IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

JUDGMENT

NOT REPORTABLE
CASE NO: AR509/2014

In the matter between:

MBONGISENI NJENGENJA MATHENJWA APPELLANT

and

THE STATE RESPONDENT

Coram : Gorven et Seegobin JJ
Heard : 11 February 2016
Delivered : 19 February 2016

ORDER

On appeal from the Regional Court, Pongola (Mr S.B. Msani, sitting as a court of first instance):

The appeal is upheld and the conviction and sentence are set aside.

JUDGMENT

SEEGOBIN J (Gorven J concurring):

[1] The appellant, a 40 year old male, was charged in the Regional Court, sitting at Pongola, with one count of rape. It was alleged that upon or about 11 July 2011 and at or near Itshelejuba, Pongola, in the Regional Division of KwaZulu-Natal, the appellant unlawfully and intentionally had sexual intercourse with a female person, to wit MN[1], a 10 year old girl, without her consent. The charge had to be read with the relevant provisions of the Criminal Law Amendment Act 105 of 1997 (CLA Act).

[2] The appellant, who was legally represented, pleaded not guilty and denied all the allegations against him. At the conclusion of all the evidence he was duly convicted. He was sentenced to life imprisonment. The present appeal against conviction and sentence serve before this court by virtue of the appellant's automatic right of appeal in terms of s309 of the Criminal Procedure Act 51 of 1977 (CPA).

[3] Mr *Marimuthu*, who appeared on behalf of the appellant, raised two preliminary issues: the first was that the trial court had failed to establish and record the competence of the intermediary appointed in terms of s170A(4)(a) of the CPA, and the second was that the trial court failed to comply with the provisions of s164 of the CPA by failing to ascertain whether the complainant

[1] To protect the identity of the minor child she will be referred to as 'MN'.

understood the nature and import of the oath and that she was capable of distinguishing between truth and lies.

[4] Dealing with the first issue, it is apparent from the record that at the commencement of the trial, the prosecutor applied for the use of an intermediary in terms of s170(A) of the CPA. There was no objection to this by the defence. Before the intermediary was sworn in, she confirmed that she was employed by the Department of Justice as an intermediary, that she was stationed at the Pongola Court and that she had acted as an intermediary in that court on 28 previous occasions. Having satisfied himself that the intermediary in question was a fit and proper person to carry out such duties, the learned magistrate proceeded to swear her in.

[5] Section 170(4)(a) of the CPA provides that 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. There was nothing in the present matter to suggest that the intermediary concerned was not such a person. In my view, the provisions of s170(A)(4)(a) were complied with. Mr Marimuthu quite fairly and correctly in my view, accepted that this was the position and was accordingly prepared to abandon the point.

[6] As for as the second issue, section 162 of the CPA provides:

> "(1) Subject to the provisions of sections 163 and 164, no person shall be examined as a witness in criminal proceedings unless he is under oath, which shall be administered by the presiding judicial officer or, in the case of a superior court, by the presiding judge or the registrar of the court, and which shall be in the following form:
>
> I swear that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God.
>
> (2) If any person to whom the oath is administered wishes to take the oath with uplifted hand, he shall be permitted to do so.

And s 164 provides:

'(1) Any person, who is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth.

(2) If such person wilfully and falsely states anything which, if sworn, would have amounted to the offence of perjury or any statutory offence punishable as perjury, he shall be deemed to have committed that offence, and shall, upon conviction, be liable to such punishment as is by law provided as a punishment for that offence."

[7] A reading of s 162(1) makes it clear that, with the exception of certain categories of witnesses falling under either s 163 or 164, it is peremptory for all witnesses in criminal trials to be examined under oath[2]. And the testimony of a witness, who has not been placed under oath properly, has not made a proper affirmation or has not been properly admonished to speak the truth as provided for in the Act, lacks the status and character of evidence and is inadmissible[3].

[8] Section 164(1) is resorted to 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. It is clear from the reading of s 164(1) that for it to be triggered there must be a finding that the witness does not understand the nature and import of the oath. The finding must be preceded by some form of enquiry by the judicial officer, 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

[2] S v Mashava 1994(1) SACR 224 (T) at 228c-d; S v N 1996(2) SACR 225 (C) at 227b-c; S v Seymour 1998(1) SACR 66 (N); S v Vumazonke 2000(1) SACR 619 (C) para10; and S v Raghubar 2013(1) SACR 398 (SCA).
[3] DT Zeffertt & AP Paizes *The South African Law of Evidence* (2 ed) at 813.

not possess the required capacity to understand the nature and import of the oath, he or she should establish whether the witness can distinguish between truth and lies[4] and, if the enquiry yields a positive outcome, admonish the witness to speak the truth.

