REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR 563/18

In the matter between:

S[….] E[….] D[….] Appellant

and

THE STATE Respondent

ORDER

In the result, the following order is made:

(a) The appeal in respect of both the convictions are dismissed and the convictions are confirmed.

(b) The appeal against sentence succeeds in part and the sentence imposed by the court a quo is substituted with the following:

"In count 1, the appellant is sentenced to eight years' imprisonment and in count 2, to three years' imprisonment. The sentence in count 2 is to run concurrently with that in count 1.".

APPEAL JUDGMENT

Delivered on: 8 November 2019

Masipa J (Naidu AJ concurring):

Introduction

[1] On 3 September 2014, the appellant was convicted by the Regional Court, Pietermaritzburg on one count of sexual assault and one count of attempted rape. He was sentenced to ten years' imprisonment in respect of the sexual assault and three years' imprisonment for the attempted rape with the sentences ordered to run concurrently. This appeal is pursuant to leave to appeal being granted by the court a quo in respect of both conviction and sentence.

The Facts

[2] The evidence leading to the appellant's conviction and sentence is briefly set out below. The complainant, was 13 years of age when she testified. In view of this, the court a quo conducted a competency test. The complainant was asked if she knew what the oath was and she replied that she did not. The court a quo then ventured into asking her further questions, some of which were the following:

'COURT All right, but tell me, do you know what it means to take the oath in court?

COMPLAINANT No, Your Worship'.

Further, on in the record, it reads as follows:

'…… COURT All right, L[....], do you know what it means to tell the truth?

COMPLAINANT Yes.

COURT Please tell me what does it mean.

COMPLAINANT The truth is something that one tells when he has seen it.

COURT All right, when I tell about something that I did not see, what would I be telling?

COMPLAINANT That would be a lie.

COURT Okay, now, L[....], are children then of your age allowed to tell the truth?

COMPLAINANT Yes, Your Worship.

COURT Who taught you that?

COMPLAINANT My mother, Your Worship.

COURT Are they allowed to tell lies?

COMPLAINANT No.

COURT Why?

COMPLAINANT They will get a hiding if they tell lies.

COURT Who will give them hiding, L[....]?

COMPLAINANT The parent or the teacher.

COURT Okay, why would they get the hiding?

COMPLAINANT They are telling lies.

COURT Is it wrong – why would that be? Is it something bad to tell lies that parents will give you a hiding?

COMPLAINANT Yes, Your Worship.

COURT Who taught you that, L[....]?

COMPLAINANT My mother.

COURT Do you know why is it bad to tell lies?

COMPLAINANT Yes, Your Worship.

COURT Why is it bad, L[....]?

COMPLAINANT I can end up causing conflict amongst people.

COURT Okay, do you know what is the religious consequences of telling lies when you tell them in church?

COMPLAINANT Yes, Your Worship.

COURT Yes, what do they tell you?

COMPLAINANT They say that can cause conflict amongst people and they can end up fighting.

COURT Will that happen if you tell the truth?

COMPLAINANT No, Your Worship.

COURT Is there anything that you, Ms Aboobaker, want to ask the child on her competency?

NO QUESTIONS ARISING FROM PROSECUTOR

NO QUESTIONS ARISING FROM MR KHUMALO

COURT Thank you, the Court is satisfied that the witness is competent. Though she is of tender age of 13 years, she is in a position to distinguish between telling the truth and lies and understand the consequence of telling the lies. THE COURT WILL THEN PROCEED TO SWEAR THE WITNESS.

L[….] N[….] D[….] (Sworn states)'.

[3] The complainant's evidence was that on 28 September 2012 she was playing with her friends in the veranda. She went into the house to take a bath leaving her friends who continued to play outside. She finished bathing and when she was putting her underwear on, she heard the door opening. She then observed her paternal uncle, the appellant herein, entering her father's room being the room she was currently in. He held her and placed her on top of the bed. He closed her mouth pressed her hands and feet down and took off her underwear. He licked her vagina and breasts, unzipped his pants and at this point released the grip from her mouth. When he was about to insert his penis into her vagina, she said 'Here is my mother'. The appellant then got off her and ran away. According to the complainant, the appellant was heavily under the influence of alcohol.

[4] She reported the incident to Sipho Gaza, her father's friend, who arrived shortly thereafter and he advised her to lock herself in the house. After doing this, she heard a knock on the door and realised it was her father. When her father entered the house, she reported the incident to him and he too was under the influence of alcohol. The next morning, she reported the incident to her mother A[….]

