

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO. CA&R 67/2023

In the matter between:

XOLISA VOTI MAXHEGWANA

Appellant

and

THE STATE

Respondent

JUDGMENT

Rugunanan J

- [1] The appellant appeared in the regional court, Bizana on a single count of rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 read with the provisions of section 51(1) and Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 in that the complainant was 6 years of age at the time of the commission of the offence. The offence was alleged to have been committed on 19 February 2019. At the time of the trial the complainant was 9 years of age.
- [2] Following his conviction the appellant was sentenced to life imprisonment. Exercising his automatic right in terms of section 309(1)(a) of the Criminal

Procedure Act 51 of 1977 (the Act) read with sections 10, 11 and 43(2) of the Judicial Matters Amendment Act 42 of 2013, his appeal to this court is against his conviction and sentence.

- [3] The appellant's conviction flowed essentially from the trial court's acceptance of the complainant's direct testimony that the appellant had raped her, with corroboration for such evidence being found in the testimony of the complainant's aunt and in the medical evidence.
- [4] The complainant testified through an intermediary and both the complainant and the intermediary were seated in a separate chamber aided by a closed circuit camera.
- [5] It is common cause that the complainant did not testify under oath as is required by section 162(1) of the Act.
- [6] The appellant argues that she was in consequence not a competent witness whose evidence was reliable.
- [7] The criticism directed at the magistrate with regard to the complainant's testimony is that the magistrate received her evidence without conducting an investigation or making a finding as to whether she understood the nature and import of the oath or affirmation – and upon admonishing her in terms of section 164 of the Act, he did not pertinently convey to her the consequences of not telling the truth.
- [8] Section 162 of the Act provides that subject to the exceptions contained in sections 163¹ and 164², no person shall be examined as a witness in criminal proceedings unless he is under oath. In terms of section 163 a person who objects to taking the oath or who does not consider the oath in the prescribed form to be binding on his conscience or who informs the

¹ i.e. persons giving evidence on affirmation in lieu of the prescribed oath.

² i.e. persons who are admonished to speak the truth without taking the oath or making the affirmation.

presiding judicial officer that he has no religious belief or that the taking of the oath is contrary to his religious belief, shall make the affirmation prescribed by the section.

[9] Section 164(1) provides as follows –

‘(1) Any person, who from ignorance arising from youth, defective education or other cause, is found 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 or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth.’

[10] The testimony of a witness who has not been properly placed under oath, has not made a proper affirmation, or has not been properly admonished to speak the truth renders inadmissible the status and character of their evidence³.

[11] The rationale for giving evidence under oath in terms of section 162, or affirmation in terms of section 163, or admonishment in terms of section 164 of the Act is to ensure that the evidence given is reliable.⁴

[12] It is settled law that though preferred, a court need not always conduct a formal enquiry for determining whether or not a witness understood the nature and import of the oath or affirmation before making the finding required by section 164. The mere youthfulness of the witness may justify such a finding⁵.

[13] It is, however, always necessary to establish whether or not a witness is capable of appreciating the distinction between truth and lies. The

³ *S v Matshiva* 2014 (1) 29 SACR (SCA) para 10.

⁴ *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* 2009 (2) SACR 130 (CC) at 279F.

⁵ *S v Mali* 2017 (2) SACR 378 (ECG) at 381a; *Director of Public Prosecutions, Kwa-Zulu Natal v Mekka* 2003 (2) SACR 1 (SCA) at 3g

significance of truthfulness is covered by an enquiry satisfying the court that the child witness understands the distinction. The evidence by a child witness who does not understand what it means to tell the truth is not reliable.⁶

[14] The magistrate was cognisant that he was dealing with the complainant as a child witness who was 9 years of age at the time of the trial. Eliminating repetition, the transcript reflects the following discourse between the magistrate and the complainant IF⁷:

‘Court: Mr Vinindwa may we introduce the name of the witness?

Prosecutor: The witness I’m calling, your worship is IF.

Court: May the witness state her names. If the mike can be put closer to the mouth, her mike. If she may state names again please?

