REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

CASE NO. AR 591/2010

In the matter between:

QONDA SIBUSISO NDOKWANE **Appellant**

and

THE STATE **Respondent**

JUDGMENT

GORVEN J:

1]The appellant was charged with one count of rape, alleged to have been committed in 2003 on a five year old female, N.M. ("N"). He was represented at the trial, pleaded not guilty and elected not to disclose the basis of his defence. He was convicted as charged. Sentence was imposed in the High Court because the regional magistrate did not, at the time, have the requisite jurisdiction to impose the sentence prescribed by s 51 of the Criminal Law Amendment Act No. 105 of 1997. In the High Court he was sentenced to life imprisonment. The appeal against both conviction and sentence comes before us with leave of the High Court.

2]N testified that she was playing with her siblings at a neighbour's house when the appellant grabbed her hand. He then took her behind the house, pushed her to the floor, told her he would give her sweets, raped her and threatened on pain of death that she should not tell her mother. During the rape she felt pain in her vagina. He thereafter put his penis in her mouth and then made her lie on her stomach and put his penis into her anus. At home, before she bathed, her mother noticed blood on her panties and asked her what had happened. N told her what had happened and that the appellant, whom she named Qonda, had done it. She knew the

appellant as a neighbour and a friend of the family who came to the house to play dice. She knew that he worked at the taxi rank. She demonstrated, with the use of dolls, the positions that she and the appellant had occupied and the movements he had made during the rape and the incident where he had placed his penis in her anus. She also described the positioning of his and her clothing at the time. The demonstration and description were consistent with the manner in which acts of rape and anal penetration could occur.

3]The mother of N materially confirmed those aspects of which she had knowledge. Counsel for the appellant submitted that there were discrepancies between their evidence. The mother said, for example, that when she called N to the bath, N ran away. N made no mention of this, saying only that her mother had noticed blood on her panties whilst undressing her for her bath. This was not a discrepancy since N was not asked what had happened prior to presenting herself for her bath. Her further evidence, which corroborated that of N, was that the incident, including the identity of the appellant, was reported to the police that day and that N was taken to see a doctor either that day or the following day. The doctor's evidence was that there was a small tear in N's rectum, blood in her faeces and that her vagina admitted one and a half fingers which was suggestive of penetration. The doctor said that what she saw was consistent with N's version. None of this evidence was challenged. All that was relied on by the appellant in argument in this regard was the concession by the doctor that the tear in the rectum could have been caused by constipation.

4]The appellant was the only witness for the defence. He confirmed that he was a neighbour, his name was Qonda, he used to play dice at N's home and that he worked at the taxi rank. The first inkling as to the nature of his defence was given in cross-examination. It was put to N that he would say that he had been at work at the time. A different version was put to N's mother to the effect that he was not working that day but had gone to see one of the taxi conductors. In his evidence, however, he departed from both of these versions, becoming more elaborate as time went by. He began by saying that he was 'not necessarily working' that day as someone else was filling in for him. He then stated in cross examination that it was his day off. It then emerged that he was not employed full time but did temporary

work. He finally stated that another boy was working with his taxi so that day he had worked with another taxi in Raisethorpe. This is a far cry from his having had the day off. He also clearly became inventive regarding a potential motive for N's mother to untruthfully implicate him. He claimed that she had suggested conducting a covert sexual relationship with him one month prior to the incident and that, when he refused, she had said that she would get him because he was smart. This was not put to her when she gave evidence. Without going into any greater detail, it is clear that the learned regional magistrate correctly dismissed his evidence as being false beyond reasonable doubt.

