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**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION**

Case No.: A67/2022

RC Case No: 18/18/2019

Reportable: YES/NO

Of interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

PH K¹

Appellant

and

THE STATE

Respondent

Coram: Opperman, J *et* Daniso, J

Date of hearing: 7 November 2022.

¹ Abbreviations are used to protect the identity of the minors.

Judgment by: Opperman, J

Judgment delivered on: 13 December 2022. The reasons for judgment were handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 13 December 2022. The date and time for hand-down is deemed to be 13 December 2022 at 15h00.

Summary: Appeal – conviction and sentence – evaluation of the evidence of minors – conduct of the presiding officer

JUDGMENT

[1] Four things belong to a judge; to hear courteously, answer wisely, consider soberly and decide impartially.²

[2] The impasse of this case is that the evidence against the appellant on all the charges convicted of might be strong, but the attack against the conduct of the presiding officer during the trial is just as powerful.

[3] Context, perspective, careful reading of the record and understanding of the nature of the proceedings and the evidence, are vital for the adjudication of the appeal.

² Unknown writer.

[4] The classic words of Curlewis, JA in *Rex v Hepworth* 1928 AD 265 at 277 are just as relevant as the above here:

By the words "just decision of the case" I understand the Legislature to mean to do justice as between the prosecution and the accused. A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge or an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done. ...seems to me to give a judge in a criminal trial wide discretion and power in the conduct of the proceedings, so that an innocent person be not convicted or a guilty person get free by reason, *inter alia*, of some omission, mistake or technicality. And it seems to me essentially applicable to the case before us... (Accentuation added)

[5] In *S v Trainor* 2003 (1) SACR 35 SCA, Navsa, JA stressed that whether it be to convict or to acquit the court must account for all the evidence, some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored. A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroboratively evidence, if any. Evidence, of course, must be evaluated against the onus on any particular issue or in respect of the case in its entirety.

[6] The appeal lies against all the convictions and resultant sentences. The crimes were allegedly committed in 2018. The trial began on 24 June 2019. The appellant was convicted on the 2nd of August 2019. Sentencing followed on the 5th of August 2019.

[7] The appeal was invoked on the terms of the provisions of section 309(1)(a)³ of the Criminal Procedure Act 51 of 1977 as result of the count of rape of a minor that resorts under section 51(1) of Criminal Law Amendment Act, 1997 (Act No. 105 of 1997). All the charges are not covered by the section 309(1)(a) - automatic appeal, but the one slots into the other and this court has an inherent jurisdiction to ensure justice.

[8] The appellant was charged, convicted and sentenced in the Regional Court on:

1. Assault: In that during 2018 he unlawfully and intentionally assaulted A-L K, 13 years of age, by giving her alcohol to drink.

Five years imprisonment were imposed in terms of section 276(1)(b) of the Criminal Procedure Act 51 of 1977.

2. Assault: In that during 2018 he unlawfully and intentionally assaulted AK, 9 to 10 years of age, by giving him alcohol to drink.

Five years imprisonment were imposed in terms of section 276(1)(b) of the Criminal Procedure Act 51 of 1977.

3. Rape of A-L K (13 years old) in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

³ Section 309(1)(a): Subject to section 84 of the Child Justice Act, 2008 (Act No. 75 of 2008), any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction: Provided that if that person was sentenced to imprisonment for life by a regional court under section 51(1) of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309B: Provided further that the provisions of section 302(1)(b) shall apply in respect of a person who duly notes an appeal against a conviction, sentence or order as contemplated in section 302(1) (a).

whereby it is alleged that the appellant penetrated her genitals with his finger. This also happened in 2018.

Life imprisonment was imposed in terms of section 51(1) of the General Law Amendment Act 105 of 1997.

4. Sexual violation of the 13-year-old A-L K in contravention of section 5(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 by, in 2018, rubbing her private part (vagina) with his foot.

Five years imprisonment were imposed in terms of section 276(1)(b) of the Criminal Procedure Act 51 of 1977.

5. Compelling or causing a child to witness a sexual offence or sexual act in contravention of section 21(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 by, in 2018, committing the act of rubbing his foot on the private part of A-L K in front of K B, 10 years old, and letting her watch the act.

Five years imprisonment were imposed in terms of section 276(1)(b) of the Criminal Procedure Act 51 of 1977.

[9] The court ordered the sentences on counts 1, 2, 4 and 5 to run concurrently with the sentence imposed on count 3.

[10] The appellant was assisted with legal representation by Legal Aid: South Africa throughout the trial. He was released on bail pending the finalisation of the case. From the record it appears that he is currently serving his sentences.

[11] The presiding officer conducted the trial on the formalities by the book. The minimum sentence applicable was explained. Legal Aid was explained and appointed subsequently. The process of section 170A of the Criminal Procedure Act 51 of 1977;

engaging the services of intermediaries and allowing testimony *via* closed circuit camera was conducted in accordance with due process. The provisions of section 120 of the Children's Act 38 of 2005 (National Child Protection Register.) were explained and correctly applied. The appellant was informed that he was automatically unfit to possess a firearm in terms of section 103 of the Firearms Control Act 60 of 2000 and granted the opportunity to address the court on the issue. His rights to appeal were explained to him.