Interpreter: IF though the volume is too low ...

Court: I did not hear the witness.

...

Witness: IF.

Court: All right, how old are you?

Witness: I am 9 years old.

...

Court: Where are you schooling?

⁶ *S v Matshiva* 2014 (1) SACR 29 (SCA) para 14.

⁷ Initials used in substitution of her full names.

Witness: At S[...] T[...]’s school.

...

Court: All right, where did she say she was schooling?

Witness: At S[...] T[...]’s school, your worship.

...

Court: All right, in what grade are you?

Witness: I am doing grade 4, your worship.

Court: Do you know your class teacher is?

Witness: Mem Ra – Mrs R[...], your worship.

Court: I need to test if you, you, you do understand stuff. You, you – for instance I – if someone were to say that the top that you are wearing or the shirt or T-shirt that you wearing is red, what would your response be.

Witness: That would be a lie.

Court: Okay, what is the colour of your T-shirt?

Witness: It is blue.

Court: Right, I can confirm that it is indeed sky-blue, and if someone were to say that you wearing a, you wearing white shorts, what, what would your comment be?

Witness: That would be a lie.

Court: What is the colour of your shorts?

Witness: It is navy.

Court: I also can confirm that the shorts can, the shorts are navy. The court wishes to warn you to tell the truth like you have done with describing your attire, because it is the truth that you are wearing a, a sky – blue T-shirt with navy shorts. Can you do that?

Witness: Yes I will.

IF admonished.

Court: Right. Mr Vinindwa, your witness.'

[15] It will be gleaned from the foregoing that what the magistrate omitted to do was to either conduct an investigation or make a finding on the question whether or not the complainant understood the nature and import of the oath or affirmation due to ignorance arising from youth, defective education or other cause as prescribed by section 164(1) of the Act.

[16] It is settled that the investigation and finding thereanant, though preferred, are not required. This was the view expressed by the Supreme Court of Appeal in *S v B*⁸ and applied with approval by a full court of this division in *S v Williams*⁹. Indubitably, the doctrine of *stare decisis* applies¹⁰.

[17] The fact that the magistrate after having established the age of the complainant proceeded to inquire whether she understood the difference

⁸ 2003 (1) SACR 52 (SCA) para 15.

⁹ 2010 (1) SACR 493 (ECG) at 496f-497f

¹⁰ *Contract Forwarding (Pty) Ltd and Others* 2003 (2) SA 253 (SCA) para 9.

between truth and lies offers, in my view, a clear indication that the complainant due to her youthfulness did not understand the nature and import of the oath.

[18] At the conclusion of the discourse between the magistrate and the complainant, the record indicates 'IF admonished'. Whether this was a declaration by the magistrate in direct speech or whether it is a retrospective inclusion inserted in the process of transcribing the record, is indeterminate. The transcriber's certificate included in the record certifies the correctness of the transcript 'so far as it is audible'. Speculatively, it may well have been inserted retrospectively though no conclusive finding is made in that regard.

[19] Having acceded to the view that it is not always required of a court to conduct a formal enquiry for determining whether or not a witness understood the nature and import of the oath or affirmation before making the finding required by section 164, the question that arises is whether there is evidence indicating that the complainant was 'admonished'.

[20] In *S v Mali*¹¹, Malusi J considered the meaning of the word 'admonished' prior to the amendment of section 164(1) by section 68 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2 of 2007. He determined –
'The Oxford Dictionary states that to admonish means "reprimand firmly; earnestly or warn'.

[21] Nothing precludes this court from having regard to the meaning ascribed to the word in the predecessor legislation¹².

[22] Applying that yardstick, it emerges from the discourse that the magistrate did 'warn' the complainant to tell the truth.

[23] She was therefore admonished.

¹¹ *S v Mali supra* at 382b.

¹² *S v Theron* 1984 (2) SA 868 (AD) at 877F-H.

[24] Hence, there was compliance by the magistrate with a peremptory requirement in section 164(1) of the Act.

