but may lead to grave injustice to the victims involved.

The Courts also have a constitutional duty to protect the fundamental rights of victims[9] and in this regard are also required to consider and give some weight to the contemporary norms, views and opinions of Namibian Society.

9) *SvVdBerg / 995(4) BCLR 479 Nm at 495 F ■ I also reported in I196(I)SACR l9Nmat490B-49l B S v Strowitsky 6f An NmHC, 15/7/96 unreported, section G of judgment. 5 v Vries 1996(2) SACR 639 Nmat66if- 662 c 5 v Namunjebo, High Court, Namibia unreported and the Supreme Court decision dated 1999/07/09.,*

In the result, I hold that the cautionary rule in sexual cases should not be applied by Courts in Namibia.

I however, also reiterate and adopt the concluding remarks in S v D, *supra,* where Frank J, said:

> "I must emphasize however, that this does not mean that the nature and circumstances of the alleged offence need not be considered carefully."

And as stated by Olivier,]A, in S v lackson, *supra,* "the evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule."

I also find it useful, as the South African Supreme Court of Appeal did in S v lackson, *supra,* to adopt the guideline laid down by Lord Taylor C] in R v Makonjuola, R v Easton[10], when laying down guidelines for the direction of a judge to the jury in sexual assault cases after the cautionary rule had already been abrogated in England by legislation.

As we have no jury system and the cautionary rule has not yet been abrogated by legislation in Namibia, the guideline as stated by Lord Taylor has to be adapted for our purposes to read as follows:

to)
1995(3) All □R *730 CA*

> In some cases it may be appropriate for the judge to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant in a sexual offence, nor will it necessarily be so because a witness is alleged to be an accomplice. There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestions by cross-examining counsel.

It has been argued in S v D that the cautionary rule is also unconstitutional because it discriminates unfairly against women as women and is thus in breech of Article 10 of the Namibian Constitution.

It is however, not necessary to decide that issue because of the conclusion already reached by following the same route as that in S_v Jackson, *supra.*

THE FACTS:

In view of the fact that this Court holds the view that the cautionary rule discussed above, should not be applied by Namibian Courts, the Court a *quo* must be taken to have misdirected itself in applying the rule.

As a consequence this Court is not bound by the credibility findings of the Court a *quo* and is at large in considering the evidence on record.

1. The facts which were common cause or not in dispute:

1.1 The complainant was a female child aged 11 at the time of the alleged crimes and consequently under the age of consent.

14. The accused is a male person 36 years of age.

15. The complainant was in fact raped.

16. The complainant was examined by a medical practitioner 4 days after the alleged rape. At that stage it was found that complainant had suffered the following injuries set out in the report:

"Breasts - abrasion right breast;

Labia majora - bruising;

Vestibule - bruising;

Hymen - completely torn;

Fourchette - abrasions, anterior and post-fourchette;

Perineum - bleeding abrasions;

Discharge - bioody;

Haemorrhage - moderate bleeding;

Examination - painful; ti

Dr. Damaseb in addition found: "Multiple abrasions back, R-breast, left and right knees and ankles".

1.5 The complainant was taken by accused from Grootfontein, where he first met her, to Berg Aukas, a farm 18 kilometers from Grootfontein, where she was found by the police and taken back to Grootfontein.

1.6 Neither the father of the complainant or the Superintendent of the hostel nor any other person gave consent to the accused to take the child from Grootfontein to Berg Aukas.

The father of the complainant, one Jonas Gaeseb, had in fact brought the complainant to Grootfontein on the Sunday, the 1st of October 1995, at the end of the weekend where he left her in the care of her sister in law to take the child to the hostel at the Makalani Primary School.

1.7 When the accused and the child arrived at Berg Aukas on foot, they were met by the sister of the accused, one Maria Katamba.

17. Maria noticed that the complainant was injured. The child appeared to Maria Katamba as unhappy and frightened, and did not appear to want to be with the accused. The accused told her when asked, that the girl was his girlfriend and her sister in law.

