THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 550/2017

In the matter between:

SOBAHLE MACINEZELA (aka MACIMELA) **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Macinezela v The State* (550/2017) [2018] ZASCA 32 (26 March 2018)

Coram: Navsa, Majiedt, Dambuza and Mocumie JJA and Hughes AJA

Heard: 15 February 2018

Delivered: 26 March 2018

Summary: Criminal Procedure – before a witness testifies in a criminal trial in appropriate circumstances an inquiry must be held into whether he or she understands the nature and import of the oath or affirmation as provided in ss 162(1) and 163 of the Criminal Procedure Act 51 of 1977 – where a witness is found not to understand the nature and import of the oath or affirmation due to intellectual incapacity an inquiry must be held in terms of s 164 of that Act into whether he or she

understands the difference between truth and falsehood ─ failure of trial court to hold an inquiry into whether a mentally ill witness understands the difference between truth and falsehood renders the evidence of that witness inadmissible.

ORDER

On appeal from: Eastern Cape Local Division, Mthatha (Brooks and Alkema JJ sitting as court of appeal).

The following order is made:

1. The appeal succeeds.
2. The order of the high court is set aside and replaced with the following:

   '*(a)* The appeal is upheld.

   (b) The conviction and sentence are set aside.'

JUDGMENT

Dambuza JA (Navsa, Majiedt and Mocumie JJA and Hughes AJA concurring)

[1] This appeal, against a conviction of rape and a consequent sentence of life imprisonment, is with the leave of this court. The appellant was convicted and sentenced by the Regional Court, Mount Frere, Eastern Cape. He had pleaded not guilty to the charge of rape in terms of s 3 of the Criminal Law (Sexual Offences and related matters) Amendment Act 32 of 2007 (the Act). His appeal against the conviction and sentence was dismissed by the full bench of the Eastern Cape Local Division, Mthatha. The central issue in this appeal is the admissibility of the evidence of the complainant who was alleged to be 'mentally unstable'.[1]

[1] Different expressions, such as 'mentally unstable, not mentally sound and mentally retarded', were used at the trial to describe the complainanat's mental condition.

[2] The complainant and the appellant are relatives. At the time of the incidents which gave rise to the charge against the appellant, he was married to the complaint's maternal aunt. The complainant, who was 28 years old at the time, resided with the appellant and his wife at Cwalinkungu in Mount Frere, Eastern Cape. It was common cause at the trial that on a number of occasions during March 2015, the appellant and complainant had sexual intercourse.

[3] The appellant was charged with having raped the complainant on more than one occasion. His defence was that there was a love relationship between himself and the complainant and that the complainant had consented to sexual intercourse with him. Before the trial commenced, the prosecutor asked that the charge sheet be amended to reflect that the complainant was 'not mentally stable'. The amendment was effected and the trial proceeded.

[4] At the trial the complainant and her maternal uncle testified on behalf of the State. The complainant testified that she and the appellant had sex on a number of occasions and that she had not consented to it. The uncle testified that the complainant was not mentally sound. The appellant was the only defence witness. In convicting the appellant, the magistrate reasoned, amongst other things, that the appellant had been aware that the appellant was 'not mentally sound', and that even if 'she may have consented to sexual intercourse such consent was not recognised by virtue of her mental illness or mental retardness'. The magistrate also remarked that he had also observed that the complainant was 'not completely sane', citing the fact that she appeared not to know her age and that she had read incorrectly the date on which she was alleged to have sent a text message to the appellant.

[5] Although the magistrate made no express credibility findings in relation to those who testified, it is evident from his judgment that he accepted the evidence of both State witnesses, particularly the complainant, and rejected the appellant's evidence that the complainant had consented to sexual intercourse.

[6] On appeal, the high court confirmed the findings of the trial court that the complainant was ‘mentally retarded’ or ‘intellectually challenged’, referring, as the trial court had also done, to her simplistic responses to questions and her inability to tell her date of birth. The high court also found that, given the period of more than a year during which the appellant had stayed with the complainant, he must have been aware of the complainant’s mental condition. It found the complainant’s evidence to be satisfactory in all material respects and was of the view that the complainant would not have made reports of sexual intercourse to her maternal uncle and the appellant’s wife, and would not have testified in court if it had not occured. That court also confirmed the magistrate’s finding that no substantial and compelling circumstances existed to justify a departure from the statutorily prescribed minimum sentence of life imprisonment.