[12] The appeal against the convictions turns on three main grounds namely:

1. That the court *a quo* erred in: "... not conducting the trial in such a manner that his open-mindedness, his impartiality and his fairness are manifest for all concerned. This, objectively viewed created the impression that the learned magistrate had decided upon the guilt of the Appellant before the end of the trial."⁴
2. Next is that the court erred in finding the State witnesses' testimony were credible.
3. Lastly, is it submitted that the magistrate erred in not accepting the version of the appellant.

[13] Specifically, the Notice of Appeal reads as follows:

The following grounds of fact and law are submitted to support the application, namely:

1. The court erred in finding the complainant, AK, to have impressed as a credible witness. In doing so the court specifically erred:
 - 1.1 By over-emphasizing the manner in which and demeanour with which she delivered her testimony.

1.2 By ignoring or alternatively attaching too little weight to the contradictions in her testimony when compared to:

1.2.1 Her statement to the police.

1.2.2 The testimony of the so-called “first report”.

1.2.3 To her brother, AK’s, testimony.

1.2.4 To her friend, KB’s, testimony.

2. The learned magistrate did refer to the fact that the complainant and other witnesses were in essence single witnesses, however, he failed to treat their testimonies with the necessary and required caution.

3. The learned magistrate erred in not conducting the trial in such a manner that his open-mindedness, his impartiality, and his fairness are manifest for all concerned. This objectively viewed created the impression that the learned magistrate had decided upon the guilt of the Appellant before the end of the trial.

4. The learned magistrate erred in not accepting the version of the accused as reasonably possibly true.

5. The court erred in not finding that substantial and compelling circumstances exist to justify the imposition of a lesser sentence.

6. The sentence imposed by the learned magistrate is shockingly inappropriate and interference is warranted.

[14] The version of the appellant is one of complete denial of all and every detailed allegation. It is his version that his daughter, his son and their young friends are concocting and dreaming up the allegations. The motive for this conspiracy is that he is a strict father and they want to be removed from his custody.

[15] This misery goes back much further in history than two children allegedly inventing false allegations against their father and not wanting to be in the care of the father. The system failed the children. They were removed from the custody of their

biological mother due to abuse and neglect and placed in a caravan, in a caravan park, with their alcohol and drug abusing biological father (appellant), his girlfriend/wife and their child(ren).

[16] The income of the father was clearly not enough to support the children and the placement of the children with him was a dreadful decision with atrocious consequences. To start with; there was not even enough food for the children in this household on any given day. The irony is that the appellant is now using these circumstances as a defence.

[17] Reading of the record shows the evidence of naïve children that did not testify perfectly. The imperfection of their evidence shows the absence of a conspiracy. The mistakes do not affect the veracity of the case against the accused as a whole. There is a real difference between an unintentional mistake and a deliberate lie. The detail of the evidence is too strong to be deceitful.

[18] The issue of police statements is well known and the court *a quo* dealt with it appropriately.⁵ The Law of Evidence in regard to the use of documents is applicable to both the State and the Accused. The authenticity of the content of a document needs to be proven by the party that relies on the veracity thereof.

⁵ In *Rautini v Passenger Rail Agency of South Africa* (Case no. 853/2020) [2021] ZASCA 158 (8 November 2021) the inclusion of "all discovered documents are what they purport to be" is not unlawful. In fact, it serves a legitimate purpose: it allows the documents to be discovered as real evidence. However, parties should be vigilant and lead the evidence of the authors of those documents if they intend to rely on the contents of the documents. The importance of this case lies in its timely reminder that litigants should be vigilant when admitting evidence and avoid falling into the trap of believing real evidence can be documentary evidence by virtue of a pre-trial minute agreement to this effect – whether in the Labour Court, High Court, or other judicial forum. This is especially true in criminal cases.

[19] In *S v Govender and Others* 2006 (1) SACR 322 (E) Nepgen, J discussed the issue extensively. He pointed out that it is important that it should always be borne in mind “ . . . that police statements are, as a matter of common experience, frequently not taken with the degree of care, accuracy and completeness which is desirable. . .’ (*S v Xaba* 1983 (3) SA 717 (A) at 730B - C.)

Furthermore, as was pointed out in *S v Bruiners en 'n Ander* 1998 (2) SACR 432 (SE) at 437h that the purpose of a police statement is to obtain details of an offence so that a decision can be made whether or not to institute a prosecution, and the statement of a witness is not intended to be a precursor to that witness' evidence in court. Quite apart from that, however, there are other problems associated with police statements. They are usually written in the language of the person who records them. Frequently the use of an interpreter is required and, invariably, such interpreter is also a policeman and not a trained interpreter. The statement, according to my experience, is also usually a summary of what the policeman was told by the witness and is expressed in language or in terms normally used by him and not necessarily the witness. I am of the view that the fact that discrepancies occur between a witness' evidence and the contents of that witness' police statement is not unusual nor surprising. Whenever there are contradictions between the police statement of a witness and the evidence of such witness, or where there is no reference in a police statement to what can be considered to be an important aspect of that witness' testimony, the approach to be adopted in regard thereto is as described in *S v Mafaladiso en Andere* 2003 (1) SACR 583 (SCA) at 593e - 594h.

[20] In *S v Mafaladiso and others* 2003 (1) SACR 583 (SCA) it is summarised in the headnote that the juridical approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as, *inter alia*, between

her or his *viva voce* evidence and a previous statement) is, in principle (even if not in degree), identical. Indeed, in neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what is the precise nature thereof. In this regard the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there may be language and cultural differences between the witness and the person taking down the statement which can stand in the way of what precisely was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions - and the quality of the explanations - and the connection between the contradictions and the rest of the witness' evidence, amongst other factors, to be taken into consideration and weighed up. Lastly, there is the final task of the trial Judge, namely to weigh up the previous statement against the *viva voce* evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings. (At 593e - 594h.)

