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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A269/18

DATE: 27-08-2024

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED AND CORRECTED

DATE 08 October 2025

In the matter between

PATRICK SIPHO THWANE

Applicant

and

THE STATE

Respondent

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**EX TEMPORE JUDGMENT**

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**KUNY, J:** This is judgment in the matter of Patrick Sipho Thwane versus the state. The judgment will be delivered in paragraph format.

- [1] The appellant, Patrick Sipho Thwane, was charged in the Regional Court of Pretoria with contravening Section 3 of the Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007, as amended (read with related provisions), and Section 51, Schedule 2, Part 1, of Act 105 of 1997.
- [2] The State alleged that during or about June 2015 at or near Windmill Park, Gauteng, the appellant, unlawfully and intentionally committed an act of sexual penetration with the complainant, G[...] M[...], by inserting his penis in her vagina without the her consent. The state alleged that the minimum sentencing provisions apply because the complainant was nine years old at the time the alleged rape was committed.
- [3] The proceedings were held in camera. On 17 October 2017, the appellant pleaded not guilty. He was convicted on 5 April 2018 as charged, and on 13 April 2018, he was sentenced to life imprisonment. The appellant was legally represented throughout the proceedings. He appeals against his conviction and sentence.

[4] The following witnesses gave evidence. G[...] M[...], the complainant, a minor, who testified through an intermediary via CCTV using the court's TV system. She was nine years of age at the time the alleged offence was committed.

[4.2] N[...] N[...] K[...], a minor who testified via an intermediary.

[4.3] J[...] M[...], the mother of the complainant.

[4.4] E[...] N[...], the complainant's aunt.

[4.5] Ms Mokwena, a nurse who examined the complainant and who gave evidence in relation to the J88 medical form.

[4.6] Thuli Mashele.

[4.7] The appellant testified in his defence.

[5] The alleged rape was described by the complainant in her evidence in the following terms:

[5.1] In June 2015, she was playing with her friends

in the evening in the veld near to her parents' house.

[5.2] She saw another child by the name of D[...] sitting around a fire near the place where they were playing. Whilst sitting with other children, the appellant arrived. He was familiar to her because she had seen him around the area where she lived.

[5.3] The complainant went with the appellant into the bush on the promise of the receipt of R2. They were near the fire and also to houses in the vicinity.

[5.4] The appellant instructed her to undress. He took off her panties. She did not remove her whole dress. He took off his trousers and underwear.

[5.5] The complainant took his penis and put it in her vagina. She used the following words to describe the act of sexual penetration - *"He took his peepee, and put it inside my cookie."* She then testified that he was "bumping" on top of her. After that, the appellant put on his clothes and left. She also collected her clothes and left.

[5.6] The complainant did not see her friend N[...]

after she came out of the bushes after the rape had taken place.

[5.7] The complainant did not tell anybody about the incident. However, upon inquiry from Thuli, the complainant told her that the appellant raped her.

[5.8] The complainant entered the courtroom and identified the appellant as the person who raped her. During cross-examination, she said she was scared to tell her mother for fear of being beaten.

[6] Nkwondo Keso testified about an incident that happened in June 2015:

[6.1] They were all sitting around the fire with other children. She could not remember the exact time, but it was already getting dark when they were seated there.

[6.2] The appellant was amongst them. When the complainant went to fetch firewood, the appellant then followed her and made as if he was going to the Bangladesh shops. At that stage, she and others went home, and she did not see the complainant and the appellant when

they came back.

[6.3] Keso knew the appellant and would see him often. The appellant is also familiar with her from her parental home. The following day, Keso was visiting a friend when she came across the appellant and a person by the name of Simpehle. She greeted them and was about to pass when the appellant stopped her and told her that he had “messed up”, and that he had raped the complainant. Keso testified she did not believe him and she told him he was lying. The appellant said he was not lying, and told her to ask Simpehle. The latter person confirmed that the appellant was speaking the truth.

[6.4] The following day, she spoke to the complainant about the incident. Initially, the complainant kept quiet, and when she asked the complainant a second time, the complainant confirmed that the appellant had raped her.

[6.5] The complainant informed her that she was scared to tell her mother for fear of getting a hiding.

[6.6] Keso reported the incident to the complainant's mother that evening. However, the mother

ignored her and she left. She confirmed that the following day, the children were singing at the complainant's gate a song with the words "*what you are doing is not good*". She was sent to buy bread and she came across Thuli to whom she reported the rape of the complainant.

