THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no**:** 513/11

Not Reportable

In the matter between:

SOUL RAMOKATA DADDY MOTSISI **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Motsisi v The State* (513/11) [2012] ZASCA 59 (2 April 2012)

Coram: NAVSA, TSHIQI AND WALLIS JJA AND PETSE AND NDITA AJJA

Heard: **16 February 2012**

Delivered: **2 April 2012**

Summary: **Rape – complainant allegedly mentally retarded – competence to testify – sections 192, 193 and 194 of the Criminal Procedure Act 51 of 1977 – admonition - section 164 read with s165 of the Criminal Procedure Act.**

ORDER

On appeal from: North West High Court, Mafikeng (Hendricks and Kgoele JJ sitting as court of appeal):

1 The appeal is upheld.

2 The conviction and sentence imposed by the magistrate are set aside and substituted with the following:

'The appellant's conviction is quashed and the sentence is set aside.'

JUDGMENT

TSHIQI JA (NAVSA and WALLIS JJA and PETSE and NDITA AJJA concurring)

[1] The issue that determines the outcome of this appeal is whether the trial court, having decided not to have the complainant take the oath or affirmation in terms of s162 and s163 of the Criminal Procedure Act 51 of 1977, properly administered the admonition in due compliance with s164 and s165 of the Criminal Procedure Act.

[2] The appellant was charged with rape, read with s51(1) of Criminal Law Amendment Act 105 of 1997 and with s94 of the Criminal Procedure Act, it being alleged that he had sexual intercourse with the complainant, a female aged 24 years, who was mentally retarded. He was convicted and sentenced to the prescribed minimum term of 15 years' imprisonment.[1] His appeal to the North West High Court, Mafikeng, was dismissed. He now appeals to this court with leave of that court, against both the conviction and sentence.

[1] Part II of Schedule 2 prescribes a minimum sentence of 15 years' imprisonment for first offenders convicted of offences contained in that schedule.

Summary of Facts

[3] The appellant and the complainant were neighbours and knew each other very well. It is common cause that on 31 May 2005, they were found by the second State witness, one T (also a neighbour and a close family friend) at the complainant's home. T had visited the home to feed the dogs, a chore which, he, according to the evidence, he seemed to perform regularly. When he arrived at the house he was unable to gain entrance because he could not find the key. He went out of the yard and enquired from the neighbours if they had not seen the complainant. He was told that the complainant had been seen entering her home. He called her cellphone and she confirmed that she was inside the house.

[4] According to T, when he entered the yard the second time, both the appellant and the complainant emerged from the house. The fact that they both emerged from the house, which had been locked when he initially arrived, made him suspicious. He solicited an explanation from both of them. It seems that the explanations given did not satisfy him because after the appellant had left, he asked the complainant again what they had been doing inside the house. The complainant informed him that 'Daddy had intercourse with her'.

[5] He stated that when he confronted the complainant he was angry and at this stage the complainant started crying. He waited for her mother to come back from work and conveyed this information to her. The complainant's mother then took steps which eventually led to the arrest of the appellant.

[6] It is not necessary to repeat the evidence of the appellant as it is mostly uncontroverted. He did not deny that he was in the complainant's yard but denied that he had engaged in sexual intercourse with the complainant. He denied that he had been in the house and that he had come out when T arrived. He stated that he had been sitting outside on the 'stoep'.

[7] Flowing from the allegations in the charge sheet that the complainant was mentally retarded, the state led the evidence of Dr Monaledi and that of the complainant's mother.

[8] Dr Monaledi had not been consulted for an assessment which would assist the court in making a determination in terms of s193 read with s194 of the Criminal

Procedure Act regarding the competence of the complainant to give evidence[2]. She had been afforded limited consultation time with the complainant and was not able to state whether the complainant suffered from mental illness, nor could she state with certainty whether the complainant would be able to testify and to what extent reliance could be placed on the complainant's testimony.[3] She informed the court that even her report, which had been presented in court, was no longer valid and that it would be necessary for her to reassess the complainant.

