**IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

CASE NO: 911/2012

**Reportable**

In the matter between:

**JAMES AZWINNDINI NEDZAMBA** **Appellant**

**and**

**THE STATE** **Respondent**

**Neutral Citation:** Nedzamba v S (911/2012) [2013] ZASCA 69 (27 May 2013).

**Coram:** NAVSA, BRAND, TSHIQI & PETSE JJA, ZONDI AJA

**Heard:** 17 May 2013

**Delivered:** 27 May 2013

**Summary:** **Criminal law – rape – indictment containing no reference to provisions of the Criminal Law (Sexual Offences and Related Matters)**

**Amendment Act 32 of 2007 – susceptible to amendment on appeal – no prejudice – convictions and related sentences liable to be quashed and set aside on basis of fundamental irregularities – cross-examination restricted or prevented – leading questions on critical issues permitted – unjustified interventions by trial judge – no care taken in relation to child witness – convictions and sentences set aside.**

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**ORDER**

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

The following order is made:

1. The appeal is upheld.

2. The convictions and the sentences imposed by the High Court are quashed and set aside.

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**JUDGMENT**

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NAVSA JA, (BRAND, TSHIQI & PETSE JJA, ZONDI AJA CONCURRING):

[1] The appellant, Mr James Azwinndini Nedzamba, was indicted in the Limpopo High Court, Thohoyandou (Hetisani J) on two counts of rape. On 13 March 2009 he was convicted on those counts and two life sentences, to run concurrently, were imposed. The present appeal, with the leave of this court, is directed both against the convictions and related sentences.

[2] In this case there were numerous mishaps, encompassing the investigation, the prosecution, the trial and even the present appeal. The result, regrettably, is that there was a negative impact with resultant injustice in relation to both the complainant and the appellant.

[3] The State's case, as set out in the indictment and the summary of substantial facts, was that on 17 March 2008, at her home in Thohoyandou, the complainant, a then 13-year old girl, was raped on two occasions by the appellant. It was alleged that the appellant, a Zion Christian Church pastor, had imposed himself on the complainant in the manner complained of under the pretext of performing church rituals.

[4] The complainant, her mother and her older brother testified in support of the State's case. The appellant's defence was one of alibi and he testified that he had been at work at the relevant time and thus could not have committed the said acts. He was the only witness in his defence.

[5] At the end of a judgment with sparse reasoning, the court below concluded as follows:

'[T]he state must prove its case beyond any reasonable doubt. Secondly, the accused' version must appear to be reasonably true. In this instance the court does not believe that the accused was telling the court the truth because he mentioned names of people, when asked where are those people, he cannot trace them, he has forgotten this, he has forgotten that.

Therefore the court finds that the version of the accused is rejected and the version of the state witnesses is accepted and the accused is found GUILTY AS CHARGED.'

[6] After conviction and sentence, an application for leave to appeal was unsuccessful, hence an application to this court which, as stated above, was successful and resulted in the present appeal. It appears that the appellant had, pending finalisation of this appeal, been incarcerated for more than four years.

[7] In the court below, the appellant raised no objection to the charge sheet. The heads of argument on his behalf in this Court relied primarily on the fact that the indictment made no reference to the provision of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act), which came into operation on 16 December 2007. It was submitted that the appellant had been charged with the common law offence of rape at a time when it had been abolished by the Act and that consequently the convictions and related sentences ought to be set aside. Put simply, it was contended that the appellant had been tried 'on [the] non-existent common law crime of rape'. There are other grounds of appeal which I intend to deal with in due course.

[8] The State in its heads of argument, clearly without careful reflection, conceded that the convictions and related sentences were liable to be set aside on the basis referred to at the beginning of the preceding paragraph. In support of its concession the

State relied on the judgment of the Constitutional Court in *S and another v Acting Regional Magistrate, Boksburg and another* 2011 (2) SACR 274 (CC). Before the hearing a note was sent to the parties through the Registrar's office, referring to authorities and indicating that the parties would be required to address the court on the correctness of the concession by the State.

