IN THE NORTH WEST HIGH COURT

MAFIKENG

CA 1 /12

In the matter between:

MOTSAATHEBE PHILEMON BUTI **Appellant**

and

THE STATE **Respondent**

CRIMINAL APPEAL

HENDRICKS J, KGOELE J

DATE OF HEARING	**:**	**22 February 2013**
DATE OF JUDGMENT	**:**	**28 March 2013**
FOR THE APPELLANT	**:**	**Advocate Hlahla**
FOR THE RESPONDENT	**:**	**Advocate Nontenjwa**

JUDGMENT

KGOELE J:

[1] The appellant was convicted of rape at the Regional Court held at Lichtenburg and was subsequently sentenced to 24 years imprisonment.

[2] His application for leave to appeal was refused by the trial court. He was thereafter granted leave on both conviction and sentence after petitioning this court.

[3] The first ground of appeal which is also the crux of the matter before this court is to the effect that the complainant was not properly admonised in terms of section 164 of the Criminal Procedure Act 51 of 1977 (the Act). The effect thereof is according to the appellant's counsel that if this court is persuaded by such submissions, the remaining evidence will be insufficient and the conviction will not stand.

[4] The summary of the evidence of the complainant who is a 13 year old boy is to the effect that on the 23rd of May 2009 he met with the appellant whilst he was walking on a footpath from Verdwaal to Paarl visiting his elder sister. He knew appellant's surname as Motsaathebe even prior this incident. There were some grass and bushes along the road. Appellant borrowed R10-00 from him. Thereafter he requested to see his buttocks. Upon the complainant's refusing, the appellant forcefully undressed him by taking off his pair of trousers and underwear. He caused complainant to lie on his stomach. Complainant screamed. He closed his mouth. Appellant then inserted his penis into his anus and continued with up and down movements till he on his own stopped this act of sexual penetration. They thereafter

parted. He reported the rape to his sister who ultimately reported it to the police.

[5] Maria, the complainant's sister, confirmed the report that was made to her. The doctor that examined the complainant's anus testified to the effect that there were posterior and anterior anal tears extending to the surrounding skin. His conclusion was the following: *"Apparent case of sexual assault, possibly secondary to anal penetration by a blunt object, which did not exclude a penis"*.

[6] The appellant testified. His version is an *alibi* and further that he does not know the complainant.

AD CONVICTION

[7] Counsel for the appellant, Advocate Hlahla submitted that it is trite law that the judicial officer must be satisfied that the child witness understands the nature and importance of the oath and what it means to tell the truth. Further that in this matter the trial court erred by failing to conduct such inquiry.

[8] The respondent on the contrary submitted that the presiding officer is only required to form an opinion. This opinion can be simply based on the age of the child witness.

[9] This aspect was thoroughly covered by the trial court in its judgment. The trial court based its findings on the Appeal Court's decision of **S v B 2003 (1) SACR page 52**. Complainant in this matter was also 13 years of age.

[10] In the S v B matter quoted above, the trial court's warning was only preceded by the following:-

> "Hof: Kan u my hoor me Siebritz?
>
> Me Siebrtz: Ek kan u hoor
>
> Hof: Kan u haar vra wat haar volle name is asseblief?
>
> Me Siebritz: Wil jy vir ons se wat is jou volle name?
>
> Getuie: A
>
> Hof: Hoe oud is jy?
>
> Me Siebritz: Hoe oud is jy?
>
> Getuie: 13
>
> Hof: Weet jy what dit beteken om te sweer dat sy die waarheid sal praat?
>
> Me Siebritz: Weet jy waat dit beteken om te se jy praat die waarheid?
>
> Getuie: Ja
>
> Hof: Kan u haar waarsku sy moet die waarheid en niks anders as die waarheid praat nie?
>
> Me Siebritz: Ons wil jou net waarsku dat jy net die waarheid gaan praat en niks anders as die waarheid nie.
>
> Getuie: "Okay"."

[11] Further, **paragraph 15** of **page 63 a-e** the following was decided by the Appeal Court:-

> "Held, further, that it was clear that s 164 required a finding that a person did not understand the nature and import of the oath of the affirmation due to ignorance arising from youth, defective education or other cause. The finding by the Court *a quo* that the fact that a finding was too narrow an interpretation of the section. The section did not expressly require that an investigation be held and an investigation was not required in all circumstances in order to make such a finding. For example, in could happen that when an attempt is made to administer the oath or to obtain the affirmation it came to light that the person involved did not understand the nature and import of the oath or the affirmation. The mere youthfulness of a child could justify such a finding. Nothing was required more than that the presiding judicial officer had to form an opinion that he witness did not understand the nature and import of the oath of the affirmation due to

> ignorance arising from youth, defective education or other cause. Although preferred, a formally noted finding was not required. (Paragraph [15] at 63 a-e.)