5]In the heads of argument and during the hearing of the appeal, counsel for the appellant raised a number of issues. Two main issues relating to the content of the evidence given were raised. The first was that there was an issue as to whether or not N had been raped. When it was pointed out to counsel for the appellant that the appellant had in evidence conceded that the rape had taken place, he did not labour the point. The concession was clearly correct. What was pressed upon us at the hearing of the appeal was that, since the date on the J88 form relating to the medical examination reflected that it had been completed one month after the incident was alleged to have taken place, this showed that the rape could not have taken place when N or her mother said that it had. This evidence was based on the answer of the doctor to a leading question as to the date of the examination. Both the question and answer clearly relied on the date appearing on the J88. It is clear that the date was filled in, not by the doctor who conducted the examination, but by someone else and is clearly a slip in writing down the month. The writing differs markedly from that of the doctor, who reflected on the form that the last time that sexual intercourse had occurred was on the date alleged for the incident and indicated that it had been ‘without consent’. N’s mother was not challenged on her evidence – likewise given in response to a leading question – as to the date of the rape and the visit to the doctor. In addition, her evidence that it was in February is supported by the CAS number, which was one for an incident which had occurred in February. Counsel for the appellant also submitted that the doctor’s recording that ‘ever since the episode she complains of burning on micturation’ supported his contention since it implied that a substantial period had elapsed before the examination. The reference to the pain of N ‘since the episode’ does not, as was

submitted, signify that a substantial period of time must have elapsed since the episode. The only time that needed to have elapsed was sufficient time for N to have urinated. These submissions have no merit.

6]The second major submission on the contents of the evidence was that, since swabs were taken, the DNA evidence should have been led since this could have been decisive as to the identity of the appellant. All that was said by the doctor was that swabs had been taken from N. The prosecutor indicated at one stage during the trial that he would attempt to establish whether these had been sent for testing. Nothing further appears from the record. It certainly does not appear that the evidence contended for was available to the state. No adverse inference can therefore be drawn from the fact that no DNA evidence was led.

7]Apart from considerations relating to the procedural points raised which will be dealt with below, it is clear from a perusal of the record and of the judgement that there is no merit in the appeal against conviction. The judgement of the learned regional magistrate was commendably cogent, comprehensive and convincing. I can find no fault with the conclusions drawn or the reasoning employed by him in that regard.

8]At the time that she testified, N was six years old. Due to her tender age, and the nature of the offence, and without objection from the appellant's legal representative, the court determined that N would suffer undue mental stress if she testified in open court and an intermediary was appointed in terms of section 170A the Criminal Procedure Act No. 51 of 1977 (“the Act”). There has been no attack on the qualification of the intermediary to act as such. The learned regional magistrate conducted an enquiry to determine whether N could understand the nature and import of taking the oath and could distinguish between truth and falsehood. He concluded that she did not qualify to take the oath but could distinguish between truth and falsehood and this conclusion was entirely justified. It was attacked in the appellant's heads of argument but not pressed during the hearing of the appeal. The attacks on the admissibility of N's evidence were twofold. First, that N was not a competent witness since it did not emerge that she was aware that, if she gave an incorrect answer she would be deemed to commit

perjury. Secondly that because the intermediary was not sworn in, the evidence given by N was inadmissible and should have been excluded from consideration. I will examine each of these submissions in turn.

9]The submission relating to competence developed, in argument, along the following lines. Section 162 of the Act requires all evidence to be given under oath. This means that the person testifying must understand the nature and import of the oath. The learned regional magistrate had not satisfied himself that N understood the nature and import of the oath. Therefore N was not a competent witness and the evidence should have been excluded as inadmissible. This line was pursued in argument with some vigour.

10]The submission has more than one flaw. On a factual level, no oath was administered. Section 162, requiring that evidence be given under oath, is made subject to the exceptions set out in ss 163 and 164. Of these, s 164 applies to the present situation. That section read as follows at the time of trial in 2004:

'(1) Any person 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, 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, the whole truth and nothing but the truth.

(2) If such person wilfully and falsely states anything which, if sworn, would have amounted to the 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.'[1]

The requirement for implementing s 164(1) is that the witness does not understand the import of the oath or affirmation. The submission made by counsel for the appellant in argument that this renders the evidence inadmissible overlooks that the effect of this is not to render the evidence of the witness inadmissible, but to constrain the court to consider whether, notwithstanding that fact, the person concerned is a competent witness. The evidence of such a witness is admissible if the requirements of the section are satisfied. There was no specific reference to

1 S 164(1) has since been substituted by s 68 of Act 32 of 2007 to read as follows: '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 an 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.'

s 164(2) but it seems that the submission might have been that, in order for s 164 to be invoked, the witness concerned must understand the provisions of s 164(2) concerning the sanction attaching to 'wilfully and falsely' stating an untruth.

