IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED.

CASE NO.: A165/2017

6/7/2018

In the matter between:

M[….] J[….] M[….] Appellant

and

THE STATE Respondent

JUDGMENT

MOSOPA, AJ

Introduction:

1. The Appellant was convicted of rape in the Ermelo Regional Court on 6 October 2011.

2. The court found that the complainant, P[….] S[….] N[….], who was a

fifteen year old girl at the time, was raped by the appellant upon or during 2009. The Appellant was sentenced to 20 years' imprisonment on the conviction of this charge and was further declared unfit to possess a firearm in terms of section 103(2) of Act 60 of 2000.

3. The Appellant was granted leave to appeal against the conviction and the sentence imposed after he petitioned this court for leave to appeal.

4. The State also applied for leave to appeal against the sentence imposed by the court a quo, which was granted by this court.

Points in Limine:

5. The Appellant's legal representative - both in his heads of argument and during his argument in court - raised two points in limine, being that;

   5.1 the State did not make an application for the complainant to testify through an intermediary, the court did not determine whether the intermediary was sworn In, and her qualifications were not placed on record to deter-mine whether she is suitably qualified to act as an intermediary, and;

   5.2 the complainant was not admonished to tell the truth as. The complainant indicated that she cannot distinguish between truth and lies, thus rendering her evidence inadmissible.

6. The complainant was born on 9 October 1994. At the time of the alleged commission of the offence in 2009 the complainant was 15 years old and when she testified she was 16 years old. The complainant is related to the Appellant in that they are born of the same mother but different fathers, therefore the Appellant is complainant's half brother.

7. The Appellant was legally represented by Mr Van der Bank throughout his trial and pleaded not guilty to the charge levelled against him. After the charge was put to the Appellant, the magistrate remarked as follows; *"Goed u hed reeds vroeer vandag getuig. P[….] S[….] N[….] is ingesweer. Mnr van der Bank, sy is 'n gekwaliflseerse tussenganger wat ook gereeld in die hof optree. Is daar enige beswaar teen haar aanstelling?"*

8. The answer to the question by the magistrate to Mr van der Bank as to whether he has any objection is noted (“onhoorbaar") Inaudible. After that the magistrate continued to ask the complainant question to determine whether she does indeed know what it means to tell the truth. The fact that the magistrate continued to ask such questions makes it clear that Mr van der Bank did not object to the use of the intermediary, Ms Nkosi. It must be further noted that the intermediary did not perform duties as an interpreter as the record clearly shows that there was an interpreter.

9. It is correct that the record shows that the State did not make an application for the use of the intermediary.

10. Section 170A of the Criminal Procedure Act 51 of 1997 (as amended) ("the Act") provides as follows;

> *"170(1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological or mental age of 18 years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection(4) appoint* a *competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary."*

11. From the above it is clear that the court is allowed judicial discretion to appoint an intermediary if it is the court's view that the witness will be exposed to undue mental stress when he/she testifies at such proceedings and the biological and mental age of the witness is less than 18 years.

12. The Appellant's contention is limited to the point that the irregularity was occasioned by the fact that the State did not make an application for the use of an intermediary, the intermediary was not sworn in and that her qualifications were not put on record to determine whether she is a qualified intermediary or not. No criticism was levelled by the Appellant to the fact that he had been prejudiced by the use of the intermediary in that the intermediary did not carry out her functions properly to the extent that it

resulted in the failure of justice.

13. In **Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others 2009 (2) SACR 130 (CC)** Ngcobo J at par 98 stated;

> *"Section 170A(1) must therefore be construed so* as *to give effect to its objective to protect child complainants from exposure to undue mental stress or suffering when they give evidence in court. This objective* is *consistent with the objective of section 28(2)* as *understood in the light of Article 3 of the CRC to ensure that the child's best interests are of paramount importance in all matters concerning the child. In particular, it conforms to the guidelines which proclaim the right of child complainants to be protected from hardships and trauma that may result from their participation in the criminal justice* system. *As* a *guidelines make clear, the protection of child complainants, includes modified court environments, making them child-friendly, allowing the child complainant to testify out of sight of the alleged perpetrator and testifying with the assistance of* a *professional such as an intermediary."*

14. Section 170A(1) is applicable in casu, due to the fact that the complainant when she testified she was 16 years old and under the stipulated requirement of 18 years. The magistrate remarked that the intermediary, Ms Nkosi, earlier appeared before him where she was an intermediary in a different case and her qualifications were placed on record. He was satisfied that Ms Nkosi is suitably qualified to perform her duties as an intermediary. Mr van der Bank, who represented the Appellant, did not find anything wrong with the approach adopted by the magistrate as he did not object to the use of Ms Nkosi as an intermediary. Furthermore, Mr van der Bank did not object to the fact that the complainant testified from a room which was separate from where the Appellant was appearing as the accused in the matter.

