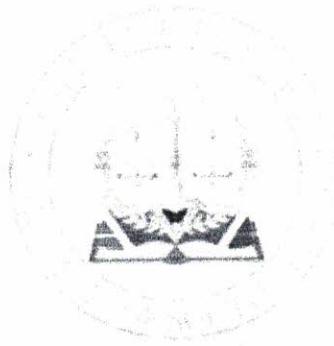


**REPUBLIC OF SOUTH AFRICA****IN THE HIGH COURT OF SOUTH AFRICA****GAUTENG DIVISION. PRETORIA.**

A4/12

CASE NO: A392/16.

Not reportable

Not of interest to other Judges.

In the matter between:

MZWENDODA BRIAN NTSHIGILA**APPELLANT**

and

THE STATE**RESPONDENT**

J U D G M E N T.

Coram: RE Monama, J. et SS Maakane, AJ**Introduction.**

- [1] During July 2009 the Appellant was charged with and convicted of one count of rape in terms the provisions of Section 52 of the Criminal Law

Amendment Act. The case was held in the Regional Court, Klerksdorp. The victim was a minor female. On 10 November 2010 he was sentenced to effective term of twenty-five years imprisonment . He was further declared unfit to possess a firearm.

- [2] During the trial in the court *a quo* he was represented by Adv LP Vertue.

Chronology of events leading to leave to appeal.

- [3] On **10 November 2010** the Appellant brought an application for leave to appeal both conviction and sentence. The application was refused.
- [4] On **6 December 2011** he was granted leave by this court to appeal both the conviction and the sentence. The appeal was set down for hearing on 25 April 2013. His heads of argument were filed on 22 March 2013. These heads are signed by Adv S Franke from his chambers in Pietermaritzburg. The heads of argument addressed the issue of **sentence** only. Respondent's heads of argument were filed on 16 April 2013. They are signed by Adv L Williams of the Office of the Director of Public Prosecutions, Pretoria. These heads of argument addressed the issue of sentence only. As regards the conviction , the Respondent in paragraph 4 thereof commented as follows
- “this is not dealt with as it appears that the Appellant is satisfied with his conviction.”
- [5] On **25 April 2013** the appeal's hearing on sentence took place before **Pretorius J** and Collis AJ. The parties did not address the issue of conviction. The appeal against the sentence was dismissed.

- [6] On or during **25 February 2014** the Registrar of this Court received a communication in form of an affidavit referring to Case No SH 2/311/06 and appeal Case No 9/11. Attached to this affidavit are several documents including a petition for leave to appeal. These documents bear the case numbers already referred to above.
- [7] On **9 June 2014** the Appellant was granted leave (presumably on petition) to appeal to the Supreme Court of Appeal by Judges **Pretorius** et Tolmay. This appeal is against sentence only and is still pending.
- [8] On or during **3 October 2016** the Registrar of this Court issued a directive to the Director of Prosecutions, Pretoria , the Legal Aid South Africa and the Clerk of the Court , Klerksdorp advising them all to file their heads of argument. The directive indicated that the appeal will be heard on **9 March 2017**.
- [9] On **21 October 2016** the Appellant filed his heads of argument. This time they are signed by Adv LA Van Wyk and dated 17 October 2016. The heads of argument now addresses the issue of conviction.
- [10] On **6 March 2017** the Respondent filed its heads of argument. The Respondent indicated that it will be making its application to strike the appeal from the roll. On **9 March 2017** the appeal hearing took place before Rabie J and Lukhaimane AJ. The matter was postponed *sine die*. The parties were granted leave to file further heads of argument.
- [11] On **14 March 2017** the Appellant filed a document titled "Additional Heads of Argument." On **21 August 2017** the Respondent replied and

filed another set of additional document titled “ heads – administration of oaths and competency of intermediary” .

The issues as raised by the appellant.

- [12] The Appellant has now raised two issues in *limine*. The first issue is whether the presiding officer in trial court administered the oath or affirmation on the intermediary properly. The second issue is whether the complainant was put under oath correctly.
- [13] The main issue is whether the Appellant has made out the case for his appeal against the conviction to be heard by this court. The secondary issues, which are also vital, relate to the oath and the ability of the complainant to tell the truth due to her age.

The relevant history in these proceedings.

- [14] The Appellant was charged and convicted on one count of rape of 11 year old complainant. The State relied on the *viva voce* evidence of the complainant, Dolly Orabile Poeng, Sara Poeng (the mother to the complainant), Dr SLK Mapeka and Alexandra Moses Takki , the uncle to the complainant. The State also relied on various documentary exhibits.

- [15] The complainant testified that she was raped by the appellant in the toilet. The medical doctor testified that the injuries on the private parts of the complainant were consistent with forced sexual intercourse. The mother testified that the complainant reported the alleged rape to her. That evidence is corroborated by the uncle. The State also relied on the statement by a witness, one Ou-Mari Maria Monaweng, who has since died together with the summary of her testimony before the departmental disciplinary hearing relating the Appellant.
- [16] The Appellant testified in his own defence. He called no witnesses. He denied the allegations of rape. He testified that the complainant's mother implicated him because she has a grudge against him.

