THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable

CASE NO. 642/2002

In the matter between

THE STATE **Appellant**

and

NKULULEKO SIDNEY KATOO **Respondent**

CORAM: HARMS, CAMERON, MTHIYANE, CLOETE JJA et JAFTA AJA

HEARD: 2 NOVEMBER 2004

DELIVERED: 30 NOVEMBER 2004

Summary: Criminal Procedure Act 51 of 1977 s 194 – incompetence of a witness afflicted with mental illness or imbecility

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JUDGMENT

JAFTA AJA

[1] The respondent was arraigned in the High Court (Port Elizabeth) before Pillay AJ, sitting with assessors, on two charges: first, of kidnapping (s 13 of the Sexual Offences Act 23 of 1957) and, second, of

rape (alternatively sexual intercourse with an imbecile under s 15(1)(a) of the said Act). After the conclusion of the state's case he closed his without testifying or calling any witnesses in his defence. He was acquitted on both counts.

[2] During the course of the trial, the prosecution sought to call the complainant, a 16 year old female. The trial judge ruled that she was not competent to testify in the light of the provisions of s 194 of the Criminal Procedure Act 51 of 1977 ('the Act'). The prosecution requested that the issue be reserved as a question of law. The trial judge refused to do so. This led to an application to this court for leave to have the question reserved. The application was referred for oral argument. The respondent declined to participate in the hearing before this court.

[3] The question formulated is –

'whether the court was correct in law in refusing the state an opportunity to present the evidence of the complainant on the charges preferred?

The answer, I believe, must be sought not only in s 194 read in isolation but also read in context with other provisions of the Act.

[4] The relevant facts are the following. The complainant lived with her parents and their other children at a house in Extension 3, Phillipsville, Hankey. On 13 July 2001 she was in the company of other children at the back of the house. She later went to stand at the gate in

front of the house, waiting for her father who had gone to town. She disappeared and her whereabouts were unknown until the next morning when she was found with the respondent in his room. She was later taken to a doctor for a medical examination, which revealed that she had recently had sexual intercourse. A complaint was laid against the respondent who was subsequently charged.

[5] During the trial the respondent admitted that he had engaged in sexual intercourse with her. The defence on the rape charge raised and advanced in cross-examination on his behalf was that the intercourse was consensual and, as far as the alternative count of intercourse with an imbecile was concerned, that he did not know that she was an imbecile (*dolus* being an element of the crime).

[6] In order to prove that the respondent must have been aware of the fact that the complainant was incapable of consenting to sexual intercourse as she obviously was an imbecile, the prosecution led (apart from the evidence of members of her family) evidence of a clinical psychologist, Mr du Toit, who had examined her and prepared a report on her mental capacity. Du Toit stated that the complainant suffered from severe mental retardation and that she could consequently be described as

an imbecile. He found that as a result of the mental retardation the complainant had a 'very limited capacity to exercise her will and make choices', and that her mental age was that of a four-year-old child. Du Toit was, however, not able to determine whether the complainant could distinguish truth from falsity.

[7] Relying on the psychologist's testimony, the trial court made the ruling mentioned. In this regard the trial judge said:

'As authority for the proposition that the witness can be so called, [counsel for the prosecution] relies on *S v J* [1989 (1) SA 524 (A)]. Now it is true that there are sections in this judgment where the appeal court, dealing with a conviction for sexual intercourse with an imbecile, expressed regret that the complainant had not been called as a witness. I do not, however, believe that it is authority for the proposition that she can be so called.

Section 194 of the Act makes it clear that mentally incompetent persons, whether the incompetence is due to mental illness or intoxication or narcotic abuse, shall not be competent to give evidence while so afflicted or disabled.

Now the State case has been, through a senior psychologist Dr du Toit, that she is severely mentally retarded to the point where she may be described as an imbecile. She is 16 years old, but has the mental age of a 4 year old. He expressed doubt, as a

trained expert, as to whether or not she can tell the difference between truth and falsehood.

In those circumstances, it seems to me to be clearly a situation governed by section 194 of the Act. There is nothing in the judgment of *S v J* to indicate that the prohibition in that section against calling an imbecile as a witness was considered.'

