IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: AR447/2019

In the matter between:

MATHEMBI THEMBEKA SIBIYA APPELLANT

and

THE STATE RESPONDENT

JUDGMENT

Delivered on 12 February 2021

Mossop AJ (Seegobin J concurring):

[1] The appellant, an adult female aged 29, stood trial in the Inkanyezi Regional Court on a charge of rape, the State alleging that on diverse occasions between 2017 and 24 August 2018 she unlawfully committed an act of sexual penetration with a nine-year-old boy, by inserting the boy's penis into her vagina

without his consent. In order to avoid identifying the boy any further I shall refer to him as '*the complainant*'.

[2] The appellant pleaded not guilty to the charge but after hearing the evidence, the Learned Regional Magistrate presiding convicted her as charged and by virtue of the provisions of section 51(1) read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 sentenced the appellant to life imprisonment because the complainant was below the age of 16 years when the offence was committed.

[3] As a consequence of the imposition of a sentence of life imprisonment, this appeal is before us in terms of the provisions of section 309 of the Criminal Procedure Act 51 of 1977 (henceforth '*the Act*').

[4] The charge sheet indicated that the offence of rape had been committed on diverse occasions. The evidence revealed that there were, in fact, three occasions that the State relied upon. No evidence was led as to the date of the first two occasions: the best that that the complainant could do was to say that the second occasion occurred on a Saturday. The third occasion was alleged to have occurred on 24 August 2018. I shall refer to the occasions of the alleged rape as the '*first assault*', the '*second assault*' and the '*third assault*' respectively.

[5] Before considering the evidence, it is appropriate at this juncture to deal with a point taken *in limine* by Mr. Marimuthu, who appears for the appellant, in his heads of argument. He submits that the Learned Regional Magistrate did not ascertain that the complainant did not understand the nature and import of the oath before he gave his evidence, and also failed to ascertain whether the complainant could distinguish between truth and lies.

[6] Mr Marimuthu correctly points out in his heads of argument that in terms of section 162 of the Act, all witnesses at a criminal trial must give evidence under oath. An exception to this general rule is to be found in section 164 of the Act. Section 164(1) finds effect when a court is dealing with the admission of evidence of a witness, who from ignorance arising from youth, defective education or other cause, is found not to understand the nature and import of the oath or the affirmation. Such a witness must instead of being sworn in or affirmed, be admonished by the judicial officer to speak the truth. However, it is clear from the reading of section 164(1) that for it to be triggered there must first be a finding that the witness does not understand the nature and import of the oath. Before such a finding can be made there must be some form of enquiry to establish whether the witness understands the nature and import of the oath. If the judicial officer should find after such an enquiry that the witness does not possess the required capacity to understand the nature and import of the oath, it must be ascertained whether the witness can distinguish between truth and lies and if the enquiry yields a positive outcome, admonish the witness to speak the truth.[1]

[7] In my view, the Learned Regional Magistrate engaged in a very thorough questioning of the complainant prior to admonishing him to speak the truth. The complainant confirmed that he knew it was important to tell the truth and acknowledged that persons who lie would receive a hiding at school, as would he if he lied at home. He was subject to a practical exercise from which it appeared that he understood the difference between a lie and the truth. The only criticism that can be levelled at the Learned Regional Court Magistrate is that she never asked him whether he knew what it was to take the oath. After questioning

[1] S v Matshivha 2014 (1) SACR 29 (SCA) at para 11.

the complainant, the Learned Regional Magistrate concluded that the complainant '*will not understand the nature and the import of the oath*'.

[8] Given his answers to the questions put to him by the Learned Regional Magistrate there was a possibility that he may well have understood what it means to take the oath, but he was never asked that specific question. I am, however, satisfied that the Learned Regional Magistrate substantially complied with the prescripts of section 164 of the Act and I cannot otherwise find any fault with the manner in which the complainant was admonished to tell the truth. In my view, the complainant's evidence was correctly received. Whether it was adequate is another question entirely. The point *in limine* must therefore fail.

[9] As regards the first two assaults, the only evidence led was that of the complainant. He gave his evidence on 31 October 2018 and indicated in response to a question from the prosecutor that the previous year he had been in grade 3. He stated further that when he was in grade 2 the first assault had occurred. On that occasion, he was at the appellant's home. He had been playing outside when the appellant called him into her room where he found her on her bed. She was clad only in her panties. She then undressed him and took off her panties. After doing so she:

> *'... took my penis and inserted it in her vagina.'*

The interpreter recorded that these were the exact words used by the complainant.

[10] The assault came to an end when his aunt returned to the homestead.

[11] That was the sum total of the evidence led on the first assault.