[9] The ground on which the State and the appellant initially relied is fallacious. Indeed, it is troubling that the State so readily made the concession referred to. In oral argument before us, the State was constrained to admit that the concessions had been made without proper thought concerning the ambit and the applicability of the Constitutional Court judgment and the absurd consequences that would follow. Counsel for the appellant rightly followed suit and agreed that reliance on that judgment was misplaced.

[10] It is necessary, to avoid similar concessions and confusion which might arise in the future, to carefully scrutinise the Constitutional Court's judgment. It is especially important to do so because of the objective of the Act, namely, to afford as much protection as possible to victims of sexual violence. The Constitutional Court noted that the Act expressly repealed the common law of rape, however it went on to say the following:

'[R]ape committed after the commencement of the Act is punishable under the Act and not under the common law.' [1]

[11] In that case the Court was dealing with the question of whether the repeal of the common law offence of rape was retrospective. More specifically, the Constitutional Court had to deal with the interpretation and application of s 69 of the Act, which is a transitional provision that reads as follows:

[1] Para 4.

‘(1) All criminal proceedings relating to the common law crimes referred to in section 68 (1)*(b)* which were instituted prior to the commencement of this Act and which are not concluded before the commencement of this Act must be continued and concluded in all respects as if this Act had not been passed.

(2) An investigation or prosecution or other legal proceedings in respect of conduct which would have constituted one of the common law crimes referred to in section 68 (1)*(b)* which was initiated before the commencement of this Act may be concluded, instituted and continued as if this Act had not been passed.

(3) Despite the repeal or amendment of any provision of any law by this Act, such provision, for purposes of the disposal of any investigation, prosecution or any criminal or legal proceedings contemplated in subsection (1) or (2), remains in force as if such provision had not been repealed or amended.’

[12] The Constitutional Court was dealing with an accused who had been charged with rape alleged to have been committed before the repeal of the common law offence of rape. At para 21 the following was stated:

‘Moreover, in the face of a presumption that common-law rape committed before the commencement of the Act remained a crime capable of prosecution by the State, it is inconceivable that s 69 could convey a contrary intention. The purpose is made manifest throughout the statute, particularly in its long title, its preamble, and its objects. The Act proclaims its purpose “to afford complainants of sexual offences the maximum and least traumatising protection that the law can provide”, and “to introduce measures which seek to enable the relevant organs of State to give full effect to the provisions of this Act”, by “criminalising all forms of sexual abuse or exploitation”.’

[13] It is clear that the Court was addressing circumstances and chronology materially different to the circumstances of the present case. That notwithstanding, the Constitutional Court was sensitive to victims of sexual offences and was intent on ensuring that they were afforded the full protection that the law provides. Significantly, at para 22 the following is stated:

‘In the light of these objects stated within the four corners of the Act itself, it is impossible to interpret the provisions to render any sexual offences incapable of prosecution. In *New Clicks*, this court approved the rule laid down in *Venter v R*, that a court may depart from the clear language of a statute where it –

“would lead to absurdity so glaring that it could never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations as the Court is justified in taking into account.”

In this case, given that the clear language does not lead to absurdity, there was no reason for the High Court to depart from the plain meaning of s 69. Accordingly, s 69 is incapable of disclosing a contrary purpose. The presumption against retrospectivity must therefore prevail.’

[14] Even more importantly, the Court, in conclusion, said the following:

‘[23] Our Constitution sets its face firmly against all violence, and in particular sexual violence against vulnerable children, women and men. Given this, and the Act’s emphasis on dignity, protection against violence against the person, and in particular the protection of women and children, it is inconceivable that the provision could exonerate and immunise from prosecution acts that violated these interests. It follows that the High Court’s declaration of constitutional invalidity cannot be confirmed, and that the accused person could and should have been charged under the common law.’

[15] Returning to the facts of the present case a useful starting point is s 3 of The Act, which reads as follows:

‘Any person (“A”) who unlawfully and intentionally commits an act of sexual penetration with a complainant (“B”), without the consent of B, is guilty of the offence of rape.’