[25] At this juncture an excursus is considered necessary for the purpose of quoting observations articulated in the judgment of the Constitutional Court in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others*¹³ to which reference is made in the appellant's heads of argument. It is edifying to quote the insightful sentiments by Ngcobo J at length before clarifying the point sought to be made in argument on behalf of the state.

'[165] The practice followed in courts is for the judicial officer to question the child in order to determine whether the child understands what it means to speak the truth. As pointed out above, some of these questions are very theoretical and seek to determine the child's understanding of the abstract concepts of truth and falsehood. The questioning may at times be very confusing and even terrifying for a child. The result is that the judicial officer may be left with the impression that the child does not understand what it means to speak the truth and then disqualify the child from giving evidence. Yet with skilful questioning, that child may be able to convey in his or her own child language, to the presiding officer that he or she understands what it means to speak the truth. What [section 164(1)] requires is not the knowledge of abstract concepts of truth and falsehood. What the proviso requires is that the child will speak the truth. As the High Court observed, the child may not know the intellectual concepts of truth or falsehood, but will understand what it means to be required to relate what happened and nothing else.

[26] The learned judge goes on to say:

¹³ 2009 (4) SA 222 (CC) paras 165-167.

‘[167] When a child, in the court’s words, cannot convey the appreciation of the abstract concepts of truth and falsehood to the court, the solution does not lie in allowing every child to testify in court. The solution lies in the proper questioning of children; in particular, younger children. The purpose of questioning a child is not to get the child to demonstrate knowledge of the abstract concepts of truth and falsehood. The purpose is to determine whether the child understands what it means to speak the truth. Here the manner in which the child is questioned is crucial to the enquiry. It is here where the role of an intermediary becomes vital. The intermediary will ensure that questions by the court to the child are conveyed in a manner that the child can comprehend and that the answers given by the child are conveyed in a manner that the court will understand.

- [27] Emphasising the importance of using intermediaries Ngcobo J proceeds to state further as follows:

‘[168] As pointed out earlier, questioning a child requires a special skill. Not many judicial officers have this skill, although there are some who, over the years and because of the constant contact with child witnesses, have developed a particular skill in questioning children. This illustrates the importance of using intermediaries where young children are called upon to testify. They have particular skills in questioning and communicating with children. Counsel for the Centre for Child Law and Childline was quite correct when, in her reply, she submitted that everything seems to turn upon the need for intermediaries when young children testify in court. Properly trained intermediaries are key to ensuring the fairness of the trial. Their integrity and skill will be vital in ensuring both that innocent people are not wrongly convicted and guilty people are properly held to account.’

- [28] In argument it was correctly submitted for the state that nothing contained in the above dicta supports the proposition contended for by the appellant that the magistrate ought to have warned the complainant of the consequences of a failure to tell the truth. It is indeed correct that the depth of questioning employed when determining whether a child witness understands what it

means to speak the truth will to a large extent depend on the experience of the judicial officer and the role played by trained intermediaries. Nothing can be fathomed from the dicta suggesting that a child witness be warned of consequences. To elevate this into the status of a mandatory requirement, would be imposing a legal requirement where there is none.

[29] In summing up, it cannot in my respectful view be concluded that the evidence by the complainant is inadmissible. Nor does it pass muster for the appellant to argue that the magistrate's failure to convey to the complainant the consequences of not telling the truth is fatal to the admissibility of her evidence. To uphold the appellant's contention would be to read into the section aforementioned something which is not expressly mentioned by the legislature.

[30] In the circumstances it cannot be concluded that there was an irregularity in the proceedings before the magistrate.

The conviction

[31] The merits were not at all addressed in the appellant's heads of argument, and although it was conceded that there was a *prima facie* case against the appellant, it was submitted that the state's evidence was insufficient to have discharged the onus of proving his guilt.