M[….] M[….] who called a family meeting. The appellant's sister, the complainant's paternal aunt, the complainant's maternal uncle and the complainant's mother attended the meeting. According to the complainant, the complainant attended and disputed that the incident had occurred.

[5] It seems that nothing transpired from the meeting. One day when the complainant was sent by her mother to fetch water, the appellant stopped her and asked why she had reported him. She reported this to her mother. Social workers visited her school and she reported the incident to them and they in turn reported the matter to the police.

[6] When Ms M[....] testified, she gave evidence, which was consistent with that of the complainant. On the day of the incident, she was in Durban for a church service. When she returned home, the children cheered for her as they thought she was not returning home on that day. After entering the house, the complainant told her that she wanted to talk to her. She asked what happened and the complainant relayed the incident to her. She added that the complainant mentioned that the appellant offered her money of approximately R200.

[7] She confirmed that after the complainant relayed all the events including that she had reported the incident to her father, she called a family meeting. Ms M[....] also reported the incident to her husband who commented that the appellant had left him at the bottle store to get up to mischief. It appears that he did nothing else thereafter. Prior to the commencement of the meeting, which was the following day, the appellant arrived at her home looking for her husband. The appellant was called into the meeting and was asked as to what he had done. The appellant's response was that he did not know what he had done the previous day. The complainant was asked to and relayed the incident. The appellant apologised and his sister said it was a family issue and they should not discuss it again. The incident was not reported to the police.

[8] Ms M[....] confirmed that the complainant had informed her that the appellant had confronted her again thereafter. It seemed like the appellant was continuously following the complainant. As a result, Ms M[....] decided to relocate. She confirmed further that the complainant reported the matter to the social workers who had visited

her school. Consequently, the complainant was removed from her care and taken to Lidgetton, a home. According to Ms M[....], she had a good relationship with the appellant.

[9] Ntokozo Zondi testified that she is a social worker and met the complainant during a school visit she conducted during May 2013. Part of her duties involves dealing with abused children, and when such abuse comes to their attention, they remove children from that environment and place them into homes. They also have to report the case within 24 hours of becoming aware of it. She confirmed that following the talk they presented at the complainant's school, the complainant confided in her and told her that she was sexually abused by her paternal uncle.

[10] Ms Zondi then met with Ms M[....] who confirmed that she was aware of the matter and had informed the complainant's father about it but nothing was done. Ms M[....] said her husband was abusing alcohol. She also mentioned the family meeting where the issue was discussed and they were told to keep it a secret. Ms Zondi interviewed several family members who confirmed the meeting. She reported the matter to the police as she established that the complainant's parents had not done this and had kept it a secret as instructed at the family meeting. She confirmed further that the complainant was placed in a temporary care facility. As at the time of Ms Zondi testifying in court, the complainant had returned to the care of her mother, as she was the one who was supportive to the child while she was at the care facility.

[11] When the appellant testified, he denied any involvement in the incident and said that on the day in question, he was working. He also denied that there was ever a family meeting held to discuss the issue. He could not provide a response as to why he had not raised this version when the State led its witnesses. According to him, the complainant and her mother were just picking on him as there was bad blood between him and Ms M[....]. He said that Ms M[....] had schooled the complainant to tell lies about him after they had quarrelled and said she should lay a charge against him. He could not explain why the matter was never reported to the police until the social worker did so.

The points in limine

[12] Two points in limine were raised for the appellant. The first was that there was a duplication of the charges and secondly that the court a quo administered an oath when it ought to have admonished the complainant.

[13] In respect of the duplication issue, it was argued that sexual assault and attempted rape constituted one criminal act and that there was a single intent. In view of this, it was prejudicial to convict the appellant twice for the same offence. It was submitted that the rule against duplication was to prevent multiple convictions arising from culpable facts which constitute one offence. In this regard Ms *Fareed* for the appellant relied on *R v Kuzwayo* 1960 (1) SA 340 (A) at 344B and *S v Grobler en 'n Ander* 1966 (1) SA 507 (A) at 513B and 523B. She also relied on *R v Johannes* 1925 TPD 782 which set out two tests when dealing with the issue of splitting or duplication of convictions. The first test is whether two acts are done with a single intent, which constitutes one continuous criminal transaction, and the second test is whether the evidence necessary to establish one crime involves the proving of another crime.

[14] Ms *Dyasi* for the respondent argued that there was no duplication as the elements of the two offences differed. While sexual assault included among others direct or indirect contact with a female's breast or genital organs through the mouth of another person; attempted rape would be an attempt to have sexual intercourse. The appellant was about to penetrate the complainant if she had not mentioned that her mother was home. It was argued that it was apparent from the evidence that the complainant had progressed beyond the stage of preparation and was commencing with the process of the rape.

