IN THE HIGH COURT OF SOUTH AFRICA
(BOPHUTHATSWANA PROVINCIAL DIVISION)
CASE NO.: CA146/2005

In the matter between:

M I D APPELLANT

and

THE STATE RESPONDENT

CRIMINAL APPEAL

LEEUW AND LANDMAN JJ

REASONS FOR ORDER

LANDMAN J:

[1] On 19 May 2006 we set aside the conviction and sentence of Mr M I D. We indicated that reasons would follow. These are the reasons.

[2] Mr M I D, "the appellant", a 17 year old boy was charged with raping S D a 13 year old girl. He was convicted in the Regional Court on 11 August 2004 and sentence to 8 years imprisonment. The appeal served before Hendricks J on 9 June 2006. He made the following order:

> "[i] a date must be arranged with the Registrar and the Director of Public Prosecutions, North West for the presenting of oral arguments.
>
> [ii] a copy of the record of proceedings and written

arguments on behalf of the Appellant must be served on the Office of the Director of Public Prosecutions, North West.

[iii] a substantive application for condonation must be made by the Appellant and reasons must be advanced for the long delay in processing this appeal.

[iv] Mr B.G. Bojosinyane OF THE FIRM OF Attorneys B.G Bojosinyane & Associates is appointed as ***amicus curiae*** to act on behalf of the Appellant."

[3] An affidavit and supporting affidavit has been filed. It is not accompanied by a Notice of Motion.

[4] Mr Bojosinyane says he had appeared at the trial for the appellant on the instructions of Scorpion Legal Protection. At the conclusion of the trial he knew that his client would be taken hundreds of kilometres away from Taung where he had been tried. So he prepared a power of attorney relating to an appeal which the appellant signed before he left Taung. Mr Bojosinyane prepared the record and drafted heads of argument. Mr Bojosinyane had then to discover where the appellant was being held and have him brought to Taung to sign his heads of argument. The heads of argument were signed on 22 November 2005 and dispatch, *inter alia*, to the Registrar of this Court on 1 December 2005. Thereafter Mr Bojosinyane went to great lengths to have the appeal heard urgently.

[5] Mr Bojosinyane submitted that a lack of money to instruct a legal representative and illiteracy are the actual cause of the delay in noting the appeal and the late prosecution of the appeal. The affidavit does not deal with the merits of the appeal but the merits are adequately dealt with in the appellant's heads.

[6] It was not brought to Hendricks J's attention that no application for leave to appeal had been made to the trial court. This is required by section 309(1)(a) read with section 309B of the Criminal Procedure Act 51 of 1977.

[7] The result is that this Court is unable to entertain the appeal but we are empowered to set aside a conviction or sentence on the ground of a gross irregularity resulting in a failure of justice. See **S v Lubbe** 1981(2) SA 854 (C) and **S v Kok** 2005 (2) SACR 240 (NC). This Court is therefore entitled to review the proceedings. Before proceeding doing so I must mention that Mr Balepile, who appears for the respondent, conceded that the conviction and sentence must be set aside.

[8] I only need to deal with one aspect of the proceedings. This relates to the identification of the appellant as the person who raped the complainant.

[9] The complainant was a 13 year old girl who was doing std. 1 at school. Her sister, Menzi, testified that she is not mentally well. Her sister said that sometimes her family believes her

when she tells them something and sometimes they do not. In the light of this the learned Magistrate was obliged to approach the complainant's evidence with caution. It would not have been remiss to have called for expert evidence on her ability to testify. The Doctor who examined her, after she was raped, said she was moderately retarded. It would have been prudent to have sought corroboration for her evidence.

[10] The complainant's evidence was not satisfactory in all material respects. She was unable to give a proper account of how she fell on the ground and was raped. As she was leaving a shop a certain boy called her. When she refused this person caused her to fall on the ground and this person had intercourse with her. She fell on her stomach. She said she fell because of a loose shoe lace then she said she tripped on a stone. It was dark. During the course of his attorney's cross-examination of the complainant about the identity of the rapist the learned Magistrate stopped this line of investigation. This was grossly irregular. The fact that the appellant had been at the shop, which was common cause, and thereafter arrested, can by no stretch of imagination render the investigation of the identity of the rapist redundant.