The common law defined rape as follows:

‘Rape consists in unlawful intentional sexual intercourse with a woman without her consent.’

[16] As can be seen, the Act preserved rape as an offence. It made the definition gender neutral and sought to broaden the offence to include acts previously excluded. Instead of being a limiting measure, the legislature intended greater protection to victims of sexual misconduct.

[17] It is true that in the present case the indictment made no reference to s 3 of the Act under which the appellant should rightly have been charged. However, it undoubtedly asserted that the appellant was guilty of the offence of rape and the summary of substantial facts set out the details. Is this deficiency fatal? The short answer, for the reasons that follow, is no.

[18] Section 86 of the Criminal Procedure Act 51 of 1977 (the CPA) provides that, where a charge is defective for the want of any essential averment therein, or where there appears to be any variance between any averment in the charge and the evidence adduced in relation thereto, or where it appears that words or particulars that should have been inserted in the charge have been omitted therefrom, or where any words or particulars that ought to have been omitted have been inserted, or where there is any other error in the charge, a court may, at any time before judgment, if it considers that the making of the relevant amendment will not prejudice the accused, order the charge, whether it discloses an offence or not, to be amended insofar as is necessary.

[19] Section 88 of the CPA also allows latitude. It provides that a defect in a charge may be cured by evidence.[2] In C*ommentary on the Criminal Procedure Act,*[3] the learned authors, with reference to *S v Kuse* 1990 (1) SACR 191 (E) at 196g-h, point out that the

[2] Section 88 provides:
'Where a charge is defective for the want of an averment which is an essential ingredient of the relevant offence, the defect shall, unless brought to the notice of the court before judgment, be cured by evidence at the trial proving the matter which should have been averred.'
[3] E du Toit, F J de Jager, A Paizes, A St. Quintin Skeen, & S van der Merwe, *Commentary on the Criminal Procedure Act* at 14-29.

purpose of s 88 was to abolish the former principle that an appellant was entitled to rely on the fact that a conviction based on a materially defective charge was bad even though this point was not taken at the trial. They state that even when an essential element of the offence is omitted it may automatically be cured by evidence. For present purposes it is clearly not necessary to debate the question whether an amendment was in fact just that, or whether it amounted to a substitution of charges.

[20] It is generally accepted that charge sheets or indictments may be amended on appeal or review. Once again the test is whether the accused could not possibly be prejudiced thereby. When application is made to amend a charge on appeal, the court must be satisfied that the defence would have remained the same if the charge had originally contained the necessary averments.[4]

[21] The question whether a charge sheet outlining a charge of rape without reference to the Act was susceptible to amendment on appeal was addressed in *S v Motha* 2012 (1) SACR 451 (KZP). The High Court permitted an amendment to the charge sheet to include a reference to s 3 of the Act on the basis that there was no resultant prejudice to the accused. In granting the amendment the High Court stated that the test was whether the suggested amended charge differed from the existing one to such an extent that it amounted to another charge, and that an additional consideration is whether there was a possibility of prejudice to the accused. It answered both questions in the negative.

[22] I commend the following part of the reasoning of the court in *Motha,* which applies equally to the present case*:*

'[13] What becomes clear from the relevant parts of the Act is the following. First, it is not the crime of rape which was abolished, it is the common law relating to the crime which was

[4] Commentary on the Criminal Procedure Act, op cit, at 14-24 and the authorities referred to.

repealed. This means that the crime of rape remains a crime, but has a different content. This content, which was previously provided by the common law, is now provided by s 3 of the Act. The content provided by s 3 includes that content previously provided by the common law, namely the penetration of the genital organ of the complainant by the genital organ of the accused. The balance of s 3 includes actions, now construed as rape, which, under the common law, did not constitute rape.'

[23] In the present case the appellant had legal representation and his case was conducted on the basis that he had been fully aware that he faced a charge of rape. He was adamant in his defence that he had not committed the offence.

