THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 413/2012

Reportable

In the matter between:

MILINGONI JEFFREY RAMULIFHO **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Ramulifho v The State* (413/12) [2012] ZASCA 202 (30 November 2012)

Coram: MPATI P, PONNAN, CACHALIA JJA and SOUTHWOOD and ERASMUS AJJA

Heard: **9 NOVEMBER 2012**

Delivered: **30 NOVEMBER 2012**

Summary: Appellant convicted of rape in the regional court and referred to the High Court for sentence – sentence of life imprisonment imposed- appellant unrepresented in the regional court and court failing to assist him in presenting his defence – appellant not receiving a fair trial - regional court not considering the evidence as a whole, but in compartments – when considered as a whole, including the appellant's admission during argument that he had had intercourse, the appellant's defence that he did not have intercourse with the complainant reasonably possibly true – entitled to acquittal on the merits

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ORDER

On appeal from: The Venda High Court, Thohoyandou (Hetisani J sitting as court of first instance):

1. The appeal is upheld.

2. The conviction and sentence are set aside.

(Ordered that the appellant be released immediately.)

JUDGMENT

SOUTHWOOD AJA (MPATI P, PONNAN AND CACHALIA JJA and ERASMUS AJA CONCURRING):

[1] The appellant appealed against his conviction of rape by the Thohoyandou regional court on 16 March 2002 and the sentence of life imprisonment imposed on him by the Venda High Court (Hetisani J) on 18 July 2002. Leave to appeal against both the conviction and sentence was granted by the Limpopo High Court (Makhafola J) on 8 November 2010. After argument at the hearing on 9 November 2012, this court upheld the appeal, set aside the conviction and sentence and ordered that the appellant be released immediately. The court also indicated that its reasons would follow. These are the reasons.

[2] The appeal was upheld for two reasons: first, the evidence did not prove beyond a reasonable doubt that the appellant had raped the

complainant nor did it prove that the appellant was guilty of any other crime; and, secondly, the appellant did not receive a fair trial in the regional court. The respondent's counsel attempted to support the conviction but readily conceded that the appellant did not receive a fair trial.

[3] The appellant was charged with the rape of a female person on 2 August 1999. It was not alleged in the charge sheet that the victim was under the age of 16 years.[1] The appellant elected to represent himself and pleaded not guilty. In his plea explanation he denied that he had intercourse with a child.

[4] Neither the South African Police Service (SAPS) nor the Director of Public Prosecutions (DDP) seems to have given any attention to the appellant's correct age at the date of the incident and they treated him as if he was an adult at the time.[2] During his evidence the appellant told the court that his date of birth was 2 August 1983 (which meant that he was sixteen years old on the date of the incident and just over the age of eighteen when the trial commenced), that he was in standard ten at the time of the incident and that he had left school when he was arrested. During her evidence, his grandmother, Martha Ramulifho, told the court that the appellant may be sixteen or seventeen years old. This age appears to relate to the time of the trial. A few questions in court elicited this information and it is difficult to understand why the SAPS and the DPP did not do this and why they did not deal with the accused as a child. By the time the trial commenced the appellant had been arrested, interrogated by the police, detained for almost two years and had been forced to make admissions or a confession, all without the assistance of a legal representative or the advice of his parents or guardian.

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[1] A conviction of rape where the victim is under the age of 16 years was necessary if the State wished the provisions of the Criminal Law Amendment Act 105 of 1997 (the minimum sentence legislation) to be applied – see *S v Legoa* 2003 (1) SACR 13 (SCA) para 24: *S v Mapule* (817/11) [2012] ZASCA 80 (30 May 2012) paras 9-10.

[2] Section 73 and 74 (as it was before its repeal by the Child Justice Act 75 of 2008 on 1 April 2010) should have been complied with.

