IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, GRAHAMSTOWN

CASE NO. CA132/2015
(Court a quo CC 78/2014)

In the matter between:

JOEY HAARHOFF First Appellant
IAN BAARTMAN Second Appellant

and

THE STATE Respondent

APPEAL JUDGMENT

BRODY, AJ:

INTRODUCTION

[1] The two appellants in this matter were charged with repeatedly raping the complainant on or about the 1st of May 2013 at Millenium Park, District of Pearston.

[2] They were both sentenced to 20 years imprisonment.

[3] Both appellants appealed against their convictions and sentence, leave to appeal having been granted by the Court a *quo.*

[4] First appellant was accused one in the Court a *quo* whilst the second appellant was accused two.

[5] I will refer to the appellants as they are in this appeal.

[6] The offences attracted the minimum sentencing provisions of Section 51(1) of the Criminal Law Amendment Act, 105 of 1997, (life imprisonment) and these were brought to the attention of the appellants (through their legal representative) when the charges were put to them.

[7] Both appellants pleaded not guilty to the charges.

[8] Both appellants were initially charged with a third accused, Henry J., who was acquitted by the Court a *quo,* after hearing all the evidence.

[9] I will refer to Henry J. as the "third accused".

THE ADMISSIBILITY OF THE COMPLAINANT'S EVIDENCE

[10] The complainant in this matter was, at the time, 24-years of age who was described as having the mental age of a 10-year old child. The State presented the evidence of a clinical psychologist, Mrs Karen Andrews, ("Mrs Andrews") who described the complainant as having a below-average intellectual functioning, but not mentally retarded.

[11] Mrs Andrews psychologically assessed the complainant and gave a report relevant to her mental ability and her ability to testify in Court.

[12] Mrs Andrews' report, and evidence in Court, was that the complainant presented as a woman who was normal in physical appearance and

possessing the physical maturity consistent with her age of 24. Mrs Andrews further testified that the complainant's childish voice alerted to the presence of an anomaly and after the necessary assessment, came to the conclusion that her mental age was 10.

[13] Mrs Andrews further testified that in her expert opinion the complainant was able to testify in Court and that she had a basic understanding of what it means to tell the truth and what it means to tell a lie. She also confirmed that the complainant had the cognitive capacity suitable to being admonished by the Court.

[14] Mrs Andrews also testified that the complainant understood what it means to have sexual intercourse and that she understood the possible consequences of sexual intercourse. She was, accordingly, able to express her consent, or otherwise, to sexual intercourse.

[15] Mrs Andrews also recommended, given the mental age of the complainant, that the services of an intermediary and a closed circuit television system be utilised when she testified.

[16] Although the appellants opposed the application for an intermediary and a closed circuit television system, through their representative, they accepted that the complainant was not a mentally disabled person as defined in Section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

[17] The Court a *quo* conducted an investigation as contemplated in the matter of S vs Williams 201O (1) SACR 493, where the Court held, in any event, in similar circumstances that even if such an investigation and finding thereanent, was preferred, this was not required. The evidence given by a complainant in the absence of an investigation is

admissible. As in the present matter, the complainant in that matter was 10 years of age when she testified, and her evidence was given through an intermediary. A social worker had also given a psycho-social assessment report where the social worker had given her expert opinion, that the complainant was able to distinguish between truth and falsehood.

[18] In the present matter the report and evidence of Mrs Andrews must have weighed heavily with the Court a *quo,* and after the necessary investigation, the trial court admonished the complainant to tell the truth, finding that by reason of her mental age, and answers to questions put to her, the complainant did not understand the nature and import of the oath.

[19] As the Court a *quo* was satisfied that the complainant comprehended the difference between truth and falsehood, and the admonishment given, that the complainant speak the truth, this was sufficient to render the complainant's evidence admissible, which is consistent with the principle established in S vs Williams, (above).

[20] The appellants, for the purposes of this appeal, did not attack any deficiencies arising out of the Court a quo's investigation and the failure to take the oath.

[21] The appellants also accepted that, after the Court a *quo's* investigation, the complainant had the ability to differentiate between truth and falsehood, however, alleged that she did not understand the moral or legal obligation of the necessity to speak the truth. The appellants further argued that the veracity of the complainant's evidence was questionable and a cautionary approach should be adopted.

THE RELEVANT FACTS

The sequence of events

[22] The complainant, whilst visiting an aunt, was returning home in the early evening of the 30th of April 2013 when the appellants approached her in the street and thereafter, according to the complainant, pulled her into the nearby house of the third accused.

[23] The complainant's version was that she was then held hostage at accused three's house and raped repeatedly by the appellants. In a second statement given by the complainant to the investigating officer, the allegation was that one Charlson/Charles had raped her twice and I will deal more fully with this statement below.

[24] The complainant testified in the Court a *quo* that the single roomed house, belonging to the third accused, had been "locked" and she was prevented from leaving until she was discovered by Ms N J., referred to as "G.", and who in turn called her guardian, Mrs Smith. G. is the sister of the third accused.

[25] The complainant then left the third accused's house on the 1st of May and after having spent at least 24 hours at the house when she was discovered.

[26] The complainant testified that the appellants took turns to rape her repeatedly, holding her down, closing her mouth, and at one point tying her legs to a bed in the house. Although the second statement given to the investigating officer apparently made reference to the third accused she did not testify to this effect at the trial.

The house

[27] Photographs and a diagram of the third accused's house were handed in at the trial and it is apparent from those photographs that this is a simple one-roomed structure, with a partition, dividing the sleeping area from the living area. There is one door, small windows, and one bed depicted in the photographs and diagram. It is clear from the photographs of the bed that a person could be tied to the bed and no evidence could be found of any "mattress", as testified to by the appellants.