[21] The court acted with judicial wisdom when adjudicating the testimony of the children all together. Again, the detail and simplicity of their evidence stands out. It is of the nature that cannot be fabricated.

[22] The court *a quo* gave due regard to the vulnerability that was in each child's unique circumstances; such as age, social and economic background. The child witnesses and complainants were exposed to the psychological stress and trauma that resulted from their participation or exposure to sexual offences that are private and intimate and embarrassing.

[23] The court found objective corroboration in the probabilities of the case and the evidence of the unattached and uninvolved friends namely, A-L and A.

[24] He was cautious and careful when he measured the evidence of the witnesses for the State to the onus of proof beyond reasonable doubt.

[25] The probabilities are against the defence of the appellant. His two children craved his presence as a father and they were realistic about their circumstances. They did not run and tattle with the social workers; the daughter told a friend that told her mother that reported the incident. The other friend saw an incident for herself and was immensely shocked by the experience. She reported the incident on her own accord. The young son of the appellant did not report the incident on of his own volition.

[26] The court sitting on appeal will only in exceptional circumstances interfere with the findings of the trial court in regard to *viva voce* evidence bearing in mind the advantage of a trial court having seen, heard, and appraised the witnesses.⁶

[27] A factor that counts against the appellant is the absence of the evidence of his wife. She was present at some of the incidences and was intimately involved in the circumstances that prevailed; she could have confirmed the appellant's version of the attitude of the children. He did not call her as witness and the only logic inference that can be drawn from this is that; in light of the strong testimony of all the children and the rest of the case, her testimony was against him and he realised this. Even without this inference and oversight; the case is strong.

[28] The children were removed from the father and placed in a home where they are happy and content. This was more than a year before the trial commenced. They have

⁶ *S v Francis* 1991 (1) SASV 198 (A) on 204.

The trial Court delivered itself of a careful and well-reasoned judgment. It is apparent, both from the terms of the judgment and the treatment of the evidence, that the Court was at all times aware, when considering D's evidence, that it was dealing with an accomplice who was also a single witness. It was fully conscious of the dangers inherent in such evidence and the need to exercise caution in the consideration and evaluation thereof. It was alive to the shortcomings in D's evidence. It was also aware of the criticisms directed at D's evidence. (It is common cause that the arguments advanced on appeal relating to the non-acceptability of D's evidence were raised at the trial.) Many of these have been specifically dealt with in the judgment. The fact that some have not been mentioned does not mean that they were not duly considered. As has frequently been said, no judgment can be all-embracing.

This Court's powers to interfere on appeal with the findings of fact of a trial Court are limited (*R v Dhlumayo and Another* 1948 (2) SA 677 (A)). Accused No 5's complaint is that the trial Court failed to evaluate D's evidence properly. It is not suggested that the Court misdirected itself in any respect. In the absence of any misdirection the trial Court's conclusion, including its acceptance of D's evidence, is presumed to be correct. In order to succeed on appeal accused No 5 must therefore convince us on adequate grounds that the trial Court was wrong in accepting D's evidence - a reasonable doubt will not suffice to justify interference with its findings (*R v Dhlumayo* (supra); *Taljaard v Sentrale Raad vir Koöperatiewe Assuransie Bpk* 1974 (2) SA 450 (A) at 452A-B). Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this Court will be entitled to interfere with a trial Court's evaluation of oral testimony (*S v Robinson and Others* 1968 (1) SA 666 (A) at 675G-H).

no reason to maintain their evidence because it is clear that without the allegations of assault and sexual abuse; the father is incapable to care for his children in general. They will not be returned to his care even if he was acquitted. It served no purpose for them and their friends to perpetuate the alleged lies and conspiracy.

[29] Reading of the record convinces of the good quality of the witnesses' evidence for the State. I will not repeat the evidence. Counsel for the State summarised it in her Heads of Argument and she is correct.

[30] Moreover, South African courts acknowledge the inadequacies of the criminal justice system in meeting the needs of child witnesses. In *Klink v Regional Magistrate*,⁷ the court highlighted the challenges of child witnesses of sexual offences in legal proceedings and the evaluation of their evidence.

The Court was convinced that a child witness may often find it traumatic and stressful to give evidence in the adversarial atmosphere of the court-room and that the forceful cross-examination of a young person by skilled counsel may be more likely to obfuscate than to reveal the truth. The unwillingness of young witnesses to subject themselves to the ordeal of a court hearing even in camera may have the effect of thwarting criminal prosecutions. It was obvious that the ordinary procedures of criminal justice were inadequate to meet the needs and requirements of a child witness.

The interests of the child witness had to be balanced against the accused's right to a fair trial. Although the principles of fundamental justice required that criminal proceedings should be scrupulously fair, a modification of the accepted rules of evidence and procedure was not necessarily open to objection. In a

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Klink v Regional Court Magistrate NO and Others 1996 (3) BCLR 402 (SE).

criminal trial it was necessary for the trier of fact to be enabled to get at the truth while at the same time providing the accused with the opportunity to make a full defence. Rules of evidence and procedure had evolved in an effort to accommodate the truth-seeking function of the courts while at the same time ensuring the fairness of the trial.