15. I therefore find no misdirection by the magistrate when he appointed Ms Nkosi as an intermediary in terms of section 170A(1). The complainant was going to testify against her half-brother and there was a reasonable possibility that the complainant would have been unduly stressed by the need to testify before the appellant. The giving of evidence in court is inevitably a stressful experience. I find no merit in the point raised by the Appellant and it stands to be dismissed. The fact that she was only 16 years old at the time when she testified cannot be allowed to distract from the fact that she was still a child who was going to testify against her half-brother about an offence of a sexual nature.

16. A further point that was raised by the Appellant is that the complainant was not properly admonished as the presiding magistrate failed to determine whether the complainant knows the difference between telling the truth and lies.

17. A proper look at the record of proceedings reveals the following;

> *"Court: Can I get the names of the complainant please.*
>
> *Witness: P[….] S[….] N[….]*
>
> *Court: How old are you?*
> *Witness: I* am *16 years old*
>
> *Court: Are you going to school?*
> *Witness: Yes Your Worship*
> *Court: In what grade are you? Witness: Grade* 7
> *Court: <u>Do you know what it means to tell the truth?</u>*
> *Witness: <u>No</u>*
> *Court: <u>Pardon?</u>*
> *Witness: <u>No</u>*
> *Court: Not*
> *Witness: No, I don't know what it means Your .Worship. I do not know what it means.*
> *Court: They do not tell you at school by teachers or your parents?*

Witness: They do talk about that at home and even at school, but I do not give attention to them on that.

Then after the complainant provided such answers to the magistrate, the magistrate further asked the complainant as *follows;*

Court: If for instance I am saying it is raining outside at the moment, is it true or is it a *lie?*

Witness: That is not the truth

Court: Not the truth?

Witness: Correct Your Worship.

Court: And if somebody says it is dark outside at the moment, is that true or is it a lie?

Witness: That is not true.

Court: And if somebody says *that light is burning in the room where you are sitting currently, is that true or is it a lie?*

Witness: It is not true

Court: Is the light not burning there?

Witness: No, it is not burning

Court: Not burning. So it is sun shining therein alright. If somebody says that you are sitting on a chair at the moment, is that true or is *it* a *lie?*

The magistrate has asked two questions at a time and it is not clear as *to which of the two questions was the complainant answering but answered as follows;*

Witness: It is true.

Court: And if somebody says *that you are wearing* a *blue shirt at the moment, is it true or* a *lie?*

Witness: That is not true.

Court: What is the colour of the shirt?

Witness: It is black.

18. Section 164 of the Act provides as follows;

> *"164(1)Any person who is fo1Jnd not to understand the nature and import of the oath or the affirmation,* may *be admitted to give evidence in criminal proceedings without taking the oath of affirmation, be admonished by the presiding judge or judicial officer to speak the truth."*

19. In **S v Nedzamba 2013 (2) SACR 333 (SCA)** at par 26 Navsa JA stated;

> *"First the complainant was 14 years old at the time of the trial. She was* a *child witness with whom care should have been taken at the outset. No thought* was *given to whether the child understood the nature and import of the oath. It was not determined at the outset whether the child knew what is meant to speak the truth. No thought was given to the desirability or otherwise of recovering the complainant's evidence through an intermediary, nor was any consideration given to any other means to protect the child witness in* a *case involving sexual offence. As to the manner in which these enquiries are conducted, see the judgment of the Constitutional Court in Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others 2009 (2) SACR 130 (CC). The purpose is to ensure that the evidence given is reliable. To admit the evidence of* a *child who does not understand what it means to tell the truth undermines the accused's right to* a *fair trial. The court* a *quo did not even begin to address any of these concerns."*

20. If a child did not understand what is meant to speak the truth, then he or she could not be admonished under section 164, and he or she was, in such a case, an incompetent witness whose evidence was inadmissible (see Commentary on the Criminal Procedure Act: Du Toit et al at 22-70).

21. **In Director of Public Prosecutions, Transvaal v Minister of**

Justice and Constitutional Development and Others (supra) at par 264 the following was stated; *"What the section requires is not the knowledge of abstract concepts of truth and falsehood. What the proviso requires is that child will speak the truth. As the High Court observed, the child may not know the intellectual concepts of what truth or falsehood, but will understand what it means to be required to relate what happened and nothing else."*

22. It is correct so that the complainant, when questioned by the magistrate, initially said that she does not know what it means to tell the truth. However. on further questioning by the magistrate in relation to the colour of the clothes she was wearing, the weather conditions, the lighting condition in the room from which she was testifying etc., it was clear that the complainant could distinguish between truth and lies.

