FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ NO: 079/2005

PARTIES: HENRDIK MOTAUNG v THE STATE

REFERENCE NUMBERS –

- Registrar: **CC 79/05**

DATE OF HEARING: 15, 16 SEPTEMBER 2005; 18, 19 OCTOBER 2005
DATE DELIVERED: 19 OCTOBER 2005

JUDGE(S): JONES J

LEGAL REPRESENTATIVES –
Appearances:

- for the State/Applicant(s)Appellant(s): **L WILLIAMS**
- for the accused/respondent(s): **E THERON**

Instructing attorneys:

- Applicant(s)/Appellant(s): **DIRECTOR OF PUBLIC PROSECUTIONS PE**
- Respondent(s): **JUSTICE CENTRE PE**

Reportable

For local circulation

In the High Court of South Africa
(South Eastern Cape Local Division) Case No: CC 79/05
Delivered: **20/10/05**

In the matter between

HENDRICK MOTAUNG

and

THE STATE

SUMMARY: Compulsory minimum sentence – referral to the High Court for sentence for rape in terms of section 52(1)(b) of Act 105 of 1997 – evidence against accused given through an intermediary – intermediary not sworn – whether conviction on that account not in accordance with justice – failure to swear in the interpreter an irregularity, but not such as to amount to a failure of justice in the circumstances – sentence – substantial and compelling circumstances for the imposition of a lesser sentence than life imprisonment found to be present.

JUDGMENT

JONES J:

[1] The accused was charged in the regional court, Port Elizabeth with the rape of a 13-year-old little girl. He was convicted. The magistrate stopped the proceedings and referred the matter to this court for sentence in terms of the provisions of section 52(1)(b) of the Criminal Law Amendment Act 105 of 1997 because the Act prescribes a sentence of life imprisonment for the rape of a girl under the age of 16 years. That sentence is beyond the jurisdiction of the magistrate.

[2] The matter came before me on 15 September 2005. Ms *Theron* for the accused raised a preliminary point before dealing with sentence. She argued that the proceedings before the magistrate were vitiated by a fatal irregularity because no oath had been administered to the intermediary through whom the complainant had given evidence in terms of section 170A of the Criminal Procedure Act 51 of 1977. She relied on the authority of *S* v *Booi and another* 2005 (1) SACR 599 (BG)

[3] Section 52(3)(b) of the Criminal Law Amendment Act 105 of 1997 provides that

> '[t]he High Court shall, after considering the record of the proceedings in the regional court, sentence the accused as contemplated in s 51(1) or (2), as the case may be, and the judgment of the regional court shall stand for this purpose and be sufficient for the High Court to pass such sentence: Provided that if the Judge is of the opinion that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice, he or she shall, without sentencing the accused, obtain from the regional magistrate who presided at the trial a statement setting forth his or her reasons for convicting the accused.'

In forming the opinion required by the section the judge does not sit as a court of appeal, but is called upon to exercise the kind of judgment used in cases of review in the ordinary course under section 304 of the Criminal Procedure Act. In such matters a judge may certify that the proceedings are in accordance of justice after a consideration of the record which is not confined

to an examination of merely procedural issues. See *S* v *Taljaard* 2005 (1) SACR 370 (C). In view of Ms *Theron*'s objection I called for the magistrate's comments on whether the failure to swear the intermediary in as an intermediary constituted an irregularity, and, if so, whether it resulted in a failure of justice. I also postponed the matter to 18 October 2005.

[4] The magistrate's reasons are to hand. It is now necessary for me to consider whether in my opinion the proceedings are in accordance with justice. In the magistrate's view his failure to administer an oath to the intermediary did not constitute an irregularity because the Act does not prescribe an oath or direct that an oath be administered. He is further of the view that even if an oath should be administered, there has been no failure of justice in this case because on the facts the complainant was properly sworn in as a witness and her evidence was properly given through the medium of an interpreter with the assistance of the intermediary. The intermediary acted purely as a conduit. He has verified this by listening to the recording of the evidence. He also refers to the provisions of section 170A(5)(a) and (b) of the Criminal Procedure Act which provide that evidence is not inadmissible solely on the ground that it was given through an intermediary who, it turns out, was not properly qualified. This suggests that the legislature does not intend that proceedings through an intermediary should be regarded as a nullity for technical reasons.

[5] The record shows that the magistrate appointed the intermediary on the application of the prosecutor. In support of his application the prosecutor handed in an affidavit showing that the proposed intermediary was a social worker duly qualified to be appointed as an intermediary who had held an interview with the complainant and had formed the opinion that the complainant would suffer undue mental stress if she were required to give evidence in open court. The application was granted, in my view correctly. There was no objection by the defence attorney, and hence less reason to not to grant it. In my view, there was nothing irregular about the inquiry conducted by the magistrate or the appointment of the intermediary, other than the alleged irregularity relating to the failure to swear her in.

[6] The record confirms that the intermediary was not required to take an oath after her appointment. The magistrate says that it is not his practice to administer an oath to intermediaries.

[7] As I understand the judgment in *S* v *Booi and another supra,* Mogoeng JP held on the facts (1) that the statutory requirements for the proper appointment of an intermediary were not properly considered and were not met; and (2) that the intermediary was not regularly appointed because no oath or affirmation was administered. In this case the first point does not arise. The second point most certainly does. I am in agreement with Mogoeng JP that the failure to administer an oath or affirmation constitutes an irregularity.