18. Maria Katamba informed the farm foreman of the presence of the girl on the farm.

19. The investigating officer Van Niekerk arrived on the farm at Berg Aukas on Wednesday, 4th October 1995, after having received information of the suspicious presence on the farm of an adult male in the company of a young girl and found the complainant. He immediately saw that she had been assaulted "because her face was swollen up and blue". He further testified: "I asked her what had happened and she then told me that a certain man, Michael Katamba, the accused before Court, had assaulted her and had sexual intercourse with her without her consent". The complainant was afraid and appeared tense and nervous.

1.11 At the section 119 proceedings before the magistrate the accused pleaded not guilty to al the charges and gave the following explanation

of plea:

> "I have proposed complainant. After she agreed - with her consent we went together. I was not at the mentioned hostei. 1 met complainant at the location".

The aforesaid section 119 proceedings was handed in at the hearing of the accused in the Court a *quo* without any objection from the defence.

1.12 The accused's defence in the Court *a quo* was in brief according to the trial judge:

> "The accused's story is a complete denial that he abducted or kidnapped the girl and that he raped her or assaulted her. His evidence in brief is that she went with him from the location to the farm on her own free will. He and three friends were drinking at a shebeen on the day in question. At around 20h00 complainant arrived and asked for assistance. He stood up and walked out of the yard with her and she asked him to stop and told him she had been assaulted by 4 guys at the single quarters and asked that he should accompany her to the place where she was assaulted. She was dirty and covered with dust and her eyes were swollen. He went with her to the place and found nobody there, but they found one of her slip-on shoes at the scene, that is at the scene where the girl alleged that she had been assaulted. After that he took her to Mulunga police station. She refused to go in, to make a report. He then said if she didn't want to do so, he would leave her. And as he left, he found her following him. And then they went to a house where he had left his dogs, and this house was near a military base called Ulkamp. Thereafter they left and went to a rubbish dump where he had left his belongings. They slept there till the following morning. And then they left for the farm near Berg Aukas where he was going job hunting, he had spent another two days there and on the third day the police came and fetched the complainant while he was away. It is common cause that there at the farm complainant slept next to the accused the two nights they slept there, and nothing happened, and also that at the dumping place where the two slept the first night nothing

happened to her.

It is also common cause that during the days that they were at the farm accused was not always present with complainant. The accused denied assaulting complainant in the bush behind the school mentioned by the complainant or that he had a knife. Under cross-examination he said when he saw this girl, the way she was, that is that she was badly hurt, he felt very bad. He felt pity for her. He had stood up and left her with the three friends at the shebeen because he was on his way to the farm. The complainant had then called him and he stopped and she said, Ouboetie-, a call to an elder male person. He insisted she called after him and stopped him as he was leaving her with the three drinking friends. And to assist her he thought he should go to the place where she said she had been assaulted to find out who had done so, as she had requested him to accompany her there. He had only known complainant's father at that stage. Complainant had told him her name but she did not want to tell her parents' names. Asked why he had not thought of taking her to the hospital for treatment, he said he had taken her to the police station and she refused to go in. And he said for the entire 4 days that he was with her he had done nothing to her. Asked whether he was glad to be with her he said he did not feel bad because 'he had brought her to the people so that she could tell the people what was wrong[1]. He further said in answer to a question, she never told him she was attending school. He had not himself gone into the police station because he was afraid he will be locked up for being drunk as this normally happened in Grootfontein. And he feared he could also have been assaulted by other inmates if he was detained. He had not taken her to her father at that stage, he did not know where he was. He said he could not make any comment whether she had also been raped when she came to him.

In short he denied the complainant's allegations as put to him one by one and said it was inconceivable. It did not happen that he raped her because he wanted her as his wife, she was too young. He denied having had a conversation with his sister about the complainant being his girlfriend and saying that he wanted her to go to school. He insisted" he went to the farm and she followed him. He had not told people at the farm to take her to hospital but left it to her to do so because she had refused

> to lodge a complaint with the police. It was put to him that he wielded force on her and she had no opportunity to leave. And his answer which is common cause, was 'Weil on the Tuesday and the Wednesday I was not on the farm, she could have left if she wanted'. It was about 2 km from where we were to Berg Aukas."