The use of alcohol

[28] The evidence established that on the day in question the complainant did not drink alcohol, at all, whilst the appellants and the third accused drank excessive amounts of alcohol. The first appellant testified that the third accused had drunk such a large amount of alcohol that he passed out in the house. The appellants then consumed 1½ bottles of Old Brown Sherry, 2 litres of Wine, and a Black Label beer.

[29] The first appellant testified to the fact that on the 1st of May 2013 they consumed "a lot of alcohol" and this was confirmed by the second appellant.

[30] The second appellant went even further stating that the drinking binge occurred at various other places, and at the house.

[31] On the evidence there can be no suggestion that the complainant joined the appellants and the third accused to "party", or to consume alcohol. The evidence was that she did not drink and nobody testified to the fact that she had any alcohol.

The manner in which the complainant testified

[32] It is clear from the evidence that the complainant testified in a childlike manner consistent with that of the mind of a 10 year old and described her abduction in simple terms.

[33] She used euphemistic descriptions for genitalia, however, gave convincing detail as to what occurred in the house, involving the two appellants, and the third accused.

[34] The complainant's evidence was in the main that she was repeatedly raped by the first and second appellants whose nicknames were "Kamala" and "Marna". I will deal more fully below with the similarity of the one nickname, with the nickname of the third accused, when expressed in Afrikaans.

The "conflicting" statements given by the complainant before the trial

[35] The first statement taken by the South African Police officer was taken in circumstances where the officer did not understand Afrikaans and the complainant did not understand English. There were clearly language difficulties between the person who minuted this statement and the complainant. This was accepted by the Court a *quo* and for this reason little reliance was placed on the first statement, by the Court a *quo,* and properly so.

[36] The second statement was taken by the investigating officer whose mother tongue was Afrikaans. Reference was repeatedly made in that statement to the complainant being repeatedly raped by "Charlsen", which then evolved to "Charles". The statement then goes on further to refer to "Kamala", and "Mamo".

[37] It is a matter of record that the third accused's nickname was "Carlson" and not "Charlsen" or "Charles". In Afrikaans the word "Charlsen", or "Charles" is pronounced with an unvoiced affricative consonant, and completely differently to the word "Carlson", which is an unvoiced plosive consonant. In addition, "Kamala" and "Carlson" are pronounced in a similar manner, as they are unvoiced affricative consonants.

[38] The Court a *quo* dealt with the differences in this statement to the evidence given by the complainant in the trial by accepting the evidence in the trial by the complainant as being satisfactory.

[39] It was common cause that the relevant DNA results had implicated the first and second appellant whilst they did not implicate the third accused. The similarity in the names "Carlson", and "Kamala" , could well have caused confusion either in the mind of the complainant, or the investigating officer, and especially where the name "Charlsen" and "Charles" are in fact minuted.

[40] There can be little doubt that the statements were taken without the necessary due care and attention and in circumstances where language was a difficulty. This was correctly accepted by the Court a *quo.*

The "wired" door

[41] The complainant was criticized in the trial for not having mentioned in her previous statements that she had been tied with wire to the bed when she testified to this fact in chief.

[42] In chief the following was put to her by the State:

"OK, did you at any stage leave the house, if yes, when did you leave that house? - I could not go out.
Why? --- They closed the door.
Who is they? --- It is Mamo and Kamala."

[43] Mamo was the second appellant's nickname and Kamala was the first appellant's nickname, both of who did not live at the house, and were "guests" of the third accused.

[44] The complainant further stated the following when questioned by the State:

"You say that Mamo and Kamala locked you in that house and left you behind? --- Yes.
OK and you, could you perhaps on your own open that door on that house? --- No.
What did you do in that house whilst you were locked inside that house? --- They closed so that I could not get out."

[45] The significance of the complainant being locked in the house is that this prevented her from leaving and had she been there freely and voluntarily she would clearly have left the house, if the door was unlocked.

[46] Under cross-examination the complainant was asked the following by the appellants' legal representative:

“You say after you were raped in that house you were locked inside the house? --- I was tied with the wire.
Are you saying that you were tied with a *wire? --- Yes.*
How did they tie you up? --- They tied me to the bed.

...Were you tied around your hands or around your feet or where? --- Round my feet. Only your feet? --- Yes, and then I untied myself."

[47] The appellants' legal representative then introduced, for the first time in the evidence, that the door was locked with wire when he asked the following question:

"Did you not testify earlier that the door was locked with a wire? --- Yes."

[48] The complainant's affirmation to this question is clearly incorrect as she had not, prior to that question, in the Court a *quo* or in her previous statements, alleged that the door was locked with "wire".

[49] The first appellant, when giving evidence, stated the following when questioned by his representative:

"And she alleges that the few of you locked her inside the house and you locked the door with a piece of wire? --- That house cannot be locked, it is like a box that you can just push open. The doors are not in a good condition."

[50] When the trial court enquired about the door the first appellant stated the following:

"Okay, when you left this particular, when you left accused number 3's *house, did you close the door of the house or what? --- No my Lady.*
Why? --- Because it is always kept open.

24/7? --- When accused number 3 passes out he does not close the door, he just goes to sleep maybe on his bed or even on the sofa.

Even during the evening he will do that, if he is drunk, sleep with an open door? --- He just pushes the door open. If it is just slightly open he just goes *and throws himself on the bed and he sleeps.*

Okay, then you said after about 30 minutes you came back and you found the doors open? --- That is correct."

[51] The closest the complainant came to alleging that the appellants had locked her in the house was in her second statement when she stated the following:

"Hulle het geloop toe maak hulle die deur van buite toe. Ek het eers gistermiddag uitgekom..."

[52] It is therefore clear from this evidence that the complainant 's evidence of being "locked" into the house was substantiated by a question put to her by the appellants' legal representative, namely, that the door had been locked with a wire. The complainant would not have seen this wire as it clearly had to be secured to the outside of the door and was the means of "locking" a door that was defective and usually left open.