[32] It is trite that a court of appeal will not readily interfere with the factual findings of a trial court unless they are wrong. In the absence of a misdirection on fact by the trial court the presumption is that its conclusion is correct, and if the appellate court is merely left in doubt as to the correctness of the conclusion, then it will uphold it¹⁴. The findings of fact and credibility by a trial court are presumed to be correct because it is that court and not the court of appeal which has had the advantage of seeing and hearing the witnesses and is in the best position to determine where the truth lies¹⁵.

¹⁴ *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 677-678.

¹⁵ *S v Leve* 2011 (1) SACR 87 (ECG) para 8.

- [33] The evidence indicates that the complainant lives with her mother, N[...], and an aunt in an RDP house. The house has four rooms. The complainant shares a room with her mother. The aunt, S[...], occupies her own room. Another room is occupied by a female lodger named P[...]. The fourth room though unoccupied, is unusable because it is unfinished.
- [34] It is common cause that the appellant visited the house, that he and N[...] went out the night and visited a tavern whereafter they returned to the house. He spent the night with N[...] in her bedroom. It is also not in dispute that the appellant and N[...] were present the following morning when S[...] accused him of having raped the complainant.
- [35] The form J88 medical report dated 19 February 2019 pertaining to an examination of the complainant was admitted into evidence by agreement. The gynaecological examination documents the presence of *'Petechiae redness on the labia minora. Abrasions on the labia majora (R) side'*. Mild swelling of the hymen was also noted. The report concludes that a sexual assault cannot be ruled out.
- [36] The appellant was legally represented and pleaded not guilty to the charge. In explanation of his plea he stated that he visited the house intending to cavort with S[...]. Because she had a male companion, he resorted to her sister N[...]. Both he and N[...] went out for drinks at a tavern. Upon their return to the house he spent the night with N[...] and had sexual intercourse with her. He stated that the complainant was not there. The following morning he was confronted by the allegation of rape.
- [37] The complainant stated that she was born on 8 July 2012. She testified that the appellant visited their home in 2019. He requested her mother to accompany him and they went to a tavern. Her mother returned later that night when she had already been asleep in the bed shared with her mother. At some point she realised that her pyjama pants and panty were at thigh level and that the accused was raping her. Her cries and shouts drew the attention of her aunt – her mother did not respond. When the aunt entered

the room, the appellant immediately stood up. The aunt took her away. She spent the night in her aunt's room. The following morning the aunt called a neighbour and the complainant was taken to hospital where she was medically examined.

[38] The complainant disputed the appellant's version that she was not at home when he initially visited and upon his return with her mother. She also maintained that the appellant was the perpetrator because he was the only male person in the house at the time of the incident.

[39] S[...] denied that she had a male companion when the appellant arrived at the house. She testified that the appellant and her sister had gone to a tavern for drinks. When the appellant and her sister had left the house, the complainant was in her mother's room where she was asleep. The complainant remained in the room all night.

[40] Upon returning from the tavern, her sister was drunk and in the company of the appellant. The pair proceeded to her sister's room, without locking the door to the main entrance of the house. S[...] stated that she locked the main door and kept the key with her. At the time there was no other male person in the house. At about midnight she heard the complainant crying out. She proceeded to her sister's room where she found the complainant, her sister and the appellant on the bed. The complainant's lower body was unclad. Her sister appeared to have passed out and for that reason could not hear the complainant crying. The complainant and the appellant were awake. She took the complainant to her room. In the course of the night she heard the appellant and her sister having sexual intercourse – her explanation being that the rooms have no ceilings. She realised at some stage that the complainant did not sleep and was terrified. The complainant told her what the appellant had done. She explained that he inserted his penis into her private parts. The next morning she called a neighbour. They inspected the child and observed that her private parts had lesions and were red. The complainant was taken to hospital.

