IN HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, PITERMARITZBURG

CASE NO: AR581/14

THEMBINKOSI EMMANUEL MBOKAZI **APPELLANT**

Aand

THE STATE **DEFENDANT**

JUDGEMENT

Delivered: 17 July 2015

MBATHA J

[1] This is an appeal from the judgment of the Madadeni Regional Court Magistrate, Ms M.T. Lubuzo, given on the 11th of April 2014. This appeal is against both conviction and sentence in terms of the Judicial Matters Amendment Act[1], which came into operation on the 22nd of January 2014.

The Appellant was convicted of one count of Rape (of a child under the age of 16 years) and was sentenced to life imprisonment.

[1] Act 42 of 2013

[2] The Appellant's grounds of appeal are broadly stated as follows:-

a) That the complainant was not properly admonished by the trial Court in that the enquiry held by the learned Magistrate in that regard, was a superficial enquiry. In that case, it cannot be said whether she established whether the witness knew the difference between the truth and a lie.
b) That her evidence as a single witness was not clear and satisfactory in every material respect, in that there were inconsistences and a contradiction in her evidence as to how the Appellant raped her.
c) That the complainant's evidence as a child complainant was unreliable due to suggestibility and susceptibility of minor children.

[3] The appeal is opposed by the State on the basis that there was no misdirection on the part of the Regional Magistrate either on the requirements of section 162 and 164 of the Criminal Procedure Act 51 of 1977 and in the evaluation of the evidence before her.

[4] It has been settled since ***R v Dhlumayo and Another***[2] and the cases that follow it that a Court of appeal will be reluctant to interfere with the trial Court's evaluation for oral evidence, unless there is a misdirection by the trial Court.

[5] The Appellant had been charged in terms of Section 3 read with the provisions of section 1, 56(a), 57, 58, 60 and 61 of the Sexual Offences and

[2] 1948 (2) SA 67 (A) 705.

Related Matters Amendment Act[3], Rape, read with the provisions of Section 51 and/or 52 of Schedule 2 of the Criminal Law Amendment Act[4], as amended. The complainant was 12 years old at the time of the commission of the offence.

[6] At the time when the complainant gave evidence in Court, she was thirteen (13) years old. Due to her tender age and the nature of the offence, the Court determined that she would suffer undue mental stress if she testified in open Court. An intermediary was then appointed in terms of Section 170A of the Criminal Procedure Act.

[7] The main issue raised by the Appellant is that the complainant was not properly admonished. Section 162 of the Criminal Procedure Act requires that all evidence be given under oath. The person testifying must understand the nature and import of the oath. Section 164 (1) of the Criminal Procedure Act[5] states as follows:

> "Any person, who is found not to understand the nature and import of the oath or affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation; provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth."

[3] Act 32 of 2007
[4] Act 105 of 1997
[5] Act 51 of 1977, as amended.

The provisions of Section 164 are peremptory as the words "*that such person shall*", appears in the wording thereof. Such a failure as stated by Appellant's Counsel would render the evidence of the complainant inadmissible. The provisions of Section 162 to 164 of the Act[6] specifically state that the witness will be examined under oath, affirmation or admonishment to ensure that the evidence is reliable.

[8] Section 192 of the Criminal Procedure Act[7] goes further to state that if a child does not have the ability to distinguish between the truth and untruth, such child is not a competent witness. It is the duty of the presiding officer to satisfy himself or herself that the child can distinguish between the truth and untruth. The maturity and understanding of the child must be established by the judicial officer, who must ascertain the level of intelligence for the child to give evidence in the trial proceedings.

[9] The Appellant's submission is that the child witness could not distinguish between the truth and lies due to the insufficient admonition made by the learned Magistrate. In amplification therefore it is submitted that when the child was asked what it means to tell the truth her response was that "*telling the truth is saying something that is straight and something that is understandable*" and when she was asked what it means to tell lies, her response was that "*It is speaking something that is not understandable, someone would not even know what you are saying*".

[6] Act 51 of 1977, as amended.
[7] Act 51 of 1977, as amended.