23. I am of the view that the complainant was properly admonished in terms of section 164(1) after the magistrate's questioning established that she could distinguish between telling the truth and lies, The court did not misdirect itself in declaring the complainant competent to testify and rendering her evidence admissible and consequently admonishing her. The court also did not, misdirect itself by further finding that the complainant could not take the oath. This point raised by the Appellant cannot succeed a11d stand to be dismissed.

Approach of the Court on Appeal:

24. The court's interference with the conviction of trial court is limited. In **S v Monyane and Others 2008 (1) SACR 643 (SCA)** at par 15 Ponnam JA stated;

> *"The court's powers to Interfere on appeal with the finding of a trial court are limited..... In the absence of a demonstrable. and material misdirection by the trial court, its finding of fault are presumed to be correct and will only be disregarded if the record evidence shows then to* be *clearly wrong (S v Hadebe and Others 1997 (2) SAOR641 (SCA) at 645 E-F),"*

25. , In **S v Pistorius** 2014 (g) SACR. 14 (SCA) par -30 It was held that;

> *"It is time-honoured principle that once a trial court has made a credibility finding an appeal court should be deferential and slow to interfere therewith unless It Is convinced that the trial court was clearly wrong (R v Dhiumayo and Another 1948 (2) SA* 677 *(A) at 706-, .S v Kebana 2010 (1) ALI,. SA 310 (SCA) par 12).* "

26. This is so because of the fact that as the trial court was ·"steeped" in the atmosphere of the trial it had advantage of observing the witnesses as they testified, which opportunity the appeal court never had.

27. It is trite that the onus is on the State in criminal cases to prove its case beyond reasonable doubt. In **S v Chabalala 2003 (1) SACR 134 (SCA)** at para 15 the court held that the correct approach is *"to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities on both sides and having done* so, *to decide whether the balance weighs* so *heavily in favour of the State* as *to exclude any reasonable doubt about the accused's guilt."*

Factual Background:

28. The State called in total three witnesses to prove its case and the following documents were, by agreement between the State and the defence, handed up as evidence without further adducing any evidence, viz, the complainant's birth certificate and the medico-legal examination in respect of the complainant, compiled by a professional forensic nurse, Mrs Doris Madisa Zorn.
29. The complainant testified through the assistance of an intermediary and testified that she stayed with the Appellant from 2006 to 2010 after the death of her mother. The Appellant raped her in 2006 when she was taking a bath. The complainant screamed during the rape and the Appellant

threatened her with a knife. After the Appellant had finished raping her she saw a whitish substance coming out of her vagina. She then used her facecloth to wipe off the substance. The Appellant would continue to do that with the passing of time especially when the Appellant's wife was not present at home. In 2009 the Appellant also raped her and he told her that he even used to do that to her sister. The appellant raped her after the complainant's wife and children left the house. The complainant never reported these incidents to any person until she visited her brother-in-law, M[….] Johannes T[….], in December 2010. The complainant testified that she did not report the incidents as the Appellant threatened to kill her if she reports the incidents to anybody. Under cross-examination it was denied on behalf of the Appellant that he raped the complainant and that she was saying all those things against the Appellant as she wanted to go and stay with her brother-in-law. It was further put to the complainant that the Appellant is HIV positive and *if* what she testified about the incident was true, she would have contracted the virus as the complainant alleged that the Appellant did not use a condom when raping her.

30. M[….] J[….] T[….] testified that he is the brother-in-law of the complainant. He testified further that the Appellant did not like the complainant talking to them or visiting them, and he realised that when talking to the complainant she would always look down and avoid eye contact. When the complainant visited them in December 2010 he sensed a bad odour from the complainant. The complainant informed him that she was wearing donated clothes and the Appellant made her to do the house chores when the rest of the children were at school and that the Appellant raped her. After the report was made to him, he (together with the sister of the complainant, D[….] M[….] N[….]) confronted the Appellant about the allegations. The Appellant denied the allegations in front of his wife and his neighbours. Mr T[….] only knew from the police officers that the Appellant was HIV positive.

31. D[….] M[….] N[….] testified that the complainant is her sister and the Appellant is her brother. Ms Ngwenya, after the death of her mother, used to stay with the Appellant, the complainant and the Appellant's wife. She

left the Appellant's place after the Appellant wanted to sleep with her. The complainant was present when Miss N[….] reported the Appellant to his wife regarding the issue of the Appellant wanting to sleep with her. Ms N[….] confirmed what the complainant told Mr T[….] and she was present when they confronted the Appellant about the allegations.