11]There is a long line of cases dealing with the assessment of the competence of a child witness. In essence there is a need to establish whether or not the child is capable of distinguishing between truth and falsehood.[2] There is no minimum age required for a competent witness; it must be adjudged whether each witness meets the requirement of competence. I have found no cases requiring that, in order to invoke s 164, a witness must appreciate that a punishment similar to that for perjury will follow if they 'wilfully and falsely' state an untruth. Neither do I regard it as necessary. At most the importance of truthfulness is generally covered, as was done in the present matter, by an enquiry satisfying the court that the witness understands that an adverse sanction will generally follow the telling of a lie. In this matter when a direct question did not elicit this response, the learned regional magistrate asked: 'Do your parents ever give you a hiding?' to which N replied: 'Yes. My mother assaults me if ever I am naughty at home.' The magistrate continued: '. . . What do you mean naughty?' to which N replied, 'My mother gives me a hiding when I am telling lies.' This was followed by the question, 'So is it a good or a bad thing to tell lies?' to which the reply was given, 'It's a bad thing, Your Worship'. I can see no basis for requiring a judicial officer to go any further than this in arriving at the conclusion that a witness is competent. Indeed, there are many cases where the courts have stopped far short of such an enquiry.

12]In *S v B,* [3] prior to the amendment of s 164(1), the court set out the correct approach in the following terms:

'[15] 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 vroeëre 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 228 g - h); *S v Vumazonke* 2000 (1) SASV 619 (K) op 622 f - 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

2 *S v L* 1973 (1) SA 344 (C); *R v Umhlahlo* (1904) 25 NLR 264 at 270; *S v N* 1996 (2) SACR 225 (C)
3 2003 (1) SA 552 (SCA) para 15 and 16

bevinding te maak nie. Dit kan byvoorbeeld gebeur dat, wanneer gepoog word om die eed op te lê 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 uit 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 185 i).

[16] Die Hof a quo was ook van mening, weer eens in ooreenstemming met 'n aantal gewysdes, dat indien 'n persoon nie die aard en betekenis van die eed of die bevestiging verstaan nie, ook vasgestel moet word of hy kan onderskei tussen die waarheid en onwaarheid, alvorens hy ingevolge art 164 gewaarsku kan word om die waarheid te praat (sien *S v L* 1973 (1) SA 344 (K) op 347H - 349B; *S v N* (supra op 229 e - g); *S v Vumazonke* (supra op 622 g - h)). (In *S v L* is gehandel met die vereistes van art 222 van die Strafproseswet 56 van 1955, die voorloper van art 164. Die bewoording van art 164 verskil egter aansienlik van die van art 222.) Of so 'n ondersoek gehou moet word hoef egter nie deur ons beslis te word nie, aangesien die Hof a quo bevind het dat dit wel gedoen is en die vraag of dit wel gedoen moet word nie deur die voorbehoue regsvrae geopper word nie.'

13]In the present matter, after conducting an enquiry, the learned regional magistrate stated the following: 'The Court is satisfied that the witness, due to her age, will not understand the nature and import of the oath. However the Court is satisfied that she is a competent witness.' No objection was made to these findings at the time. The court conducted an enquiry, made a finding that N could not understand the nature of the oath, made a further finding that N was a competent witness in understanding the difference between truth and falsehood and had her admonished to tell the truth, the whole truth and nothing but the truth. This clearly meets the requirements of s 164 of the Act. This was far more than was done in the matter of *Director of Public Prosecutions, KwaZulu-Natal v Mekka* [4] where the court, after confirming the correctness and binding nature of the approach in *B's* case, said the following:[5]

'The fact that the magistrate, after having established the age of the complainant, proceeded to enquire whether she understood the difference between truth and lies and then warned her to tell the truth is, in my view, a clear indication that she considered that the complainant, due to her youthfulness, did not understand the nature and import of the oath. In her additional reasons the

4 2003 (4) SA 275 (SCA)
5 Para 11

magistrate confirms that to have been the case. The magistrate did, therefore, make a finding that the complainant was a person who, from ignorance arising from her youthfulness, did not understand the nature and import of the oath. The magistrate saw and heard the complainant and this Court is in no position to question the correctness of her finding.'