[9] Having regard to the provisions of section 164, *supra*, the following exchange is recorded between the learned magistrate and the young complainant when the latter was called to testify:

> "COURT How old are you MN?
> WITNESS I am 10 years old.
> COURT Do you go to school?
> WITNESS Yes.
> COURT What grade are you in this year?
> WITNESS In Grade 4.
> COURT What school do you go to? What is the name of your school?
> INTERPRETER Come again?
> WITNESS Sizakahle[?].
> COURT Is it Sizakahle Primary School?
> WITNESS Yes.
> COURT Where is that school?
> WITNESS It is at Kwbhembe[?] area.
> COURT Is that in Pongola?
> WITNESS Yes.
> COURT Who is your class teacher?
> WITNESS Ma'am Ntshangase.
> COURT Who is the principal of your school?
> WITNESS It is Mrs Ntshangase.
> COURT Is that the same teacher who is your class teacher?
> WITNESS No.
> COURT So, it is a different one?

[4] S v N Supra n 1 at 229d-g.

WITNESS Yes.

COURT I see. What subjects do you do in Grade 4 this year?

WITNESS IsiZulu, Maths, Afrikaans, L.O, EMS and Natural Science, Social Science and Technology as well.

COURT Okay, that is enough now. Can you count?

WITNESS Yes.

COURT Do you know the months of the year?

WITNESS yes.

COURT Just say these for us so that we can hear.

WITNESS January, February, March, April, May, June, July, August, September, October, December. … [spoke in English].

Court Yes. Do you know the colours? Just tell us the few colours that you know.

WITNESS Red, blue, white, black, yellow, purple, pink. … [spoke in English]

COURT Okay. Do you know the difference between the truth and lies?

WITNESS No.

COURT Do you know what it means to tell lies?

WITNESS Yes.

COURT Just tell us.

WITNESS If you lie about your parents.

COURT Is it good to do that?

WITNESS No.

COURT What happens if you tell lies, do you know? What happens to you?

WITNESS I do not know.

COURT You do not get punished?

WITNESS You get punished.

COURT Is it a good thing to tell lies?

WITNESS No.

COURT Do you know where you are today?

WITNESS Yes.

COURT Where are you?

WITNESS I am in court.

COURT Do you know that you are supposed to tell the truth in court?

WITNESS Yes.

COURT Are you going to tell us the truth today?

WITNESS Yes.

COURT You must please do so, you must speak freely, nothing is going to happen to you, you must tell us the truth only, you understand that. You promise to tell us the truth? Please do not tell us anything that another person may have told you to come and tell us. Tell us only what you know, do you understand that? Not what another person told you to come and tell us.

MN (admonished)

COURT I am satisfied that the witness is competent to testify and she has been duly admonished to tell the truth. You may proceed, Mr Prosecutor."

[10] In my view, the above exchange indicates adequately that the learned magistrate went far enough in his questioning to form the opinion that the young complainant possessed sufficient intelligence to testify and had a proper appreciation of the duty to speak the truth. It was only after he had satisfied himself fully on these aspects that he proceeded to admonish the complainant to speak the truth. In the circumstances, I do not consider that there is any substance in the argument advanced on behalf of the appellant on this aspect.

[11] That aside I have a fundamental problem with the conviction in this matter, both insofar as the evidence is concerned as well as the manner in which the trial was conducted. In my view, the evidence fell dismally short of establishing the guilt of the appellant beyond a reasonable doubt. There are certain clear and blatant misdirections committed by the trial court. These were highlighted by Mr Marimuthu in argument and will be dealt with hereunder. Mr Mcanyana, for the State, was constrained to concede that the conviction of the appellant could not be sustained on the evidence. In fairness to Mr Mcanyana, it should be pointed out that he did not draw the heads of argument on behalf of the State.

[12] The young complainant was a single witness to the alleged rape. As such the cautionary rule was applicable to her evidence. This meant that her

evidence had to be satisfactory in all material respects. Tshiqi JA in *S v Raghubar*[5], *supra*, pointed out that:

> "Whilst I accept that it is not unusual for young children to experience difficulties relating to the court what actually happened, with the precision expected of an adult, especially pertaining to incidents concerning sexual behavior, as well as incidents that occurred a while ago, the need for caution cannot be ignored."

[13] In *S v Viveiros*[6], the SCA said the following with reference to young children and the application of the cautionary rule:

> "'In view of the nature of the charges and the age of the complainants it is well to remind oneself at the outset that, whilst there is no statutory requirement that a child's evidence must be corroborated, it has long been accepted that the evidence of young children should be treated with caution (*R v Manda* 1951 (3) SA 158 (A) at 163C; *Woji v Santam Insurance Co Limited* 1981 (1) SA 1020 (A) at 1028B – D); and that the evidence in a particular case involving sexual misconduct may call for a cautionary approach (*S v J* 1998 (2) SA 984 (A) at 1009B). For reasons which will presently emerge the present case is plainly one which calls for caution."