[7] Nurse Mokwena gave evidence that she examined the complainant in July 2015. She established from an internal examination that the complainant had scar tissue in her vagina at 9 o'clock, and she confirmed that this was a result of vaginal penetration with a blunt object.

[8] The appellant testified as follows:

[8.1] He confirmed that he knew the complainant as he used to see her around playing.

[8.2] He denied that he at any stage told N[...] or admitted to N[...] that he raped the complainant.

[8.3] He confirmed that a meeting was held where the allegation was brought up. He was asked if he knew about the problem. He responded that he had heard of the allegations but he denied

them. He confirmed that the complainant pointed him out as the person who raped her and that he was passing by Thuli's house when the children were singing.

[8.4] Under cross-examination, he testified that he knew about the other children who were playing with N[...], and he also knew about the fire where these children sat near the veld around June. He used to go there. However, after the allegations surfaced, he stopped going there. He had no bad blood with the complainant or N[...].

[8.5] He could not say why the complainant pointed him out as the person who raped her.

Alleged contradictions in the state's evidence

[9] Counsel for the appellant in argument relied heavily on submissions that there were contradictions in the evidence of the complainant N[...]. On this basis, he submitted that the court could not rely on their evidence. The contradictions were said to be the following:

[9.1] The complainant did not mention that N[...] was present on the day of the alleged rape.

[9.2] The complainant testified that N[...] saw the appellant raping her. However, N[...] testified that she did not see the alleged rape.

[9.3] It was submitted that the complainant's evidence was contradicted by the evidence of Thuli Mashele, who testified that N[...] told her that she (N[...]) had witnessed the rape.

[9.4] N[...] testified that the appellant had informed her of the rape. However, this aspect of N[...]s testimony was not confirmed by the complainant.

[10] A close analysis of the evidence shows that these so-called contradictions were in fact more apparent than real:

[10.1] The complainant did not, in her evidence, exclude the presence of N[...] at the fire she sat around with the other children.

[10.2] She testified that X[...], F[...] and N[...] had departed after they had played together, not after they had been sitting around the fire.

[10.3] The complainant's testimony that N[...] saw her being raped implies that N[...] was also sitting

around the fire or was in the near vicinity when the appellant took the complainant into the bushes. This confirms N[...]’s evidence that she was present at the time that the appellant took the complainant into the bushes.

[10.4] The complainant’s evidence that she did not see N[...] when she came out of the bushes suggests that she was there before she went into the bushes. This again is consistent with N[...]’s evidence that she was present when the complainant left the fire with the appellant and that she had not seen the complainant return because she had already gone home.

[11] The discrepancy in the evidence of the complainant, who said that N[...] had seen the rape, and N[...]’s testimony that she had not witnessed the rape, in my view, is not material. N[...]’s testimony substantially corroborated the evidence of the complainant in relation to the fact that the appellant had been sitting around the fire and had taken the complainant into the bushes. It also corroborated the complainant’s evidence in relation to the complainant’s subsequent report that the appellant had raped her. Finally, the appellant’s admission to N[...] that he had messed up

by raping the complainant corroborated the complainant's evidence as regards the rape.

[12] A further issue taken by the appellant was that the complainant testified that she had reported the incident five days after it happened. The medical report showed that the scars had healed. Nurse Mokwena, who examined the complainant, testified that injuries caused by forced penetration take between 7 and 21 days to heal. On this basis, it was argued that the evidence of the complainant could not be relied upon.

[13] The complainant testified that she told Thuli about the rape five days after it happened. Thuli testified that after the report, she discussed the matter with the complainant's mother. The complainant was first taken to the clinic. E[...] testified that after they returned from the clinic, they called the appellant's mother and informed her of the allegations against her son. At that stage, the complainant pointed out the appellant as having been the person who raped her. The appellant's mother gave them R100 to take the complainant to the hospital the following morning.

[14] The evidence was that the complainant was taken to the OR Tambo Memorial Hospital and then to Bertha Goxowa Hospital in Germiston, where the complainant was examined by Nurse Mokwena on 5 July 2015.