[53] If it is so that the appellants, or the third accused, secured the house by wiring the front door shut this is corroboration of the complainant's version as there would be no reason to lock a "guest" in the house. The question put by the appellants' legal representative to the complainant that wire was utilised to lock the door from the outside is clear corroboration for the complainant's version and a relevant fact amongst a matrix of other facts.

The state of the complainant when seen for the first time after her absence

[54] Complainant's guardian became alarmed when the complainant did not arrive home from her aunt at 7pm in the evening, and began looking for her.

[55] It was only at 5pm the next day that Ms J. ("G.") called the guardian and said that the complainant had been found. The complainant was actually in the third accused's house, in the same street, and the garden gate faced the guardian's house. The guardian immediately walked across, which must have taken a very short period of time, possibly a few minutes, and observed the complainant for the first time after her absence. She described the complainant as follows:

> "She *had fear in her, she was nervous and she* was *scratching herself*
> *Does she usually scratch herself?* --- Yes *she does on occasion scratch herself, but on that day it* was *terrible, it* was *worse* as *if it was someone who went through an ordeal."*

[56] She went further to describe the emotional state of the complainant as follows:

> "...*On that day it* was *worse? --- Even in the past few days that she was here she scratched herself but it was not as worse as on that particular day.* ...*On my arrival she* was *already busy scratching herself"*

[57] It is common cause that G. found the complainant for the first time at the third accused's house and although G. alleged that the complainant was playing marbles with other children at the house this is contradicted by the evidence of the guardian and must be treated with extreme caution. G. is after all the sister of the third accused and there is every possibility that G. was attempting to protect her own brother in a situation where he was facing a very serious charge of rape and life imprisonment.

[58] In addition to the clearly distressed state that the guardian found the complainant in, the psychological assessment report by Mrs Andrews also establishes clear evidence of trauma to the complainant where Mrs Andrews stated the following:

> *"When* she *was asked about the impact of the incident in question on her she stated in her own words, "Ek kry die droom van die mannetjies" (I get the dream about these little men). Here she was referring to the accused in this* case as *"die mannetjies".*

[59] Although these nightmares are referred to in the later reports by Mrs Andrews, and in more detail, the assessment of the complainant prior to the trial on the merits already established evidence of nightmares arising out of the night and day in question.

Intellectual capacity of the complainant

[60] It was common cause in this matter that the mental age of the complainant was that of a 10 year old child. She was also described by Mrs Andrews as lacking any initiative, that she had to be instructed to wash and to dress and did not have the ability to do domestic work. Although she looked physically mature she sounded like a child (which

is also borne out by her evidence at the trial). She had an IQ between 70 to 79, although she was not mentally retarded. She was also vulnerable as a result of Epilepsy which worsened after the incidents for a period of approximately six months.

[61] Mrs Andrews also testified that not only did she lack intelligence, but she lacked emotional maturity, and social maturity. She had one year of education and she had lived an isolated life previously, on a farm.

[62] The second appellant testified in chief that he knew the complainant previously. In fact, under cross-examination, the second appellant confirmed that he had known the complainant for the previous ten years.

[63] The first appellant also testified in chief that he knew the complainant as he worked previously for her father and she would make food for him on the farm. It is therefore clear that both the appellants knew the complainant reasonably well and would have known of her mental difficulties, as described by Mrs Andrews in her report and evidence. They must have known at all material times that they were dealing with a vulnerable person who was mentally challenged.

[64] The complainant's aunt also testified that she kept a tight reign on the complainant, and although counsel for the appellants argued that the complainant had a history of promiscuity, there was no such evidence in the record.

The medico-legal examination of the complainant

[65] Much was made by the appellants' counsel that the medico-legal examination of the complainant did not support her version as there were no serious visible injuries, and no evidence of torn clothing.

[66] In my view the medico-legal examination does not contradict the complainant's version of what occurred in accused three's house. It was never her case that physical injuries were caused to her as she described being tied to the bed, her mouth held closed, and being pushed down by the one appellant whilst the other raped her.

[67] Despite the fact that the medico-legal examination was undertaken on the same day, it does disclose that the complainant had bathed, washed, urinated, and changed her clothing before the examination, and after the events. In my view no point can be made in regard to "visible" injuries or the lack of torn clothing.

[68] The report also indicated that there was no evidence of drugs or alcohol, this supporting the other evidence that the complainant had not consumed alcohol whilst at accused three's house.

THE EVIDENCE OF THE FIRST APPELLANT

[69] The first appellant, a 33 year old man at the time, confirmed that the complainant was well known to him and he had heard that she had a limited mental capacity.

[70] According to him the complainant came from an unknown destination in the early evening and he approached her after there had been heavy drinking. In fact, to the extent that accused three had passed out. I have already dealt with the large volume of alcohol that was consumed by the two appellants and accused three.

[71] The first appellant allegedly then approached the complainant requesting her to engage in sexual intercourse which then allegedly

occurred in accused three's house, on a mattress, where he allegedly used a condom. In describing this sequence of events he initially failed to make any reference to the presence of the second appellant and the third accused.

[72] His improbable version is that after having sexual intercourse the complainant then stood up and went to lie with accused three, on his bed, where accused three had passed out.

[73] Later on, in his evidence in chief, the first appellant then alleged that when he arrived at accused three's house the complainant was already there and sitting in "the room". She was then asked why she did not go home and she gave no response. This is a direct contradiction of what he had said a few minutes before, in chief.

[74] The first appellant explained that the house belonged to accused three, who was the sole occupier, and that the door was normally left open, even when he sleeps.

[75] Under cross-examination the first appellant confirmed that the complainant arrived at the house in the dark, although he could not remember the exact time. This corroborates the state witness' version that the complainant's disappearance occurred at approximately 7pm.

[76] Under cross-examination the first appellant confirmed that, at some point, the second appellant arrived at accused three's house and both he and the third accused were in the house. This corroborated the complainant's version that the three of them were together in the house during the ordeal.

