IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

REVIEW NO: R124/13

CASE NO: SH 105/09

In the matter of:

THE STATE **APPLICANT**

V

BUYANI NTSHO ZUNGU **RESPONDENT**

SPECIAL REVIEW JUDGMENT

D. PILLAY J

[1] This is a special review in terms of s 304 (2) of the Criminal Procedure Act 51 of 1977 (CPA). This section requires a magistrate in the trial court to refer a matter to the High Court if the trial is not in accordance with justice.

[2] The accused was charged with two counts of rape. In count one the complainant N was a girl of eight years. In count two the complainant W was a girl of seven years. Both incidents happened on 22 November 2008 in Dutch location,

Escort Kwazulu-Natal. The accused, a male of eighteen years, was arrested the following day. He was released on warning with conditions. After several adjournments the trial eventually commenced on 5 July 2010. The accused was convicted on both counts on 29 June 2011. He was held in custody pending the submission of pre-sentencing reports by a social worker and probation officer based in the Department of Social Development, Escort.

[3] The child complainants testified. Notwithstanding their youthfulness they were model witnesses. They corroborated each other wherever possible. There were no inconsistencies within their evidence or between each other's versions.

[4] Their evidence was that they were alone in the home of W watching television. The accused arrived. He took each of them by the hand to an adjoining bedroom. He pushed N to the floor in between the wall and the bed. He stuffed a cloth in the mouth of the complainants. He threw W onto the bed and raped her. Each time N tried to peep at what was going on, he shoved her down. W bled as a result of the rape. After raping W he told her to wash herself and her panty. She left the room but did not carry out his instructions. Instead, she hid her panty behind the house. After she left, the accused raped N. N defecated in her panty. She kept it in her pocket. The accused threatened them not to report the incident to anyone. It also emerged that this was not the first time the appellant raped W.

[5] The complainants were afraid that the accused would stab them hence their reluctance to report the rape. Later when N's aunt returned from church she noticed that N walked slowly and awkwardly. The aunt probed. N extracted a promise from her aunt that she would not tell the accused. Thereafter N reported the rape to her. The two of them went to the home of W. W also got an assurance that their aunts would not report the matter to the accused. Then W also gave her account of the rape.

[6] The appellants reported to the doctor that the accused had raped them. Both children were medically examined. The doctor who prepared the J88 medical report confirmed that both complainants had injuries consistent with rape. In the case of W she also had old scars which corroborated W's evidence that she had been raped previously. The complainants' aunts corroborated the complainants about how the rape was reported. W's aunt testified that her relationship with the accused was not

good because he took her belongings without her permission. N's aunt also testified that N had reported to her that the accused had raped her previously. N's aunt testified that the accused was a quiet child with whom she had no quarrel.

[7] The accused was the cousin of W. Their mothers were sisters. He denied raping the complainants. He alleged that he was at home taking care of his ailing grandfather. His grandfather corroborated him saying that the accused was with him the entire day and that he had not left home at all. The learned magistrate rejected the accused's evidence and his alibi on the evidence of W's aunt who testified that she had seen the accused at her home that day before she left for a funeral.

[8] Seldom in a rape case are witnesses so clear and convincing. This case is all the more remarkable considering that the principal witnesses are two children aged seven and eight. The accused was well known to the complainants. Therefore identifying him was not an issue. Unsurprisingly therefore, the learned magistrate placed no weight on the DNA results following the tests on the complainants' panties. Preliminary tests were negative and no DNA comparison was carried out. Commendably, the learned magistrate took care to test the complainants' ability to be truthful. Both legal representatives were satisfied that they understood what it meant to be truthful. The complainants testified through an intermediary who was properly sworn in. Procedurally too this was a model trial. Predictably the learned magistrate convicted the accused.

[9] She adjourned for a pre-sentencing report. On resumption the social worker testified that she interviewed the complainants. Both of them informed her that it was not the accused who had raped them but another man by the name of Dikho. Dikho had threatened to kill them if they reported the rapes to anybody. The complainants were recalled. They corroborated the social worker. They testified that Dikho knew the accused and it was at his suggestion that they implicated the accused.

[10] This is an extraordinary case. Notwithstanding the meticulous application of the rules of evidence, truth remains elusive. Were the complainants lying the first time they testified or the second time? Whatever their answer is, they have to live with the consequences of lying in court for the rest of their lives. Worse still, they and whoever else might be responsible, have to live with their consciences knowing that a rapist might go unpunished.

[11] In these circumstances I find that the proceedings in the Magistrates' Court and the ensuing convictions were not in accordance with justice. The only remedy is to quash the convictions in terms of s 304 (2) (c) (i). The order I grant is the following:

The convictions of the accused on both counts are quashed.

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D. Pillay J

I agree.

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Ploos van Amstel J

Comment [A1]: Insert 'I agree'.