CASE NO.: SA 19/2001

IN THE SUPREME COURT

JACKSON NDJIMBA APPELLANT

And

THE STATE RESPONDENT

CORAM: STRYDOM C.J., O'LINN A.J.A. et CHOMBA A.J.A.

HEARD ON: 3 April 2002

DELIVERED: 19 June 2002

JUDGMENT

STRYDOM, C.J.: The appellant was granted leave by the Court *a quo* to appeal against his conviction on a charge of rape and against his sentence of 20 years imprisonment. It was alleged:

> "That on or about 25 May 1997 and at or near Erf 1336, Freedomland in the district of Windhoek the accused unlawfully and intentionally had sexual intercourse with TN a female person under the age of consent, namely 2 years old.

Mr. Potgieter appeared on behalf of the appellant and Ms. Lategan on behalf of the respondent. Neither Counsel represented any of the parties in the Court *a*

quo Mr. Potgieter appeared *amicus curiae* and the Court wants to thank him for his assistance in this matter.

The mother of the complainant, Ms. NM, testified that the appellant, together with the State witness Timo Thomas, one Dawid and one Marcus, lived with her, her husband and children, in a house in Freedomland. On the morning of the 25th May, she and Timo Thomas went to town and left the complainant in the care of the appellant. On their return they met the complainant who was crying. On being questioned, the complainant told them that Hambulondo beat her and she indicated between her legs. The witness thereupon examined the private parts of the complainant and found that there was blood mixed with white things coming out of her vagina. These white things looked like semen. The entrance to the vagina was also torn. Hambulondo is the name under which the appellant was known.

Timotheus was sent to call the appellant but he had left the house and Ms. M testified that she neither saw him nor talked to him again up to the date that she gave evidence in Court. The witness did not take the complainant to the hospital nor did she lay a complaint with the police. She explained that her husband was away and that she did not have money to go to hospital. She tried to borrow money but was unsuccessful. She did not go to the police because this was the first time that something like this had happened to her and she was shocked and afraid. When her husband returned she reported the incident to him and he then laid a charge whereafter the complainant was taken to hospital.

Timo Thomas, also referred to as Timotheus, testified that the complainant was left in the care of the appellant when he and the previous witness went to town. On their return form town they met the complainant who was crying and who told them that she was beaten by the appellant on her vagina with his penis. As to the instrument with which she was assaulted the complainant demonstrated this by showing her arm and fist. When they came into the house the appellant left. The witness was present when the mother examined the complainant's private parts. He said he saw blood and he identified the "white things" as semen.

The father of the complainant, Mr. SN, confirmed that he left for Ovamboland on the 24th May and returned on the night of the 31st. On his return the mother of the complainant made a report to him as a result of which he laid a charge at the police on the 1st June. He said that he had asked his wife why she had not laid a charge and she said that she had been shocked and afraid of the appellant. From the evidence it seems that the reference to the 31st May, as the date on which the witness returned, was wrong and should be the night of the 1st June.

The respondent also called the complainant to testify. She was now five years old. She said that she was assaulted between her legs and demonstrated the size of her fist. She stated that Jackson assaulted her but she said that this person who assaulted her was in Ovamboland and not present in Court. She

further stated that she would know him if he was present in Court. The appellant was pointed out to her but she said that she did not know him.

Dr. Odumlami examined the complainant on the 2nd June. He observed old bruises on both thighs, in the inner aspect of the thighs. There was also an old bruise around the vestibule and around the fourchette and perineum. The doctor further observed a foul smelling discharge which he ascribed to infected blood. Because of this infection and the time lapse the doctor did not find any remnants of the hymen although he also mentioned that there were instances where girls were born without a hymen. The doctor was of the opinion that the injuries had been caused by blunt force like a penis or finger or any other blunt object. The colouring of the bruises, found by Dr. Odumlami, showed that they were sustained about a week before he saw the complainant.

That was the evidence presented on behalf of the respondent.

The defence of the appellant, who had pleaded not guilty, was an alibi. He denied that he was at the house of the complainant on the morning of the 25th and denied that she was left in his care. He stated that on the afternoon of the 24th he went to a house in the Ombili Township where he stayed the night. He stayed there until 4 o'clock on the 25th. He explained further that, on the 25th, he met Dawid and Marcus at a certain cuca shop. They brought him a message from one Joseph that a certain company was looking for employees and that appellant should go to the Company early in the morning, together with one Lucas, seemingly to try and find employment.