An intermediary plays an important role in the process of presenting evidence to the court in a fair and proper manner, which is the best of reasons to require an oath or affirmation. Furthermore, while the introduction of the intermediary procedure to avoid distress to a child witness is to be welcomed, it must not be forgotten that the price to be paid is an inroad upon the fundamental rule of our criminal procedure that the accused is entitled to be confronted by the accuser in open court (*S* v *Stefaans* 1999 (1) SACR 182 (C)). The impact of this inroad must be reduced as much as possible. One procedural method of reducing it is to require the intermediary to perform his or her functions in accordance with an oath or affirmation which acknowledges the solemn and important function he or she performs in the courts. The oath or affirmation will ensure that the intermediary appreciates the need to convey properly, accurately, and to the best of his or her ability the witness's evidence to the court, and, where necessary, to convey the general import of what is said to and by the witness. An intermediary performs a similar function to that of an interpreter. It is recognized that although there is no statutory direction in the Supreme Court Act 59 of 1959 or the Magistrates' Courts Act 32 of 1944 or the Criminal Procedure Act 51 of 1971 that an interpreter be sworn, a failure to swear him in constitutes an irregularity which may amount to a fatal irregularity (*S* v *Naidoo* 1962 (2) SA 625 (A)). The administration of an oath to an interpreter is governed by practice and the rules of admissibility of evidence, and is now formalized by Uniform rule 61(1) and (2) and Magistrates' Courts rule 68(1) to (5). In my

view the same rules of practice require that an oath or affirmation be administered to an intermediary in every case as a matter of course, unless intermediaries in full time employment of the State are required to take a general oath in the same way as full time interpreters.

[8] I conclude that the magistrate's failure to swear in the intermediary was an irregularity. This does not, however, necessarily mean that the proceedings are not in accordance with justice. They are not in accordance with justice if the irregularity caused prejudice to the accused which resulted in a failure of justice. The intermediary procedure is part of the process of placing evidence before the court. If it is irregular it may result in evidence being unfairly or improperly placed before the court, in which event it will be prejudicial, perhaps fatally so. Usually, the prejudice arises because the irregularity makes the evidence inadmissible, as in *Naidooi*'s case *supra*, where the evidence of a witness was inadmissible because the interpreter was not sworn in and his administration of the oath to the witness was of no force and effect. See also *S* v *Siyotula* 2003 (1) SACR 154 (E). In the event that the evidence is inadmissible, the question becomes whether a conviction is justified by the rest of the evidence, as in *Naidoo's* case, or whether there is some other method of curing the defect, as in *Siyotula's* case.

[9] The transcript of the record of evidence shows, and the magistrate's reasons confirm, that after appointing the intermediary the magistrate swore

the child in as witness. She then gave evidence in terms of sections 158(2)(a) and 170A(3)(c) of the Criminal Procedure Act in a room outside the court through the medium of closed circuit television. Questions were put in English and were interpreted into isiXhosa by the interpreter. The interpretation was heard by the child and repeated by the intermediary in the course of assisting and supporting her during the course of her evidence. The intermediary's rendition of the questions interpreted by the interpreter was audible to the interpreter, and if there had been any misunderstanding he would have been aware of it and would have cleared it up in the course of his ordinary duties as an interpreter. The child gave her answers either in isiXhoza or Afrikaans, and the interpreter once again interpreted these into English. Everything was recorded and capable of verification.

[10] The complainant gave evidence after being properly sworn in as a witness by the magistrate himself, unlike in the *Naidoo* case *supra* where the oath was ineffective because it was administered by an unsworn interpreter. Here, the complainant's evidence is not inadmissible. As I understand the magistrate's reasons and as I read the record, the intermediary did not fulfil the role of interpreter. The magistrate is correct that she was merely a conduit. The complainant's evidence was conveyed through the intermediary but was audible through the closed circuit television system. It was recorded as part of the record and was interpreted to the court directly by the interpreter. On the facts there is no suggestion anywhere of any impropriety or any irregularity

involving the presentation of evidence or its admissibility which operated to the detriment of the accused and which arose because the intermediary did not take an oath.

[11] For these reasons I formed the opinion that the proceedings were in accordance with justice despite the irregularity, and I confirmed the conviction in terms of section 52(3)(d) of Act 105 of 1997. The question of sentence then arose.

[12] I am satisfied that in this case there are substantial and compelling circumstances within the meaning of section 51(3) of Act 105 of 1997 for the imposition of a lesser sentence than the prescribed sentence of life imprisonment. All rape cases are serious, and particularly the rape of children of 16 years or less, which is why a mandatory sentence is prescribed. But there are degrees of seriousness, and this case does not fall within that category of serious cases for which the ultimate penalty should be reserved. Apart from minor bruising, there was no physical injury to the complainant, and the assessment presented in evidence by the State satisfies me that the psychological trauma, while never to be regarded as insignificant, is no greater in this case than in any other case. The accused is a 22-year-old first offender who, despite minimal educational opportunities and a background of poverty, managed to secure permanent employment in the forestry industry and showed an awareness of his social responsibilities by contributing to the

maintenance of a minor child. He appears to come from a good family. He is clearly a candidate for rehabilitation. In my view there was a realistic basis for his belief that the complainant was older than her 13 years because she was playing pool in the tavern till late on a Saturday night. In all the circumstances a sentence of life imprisonment would be an unjust sentence. If I take into account

- the interests of the community in regard to retribution, rehabilitation, the imposition of deterrent sentences, and the protection of society;
- the mitigating features of the case;
- the personal circumstances of the accused;
- the need for compassion in the judicial process and for constructive sentences which make rather than break the offender;
- the guidelines in rape cases on sentence imposed by the Supreme Court of Appeal in recent years, always bearing in mind that those sentences were imposed in the light of the particular facts and circumstances of the case in hand; and
- that this is the rape of a 13-year-old child

I am of the view that in this case a sentence of 10 years' imprisonment is a proper and appropriate sentence.

[13] The accused is sentenced to 10 years' imprisonment.

RJW JONES
Judge of the High Court
20 October 2005