These words find echo in the present matter. I can see no reason to find that N was not a competent witness or that the correct procedure was not followed before s 164 was applied.

14]The second submission, relating to the intermediary not having been sworn in, was first raised during argument. Although no mention was made of the case by either counsel, the underlying reasoning for the submission was the proposition that the function of an intermediary is similar to that of an interpreter as was held to be the position in *S v Motaung* [6] and *S v Booi & Another.*[7] In order to evaluate this submission, it will be necessary to analyse the scheme introduced by S 170A of the Act and it is therefore useful to set out certain of its provisions. These read as follows:

'(1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological or mental age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.

(2) (a) No examination, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary under subsection (1), except examination by the court, shall take place in any manner other than through that intermediary.

b) The said intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness.

(3) If a court appoints an intermediary under subsection (1), the court may direct that the relevant witness shall give his or her evidence at any place-

(a) which is informally arranged to set that witness at ease;

(b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and

(c) which enables the court and any person whose presence is necessary at the relevant

6 2007 (1) SACR 476 (SE)
7 2005 (1) SACR 599 (B)

proceedings to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his or her testimony.

(4) (a) The Minister may by notice in the Gazette determine the persons or the category or class of persons who are competent to be appointed as intermediaries.

. . .

(5) (a) No oath, affirmation or admonition which has been administered through an intermediary in terms of section 165 shall be invalid and no evidence which has been presented through an intermediary shall be inadmissible solely on account of the fact that such intermediary was not competent to be appointed as an intermediary in terms of a regulation referred to in subsection (4) (a), at the time when such oath, affirmation or admonition was administered or such evidence was presented.

(b) If in any proceedings it appears to a court that an oath, affirmation or admonition was administered or that evidence has been presented through an intermediary who was appointed in good faith but, at the time of such appointment, was not qualified to be appointed as an intermediary in terms of a regulation referred to in subsection (4) (a) , the court must make a finding as to the validity of that oath, affirmation or admonition or the admissibility of that evidence, as the case may be, with due regard to-

(i) the reason why the intermediary concerned was not qualified to be appointed as an intermediary, and the likelihood that the reason concerned will affect the reliability of the evidence so presented adversely;

(ii) the mental stress or suffering which the witness, in respect of whom that intermediary was appointed, will be exposed to if that evidence is to be presented anew, whether by the witness in person or through another intermediary; and

(iii) the likelihood that real and substantial justice will be impaired if that evidence is admitted.

. . . .'

15]It does not appear from the record in the present matter that the intermediary was sworn in prior to functioning as such. The point was not raised before the learned regional magistrate or in argument in the application for leave to appeal. No grounds of appeal raising the point formed part of the record. The learned regional magistrate had therefore not had an opportunity to deal with the factual situation. An enquiry was accordingly directed to him after the appeal was heard and with the consent of the parties, as to whether the intermediary had been sworn

in and as to the manner in which the intermediary had functioned whilst N testified. The response of the regional magistrate, furnished with commendable promptness and clarity, was to the effect that the intermediary had not been sworn in, either at the trial or generally. She was however a person who regularly acted as an intermediary in that court. The interpreter could hear what the intermediary conveyed to N relating to the questions posed. The intermediary, whose first language was Zulu, did not have the questions interpreted to her before conveying them to N, which she did in Zulu. In other cases involving that same intermediary heard by the learned regional magistrate, if the interpreter was of the view that the intermediary had not conveyed the question accurately, the interpreter intervened although this had not been necessary in the present matter. The attorney representing the appellant was himself Zulu speaking and could at any stage have challenged the manner in which the question was conveyed. It is clear from the record that he did not do so at any stage. The response interpreted by the interpreter was that given by N herself, without any involvement of the intermediary. It is worth noting that N gave evidence on 15 July 2004, well before *Booi* was decided. In his judgment the learned regional magistrate stated that, when N testified, she sat in a room adjacent to the courtroom and separated from it by only a panel of glass, which became a one-way glass when the lights in the courtroom were dimmed. She was visible to everybody inside the courtroom. The questions the intermediary put to her after they had been posed by the prosecutor, counsel for the appellant or the court and N's responses to them were clearly audible inside the courtroom via a speaker situated in the courtroom.