[31] In *Teddy Bear for Abused Children and RAPCAN v Minister of Justice and Constitutional Development* 2014 (1) SACR 327 (CC) at paragraph 1 Khampepe, J stated that children are special members of our society, therefore, any law that affects them must take into consideration their vulnerability and need for guidance. Moreover, she noted that courts have a duty to ensure that children receive the support and assistance essential to ensure a fair trial and in line with their growth and development.

[32] The above is without any doubt the method in which presiding officers should treat children in court and evaluate their evidence; in a manner giving regard to their age and development and the circumstances. To treat them as the children they are, is not to show bias but to do justice.

[33] To conduct a fair trial in difficult circumstances is challenging for any presiding officer. Many factors every so often exist that can cause a judicial mistake to happen. It frequently happens that counsel for the State and defence do not deal with all the issues and the witness had not been granted the opportunity to explain the existence of a fact or a probability. It will be grossly unfair of the presiding judge or magistrate to deny the accused the opportunity to answer to probabilities on which he will base his judgment subsequently. Presiding officers are, more that they want, forced to pose questions to set the record straight and give the accused the opportunity to put his

version before the court. This is admissible if it does not denigrate into cross-examination.

[34] Courts may not permit vague and ambiguous or erroneous questions by counsel. To regulate a trial may sometimes be perceived on paper as interference with the constitutional rights of a party; or irritation. But, to read something on paper is not the same as to hear the tone of the voice of the magistrate or judge.

[35] Guidance to cause a fair trial by essential reproach is not bias and irregular. This is the case in the instance. The content and the context of the words of the magistrate cannot be said to be tantamount to prejudice; but for when he asked the appellant if he did not make a mistake. I will return to it later.

[36] These are the parts referred to and relied upon by the appellant to show his perceived bias and favouritism perpetrated by the presiding officer:⁸

1. VOLUME 2 – PAGE 146 – LINE 2 – 147 LINE 24

MR MOKOENA: Earlier you testified that he touched your private part?

TOLK Jy het voorheen gesê dat hy jou privaatdeel, aan jou privaatdeel gevat het?

MEV. BOSHOFF: A[....], jy het voorheen gesê dat pappa aan jou privaatdeel gevat het? Is dit so?

A[....]: Dit is so.

⁸ Paragraphs 3.4 and 3.5 of their Heads of Argument.

INTERPRETER: That is correct.

MR MOKOENA: Okay, let us understand that. According to you, am I getting correctly that by touching, you are referring to a literal touching of your private part?

TOLK Verstaan ek mooi as jy sê hy het aan dit gevat, hy het aan dit gevat?

MRS BOSHOFF: Your Worship, can that question just please be rephrased? I am not sure how to ask it to the child.

COURT: Please rephrase, sir.

MR MOKOENA: Will I be correct to understand that he just only touched your private part?

PROSECUTOR: Your Worship, the state is going to have to object at this stage because this is not what the witness has been testifying.

COURT: Yes, I was waiting for that objection.

PROSECUTOR: Indeed, so Your Worship, I had just given my learned colleague some leeway as I was not sure what the question actually meant earlier, Your Worship. She clearly states insertion of the fingers into the private part.

COURT: Yes, thank you, Mr Mokoena.

MR MOKOENA: Thank you, Your Worship. She clearly stated insertion of the fingers into the private part.

Ad 1.

The legal representative of the appellant committed the error in the question and the court merely ruled on an objection and after there was also some confusion from the

intermediary on the question. This cannot be labelled as irritation towards the legal representative.

2. VOLUME 2 – PAGE 148 LINE 21 – 149 LINE 23

MR MOKOENA: Okay. So, until you woke up and – or you decided to leave and went to the bathroom also, did I get you correctly?

COURT: That is not a very nice sentence, please rephrase.

MR MOKOENA: Okay.

COURT: Think and then you start afresh.

MR MOKOENA: Thank you, Your Worship. Then after that, that is when you felt uncomfortable and you decided to go to bathroom?

TOLK Dit is toe jy ongemaklik gevoel het en toe besluit het dat jy badkamer toe gaan?

MEV. BOSHOFF: Is dit so A[...] dat jy toe ongemaklik begin voel het en besluit het om badkamer toe te gaan?

A[...]: Dit is so.

INTERPRETER: That is correct.

COURT: Just a moment, Sir. Also, you have omitted once again a very important step. She moved away first of all and then she went to the bathroom.

MR MOKOENA: Indeed, Your Worship.

COURT: Do you understand, that was her evidence on this topic.

MR MOKOENA: Indeed, Your Worship. Thank you, Your Worship. So, will I be correct to also understand your evidence in respect also to the second time when this happened, it also happened in the same manner, for example, the insertion of the finger, it happened on the same manner as you described to the Court?

TOLK Is ek reg as ek sê soos wat jy verduidelik het dat die tweede keer toe hy sy vinger so ingedruk het, het dit net so gewees soos dit die vorige keer gewees het?

MEV. BOSHOF: A[...], is dit reg om te sê dat die tweede keer wat papa dit gedoen het met jou, is dit dieselfde gedoen as die eerste keer dat hy sy vingers in jou privaatdeel gedruk het?

Ad 2.

The above is clearly only an effort by the magistrate to make sense of the question and ensure that the correct version was put to the witness. The legal representative agreed with the court and adapted his language accordingly. It is clear from the record that English is neither the first language of the legal representative nor the magistrate. Irritation or bias cannot be inferred here.