[5] Section 35 (3) of the Constitution provides that every accused has a right to a fair trial, which includes the right to have a legal practitioner assigned to his case by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly. This was an obvious case for the provisions of the section to be applied but there is no indication in the record that the appellant was informed of these rights.[3] The appellant was therefore unrepresented and the regional court was obliged to assist him to present his defence properly so that he received a fair trial.[4] This meant that the regional magistrate was obliged to act as the guide of the appellant at all stages of the trial. He was obliged to inform the appellant of his basic procedural rights – the right to cross-examine, the right to testify, the right to call witnesses, the right to address the court both on the merits and in respect of sentence, and in comprehensible language to explain to him the purpose and significance of his rights. The regional magistrate was also obliged to assist the appellant whenever he needed assistance in the presentation of his case.[5] It was also required of the regional magistrate that he ensure that the parties' cases were presented fully and fairly and that the truth was established: in other words, he was not to be a passive observer of the trial: he was obliged to ensure fairness and justice and, if necessary to intervene to achieve this.[6] As in any other trial, whether or not the prosecutor followed the correct procedure, it was the overriding duty of the regional magistrate to ensure that only admissible evidence was placed before the court before reliance was placed on it.[7]

[6] There was also reason for the regional magistrate to exercise great care in the assessment of the evidence: this was a rape case involving a

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[3] See *S v May* 2005 (2) SACR 331 (SCA) paras 4-10 where the court said: 'Whether or not prejudice has resulted from the lack of legal representation is really a question that can be determined only by having regard to the whole trial, and the way in which it was conducted by the judicial officer; and the ability, as shown during the course of the trial, of the accused to represent himself adequately; and to whether the evidence adduced has led justifiably to the conviction and sentence.'

[4] In *S v Rudman; S v Johnson; S v Xaso; Xaso v Van Wyk No* 1989 (3) SA 368(E) at 377E-379C the essential rules applicable before the advent of the Constitution are summarised. These are equally applicable now.

[5] See *State v Rudman* supra at 378A-D.

[6] *S v May* supra

[7] *S v Nkosi* 1980 (3) SA 829 (A) at 844F-845C.

young complainant. In *State v Vilakazi*[8] this court outlined the correct approach to such a case –

'[21] The prosecution of rape presents peculiar difficulties that always call for the greatest care to be taken, and even more so where the complainant is young. From prosecutors it calls for thoughtful preparation, patient and sensitive presentation of all the available evidence, and meticulous attention to detail. From judicial officers who try such cases it calls for accurate understanding and careful analysis of all the evidence. For it is in the nature of such cases that the available evidence is often scant and many prosecutions fail for that reason alone. In those circumstances each detail can be vitally important.'

[7] At the conclusion of the evidence the regional magistrate was required to consider all the evidence before making his finding. In *S v Hadebe*[9] this court adopted, with approval, the following statement from *Moshephi and Others v R* (1980-1984) LAC 57 at 59F-H –

'The question for determination is whether, in the light of all the evidence adduced in the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently on the separate and individual parts of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial, may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.'[10]

[8] The alleged rape took place at the appellant's home which was literally right next to the complainant's home – a few metres separated them. The state called three witnesses: the complainant's brother, Mushomi Ndoahana,

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[8] 2009 (1) SACR 552 (SCA).
[9] 1998 (1) SACR 422 (SCA) at 426f-h.
[10] See also *S v Van Aswegen* 2001 (2) SACR 97 (SCA) para 8; *S v Mbuli* 2003 (1) SACR 97 (SCA) para 57.

the complainant's sister-in-law, Molaharo Ndoahana, and the complainant. The prosecutor also handed in a J88 report of the medico legal examination. The appellant testified and called his grandmother, Martha Ramulifho. The regional magistrate then proceeded to consider the state's evidence and then, having found that evidence to be credible and reliable, proceeded to consider whether the appellant's evidence could be reasonably possibly true. He concluded that the appellant was guilty because he had admitted in argument that he had had intercourse with the complainant. It is unnecessary to decide whether this statement by the accused constituted evidence or was properly received in terms of either s 115(2) or s 220 of Act 51 of 1977. For purposes of this judgment I shall accept that the statement is a formal admission by the appellant that he had intercourse with the complainant.