[7] This appeal is founded, broadly, on two grounds. The first is that the trial is tainted by a material irregularity emanating from the manner in which the complainant’s mental condition was introduced into the proceedings. The complaint is that the appellant was never given an opportunity to make submissions on the proposed amendment to the charge sheet to that effect. There was also no ruling by the court on the proposed amendment. Consequently, the trial court’s finding that the charge sheet was duly amended and that the complainant’s ‘mental disability’ was established is wrong. The second ground is that both the trial court and the high court failed to properly consider whether the complainant was in fact ‘mentally disabled’ as envisaged in the Act.

[8] For a proper perspective of the issues that arise in this appeal, a closer account of the proceedings at the start of the trial is required. After the appellant had pleaded to the charge, the prosecutor called the complainant as the first witness for the State. When the complainant took the witness stand, the prosecutor addressed the court as follows:

‘Your Worship, there is something that I have just missed regarding to complainant. When I consulted with her, Your Worship, I found that she is not mentally stable, to a certain extent, Your Worship. May I apply, Your Worship, to also insert same on the charge sheet, Your Worship?’.

[9] The magistrate remarked that the amendment sought would have 'no effect' (presumably on the charge against the appellant and the applicable sentencing regime). He said:

'[T]he facts will still be the same if the basis for invoking Section 51[2] was the fact that it was more than once, you have the same effect. In other words if for instance it was just a question of mental illness, it will still fall under that category, whether it was more than once or not. So it doesn't make much of a difference.'

[10] The magistrate then explained to the appellant that it had been 'placed on record by the State that during consultation it transpired that the complainant was not mentally sound'. Immediately thereafter the complainant was sworn in in the usual course and she proceeded to testify. The trial proceeded to finality and the appellant was found 'guilty as charged'.

[11] As already stated, in his evidence the complainant's uncle described the complainant as 'not mentally sound'. His opinion was based on the fact that the complainant had not passed Sub A at school and was receiving a social grant. On cross examination he explained that:

'When you are looking at her you would think that she is mentally sound, but if you are staying with her you would observe from her conduct that what she is doing is not supposed to be done by somebody her age.'

[12] This being the only evidence that was led before the trial court on the complainant's mental capacity, it is clear that the pertinent antecedent issue of whether the complainant's evidence would be admissible arose. The primary issue that arises is whether the proper procedure was followed when it became apparent at the outset that the complainant might not understand the nature and import of the oath or affirmation as provided for in s164 of the Act. Regrettably, that issue was not identified by the magistrate, the prosecutor and the defence.

[2] This is a reference to the Criminal Law (Sexual Offences and related matters) Amendment Act 32 of 2007.

[13] It is trite that the principal method of adducing evidence in a trial is by oral evidence of a competent witness.[3] Section 192 of the Criminal Procedure Act 51 of 1977 (CPA) provides that:

'Every person not expressly excluded by this Act from giving evidence shall, subject to the provisions of section 206, be competent and compellable to give evidence in criminal proceedings'.[4]

[14] The general rule, therefore, is that everyone is presumed to be a competent and compellable witness. In terms of s 194 of the CPA, persons who suffer from mental disorder and intoxication are not competent to give evidence in certain circumstances.[5] Importantly, that section does not decree a blanket exclusion of the evidence of people suffering from intellectual incapacity. It is only where the intellectual capacity results in an inability to reason properly that the affected person is disqualified from testifying. In *S v Katoo* 2005 (1) SACR 522 (SCA), at para 11 this court set out the parameters for assessing whether an affected person may give evidence. It said:

'The first requirement of the section is that it must appear to the trial court or be proved that the witness suffers from (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'.

[15] In this case there is no indication from the record whether, apart from the allegation by the prosecutor at the start of the trial, the magistrate had himself formed a view in respect of the complainant's mental capacity. The application made by the prosecutor for amendment of the charge sheet on account of the complainant's

---

[3] D T Zeffert and A P Paizes *The South African Law of Evidence* 2 ed (2009) at 805.

[4] Section 206 of the Criminal Procedure Act 51 of 1977 refers to the law relating to express exclusions from the generally accepted competency and compellability provided as it was on 30 May 1960.

[5] Section 194 provides that: 'No person appearing or proved to be afflicted with 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*.' (My Emphasis.)

mental condition clearly called for vigilance in considering the proper approach to her evidence.

[16] A court confronted with the difficulty of a potentially mentally ill witness may opt to seek expert medical evidence on the effect thereof on the witness' cognitive faculties, or it may allow the witness to testify in order to assess his or her competency. Where, as in this case, the court allows the witness to testify, the provisions of ss 162, and 163 of the CPA come into play. Section 162(1)[6] commands that all witnesses must testify under oath. Section 163 provides for administration of affirmation in lieu of oath in certain circumstances. These sections must be read with s 164 which provides that:

'(1) Any person, who is found not to understand the nature and import of the oath or affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth.