The message was that they should also tell Lucas about this opportunity. They went to the home of Lucas but did not find him and left a message that he should come early the next morning to the house of the appellant. Because they did not know where the premises of this company were they went to Joseph in Havana to get directions from him. He told them where to go but also informed them that the next day, which was Monday, was Africa Day, which was a public holiday, and that they should go to the Company on the Tuesday morning. They then returned to their home in Freedomland. Lucas, who was not aware that it was a holiday, turned up early the next morning and the two of them spent the day together and visited various places. Appellant returned to Freedomland late that afternoon where he found the mother of the complainant alone at home. She invited him twice to have sex with her but he declined every time.

On the Wednesday, that was the 28th, appellant said that he was at the house in Freedomland when Ms. M and Timotheus, together with the children, left him at home and told him that they were going to sell cooking oil. Appellant later also left the house but again slept there that night. In each instance the appellant described in detail his coming and goings in regard to the week following on the 25th May.

From the 30th May till the 2nd of June appellant said that he stayed at the house of his uncle in Ombili. Early the morning of the 2nd he returned to the house in Freedomland to get ready to go to Klein Windhoek where he was employed on

a casual basis. When he arrived at the house he knocked and Dawid opened the door for him. Although he did not see them he found that Mr. N, the owner of the house, was back from Owamboland and he greeted him as well as his wife, Ms. M. That afternoon he returned to Ombili where the police later arrested him.

The appellant called two witnesses to substantiate his alibi. The first was Dawid Hamukwaya, who lived with him in the house at Freedomland. The witness started off by saying that the appellant had not been at the house on Saturday and that he had slept at Ombili. That was the Saturday before the Sunday on which it was alleged that the appellant raped the complainant. The witness further stated that the appellant had stayed at the Freedomland house from Monday through to Wednesday. Dawid could not remember where the appellant was during the rest of that week but stated that he again saw the appellant very early on the morning of the 2nd June On this occasion the appellant greeted them all and that included Mr. N and his wife, Ms. M. The witness further stated that he had left the house early on the Sunday morning, the 25th of May, and could therefore not say what might have happened later that Sunday and whether the appellant had returned to the house or not.

The second alibi witness, called by the appellant, was Mbery Thomas. This witness testified that he lived in Ombili. He said that on the 25th or 24th of May the appellant arrived at their house and slept there that evening. It was a Saturday. Appellant stayed the next day at the house until 2 p.m. and then

went to Havana. When he left he said that he was going to visit one Joseph. The witness again saw the appellant on Friday the 30th of May. He then stayed there until Monday morning when he left early that morning to go to work. The witness did not see the appellant again and only later heard that he was arrested on a charge of rape. This witness also testified that the house where the appellant periodically stayed in Ombili was a house belonging to an uncle of the appellant.

That concluded the evidence on behalf of the defence.

The learned Judge in the Court *a quo* accepted the evidence of Ms. M and Timo Thomas, as further corroborated by the medical evidence, and rejected the evidence of the appellant and his witnesses. In the latter instance the Court referred to certain improbabilities in the evidence of the appellant and further stated that it was his impression that there was collusion between the appellant and more particularly the witness Dawid to mislead the Court. The Court consequently convicted the appellant as charged.

Mr. Potgieter strongly criticized the evidence of the two main State's witnesses and further pointed out that the complainant was, in certain respects, a single witness whose evidence should have been approached with caution which, so Counsel submitted, was not done by the Court *a quo.* He also submitted that the Court did not apply the cautionary rule in regard to children although the complainant was still a child of tender years. Counsel further submitted that the State did not prove beyond reasonable doubt that the crime of rape was

committed and submitted that the evidence fell short of proving penetration by the male genital organ into that of the complainant.

Ms. Lategan submitted that the State proved beyond reasonable doubt that penetration *per penis* took place. She also submitted that it was proved beyond reasonable doubt that the appellant was the perpetrator of the crime. Counsel criticized the evidence of the appellant and his witnesses and submitted that the trial Court had certain advantages by seeing and hearing the witnesses which a Court of Appeal does not have. Consequently this Court would only interfere with the factual and credibility findings of that Court if there were cogent reasons for doing so.