[15] There is a rule against splitting of charges. See *S v Grobler* 1966 (1) SA 507 (A). Where there is such a close connection between all the acts complained of, they should be treated as a single continuous event. This occurs where all the actions upon which the charges are based are committed at the same time and place against the same complainant. See *S v Wehr* 1998 (1) SACR 99 (C). In *S v Benjamin en 'n Ander* 1980 (1) SA 950 (A) at 956E-H), however, the court stated that where the evidence which is necessary to establish the one charge also establishes the other charge, there is only one offence. <u>If one charge does not contain the same elements as the other</u>, there are two offences. (Emphasis added)

[16] There are many instances where perpetrators start off with an intent to commit a specific offence but end up committing other offences. Despite the close connection between the acts, two crimes would be committed due to the varying nature of their elements. One such example is where several perpetrators embark upon committing an armed robbery and in the process of committing such an offence someone is shot and killed. It can be argued that if one was to follow the single continuous event test, then only one charge can be preferred whereas if one was to be guided by the test which focuses on the elements of the crime test, at least two offences can be preferred.

[17] Nowadays, the crime rate is very high and it is mostly serious crimes which are being committed. Public interest and public policy calls for an approach which will ensure that perpetrators are adequately charged and prosecuted. In my view, the single intent falls short of meeting the requirements of our society while the elements of the crime test would satisfy this. The elements of the crime test were raised with Ms *Fareed* who conceded that if this test was to be applied, it was apparent that the offence of sexual assault embodied different elements to those of attempted rape. While sexual offence includes direct or indirect contact between the mouth of one person and the genital organs or anus of another person or, in the case of a female, her breasts, attempted rape includes an attempted penetration of a vagina by a penis. Consequently, she accepted that there were two separate offences committed.

[18] As regards the issue of the oath, Ms *Fareed* submitted that the reason evidence is given as prescribed under the Criminal Procedure Act 51 of 1977 (‘the CPA’) in s 162 (under oath); s 163 (affirmation) or s 164 (admonishment) is to ensure that the evidence is reliable. She argued that where a child cannot distinguish between truth and untruth, then such a child is not a competent witness. It is therefore the duty of the presiding officer to satisfy himself that a child can distinguish between the truth and untruth. See *S v Raghubar* 2013 (1) SACR 398 (SCA) paras 4-5.

[19] The provisions of s 162 of the CPA is peremptory except where stipulated exceptions apply. Consequently, where a witness has not been sworn in, affirmed or

admonished, her evidence is inadmissible. See *S v Matshivha* 2014 (1) SACR 29 (SCA) paras 10-11. The lack of understanding of the import of the oath is what triggers the application of s 164. These findings must be preceded by an enquiry by a judicial officer. After the enquiry, the judicial officer should establish whether the witness can distinguish between truth and lies and if the outcome is in the affirmative, admonish the witness. See *Matshivha* and *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, & others* 2009 (4) SA 222 (CC) paras 165-167.

[20] The appellant faults the court a quo for administering an oath to a child witness. In this regard, it is submitted that the court a quo failed to establish and satisfy itself that the complainant understood the nature and import of the oath; secondly, that it failed to make a finding that the complainant did not understand the nature and import of the oath; thirdly, that the court a quo misdirected itself in swearing in the complainant under oath knowing well that she did not know the nature and import of the oath. In my view, the third point is inconsistent with the first one. If it is accepted that the court a quo misdirected itself by swearing in the complainant whilst being aware that she did not understand the oath, then it follows that the court a quo would have established and therefore would have satisfied itself that the complainant did not understand the import of the oath.

[21] It was argued that the complainant was not properly admonished to speak the truth as envisaged in s 164 and consequently, that her evidence was inadmissible. Ms *Dyasi* argued that since the complainant had indicated that she did not understand what it meant to take the oath, the court a quo did not have to establish her capacity to understand the oath. The enquiry that followed was sufficient to determine the complainant's ability to distinguish truth and falsity. See *Haarhoff & another v Director of Public Prosecutions, Eastern Cape* 2019 (1) SACR 371 (SCA) para 30.

[22] It is common cause that the court a quo did not make a finding that the complainant did not understand the nature and import of the oath as envisaged in *Matshivha*. It is apparent from the evidence that the court a quo was not satisfied that the complainant understood the import and purport of the oath, I say this because it conducted an enquiry as envisaged in s 164.