(2) If such person wilfully and falsely states anything which, if sworn, would have amounted to the offence of perjury or any statutory offence punishable as perjury, he shall be deemed to have committed that offence, and shall, upon conviction, be liable to such punishment as is by law provided as a punishment for that offence'.

[17] In *S v Matshivha* 2014(1) SACLR (SCA) 29 at paras 10 and 11 this court set out clearly the material determinants for admissibility of evidence under ss 162, 163 and 164. It said that:

'The reading of s162(1) makes it clear that, with the exception of certain categories of witnesses falling under either s163 or s164, it is peremptory for all witnesses in criminal trials to be examined under oath. And the testimony of a witness who has not been placed under oath properly, has not made a proper affirmation or has not been properly admonished to speak the truth as provided for in the Act, lacks the status and character of evidence and is inadmissible.

[6] Section 162 of the CPA provides: 'Subject to the provisions of section 163 and 164, no person shall be examined as a witness in criminal proceedings unless he is under oath, which shall be administered by the presiding judicial officer or, in the case of a superior court, by the presiding judge or the registrar of court, and which shall be in the following form:
"I swear that the evidence I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God".'

Section 164(1) is resorted to when a court is dealing with the admission of evidence of a witness who, from ignorance arising from youth, defective education or other cause, is found not to understand the import of the oath or affirmation. Such a witness, must, instead of being sworn in or affirmed, be admonished by the judicial officer to speak the truth. It is clear from the reading os s164(1) that for it to be triggered there must be a finding that the witness does not understand the nature and import of the oath. The finding must be preceded by the form of enquiry by the judicial officer, to establish whether the witness understands the nature and import of the oath. If the judicial officer should find after such an enquiry that the witness does not possess the required capacity to understand the nature and import of the oath, he or she should establish whether the witness can distinguish between truth and lies, and if the inquiry yields a positive outcome, admonish the witness to speak the truth'. (footnotes omitted)[7]

[18] Although these remarks were made in respect of child witnesses, they are equally applicable in respect of mentally ill witnesses. The inquiry ordered under s 164(1) applies to any person who is found not to understand the nature and import of the oath or affirmation for the reasons stated in that section, including defective education or other cause. It is for that reason that this Court, in *Motsisi v S* [2012] ZASCA 59 (2 April 2012), set aside a conviction of rape. There the trial court had failed to establish that the complainant who was allegedly mentally retarted was able to distinguish between truth and falsehood.

[19] An inquiry into whether a potential witness can distinguish between truth and falsity goes to whether the witness is competent in the first place. On the other hand, a question directed to a witness on whether he or she understands the nature and import of the oath and affirmation goes to whether the witness should be caused to take the oath or affirmation, or should be admonished to speak the truth in terms of s 164(1).[8]

[20] In this case the oath or affirmation could not, in the circumstances, be administered in the ordinary course. At the very least an inquiry in terms of s164

[7] See also other authorities cited in [7] Du Toit *et al Commentary on the Criminal Procedure Act* (Service 58, 2017) at 22-67.
[8] Du *Toit (supra*) at 22-70.

should have been conducted. Clearly, none of these considerations occupied the mind of the magistrate in this matter. As a result, he never conducted an inquiry into whether the complainant could distinguish between truth and falsehood. The failure to hold such inquiry is fatal.

[21] This appeal and many other similar cases illustrate the injustice that can be suffered by both complainants and accused as a result of failure by courts to properly ascertain whether a witness is able to disnguish between truth and falsehood. In *S v Nondzamba* 2013(2) SACR 333 (SCA) this court highlighted the sensitivity of our courts to victims of sexual violence and the courts' determination to ensure that such victims are afforded the full protection of the law.[9] Such pronouncements are undermined when proper care is not taken to ensure that evidence led is admissible.

[22] The following order is therefore issued:

1. The appeal succeeds.
2. The order of the High Court is set aside and replaced with the following:

   '*(a)* The appeal is upheld.

   (b) The conviction and sentence are set aside.'

_____

N Dambuza

Judge of Appeal

[9] At para 13, with reference to the remarks made by the Constitutional Court in *S and Another v Acting Regional Magistrate, Boksburg and Another* 2011(2) SACR 274 (CC) paras 22 and 23.

APPEARANCES

For the Appellant:	E Crouse
Instructed by:	Mthatha Justice Centre
	Legal Aid South Africa, Bloemfontein
For the Respondent:	M F Mzila
Instructed by:	The Director of Public Prosecutions, Mthatha
	The Director of Public Prosecutions, Bloemfontein