I must agree with Ms. Lategan that the evidence proved beyond reasonable doubt that the complainant was raped. The evidence of Ms. M and Timo Thomas on what they saw when they inspected the private parts of the complainant stand uncontested and is furthermore corroborated by the medical evidence. Ms. M testified that she saw blood and a white matter, which looked like semen, coming out of the vagina and the vagina was torn. Timo Thomas had no hesitation in identifying this white matter as being semen. Dr. Odulami stated that when he saw the complainant, after about a week, he could not find any remnants of the hymen. He said that this could be due to the lapse of time and also because he found that there was infection. It is so that he also testified that there are rare instances where a girl is born without a hymen and Mr. Potgieter latched on to this evidence to submit that this might be such an instance and that there was therefore nothing significant in the fact

that the doctor found that the hymen was absent. However, in the light of all the evidence I am satisfied that such a possibility can be ruled out as so remote that it can be left out of consideration.

The only question that remains is whether the State proved beyond reasonable doubt that it was the appellant who raped the complainant. When considering the evidence it is clear that there is no *onus* on an accused to establish his alibi, and if there is a reasonable possibility that it might be true the accused should be acquitted. (See R v Biya, 1952 (4) SA 514 (AD) at 521 B – D and S v Mhlongo, 1991 (2) SACR 207 (A) at 210 d – g.) Furthermore it was stated in R v Hlongwane, 1959 (3) SA 337 (AD) that a Court's approach to alibi evidence is not to consider it in isolation but to consider it in the totality of all the evidence and the impressions made by the witnesses. (p 341 A).

Another aspect of which I am mindful, and which was pointed out by Ms. Lategan, is the fact that the Court *a quo* had the advantage of seeing and hearing the witnesses and being steeped in the atmosphere of the case. (See R v Dhlumayo, 1948 (2) SA 677 (AD) at 705 and 706 and R v Nxumalo and Others, 1960 (2) SA 442 (TPD) at 446 A – B.) Consequently a Court of Appeal would be reluctant to upset the findings of the trial Court. However, on a reading of the trial Judge's reasons for rejecting the evidence of the two alibi witnesses, Dawid and Mbery, it is, in my opinion clear that he did so solely on the basis of their demeanour in Court. The only reason for the rejection of this evidence appears in the judgment, on page 144 of the record, and reads as follows:

> "In order to convince the Court that on the day in question and at all relevant time, 25 May 1997, he was not present the accused called the witnesses here-in-before mentioned. The accused did not make a good impression on me and the same applies to his witnesses. It is clear from the way in which they testified especially, in the case of the accused's first witness, Davey Hamukwaya, that there was some sort of collusion between the two in trying to mislead the Court."

The Court went on to state that Timo Thomas was adamant that the appellant was present on that day and that there was no reason, and none was advanced, why he would falsely incriminate the appellant. The excerpt, cited above, contained the only reason for the rejection of this evidence and the Court seemingly did not give any consideration to the fact that these witnesses, not only corroborated the evidence of the appellant, but that there were indications in the evidence of the State witness, Timo Thomas, which support important parts of their evidence. I am mindful of the fact that a judgment cannot be all embracing but as was stated in S v Singh, 1975 (1) SA 227 (N) at 228 F – H, the best indication that a Court has applied its mind to the evidence in the proper manner is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses.

It was pointed out in many cases that, although important, a witness's evidence should not be rejected solely on the basis of demeanour. In S v Dladla, 1974 (2) SA 689 (N), the following was stated in this regard on p.690H – 691A, namely –

> "The demeanour of a witness, although always a relevant and sometimes a very important factor in the final determination of disputes of fact, is notoriously fallible as a decisive ground of decision. As Wessels, J.A., observed in *Estate Kaluza v. Braeuer,* 1926 A.D. 243 at p. 266, a crafty witness "may simulate an honest demeanour". It is always the court's function and duty to test the apparent sincerity of such a witness by such means as are available to it and the most important of such means is almost invariably a close examination of the content of the evidence given and the degree of its harmony with the inherent improbabilities."

In S v Civa, 1974 (3) SA 844 (T), Margo, J. approached demeanour evidence as follows:

> "The effect of demeanour in assessing credibility is a matter of judgment and common sense, but it must be remembered that the truthfulness or untruthfulness of a witness can rarely be determined by demeanour alone without regard to other factors…The evidence must be weighed as a whole, taking account of the probabilities, the reliability and opportunity for observation of the respective witnesses, the absence of interest or bias, the intrinsic merits or demerits of the testimony itself, any inconsistencies or contradictions, corroboration, and all other relevant factors."

See also S v Van As, 1991 SACR 74 (W) at p. 101 a – f.