[12] As regards the second assault, the complainant said that it occurred on a Saturday. He was in grade 3 when it occurred. It happened during the day at his homestead and he indicated that there were many people at home that day, including his mother. He had gone to the appellant to ask her to dish up his food for him. She had referred him to a person known as Nto. However, Nto refused to assist him and he went back to the appellant to report this to her. The appellant then undressed him, undressed herself and instructed him to get on the bed. After he was on the bed, she got on top of him and she then:

> *'... took my penis and inserted it into her vagina.'*

That was the sum total of the evidence led on the second assault.

[13] Turning to consider the facts of the third assault, the principal witness for the State, besides the complainant, was Simphiwe Zinhle Mathaba. She was friendly with one Andile who resided at the complainant's homestead and she had previously visited that homestead. She, Andile and others had attended a rehearsal at a neighbouring homestead on the afternoon of 24 August 2018. They returned to the complainant's homestead at around 22h30 and retired to bed. They were to sleep in a rondavel in which there were two beds. The complainant's mother occupied one of those beds. The other bed was occupied by Andile and the appellant. There were others in the room as well: the witness indicated that:

> *'On the floor now the children slept, there were many and that is where they slept in any event, they slept on the floor.'*

[14] The witness herself slept on the floor. She testified that the rondavel had electric lighting. With the room in darkness, she fell asleep. She testified,

however, that it was her habit to waken at midnight in order to pray. To ensure that she kept to this routine, she set her cellular telephone's alarm to waken her at that hour. Praying appears also to have required her to don certain church garb. Waking at midnight and after having put the required clothing on, she completed her prayers in the dark but noticed that the appellant was awake and that she was in the process of waking the complainant. The appellant gave the complainant her cellular telephone and it appeared to the witness that she instructed him to check whether all the other occupants of the rondavel were asleep. The next thing that the witness heard was a noise that sounded like

> *'[i]t was like a person was screaming …'*

[15] The voice that the witness heard was that of a female. The witness immediately got up and switched on the overhead electric light, illuminating the rondavel. She observed the appellant '*on top of a child*'. The child, she later clarified, was the complainant. She testified that the appellant was having sexual intercourse with the complainant. This was happening on the floor. The complainant slept on the floor next to the bed occupied by the appellant. According to the witness, the appellant was wearing her pyjama top on the upper part of her body but wore nothing on the lower part of her body. When the light was turned on, the appellant moved off the complainant back to the bed that she previously occupied.

[16] The witness thereafter turned off the overhead light and slept until 04h00, when she next was required to wake and pray. The complainant also awoke at that hour and asked the witness what the time was. She indicated that it was still too early for him to prepare water for a bath but nonetheless he went and bathed. When he was done and was intent on disposing of the bathwater, the

witness walked with him and asked what the appellant had been doing to him during the night. The complainant looked around but did not respond and the witness indicated to him that she had made a video recording of what had occurred and would show it to his mother. The complainant then narrated that the appellant had woken him up, undressed him and inserted his penis into her vagina.

[17] The complainant's version of what transpired on the third occasion was that when the witness Mathaba, Andile and a person named '*Le*' returned from the rehearsal at the neighbour's homestead, he awoke and went to fetch a bowl to wash but was told that it was not yet time to bath so that he '*could go to school*'. He went back to sleep on the grass mat on the floor. He confirmed that there were seven children including himself in the rondavel and five adults, one of whom was his mother. Having gone to sleep, the complainant testified that the appellant woke him and asked him to fetch her cellular telephone. He did so and placed it on her bed. The appellant moved the blanket away and revealed that she was only wearing her panties. The rondavel, however, remained in darkness. The appellant then undressed the complainant and removed her panties and then got on top of the complainant, who was supine on the floor, and she:

'… then took my penis and inserted it into her vagina …'

[18] The light was then switched on by Mathaba and the appellant jumped off him and returned to her bed. The appellant thereafter asked him to locate her pyjamas and gave him her cellular telephone to help him to do so. The appellant allegedly also spoke to Mathaba about where her, the appellant's, blanket might be.

[19] The complainant's mother, who was in the rondavel on one of the beds, was called to testify. She did not testify at all about any of the events that allegedly occurred in the rondavel. Her knowledge of events was derived solely from what she had been told by the witness Mathaba or what she was told by her son. She had been notified by Mathaba that something was amiss and joined Mathaba and the complainant outside the rondavel. Interestingly, she testified that she asked her son why he had had not cried out whilst the appellant was raping him '*because I would have perhaps heard that*.' The evidence of Mathaba was that there had been a noise of someone screaming, but clearly the complainant's mother had not heard that.