[12] In this matter the trial court only said the following after establishing that his age is 13 years:-

> "You are hereby admonished to tell the truth during the proceedings, do you understand?"

It therefore becomes apparent that because of the tender age of the child, the trial court formed an opinion that he will not understand the nature and import of the oath, and therefore simply, admonished him.

[13] There is therefore no misdirection on the part of the trial court on this aspect.

[14] Appellant's counsel was made aware of this decision during the submissions in court. As this ground of appeal was the main crux of the appellant's appeal, the remaining submissions were not persisted on by him. There is therefore no need to deal with them. The trial court's finding on conviction cannot therefore be disturbed.

AD SENTENCE

[15] Appellant's counsel submitted the following in respect of the sentence meted out by the trial court:-

> *"The issue to be determined is whether the sentence imposed by the trial court is shockingly sever for this court to interfere.*
>
> *The following factors were placed on record in mitigation of sentence:-*

9.1 Accused was 45 years old but at time of commission he might have been 43 years old

9.2 He left schooling at standard 5

9.3 At the time of his arrest he was a truck driver earning an amount of R4500 per month

9.4 Accused is not married but he does have children, three in number, their ages are:- First born 17 years old, second born 11 years, and last born 6 years old.

9.5 Accused is a sickly person suffering from (TB) and high blood pressure

9.6 The complainant did not suffer any serious injuries in her private parts as a result of rape

9.7 It will be argued that the sentence of 24 years imprisonment stands to be set aside based on the afore mentioned mitigating factors

9.8 That the accused spent 18 months in custody awaiting finalisation of this matter."

[16] The gravamen of the submission by appellant's counsel is to the effect that although the trial court considered the stated factors, it did not attach a proper weight to them. Counsel for the respondent submitted on the other hand that the sentence imposed is appropriate as the offence committed is serious and rife in our country.

[17] The trial court regarded the fact that appellant had been in custody for +- 18 to 21 months only as substantial and compelling circumstances. It therefore deviated from imposing a minimum sentence of life imprisonment.

[18] The duty to impose what it considers to be an appropriate sentence is that of the trial court and a court of appeal should never allow itself to be unaware about this. The trial court has an advantage, which this court does not enjoy, it was imbued with the atmosphere of the trial. In

S v Malgas 2001 (1) SACR 469 at 478 d-h, Marais JA, stated the law in the following significant passage:-

> "A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'. It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because if prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation."

[19] When dealing with sentence, the trial court remarked that the complainant did not suffer any injuries in her private parts as a result of rape. I am unable to understand what the court intended to convey because it is common cause that sexual intercourse took place not through his private parts namely, "penis", but through his anus. Furthermore, the J88 and the testimony of the doctor is to the effect

that there were tears on it. I am however mindful of the fact that the complainant did not sustain any other physical injuries on his body except his private parts.

[20] Whilst one appreciates the attempt by the trial court to mitigate the stiffness of the sentence it imposed, and further, not loosing sight of the fact that the offence the appellant was convicted of is very serious and rife, I am of the view that the personal circumstances of the appellant to wit:-

- His age being 45 years;
- The fact that he is sickly suffering from TB;
- The fact that complainant did not suffer any physical injuries on his body excluding his private parts.

coupled with the fact that he spent +- 2 years in prison, weighs heavily to the fact that a lesser term of imprisonment would have served the same purpose as that imposed by the trial court. I therefore come to the conclusion that this court is justified to interfere with the sentence imposed by the trial court as the disparity between the sentence of the trial court and the sentence which this court would had imposed had it been the trial court is so marked that it can properly be described as “shocking”, or “disturbingly inappropriate”.

[21] Consequently the following order is made:-

21.1 The appeal against conviction is dismissed;
21.2 The appeal against sentence is upheld;

21.3 The sentence imposed by the trial court is set aside and is substituted by the following:-

"Fifteen (15) years imprisonment"

21.4 The sentence is antedated to the 6 of June 2012.

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A M KGOELE
JUDGE OF THE HIGH COURT

I agree

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R D HENDRICKS
JUDGE OF THE HIGH COURT

ATTORNEYS:

FOR THE APPELLANT	:	MAFIKENG JUSTICE CENTRE
FOR THE RESPONDENT	:	DPP MAFIKENG