[9] The complainant's mother did not state that her daughter had been positively diagnosed as suffering from a mental illness. Her evidence was reliable only to the limited extent that it showed that the complainant was a slow learner and that at home she could only perform rudimentary tasks, like cleaning the house, washing dishes etc.

[10] The evidence of Dr Monaledi and the complainant's mother did not establish whether or not the complainant could testify nor was it established whether she could benefit from the services of an intermediary.

[11] It appears that the magistrate decided that the complainant would not understand the nature and import of the oath and instead of requiring sworn testimony from her decided to admonish her in terms of s164(1) of the Criminal Procedure Act. Before a court may admonish a witness in terms of s164 read with s165 of the Criminal Procedure Act, it must satisfy itself whether or not the witness understands what it means to speak the truth. To that end it must conduct an enquiry.[4] However, in *S v B* 2003 (1) SA 552 (SCA) para 15, this court held that this is not always required. However, once the magistrate formed that view, there was one further step that he was required to take, namely to enquire whether the complainant was capable of distinguishing truth from falsehood. In *S v B* and again in *Director of Public Prosecutions, KwaZulu-Natal v Mekka* 2003 (4) SA 275 (SCA) para 12, that question was left open. It has now received a clear affirmative answer from the Constitutional Court. In *DPP v Minister of Justice and Constitutional Development* 2009 (4) SA 222 (CC) para 166, the Constitutional Court stated:

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[2] In terms of s192 of Criminal Procedure Act, every witness is presumed to be competent and compellable to give evidence in criminal proceedings, unless expressly excluded. Any finding that a witness is incompetent or not compellable to give evidence due to the state of mind, must be made after a positive diagnosis in terms of s1 of the Mental Health Act or as a result of a determination by the court in terms of s193 read with s194 of the Criminal Procedure Act.

[3] *S v Katoo* 2005 (1) SACR 522 (SCA) para 12.

[4] *S v Sikhipha* 2006 (2) SACR 439 (SCA) para 13

'The reason for evidence to be given under oath or affirmation or for a person to be admonished to speak the truth is to ensure that the evidence given is reliable. Knowledge that a child knows and understands what it means to tell the truth gives the assurance that the evidence can be relied upon. It is in fact a precondition for admonishing a child to tell the truth that the child can comprehend what it means to tell the truth. The evidence of a child who does not understand what it means to tell the truth is not reliable. It would undermine the accused's right to a fair trial were such evidence to be admitted. To my mind, it does not amount to a violation of s 28(2) to exclude the evidence of such a child. The risk of a conviction based on unreliable evidence is too great to permit a child who does not understand what it means to speak the truth to testify. This would indeed have serious consequences for the administration of justice.'

[12] In para 165 the Constitutional Court clarified that what s164 of the Criminal Procedure Act requires 'is not the knowledge of abstract concepts of truth and falsehood. What the proviso requires is that the child will speak the truth …the child may not know the intellectual concepts of truth or falsehood, but will understand what it means to be required to relate what happened and nothing else'.

[13] The magistrate's only endeavour to comply with this requirement lay in the following questions that he put to the complainant before admonishing her to speak the truth.[5]

'COURT: Tell me L, how old are you?

MS K: I am 17-years old [her mother had testified that she was born 22 June 1982 which meant that she was approximately 24 years at the time].

COURT: Can you give me the date on which you were born, do you know it?

MS K: No Your Worship, I do not know.

COURT: Now tell me what do you do? Do you attend school or do you work, or do you merely stay at home or what do you do?

MS K: Your Worship no, I do [am] not attending school at this moment, but I was attending at Iteko School.

COURT: What are you doing presently?

MS K: I am staying at home.

COURT: Yes now L, you are going to be asked questions relating to something that transpired some time ago, something that happened to you which is what we are going to ask about. Now as you should answer the questions freely without any fear as nothing is going to happen to you and that relates to the accused, between yourself and the accused.

MS K: Yes Your Worship.

COURT: Yes now you should try and tell us all that happened?

[5] I have anonymised the complainant's name in order to avoid the disclosure of her identity.

MS K: Yes.