The judgment of the trial court.

- [17] The trial court assessed and evaluated the evidence. The learned magistrate was conscious that the complainant is a single witness. He accordingly approached same with the necessary caution. He properly dealt with the admissibility and the probative value of the hearsay evidence as contained in the statement of Ms Maria Monaweng.
- [18] The court *a quo* made a favourable credibility findings on the state witnesses. It rejected the version of the Appellant as not

reasonably possibly true and that it is in fact false. It found that the State has proven its case beyond reasonable doubt and convicted the Appellant as charged.

- [19] On 10 November 2010 the trial court imposed, *inter alia*, a sentence of 25 years effective imprisonment. The trial considered the triad when it imposed the said sentence. It also gave due consideration of the existence or otherwise of substantial and compelling circumstances.

The subsequent events.

- [20] On 10 November 2010, the trial court refused his application for leave to appeal both the conviction and the sentence. The refusal triggered the events mentioned in paragraphs 3 to 10 above. On 6 December 2011 the Appellant was informed that he was granted leave to appeal both the **conviction** and **sentence**.
- [21] In due course the appeal was set down for hearing on 25 April 2013. The Registrar of this court issued the necessary directives. They informed him and other affected parties about the date of set down and time limits within which to file his heads of argument.
- [22] The Appellant filed his heads of argument drawn by Adv. Franke as stated above. The heads of argument dealt with the issue of sentence only.

[23] The appeal was heard by Pretorius J and Collis AJ. The written judgment of that appeal is dated 25 April 2013. From the record there is no indication as to why the Appellant pursued the issue of sentence only, when he was granted leave to appeal both the conviction and sentence. In answer to this observation, Collis AJ in paragraphs 3 and 4, stated the following:

- “3. Leave to appeal both conviction and sentence was refused by the court a quo and only granted on petition to the Judge President. The present appeal however, only concerns the sentence imposed on the appellant.
4. In essence the appellant is aggrieved by what he considers to be an excessive sentence imposed on him.”

[24] In our view, the appeal court correctly dealt with the issues as raised by the Appellant in his heads or argument. From the record there is no indication as to why the Appellant pursued the issue of sentence only, when he was granted leave to appeal both the conviction and sentence.

The effect of the failure to deal with the conviction.

[25] It has been a long-standing practice of our Courts that appeals particularly in criminal matters, should not be dealt with on a piece-meal basis. In other words, it is undesirable that the

Appellant prosecutes his appeal in respect of sentence only and if this fails, then later try and pursue same in respect of conviction¹.

[26] When this happens, the appeal Court will be entitled to infer and find that such an Appellant has waived his right to appeal against the conviction, *alternatively* that he has abandoned his appeal in that respect.

[27] Be that as it may, on 9 March 2017 the matter served before Rabie J and Lukhaimane AJ. The matter was postponed *sine die* and parties were granted leave to file additional heads of argument. The order is silent on the aspect we have referred to above. We assume therefore the postponement was meant to afford the parties a further opportunity to deal with the issues addressed above.

[28] That being the case, we assume in favour of the appellant that the appeal is properly before us. However, we do not condone the manner in which the Appellant has dealt with and handled this matter.

¹ **Walhaus v Additional Magistrate, Johannesburg 1959 (3) SA 113 (A) at 120E**

- [29] As stated above, the Legal Aid South Africa took over the matter, it for the first time challenged the conviction. There is no explanation whatsoever for failure to also challenge the conviction at the same time when the appeal on sentence was heard.
- [30] The other issue, which is of peripheral nature, is the order by **Pretorius** and Tolmay J dated 9 June 2014 . The said order granted the Appellant leave to appeal the sentence to the Supreme Court of Appeal. It appears that Judge Pretorius was the member of the court that refused the Appellant leave to appeal the sentence on 23 April 2013. We do not know that if the judge who was part of the courts on 23 April 2013 and 9 June 2014 is one and the same person. In the event that this refers to one and the same judge, we are of the view that there is no prejudice whatsoever.

The first point *in limine* – the swearing in of the intermerdiary

- [31] The function of the intermediaries is governed by legislation². The Appellant does not challenge the suitability or the qualifications of the intermediary, Ms Nomvula Dorothy Jas. This intermediary, was and has been employed as such on the permanent basis by the Department of Justice. This was the case as at the date of the trial in the regional court. She was properly sworn in to act³ and serve as such.

² Section 170A of the Criminal Procedure Act, No 51 of 1977.

³ See line 14 on page 31 of the record.

