REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE HIGH COURT, CAPE TOWN]

Case No.: A551/14

In the matter between:

MTHOBELI MATHIKINCA Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED: 18 SEPTEMBER 2015

FOURIE, J:

[1] The appellant stood trial in the regional court, Bredasdorp, on a charge of rape as defined in s3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007, in that he had committed an act of sexual penetration with a four year old girl ("the complainant") by inserting his

finger and/or similar object in her anus and/or private parts. He pleaded not guilty, but after hearing evidence the regional magistrate found him guilty as charged. He was thereupon sentenced to imprisonment for life in accordance with the provisions of the Criminal Law Amendment Act No. 105 of 1997.

[2] In terms of section 309 of the Criminal Procedure Act No. 51 of 1997, as amended by Act No. 42 of 2013, the appellant, having been sentenced to imprisonment for life by a regional court under s51 (1) of Act 105 of 1997, has an automatic right of appeal against his conviction and sentence. He duly noted an appeal against his conviction and sentence.

[3] It is common cause that the complainant was in the company of the appellant on the day of the alleged commission of the offence. According to her mother she bathed the child during the early afternoon of that day, whereafter the complainant left to play with friends of hers in the neighbourhood. She was again seen late the afternoon when her father and a Mr. Jaars noticed the appellant walking in the street whilst carrying the complainant on his back. According to the appellant he had come across the complainant in the course of the afternoon when she asked him for money to buy sweets and he then proceeded to buy her some sweets at a local shop. Appellant says that he carried her on his back as dogs had threatened to attack her. He says that he was on his way to take the complainant home. I should add that the appellant and the

complainant were known to each other, as they resided in the same neighbourhood.

[4] The father of the complainant noticed dried tears on her face, but was not really concerned about her being in the company of the appellant; in fact, he requested the appellant to take her home. On the way to the complainant's home, they saw the complainant's mother, whereupon the appellant took the complainant off his back and put her down in the road. According to the mother they were approximately 200 meters apart when this happened. The appellant testified that he acted in this manner as they were close to the complainant's home.

[5] The mother testified that the complainant then told her that 'hy (the appellant) het sy penis gevat en in my gedruk', but that the complainant 'kon nie verduidelik waar presies hy sy penis in haar in gedruk het nie'. On the strength of this report charges were laid against the appellant and at 20h30 the same evening the complainant was examined by a medical practitioner. Her conclusions were stated thus in her medical report:

'Pasiënt se ondersoek pas in met 'n onsedelike aanranding. Moontlike anale penetrasie met vinger. Geen genitale anale tekens van…' (The latter sentence was incomplete).
'Tekens dat pasiënt anaal aangerand is, moontlik gepenetreer met vinger/voorwerp'.

[6] In her testimony the medical practitioner stated that the complainant had bruises on her legs and fresh fissures and bruises in the anal area. She opined that the anal injuries could have been caused by any object such as a finger and even a penis. I should add that the medical report also records what the complainant had told the doctor, in particular, *'…na vele verduidelikings sê sy hy het periaal en vaginaal haar betas/penetreer met sy vinger.'*

[7] The State did not call the complainant as a witness at the trial and no reason for this was advanced. Nor was any attempt made by the prosecutor to present the complainant's evidence through an intermediary in terms of s170A of Act 51 of 1977. At the hearing of the appeal, this court enquired whether, in circumstances where the complainant did not give evidence, the terms of the complaints made to her mother and the medical practitioner, could be admitted as evidence.

[8] The report made by the complainant to her mother, referred to above, was relied upon by the State in seeking the conviction of the appellant. It also

formed an integral part of the reasoning of the magistrate in concluding that the guilt of the appellant had been proved beyond reasonable doubt.

[9] It is now trite law that the fact of a complaint and its terms are admissible in proceedings relating to sexual offences, as establishing consistency in the complainant's evidence and therefore supporting her credibility. See **S v Hammond** 2004 (2) SACR 303 (SCA) at para 17.