[9] The regional magistrate's approach to the evidence was manifestly wrong because he did not follow the approach already referred to and consider whether, in the light of all the evidence, it had been established that the appellant was guilty beyond reasonable doubt. The conclusion reached had to take all the evidence into account. 'Some of it might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it could be simply ignored.'[11] The appellant was obviously entitled to be acquitted if there was a reasonable possibility that he might be innocent.[12]

[10] The complainant's brother obviously jumped to the conclusion that the appellant had raped the complainant, when he returned home at about 18h30 and found that she was not there but at the appellant's home. He drew an inference from insufficient facts and did not budge from his view. The complainant's sister-in-law testified that she was at home on 8 August 1999 (the incident took place on 2 August 1999 and this discrepancy was never explained) when the complainant returned crying and when she enquired why the complainant said that the appellant had had intercourse with her. The complainant testified that the appellant called her to his home, told her to

[11] *S v Van der Meyden* 1999 (2) SA 79 (W) at 81I-82E; *S v Van Aswegen* supra para 8.
[12] *S v Mbuli* supra para 57.

undress and lie down and then undressed and took out his private part and raped her. She used the word ‘rape’ repeatedly with no apparent understanding of its meaning. She clearly did not understand what intercourse is but, by means of obviously leading questions, the prosecutor got on record that the appellant had had intercourse with the complainant. Eventually the complainant insisted that the appellant had had sexual intercourse with her. The appellant testified that he had not had sexual intercourse with the complainant, that the complainant’s brother had been extremely angry and assaulted him and that he was assaulted at the police station and forced to admit that he had had intercourse with the complainant. He did this because he was frightened. Martha Ramulifho testified that the appellant proposed love to girls; that the complainant had come to the appellant’s home; but that she had not entered before her brother arrived on the scene and that he was very angry. She could not say what had happened between the complainant and the appellant but it was clear that the complainant’s brother had assaulted the appellant.

[11] In every rape case the objective evidence provided by the medico legal examination of the complainant is essential to determine where the truth lies. This evidence must always be carefully scrutinised by the presiding judicial officer as the examination and the injuries found will usually determine the outcome of the trial. If the results of the examination show that a sexual assault has taken place the accused’s denial of intercourse will usually be rejected. If the results of the examination are inconsistent with the complainant’s description of a sexual assault the accused’s denial of intercourse will usually be accepted as reasonably possibly true. The report of the medico legal examination performed in this case, on 5 August 1999, contradicts the state’s case. The doctor did not find any injuries or anything abnormal and he did not conclude that the complainant had recently had intercourse. He reported that the hymen was ‘opened’ but did not say whether this was a recent development or that it showed any signs of having been torn. If the purpose of the examination is borne in mind it is striking that the doctor expressed no opinion that the examination shows that the complainant had sustained injuries consistent with forceful penetration of her vagina and

that this indicates that she was sexually assaulted. In short, the contents of the report supports the appellant's denial that he had had intercourse with the complainant. This means that the appellant's denial is reasonably possibly true. If there was any doubt as to what the import of the report was, to ensure a fair trial the regional magistrate should have called the doctor so that he could explain whether his findings supported the state's case. Unfortunately the regional magistrate misread or was misled about the contents of the report. He clearly did not understand the significance of the findings or the problem which the findings presented for the state.