32. The Appellant testified in his defence and denied the allegations levelled against him. He testified that he is HIV positive and if he raped the complainant he could have infected the complainant with the virus, as she alleged that he did not use a condom when raping her. The appellant testified that the complainant fabricated her story as she no longer wanted to reside with him. The Appellant closed his case without calling further witnesses.

The Appeal:

33. Mr van As, on behalf of the Appellant, contended that the complainant was a single witness and that the magistrate should have applied cautionary rules to her evidence, but failed to do so.

34. Mr Jacobs, on behalf of the Respondent, contended that the magistrate did not misdirect himself and that the evidence of the complainant was corroborated by her brother-in-law.

35. The magistrate in his judgment evaluated the evidence of the complainant and remarked as follows;

> *"Die klaagter as ek reg is word Sondag dit wil se omtrent vier dae seker van vandag af word sy 17 jaar oud so op die stadium wat sy in hierdie hof getuig het was* sy *reeds 16 jaar oud.* Sy *is nie meer 'n klein dogtertjie nie. Dit is so dat* sy *betreffende die voorvalle waaroor sy getuig het 'n enkelegetuie is en op sterkte daarvan moet haar getuienis seker met versigtigheid benader word. Die Hof het haar* as *getuie waargeneem.* Sy *is aan kruisonder vraging onderwerp.* Sy *het beslis 'n gunstige indruk op die Hof gemaak.* Sy *was nerens ernstig emosioneel gewees terwyl sy getuig het nie."*

36. The submission by Mr van As on behalf of the Appellant cannot be supported as it is clear from the above that the magistrate did account for the complainant being a single witness to the rape incident and that her evidence should be approached with caution.

37. Section 208 of the Act provides that an accused may be convicted of any offence on the single evidence of any competent witness.

38. The danger of relying exclusively on the sincerity and perspective powers of a single witness has evoked a judicial practice that such evidence be treated with the utmost care. This practice seems to have originated in the following remarks made by De Villiers JP in **R v Mokoena 1932 OPD 79** at par 80;

> *"Now the uncorroborated evidence of a single witness is no doubt declared to be sufficient for* a *conviction by [the section], but in my opinion that section should only be relied on where the evidence of* a *single witness is clear and satisfying in every material respect. Thus the section ought not to be invoked where, for instance, the witness has an interest or bias adverse to the accused, where he has made* a *previous inconsistent statement, where he contradicts himself in the witness box, where he has been found guilty of an offence involving dishonesty, where he has not had proper opportunities for observation.. ."*

39. Corroboration, which is a common safeguard against the dangers of relying on the evidence of a single witness, has been defined as *"other evidence which supports the evidence of the state witness and which renders the evidence of the accused Jess probable on the issues in dispute"* (see **S v Gentle 2005 (1) SACR 420 (SCA)).**

40. The evidence of the complainant found corroboration in the evidence of Mr T[….], to whom the complainant first reported the incident. The complainant, despite the fact that at the age of 16 years was still doing grade 7, never contradicted herself when she was cross-examined and

she was consistent throughout her evidence, even though at times she forgot certain dates, that the Appellant is the person who raped her. She never in her testimony expressed hatred or adverse biasness to the Appellant.

41. The complainant did not immediately report the incident which allegedly took place between 2006 to 2009 to any person and only reported the incident to her brother-in- law in December 2010 when she was visiting them. The complainant testified that she did not report the incident because the Appellant threatened to kill her if she reports the incident to anybody, and that she did not have a place to stay other than the place she was staying with the Appellant.

42. Section 59 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 provides as follows;

> *"In criminal proceedings involving the alleged commission of sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof."*

43. Section 59 (supra) prevents the court from drawing any inference from the length of the delay between the commission of such offence and the reporting thereof. In casu, the complainant did give an explanation as to why she could not immediately report the incident due to the threats made by the Appellant and the fact that the complainant was an orphan who relied on the Appellant for accommodation. Given the above provisions there is no need for the court to draw an inference on the complainant's delay in reporting the incident since the time of its commission.

44. The issue of the Appellant being HIV positive was put to the complainant. It was put to her that if the Appellant ever raped her she would also test positive for HIV. This was deliberately put to the complainant as the defence knew that the complainant tested negative to HIV. However the

evidence indicates that the complainant, after testing negative for HIV, was put on a course of antiretrovirals (ARV) to minimise the risk of being infected with the virus. The Appellant's submission could not stand as no medical evidence was adduced by either the State or the defence to determine such issue. Then the question arises why was the complainant put on ARV treatment? This clearly shows the Appellant's conduct put the complainant at risk of infection by sexually penetrating her without a condom.