[77] According to the first appellant they then left the house to continue with their drinking spree and no explanation is given as to why the complainant would have seen fit to stay there on her own and not return to her guardian.

[78] Under cross-examination the first appellant confirmed again that the three of them were together in accused three's house whilst the complainant was there.

[79] The first appellant readily admitted that he had sexual intercourse with the complainant whilst accused three was in the same house, however, alleged that accused three had passed out.

[80] The sole reason the first appellant gave for requesting the complainant to have sexual intercourse with him was because they had done this before. He alleged that he advised the complainant that no-one would know about it.

[81] Under cross-examination the first appellant confirmed that there was no love relationship between him and the complainant and that she agreed to have sexual intercourse with him simply as a result of his invitation. There was no suggestion that she had been offered a reward for this alleged sexual favour.

[82] The first appellant, under cross-examination, could give no reason why the complainant would move from the "mattress" and then join the third accused on his bed, when the third accused had apparently passed out.

[83] The first appellant's reason for not inviting the complainant to sleep with him on the "mattress" was also nonsensical. He alleged that he did not

do so because the "streets were still busy". This was simply not an answer to the question put to him.

[84] When asked why he decided to spend the night at accused three's house, he alleged that it was better to do so rather than fight with his current girlfriend. That too made no sense.

[85] When the first appellant was asked under cross-examination why the complainant would allege that both he and the second appellant had had sex with her, at the same time, that evening he suggested that the reason was because *"people normally* sees *when we start to drink we are all together'.* This was a most implausible reason and clearly had no rational basis.

[86] The first appellant's version was that the second appellant was never in the house that evening and also the following morning and only arrived when they were called to join him for their drinking spree. This is contradicted by the second appellant in his evidence, which I will deal with below.

[87] The first appellant could also give no reason why the "mattress" had suddenly disappeared when the rapes were investigated and why only a bed was found, as testified to by the complainant. The absence of a "mattress" is yet a further fact which corroborates the complainant's version that there was only a bed.

[88] There were also major contradictions between what was put to the complainant by the appellants' counsel and the evidence given by the first appellant. It was put by the appellants' counsel that after the first appellant and the complainant had had sex they both fell asleep on the "mattress". This was a completely different version to that testified to by

the first appellant. The first appellant could give no reason for this contradiction even though he was present throughout the hearing and had heard the version being put to the complainant.

[89] A further contradiction highlighted by the trial court was that it had been put to the complainant by the appellants' counsel that when first appellant woke up the following morning the complainant was not there. It was put that only accused three and the first appellant were in the house. That version completely contradicted what the first appellant testified to. The first appellant could give no reason for this material contradiction.

[90] The first appellant conceded that the complainant's version that the appellants and accused three had left her alone in the house when they left together, was accurate and correct. This was a further fact which corroborated her version of events.

[91] The first appellant could also not give a reason why it had been put to the complainant that it was in fact him and accused three that left the house and then went to accused two's house for the drinking spree. This of course was not the evidence that he gave in chief and under cross-examination.

[92] The first appellant also alleged that he wore a condom. The complainant said no such thing in her evidence and the fact that the DNA reports identified the second appellant strongly suggests that no condom was utilised. This is a further fact which corroborates the complainant's version of events.

[93] The final concession which was made by the first appellant is damning, when he admitted the following:

"And you all woke up in the same room, the three of you? --- That is correct."

[94] That concession confirmed the complainant's version that all three were together in the same room, overnight, and into the next morning, and woke at the same time.

THE EVIDENCE OF THE SECOND APPELLANT

[95] The second appellant confirmed that he knew the complainant and then proceeded to explain that he decided to take a bath at accused three's house. This was his reason for being there. Leaving aside the fact that there was no suggestion in the sketch plan and the photographs that a bath in fact existed at the third accused's house, his reason for having a bath was unconvincing.

[96] The second appellant's allegation that he only arrived there at 9am on The 1st of May 2013 and found the complainant alone in the house is directly contradicted by the first appellant who alleged that all three the accused and the complainant were in the house at one point and went out drinking together.

[97] The second appellant confirmed that the only sleeping place in the house was the third accused's bed, save for a "cover mattress" and this supported the complainant's version that there was only a bed in the house.

[98] The second appellant's evidence that it was the complainant who enticed him to have sexual intercourse is also not convincing. This is alleged to have been done without any input from the second appellant,

especially in circumstances where he had never had a relationship with the complainant and had never had sexual intercourse with her before.

[99] The second appellant then directly contradicted the evidence of first appellant by suggesting that it was only first appellant and the third accused who went to town because he had to do various "piece jobs". This is rather curious as 1st of May was a public holiday and the first appellant made no mention of any such thing.

[100] Under cross-examination second appellant could not give any plausible reason why the complainant would ask him for food when she was a "visitor" in the house and he too was a "visitor".

[101] Second appellant could also give no reason why it was never put to the complainant that the sexual intercourse arose as a result of the complainant making advances and thereby seducing him.

[102] Second appellant also alleged that the complainant and he had sex, standing up, and could give no explanation why it was put to the complainant that in fact he and the complainant had engaged in sex on a "mattress". Second appellant's allegation was that his counsel was "simply wrong".

[103] Second appellant's evidence also had many other inconsistencies which are too many to record in this judgment.

THE ANALYSIS

[104] In the matter of *S* vs *van der Meyden 1999(1) SACR 447(W) at 449a, as approved in S vs van Aswegen 2001(2) SACR 97 (SCA) at 101a* the following passage arises:

"It is difficult to see how a *defence can possibly be true if at the same time the State's case with which it is irreconcilable is "completely acceptable and unshaken."*

The passage seems to suggest that the evidence is to be separated into compartments, and the "defence case", examined in isolation, to determine whether it is so internally contradictory or improbable has to be beyond the realm of reasonable possibility, failing which the accused is entitled to be acquitted. If that is what is meant, it is not correct. The court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence. The conclusion which it derives at must account for all the evidence."