2. The Probabilities:

It was the above defence which the court found not to be improbable "in the circumstances".

20. One of the "circumstances" was of course the application of the cautionary rule and this rule obviously affected and tainted the Courts finding on all the facts, including the abovestated finding on the probabilities.

21. The only dispute in regard to the rape charge was whether the complainant was raped by the accused as alleged by the complainant, or by some other persons, prior to her meeting with the accused as suggested by the accused.

The only evidence about another person or persons was that of accused at his trial, where he alleged that the complainant, when he met her at a shebeen where he was drinking with three friends, walked in and told him that she had been assaulted and raped by 4 guys at the single quarters. He then noticed "that she was already badly hurt.

This evidence was of course contradicted by the complainant.

The only issue in dispute was therefore whether the accused was the rapist.

This was however, not a defence of "mistaken" identity, but a defence necessitating a finding that the complainant, although badly assaulted and violently raped by four thugs, deliberately and falsely alleges that her benefactor, the accused, had abducted, assaulted and raped her.

There can be no motive for such a fabrication and not even reliance on the cautionary rule, could suggest one.

It is extremely difficult to believe that a young girl who had just been assaulted and raped by a gang of four, would refuse to go into the police station when brought there by an adult, but immediately follow a stranger through the bush to an unknown destination for 18 kilometers on foot, away from the surroundings at Grootfontein known to her, such as the police station, the hostel where she stayed for schooling purposes, the hospital and clinic etc.

The excuses put forward by the accused for not taking the complainant into the police station, or to the hospital and clinic are flimsy in the extreme.

According to the accused he had compassion for complainant, but soon after her complaint, he left her with his drinking friends at the shebeen. But she ran after him. She asks him to accompany her to the scene of crime and they visit the scene, but thereafter she refuses to go into the police station. The accused first indicates that he did not take her to the hospital or clinic, apparently because she refused to go into the police station. But later he says under cross-examination that he never thought of taking her to the hospital or clinic. Notwithstanding her injuries and sorry state, he takes her for a 18 kilometers walk through the bush to a farm at Berg Aukas, where there are no police, medical help or people known to her.

There can be no doubt that his story is highly improbable and patently false.

The Court consequently also misdirected itself on this issue.

3. The conflicting defences:

The plea explanation of the accused at the section 119 proceedings, was conflicting with his later defence in Court.

The defence at the section 119 proceedings was not that the complainant had followed him and that he had reluctantly allowed her to do so - but that:

(i) He had proposed the complainant and

(ii) After she agreed - with her consent they went together.

The Court ignored or alternatively, gave no weight to this glaring inconsistency, in the accused's defences.

Furthermore, the said plea explanation gives support to the evidence of Maria Katamba that accused told her when she enquired, that the child is his girlfriend and her sister in law. His statement in the course of his evidence in Court that he wanted to take the girl as his wife points in the same direction.

This again supports the evidence that motive of the accused was a sexual one and that he had intercourse with her.

It is probable that the accused's first defence was consent, but when he was later told or realised for some reason or other that consent would be no defence in view of the fact that the girl was under the age of consent, he invented the story that she had been assaulted prior to his

meeting with her and that she told him that she had been raped by four others persons.

The Court once again misdirected itself when it ignored the inconsistent defence at the section 119 proceedings and its significance or failed to give it the necessary weight.

4. The corroboration of the complainant's testimony:

There was strong corroboration for the complainant's evidence in all important respects, *inter alia:*

22. The complainant was in fact assaulted and raped. That is common cause.

23. When the police arrived at Berg Aukas she immediately complained that the accused had assaulted and raped her.

24. She was in the company of the accused for a few days and she could consequently not have made a mistake in identifying the accused as the rapist.

4.4 Maria Katamba, sister of the accused corroborated her evidence *inter alia* by testifying that:

(i) The accused admitted to her that the complainant was his girlfriend and she was complainant's sister in law.

(ii) The accused had admitted to her that he had assaulted the complainant.

(iii) The complainant was nervous and appeared to be afraid during her stay at Berg Aukas.