[24] It was accepted before us that allowing an amendment would not result in any prejudice to the accused and that it was clear that his defence would have remained the same. South Africans would rightly be aghast if the view initially taken by the state, referred to earlier in this judgment, was to prevail. It would elevate form above substance, would have grave consequences for victims of sexual abuse and would bring the administration of justice into disrepute.

[25] I now turn to deal with the conduct of the trial in the court below, having regard to fundamental irregularities tainting the trial, some of which were raised on behalf of the appellant, as well as by the State.

[26] First, the complainant was 14-years old at the time of the trial. She was a child witness with whom care should have been taken at the outset. No thought was given to whether the child understood the nature and import of the oath. It was not determined at the outset whether the child knew what it meant to speak the truth. No thought was given to the desirability or otherwise of receiving the complainant's evidence through an intermediary, nor was any consideration given to any other means to protect the child

witness in a case involving a sexual offence. As to the manner in which these enquiries are to be conducted, see the judgment of the Constitutional Court in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and others* 2009 (2) SACR 130 (CC). The purpose is to ensure that the evidence given is reliable. To admit evidence of a child who does not understand what it means to tell the truth undermines the accused' right to a fair trial. The court below did not even begin to address any of these concerns.

[27] Second and equally serious is the trial judge's early, unjustifiable entry into the arena. The complainant's mother had testified about how the appellant had, on a prior occasion, come to enquire about the purchase of a trailer from her brother, the complainant's uncle. Before the complainant's mother was cross-examined the trial judge said the following:

'So you only knew him when he entered your home that day on the *pretext* that he was coming to try to negotiate for the purchase of a trailer from your brother, Ishmael?'(My emphasis)

The witness answered in the affirmative. This unjustifiable attitude, indicating a predisposition, was compounded by what the court below stated in refusing an application for a discharge at the end of the State's case in terms of s 174 of the CPA. In reasoning that the appellant should be put on his defence the court said the following:

'Therefore, the question is why would a Christian family, like the one who are the victims here, . . . , want to incriminate you if it was not true.'

[28] Third, the trial judge had failed to intervene when he should have. This was compounded by defence counsel not raising any objection. This occurred during a critical juncture in the trial. Before she was cross-examined, the complainant testified that the appellant had instructed her to lie down and that he positioned himself on top of her. This was her evidence in respect of both charges. The high point of her evidence at

that stage was that '[h]e was just shaking on top of me'. When she was asked to clarify what had occurred, she said:

'He lied on top of me.'

She repeated this twice more. The prosecutor then put the following question to her:

'[D]id he insert his penis into you?'

To this she replied in the affirmative. There was no objection by appellant's counsel and there was no intervention by the judge. The prosecutor then asked:

'What happened thereafter?'

And without pause, asked further:

'Did he ejaculate in you?'

To which she answered:

'Then I was surprised to see things which are like saliva.'

A similar line of questioning was followed in respect of both counts of rape.

[29] Caution should have been the watchword. Time and care should have been taken to explore precisely what had occurred and to determine what exactly the complainant was saying the appellant had done to or with her. In this regard see *S v MM* 2012 (2) SACR 18 (SCA) para 9. Far from exploring the complainant's version of what had occurred, the prosecutor suggested what had occurred by a series of leading questions on elements critical to a conviction. The court below should have intervened at a very early stage during this line of questioning. Regrettably, it failed to do so.

[30] Fourth, the court below wrongfully prevented or restricted cross-examination at critical times. When the complainant was being cross-examined and the question arose

whether she had agreed to do as the appellant instructed, the trial judge intervened and said the following:

'Mr Mathobo, for a 13 year girl, a man coming, telling her he is going to perform rituals, when he means raping her, why would she not agree, because he says, "I am going to perform rituals" of their church. We know that the ZCC is the oldest African church in South Africa and it performs these rituals. So there are some other people then who sometimes now abuse those rituals. She only realised what he wanted to do when he unzipped his trousers. That is what she said. Then she said, "my mother will quarrel with me". He says, "No, I have already told your mother". Which means he had already told her mother and her mother had agreed because that was a ritual.'