[14] A similar caution was meted out by the SCA in *S v Stevens*[7], as follows:

> "[13] Courts in civil or criminal cases faced with the legitimate complaints of persons who are victims of sexually inappropriate behaviour are obliged in terms of the Constitution to respond in a manner that affords the appropriate redress and protection. Vulnerable sections of the community, who often fall prey to such behaviour, are entitled to expect no less from the judiciary. However, in considering whether or not claims are justified, care should be taken to ensure that evidentiary rules and procedural safeguards are properly applied and adhered to.'
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> In para 17 it further stated:
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> 'As indicated above, each of the complainants was a single witness in respect of the alleged indecent assault upon her. In terms of section 28 of the Criminal Procedure Act 51 of 1977, an accused can be convicted of any offence on the single evidence of any competent witness. It is, however, a well-established

[5] 2013(1) SACR 398 SCA.
[6] [2000] 2 All SA (SCA).
[7] [2005] 1 All SA (1) (SCA)

> judicial practice that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility (see, for example, *S v Webber* 1971 (3) SA 754 (A) at 758G – H). The correct approach to the application of this so-called cautionary rule was set out by Diemont JA in *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E – G as follows:
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> > "There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in *S v Webber* . . .). The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 [in *R v Mokoena* 1932 OPD 79 at 80] may be a guide to a right decision but it does not mean
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> > > 'that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well-founded'
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> (per Schreiner JA in *R v Nhlapo* (AD 10 November 1952) quoted in *R v Bellingham* 1955 (2) SA 566 (A) at 569.) It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."

[15] Turning to the matter at hand the following observations are made:

[15.1] The first is that record in this matter comprises a total of 76 pages of which only 23 pages make up the evidence that was led by both the prosecution and the defence. This, in my view, immediately raises serious concerns about the manner in which the evidence was led and the lack of detail involved. Bearing in mind that the matter involved a young complainant in a sexual assault, one would have expected the evidence to be led in some detail and with greater clarity. This is not what happened here as I proceed to illustrate hereunder.

[15.2] The charge sheet alleges that the rape occurred on 11 July 2011. No attempt was made by the prosecution to establish this fact when the

complainant testified. Nor did the court deem it necessary to establish this fact for itself.

[15.3] The complainant's evidence was confusing and difficult to follow. For instance, she creates the impression that she reported the incident to the witness Miss Moyo on the same day, shortly after it occurred when she went to the stream to fetch water. The impression is also created that Miss Moyo then took her on the same day to the health workers who questioned her and thereafter the police were called and the appellant was arrested. However, according to Miss Moyo she went to the complainant's homestead to check on the complainant's mother who was ill and it was only then that the complainant informed her that she was raped by her uncle. The complainant further told her that her uncle also tried to rape Xolile but she ran away. Once again, no effort was made by the prosecutor or the court to ascertain when all this took place. Miss Moyo also testified that when she observed the complainant on that occasion she noticed that she was struggling to walk. It was then that she called the police. Miss Moyo was unable to say when the incident occurred. These discrepancies in the evidence of the complainant and the witness Miss Moyo were never clarified.

[15.4] The charge sheet alleges a single act of rape which occurred on a specific date. The medical evidence, however, points to three incidents and indicates that this was the third one. The medical report also records that the hymen was absent with only redness on the *labi majora*. No swelling or tears were noted. It recorded that this was an 'old incidence'.

[15.5] The medical report (J88) completed by the doctor on 16 July 2011 was admitted into evidence by agreement. The medical doctor was

not called. In my view, the failure on the part of the prosecution to call the evidence of the doctor leaves a number of aspects arising out of his examination unexplained. For instance, the doctor concerned could have explained the complete absence of the hymen in a young child such as the complainant. He could have also explained why no tears were found or why he regarded this to be an old incident. He could have also explained whether the redness found might have been self-inflicted or have arisen out of poor hygiene. It is interesting to note from the medical report that the doctor himself does not conclude that the complainant was sexually assaulted. He merely records "alleged sexually" which could be interpreted to mean many things.

[15.6] It must be borne in mind that judicial officers do not have the requisite medical knowledge or expertise to interpret these medical reports and to draw conclusions therefrom. It cannot be emphasized more why medical evidence in matters of this nature should not be called in these cases where there is a need to clarify issues, as happened in this case. It goes without saying that the medical evidence procured in such matters may make the difference between a conviction and an acquittal or may even result in a conviction on a lesser charge. Perhaps it is time for the office of the Director of Public Prosecutions to provide some guidelines to lower courts on how to deal with matters of this nature.

[16] The above shortcomings in the evidence are not the only problems in this matter. The judgment of the trial court is seriously lacking in detail and clarity. The learned magistrate simply paid lip service to the cautionary rule without properly evaluating the evidence of the complainant to ensure that it met the requisite standards for a safe conviction. Had the learned magistrate conducted

this exercise with some diligence he would have found that the evidence did not go far enough to sustain a conviction.

[17] The appellant's version was a bare denial. This is not surprising considering the sketchy nature of the evidence he faced, not least as to the date of the alleged offence. His cross-examination was short and failed to reveal anything of significance. All in all, I do not believe that the State had succeeded in proving the guilt of the appellant beyond reasonable doubt. It follows that the conviction cannot stand and must be set aside.

ORDER

[18] The order I make is the following:

The appeal is upheld and the conviction and sentence are set aside.

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_____ I agree

GORVEN J

Date of Hearing	:	11 February 2016
Date of Judgment	:	19 February 2016
Counsel for Appellant	:	P Marimuthu
Instructed by	:	Justice Centre, Pietermaritzburg
Counsel for Respondent	:	MV Mcanyana
Instructed by	:	The Director of Public Prosecutions, Pietermaritzburg