- [32] The complaint that the complainant was not put properly under oath has already received judicial consideration⁴. The courts have distinguished between the functions of an interpreter on one hand and that of an intermediary on the other. The latter has much flexibility than the former. An interpreter's duties are delineated in terms of the Rule 61 of the Uniform Rules of Court, Rule 68 of the Rules of the Magistrate's Court and the Magistrate's Court Act.⁵
- [33] The duty of an intermediary is to convey the general purport of any question⁶. The main function is to minimise the mental stress and or mental suffering of a witness. Such witness must fully satisfy the requirements stipulated in the Act. An intermediary conveys the evidence and does not herself testify as a witness.
- [34] An interpreter does not enjoy such latitude. Ms Jas took an oath. She is in the permanent employment of the State. Therefore, it was strictly unnecessary to swear her as the court *a quo* did. The approach of the trial court was an exercise in *ex abundanti cautela*. The Appellant relied on the judgments which have since been rejected in this court⁷ or overtaken by the new jurisprudence.
- [35] In this regard, we were referred to the case of Mbongisena Mzwakhe Mahlangu v State (Case No. A382/2014) an unreported judgment of this

⁴ S v Naidoo 1962 (2) SA 625 (A), S v Booie and Another 2005 (1) SACR 599 (B), S v Motaung 2007 (1) SACR 476 (SE), S v QN 2012 (1) SACR 380 (KZP) and the unreported case of the S v Mahlangu Case No. A382/2014.

⁵ Section 6 (2) of Act 32 of 1944.

⁶ See Section 170A (2)(b).

⁷ S v Naidoo, S v Booie and Another, and S v Motaung.

division in which Pretorius J concurred. Jansen J (as she then was) said the following:

"[8] I am in agreement with the authorities which hold that the failure to swear in an intermediary cannot vitiate the proceedings."

[9] The point in limine is therefore dismissed."

(At paragraphs 8 and 9)

The Second point in limine-The warning to the complainant

[36] The complainant was 11 years old. She had to testify through Ms Jas, an intermediary. Before the commencement of her testimony in the trial certain questions were put to her. The purpose was to determine whether she did appreciate the nature of the oath and the consequences of lying⁸. The argument that the complainant was not properly warned or sworn in is without merit. The complainant testified that:

*"My ma het my al geleer dat ek die waarheid praat
maar nie meer leuens vertel nie."⁹*

⁸ See from line 19 on page 32 to line 15 on page 33 of the record.

⁹ See line 9 on page 33 of the record.

- [37] The trial court was informed by the complainant during this warning process the effect and consequences of lying. She testified that if any person lies in court, then:

“So person gaan tronk toe¹⁰.”

- [38] In our view she was acutely aware of the purpose of the warning and the oath. She was conscious that her duty was to tell the truth. Again this point in *limine* lacks merit and stand to be rejected.

- [39] I accordingly find no misdirection or the alleged irregularity. Finally, counsel for the Appellant obliquely insinuated that the trial was unfair in that the Appellant did not see the complainant in person when she testified. However, this argument was not seriously pursued. Counsel for the Appellant took a correct approach in this regard. It has long been settled that the procedure in Section 170(A) of Act 51 of 1977 is constitutional. Again, this argument is without merit.

The appeal on the conviction.

- [40] It is trite that the State must proof its case beyond reasonable doubt. It is also trite that this court can only interfere in very limited instances. Such instances, will include material and substantial misdirection as to the facts or the law.

¹⁰ See line 4 on page 33.

[41] The conviction was based on the evidence of the complainant, her mother, her uncle and the late Ms Maria Monaweng. The latter evidence is in the nature of hearsay and was received in terms of the provision of Section 3 of the Law of Evidence Amendment Act. The trial court was conscious that the complainant is a single witness on a charge of rape. It correctly applied cautionary rules. The evidence of penetration is corroborated by the doctor who examined her. The court correctly found that the State witnesses were credible and reliable.

[42] The Appellant's version was correctly rejected. In my view the Magistrate was correct in rejecting the alleged grudge said to be held by the complainant's mother. We are in full agreement with the conclusion of the learned magistrate when he stated, namely that:

"En verwerp ek dus die beskuldigde se weergawe dat hierdie 'n hele beplande storie is van almal om bewustelik saam te sweer om hom valslik te impliseer as 'n wolhaar storie van hom ¹¹.

[43] In the circumstances I find no misdirection in respect of the conviction. I accordingly propose the following order:

"The appeal against the conviction is dismissed and the conviction of the Appellant by the trial court is hereby confirmed."

¹¹ See lines 9-11 page 102 of the record.

I agree

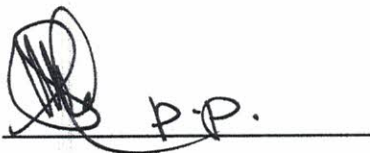
A handwritten signature in black ink, appearing to read 'SS MAAKANE', written over a horizontal line.

SS MAAKANE

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

It is so ordered

A handwritten signature in black ink, appearing to read 'RE MONAMA', written over a horizontal line.

RE MONAMA,

JUDGE OF THE HIGH COURT,

GAUTENG DIVISION, PRETORIA.

Appearances

For the Appellant: Adv. F van As

Instructed by: Pretoria Justice Centre, Pretoria.

For the Respondent: Adv. S Mahomed

Instructed by:	Office of the State Attorney, Pretoria.
Date of hearing:	4 September 2017.
Date of judgment:	28 March 2018.