3. VOLUME 2 – PAGE 149 LINE 8 – 149 LINE 13

COURT: Just a moment, Sir. Also, you have omitted once again a very important step. She moved away first of all and then she went to the bathroom.

MR MOKOENA: Indeed, Your Worship.

COURT: Do you understand, that was her evidence on this topic.

Ad 3.

The court assisted the legal representative to put the correct version to the witness. This cannot be faulted as bias or irritation.

4. VOLUME 2 – PAGE 152 LINE 17 – 152 LINE 19

COURT: Mr Mokoena, identity of this person?

MR MOKOENA: Your Worship?

COURT: Ask her.

Ad 4.

Here the court actually assisted the legal representative to place crucial evidence on record to promote the case for the appellant.

5. VOLUME 2 – PAGE 154 LINE 13 – 154 LINE 18

MR MOKOENA: Your Worship, I believe that it is only the signature which is – I believe that it is only the signature which is ...[intervenes]

COURT: Voluntarily, which language was it done?

MR MOKOENA: Yes, indeed, Your Worship.

COURT: Those type of questions, Sir.

Ad 5.

The court assisted the legal representative to formulate a basis for admissibility and veracity of documentary evidence that he wants to put on record. The guidance of the court cannot be faulted.

6. VOLUME 2 – PAGE 157 LINE 11 – 149 LINE 24

MR MOKOENA: Thank you, Your Worship. I believe indeed. Your Worship, the basis was all laid, unless the state wanted to authenticate?

COURT: Lady?

PROSECUTOR: Your Worship. I believe indeed, Your Worship, the basis was all laid, unless the state wanted to authenticate?

COURT: Lady?

PROSECUTOR: Your Worship, for what it will be worth, the state will not object and that we may proceed.

COURT: I think the signature, sir?

MR MOKOENA: Pleases the Court, Your Worship.

COURT: Is this her signature here? There is one on the end, but she denied having made?

MR MOKOENA: May I ...[intervenes]

COURT: But from the state there is no objection.

MR MOKOENA: There is no objection.

COURT: But do you understand, you have missed this point?

Ad 6.

Again, the court assisted the legal representative and did not obstruct him.

7. VOLUME 2 – PAGE 160 LINE 9 – 161 LINE 23

PROSECUTOR: Your Worship, if I may perhaps just to be fair to this witness as well, that the defence provide them with a copy as well, as it is most difficult for this intermediary and the witness to be doing this procedure without having a copy of the statement with. The state was not aware of the fact that this would be tendered and therefore there was not copies made on the state's behalf.

COURT: Fine, sir do you have the additional copies?

MR MOKOENA: Your Worship, I do not have additional copies, I have marked them.

COURT: From now on sir, the moment when you think you are going to make use of a witness statement, you ensure that there is also a copy for the other party.

MR MOKOENA: Yes, Your Worship.

COURT: Do you understand, otherwise it is not fair.

Ad 7.

The court guided the legal representative and correctly so to have the correct number of copies ready when documents are used during trial. This cannot be construed as bias or irritation.

8. VOLUME 2 – PAGE 165 LINE 12 – 166 LINE 13

COURT: Thank you. Seems to me she is still able to continue right now, but I just want to say this Sir, I want to make a remark and I want to place it on record. Paragraph 5 is following paragraph 4, therefore there is a certain sequence.

MR MOKOENA: Indeed.

COURT: Do you understand? Clearly in paragraph 4 she is referring to the alcohol.

MR MOKOENA: The issue of the alcohol.

COURT: Situation.

MR MOKOENA: Indeed, Your Worship.

COURT: Do you understand? See every question that you have asked, all four questions about paragraph 5 were affirmed by her. Do you understand, so there is no problem with paragraph 5, if I may make it? The reason why I am telling you this Sir, I really, normally I cannot see, I cannot understand the need to work through the statement paragraph for paragraph for paragraph. Is that correct? Yes. Is that correct? Yes. I also want o ... [inaudible], I am not going to give you unlimited time to continue with cross-examination. I have discussed this matter at length to you in previous matter as well, so you must understand we are busy for quite a long period of time in this instance already. Just keep it in mind. You understand? So, if you are going to continue with all the paragraphs, do not be surprised at the end if there is no time left for

cross-examination, because this is not cross-examination. This is just confirmation of what was said. Do you understand what I am trying to say?

Ad 8.

The court explained to the legal representative what the consequences of lengthy and irrelevant cross examination might be. The court did not stop him in his cross examination. He allowed him to proceed as he wished.

9. VOLUME 2 – PAGE 166 LINE 15 – 166 LINE 23

COURT: So just keep in mind you have got the time constraint as well. On the previous time I have told you, it is very important, I am only interested mostly in the version from your client on each count.

MR MOKOENA: Pleases the Court.

COURT: Do you understand? Then if there is time, it is possible to work with ...[inaudible] like this, because paragraph 6 is clearly to a certain extent, until now it is a waste of time. Each and every answer was yes. Proceed, Sir.

Ad 9.

The court again explained to the legal representative what the consequences of lengthy and irrelevant cross examination might be. The court did not stop him in his cross examination. He allowed him to proceed as he wished.

10. VOLUME 2 – PAGE 182 LINE 16 – 182 LINE 21

MR MOKOENA: When did you start smoking? Were you here or – when you start smoking were you still here in – were you still here in Bloemfontein or where at Pretoria?

COURT: No Sir, this is not a reasonable question to a child.

MR MOKOENA: Okay.

COURT: Rephrase.