16]The submission of the appellant must be viewed against this factual backdrop. In accepting that the position of an intermediary under s 170A of the Act is analogous to that of an interpreter, the following was said in *Motaung*:[8]

'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 recognised 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 1977, that an interpreter be sworn in, a failure to swear him in constitutes an irregularity which may amount to a fatal irregularity (*S v Naidoo* 1962 (2) SA 625 (A)).

8 Para 7

The administration of an oath to an interpreter is governed by practice and the rules of admissibility of evidence, and is now formalised by Uniform Rule 61(1) and (2) and Magistrates' Courts Rule 68(1) - (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.'

The submission in the present matter saw as decisive this first stage of the enquiry in *Motaung,* which was to the effect that the failure to swear in an intermediary amounts to an irregularity. *Booi* held similarly although it was held that no case had been made out that intermediaries should be appointed in that matter and it is arguable that this finding was therefore *obiter*.[9] No submissions were made as to the second stage, viz whether the irregularity caused prejudice to the appellant, resulting in a failure of justice.[10] In *Motaung* Jones J concluded that it did not, dealing with it in the following terms:

'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.'

17]*Booi* and *Motaung* both relied on *S v Naidoo*,[11] which held that testimony given in court through an unsworn interpreter is unsworn testimony, the production of which to a court constitutes an irregularity. If no conviction should have followed without that evidence, that irregularity results in a failure of justice. *Naidoo* dealt with this situation at a time when there was no legislation providing for, or regulating the procedure for, the use of interpreters in courts in South Africa. This has since been remedied by Rule 61 of the Uniform Rules and Rule 68 of the Magistrates' Courts Rules of Court read with s 6(2) of the Magistrates' Courts Act,

9 Paras 25, 26 & 29
10 Para 8
11 1962 (2) SA 625 (A)

No 32 of 1944. At the time there were administrative procedures for the appointment of permanent interpreters after satisfying the requirements of an examination board and of casual interpreters who did not have to meet that requirement. These administrative procedures were set out in the Codified Instructions issued by the Department of Justice which provided that both categories should take an oath prior to interpreting in court. Williamson JA held that the interpreter was a witness and, therefore, if he or she had not been sworn, his or her testimony was unsworn, and therefore inadmissible, evidence. A previous approach, not followed in *Naidoo*, was that such evidence was inadmissible because it amounted to hearsay. This was raised by way of the following example:

'The principle there involved is clear. If a witness states in Court that a person, an accused for instance, previously made a statement to him in a language which the witness did not understand but which was interpreted to him, then that witness' evidence as to what was said is, by itself, hearsay and not admissible as proof of what was said. When, however, in addition the person who interpreted is called to testify on oath that he correctly interpreted what was said, there is a completed chain of sworn testimony as to the terms of the prior statement and this testimony can be accepted as proper proof of such terms; for example see *Rex v Mutche*, 1946 AD 874 and *Rex v Makubesi*, 1952 (2) SA 75 (T)'.[12]

Williamson JA accepted the correctness of this example but questioned whether this applied to evidence given in court in the following terms:

'The hearsay rule obviously comes into consideration when a witness tells a Court that an accused or other person made a specific prior statement to him, if in fact all he knows of that statement is what an interpreter told him it contained; but it is a little difficult to understand how the hearsay rule is involved in the case when an interpreter in Court is telling the Court directly what the sounds being made by a witness in Court mean in the language understood by the Court. It seems much more logical to accept the passage in which Wigmore describes the interpreter as 'a kind of witness'. That, on analysis, is what he really is. The witness being examined is saying something not perhaps understood by the Court or the Court recorder; a species of expert witness is telling the Court in a language understood by the Court (and by any recorder) what it is the witness is actually saying. What the expert or interpreter tells the Court becomes the actual evidence in the case put before the Court and recorded. If that is not on oath, the evidence so given or recorded is unsworn testimony. Hence the requirement for swearing such an interpreter, for only sworn testimony can generally be placed as evidence before a Court. . . .'[13]

---

12 At 631H-632B

13 At 632F-H. Approved in *S v Mpopo* 1978 (2) SA 424 (A) at 426 F-G; *Tshabalala v Lekoa City Council* 1992 (3) SA 21 (A) at 32F-G

18]It can therefore be seen that the crucial aspect of the function of the interpreter is that the witness has given his or her evidence in a language not intelligible to the court resulting in the need for the interpreter to give evidence of what the witness has said in his or her evidence. The interpreter's evidence, like that of any witness, must be given under oath so the interpreter must be sworn.[14] The interpreter testifies of what constitutes the evidence of the witness and is the sworn testimony of the witness, albeit given in a language not understood by the court. In order for the evidence to be placed before the court properly it must not only be spoken by the witness but also interpreted accurately by the interpreter. It is obviously important for the interpreter also to interpret the questions to the witness but a failure to do so would, at least in most instances, become apparent by answers that are at odds with the questions posed. The questions, whilst eliciting evidence, do not constitute evidence. Whilst it is not practical to thus dichotomise the role of the interpreter, the underlying reasoning of *Naidoo* clearly relates to what is said by the witness. This has a bearing on the issue before us.

19]Although both *Booi* and *Motaung* concluded that an intermediary should be sworn in because she or he functioned in a way similar to an interpreter, neither analysed the precise role of the intermediary introduced by s 170A. The test for whether an intermediary should be appointed in a particular case is a useful starting point. The test is clear. A court must conclude that testifying would expose a witness to undue mental stress or suffering. This shows that the object of the intermediary is to function in a way calculated to minimise the mental stress or suffering of the witness by enabling the witness to give their evidence through the intermediary. The only other provision in s 170A that sheds light on the manner in which the intermediary is to perform this function is contained in s 170A(2)(b). This is permissive rather than prescriptive and allows an intermediary, instead of conveying the actual question to the witness, to convey its general purport. This may be done unless the court directs otherwise. It must be accepted, therefore, that the usual manner in which she or he functions includes conveying the general purport of a question to the witness where he or she deems it appropriate. It may,

14 It would seem to follow that if the interpreter's sole function is to convey to the accused in his or her own language what is being said in court that does not require the interpreter to be sworn because what the interpreter is saying is not evidence.

of course, not be appropriate such as when dealing with factual and non-stressful questions such as the name and age of the witness. It has been held, correctly in my respectful view, that the proper functioning of an intermediary does not curtail appropriate cross-examination of the witness.[15] Dealing with the constitutionality of the provision, whilst also giving insight into the role of the intermediary, the following was stated in *K*:[16]

'There are sound reasons why the conveyance of the general purport of the question might enable a child witness to participate properly in the system. Questions should always be put in a form understandable to the witness so that he or she may answer them properly (see *S v Gidi (supra* at 540E)). Where the witness is a child, there is the possibility that he may not fully comprehend or appreciate the content of a question formulated by counsel. The danger of this happening is more real in the case of a very young child. By conveying 'the general purport' of the question, the intermediary is not permitted to alter the question. He must convey the content and meaning of what was asked in a language and form understandable to the witness. From the articles and the evidence put before us it is quite apparent that it is in the interests of justice for questions to be posed to children in a way that is appropriate to their development. This furthers the truth-seeking function of the trial court without depriving the accused of his right to cross-examine. Moreover the Judge or magistrate who presides at the trial controls the proceedings and is able to see to it that the intermediary carries out his function properly and without prejudice to the accused'.