[23] In *Matshivha* the complainant was neither admonished nor sworn in and the process, which was followed to determine whether she could tell the difference between truth and lies, was inadequate. The evidence was therefore unreliable. This is distinguishable from the present case since in the current case, the complainant was took the oath. The question therefore is whether the absence of a finding on whether the complainant understood the import of the oath and the subsequent swearing in of the complainant vitiates the entire process. To answer this question, it is necessary to revert to the purpose of testifying under oath, affirmation or admonishment. The decisions *of Director of Public Prosecutions, Transvaal* and *Raghubar* set out the purpose as being to ensure that evidence is given reliably.

[24] It is clear that the court a quo undertook a process to ensure that the complainant's evidence was reliable. Although at the end of that process, there was no finding by the court a quo, it was satisfied that the complainant was able to distinguish truth from lies and was alive to the serious consequences of telling lies. In *Mangoma v S* (155/13) [2012] ZASCA 205 (2 December 2013) para 5 the court stated the following:

'…First, it should be noted that it is clear from the record that the witnesses were sworn in and that thereafter a very curt enquiry about whether each understood the meaning of telling the truth followed. Had there been any doubt concerning the ability of the child witnesses to understand the nature and import of the oath the precaution set out in s 164 of the Criminal Procedure Act 51 of 1977 ought to have been followed. The enquiry in relation to the witnesses' ability to understand the importance of telling the truth appears to have been resorted to after the oath had been administered. The sequence was wrong. That notwithstanding, there is nothing on the record to indicate that a doubt about the witnesses' ability to understand the truth ought to have been entertained….'.

[25] In *Haarhoff* para 27, the court relying on *S v B* 2003(1) SACR 52 (SCA) para 15 stated as settled law that an express finding was not a prerequisite to admonishing a witness. The court a quo was satisfied that the witness was competent to give reliable evidence. This and the fact that the complainant testified under oath as is contemplated in s 162; and the nature of evidence given by the complainant, proved that she was a competent. While the content of the oath administered is not apparent from the record, I am satisfied that the requirements of

s 162 have been met. Since the complainant clearly understood the importance of telling the truth and the consequences of a failure to do so, no substantive injustice occurred.

[26] I am of the view that the complainant was a competent witness and that prior to allowing her evidence, the court a quo was satisfied that her evidence was reliable. On a consideration of the facts and relevant law, I find that the court a quo correctly admitted her evidence.

The argument on merits and the analysis

[27] It is common cause that the complainant was a single witness in respect of the two offences. This was adequately considered by the court a quo which applied the test set out in *S v Sauls & others* 1981(3) SA 172 (A) at 180E-G to weigh all elements pointing to the guilt of the accused against those indicating his innocence, taking into account inherent strengths and weaknesses, probabilities and improbabilities and then to decide whether the truth has been told to sustain the exclusion of doubt in the State's case. The court a quo also considered the provisions of s 208 of the CPA, which provides that an accused may be convicted of any offence on the single evidence of any competent witness. The court a quo also relied on the decision of *S v Abdoorham*1954 (3) SA 163 (N).

[28] Having considered applicable principles regarding single witnesses, the court a quo mentioned that the complainant was also a young child. It was however satisfied that her evidence was clear and satisfactory in all material respects and was flawless. The court found corroboration of the complainant's evidence in the evidence Ms M[....] and Ms Zondi.

[29] Ms *Fareed* argued that the evidence of the complainant was not reliable as she did not initially mention that the appellant had sexually assaulted her or attempted to rape her and only mentioned this following extensive probing by the prosecutor. Secondly, the State failed to call Sipho Gasa who the first report was made to as a witness and also failed to call the complainant's friends as witnesses. It was submitted that there were contradictions in the evidence of the complainant and her mother on whether the complainant's friends left the veranda or were chased by

the appellant. Secondly, whether the complainant reported the incident to Ms M[....] on the night of the incident or the following day. Thirdly, the complainant mentioned that at the meeting, the appellant denied the allegations and never mentioned that the appellant apologised which was inconsistent with Ms M[....]'s evidence. Fourthly, the complainant made no mention of being offered money while Ms M[....] testified that the appellant offered the complainant money and the complainant declined the offer.

[30] Ms *Dyasi* argues that the inconsistencies in the evidence of the complainant and Ms M[....] were immaterial. She submitted that his was a sign that their evidence was not rehearsed and that there was no conspiracy to falsely implicate the appellant. This should be considered together with the evidence of Ms Zondi who was an independent and objective witness. Although not a first report, she interviewed all relevant parties and her evidence confirms the version of the complainant together with that of Ms M[....].