Ad 10.

The legal representative was allowed to rephrase the question for the witness to understand and she answered the question and the evidence the defence wanted to illicit came on record clearly and unambiguously.

11. VOLUME 3 – PAGE 236 LINE 1 – 236 LINE 6

MR MOKOENA: Earlier you testified that your mother was the one who was pouring alcohol for you and your father was aware of such. Do you still recall that?

COURT: The stepmother.

MR MOKOENA: Yes, the stepmother.

COURT: Just put the statement correct, Sir.

Ad 11.

The question was clearly wrong; the legal representative was supposed to refer to the stepmother and not mother. The guidance of the court cannot be faulted.

12. VOLUME 3 – PAGE 246 LINE 17 – 246 LINE 25

MR MOKOENA: You will not know any A[...] will say to the Court that your father did give you alcohol once and by then yourself – okay, you will not know ... [intervenes]

COURT: Yes, please start afresh because I do not have a vaguest idea what type of question you are going to ask.

MR MOKOENA: Thank you, Your Worship. You will not know why will your sister say that when your father gave her alcohol yourself you had already went asleep?

COURT: Sir, with all due respect I do not understand and there is also equally a big question mark on the face of the interpreter. You are talking to a child, but if we do not understand what you are asking how do you think he will understand?

Ad 12.

The situation cannot be labelled as bias or irritation. The question was not clear; Mr Mokoena rephrased his question. Mr Mokoena throughout the trial struggled to phrase questions. The court must assist him as well as serve the administration of justice.

13. VOLUME 3 – PAGE 246 LINE 25 – 247 LINE 19

COURT: Sir, with all due respect I do not understand and there is also equally a big question mark on the face of the interpreter. You are talking to a child, but if we do not understand what you are asking how do you think he will understand?

MR MOKOENA: I will rephrase, Your Worship.

COURT: Make it easy.

MR MOKOENA: ... [Inaudible – error on the recording] yourself you had already go to sleep, do you know about that?

PROSECUTOR: Your Worship, state is also going to object to that, because that was never her direct words. She has also confirmed the fact that both her and her brother were given alcohol. Your Worship, this question is not fair to a child of this age.

COURT: Thank you, an objection, Sir.

MR MOKOENA: Thank you, Your Worship.

COURT: Do you want the answer to it?

MR MOKOENA: I also agree ... [intervenes]

COURT: Yes, I am in agreement Sir, I think this is totally an unfair question and irrelevant. Anything else?

MR MOKOENA: May I withdraw that, Your Worship?

Ad 13.

The court in the instance ruled on an objection by the State.

14. VOLUME 4 – PAGE 351 LINE 4 – 357 LINE 7

COURT: Thank you. Questions from court. Did you notice your children in court, sir?

MR K[....]: Yes, sir.

COURT: They are seemingly doing well right now?

MR K[....]: It is a good thing if they are doing better. So, I saw them suffer and I took, tried to take that away from them.

COURT: I do understand your answer, but you are in agreement with me they are doing well right now?

MR K[....]: Yes, sir.

COURT: It seems to me they are relaxed and they are ... [intervenes]

MR K[....]: Come, comfortable.

COURT: Receiving foods on a daily basis and everything is in order?

MR K[....]: [no reply].

COURT: You are just nodding yes.

MR K[....]: Yes, Your Honour.

COURT: And how long are they in the children's house?

MR K[....]: Before I fetched them or now?

COURT: Now.

MR K[....]: I think it is about six months. No, it is a year. Since the case, since the case started yes.

COURT: So, it might be even 18 months?

MR K[...]: In between there yes.

COURT: It is a long period of time?

MR K[...]: Yes.

COURT: Now since they are there, there is no contact with you anymore. You are not there to influence their life?

COURT: And they know they are permanently there in the children's house. Is that correct?

MR K[...]: Yes, Your Honour.

COURT: Now if that is the case why would they still continue with the false charge against you

MR K[...]: Sighs. I would say maybe because they are afraid of me.

COURT: Why will they be afraid of you? You are not allowed to be with them. Is that not the case?

MR K[...]: Yes, Your Honour.

COURT: Why will they be afraid of you?

MR K[...]: I do not know, maybe if I walk in the road or something and they see me. I have no idea.

COURT: Are you that dangerous, sir?

MR K[....]: No, sir.

COURT: You see I just want to understand your entire version because I cannot understand the moment when they have testified in court, they seemed to me quite happy. ... [indistinct] people right now who got a lot of understanding of the entire situation. I did not pick up any bad motive from them you understand, any intention to do you harm. Did you pick up any intention whilst they testified?

MR K[....]: Just the fact that they say I did things that I never would have done in my whole life.

COURT: Ja, apart from that. But did you pick up anything else from them? Was that a type of hatred against you or anything?

MR K[....]: From A[...] yes, I did.

COURT: And from your son?

MR K[....]: Not that much.

COURT: Mm. Do you think it is possible for her to influence him?

MR K[....]: Yes.

COURT: Why?

MR K[....]: They have never been broke up as brother and sister. They always stayed together and she always protected her brother no matter what. So even in the house if I was a bit angry with A[...]2 then he run to her and she comforts him. They went to the same schools.

COURTS: That is a magnificent personality trait, sir. It seems to me she was caring for him, even as a youngster?

MR K[....]: That is the kind of ...[intervenes]

COURT: Do you agree that is a positive?

MR K[....]: That is the kind of beliefment that I did find.