In this regard, the Court was referred to **S v B**[8], where the Court held that where there has been a failure to admonish the child witness, such evidence should be inadmissible.

[10] Upon perusal of the record it is clear that the Magistrate was alert to the fact that the complainant was a child witness. She enquired about her date of birth. The complainant gave the 23rd of May 2000 as her date of birth. When the Magistrate informed her that she was enquiring because of what is written in her birth certificate. She proffered that there was a mistake on the birth certificate, as it did not reflect the correct date. The Magistrate enquiry went on further as follows:

"Court: *Do you understand the meaning of the oath?*

Complainant: *No.*

Court: *Do you know what it means to tell the truth?*

Complainant: *yes.*

Court: *yes, what does it mean?*

Complainant: *Telling the truth is saying something that is straight and something that is understandable.*

Court: *How? What do you mean by this, saying something that is straight and understandable? Can you elaborate?*

Complainant: *No.*

Court: *Do you know what it means to tell lies?*

[8] 2003 (1) SACR 52 SCA.

Complainant: *Yes.*

Court: *What does it mean?*

Complainant: *Its speaking something that is not understandable. Someone who would not even know what you are saying.*

Court: *I understand that in view of your age…(intervention).*

Interpreter: *Are you?*

Court: *I understand that in view of your age, you may be ignorant of the concept such as oath and so on. Let me put it this way. Is it a bad thing or a good thing to tell lies?*

Interpreter: *Can you please repeat the question.*

Court: *Is it a bad thing or a good thing to tell lies?*

Complainant: *It is a bad thing.*

Court: *I am satisfied that the witness is competent. Philile Mbokazi.*

Record: *(admonished).”*

[11] It is clear from the above extract from the record that the learned Magistrate determined that the complainant understood what it meant to tell the truth. The word “straight” as used by the interpreter when he related to the Court what the complainant was stating is synonymous with the words “unswerving, direct and undeviating and unbending”. The Oxford Dictionary gives various examples of the definition of the word straight. In one of its

definitions which I consider to be relevant to the context of this matter is this one.

"Not evasive; honest, 'a straight answer' thank you for being straight with me."

[12] When she was asked what does it mean to tell lies, she answered in the same fashion; "It is something that is not understandable, someone would not even known what you are saying". Her response basically means that if you lie it's something that you manufactured, a figment of your imagination and something that people will not understand as it is not in existence or an untruth."

[13] The learned Magistrate to clarify what the complainant meant, went on to establish if she understood the effect of telling a lie, when she asked her whether it is a good or a bad thing to tell a lie. Her response was an unequivocal answer that "it is a bad thing".

[14] It did not end there, but she admonished child as the record clearly states that she is admonished at every stage of the proceedings. The words used are not typed on the record as it is often the case when the oath is administered, the record merely reflects the words "sworn in".

[15] The Appellant's Counsel referred us on this aspect to **S v B**[9], where the Court held such evidence by the complainant to be inadmissible due to a failure to affirm or admonish a witness. The decision in **S v B** was confirmed in **Director of Public Prosecutions v Mekka**[10], where the Supreme Court of Appeal held that Section 164 of the Criminal Procedure Act[11] required nothing more than that the presiding judicial officer had to form an opinion that the witness did not understand the nature and import of the oath or affirmation due to ignorance arising from youth, defective education or other cause and that the section did not expressly require that an investigation be held in all circumstances before such a finding could be made, was not abiter and also was correctly decided.

[16] The finding by the learned Magistrate that she was competent to give evidence is also reinforced by the manner in which she gave evidence. Her evidence is clear and her answers to cross-examination questions reflect her maturity and competency.

[17] This Court is satisfied that the judicial officer did not superficially carry out her duties. The intermediary was first sworn in terms of section 170A of the Criminal Procedure Act, she had the birth certificate of the complainant as proof of her age and had already detected that there was an error in the birth certificate as proffered by the complainant.

[9] 2003 (1) SACR 52 (SCA).
[10] 2003 (2) SACR 1 (SCA).
[11] Act 51 of 1977

[18] It is our view that there was sufficient compliance with the provisions of section 162 and 164 of the Criminal Procedure Act. The complainant was a competent witness and her evidence is admissible.