[105] The State must prove an accused person's guilty beyond a reasonable doubt and the onus rests on it to prove every element of the crime alleged.

[106] The State must prove the guilt of an accused beyond reasonable doubt as no onus rests on the accused to prove his innocence. See: *R vs Hlongwane 1959(3) SA 337(A) at 340A.*

[107] In order to be acquitted, the version of an accused need only be reasonably possibly true. The position was set out by Nugent J in S *vs van der Meyden 1991(1) SACR 447 (W) at 448:*

"The onus of proof in a *criminal* case *is discharged by the State if the evidence establishes the guilt of an accused beyond reasonable doubt . The corollary that he is entitled to be acquitted if it is reasonably possible that he might be innocent (See for*

example R vs Difford 1937AO 370 at 373 and 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being a *logical corollary of the other."*

[108] In S *vs Mlambo 1957(4) SA 727 at 738A,* Malan JA stated that, while it was not incumbent on the State to "close any avenue of escape which may be said to be open to an accused, it would be sufficient, in order to procure a conviction, to *"produce evidence by means of such* a *high degree of probabilities raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused had committed the crime charged. He must, in other words, be morally certain of the guilt of the accused."*

[109] In my view in her judgment the trial court analysed the correct facts and circumstances and applied the abovementioned principles correctly.

[110] The trial court's assessment of the complainant's evidence, as being satisfactory, cannot be challenged. Her findings of the demeanor or the first and second appellant also cannot be challenged. It is clear from the record that the appellants were shocking witnesses in that they had many discrepancies and contradicted each other in relation to the events which occurred on the evening of the 30th of April and 1st of May 2013.

[111] Counsel for the appellants could give no valid reason why the complainant, with the mental age of a 10 year old would choose to stay

in a one roomed house, close to her own home, with three mature adult men and then proceed to have sexual intercourse with at last two of them over an extended period of time.

[112] There are a number of facts that corroborate the complainant's version. It was common cause that first and second appellants, and the third accused, were at some point together with the complainant in the house. The first and second appellants admitted to having sexual intercourse with the complainant well knowing that she was vulnerable having regard to her intellectual capacity.

[113] First and second appellants' version of events that night and day is so improbable as to be beyond the realm of reasonable possibility.

[114] At no stage did the complainant testify that the first appellant used a condom and the DNA results give the lie to this suggestion. The complainant's version was a simple one. She was raped on a number of occasions by both the first and second appellants, the one holding her down, whilst the other perpetrated the rape.

[115] The matrix of facts support the complainant's version in other material respects. The suggestion that the door was wired supports her version that she was "locked" into the house from the outside.

[116] Mrs Andrews indicated in her expert opinion that the events of that night and day caused trauma to the complainant to such an extent that she had nightmares about the men. This expert opinion is also corroborated by the guardian who said that the complainant was scratching herself, a sign of anxiety and trauma.

[117] The various concessions by the first and second appellants are also indicative of the fact that they did not tell the truth and were guilty of the rapes. The first and second appellants certainly did not give any innocent explanation for what occurred and there is no reasonable possibility that they are innocent of the charges against them.

[118] Applying the legal principles, set out above, and taking into account all the evidence given by the independent expert witnesses, the complainant, and the two appellants, the trial court's decision to convict the appellants is sound.

[119] In the result I find that the State discharged the onus both in respect of lack of consent and repeated rape. The versions of the appellants are not reasonably possibly true.

SENTENCE

[120] Sentencing is within the discretion of the trial court, the Court of Appeal interfering only if there is a clear misdirection on the part of the trial court or the sentence is shockingly severe. See: S *vs Pieters 1987(3) SA 717A.*

[121] In S *vs Pillay 1977(4) SA 534(A)* the nature and the extent of misdirection was explained as follows:

> "... *mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must 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." At 535 FG.

[122] Counsel for the appellants argued that an appropriate sentence would be 10 years direct imprisonment instead of 20 years.

[123] In my opinion, in its judgment the trial court, analysed the correct facts and circumstances relevant to sentence, taking both aggravating and mitigating factors into account. I take into account the fact that the complainant was repeatedly raped for an extended period of time, that there appears to be no expression of remorse, and the serious psychological harm caused to the complainant.

[124] The complainant was a vulnerable person in the community and Mrs Andrews testified that the complainant was able to appreciate the nature of what had occurred. Even two years after the rapes, the complainant had recurring nightmares about the rapes which had, in any event, exacerbated her Epilepsy for a period of at least six months after the rapes.

[125] Mrs Andrews also indicated that the complainant's low quality of life deteriorated significantly after the rapes, she suffering chronic sleep disturbance, and episodes of running away. The complainant's feelings of anger and low self-esteem continued for a "very long time". She had hateful feelings towards the first and second appellants.

[126] Although there is no clear evidence that the complainant contracted HIV from the first or second appellants, Mrs Andrews testified that by April 2015 the complainant had tested positively for HIV and had lost significant weight, (indicating the onset of AIDS). The complainant had become chronically ill with flu-like symptoms during 2014.

[127] There can be no doubt that the events of the 30th April 2014 and 1st May 2015 had a devastating impact on this young vulnerable complainant.

[128] The community in the Pearston district were also incensed at the actions of first and second appellants and they, in turn, could give no valid reason why they did not challenge the community and contest their innocence when the allegations of rape were made on 1st May 2013 and after a crowd had met in front of accused three's house.

[129] The crimes committed by the appellants were not impulsive and were perpetrated over a lengthy period of time.

[130] As was pointed out in *Director of Public Prosecution Kwa-Zulu Natal vs Ndobo & Others 2009(2) SACR 361(SCA)* our courts are expected to dispense justice. The brutality and violence of rape is prevalent in our society and the courts are expected to send out a clear message that such behavior will not be tolerated. This is clearly also the intention of the Legislature in promulgating minimum sentences.