20]A further factor which is of importance in understanding how an intermediary should function emerges from the kind of persons who qualify to act as intermediaries. The Minister, acting in terms of s 170A(4)(a) has determined that medical specialists in paediatrics and psychiatry, family counsellors with specific qualifications and experience, certain educators, social workers, and clinical or counselling psychologists qualify. In broad terms, therefore, it is those people who are most appropriately qualified to understand how best to communicate with a vulnerable witness covered by the section. This is entirely consonant with the dictum in *K* set out above.

21]It is also important to note that, although the section talks of testifying 'through' an intermediary, it envisages that the witness will give her (or less frequently his) own answer which, if not given in the language of the court, is interpreted by the interpreter. In my view the section does not provide for the intermediary to convey

---

15 *K v Regional Court Magistrate NO & others* 1996 (1) SACR 434 (E) at 448*e-f*
16 At 445*c-f*

what is said 'by the witness' as was stated in the passage in *Motaung* referred to above.[17] The purpose of the section is met by mediating the questions put, not the answer given. I can see no reason for an intermediary to become involved in the answers given by the witness. It is not as if the witness will be unduly stressed if the answer is not conveyed by the intermediary. Neither is it the case that the court would require the answer to be phrased in a way that it understands. If the intermediary was to convey an answer given by a witness and a challenge was raised, the court would in any event have to construe the original answer.

22]The analogy between an interpreter and an intermediary breaks down when one considers the situation where a case is conducted in English, with an English speaking accused, a child witness whose home language is likewise English and an English speaking presiding officer and lawyers. There is then no question of interpretation. A question is posed and where appropriate the intermediary reformulates it for the child in non-threatening language. The child then answers. All of this is done in a language common to all the participants in the process. On what basis in that case can it be said that the intermediary must be sworn? Clearly there is no reason for that to be done. The 'requirement' that this be done cannot therefore flow from anything inherent in the role of the intermediary. Once it is recognised that the witness must give her own answers to questions, however and by whom they have been formulated, the intermediary is not conveying the evidence to the court as does an interpreter. These examples illustrate the point that the analogy between the two is a false one. It can only be valid if the intermediary is permitted to supplant the role of the interpreter in conveying the evidence of the accused to the court and that was not done in the present case.

23]Viewed in the light of the purpose of the section there are other clear indications that the role of intermediary differs significantly from that of an interpreter. First, if the witness is testifying in a language other than that of the court, an interpreter is in a position to intervene if the question is incorrectly or misleadingly framed by the intermediary. Where the witness testifies in the language of the court, this

17 Para 7. Mogoeng JP (as he then was), held to similar effect in *Booi*, para 25, when he said the following: 'An intermediary must specifically undertake to convey correctly and to the best of his or her ability the general purport of what is being said to and by the witness, before she or he begins to help the witness.'

intervention will be by the judicial officer. Secondly, if the question has not been correctly framed and the interpreter has not performed his or her duty to intervene, the answer will almost invariably elicit an answer which shows that the question was not accurately conveyed. The most fundamental difference, however, remains that the intermediary is not involved in conveying to the court what emerges from the mouth of the witness. None of these situations applies to the position of an interpreter. It may be so that, if there is an officer of the court present who speaks the language in question, the interpretation can be challenged but this is not an invariable situation as in the case of an intermediary.

24]There is, in addition, a difficulty in principle with the approach adopted in *Motaung* that the intermediary performs a function similar to an interpreter and must, for that reason, be sworn in. On *Naidoo's* reasoning, evidence interpreted by an unsworn interpreter amounts to unsworn evidence and is thus inadmissible. If this reasoning applied to intermediaries, the second stage of the enquiry adopted in *Motaung* must be incorrect. The only enquiry possible in those circumstances is whether, if that evidence is excluded, there remains sufficient evidence on which to convict. In *Motaung* however, the evidence was taken into account on the basis that it was reliable despite the failure to swear in the intermediary. This cannot be based on equating the intermediary with an interpreter. The enquiry undertaken in *Motaung* is inconsistent with the two standing on the same footing. In the absence of a basis for likening the function of an intermediary to that of an interpreter there is no foundation for the conclusion that the failure to swear in an intermediary amounts to an irregularity. I can see no basis for such a conclusion. As indicated above, the evidence given is that of the witness, interpreted if necessary. That evidence is neither unsworn nor hearsay and is not, on either basis, inadmissible.