[41] N[...] testified that she and the appellant had been drinking at the tavern. Before having left the house, the complainant had taken a bath and proceeded to the room to sleep. They did not consume liquor in the house. When they left the house the complainant was there. She could not recall the time when she returned with the appellant. She conceded that she was heavily intoxicated and having passed out in her room she did not hear the complainant's cries and screams. The following morning, she woke up. She noticed that she was not wearing her panty. She then learnt that the appellant raped the complainant. For her part, she then and there denied that he would have done this. It emerged during her testimony that on the morning on which the allegation was made against the appellant, he called her aside and threatened that he would harm her and her child if she supported S[...]’s allegation against him. Although his threat convinced her that he was not innocent, she conceded that she put up the denial because she wanted to protect her child from harm. She confirmed that no other male person had been in the house, neither at the time of the appellant's initial visit nor upon their return from the tavern. She denied the suggestion to the contrary as put to her in cross-examination.

[42] The appellant's version comes down to S[...] being jealous because he had sex with N[...]. For that reason he believed that the rape allegation was manufactured. S[...] testified that she and the appellant merely had a casual liaison at some prior stage, hence she would not have had a reason to be jealous of him when he slept with her sister.

[43] The appellant testified that he visited the house that day to cavort with S[...] but she was busy with another man. The appellant met her sister N[...]. They had drinks in her room. The complainant was not present. He propositioned N[...] for sex. They left the house and had drinks at a tavern. They returned to N[...]’s room. The complainant was not in the room because the bed was far too tiny to be occupied by three people. He woke up the following morning in N[...]’s room. Her sister enquired from him why did he sleep over. She also alleged that he raped the complainant. He denied this, maintaining that he had been drinking in N[...]’s room while they were in the company of

another male person named B[...]. He stated that S[...] would not have seen this because she was in another room. The version of B[...] being present was never put to N[...].

[44] The magistrate's judgment indicates that he undertook a holistic assessment of the evidence, and that he took into consideration the inherent strengths and weaknesses including the probabilities and improbabilities of the parties' versions. He was also acutely aware that the complainant was a single witness. Her evidence was reliable and he found her to be an impressive witness. She was violated by the person whom she identified as the appellant and her version that she was raped found corroboration in the medical report. The medical examination was conducted the following day – the time frame excluded the possibility of a concocted scenario.

[45] On the magistrate's assessment he found S[...]’s denial of being jealous of the appellant, credible; and although not stated in identical terms, he found her to be a fair witness. As for the complainant's mother N[...], she was an honest witness. Her version, supported by S[...], placed the complainant in her room and excluded the proposition by the appellant that the child was not present in the house. The magistrate noted that she was candid enough to admit to her drunken state and that she readily conceded that she denied the allegation against the appellant because she tried to protect her child from harm.

[46] As for the appellant, the magistrate was not persuaded that his version could be said to be reasonably possibly true. There were no ill-feelings between any of the parties and the proposition that S[...] had framed him was insupportable on the probabilities.

[47] In my view a compelling factor on the probabilities is that the evidence clearly indicates that no other male person was in the house, neither when the appellant initially arrived nor at the time when he returned from the tavern together with the complainant's mother. The main door of the house was locked and this excluded the possibility that a male person may have

entered (or left) the house during the course of the night. Furthermore, the version by S[...] indicates that the complainant remained at all times in the house. When the appellant had left with her sister, the complainant retreated to her mother's room. This is consistent with N[...]’s evidence that the complainant had gone to the room to sleep where she remained throughout.

- [48] Applying the principles set out hereinabove, the evidence tendered is in my view sufficient to enable the state to have discharged the onus of proof, and as I am not persuaded that the magistrate erred or misdirected himself, the appellant’s conviction is not open to interference.

On sentence

- [49] A court of appeal does not have a blanket discretion to ameliorate the sentence imposed by a trial court. The trial court enjoys a wide discretion (a) in deciding which factors should be allowed to influence it in determining a suitable punishment; and, (b) in determining the value to be attached to each factor.¹⁶ An appeal court may only interfere with a sentence imposed by a trial court where, (a) an irregularity occurred; (b) the trial court materially misdirected itself on the question of sentence; or, (c) the sentence could be described as so disturbing that it induces a sense of shock.
- [50] In his notice of appeal the appellant’s sentence is assailed on the grounds of shock and misdirection – his personal circumstances were not accorded proper weight; the result being that the sentence imposed is disproportionate with the basic triad of factors espoused in *S v Zinn*.¹⁷ The point is taken that the magistrate failed to accord recognition to prospects for rehabilitation as also the fact that the appellant has minor children and aged parents as dependants – such factors not having been accorded proper recognition by the magistrate in assessing the cumulative effect of all considerations in the scheme of the triad.