[31] Disturbingly, immediately thereafter, before the witness ended her testimony and well before all the remaining evidence was tendered, the court below said the following:

'So this is not a case of a person just agreeing because she wants to do it. She has been duped or misled. She had been defrauded to believe that all those things, taking a towel and hat and take your panty, up until that time when the man now started to have sex with her, then she objected, then he said, "No, calm down, I have talked about this with your mother".'

[32] When the complainant was being cross-examined about the presence of her brother in the vicinity and why she did nothing to attract his attention, she stated that she had been afraid. She denied that she had been intimidated. At that stage the trial judge intervened and said the following:

'You must not forget, before anything happened, it is said that the accused told, because the accused came and [her brother] came after the accused has arrived. Accused was now busy with his plan. He even told [her brother], "Go and sit there, I am coming next with the ritual." Do not ignore that.'

Almost immediately thereafter he said:

'He told him and [her brother] went to wait for the ritual. Who would not like to get blessings from God?'

Thereafter the trial judge once again prevented further cross-examination on this aspect.

[33] Leaving aside questions of whether consent by someone so young is in any event nullified and still leaves an accused liable to criminal sanction of some sort, what is clear is that the appellant was denied the right to cross-examine fully. An accused person has the fundamental right in term of s 35(3)*(i)* of the constitution to adduce and challenge evidence. More than five decades ago this court considered whether the disallowance of proper questions sought to be put to a witness by cross-examining counsel is an irregularity. It said the following:

'The first question to be considered was whether there had been an irregularity. The answer could not be in doubt.'[5]

That was said in a civil matter. It is all the more relevant in a criminal prosecution.[6] More particularly since the improper prevention of cross-examination militates against an accused's fundamental rights. See *S v Mgudu* 2008 (1) SACR 71 (N) at 77g-h. The trial in the court below was mismanaged from beginning to end.

[34] The irregularities referred to above, singularly or cumulatively are of such a nature that they have resulted in justice not having been done. Put differently, the appellant did not have a fair trial. In this regard see the *Criminal Procedure Act* supra at 31-28 and 31-29, and the authorities there cited. See also *S v Moodie* 1961 (4) SA 752 (A). The irregularities render the convictions and sentence liable to be set aside. The consequence is that the appellant has already been in prison for more than four years

[5] *Distillers Korporasie (SA) BPK v Kotze* 1956 (1) SA 357 (A) at 361G-H.
[6] See Du Toit *et al* (supra) at 22-21 to 22-22.

without a fair trial to finality. Equally, for the child complainant there has been no closure. In this instance the administration of justice appears to have failed them both.

[35] One remaining aspect requires attention, namely, the manner in which the police investigation and medical examination was conducted. It appears at least on the face of it, from the complainant's evidence, that there was material for DNA testing that was likely to prove conclusive. There was no indication that a testing kit was used or available. No explanation was proffered for the State's failure to conduct such an investigation. In *S v Carolus* 2008 (2) SACR 207 (SCA) para 32 the following was stated:

'There are disturbing features of this case that we are constrained to address. In addition to the flagrant disregard of the rules relating to the identification of suspects, no crime kits were available at the hospital to enable Dr Theron to take a sample for DNA analysis. It is imperative in sexual assault cases, especially those involving children, that DNA tests be conducted. Such tests cannot be performed if crime kits are not provided. The failure to provide such kits will no doubt impact negatively on our criminal justice system. Fortunately in this matter such negative outcome has been avoided by the brave and satisfactory evidence of A as corroborated by other witnesses.'

Every effort should be made by the relevant authorities to ensure proper testing with appropriate sensitivity.

[36] Because of the fundamental irregularities mentioned above, the following order is made:

1. The appeal is upheld.

2. The convictions and the sentences imposed by the High Court are quashed and set aside.

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MS NAVSA

JUDGE OF APPEAL

APPEARANCES:

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| FOR APPELLANT: | M Madima |
| | Instructed by: |
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