[10] However, if the complainant gives no evidence at all, neither the terms of the complaint nor the fact that it was made can be ordinarily admitted. As stated by DT Zeffert and AP Paizes, **The South African Law of Evidence** 2nd edition page 452, the complaint, whose probative purpose is to show consistency, would, in the event of the complainant failing to give evidence, be inadmissible precisely because it would be absurd to regard a statement as being consistent with something that does not exist. In **Rex v Kgaladi** 1943 AD 255, the following was said at 261:

> *'From all these authorities it is, therefore, clear that, when the evidence of the complainant is not before the court, neither the particulars of a complaint made by her, in the absence of the accused, nor the bare fact that a complaint was made, can be given in evidence'.*

In **Rex v Malete** 1907 TH 235, Bristowe J was faced with a similar situation and stated:

> *'If a child of three years old cannot give evidence in court, how can she give evidence through her mother?.*

[11] I have considered whether the provisions of s58 of the Criminal Law (Sexual Offences and Related matters) Amendment Act 32 of 2007, assist the State. The relevant part of s58 reads as follows:

> *'Evidence relating to previous consistent statements by a complainant shall be admissible in criminal proceedings involving the alleged commission of a sexual offence…'*

As explained in **The South African Law of Evidence**, supra at 452, the section in effect restates the common law position, ie previous consistent statements by a complainant shall be admissible in criminal proceedings involving the alleged commission of a sexual offence, to show the consistency of the complainant. Therefore, if the complainant does not give evidence, a previous statement is inadmissible.

[12] I should add that I have also considered the provisions of s3 of the Law of Evidence Amendment Act No. 45 of 1988, which makes provision for the admittance of hearsay evidence in certain prescribed circumstances. However, at the trial the State did not attempt to lay any basis for the invocation of this

statutory provision. Nor can it be said that the defence has specifically agreed to the introduction of the complaint, being hearsay evidence, in terms of the provisions of s3 (a) of Act 45 of 1988. A reading of the record rather shows that all the parties involved, including the presiding magistrate, simply did not consider the issue of the admissibility of this evidence.

[13] It follows that the statements made by the complainant to her mother and the medical practitioner, could not be relied upon by the State in their quest to prove the guilt of the appellant. In the circumstances, counsel appearing for the State at the appeal was constrained to submit that the remaining circumstantial evidence was sufficient to prove the guilt of the appellant beyond reasonable doubt. The defence, on the other hand, submitted that a careful reading of the record shows that the circumstantial evidence does not exclude the reasonable inference that the injuries to the complainant's private parts could have been caused in a manner unrelated to any conduct on the part of the appellant.

[14] In my view the remaining circumstantial evidence, even when bolstered by the less than satisfactory evidence given by the appellant, does not prove beyond reasonable doubt that the appellant had sexually assaulted the complainant. There is, in fact, insufficient evidence to justify a reasonable inference that the appellant had molested the complainant.

[15] The questions raised by this court during argument prompted counsel for the State to hesitantly suggest that a remittal of the case to the regional court for the hearing of further evidence should be considered. In the light of this suggestion we invited the parties, if so inclined, to present us with a substantive application for our consideration. We subsequently received an application by the State in which an order is sought 'reviewing and setting aside the conviction and sentence' and remitting the matter to the regional court for hearing *de novo* before another presiding officer in terms of section 304 (2) (c) (v) of the Criminal Procedure Act 51 of 1977. The application is opposed by the appellant.

[16] Section 304 of the Criminal Procedure Act deals with the High Court's powers of review. Subsection 304 (2) (c) (v) provides that, where it appears that the proceedings of a lower court are not in accordance with justice, or that doubt exists whether the proceedings are in accordance with justice, the High Court, after obtaining reasons from the presiding officer, may remit the case to the lower court with instructions to deal with any matter in such manner as the High Court may think fit. This would include the power to direct the presiding officer to hear further evidence. In terms of section 309 (3) of the Criminal Procedure Act, the High Court hearing an appeal from a lower court, shall have the powers referred to in section 304 (2) of the said Act. This includes the power to hear

further evidence on appeal (s304 (2) (b)) or to remit the case to the magistrate with the direction to hear further evidence.

[17] The power of a court of appeal to remit a criminal case to the trial court for further evidence to remedy a deficiency in the State's case, will be sparingly exercised and only in exceptional circumstances. See the general discussion of this topic in **Hiemstra's Criminal Procedure** at 30-46 and following. In **S v Hanuman** [1998] 1 ALL SA 254 (A), the Supreme Court of Appeal reiterated that it is a fundamental and settled principle that, when a decision has been given on an issue, further evidence will only be allowed in exceptional circumstances. There have to be special reasons before a court of appeal will exercise its discretion. In **S v Stevens** 1983 (3) SA 649 (A) at 661 B-C, the following principles laid down in **S v Mokgeledi** 1968 (4) SA 335 (A) at 338H-339B, were restated:

> *'Normally, remittal for the hearing of further evidence will only be ordered where the desired evidence is of a merely formal or technical character or is such as would prove the case without delay and without real dispute; where it has been omitted at the trial, not deliberately, but by oversight, and where, in addition, a satisfactory explanation is furnished as to why the desired evidence had not been adduced in the first instance.'*

[18] In **Stevens** at 661D, it was reiterated that, fundamental to the approach of the courts in such cases, is a recognition of the truths that, while it is in the interest of justice and in the public interest that those who are guilty of an offence ought to be convicted, it is also in the interest of justice that finality should be reached in criminal cases and that they should not be allowed to drag on indefinitely. In our present constitutional dispensation one should add that, in terms of section 35 (3) of our Constitution, every accused person has a right to a fair trial, which includes the right to have his or her trial begin and conclude without unreasonable delay.

[19] What one gathers from the application of the State, is that the remittal of the matter to the court below would be for the purpose of leading the evidence of the complainant. The reasons put forward for the failure to call the complainant at the trial are two-fold. Firstly, it is stated that, during consultation, the complainant became emotional and a proper consultation with her could not be held. Secondly, it is stated that a victim impact report was compiled which indicated that the child could not differentiate between wrong and right and could not tell the difference between the truth and a lie.

[20] The first reason is woefully inadequate to serve as a basis for an application of this nature. It is not uncommon that young witnesses may be emotional during consultation, but no attempt is made in the papers to show that

her emotional state would have precluded her from giving evidence. It should be borne in mind that at the time of the trial the complainant was 5½ years old. Nor is any explanation proffered for the failure to invoke the provisions of s170A of the Criminal Procedure Act, for the appointment of an intermediary through whom the complainant's evidence could be presented.

[21] The second reason put forward refers to a victim impact report which had been compiled, but same is not annexed to the application papers before us. Nor was such a report presented to the trial court. The only victim impact report which forms part of the record, is exhibit D, which does not deal at all with the issue whether or not the complainant was fit to give evidence at the trial.

[22] It follows that this court is left completely in the dark as to the surrounding circumstances which led to the decision not to call the complainant as a witness. As indicated earlier, the onus is on the State to provide a satisfactory explanation for this failure. Not only has the State failed to provide this satisfactory explanation, but it seems that, in any event, the decision not to call the complainant as a witness had been deliberately taken and had not been the product of an oversight or misapprehension. I should add that the application before us has been brought on the strength of an affidavit deposed to by counsel appearing for the State in this appeal, but no affidavit has been filed by the prosecutor who had taken the decision at the time.

[23] Apart from the aforesaid, it is clear that the nature of the evidence which the State now belatedly wishes to tender, is not merely of a formal or technical character, but substantive evidence which goes to the heart of the real dispute between the parties. Where it had been deliberately omitted at the trial, with the State relying mainly on hearsay evidence to prove its case, one has to ask why the appellant should now, some three years after the trial in the regional court had commenced, be required to face a trial *de novo* caused solely by the State's failure to properly present its case in the first instance.

[24] I should add that, in the present application, there is also no affidavit deposed to by any person who has personal knowledge of the present circumstances of the complainant. She is now 8½ years old and we only have the hearsay statement of the state advocate in her founding affidavit, that "*…because the child is now 8 years old, she will be able to differentiate between right and wrong; between a lie and the truth. The children are taught at school to make such differentiations.*"

[25] Not only do these allegations constitute hearsay evidence, but they in any event amount to no more than pure speculation. It may be, if the matter were to be remitted to the regional court for the hearing of further evidence, that the complainant may still not be able to enlighten the court as to what actually

transpired, if anything, between her and the appellant on the day in question. The problem, as I have said before, is that this court is simply left in the dark.

[26] I am accordingly of the view that the State's application for the remittal of the matter to the court below for the hearing of further evidence, should be refused. As I have indicated earlier, the admissible evidence tendered by the State at the trial does not prove the guilt of the appellant beyond reasonable doubt. His evidence as to what had transpired between him and the complainant on the afternoon in question, may well be reasonably possibly true. Therefore the conviction and sentence cannot stand.

[27] In the result I propose the following order:

1. The application of the respondent to review and set aside the conviction and sentence imposed by the regional court on 27 November 2012, and to remit the matter to that court for hearing *de novo* in terms of s304 (2) (c) (v) of Act No. 51 of 1977, is refused.
2. The conviction and sentence imposed by the court *a quo* on 27 November 2012 are set aside and the following substituted therefor:

"The accused is found not guilty and discharged."

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P B Fourie, J

I agree.

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Van Staden, AJ