5. Other diverse reasons of the Court for holding that the story of the accused was not improbable and that the State has not proved its case beyond reasonable doubt.

5.1 The Court refers to the fact that the State did not challenge that part of the evidence in chief of the accused that they found only one of the slip-on shoes of the complainant at the scene, where according to the accused the complainant had taken him to show where the four men had raped her.

It would have been better if state counsel specifically put it to the accused in cross-examination that he was lying on this point.

The reason why the State did not put this point in particular appears to be that the state put it to the accused that his whole story was preposterous and in the course of this put the essence of the state case and the sequence of events to the accused, which clearly excluded that the complainant had been raped by any other persons, that complainant had said that to the accused and that she had even taken him to the scene of the alleged rape where they had found one of her shoes at the place pointed out.

Surely, even if the State can be criticised for not traversing the point specifically and pointedly in cross-examination, it can never justify the court regarding this as some implied admission of the accussed's evidence on the point.

Furthermore, the defence never put this allegation to the complainant in cross-examination, as it should have done if it was serious about the story. As a matter of fact the Court itself stated in its judgment: "Accused's defence in detail was put to the complainant question by question and she denied it accordingly.

This fact also indicates that the so-called visit to the scene of the alleged assault by the four strangers, was an

afterthought.

Even if counsel on either side erred in not canvassing the point in their cross-examination, it was the Courts duty, in the absence of an application by the State to recall the complainant, to *mero motu* recall the complainant to allow her to deal with the issue raised by the defence for the first time in the evidence in chief of the accused."

5.2 The Court considered as very important the fact that the complainant did not point out the rape-scene to the police.

It is not alleged that the complainant had not told the police in her statement, as she did in her *viva voce* evidence, that she had been raped twice behind the school.

In this regard Ms Lategan for the State made the following submission: "... it must be taken into account that she is a child, she is dependent on the police on how they chose to handle the investigation. From the investigating officer's evidence it appears that there was a communication gap between the complainant and the policeman with regard to this very aspect. Van Niekerk understood the places from which he

/ /; *See the decisions in SvVd Berg 1995(4) BCLR 479Nm x 489E- 190 H, 3lso reported in* 1*996(1) SACR 19 (Nm)*
See *note 9 jnd decisions therein referred to.*

took photographs to be the places, where the accused had sex with the complainant although she in fact said: "Dit is die plek waar die beskuidigde met my geslaap het". ("This is the piace where the accused slept with me.") (My free translation from the Afrikaans.)

The Court a *quo* appears to have accepted that there was a problem with regard to interpretation.

But what the Court appears to have overlooked, is that the investigating officer Van Niekerk testified that he had not asked the complainant to point out where the accused had assaulted her.

The reason why he never asked her, appears to be that when she pointed out where she and accused had slept, (In Afrikaans, dit is die plek waar ons geslaap het), Van Niekerk assumed that she meant that that is the place where the accused had allegedly assaulted and raped the complainant.

Van Niekerk was wrong in such assumption, and the Court should have considered the position from that starting point.

Again, it seems that the complainant was never confronted in cross-examination by defence counsel or by the Court with her alleged failure to point out to the police the place at Grootfontein where she had been assaulted and raped. The State again failed to apply for the recall of the complainant to clear up the issue and the Court again failed to follow the guidelines in S v Van den Berg, *supra,* to enable the complainant to deal with the alleged omission on her part. In any event it is trite practice that when a party wishes to rely on a specific circumstance or alleged omission on the part of a witness, to discredit that witness, such circumstance or omission should be put to that witness to enable him or her to deal with the alleged fact or omission.

In my respectful view, this case again demonstrates the need of Courts to follow the guidelines set out in S v Van den Berg, *supra,* and applied in several decisions thereafter, in order to do justice also to the fundamental rights of the victim.

It seems that there is substance in the above-quoted comment of defence counsel. The Court *a quo,* in my respectful view, misdirected itself regarding the alleged failure to point out to the police the place where the complainant was assaulted and raped.

5.3 The Court further criticised the evidence of the complainant on the following grounds:

(i) She did not report to Maria Katamba.