The danger lies therein that just as a crafty witness can simulate honesty, factors such as anxiety or fear may create the impression of uncertainty or hesitancy and may reflect poorly on the demeanour of an honest witness. As was laid down in the cases of Dladla, *supra*, and Civa, *supra*, rather than to rely on demeanour alone, the Court should also consider the evidence of a witness in relation to various other factors and should closely examine the content of the evidence given and the probabilities or improbabilities inherent in such

evidence. As a result of the Court *a quo's* failure to deal properly with the alibi evidence, this Court is at large and is under the circumstances obliged to undertake this task as best it can and to make its own findings in that respect.

Dawid's evidence as to whether the appellant was at the Freedomland house on the 24th and 25th May is somewhat confusing and Ms. Lategan strongly criticized his evidence in this regard. It is correct that he sometimes said that the appellant was there on the Saturday and that he slept there that night. He may also have been confused with the dates when he spoke of July instead of June as the date on which the appellant was arrested. He testified however that the appellant slept at the Freedomland house on the Monday, Tuesday and Wednesday nights. The witness knew about the cooking oil incident and also testified that the appellant came to the house early on the morning of the 2nd of June and spoke with Mr. N and his wife. He said that the appellant, during this period, also stayed at the house during the daytime. He mentioned that he together with Timo Thomas visited the appellant in prison and that on that occasion Timo said that he was influenced by Ms. M to incriminate the appellant. Timo, when he was recalled by the Court, confirmed that he visited the appellant in prison, but he denied that he said that he was influenced by Ms. M to incriminate the appellant in the crime.

Mbery Thomas did not stay with the appellant and Dawid at the Freedomland house. He lived in Ombili, seemingly at the house where appellant periodically slept when he was in Ombili. He testified that the appellant was there on the Saturday, the 24th, till 2 p.m. on the Sunday afternoon when he left for Havana

and he informed them that he was on his way to one Joseph. Thereafter he only saw the appellant again on the 30th of May, that was the Friday, and on this occasion he stayed there until early Monday morning. The only criticism leveled at the evidence of this witness by Ms. Lategan was that he could not explain why he remembered the dates of the 24th and 25th of May. This is not entirely correct because under cross-examination the witness said that he remembered those dates because he and the appellant were together and because of the fact that it was later alleged that the appellant committed the crime during that period.

The evidence of the two State witnesses, Ms. M and Timo Thomas, was also not satisfactory in all respects. When evaluating the merits or demerits of a witness's evidence it should not only be measured against how far that evidence co-incides, or does not, with that of other witnesses. It is just as important to consider probabilities or improbabilities flowing from that evidence judged against the conspectus of all the evidence. Ms. M testified that after she had examined the complainant on their return from town, Timotheus was sent to call the appellant but that he could not find him. If one accepts for the moment that this was so and, although she did not say why she wanted to see the appellant, I think there could only have been one purpose namely to confront him with the evidence. Under the circumstances her later explanation that she did not go to the police because she was afraid of the appellant does not make sense. Why, if she was afraid of the appellant, was she willing to confront him directly instead of laying a charge and leaving it to the police to deal further with the appellant? By laying a charge she would

also have solved her problem of getting the complainant to a doctor. Another aspect, which is in my opinion important, particularly in the light of the alibi evidence, is the statement by this witness that she did not see the appellant again until she gave evidence in Court. I will later deal more fully with this aspect. This witness also said that as a result of the assault upon her the complainant is now lame in the left leg. The father of the child, Mr. N, did not know anything about this.

Timo Thomas testified that the complainant, who was then two or three years old, informed him that the appellant assaulted her with his *penis.* It only later became clear that that was a conclusion drawn by him after a demonstration by the complainant. Timo had great difficulty in explaining the whereabouts of the appellant when they arrived home from town. This is an important aspect because it turns on the dispute in this matter, namely whether the appellant was present at the Freedomland House on the morning of the 25th May. He first of all said that when they got into the house the appellant was leaving the house. By then they had already received the report from the complainant as a result of which he concluded that the appellant had assaulted her with his penis. Seemingly nothing was done to stop the appellant from leaving. The witness was again asked to state where the appellant was at the time the complainant told them of what had happened. His answer was that the appellant was not at home. The learned Judge found these answers conflicting and questioned the witness. He confirmed the answer previously given by him but said that when he went to call the appellant he was not there. The Court further questioned the witness and he then said that when they came to the

house the appellant had already left. Still later he said that when they came to the house the appellant was going out. On this evidence it is impossible to come to any conclusion as to whether the appellant was still at home, whether he had already left or whether he was leaving the house when Ms. M and Timo came to the house after the complainant had made her report to them.