COURT: That is a type of thing that a parent wants to install with his children, to care for one another and she has done that?

K[....]: Yes.

COURT: So, to a certain extent good. Full points for her on the topic?

MR K[....]: Yes.

COURT: It is not a negative towards her, are you in agreement?

MR K[....]: Yes.

COURT: And your son what type of personality does he have?

MR K[....]: Quite aggressive.

COURT: Is he more aggressive?

MR K[....]: *Ja*

COURT: Than your daughter?

MR K[....]: Yes.

COURT: Why is he aggressive?

MR K[....]: I cannot answer. I know for the times that I did see them, the little bit of times that I saw them, that is how he being with me as well. Always aggressive.

COURT: Mm. It seems ... [intervenes]

MR K[....]: And fighting.

COURT: Okay. It seems to me your daughter was sorry for you as well. She realised it is difficult for you to have them. Is that the case?

MR K[....]: Yes, Your Honour.

COURT: And she tried to assist?

MR K[....]: Yes, Your Honour.

COURT: Once again the good caring type of personality?

MR K[....]: Yes.

COURT: Are you in line?

MR K[....]: No.

COURT: Not?

MR K[....]: [No reply].

COURT: The moment when she is caring about you, she is asking you this question?

MR K[....]: Ja. No, she was ...[intervenes]

COURT: She understand the suffering?

MR K[....]: She did understand the situation.

COURT: Because that is my feeling about her you understand. It is part of my job to evaluate people and I have got the impression that she is a caring type of a soft person?

MR K[....]: [No reply]

COURT: Are you in agreement?

MR K[....]: Yes.

COURT: Not a bad person?

MR K[....]: I did find her a few times bad, but not this bad.

COURT: Let us leave alone the accusation against you, that is a separate thing. Let us park it there. Apart from that, was she a mean type of person?

MR K[....]: No, she was always friendly. Sometimes a lot sad, but never aggressive.

COURT: Actually, a very nice child?

MR K[....]: Yes, Your Honour.

COURT: But for one thing? If it was not for the charges against you, it is possible for you to give her a very good write down?

MR K[....]: To be a good, sorry?

COURT: Write down type of a report on her?

MR K[....]: Yes.

COURT: *Ja*. So, this was totally out of line the entire charge. Are you in agreement?

MR K[....]: Yes, Your Honour.

COURT: Because that is interesting to me you understand. Personality wise is she more like you or more like your ex-wife, or not like anyone?

MR K[....]: Not like any of us.

COURT: She is more, is she cool headed?

MR K[....]: Yes, quite.

COURT: And you are not cool headed?

MR K[....]: Quite clever also.

COURT: Clever as well *ja*. Why are you uncertain right now, sir? I am not asking a question and you are looking at different places. You are ... [intervenes]

MR K[....]: I am sad.

COURT: In a jittery fashion.

MR K[....]: I am sad, sir. I am sad, Your Honour.

COURT: Have you not just made a big mistake?

MR K[....]: No, Your Worship I did not make any mistakes. I did treat my children a bit bad, but I wished for my children to stay with me for the last seven years. So, I, when I had a chance to do that, I did not know I could really afford it. But I did take a chance to try because I ... [intervene]

COURT: You tried your best?

MR K[...]: I did my best to have my children with me.

COURT: Thank you, any questions from your side Mr Mokoena?

MR MOKOENA: I have no question, Your Worship.

Ad 14.

The above may be labelled as cross examination and too much interference by the court but it did not affect the appellant or cause him any distress. He answered with self-confidence and even at times disagreed with the presiding officer. He was not intimidated and stood his ground. The probabilities that the presiding officer wanted to use in the evaluation of the evidence were put to him to give his opinion and he did so. The person that knew his children the best is the appellant and the court elicited his version. The above did not affect the fairness of the trial to the extent that the trial can be ruled to be substantially unfair.

[37] If the test is applied as was depicted by counsel for the appellant and based on *S v Le Grange* 2009 (1) SACR 125 SCA; the conduct of the presiding officer *in casu* did not transgress to the extent of unfairness. The law require not only that a judicial officer must conduct a trial open-mindedly, impartially and freely; but that such conduct must be apparent, especially to the accused. The Supreme Court of Appeal *supra* ruled that:

1. The requirement of impartiality was closely linked to the right of an accused person to a fair trial. Such fairness would clearly be under threat if a court failed to apply the law and assess the facts impartially and without fear, favour or prejudice.
2. Presiding over criminal trials was a difficult task and cross-examination could sometimes appear protracted and irrelevant. However, impatience was something that a

judicial officer must wherever possible avoid and always strictly control. It could impede his perception, blunt his judgment and create an impression of enmity or prejudice in the person against whom it was directed.

3. A judicial officer could perform his demanding and socially important duty properly only if he stood guard over himself, mindful of his own weaknesses and personal views, and controlled them. (Paragraphs [14] and [18] at 140e-g and 149e-g.)

4. Many of the presiding judge's questions to the appellants had been legitimately put for elucidation or supplementation, but the record was also replete with questions that were intended to discredit the appellants, compounded in many instances by disbelief and scepticism. Far from merely clarifying matters, the questioning sought to pick holes in the appellants' version, and must have seemed to them to have been designed to produce answers favourable to the State.