[31] As regards the medical evidence, I agree with Ms *Fareed* argued that this did not take the matter further since the conclusion of Doctor Vather was general in nature. It was never the complainant's evidence that there had been any penetration. Despite the medical test being conducted in excess of six months after the incident, the medical evidence is as could be expected.

[32] The approach in dealing with the evidence of a single witness as set out in earlier decisions is to weigh up all the elements pointing towards the guilt of the accused against those, which are indicative of his innocence. See *S v Sauls & others* 1981 (3) SA 172 (A) at 180 and *S v Van der Meyden* 1999 (1) SACR 447 (W). The evidence of the complainant was credible, consistent and reliable.

[33] It is for the State to prove the guilt of the accused while the accused is merely required to provide a version, which is reasonably possibly true. The appellant denies that he committed the offences he was charged with. He suggests that there was bad blood between his family and the complainant's family and that was the reason he was falsely implicated in this matter. Ms M[....] denied that there was bad blood when the offence was committed and said that they had good relations. This is

observable from the fact that she did not report the matter to the police when she first learnt of it and approached various family members to address it. They then held a family meeting where an instruction was issued that they should not discuss the matter with anyone else. Of course, Ms M[....] complied with this instruction although her decision was wrong.

[34] Even after she left the area of her in-laws, she did not report the matter to the police. This is clearly not the conduct of someone having bad relations with the appellant. The suggestion by the appellant that Ms M[....] 'put the complainant up to the reporting' cannot be correct since if this was so; she would have ensured that the incidents were reported immediately after she became aware of them. The version of the appellant is improbable and cannot be reasonable possibly true. Accordingly, the court a quo was correct in rejecting it.

[35] When considering the issue of sentence, an appeal court will not interfere with the discretion of the court a quo unless the discretion was exercised improperly or that the sentence is vitiated by irregularity or misdirection, is disturbingly inappropriate, or is clearly wrong. See *S v Romer* 2011 (2) SACR 153 (SCA) para 22 and *S v Pistorious* 2014 (2) SACR 314 (SCA) para 30.

[36] On the issue of sentence, Ms *Fareed* argued that on count 1, the court a quo misdirected itself when it sentenced the appellant in terms of s 51(1)(b) part 3 of the Criminal Law Amendment Act 105 of 1997 since there was no prescribed minimum sentence applicable. In the absence of the minimum sentence, Ms *Fareed* argued that the court a quo ought to have sentenced the appellant in accordance with common law. Ms *Dyasi* correctly conceded to the misdirection by the court a quo. Not only does the offence not fall under the provisions of the 1997 Act, the provision referred to by the court a quo does not exists in that Act. Ms *Fareed* and Ms *Dyasi* agreed that the appropriate sentence under the circumstances of this case would be a sentence of eight years imprisonment. I agree with them in this regard.

[37] As regards count 2, Ms *Fareed* argued that the court a quo overemphasised the seriousness of the offence and the interest of the community at the expense of the appellant's personal circumstances. Those personal circumstances being that he was 38 years of age; had four minor children who were financially dependent on him;

earned a salary of R3 000 per month; was a first offender and was epileptic. She argued that these called for this court to intervene and amend the sentence of three years' imprisonment imposed by the court a quo. Ms *Dyasi* argued that the sentencing in count 2 could not be faulted.

[38] Although this issue was not raised with counsel and was not raised by counsel in their argument, a reading of the record reveals with when the appellant committed both offences, he was under the influence of alcohol. According to the complainant's evidence, he was heavily under the influence of alcohol. While it cannot be said that his capacities were impaired as no evidence was led in this regard, the issue cannot be overlooked especially taking into account the complainant's own evidence. The issue ought to have been considered by the court a quo and its failure to do so is another misdirection. Having said this, I am of the view that the three-year sentence imposed in count 2 was reasonable and the fact that the sentence in count 2 was ordered to run concurrently with that in count 1 is sufficient to consider this fact.

Order

[39] In the result, the following order is made:

(a) The appeal in respect of both the convictions are dismissed and the convictions are confirmed.

(b) The appeal against sentence succeeds in part and the sentence imposed by the court a quo is substituted with the following:

"In court 1, the appellant is sentenced to eight years' imprisonment and in count 2, to three years' imprisonment. The sentence in count 2 is to run concurrently with that in count 1.".

_____

Masipa J

I Agree

_____

Naidu AJ

Appearances:

For the Appellant:	Ms Fareed
Instructed by:	Legal Aid South Africa
For the Respondent:	Ms Dyasi
Instructed by:	Director of Public Prosecution
Matter heard:	18 October 2019
Judgment delivered:	8 November 2019