[19] On the merits the facts of the case are that on the afternoon of the 26th of April 2012, the Appellant arrived at the home of the complainant to visit her family. The Appellant is her uncle whom she was seeing for the second time on that day. The Appellant sat with the children in the dining room, where the complainant and her younger siblings played games on the Appellant's phone and whilst they were busy playing games the Appellant touched her on her waist. The complainant who was uncomfortable with that moved to sit on another sofa. They also watched TV up to the time that they decided to retire to bed. They prepared their sleeping places on the floor of the dining room where they often slept. They retired to their respective sleeping places on the floor.

[20] The Appellant had remained seated on the sofa. Whilst sleeping she felt his hand touching her breasts and underclothing. She tried to push him away but the Appellant continued to touch her breast, lick her ears and was also trying to kiss her. Finally, he got underneath her blankets. He fingered her and made her touch his penis. She cried and faced towards the direction of the TV set (away from the Appellant). When she turned her back towards him, it was then that the Appellant penetrated her vagina from the back. He made forward and backward movements. She felt pain. The Appellant instructed her to get on top of him inside her private parts. When that happened the

Appellant heard the sound of keys opening the door, he jumped up quickly and returned to the sofa where he had been sitted.

[21] On behalf of the Appellant it is submitted that she was not a clear and satisfactory witness, because under cross-examination she testified that the Appellant made her turn around, face him and then he raped her. Having done that he placed his penis inside her vagina and started moving back and forth, and that her grandfather and Manqo came in, when she had got on top of the Appellant. It is also submitted that it is a material contradiction in her evidence regarding whether she was facing him during the rape or whether he penetrated her through bum into the vagina.

[22] The learned Magistrate was mindful that whenever it comes to the evidence of young children, she should guard against two (2) elements suggestibility and imaginativeness. It is clear in her judgment too that she was alive to the fact that she was dealing with the evidence of a single witness, which need to be clear and satisfactory in every material respect. It is clear to this Court that she considered the merits and demerits of the evidence of the complainant, a single witness. Having done so, considered if the truth had been told or not, irrespective of the shortcomings, defects or contradictions in the evidence. This Court has noted the following:-

a) It is clear from the evidence presented before the trial Court that penetration had taken place. This is corroborated by the evidence of Dr Shoba who examined the complainant;

b) The Appellant was the only adult male in the dining room where the complainant and the younger children were sleeping. There is no dispute as to the identity of the Appellant or his presence in that room that night;

c) The grandfather of the complainant corroborated her evidence in a material respect. He independently said, when he woke up from his bedroom to go past the dining room he saw the Appellant lying behind her. This is consistent with how she described being raped;

d) It was also her evidence that the Appellant had ordered her to get on top of her, after he penetrated her through her back. This was not a figment of her imagination that she had been penetrated by the Appellant;

e) The complainant immediately reported the rape to her aunt, Nkosingiphile Venetia Mbokazi, who testified that she was crying when she reported that she had been raped by the Appellant. Upon her examination, the aunt found her to be wet, which is consistent with what she reported to her;

f) The Appellant was a visitor to her home; she did not wait for him to leave before making a report. The moment he let go of her nightie, she jumped up to go and report to her aunt. There is nothing in her evidence and other witnesses' evidence, which suggests imaginativeness or unreliability. This Court accepts that the primary concern for the trier of facts is to ascertain if the truth has been told and this was done by the learned Magistrate;

g) The learned Magistrate did not ignore the discrepancies and contradictions in the complainant's evidence, but weighed up all the

evidence in its all totality, and accepted that the State had proved its case beyond any reasonable doubt; and

h) When approached by the complainant's grandfather the Appellant could not explain why he was lying behind the complaint. There is no reason why the grandfather would have fabricated against a nephew who does not live with him and who has no issues with him. It is also important to note the grandfather's evidence that the Appellant had no reason to sleep on the floor as he had been directed by him to go and sleep with the other boys in the outside rooms.