[131] I am satisfied that the trial court did not err in finding there to be substantial or compelling circumstances and that it sufficiently took into account the totality of the facts in ordering a 20 year sentence of direct imprisonment.

THE CONCESSION BY THE STATE THAT THE APPEAL ON CONVICTION AND SENTENCE SHOULD BE CONCEDED

[132] It would be remiss of me not to make reference to the fact that the State conceded the appeal on conviction and sentence when heads of argument were filed, and during argument.

[133] This decision is incomprehensible having regard to the fact that counsel for the State was the same counsel that argued in the Court a *quo* for conviction and a lengthy period of imprisonment.

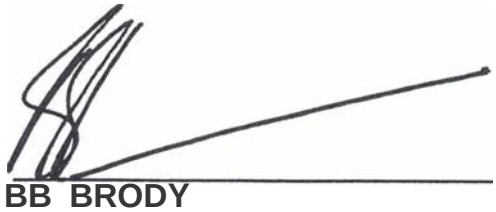
[134] As the State's heads of argument were brief and the argument at the hearing of the appeal was even more brief, the true reasons for this concession, is not apparent. No attempt was made to canvass the evidence or to consider the facts on the basis of the principles set out above.

[135] I am of the view that the State's decision to concede the appeal on conviction and sentence was clearly wrong.

CONCLUSION

[136] In the result the following order issues:

The appeal is dismissed.



BB BRODY

ACTING JUDGE OF THE HIGH COURT

CHETTY J

I agree.

D CHETTY

JUDGE OFTHE HIGH COURT

MJALI J

[137] This matter sadly highlights what Nugent JA pointed out in **S v Vilakazi** [2008] 4 All SA 396 (SCA) at para 21 when he stated that

"The prosecution of rape presents peculiar difficulties that always call for the greatest care to be taken, and even more so *where the complainant is young. From prosecutors it calls for thoughtful preparation, patient and sensitive presentation of all the available evidence, and meticulous attention to detail. From judicial officers who try such cases it calls for accurate understanding and careful analysis of all the evidence. For it is in the nature of such cases that the available evidence is often scant and many prosecutions fail for that reason alone."*

[138] After a careful consideration of the judgment of my brother Brody AJ. I am, with respect, unable to agree with it. The reasons of my respectful inability to agree with the latter are these. First is the question whether there was proper compliance with the provisions of section 162 read with section 164 of the Criminal Procedure Act No. 51of 1977 ("the Act"). Secondly whether the evidence presented was sufficient to sustain a conviction on the charge of rape.

[139] Pursuant to its acceptance of the evidence of Ms Karen Andrews, the clinical psychologist who examined the complainant and compiled a report pertaining to her mental capacity and her ability to testify, the trial court

acted in terms of section 164 of the Criminal Procedure Act and admonished the complainant to speak the truth prior to her giving testimony.

[140] Ms Andrews found inter alia that the complainant had a physical maturity' consistent with her reported age of 23. Further that, she was uneducated, intellectually and psychologically immature for her age. She had a mental age of 10 years with an IQ of 70 which placed her on the border line between mild mental retardation and border line intellectual functioning. However despite those challenges Ms Andrews expressed the view that the complainant did not fall within the definition of mentally disabled in terms of Section 1 of the Criminal Law Sexual Offences and Related Matters Amendment Act No 32 of 2007 in that she was able to appreciate the nature and reasonably foreseeable consequences of the sexual acts in this matter. Further, that she was able to act in accordance with such appreciation by communicating her unwillingness and trying to resist the acts perpetrated against her. I interpose to state that this view was apparently informed by the utterance made by the complainant that "when she was taken against her will she had an idea that these men would want to rape her" and that she was able to demonstrate that she understands what it means to have sexual intercourse. This appears to have been accepted in the court a quo without any examination of the the reasoning of the expert and determination as to whether it is logical in the light of the fact that the complainant was found to be intellectually delayed and psychologically immature for her age as well as bearing in mind that she has a mental age of 10 years with an IQ of 70 which placed her on the border line between mild mental retardation and border line intellectual functioning. The trial proceeded on the understanding that although she was of a mental age of 10 years she could validly consent to sexual intercourse and hence the indictment was amended to include only rape by the appellants acting in concert.

[141] Ms Andrews also found that she is able to testify in court through the services of an intermediary and CCTV system due to her mental age of 10 as well as the undue mental distress that will be occasioned by her having to testify in open court. She was able to demonstrate that she has a basic understanding of what it means to tell the truth and what it means to tell a lie and has a cognitive capacity to be admonished like any other 10 year old.

[142] Section 162 of the Act provides:

> *"(1) Subject to the provisions of sections 163 and 164, no person shall be examined as a witness in criminal proceedings unless he is under oath, which shall be administered by the presiding judicial officer or, in the case of* a *superior court, by the presiding judge or the registrar of the court, and which shall be in the following form:*
>
> *'I swear that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God.'*
>
> *(2) If any person to whom the oath is administered wishes to take the oath with uplifted hand, he shall be permitted to do so."*
>
> *And section 164 provides:*
>
> *"(1) Any person, who is found not to understand the nature and import of the oath or the 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.*
>
> *(2) If such person wilfully and falsely states anything which, if sworn, would have amounted to the offence of perjury or any statutory offence punishable as perjury, he shall be deemed to have committed that offence, and shall, upon conviction, be liable to such punishment as is by law provided as* a *punishment for that offence."*

[142] I make no issue about the fact that the trial court made no enquiry as to whether the complainant understood the nature and import of the oath or

affirmation as the her mere youthful mental age coupled with all the other difficulties alluded to by the psychologist placed it beyond pale that she could not possibly understand the import of taking an oath or affirmation. In **S v B** 2003 (1) SA 552 (SCA) that an inquiry is not always necessary in order to make the finding required by section 164 and that the mere youthfulness of a witness may indeed justify such a finding. In paragraph 15 of the judgment that Court said:

"Dit is *duidelik dat art 164 'n bevinding vereis dat 'n persoon weens onkunde voortspruitende uit jeugdigheid, gebrekkige opvoeding of ander oorsaak nie die aard en betekenis van die eed of die bevestiging begryp nie. Soos in die geval van 'n aantal vroeere uitsprake , het die hof a quo beslis dat die feit dat 'n bevinding vereis word, noodwendig inhou dat 'n ondersoek die bevinding moet voorafgaan (sien* S *v Mashava (supra op 228g- h);* S *v Vumazonke 2000 (1) SASV 619 (K) op 622f- g). Na my mening is dit 'n te enge uitleg van die artikel. Die artikel vereis nie uitdruklik dat* so *'n ondersoek gehou word nie en 'n ondersoek is nie in alle omstandighede nodig ten einde* so *'n bevinding te maak nie. Oit kan byvoorbeeld gebeur dat, wanneer gepoog word* om *die eed op te le of om 'n bevestiging te verkry, dit aan die lig kom dat die betrokke persoon nie die aard en betekenis van die eed of die bevestiging verstaan nie. Die blote jeugdigheid van 'n kind kan* so *'n bevinding regverdig. Na my mening word niks meer vereis* as *dat die voorsittende regterlike amptenaar 'n oordeel moet vel dat 'n getuie weens onkunde voortspruitende uft jeugdigheid, gebrekkige opvoeding of ander oorsaak nie die aard of betekenis van die eed of bevestiging begryp nie. Hoewel verkieslik word geen formele genotuleerde bevinding vereis nie (sien* S *v Stefaans 1999 (1) SASV 182 (K) op 185i)."*

[143] I am however not satisfied that there was proper compliance by the court *a quo* with the provisions of section 164(1) of the Act. According to the record of the proceedings the admonition was preceded by the following:

"COURT: Please ask her name?

WITNESS: S. P.. COURT: How old are you?

WITNESS: She does not know how old she is M'Lady.

COURT: S. do you know the difference between what is true and what is not true, that is the difference between truth and lies?

WITNESS: Yes M'Lady.

COURT: If I say to you you are a boy am I telling the truth?

WITNESS: No.

COURT: Do you know what happens to someone who does not tell the truth?

WITNESS: No M'Lady.

COURT: Is it good to tell lies?

WITNESS: Yes M'Lady.

COURT: Do you know what happens, okay you have already answered that, now we have asked you to come here today because we want you to tell us the truth. Are you going to tell us the truth?

WITNESS: Yes M'Lady.

COURT: Any questions, I have asked those questions just to establish whether she understands the difference between the truth and lies, I don't know if either of you want to pose any further questions before I swear her in?

PROSECUTOR: M'Lady can we ask one or two questions just to.....?

COURT: Okay.

PROSECUTOR: S. you indicated earlier that if a person says you are a boy that person would be telling a lie.

WITNESS: Yes.

PROSECUTOR: And if a person says you are a girl, is *he telling the truth or is he telling a lie?*

WITNESS: He is telling the truth.

PROSECUTOR: That is all M'Lady.

The court then enquired from the accused's legal representative as to whether he had some questions to ask from the witness. He expressed a view that it had not been shown with any clarity that the witness understood the difference between the truth and lies. That concern was based on the fact that the witness had stated that she didn't know what happens to someone who does not tell the truth and that it was good to tell lies. In reply to the issues raised the state simply referred the court to the provisions of section 164 (1) of the Act and asked the court to just admonish the witness. That submission seems to have weighed heavily with the trial court and it accordingly warned the witness to tell the court what is true and not to tell lies."

[144] Not only was the he enquiry preceding the admonition very cursory and failed to yield the desired results but it also raised some concerns which must be addressed. In terms of section 193 of the Criminal Procedure Act the court before which criminal proceedings are conducted must decide any question of competency of any witness and that such duty cannot be abdicated but must be carried out by the court itself. In **Motsitsi v S** 2012 ZASCA 59 (delivered 2 April 2012) it was held that the duty to ensure that a witness has properly taken an oath, affirmation or admonition is imposed on the judicial officer. In casu, the enquiry conducted to determine whether the complainant distinguished between the truth and falsity was insufficient and despite serious misgivings being expressed by the defence, the court simply admonished the complainant to tell the truth. The purpose of the enquiry prior to admonition is not to merely determine whether a witness can understand the abstract concepts of truth and falsehood or can give a coherent and accurate account of the events but to determine whether he or she can distinguish between truth and falsity. That entails recognition of the danger and wickedness of lying. (see **S V Henderson** [1997] 1 All SA 594 (C)) . The crux of an enquiry in terms of section 164(1) of the CPA is to establish whether the witness understands her obligation to testify truthfully.

In casu the complainant clearly demonstrated the lack of such obligation and appreciation of the dangers of lying as she does not know what happens when one tells lies and thinks it is good to do so.

[145] The Constitutional Court made it plain in **Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and others** 2009(2) SACR 130 (CC) para 166 that:

"The reason for evidence to be given under oath or affirmation or for a *person to be admonished to speak the truth is to ensure that the evidence given is reliable. Knowledge that a child knows and understands what it means to tell the truth gives the assurance that the evidence can be relied upon. It is in fact* a *precondition for admonishing* a *child to tell the truth that the child can comprehend what it means to tell the truth. The evidence of a child who does not understand what it means to tell the truth is not reliable. It would undermine the accused's right to a fair trial were such evidence to be admitted. To my mind, it does not amount to a violation of s 28(2) to exclude the evidence of such a child. The risk of a conviction based on unreliable evidence is too great to permit a child who does not understand what it means to speak the truth to testify. This would indeed have serious consequences for the administration of justice."*

The court went on to say in paragraph 167:

"When a child, in the court's words, cannot convey the appreciation of the abstract concepts of truth and falsehood to the court, the solution does not lie in allowing every child to testify in court. The solution lies in the proper questioning of children; in particular, younger children. The purpose of questioning a *child is not to get the child to demonstrate knowledge of the abstract concepts of truth and falsehood. The purpose is to determine whether the child understands what it means to speak the truth. Here the manner in which the child is questioned is crucial to the enquiry. It is here where the role of an intermediary becomes vital . The intermediary will ensure that questions by the court to the child are conveyed in* a *manner*

that the child can comprehend and that the answers given by the child are conveyed in a *manner that the court will understand."*

[146] In the light of the difficulties I have highlighted, I am not satisfied that there was compliance with the provisions of section 162 read with section 164(1) of the Act. That being the case, no reliance can be placed on the evidence of the complainant as it is trite that the testimony of a witness who has not been placed under oath properly, has not made a proper affirmation or has not been properly admonished to speak the truth as provided for in the Act, lacks the status and character of evidence and is inadmissible.