[8] Section 194 provides:

'No person appearing or proved to be afflicted with a mental illness or to be labouring under any imbecility of mind due to intoxication or drugs or the like, and who is thereby deprived of the proper use of his reason, shall be competent to give evidence while so afflicted or disabled.'

[9] The section must read in the context of sections 192 and 193 which precede it. Section 193 provides that the court before which criminal proceedings are conducted must decide any question concerning the competency of any witness. According to s 192 every person is competent to give evidence in a criminal trial unless expressly excluded by the Act from doing so.

[10] Section 194 stipulates specific requirements for determining whether or not a particular witness is incompetent. The history of the

provision is instructive, although its wording is clear. Section 225 of the Criminal Procedure Act of 1955 had a similar provision in these terms:

'No person appearing or proved to be afflicted with idiocy, lunacy, or insanity, or labouring under any imbecility of mind arising from intoxication or otherwise, whereby he is deprived of the proper use of reason, shall be competent to give evidence while so afflicted or disabled.'

This gave rise to interpretation problems as appears from the judgment of Jansen JA in *S v Thurston and another* 1968 (3) SA 284 (A) at 289C-F:

'Die strekking van die artikel is egter nie vanselfsprekend nie. Skynbaar (altans volgens die Afrikaanse redaksie deur die Goewerneurgeneraal onderteken) is dit nie elke geestesgebrek wat onbevoegdheid meebring nie, slegs dié waardeur die persoon "van die behoorlike gebruik van sy sinne beroof word" ("is deprived of the proper use of reason"). In wye sin kan dit seker gesê word van enige persoon met 'n geestesgebrek van een of ander aard, maar dit is beswaarlik denkbaar dat die Wetgewer dit so bedoel het - dit sou die kwalifikasie oorbodig maak behalwe ten opsigte van "verstandsverbystering voortspruitende uit dronkenskap of andersins". Juis hierdie gedagtegang kan aanleiding gee tot 'n interpretasie wat die kwalifikasie tot laasgenoemde geval beperk. Die Engelse redaksie is veral vatbaar daarvoor. Ook in *Rex v Burger*, 1938 CPD 37, is die kwalifikasie in 'n bykans presies

ooreenstemmende artikel skynbaar aldus verstaan. Daar word nie uitdruklik mee gehandel nie, maar die aanvaarding dat as 'n getuie 'n idioot is, sy sonder meer 'n onbevoegde getuie is, dui sterk daarop.'

Pursuant to the recommendations of the Botha Commission of Inquiry into Criminal Procedure and Evidence the present Act was amended to remove the uncertainty and to bring our law in conformity with other systems. (Cf the authorities referred to by Jansen JA at 289F-290E and also Wigmore *Evidence in trials at common law* (1979 ed) vol 2 para 498-499, *Bellamy* [1986] Cr App R 222, and *R v D* [2002] 2 Cr App R 36.)

[10] The first requirement of the section is that it must appear to the trial court or be proved that the witness suffers from (a) a mental illness or (b) that he or she labours under imbecility of mind due to intoxication or drugs or the like. Secondly, it must also be established that as a direct result of such mental illness or imbecility, the witness is deprived of the proper use of his or her reason. Those two requirements must collectively be satisfied before a witness can be disqualified from testifying on the basis of incompetence.

[11] The evidence led in the present case falls short of establishing that those requirements were met. The psychologist's evidence does not indicate that the complainant suffered from any mental illness. It merely establishes that she was, in the outdated terminology of the Act, an imbecile. Imbecility is not a mental illness and *per se* did not disqualify her as a witness. It is only imbecility induced by 'intoxication or drugs or the like' that falls within the ambit of the section (and then only when the witness is deprived of the proper use of his or her reason). It is also clear from the evidence thus far led that the complainant was not deprived of the proper use of her reason because she had a limited mental capacity.

[12] The trial court had a duty properly to investigate the cause of her imbecility before concluding that she was incompetent. Section 193 enjoins a trial court to enquire into this issue and decide whether a witness is in fact incompetent. This may be done by way of an enquiry whereby medical evidence on the mental state of the witness is led or by allowing the witness to testify so that the court can observe him or her and form its own opinion on the witness's ability to testify. In the past courts in this country have permitted persons suffering from mental disorders as well as imbeciles to testify subject to their being competent

to do so. See *S v Thurston* (supra); *S v J* 1989 (1) SA 525 (A); *R v K* 1957 (4) SA 49 (O) and *S v Malcolm* 1999 (1) SACR 49 (SE).