(ii) She did not report to the house near the military camp at Grootfontein.

(iii) She did not run away.

(iv) There is a contradiction between her evidence and that of Maria Katamba.

I agree in substance with the submissions of state counsel on these points. It amounts to this: We are dealing with a young child. On her evidence she was brutally raped, assaulted and abused by an adult. The people referred to by the Court to whom she could have reported were strangers. Berg Aukas was at least 18 kilometers from Grootfontein if you walked straight through the bush. The child complainant did not know the road, but even if she did she remained under the control of the accused. Even if he was not always in her immediate presence, she did not know his whereabouts.

There is a small measure of contradiction between her and Maria Katamba. So e.g. complainant testified that she told Maria that the accused had sex with her. Maria denies that. But Maria was also afraid of her brother. She was also a reluctant witness in view of the fact that the accused was her brother. Nevertheless, she testified that she did ask the accused about the cause of the girl's injuries and accused admitted to her that he was the one who assaulted the girl. She also testified that the accused had told her that the girl was his girlfriend and that she, Maria Katamba was the sister in law of the complainant. Maria was also the person who contacted the farm foreman and reported the presence of the accused and the girl and asked for advice. The advice was *inter alia,* that they should contact the police which was then done.

It follows from the above that the Courts criticism of the evidence of the little girl, was to say the least, unconvincing.

25. The Court found fault with the evidence of Maria Katamba. Again the criticism of Maria's evidence is unsubstantial. The Court should have accepted her evidence in substance, which it failed to do.

26. The Court found corroboration for the evidence of the accused in the evidence of the complainant. The main "corroboration" relied on by the Court appears to be the alleged failure of the complainant to point

out to the police the place at Grootfontein where she had been allegedly raped by the accused. I have already indicated *supra,* that the failure to point out cannot be held against the complainant in the circumstances there set out. For the same reason it cannot serve as "corroboration" of the accused.

There is no other valid point of corroboration for the story of the accused. His evidence stands alone in all respects where he purports to contradict the evidence of the state witnesses.

8. The accused rather corroborates the state witnesses in substantial respects, *inter alia:*

27. He alleged to Maria Katamba that the complainant was his girlfriend and Maria Katamba her sister in law. He testified in Court that he wanted to take the girl as his wife.

28. The plea explanation in the 119 proceedings is further corroboration of Maria's testimony.

29. The absence of any allegation by accused that he told his sister when he had opportunity to do so, that four other persons had allegedly raped the complainant on the afternoon before he met her at Grootfontein, further corroborates Maria's evidence that

when she asked the accused about the injuries to complainant, he admitted that he was the one who had assaulted the complainant.

9. The accused contradicted himself *inter alia* in the following important respects:

30. He relied in his aforesaid plea explanation on the consent of the complainant after he had actually proposed to her. But at his trial he testified that he had walked away from her leaving her with his friends but that she called after him and followed him, apparently without his consent and against his will.

31. As to the reason why he did not take the complainant, in view of her injuries and generally sorry state, to the hospital or clinic, he first indicated that after he had taken her to the police station and she had refused to go in, he did not take her to the hospital because she did not want to go into the police station to lay a complaint.

Under further cross-examination however, he said that he never thought of taking her to the hospital.

It is not necessary to go into further details to demonstrate the absurdity of the accused's story.

In view of the Court's several important misdirections, the highly improbable nature of .the accused's defence, the convincing nature of the evidence of the complainant and Maria Katamba in all important respects, the facts which are common cause and the overwhelming probabilities in favour of the state case, compared to the patently contradictory and lying testimony of the accused, I have no hesitation whatever to accept the evidence produced by the State and reject that of the accused in all respects where his evidence contradicts that of the State.

In the circumstances the accused should be found guilty on the rape charge and the appeal should succeed on this charge.

THE LEGAL ISSUE REAISED BY THIS COURT *MERO MOTU*

At the hearing of the appeal before this Court, the Court raised the following point *mero motu:*

"Having heard Mr. Lategan, Counsel for the Appellant, and Mr.