Timo Thomas also said that he did not see the appellant again until early the morning after Mr. N had come home. Mr. N returned on the night of the 1st June. Timo however denied that the appellant talked to Mr. N although he said that Ms. M heard him when he knocked at the door. It would seem that she must have been awake and knew that he was there. There then followed some confusing evidence as to when this was and when the appellant returned to the house. Although Timo said that it was the same day that Mr. N returned home from Ovamboland he went on to say that the date was the 25th May. He was then specifically asked whether he meant the day that the incident took place and he replied in the affirmative. He again confirmed this on a further question asked by the prosecutrix. Then later he said that the incident took place on the 20th and the father of the complainant returned the same month on the 5th. It is clear that the witness was completely confused as to the dates and days when specific incidents took place and his denial that the appellant was at the house on previous days, and even slept there, is at least questionable. Timo was asked whether he saw the appellant at the Freedomland house on the 28th or 29th of May. He did not deny that the appellant was there but said that he himself was not at home.

Under cross-examination Timo was further asked about the comings and goings of the appellant during the week preceding his arrest. It was put to him that on Monday the 26th May the appellant was at home with the complainant. Again he did not deny that that was so but stated that they, meaning the complainant and appellant, were never left alone on this occasion. It was then put to him that on the 28th Ms. M, the two children and the witness went to sell a litre of cooking oil and left the appellant at home. The witness said that that was correct. To add to the confusion the witness, after further cross-examination, now said that on the 2nd, seemingly the night of the 1st to 2nd June, the appellant slept in the house. On re-examination by the State prosecutrix Timo again confirmed that the appellant was at the house on the day they went to sell the cooking oil. Counsel for the defence was given another opportunity to cross-examine the witness and he now said that the oil was sold by him and Dawid and that it was on the day the father of the complainant left for Ovamboland. He now denied that he said that that incident occurred on the 28th of May.

The evidence of Timo Thomas, regarding the comings and goings of the appellant during the week after the alleged rape of the complainant, did nothing to disturb the evidence given by the appellant and Dawid, and also that of Mbery Thomas to the extent that he testified that on those days the appellant was not at the Ombili house. What is significant is that from time to time it shimmered through the evidence of Timo that the appellant's evidence, as supported by his two witnesses, that he stayed at the Freedomland house as usual, on various days subsequent to the alleged rape, and even slept there,

might be true. However when the witness was pinned down he tried to escape from his predicament by moving the particular incident to some other date which fell outside the relevant period. One such instance was the cooking oil incident which he now alleged happened on the day Mr. N left for Ovamboland. That was before the rape was committed.

The only other witness, who denied that the appellant returned to the Freedomland house and was present there after the rape was committed, was Ms. M. In the light of all the evidence, also that of Timo Thomas, I find her evidence that, after the incident, she only saw the appellant again when she testified in Court, so improbable that it can safely be rejected. She must have realized that it would have been difficult to explain why the appellant was allowed to come and go as he pleased and why neither she nor Timo Thomas ever confronted him with what had happened on the 25th. Then again, if the appellant had disappeared, as she testified, and did not return to the house where his belongings still were, it would have lent support to the allegation that he was the rapist and, knowing what he had done, to try and avoid a confrontation. The fact that the appellant stayed away would have been an indication of guilty knowledge. On the other hand, the fact that the appellant returned to the house and stayed there, as if nothing had happened, is difficult to reconcile with the actions of a man who knew that he had raped the little complainant and, if he was indeed the person in whose care she was left, he must have known that he would be under suspicion.