45. The J88 relating to the medical examination of the complainant, which was completed on 7 February 2011 and admitted into evidence, indicates that;

45.1 the complainant's hymen was not intact;

45.2 there was an offensive vaginal watery discharge; and

45.3 the complainant developed sores on her left inner thigh.

It was concluded that there is a "suspicion of sexual penetration."

46. The complainant's J88 corroborates the complainant's version that she was sexually penetrated even though it does not indicate that the Appellant is the one who penetrated her. No DNA test was conducted due to the delay in the reporting of the incident. The complainant's evidence is also corroborated by the complainant's brother-in-law.

47. I am therefore satisfied that the magistrate did not misdirect himself when convicting the Appellant. The Appellant was properly convicted.

Sentence:

48. Jurisdiction of a court of appeal to interfere with sentence imposed by the trial court is limited. In **S v Bogaards 2013 SACR 1 (CC)** par 41 Khampepe J stated;

> *"Ordinarily, sentencing is within the Jurisdiction of the trial court. An appellate court's power to interfere with sentence imposed by the court below is circumscribed. It can only do so where there has been an irregularity that results in failure of justice, the court below*

misdirected itself to such an extent that its decision on sentence is limited; or the sentence is so *disproportionate or shocking that no reasonable court could have imposed it."*

49. It is uncertain from the record whether the Appellant was convicted in terms of the provisions of section 51(1) or 51(2) of the Criminal Law Amendment Act 105 of 1997 (as amended). However, reliance was placed (and it was agreed by the State and the court) that the Appellant was convicted under section 51(1) of the Act. The magistrate, after considering the personal circumstances of the Appellant and the fact that the complainant did not sustain serious injuries, deviated from the prescribed minimum sentence and imposed a sentence of 20 years' imprisonment.

50. Section 51(1) of the Minimum Sentence Act provides as follows;

"Notwithstanding any other law, but subject to subsection (3) and (6), a *regional court or* a *High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life."*

51. The Appellant raped a child who was 11 years old at the time of commission of the offence in 2006 until such time that the complainant was 15 years in 2009. It is unfortunate that even though the admitted testimony of the complainant indicates that she was raped from 2006 to 2009, the charge sheet was not amended to read as such but only listed the single sexual offence of 2006. The State was not diligent in drafting that charge and such kind of incompetency cannot be tolerated as the victims of crime depend on the State for their cases to be properly adjudicated. Evidence was also presented that the Appellant is HIV positive and he had such status when the complainant was sexually offended, but the State failed to apply for the amendment of the charge sheet as it is provided for in the Criminal Procedure Act 51 of 1977. Despite the shortcoming as indicated above I see no reason to interfere with the magistrate's sentence as I am of the considered view that he did

not misdirect himself.

Cross-appeal on Sentence:

52. The Respondent was granted leave to appeal the sentence of twenty years' imprisonment imposed by the magistrate.

53. It was contended on behalf of the State that the magistrate misdirected himself by not considering the fact that the Appellant, by his own admission, testified that he was HIV positive at the time of commission of the offences. That is correctly so, but the State failed in the light of the testimony to apply for the amendment of the charge to insert the words that, *"the Appellant raped the complainant while aware of his HIV status."* The Act allows the State to amend the charge sheet after evidence is held, in the event there is variance between any averment in in charge and the evidence adduced (see section 86(1) of the Act).

54. It was further contended that the magistrate misdirected himself when he deviated from the prescribed minimum sentence due to the fact that the complainant did not sustain serious injurie . The complainant was raped over a period of time and the last incident took place in 2009. She only reported the. incident in December 2010 and was thereafter taken to a professional nurse for examination. The complainant was atilt young when she was sexually offended and it can be that when she went for examination, her injuries were already healed. I find no reason to say that the magistrate misdirected himself as his findings were based on what is contained in the J88.

55. Having regard to the above, I propose that the following or-der be made;

(1) Th points in limine raised by the Appellant are dismissed.

(2) The appeal against conviction and sentence of the court a quo is dismissed.

(3) The sentence of 20 years imprisonment by the court a q o ls confirmed

(4) The cross-appeal by the State. against sentence *9f* the court quo is dismissed .

MOSOPA M.J.
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree and it is so ordered.

DE VOS H.J.
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

For the Appellant	: Adv. F van As
Instructed by	: Legal Aid South Africa
	Pretoria Justice Centre
For the Respondent	: Adv. J.J Jacobs
Instructed by	: Director of Public Prosecutions
	Pretoria
Date of judgment	