[23] The DNA results were inconclusive, in that it stated as follows that "no male DNA was obtained from exhibits (O8D1AC4913XX)and the Court was alive of this favourable factor to the Appellant. However, she considered that there were factors that led to such inconclusive results like in the case where the perpetrator used a condom, but found that the direct evidence of the complainant and her witnesses to be true and consistent. This was also corroborated by the evidence of Dr Shoba and her findings in the J88 medical report.

[24] It is also our view that there was no misdirection on the part of the learned Magistrate in her consideration of the evidence before her. We are accordingly satisfied that there is no basis to interfere with the learned Magistrate's findings that the State had proved beyond any reasonable doubt that the accused is guilty of the crime of Rape.

Sentence

[25] It is trite that the Court will only interfere with a sentence if a Court misdirected itself in passing sentence. Moreover, a misdirection alone does not suffice for a Court of appeal to interfere, a misdirection should be material as expressed by Trollip JA in **S v Pillay**[12], where he stated as follows:

> *"It should be of such a nature, degree or seriousness that it shows directly or inferentially, that the Court did not exercise its discretion at all or exercise it improperly or unreasonably. Such a misdirection is usually and conveniently termed, one that vitiates the Court's decision on sentence. That is obviously the kind of misdirection predicated in the last quoted dictum."*

[26] It is common cause that the conviction attracts a sentence of life imprisonment. The Court had to determine if there were substantial and compelling circumstances that would make it deviate from imposing the prescribed minimum sentence.

[27] It is clear from the record that the learned Magistrate is *au fait* with the provisions of Section 3(A) of the Criminal Law Amendment Act[13], which sets out four (4) factors which will not count as substantial and compelling circumstances; they are the complainant's previous sexual history, the apparent lack of physical injury to the complainant; the accused's persons

[12] 1997 (4) SA 531 (A).
[13] Act 38 of 2007

cultural or religious beliefs about rape and any relationship between the accused person and the complainant prior to the offence being committed.

[28] The learned Magistrate also took into account the traditional factors taken into account, when sentencing is considered. The Appellant was a first offender, had one minor child, was 29 years at the time of the commission of the offence and was gainfully employed. The Courts should not shy away from imprisoning first offenders and not depart easily from imposing the prescribed sentences. In this case, his age and other personal circumstances were found not to be substantial and compelling circumstances.

[29] The Court took into account what was stated in the Victim Impact Report and also considered the aggravating factors being that the complainant was raped in the sanctity of her home by a relative. She was a child, who will have to bear the rape scars for life. It also took into account that the Appellant was not an immature young man but was a 29 year old male, who is also a father to a child. She aligned herself with what was stated in **S v Matyityi**[14], regarding the personal circumstances of the Appellant.

[30] The Supreme Court of Appeal in various judgments has repeatedly held that it is not only for rapes of the worst type, that life imprisonment will be justified, for example; in **S v Abrahams**[15], **S v Mahomotsa**[16] and the more

[14] 2010 (SCA) 127
[15] 2002 (1) SACR 116 (SCA)
[16] 2002 (2) SACR 435 (SCA)

recent **Mudau v S**[17] delivered on 9 May 2013. **S v Vilakazi**[18] differed and held that life imprisonment is not reserved only for extreme cases, as long as it is proportionate to the offence. The Courts should not only look at physical injuries, courts should not ignore profound psychological, trauma, loss of dignity and emotional scars in the victims of rape.

[31] In the light of the facts before us, we find that there was no discretion or irregularity on the part of the learned Magistrate in imposing the sentence of life imprisonment on the Appellant.

[32] I accordingly propose the following order:

a) The Appeal against both conviction and sentence is dismissed.

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MBATHA J

I agree: _____

D. PILLAY J

[17] 764/12 SACR 292 (SCA)
[18] 2009 (1) SACR 552 (SCA)

Date of hearing	:	14 July 2015
Date delivered	:	17 July 2015

Appearances:

For the Appellant	:	Adv. P. Andrews
Instructed by	:	Legal Aid, Pietermaritzburg
For the Respondents	:	Adv S. Singh
Instructed by	:	The Director of Public Prosecutions Pietermaritzburg