[147] Even if there had been proper compliance with section 164(1) of the Act, the evidence presented was insufficient to sustain a conviction on the charge of rape. The only evidence regarding the rape is that of the complainant. She is a single witness who also has a mental capacity of a 10 year old child and thus her evidence was subject to the cautionary rule to which it appears from the record that the court below failed to give proper consideration. The unreliability of the complainant as a witness is manifest from the record in many respects. Out of the many material contradictions in her testimony in court and her statement to the investigating officer I deal with only a few. First, is the fact that the complainant in her statement to the police, not only implicated accused number 3 as being present in the room when she was raped but she stated elaborately as to the role played by him in raping her repeatedly and in concert with the two appellants. Yet in her testimony in court she stated that it was only the first and second appellant who raped her and that although accused number 3 was present in the room he never participated in the rape. This is a fact which should have raised serious concerns and cannot simply be explained away by reliance to the similarity of the names of one of the appellants and accused number 3. The complainant herself could not explain such a serious discrepancy. Given the fact there was no language barrier between her and the investigating officer

who obtained her statement and further that such statement was meticulously obtained from her and even read back to her after completion, this material discrepancy cannot be attributed to the often flimsy manner in which police statements are obtained. The court a quo was wrong in my view in simply dealing with these discrepancies by merely attributing them to the different manner in which such statement was obtained as opposed to the manner in which she was led in court. Both processes sought to find out from her what transpired, how it all evolved and who was or were the perpetrators. Her implication of the accused number 3 and the elaborate role he played in her police statement as opposed to her complete absolution of him in her later testimony cannot be simply explained in that way.

[148] The consequences of her implication of accused number 3 in her police statement were that a man had to go through the ordeal of being charged and endure a fully blown trial when prosecuted for rape. That is a matter which perhaps with thoughtful and meticulous preparation could have been avoided.

[149] Yet another worrying feature was the unwarranted strenuous opposition as well as the refusal of the application for discharge of accused number 3 at the end of the state case in terms of section 174 of the Criminal Procedure Act. *Ex facie* the record it appears that the only reason for such refusal was that the rape took place at the premises of accused number 3 and in his presence. Our law is clear that the mere presence at the scene of crime without active participation or any other association with the offence does not constitute a crime. Whilst it may be argued that that accused number 3's case is not before us in this appeal, the undeniable fact is that important issues pertaining to the reliability and credibility of the complainant's evidence are raised and must be properly dealt with. If anything her

implication of accused number 3 clearly confirmed that she does not know what it means to tell the truth and thinks telling lies is good.

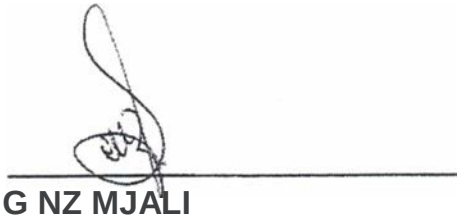
[150] Another contradiction is the fact that in her testimony in chief she failed to mention being tied with a wire to the bed and also that the door was locked with a wire when the appellants and accused number 3 left her on the following morning. That only came up under cross examination and was a far cry from her testimony that the appellants simply locked the door from outside and that she could only get out of that house when N. J. ("G.") saw her through the window and opened the door for her. G. denied having opened the door for her and stated that she saw the complainant playing with marbles outside. In the absence of any evidence to suggest that G. was biased in favour of accused number 3 because of her being related to him. Bearing in mind that the complainant is also related to G. it is difficult to comprehend how such a conclusion of bias can be made.

[150] It is difficult to comprehend how the events of the day in question evolved as when confronted with the first appellant's version, the complainant confirmed it. Contrary to her testimony the complainant confirmed that the first appellant had sexual intercourse with her on the mattress that was lying on the floor and that thereafter the two of them fell asleep on that mattress. She further confirmed that when the first appellant woke up during the night she had left. She stated that she had left for her aunt's place

[151] I do not propose do deal with each and every difficulty in the evidence presented in this matter save to state that medical evidence didn't go beyond than merely confirming that sexual intercourse took place the complainant and the appellants. The appellants admitted having done so with the consent of the complainant and at separate occasions without the other one knowing.

[152] The trial court seems to have found corroboration for the state's case in the fact that the complainant spent the night at the accused number 3's place and that she was found in those premises on the following day as well as the fact that that the appellants "were ill at ease when they were in the witness stand and seemed not to be forthcoming with the truth." None of these facts proves a case against the appellants. As for the demeanour of a witness, our courts have repeatedly held that that is a tricky horse to ride. The appellants might have been nervous on the witness stand and might have been poor witnesses but that does not absolve the state of its duty to prove its case beyond reasonable doubt. Given the pliability of the complainant's version as well as the fact that she confirmed the defence version in some respects I am left with serious doubt as to how the events of the night in question evolved and as such the appellants are entitled to the benefit of doubt.

[153] Accordingly I would allow the appeal.



G NZ MJALI

JUDGE OF THE HIGH COURT

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Date Heard: 02 August 2017

Date Delivered: 17 August 2017