[15] The evidence shows that there would have been a delay of at least a day from the time when the complainant first made her report until she was examined by Nurse Mokwena. It is reasonably possible that by the time the complainant was examined, the injuries she had sustained had healed sufficiently for them to be noted as clefts. It is also quite conceivable that a young child giving evidence in relation to time may not have been accurate in her estimate. In my view, the complainant's time estimate falls well within the parameters of the medical evidence led by the state, and there is no substance in the argument that the evidence as to time discredited the complainant's evidence.

[16] As has been pointed out in many cases, contradictions *per se* do not lead to the rejection of a witness's evidence. They may be simply indicative of an error, and not every error made by a witness affects his or her credibility. See *S v Mkhle* 1990

(1) SACR 95 (SCA).

[17] There were two material contradictions between the evidence given by the appellant and the version that was put to the state witnesses. First, it was put to N[...] that the appellant would deny sitting around the fire because he was not friendly with her. In his evidence, he admitted sitting around the fire because it was not far from his place. Secondly, it was put to Thuli that the appellant denied that the girls were singing a song when he passed by. In his evidence the appellant admitted that the children were singing when he passed by the gate. He, however, testified that he did not know what message they were driving home. It is true that there is no onus on the appellant to prove his defence. He is entitled to an acquittal if the evidence that he gives is reasonably possibly true.

[18] The court must also take into consideration that the complainant is a young child who is a single witness insofar as the actual rape was concerned. However, I am satisfied that the magistrate took all of this into account when he weighed up the evidence. The appellant conceded that there was no animosity

between him and the complainant and N[...], and he could offer no reason why they would falsely implicate him. In my view, therefore, he was correctly convicted of the charges against him.

### SENTENCE

[19] In mitigation of sentence, the appellant's legal representative submitted that the appellant was 22 years of age. This was in 2018, some three years after the rape. The court accepted that this was his age. Accordingly, he would have been approximately 19 years of age at the time of the rape.

[20] No pre-sentencing report was called for in respect of the appellant. A short victim impact statement dated 21 April 2017 was produced in respect of the complainant. However, no full victim impact report was produced after the appellant had been convicted.

[21] Our courts have repeatedly emphasised the need for pre-sentencing reports in the case of young offenders. See, for example, *S v M and Another 2005 (1) SACR 481 (E)*, *Ravele v S (20079/14) [2014] ZASCA 118 (19 September 2014)*, *S v Siebert*

(214/1996) [1996] ZASCA 135 (27 November 1996), *S v Matyityi 2011 (1) SACR 40 (SCA)*, *S v Manka 2003 (2) SACR 515 (O)*, *S v Gagu and Another 2006 (1) SACR 547 (SCA)*, *S v Phulwane and Others 2003 (1) SACR 631 (T)*.

[22] The Criminal Law Amendment Act, 105 of 1997 requires the court to impose a life sentence if no substantial and compelling circumstances warrant a lesser sentence. In these circumstances, when dealing with a young offender, it was essential that a pre-sentencing report be obtained, even if it was not called for by the defence. In my view, there was a material misdirection in not obtaining this report. The age of the appellant should also have been independently verified. It would also have been appropriate for the court to obtain a victim impact report comprising a more detailed investigation conducted by a social worker pertaining to the physical and psychological effects of the rape upon the complainant.

[23] Accordingly, I am of the view that this court is at liberty to and should interfere with the sentence imposed upon the appellant. However, this can only

be done once proper sentencing reports are obtained. In my view, no purpose would be served by referring the matter back to the Magistrate's Court for such reports to be obtained. This court has the power to call for the reports needed to impose an appropriate sentence. In the circumstances, I make the following order:

1. The conviction of the appellant is confirmed.
2. The appeal on sentence is postponed *sine die*.
3. The court directs the following reports shall be obtained:
  - 3.1 A victim impact assessment report in respect of the complainant, G[...] M[...].
  - 3.2 A sentencing report from a probation officer/social worker in relation to the re-sentencing of the appellant.
- 4 Once the aforesaid reports have been obtained, the registrar is directed to set the appeal down

for further consideration.

- 5 Pending the reconsideration of the appellant's sentence, he shall remain in detention as a sentenced prisoner.

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**KUNY J**

**JUDGE OF THE HIGH COURT**

**GAUTENG HIGH COURT**

MATHUNZI, AJ: I agree.

**PP**

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**MATHUNZI, AJ**

**ACTING JUDGE OF THE HIGH COURT**

**GAUTENG DIVISION**

**Judgment delivered in open court on 27 August 2024**

**Judgment corrected and signed on 08 October 2025**