[13] That approach is in harmony with the presumption contained in s 192 to the effect that every person is a competent witness. But the fact that someone is a competent witness does not mean that that person can be sworn as a witness. That raises a discrete issue, namely whether the witness understands the nature and import of the oath or affirmation, which must be dealt with under s 164 (see *S v B* 2003 (1) SACR 52 (SCA)). In addition, the intention of the state here was not to rely on the truth of the evidence of the complainant; it was to demonstrate to the court that she was an imbecile and that that fact would have been apparent to anyone – in other words, a procedure akin to an inspection *in loco*.

[14] It is regrettable that, once again, it becomes necessary to repeat the admonition on the importance of lower courts following decisions of higher courts. *S v J* was binding on the court *a quo* and the trial judge should have followed it. In *De Kock NO and others v Van Rooyen* 2004 (2) SACR 137 (SCA) Cameron JA said at 146 f-g:

'It is necessary to repeat the admonition. Consistency, coherence, certainty and predictability in our new constitutional order require the due application of the decisions of higher Courts. Disregarding them wastes precious resources. It also imperils public understanding of the Constitution and its implications by creating an impression of incoherence, irrationality and unpredictability.'

See also *Blaauwberg Meat Wholesalers v Anglo Dutch Meats (Exports)* 2004 (3) SA 160 (SCA) para 20 and the cases there cited.

[15] In the circumstances of the present case I am satisfied that the answer to the reserved question of law must be 'yes'. This finding then gives rise to the question 'what steps' this court should direct (s 322(4) read with s 324). The ruling made by the trial court amounted to a serious irregularity. The state was deprived of the oportunity of leading evidence, which was palpably admissible on the plain wording of the section. The evidence was material for its case on count 2. A miscarriage of justice occurred. The accused, on the other hand, although he has had to suffer all the prejudices that follow from a trial, will not be materially prejudiced by a trial *de novo*. He has not yet testified, the trial was brief and there is no suggestion that witnesses for the defence are no longer available. It is therefore an appropriate case to allow a new prosecution if

the state is so minded. (*R v Gani* 1957 (2) SA 212 (A) 222.) However, the question reserved did not affect the acquittal on count 1 (kidnapping) and that count cannot form the subject of any retrial.

[15] Before concluding this judgment there are two issues to which I should refer. The first relates to the trial court allowing evidence on the complainant's previous sexual experience to be introduced into the record of the proceedings. Section 227(2) of the Act stipulates that evidence of a complainant's sexual experience, which does not relate to the incident giving rise to the trial, may not be adduced without leave of the court and that such leave may be granted only if the court is satisfied that it is relevant. Consistently with this provision trial courts must vigilantly protect complainants' privacy and dignity by allowing evidence of past sexual experience to be led only where the requirements of the section are met. In *S v M* 2002 (2) SACR 411 (SCA) Heher AJA said at 425j - 426b:

'One is here dealing with an issue which requires of a trial court great sensitivity and about which strongly conflicting views may be held ... There is a responsibility on practitioners and the courts to uphold the spirit of the legislation. In the case with which we are concerned, all appreciation of the statutory requirements and niceties seems to have escaped the trial court.'

[16] In the present matter the requirements of s 227(2) were not complied with before the evidence pertaining to the complainant's previous sexual experience was adduced. The leading of such evidence should have been prevented.

[17] The other issue relates to the weight attached by the trial judge to the defence version which was put to state witnesses under cross-examination. It was treated as if it were evidence when the trial court considered its verdict on the merits. As the respondent failed to place any version before the court by means of evidence, the court's verdict should have been based on the evidence led by the prosecution only.

[18] In the result the following order is made:

1. The application for the reservation of the question of law is granted in terms of s 317(5) of the Criminal Procedure Act.

2. The reserved question of law is answered in the affirmative.

3. Under s 324 of the Act, the respondent may be retried on count 2.

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C N JAFTA
ACTING JUDGE OF APPEAL

HARMS JA)
CAMERON JA)CONCUR
MTHIYANE JA)
CLOETE JA)