[12] During argument the appellant admitted that he had had intercourse with the complainant. This was an astonishing about-turn. The appellant had denied this throughout the trial and when he testified he denied that he had had intercourse and he had not been shown to be unreliable let alone discredited – particularly in the light of the J88 which supported his evidence. In these circumstances the regional magistrate should have investigated the appellant's change of stance to establish whether he really meant to admit that he had had intercourse with the complainant. At the very least, in view of the appellant's evidence about the assaults, the regional magistrate should have investigated whether the appellant had been induced by threats or assaults to admit to the intercourse. Even if the appellant had confessed to the rape the court would have been obliged to ascertain from the other evidence that the crime had been committed.[13] Unfortunately the regional magistrate did not do so and this failure is consistent with the manner in which the regional magistrate conducted and allowed the prosecutor to conduct the trial. The regional magistrate did not inform the appellant of his right to legal representation; he did not properly explain to the appellant how to cross-examine,[14] and when the appellant showed, through his questions, that he did not understand how to cross-examine, he did not assist the appellant to put questions; he allowed the prosecutor to ask obviously leading questions on

[13] *S v Kumalo* 1983 (2) SA 379 (A) at 382C-F and 383F-H where the court observed that: 'Experience in the administration of justice has shown that people occasionally do make false confessions for a variety of reasons. Our courts have recognised this phenomenon of human nature'.

[14] See *S v May* 2005 (2) SACR 331 (SCA) paras 11-13.

the material issues and to lead inadmissible evidence about what the appellant said at various times; he did not properly explain to the appellant his rights in respect of the medico legal report[15] and he clearly did not read it, or, if he did, he did not understand its import. Eventually, when he gave judgment the regional magistrate did not properly consider all the evidence. With regard to the complainant, he did not warn himself about the dangers inherent in dealing with a child's evidence and there is no suggestion that he carefully considered her evidence to determine whether it could be found to be reliable.[16] He dealt with the appellant's and Martha Ramulifho's evidence in two or three lines and what he says does not properly reflect the substance of what they said and he did not consider their evidence in the light of the medico legal report which obviously indicated that they were telling the truth. The conduct of the trial shows that a lack of legal representation prejudiced the appellant. The respondent's counsel's concession was clearly correct.

[13] In my view, even if it is accepted that all the evidence was properly before the court, it did not prove beyond a reasonable doubt that the appellant was guilty and he should have been acquitted.

[14] For those reasons the appeal was upheld, the conviction and sentence set aside and the immediate release of the appellant ordered.

[15] Unfortunately something must be said about the time it has taken for this appeal to reach this court. The appellant has spent twelve years in custody, two years awaiting trial and another ten years waiting for his application for leave to appeal and this appeal to be heard. Some light is shed on the delays in the appellant's application for condonation. According to the appellant, the appellant's counsel in the high court did not inform him of his right to apply for leave to appeal and he found out from his fellow prisoners

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[15] eg. in terms of s 212 of Act 51 of 1977 the court has a discretion to call the doctor, who conducted the medico legal examination, to give oral evidence in explanation of his findings and would exercise that discretion if requested to do so by an unrepresented accused. See *S v Hlongwa* 2002 (2) SACR 37 (T) para 22.

[16] See *R v Manda* 1951 (3) SA 158 (A) at 163C; *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A) at 1028B-D; *S v J* 1998 (2) SA 984 (A) at 1009B; *S v V* 2000 (1) SACR 453 (SCA) at 454h-i.

that he had such a right and that if he succeeded in obtaining leave he could appeal against both the conviction and sentence. They also told him that he could apply to be represented by a legal aid attorney. On 4 June 2003 he telephoned the legal aid office in Thoyohandou and was told that a legal aid officer would visit him in due course to take instructions. This happened in August 2003 and the legal aid officer told the appellant that he would communicate with him again as soon as he had obtained the transcript of the proceedings and a date for the hearing of the application for leave to appeal. Seven years passed before the appellant's attorney, Mr Thomu, visited the appellant in prison and told him that the application for leave to appeal had been enrolled for hearing on 8 November 2010. On that day leave was granted. Mr Thomu then told the appellant that he, Thomu, would communicate with the appellant as soon as the registrar of the high court had sent the record to this court. In February 2012 Mr Thomu visited the appellant in prison and told him that he, Thomu, had received the record on 2 February 2012, that he would file the record at this court and that he would commence preparing for the appeal. According to Mr Thomu, in June 2009 he was appointed by the legal aid board to represent the appellant and he informed the appellant that he, Thomu, would have to apply to the registrar of the high court for a transcript of the proceedings so that the appellant could apply for leave to appeal. He received the transcript in July 2010 and the application for leave to appeal was enrolled for hearing. Thereafter the record of the proceeding for the purpose of this appeal was received on 2 February 2012 and this was filed with the registrar of this court.