5. This questioning strongly indicated that the judge had made up his mind at an early stage that the State witnesses were telling the truth and the appellants lying. (Accentuation added)

6. While judicial officers could, and did, form provisional views on the credibility of witnesses, it remained their fundamental duty not to close their minds to the possibility of changing such views until the last word had been spoken. Certain comments made by the presiding judge could mean only that he had decided, long before the cross-examination of the State witnesses, let alone before hearing the evidence of the appellants, that the State's case was the truth.

7. He had not approached the appellants' case objectively and impartially, and the language used suggested that he had certain preconceived biases, which he had allowed to affect his judgment. (Paragraphs [20] and [23] at 150c-f and 152f-153b.)

8. Further, that some of the irregularities complained of would, in themselves, not have constituted sufficient indication that the appellants had not enjoyed a fair trial. Taken cumulatively, however, they compelled the conclusion that the presiding judge had not been fair and impartial during the trial.

9. Under the circumstances the proceedings were invalid and the convictions and sentences could not stand.

10. The irregularity was such as to have vitiated the trial entirely; the possibility of double jeopardy did not arise, and the institution of a new trial would not infringe s 35(3)(m) of the Constitution of the Republic of South Africa, 1996. There was a pressing societal demand for, and public interest in, the case, which involved a most serious charge; accordingly, there would be a miscarriage of justice should proper trial not ensue. (Paragraphs [29] and [31] at 155c-d and 156c-e.)

11. Convictions and sentences set aside. Matter remitted to the High Court for retrial before a different judge.

[38] The interference and conduct were severe and grossly irregular in the case above. The magistrate here, *in casu*, treated the appellant with courtesy and endeavoured to understand his version and circumstances. It is not irregular for a presiding officer to have made up his mind at the end of the testimony of the accused.

[39] The magistrate displayed empathy to all the parties if the whole of the record is regarded. He might be inclined to voice his own personal views and experiences and should cease this habit. It is tantamount to evidence from the bench.

[40] The only question that raises discomfort was when it was asked if the appellant made a mistake. The appellant was not intimidated and stood his ground. The presiding officer must be admonished to also stop asking questions of this nature and realise the consequence of such. If the appellant confessed the crimes on this question, it could have led to a gross irregularity. It is not the place of the presiding officer to illicit confessions. The position of authority of a magistrate might have, unlawfully so, intimidated the appellant into pleading guilty by confession. It, fortunately, did not.

[41] The record in its entirety shows that the appellant is guilty as charged and the trial was fair.

[42] The issue of sentence now come to the fore. The appellant maintains that life imprisonment for the rape of his own 13-year-old daughter is shockingly inappropriate. The victims in the instance were removed from their biological mother due to abuse and neglect. They were placed in the care of their father whom they believed will be their saviour. Even though they lived in poverty and dire circumstances the daughter testified that she did not mind and understood. She was not angry; just sad.

[43] Notwithstanding that the appellant penetrated his young daughter's vagina with his finger, he also during another incident, rubbed her vagina with his foot in front of her friend. He gave her alcohol and must have realised that this will inhibit her lucidity. The conduct was not on the spur of the moment but as if out of some perverted perceived sense of normality and right to do so. The humiliation in front of her friend must have been severe. The trauma for the young 10-year-old friend that was witness to an incident speaks volumes.

[44] Counsel for the appellant took issue with the manner in which the magistrate referred to the statistics on rape in South Africa. He is indeed correct; the defence must be given the opportunity to investigate the veracity of the statistics before a court can regard it. The irregularity is not fatal.

[45] The statistics that happened in the court itself is judicial notice and it cannot be criticized. The manner in which sentences were dealt with in the court *a quo* and the increase thereof that evolved over the years, cannot be faulted. It is the mirror image with which the legislator and the people of the country regard and fear the crimes of abuse and rape of children. The promulgation of prescribed minimum sentences underscores this.

[46] The appellant argued that the lack of physical injuries counts in the favour of the father. The mental scars and secondary trauma that the children experience do however negate any physical scar. In *S v Matyityi* 2011 (1) SACR 40 SCA at 45(j) to 46(b) the Supreme Court of Appeal noted correctly that:

To the extent that he may have been referring to permanent physical injuries, one can hardly quarrel with that conclusion. But, with respect, to restrict the enquiry to permanent physical injuries, as the learned judge appears to have done, is to fundamentally misconstrue the act of rape itself and its profound psychological, emotional and symbolic significance for the victim. As it was put by this court in *S v De Beer*: 'Rape is a topic that abounds with myths and misconceptions. It is a serious social problem about which, fortunately, we are at last becoming concerned. The increasing attention given to it has raised our national consciousness about what is always and foremost an aggressive act. It is a violation that is invasive and dehumanising. The consequences for the rape victim are severe and permanent. For many rape victims the process of investigation and prosecution is almost as traumatic as the rape itself.'

[47] To be weighed against the above are the personal circumstances of the appellant. He is a man that would have enough money for alcohol but not enough money to have food for his family on the table. He is a first offender and alcohol played

a role during the commission of the offences. He has completed a N3 certificate qualification and was employed during the offence. He was under the stress of severe financial constraints at the time of the offence. The responsibility on him to maintain a rather extended family was grave.

[48] The appellant showed no remorse and blamed his children for the case. He put the already fragile children through the trauma of a trial. They will have to live with the fact that their testimony had put their father in prison. It is a double tragedy; undeserved abuse and the undeserved self-blame because you vilified your father.

[49] The sentences are appropriate and must be confirmed.

[50] ORDER

The appeal against the convictions and the sentences is dismissed.

M OPPERMAN, J

I concur

N.S DANISO, J

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