I have, in my discussion of the evidence, limited myself to that part of the evidence which touched upon the movements of the appellant after the crime was committed because it seems to me that if Ms. M and Timo Thomas lied about this aspect of the case then there is also a reasonable possibility that they had lied when they said that the appellant was at the Freedomland house on the morning of the 25th May and that the complainant was left in his care. There is nothing inherently improbable in the alibi evidence and nor are there material discrepancies or conflicts in this evidence. In fact a reading of the evidence of both Dawid and Mbery showed that they were not afraid to make concessions or even to contradict the evidence of the appellant. Dawid correctly conceded to the State that he could not say whether it was in fact the appellant who had raped the complainant. This concession was made in the light of the evidence that he himself had left the Freedomland house on the morning of the 25th and could therefore not say what might have happened later that day. This concession did however not affect his evidence that the appellant did not sleep at the house and was not there at the time when he had left. As far as Mbery Thomas was concerned it was put to him by Counsel for the defence that when the appellant left the Ombili house on the afternoon of the 25th he did so in the company of two other persons. Mbery denied this. A reading of the evidence showed that this statement by Counsel was wrong because appellant had testified that he met Dawid and Marcus at a Cuca shop in Ombili. However, this statement coming from appellant's Counsel, it would have been easy for the witness to tailor his evidence to fit in with what was put to him by Counsel. The fact that he did not do so seems to gainsay the impression that he was telling a fabricated story to give the appellant an alibi.

He also only heard about the rape after the appellant's arrest and he testified that he did not see him again.

I have given careful consideration to the evidence set out above. There are no inherent improbabilities in the evidence by these two witnesses. The evidence supports the version of the appellant, not only in regard to what had happened on Sunday, the 25th, but also in regard to his movements during the week after the 25th. Further impetus is given to this evidence by that of Timo Thomas who at times admitted that that was so and at times tried to extricate himself from his dilemma in a clumsy way. The totality of this evidence refutes in my opinion the denial by Ms. M that after the incident the appellant disappeared from the scene only to surface again when he was arrested. As I have tried to show there were various reasons for doing so, all of which would leave a question mark over the cogency of her evidence.

Dealing with the evidence of the appellant, the Court *a quo* mentioned some unsatisfactory aspects in his evidence. This came about in the following way. The appellant gave two reasons why he thought Ms. M falsely implicated him in the commission of the crime. The first concerned a ring of the witness which was given to him and which he never returned. The Court *a quo* correctly pointed out that Ms. M was never confronted with this evidence under cross-examination. The reason why this was not done, which was given by the appellant, may not be satisfactory however, both Timo Thomas and Dawid testified that there were quarrels between the appellant and Ms. M, from time to time, although they did not further elaborate on that. The second reason

given was the invitation to have sex with her and which the appellant then refused. Appellant further said that it suited her to have him arrested because then he would not have been able to talk with her husband, Mr. N. The Court *a quo* rejected this evidence as highly improbable and found it strange that a mother would approach the person who had raped her two-year-old child and of whom she was afraid. However this line of reasoning begs the question because the Court accepted, against the appellant, that he was indeed the person who committed the rape and who was the person of whom she was afraid. The test is whether it would still be so highly improbable if the appellant were not the person who committed the crime, and in my opinion that would not be so.

According to the evidence the complainant was two years old when the incident occurred. The trial was about a year later when she was still of tender age. We have only the word of Ms. M and Timo Thomas that she identified the appellant when she made her report concerning the rape to them. The report is itself not evidence and when she testified she did not again state that she had made such a report. She now said that the person who raped her was Jackson and she was unable to point him out. I do not think that much can be made of the fact that she was unable to point out the appellant, given the fact that she was so young when the incident happened and that a further year had passed before she gave evidence. But under the circumstances her evidence does not take the matter any further. Ms. Lategan submitted that the fact that the complainant did not identify the appellant as the person who raped her is of no significance because of the inherent danger in a dock identification. I

agree with the sentiments expressed by the Courts in regard to dock identifications, but I do not agree with Counsel's suggestion that nothing turns on the failure to identify an accused in Court. Mostly that would lead to an acquittal of the accused unless there was other cogent evidence to that effect. In the instant case the failure of the complainant to identify the appellant as her assailant has the effect that her evidence does not assist the State and cannot serve as corroboration of the evidence of Ms. M and Timo Thomas.

Considering all the evidence I am of the opinion that there is a reasonable possibility that the alibi evidence of the appellant and his witnesses might be true and if that is the case then there is also a reasonable possibility that it was not the appellant who committed the crime. I am therefore of the opinion that the appeal should succeed.

In the result the following order is made:

The appeal succeeds and the conviction and sentence of the appellant is set aside.

_____
STRYDOM, C.J.

I agree,

_____
O'LINN, A.J.A

I agree,

_____
CHOMBA, A.J.A.

COUNSEL ON BEHALF OF THE APPELLANT:	Mr. J.D. Potgieter (*Pro Amico*)
COUNSEL ON BEHALF OF THE RESPONDENT:	Ms. A. Lategan (Prosecutor-General)