L: admonished (through interpreter)

COURT: Yes the witness has been admonished. You may proceed Mr Prosecutor.'

[14] The above questions were irrelevant and clearly did not demonstrate to the court whether the complainant was able to testify and importantly, whether she was able to distinguish between truth and falsehood.

[15] The duty to ensure that a witness has properly taken the oath, affirmation or admonition is imposed on a presiding judicial officer.[6] It is the judicial officer who has to be satisfied that the witness comprehends what it means to speak the truth. The fact that a judicial officer may utilise the services of an interpreter or an intermediary or a registrar of the court to communicate with a witness does not relieve the judicial officer of the duty to perform this function, but what it does is that it provides the judicial officer with a means of utilising the assistance of these functionaries to perform his or her functions. Their vital role is limited to ensuring, because of their skill, 'that questions by the court to the child [witness] are conveyed in a manner that the child [witness] can comprehend and that the answers given by the child [witness] are conveyed in a manner that the court will understand' (*DPP v Minister of Justice and Constitutional Development* para 167 (supra)). It does not appear *ex facie* the record that the regional magistrate performed this function himself as required by the Criminal Procedure Act. What appears *ex facie* the record are the words 'admonished (through interpreter)' and nothing more. A judicial officer cannot simply abdicate his or her responsibilities and hope that an interpreter or intermediary will be able to admonish a witness, as it appears to have been the case in this particular matter.

[16] This then brings me to another issue of concern in this matter. This pertains to the referral to the complainant throughout the trial as 'the victim'. It has long been established even long before the constitutional era[7] that all witnesses ought to be addressed in a humane manner in court proceedings. In *S v Gwebu* 1988 (4) SA 155 (W) at 158F-H it was stated:

'It is perhaps as well also to say something about the habit which a number of magistrates, and some prosecutors in the magistrate's courts, have developed in recent years, of addressing accused persons by the appellation "accused" or "beskuldigde". And, one sees, too, in many records that some magistrates (not in this case) refer to witnesses as "witness" or "getuie". This

[6] Section 165 of the Criminal Procedure Act.

[7] Section 10 of the Constitution provides that '[e]veryone has inherent dignity and the right to have their dignity respected and protected.'

depersonalising of people is disrespectful and degrading. It is no cause for difficulty for people to be called by their proper names. I can find no reason for the appellant, in this case, when addressed directly by the magistrate, not being called “Mr Gwebu”. Members of the public who appear in our courts, whether as accused or as witnesses, are entitled to be treated courteously and in a manner in keeping with the dignity of the court.’

It is hoped that judicial officers will always be alive to this and discourage this practice. Nothing further need be said on this issue.

[17] A perusal of the record, as it stands, shows that there is no evidence, apart from that of the complainant from which the appellant could have been convicted. Since her evidence has not properly been placed on record there is no manner of determining whether the charge against the appellant was well founded. T’s evidence alone cannot be elevated to constitute proof that sexual intercourse had taken place between her and the appellant, nor can it cure the other inherent problems in the State case.

[18] The medical evidence did not advance the State’s case. The J88 (medical report completed by a medical practitioner) reflected that it could not be established whether there was penetration because the complainant was menstruating at the time of the examination and it was therefore difficult to examine her. Although the J88 noted that there was a small bilateral contusion on the labia minora which looked recent, the conclusions contained therein were that the findings were inconclusive of neither forceful penetration nor alleged sexual assault. The medical practitioner was not called to testify. Any suggestions that the small contusions could have been caused when the appellant’s penis allegedly touched her vagina would be sheer speculation in light of the conclusions in the J88.

[19] Because of the fundamental irregularities perpetrated by the magistrate referred to above I make the following order:

1. The appeal is upheld.

2. The conviction and sentence imposed by the magistrate is set aside and substituted with the following:

   ‘The appeal succeeds and the appellant’s conviction is quashed and the sentence is set aside.’

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Z L L Tshiqi

Judge of Appeal

APPEARANCES

APPELLANT:	G S Maema The Office of the D.P.P Mafikeng
RESPONDENT:	Adv. N L Skibi Legal Aid Board Mafikeng