[20] The State also called the evidence of the district surgeon who examined the complainant after the third assault. Dr Gumede testified that he found two small red erosions on the corona of the complainant's penis. His examination otherwise did not reveal anything unusual. He indicated that he was not an expert on sexual assault and did not feel comfortable straying into that field and so he did not. He did testify, however, that pulling back the penis with force could cause bruising and as a consequence

> *'... I can never conclude it was due to the case that was presented sexual assault, but any force applied, pressure applied can lead to the erosion of the skin.'*

[21] As Mr. Marimuthu pointed out in his heads of argument, the doctor was imperfectly questioned and cross-examined. He was not asked therefore the obvious question of whether the erosion that he observed could have been self-inflicted in the course of sexual self-exploration by the complainant or boisterous, young activity. Given the reluctance of the doctor to commit to a

finding that sexual interference did occur, this is a possibility that was not excluded by the State

[22] The conviction of the appellant of the three sexual assaults depended, primarily, on the evidence of the complainant. That the evidence of a single witness who is also a child needs to be approached with caution is trite. In *Woji v Sanlam Insurance Co Ltd*,[2] Diemont JA provided a guide to approaching the evidence of young children. The guide highlights, as the focal point, the trustworthiness of the evidence. The Learned Judge said the following:

> *'The question which the trial Court must ask itself is whether the young witness' evidence is trustworthy. Trustworthiness, as is pointed out by Wigmore in his Code of Evidence para 568 at 128, depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears "intelligent enough to observe". Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion "to remember what occurs" while the capacity of narration or communication raises the question whether the child has "the capacity to understand the questions put, and to frame and express intelligent answers" (Wigmore on Evidence vol II para 506 at 596). There are other factors as well which the Court will take into account in assessing the child's trustworthiness in the witness-box.*

[2] 1981 (1) SA 1020 (A).

> *Does he appear to be honest – is there a consciousness of the duty to speak the truth? Then also "the nature of the evidence given by the child may be of a simple kind and may relate to a subject-matter clearly within the field of its understanding and interest and the circumstances may be such as practically to exclude the risks arising from suggestibility" (per SCHREINER JA in R v Manda [1951 (3) SA 158 (A)]). At the same time the danger of believing a child where evidence stands alone must not be underrated.'*[3]

[23] The Learned Regional Magistrate found at the outset of the trial that the complainant was not capable of understanding the concept of the oath. In addition, he disclosed that he had been required to repeat grade 1 of his schooling. These are factors that need to be borne in mind when assessing his evidence. The complainant's powers of observation and his ability to recollect events seemed to be limited. Two examples of this should suffice. In his evidence on the first assault, the following exchange occurred between the prosecutor and the complainant:

> *'PROSECUTOR Boy do you remember how was your penis when Mathembi inserted it in her vagina? --- No.'*

[24] One would have anticipated that the complainant would have recalled this as he was adamant that his penis had been inserted into the appellant's vagina. In fact, no evidence was ever adduced as to whether the complainant ever had an erection. Such evidence would have been important in establishing

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[3] **At 1028A-E.**

whether it was indeed possible for his penis to be inserted into the appellant's vagina as he repeatedly testified.

[25] The second example of his limited powers of observation and recall is to be found in the following exchange between him and the prosecutor when he testified on the second assault:

> *'PROSECUTOR And how was Mathembi on the bed, how was her position on the bed when she told you to come closer to her? -- -- I cannot remember.'*

This is critical evidence when the complainant is the only source of evidence that was utilised to convict the appellant. It is evidence that one would have expected him to have remembered and recalled.

[26] Where evidence other than that of the complainant's evidence was relied upon by the State, there were significant differences between what the complainant said and what the other witness said, more specifically what the witness Mathaba said. Dealing with the evidence in respect of the third assault, on the complainant's version, the appellant was completely naked as she was wearing no top and had removed her panties, whereas Mathaba testified that she was wearing her pyjama top. Mathaba said that the complainant went around the rondavel with the appellant's cellular telephone checking whether each of the occupants of the rondavel were asleep – the complainant made no reference to this at all. The complainant testified that there had been a discussion between the appellant and Mathaba after the light had been turned on concerning where the appellant's blanket was - Mathaba did not mention speaking to the appellant after the light was turned on.

[27] In addition, the complainant testified that he intended to bath so that he would be able to attend school. This would seem to be unlikely as 24 August 2018, the date of the third assault, was a Friday and the complainant would not have attended school on the Saturday.

[28] These are all points that have been well taken by Mr. Marimuthu in his considered heads of argument.

[29] A further matter of some concern is the almost mechanical fashion that the complainant testified that the appellant had inserted his penis into her vagina. His evidence on this aspect of each of the assaults was identical and creates the impression that he had, perhaps, been schooled to ensure that he said these words.