Grobler, Counsel for the Respondent, on Count 2, namely

> Abduction, as set out in the charge sheet, and accepting that the Appellant's grounds of appeal do not cover this count, therefore:
>
> IT IS ORDERED
>
> 1. That both Counsel have to deliver further written heads of argument not later than 16h00 on Tuesday, 9 November 1999, in which they must address the following two points, namely:
>
> 32. Whether this Court can *mero mow* raise this issue and become ceased with this matter, namely Count 2, in the light of the fact that the Court a *quo,* although it acquitted the Respondent, nowhere dealt with it in its judgment; and
>
> 33. If this Court become seized with this matter, what the merits or demerits are of an appeal against this acquittal."

At the outset it must be noted that the word "accepting" in the introductory words may have created the wrong impression. In my respectful view, a better word for expressing the Courts real intention would have been "assuming", with other words the introductory sentence should have read: "...and assuming that the Appellant's grounds of appeal do not cover this point..."

I must point out further that up to the stage that this Court raised this point, counsel for the accused had not raised the point that either the notice of appeal in regard to the charge of abduction, alternatively, kidnapping was invalid or that the grounds of appeal were inadequate, for the purposes of an appeal against the latter charges and that it may therefore not be raised. On the other hand counsel for the State had incorporated in her written heads of argument, the submissions, on the second charge, and the alternative to it.

It

Is clear from that argument that State counsel at all times before the point was raised by this Court assumed the validity and sufficiency of its notice of appeal on all charges on which the accused were acquitted. Notwithstanding the fact that defence counsel had notice before the oral argument on appeal of the States attitude, he failed to raise any objection before the Court raised the point.

It is also quite clear from the judgment of the Court a quo and the reasons of that Court, that it would have been absurd for the State not to appeal against the acquittal on the charge of abduction and its alternative, in addition to appealing on the acquittal on the charge of rape.

It appears therefore that even if the grounds were inadequate there could be no prejudice to the accused in the legal sense of the term to allow the same point to be argued by the State in regard to the charge of abduction, alternatively kidnapping.

Counsel had no opportunity to consider beforehand the point raised by the Court. Consequently counsel were given the opportunity to submit written argument on the issue as raised by this Court.

In the circumstances it would have been wrong for this Court to purport to give a definitive order regarding the invalidity of the notice of appeal regarding the charges of abduction, alternatively, kidnapping. In my view this

was also not done. The point relating to the "grounds of appeal" must be distinguished from a point that the notice of appeal as such was invalid in regard to the charge of abduction, alternatively kidnapping. When a notice of appeal as such is invalid, the appellant will have a more difficult case to overcome on appeal than in the case where the grounds of appeal, contained in the notice, are merely inadequate for the purpose of arguing certain points on appeal.

In the latter case, the question of prejudice to the accused in dealing with grounds not stated in the notice of appeal, will be decisive, whether or not the particular ground of appeal has been raised by the appellant or by the Court *mero motu.*

I must further point out that the order made, was in my respectful view, essentially a request for further heads of argument, couched in the rather peremptory form of an "order". Furthermore, it amounted to an interlocutory order, which can be changed by the Court that gave it, and certainly by this Court, in giving its judgment on appeal.

Both counsel have since the above order, submitted their heads of argument.

Counsel for the State has argued that the Court can *mero motu* deal with the second charge and its alternative, should this Court find that the notice of appeal was defective in this regard.

Even though in my view, the Court did not raise the issue of the validity of the notice of appeal as such, it is necessary at least for the purpose of the chronology and a better understanding of the point raised to begin there.

In my respectful view, the notice of appeal was not only a valid notice of appeal in regard to the charge of rape, but also in regard to the charge of abduction, alternatively kidnapping. I say this *inter alia* for the following reasons:

1. Counsel for the accused in his written argument before the Court a *quo* and expressly incorporated in his oral argument before us that:

> "20. If the version of the accused regarding the rape is accepted there can also be no room for the inference that he abducted or carried the complainant away and he must also be found not guilty on those charges. There are no grounds for the inference that he had the necessary intention to abduct or carry away the complainant.
>
> 21. Even on the evidence of the complainant herself, there is no room for a conviction on Count 2, the abduction charge as the rape was already committed before complainant left Grootfontein with the accused.