[11] After she was raped she went home. There she gave her account of why she was late. It had to do with her searching from shop to shop for milk.

[12] Her sister Menzi noticed grass on her back and took her into a bedroom for a discussion. The complainant told her she had been raped. She did not say who the boy was even though, according to her testimony, she had known the appellant for 3 years. The complaint was not consistent about the period which she had known the appellant. The complainant told her sister that she did not know the boy but she could identify him.

[13] Even this conversation between the complainant and Menzi is suspect or at least reflects badly on the complainant's memory or grasp of reality. The complainant said that Menzi was not there when she arrived home.

[14] The complainant went with Menzi and her elder brother to the area to find the rapist. However, before they left, the complainant was thrashed 12 twelve times at her home according to her. Menzi denies this. This, if it is not true, it reflects on the complainant's sense of reality and her reliability and credibility. If it is true, it makes the subsequent pointing out of the appellant as the rapist suspect. For it raises the question whether the complainant was pressurised to point out someone (possibly anyone) as her rapist.

[15] The accused was pointed out by the complainant. He immediately denied that he had raped the complainant. He explained that he had met her at the shop and made an agreement to see her later. A while later a boy, who was on the same sports team as he was, had come to him and said

that he had already had intercourse with the complainant and he proffered his hand to the appellant for him to smell it. The appellant insisted that he himself would lay a charge with the police.

[16] In the event the appellant was arrested and charged. In his defence he repeated the version outlined above.

[17] The appellant did not receive a fair trial. The plea explanation reads:

> "Accused in his plea explanation admits that he was at Majakgoro on the date mentioned in the charge sheet, and that on the said date he did see the complainant in this matter, but denies having had sexual intercourse with her."

[18] The plea statement was very crisp. It seems to have led the learned Magistrate to believe that the identity of the rapist was not an issue although it was. Mr Bojosinyane in the course of his cross-examination sought to elicit from the complainant what the accused was wearing on that day. Presumably this would be followed by the question "What was the rapist wearing." The learned Magistrate put a stop to this. He said:

> "I do not think that point of the clothing is really necessary because, you will recall Mr Bojosinyane in your plea explanation you have admitted that that day the accused saw the complainant. So, identity is not in dispute."

[19] Mr Bojosinyane changed tact. The complainant explained how she had been raped. She did not see the accused

coming after her. She was lying on her stomach and the rapist lay upon her but she said she saw it was the accused. Mr Bojosinayne was questioning the complainant about the opportunity to look at the person lying on her when the Prosecutor objected. The objection reads:

> "PROSECUTOR: Your worship, she has already answered that question. She said she saw the person.
>
> COURT: Objection sustained. You see my problem is, I see you want to pursue the question of identity, but like I have said Mr Bojosinyane in your plea explanation, it is already on record that the accused admits having seen the complainant that day and the complainant says she saw the accused as well that day.
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> MR BOJOSINYANE: Thank you your worship. Your worship, I admit I did say that your worship, but what I meant I did not just elaborate on that. In fact I want to say that ….(intervenes).
>
> COURT: Just a minute, just a minute. Perhaps in putting up your defence, I think it is better to tell this witness, say the accused denies the act of sexual intercourse, but perhaps it would be better to say the accused admits that he saw you at a certain place, but not at this place where you allege you were raped. I would understand that.
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> MR BOJOSINYANE: Thank you your worship. Your worship, let me just make three statements as why am I following this line of cross-examination.
>
> COURT: Yes.
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> MR BOJOSINYANE: Accused does not deny that he did see the complainant, but not there at the certain spot.
>
> COURT: Exactly, that is my point.
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> MR BOJOSINYANE: Again the accused would say at that particular spot somebody told me in the presence of another group of boys that that person

has sexual intercourse with you. I am going to call the witnesses to that effect. Now, maybe the person who may have had sexual intercourse or inserted a finger here, is not the very same person, it was not the accused your worship.