[30] The proper approach in a case such as this is for the court to apply its mind not only to the merits and the demerits of the State and the defence witnesses, but also the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt.[4]

[31] The probabilities in this case would appear, in my view, to be largely in favour of the appellant. As regards the third assault, given the large number of people in the room (totalling twelve in all of which five were adults) and the fact that one of those adults present was the complainant's mother, it strikes me as being improbable that the appellant would have conducted herself in the fashion alleged. The possibility of being caught *in flagrante delicto* would have been great. Furthermore, it seems inconceivable that the scream that the witness

[4] S v Singh 1975 (1) SA 227 (N) at 228.

Mathaba heard was loud enough to rouse her but not any of the other people occupying the rondavel. No-one else was called to testify that they heard the scream. In addition, it seems improbable that none of the other occupants of the rondavel were woken by the switching on of the overhead light by Mathaba to permit them to observe what only the witness Mathaba appears to have observed. Finally, if Mathaba had indeed witnessed what she claims to have seen, it seems improbable to me that she would not then and there have raised the alarm and drawn attention to what was happening before her very eyes. She would surely have acted immediately to put a stop to what was occurring. She professed to have been shocked, but was still able to go back to sleep and did not think of drawing attention to the abuse that she had just witnessed.

[32] The complainant did not report to his mother the occurrence of any of the acts of assault to which he was allegedly a victim. It is difficult to assess how long he had remained silent about the first and second assaults as it is not known when those assaults occurred. But it is inescapable that he remained silent until he was spoken to by the witness Mathaba, when he then mentioned all three assaults. That he made mention of the events surrounding the third assault was as a consequence of the witness Mathaba falsely stating that she had made a video recording of what had transpired. In truth she had done no such thing. But what she said, false though it may have been, appears to have persuaded the complainant to reveal all.

[33] In the matter of *R v C*,[5] the common law requirement for the admissibility of statements of victims of sexual assault was stated to be that the complaint must have been made voluntarily, not as a result of leading or suggestive questions, nor of intimidation. This approach has been followed in Act

[5] 1955 (4) SA 40 (N) at 40G – H.

32 of 2007 where the words '*shall be admissible*' appearing in section 58 should be read as incorporating the common law requirement of voluntariness.

[34] In *R v Osborne*[6], the court held as follows:

> *'The mere fact that the statement is made in answer to a question in such cases is not of itself sufficient to make it inadmissible as a complaint. Questions of the suggestive or leading character will, indeed, have that effect… If the circumstances indicate that but for the questioning there probably would have been no voluntary complaint, the answer is inadmissible. If the question merely anticipates a statement which the complainant was about to make, it is not rendered inadmissible by the fact that the questioner happens to speak first…'*

[35] In my view, the complainant was not about to speak when he was spoken to by Mathaba. He remained silent initially. He only spoke once she referred to the video recording. While he was not threatened with any form of physical violence, he was induced to speak by a false set of facts being communicated to him by Mathaba. Given his prolonged silence concerning the first and second assault, it seems likely that he would have continued maintaining that silence but for Mathaba's intervention. His statement was, in the circumstances, not made voluntarily and it ought not to have been accepted as evidence in the court *a quo*. Excluding that statement results in the exclusion of the reports made by the complainant of the events comprising the first and second assaults as well.

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[6] 1905 KB 551 at 556.

[36] The question remains whether a failure of justice has resulted from the wrongful admission of the complaint. The test to be applied is whether a trial court hearing all the evidence but refusing to admit the complaint, would inevitably have convicted the appellant.[7] Put differently, where no voluntary report of rape was made, the court must determine whether the evidence (excluding the report) proves the charge of rape against an accused beyond reasonable doubt.

[37] After considering all the evidence and the probabilities, and excluding the evidence of the report of the complainant, I come to the conclusion that the evidence of the complainant was not sufficiently trustworthy and reliable to warrant the conviction of the appellant and her incarceration for life. It follows that I am unconvinced that the guilt of the appellant was established beyond reasonable doubt. In my view, it would be unsafe to allow her conviction and sentence to stand.

[38] It is finally necessary for the court to thank Mr. Marimuthu for his thoughtful and incisive heads of argument. They helped immeasurably in analysing the evidence in the matter and arriving at a just resolution of the appeal.

[39] I would accordingly propose that the appeal be allowed and that the appellant's conviction and sentence be set aside.

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[7] **S v T 1963 (1) SA 484 at 487F.**

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MOSSOP AJ

I agree:

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SEEGOBIN J

APPEARANCES

Date of Hearing	:	12 February 2021
Date of Judgment	:	12 February 2021
Counsel for Plaintiff	:	
Instructed by	:	
Counsel for Defendant	:	
Instructed by	:	