22. In all the circumstances I pray that the accused be found not guilty on all three charges and acquitted."

The Court in its judgment found accused; "not guilty on all the charges and is acquitted".

The reason why the Court a *quo* did not expressly give reasons for acquitting the accused on the charge of abduction, alternatively kidnapping, was because it apparently was in agreement with Mr. Grobler's above-quoted submissions, being that once the Court finds that the accused's evidence is not improbable and can be reasonably possibly true, it follows without more that accused must also be acquitted on the charge of abduction and the alternative - kidnapping.

The Court did not give separate reasons for the acquittal on the individual charges and in view of the finding that the accused's story could be reasonably possibly true, it was neither strange nor necessary for the Court to do so.

Consequently, it was for the same reason not necessary to specify the different charges as charges against which the State wished to appeal. It would have been different if the Court gave different verdicts on the

different charges, such as "guilty" on one charge and "not guilty" on another.

The same argument applies *mutatis mutandis* to the question of whether

the State in its grounds of appeal, should have distinguished between the two charges, and the alternative of the second charge, when the grounds for appealing on charge 1, also covers charge 2 and its alternative.

In this case, the cautionary rule in sexual cases is not restricted to charges of rape. That is trite law.

It will therefore also apply to charges of abduction, where there is a sexual element, even though there are also some additional elements, such as the lack of consent of parent or guardian.

The ground of appeal relating to the application of the cautionary rule, consequently also applies to the charge of abduction.

The ground of appeal numbered 2.3 in the notice of appeal, i.e. that "The Honourable Judge erred in law/and or fact in holding that on the totality of the evidence the accused's version was not improbable and thus reasonably possibly true in all the circumstances of the case", was thus not only sufficient for the appeal on the rape charge, but also on the charge of abduction, alternatively kidnapping.

34. The grounds of appeal could certainly have been more extensive, but there is no question of the notice not being valid or the grounds being inadequate for the purpose of any of the charges.

35. In the result it is not necessary to decide whether or not the Court can raise a ground of appeal *mero motu.* I can immediately proceed to the consideration of whether or not the State's appeal should also succeed on the charge of abduction or its alternative.

It is clear from the facts which are not in dispute, that the accused did not obtain the consent of the parent or guardian of the child, being Jonas Gaeseb.

From the evidence of the child, accepted by this Court, it can be inferred as the only reasonable inference from the accepted facts, that the accused took the child for the purpose of sexual intercourse.

Mr. Grobler argued that even if the evidence of the child is accepted, there can be no conviction for abduction, because the rape had already been committed at Grootfontein before the taking out of the control and against the will of the guardian commenced.

I cannot accept this argument because the "taking" took place at Grootfontein before the rape at Grootfontein. Thereafter, the "taking"

continued when the

child was taken from Grootfontein to Berg Aukas. The intention of taking the child from Grootfontein to Berg Aukas, clearly continued to be having sexual intercourse with the child.

The taking out of the control and against the will of the parent and guardian is an element of the crime of abduction but not of rape. Although the taking in this case was an integral part of a continuing chain of events, which included rape, the crime of abduction was nevertheless also committed in addition to the crime of rape.

The fact that the crime of abduction was committed in the course of a continuing chain of events which included rape, is a factor relevant to the question of an appropriate sentence.

The case will however, have to be remitted to the Court *a quo* for the consideration and imposition of an appropriate sentence.

In the result this Court makes the following order:

36. The appeal succeeds.

37. The acquittal in the Court a *quo* is set aside and substituted with an order that the accused is convicted on both the charge of rape and the charge of abduction.

to the Court a *quo* for the consideration and imposition of an

57 appropriate sentence.

3.

0'LlNN, A. J. A

I agree

STRYDOM, C.J.

I agree.

SILUNGWE, A.J.A.

COUNSEL FOR THE APPELLANT: Mrs. A. Lategan
(Prosecutor-General)

COUNSEL FOR THE RESPONDENT: Mr. ZJ. Grobler
(Amicus Curiae)