¹⁶ *S v Kibido* 1998 (2) SACR 213 (SCA) at 216g-h; *S v Petkar* 1998 (3) SA 571 (AD) at 574C.

¹⁷ 1969 (2) SA 537 (AD) at 540F-H. However daunting the exercise of balancing these factors to formulate an appropriate sentence may be, the courts are enjoined to avoid an over - or underemphasis of any one of them. See *DPP Transkei v Dubo* 2011 (1) SACR 191 (ECM) para 9.

- [51] The record indicates that the parties presented evidence in mitigation and aggravation by addressing the magistrate from the bar. Gauging from their submissions on sentence, it appeared that it was common cause that the complainant required psychological counselling due to the trauma of the rape. The effects of the rape and its seriousness were correctly and fairly acknowledged by appellant's legal representative.
- [52] Consequent to the address by the parties, the magistrate's judgment on sentence was delivered *ex tempore*. Thus, it does not necessarily follow that because something has not been mentioned it has not been considered.¹⁸
- [53] The appellant's personal circumstances are that he was aged 27 at the time of sentencing; he is unmarried, has minor children attending school, has elderly parents, and is the sole breadwinner earning an income of R6 000 per month as a bus conductor.
- [54] The appellant did not testify in mitigation. That was his choice but the consequence is that there is no evidence indicating his level of insight into the commission of the offence in order to assess his prospects of rehabilitation. A reading of his testimony indicates that he is a deceitful person. At no stage after his conviction did he express any sentiment of remorse. Remorse must precede rehabilitation. It can justifiably be said that the submission about his prospects of rehabilitation is fanciful.
- [55] In summary, the appellant's personal circumstances even if viewed cumulatively (which accords with the approach of the magistrate), do not outweigh the other two component considerations in the *Zinn* triad.¹⁹ This is indicative, to my way of thinking, of the absence of substantial and compelling circumstances.

¹⁸ *R v Dhlumayo and Another supra* at 678.

¹⁹ Stated otherwise, the appellant's personal circumstances are outweighed by the objective gravity of the offence for which a severe punishment must be imposed. See *Director of Public Prosecutions, North Gauteng, Pretoria v Thusi and Others* 2012 (1) SACR 423 (SCA) para 18.

- [56] Absent such circumstances, this court must uphold the prescribed minimum sentence.
- [57] In the aggregate, the magistrate correctly found that substantial and compelling circumstances were non-existent and that the appellant's personal circumstances were outweighed by the nature and seriousness of the offence and the interests of society and those of the complainant. A finding that the appellant's personal circumstances on their own amount to substantial and compelling circumstances would be unduly sympathetic and would amount to a departure from the specified sentence, 'lightly and for flimsy reasons'²⁰.
- [58] In imposing sentence, it was at all times the magistrate's prerogative to (a) decide which factors should be allowed to influence him in determining a suitable punishment; and, (b) in determining the value to be attached to each factor.²¹ Absent any demonstrable indication that particular facts were over-emphasised at the expense of others, there is no basis for interfering with the imposed sentence.

The order

1. The appeal against conviction and sentence is dismissed.
2. The conviction and sentence imposed by the court a quo are confirmed.

S. RUGUNANAN

JUDGE OF THE HIGH COURT

I agree.

D. POTGIETER

JUDGE OF THE HIGH COURT

APPEARANCES:

²⁰ *S v Malgas supra* at 477d.

²¹ *S v Kibido* 1998 (2) SACR 213 (SCA) at 216 g-h; *S v Petkar* 1998 (3) SA 571 (AD) at 574C.

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Date heard:

15 February 2023.

Date delivered:

18 April 2023.