25]This approach is lent more force by further analysis of the section. In the first place, despite the provisions relating to interpreters having been clarified by *Naidoo* and now having received legislative attention, the lawmaker did not see fit to include a corresponding provision for intermediaries. Not only this, but s 170A(5) specifically renders admissible evidence given through an incompetent, but appointed, intermediary. On the reasoning of *Naidoo,* evidence given through an unqualified interpreter is not admissible since an interpreter functions as an expert

witness and is relied on by the court to correctly express the evidence of a witness. It seems clear from this that the legislature does not see the functions of the two as comparable.

26]As will have become clear, I respectfully differ from the approach taken in *Booi* and *Motaung* to the role of the intermediary and the finding that, if an intermediary is not sworn in, this amounts to an irregularity. Having said this, I do not wish to denigrate the practice that has grown up since *Booi* and *Motaung* of swearing in an intermediary. The function of the intermediary is extremely important. That function, as I have said, is to minimise the mental stress or suffering of the witness by employing her or his specific expertise whilst the witness gives evidence. Requiring an intermediary to discharge this function under oath seems to me a salutary practice. I only differ in the finding that, if this is not done, an irregularity occurs. No form of any such oath has been prescribed. If an oath is administered it should be to honestly and faithfully and to the best of her or his ability discharge the function of an intermediary.

27]Even if I am wrong in this regard and the failure to swear in the intermediary constituted an irregularity, if one employs the test for the second stage in *Motaung* it cannot be said that a failure of justice resulted in the present case. It was submitted that the learned regional magistrate unfairly protected N during cross examination. I disagree. As mentioned above, the interpreter heard what was put to N by the intermediary, as did the appellant's legal representative. Neither of them saw fit to intervene in order to correct any inaccuracies. The interpreter interpreted the answers given to the questions by N without the involvement of the intermediary. The record nowhere indicates any incongruity between the questions put and answers given which may support an inference that the intermediary did not perform her function adequately.

28]For these reasons, the appeal against the conviction of the appellant must fail.

29]This leaves the appeal against sentence. This was not dealt with at any great length in argument, save for the submission that the age of the appellant was not adequately determined and that Hemraj AJ therefore should not have applied the

provisions of s 51 of the Criminal Law Amendment Act. Leaving aside that point for the moment, it is clear that no other misdirections were made, including the finding that no substantial and compelling circumstances existed which warranted a departure from the prescribed sentence of life imprisonment. It can also hardly be said that the sentence is so startlingly inappropriate as to induce a sense of shock. As regards the point concerning the age of the appellant, it was stated on his behalf in argument that he was 20 years old at the time of the commission of the offence and also 20 years old at the time of sentencing. The issue therefore did not arise on the record. However, on the day of the appeal, an appeal from another conviction and sentence of the same appellant was dealt with. The issue of the appellant's age arose in that matter. There was confusion in the record as to his age at the date of commission of those offences and a possibility that, at that time, he was under the age of 18 years. Since this offence was committed prior to the offences in that matter, it seems appropriate in the interests of justice to adopt the course adopted in that matter. This requires that the sentence be set aside and the matter remitted back to the learned acting judge so as to determine the age of the appellant at the time he committed this crime and to consider a sentence thereafter.

30]In the result I propose that the following order be made:

(a) The appeal against conviction is dismissed.

(b) The appeal against sentence succeeds. The sentence of life imprisonment is set aside and the question of sentence is referred back to the High Court for reconsideration after a proper determination of the age of the appellant at the time he committed this crime.

GORVEN J

WALLIS J – I agree

NGWENYA AJ – I agree

GORVEN J – it is so ordered.

DATE OF HEARING	:	4 May 2011
DATE OF JUDGMENT	:	27 May 2011
FOR THE APPELLANT	:	Adv SB Mngadi
FOR THE RESPONDENT	:	Adv J du Toit