[16] The appellant and Mr Thomu have provided very little detail but from this somewhat sketchy information it appears that the delays were caused at various stages of the appeal process by –

(1) the failure of the appellant's advocate to inform him, immediately after sentence, of his right to apply for leave to appeal and his right to appeal;

(2) the failure of the legal aid officer who consulted with the appellant in August 2003 to appoint an attorney to represent the appellant and order a transcript of the proceedings to enable the appellant to apply for leave to

appeal – there is no explanation for this in the papers but it indicates a complete lack of diligence and attention to the case;
(3) the failure of the appellant to follow up his instructions to ascertain what progress his attorney was making – again this is not explained but it was probably due to the appellant's lack of education and means. Also not explained is the sudden appointment, after the passage of seven years, of Mr Thomu to represent the appellant;
(4) the failure of the legal aid officer or attorney appointed by the legal aid board to expeditiously obtain the record for the purpose of the application for leave to appeal and the appeal itself. The record with exhibits is only 81 pages and could be prepared in a day or two. It is inconceivable that it could take one year to prepare such a record for the application for leave to appeal and sixteen months to prepare the record for the appeal in this court. These failures indicate a lack of diligence and even a high degree of negligence on the part of the legal aid officer and the attorney appointed by the legal aid board. The legal aid officer and the attorney appointed by the legal aid board should have followed up the requests for the record and made sure that the appeal process was not delayed. On the face of it the delays are inexcusable.

[17] Delays of this nature in the prosecution of a criminal appeal when the appellant is serving a prison sentence are not acceptable and run contrary to the ethic which should prevail in the administration of the criminal justice system. Where a convicted person who is serving a prison sentence wishes to appeal, every person involved in the process must ensure that he or she does, with the utmost expedition, what he or she is required to do. The judge or magistrate must hear the appliction for leave to appeal without delay, the registrar or clerk of the court must have the record transcribed and prepare the record of proceedings and transmit and file all necessary documents without delay, the attorney representing the accused must ensure that everyone involved expeditiously does what is required. And that is because the freedom of the individual is involved and must be safeguarded within the limits of the law. It is an egregious violation of individual freedom to detain a person in prison, and it is the solemn duty of every judicial officer, official involved in the administration of justice, and the legal practitioner representing

the accused to ensure that it will happen only with the full authority of the legal process. The judicial officer and every other official involved in the legal process whereby a person is deprived of his freedom are obliged to ensure that that process obtains the full stamp of approval of the law as quickly as possible and the impression must never be created that our courts and judicial officials are indifferent to the freedom of the individual.[17]

[18] For these reasons the registrar is directed to send copies of the record, the heads of argument filed by the appellant and the respondent, the appellant's application for condonation and this judgment to the president of The Law Society of the Northern Provinces and to the Chairman of the Legal Aid Board to investigate the reason for the delays referred to in this judgment and to take whatever steps they deem necessary against those responsible.

B R SOUTHWOOD
ACTING JUDGE OF APPEAL

[17] See eg *S v Letsin* 1963 (1) SA 60 (O) at 61A-H.

APPEARANCES

For Appellant:	THOMU A L Thohoyandou Justice Centre Thohoyandou Justice Centre Bloemfontein
For Respondent:	MAKHERA R J The Director of Public Prosecutions Limpopo High Court Thohoyandou The Director of Public Prosecutions Supreme Court of Appeal Bloemfontein