COURT: Yes.

MR BOJOSINYANE: It is just to show that accused admits that he did see you in the afternoon or that same day at the shop.

COURT: Yes.

MR BOJOSINYANE: But here somebody told me in the presence of so many persons that I am going to call that that person did have sexual intercourse with you and that is a place that is well-known at Majakgoro village, this is why I want to know whether you did see this person clearly at the time when he was lying on top of you and inserting a finger that she did see him earlier that day your worship, but ….(intervenes).

COURT: But perhaps it would be better if you put the very same questions that you are just mentioning now to this witness so that she can respond, because once she leaves the witness stand and these has not been put to her, the defence cannot argue at a later stage that perhaps this was the version of the accused which was never put to this witness to respond thereto.

MR BOJOSINYANE: Thank you your worship. That was the question that I was …, I will come to it at a later stage because I know these people are attempted to say no immediately. I wanted just to build up a story your worship and then to approach her with that question eventually.

COURT: Yes, I am not actually trying to interfere with your line of cross-examination, but my suggestion would be that perhaps you should put this version to this witness so that she can respond.

MR BOJOSINYANE: I will do so your worship.

COURT: In the light of the fact that in the plea explanation it is already admitted by the accused that he saw the complainant on that day. The complainant

has given evidence as well that she saw the accused at his shop.

MR BOJOSINYANE: Yes your worship. Thank you your worship, but I want to confine myself to the scene more of the little shop because that one is not in dispute."

[20] Mr Bojosinyane resumed his cross-examination. The complainant admitted she was running, it was dark there was no moonlight and she fell. Mr Bojosinyane asked what caused her to fall. She replied "My shoe lace."

[21] The prosecutor and the learned Magistrate intervened. This intervention reads:

"PROSECUTOR: She has already answered that question. My shoe lace.

COURT: Mr Bojosinyane please, the witness has indeed correctly responded to these questions.

PROSECUTOR: And not once.

MR BOJOSINYANE: In fact if this question could be asked your worship, at some stage she said I did fall because I was running, because of shoes, etc. Now there is she now, somebody coming from behind which she did not see ….(intervenes).

COURT: Well, she is going to answer this question for the last time. What caused you to fall? – Stones.

MR BOJOSINYANE: How did the stones cause you to fall? – I fell on my stomach.

[22] Cross-examination of a witness is very often the only means which an accused has to uncover the truth and so defend

himself or herself. When the cross-examination of a witness is stifled by a presiding officer it potentially leads to injustice. Zeffertt et al **The South African Law of Evidence** (2003) at 456-7 put it this way:

> "Failure to allow cross-examination is a serious irregularity which will almost invariably prejudice a party, since there is no knowing what favourable evidence he or she might have been able to elicit."

[23] I do not wish to be heard to be saying that the learned Magistrate was malicious or biased, far from it. But the effect of his ruling was to close the door upon an exploration of the identity of the alleged rapist. In the circumstances of this case it denied the appellant a fair trial. There has been a failure of justice.

[24] In any event the evidence for the State is too untrustworthy and too unreliable for it to be said that the State established beyond reasonable doubt that the appellant was the rapist.

[25] The conviction cannot stand. It and the sentence must be set aside.

[26] I wish to record the indebtedness of this Court to Mr Balepile for his head of arguments and to Mr Bojosinyane for his dedication to his client and for his assistance to him without which this travesty of justice may not have been rectified. His actions were in accordance with the noblest tradition of the office of an attorney.

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A A LANDMAN
JUDGE OF THE HIGH COURT

I agree

_____
M M LEEUW
JUDGE OF THE HIGH COURT

APPEARANCES:

FOR THE APPELLANT	:	MR BOJOSINYANE
FOR THE RESPONDENT	:	MR BALEPILE

ATTORNEYS:

FOR THE APPELLANT	:	MR BOJOSINYANE
FOR THE RESPONDENT	:	STATE ATTORNEY

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DATE OF REASONS	:	9 JUNE 2006