Reportable

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION - GRAHAMSTOWN

Case No: CA&R 217/2015

In the matter between:

ANDILE MALI

Appellant

and

THE STATE

Respondent

JUDGMENT

MALUSI J

[1] The appellant was arraigned before the Regional Court, Port Elizabeth on charges of kidnapping and rape with the latter offence falling under the provisions of section 51(1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997. He was convicted as charged. He was sentenced to 5 years imprisonment on the kidnapping charge and life imprisonment on the charge of rape. He now appeals against both his conviction and sentence.

[2] It is necessary to set out the testimony led in the court *a quo* before considering the issues arising in the appeal.

[3] The complainant, an eleven year old child, testified that on 9 July 2012 at about 18h30 she was sent on an errand by her mother to the local spaza shop. Whilst walking in the street in the neighbourhood on her way to the spaza shop she was grabbed from behind by the appellant. He picked her up and gagged her with a cloth. He carried her to his shack at the back of his home which was in the same neighbourhood.

[4] According to the complainant she was placed on a chair with her hands tied behind her back. The appellant undressed himself and removed the cloth from the complainant's mouth. He instructed her to perform fellatio on him and she refused. He removed the complainant's tracksuit pants and her underwear. He untied her hands. The appellant threw her on top of the bed and raped her. Thereafter they both put on their clothes. A man called Mthuthuzeli came into the shack to fetch a chair and left immediately.

[5] The complainant testified that the appellant accompanied her as she left the shack after Mthuthuzeli's exit. On her way home she met her mother who scolded her for the delay. She then pointed at the appellant, who had been walking behind her, reporting to her mother that the appellant kidnapped her. The appellant ran away. Shortly thereafter the complainant, her uncle and her mother traced the appellant to his shack where he was arrested by the police.

[6] The complainant's mother gave evidence on those aspects known to her which corroborated the complainant's version in all material respects. She confirmed the errand, the delay and the appellant following the complainant at the time she met her after the rape. Both the mother and the medical doctor testified that the complainant was visibly distressed when each of them met the complainant after the rape. The medical doctor found injuries to her vagina and anal orifice consistent with recent penetration as recorded in the J88 and explained in his evidence.

[7] The appellant testified that on the day of the incident he fortuitously met the complainant in the street. The complainant requested that they spend some time together in private. They had been having an affair for approximately two to three months by that time. They decamped to his shack where they spent the next two hours chatting. He vehemently denied any kidnap and rape of the complainant.

[8] The regional magistrate in his judgment found the complainant, despite her age, had the demeanour of a mature and sensible person who was well spoken. Though he

exercised caution in evaluating the evidence of the complainant, he accepted it and found that it was corroborated by her mother and the medical doctor. He found the appellant to have been a poor witness. Various aspects of the appellant's evidence had not been put to the complainant in cross-examination due to these aspects being fabricated by the appellant as he testified.

[9] Mr Solani, who appeared on behalf of the appellant, assailed the conviction on the basis that the complainant was not a credible witness. Ms Hendricks, who appeared on behalf of the State, supported the conviction on various grounds.

[10] At the start of the appeal hearing, the court raised the question with both counsel whether the testimony of the complainant was properly admitted in the court *a quo.* If not, what were the consequences of such an irregularity.

[11] Section 162 of the Criminal Procedure Act 51 of 1977 peremptorily requires that all witnesses give evidence under oath subject to exceptions for limited categories of witness. The first exception provided in section 163 is for a witness to take an affirmation because he or she either objects to taking the oath or considers the oath not binding on his or her conscience, or objects thereto on account of religious beliefs. The other exception in section 164 provides for a witness to be admonished to speak the truth after a finding that he or she does not understand the nature and import of the oath or affirmation due to ignorance arising from youth, defective education or other cause.

[12] It is settled law that, though preferred, a court need not always conduct a formal enquiry to determine whether or not a witness understood the nature and import of the oath or affirmation before making the finding required by section 164. The mere youthfulness of a witness may justify such a finding [1] . Despite the clear authority in the aforementioned cases, the Supreme Court of Appeal has recently stated that : [2]

"It is clear from the reading of section 164(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 some form of enquiry by the judicial officer, to establish whether the witness understands the nature and import of the oath".

In my view, with respect the aforementioned statement in *Matshiva* was a manifest oversight as none of the earlier Supreme Court of appeal cases were referred to in the judgment. Furthermore, the statement was made *obiter dictum* whereas the earlier cases considered the issue as part of the *ratio decidendi.* The *doctrine* of judicial precedent which is a component of the rule of law, a founding value in the Constitution, required *Matshiva* to follow the earlier judgments[3] •

[13] It is always necessary to establish whether or not a witness is capable of distinguishing between truth and lies[4] • The importance of truthfulness is covered by an enquiry satisfying the court that the child witness understands that an adverse sanction will generally follow the telling of a lie [5].

[14] The record in *casu* reveals that the regional magistrate asked a number of pertinent questions to establish that the complainant knew the difference between truth and lies. She knew that *'punishment'* follows the telling of a lie.

[15] At the conclusion of the enquiry the following is recorded:

"Okay. Asinathi do you then confirm to this Court that you are going to tell us the truth" - Yes your Worship".

[16] Section 164 of the Act was amended by Section 68 of Act 32 of 2007. Before it was amended it provided that the witness should be *'admonished ... to speak the truth, the whole truth and nothing but the truth'.* The Oxford Dictionary states that admonish means *'reprimand firmly; earnestly urge or warn'.* The complainant in *casu* was asked to *"confirm"* that she will tell the truth. The regional

magistrate did not comply with the peremptory requirement to admonish the child. Consequently, her evidence in chief was neither given under oath nor was she admonished.

Thus, the evidence is inadmissible due to the irregularity [6] •

[17] The complainant was cross-examined five months after tendering her evidence in chief. This was due to the withdrawal of the appellant's attorney, the need for a transcript to be prepared and a new attorney appointed.

[18] Upon resumption before the complainant testified the following exchange between the regional magistrate and the complainant took place:

"Okay. You still remember that on the last occasion you promised us that what you are going to tell the Court, will be the truth. You still recall? - Yes your Worship.

Okay, I am just reminding you then that you are still under oath - okay".

[19] The irregularity persisted as the complainant's evidence was neither given under oath nor was she admonished. The record reveals she had neither *"promised"* to tell the truth nor was an oath administered to her at any stage of the proceedings.

[20] The question to be decided is whether the irregularity resulted in an unfair trial. An irregularity would vitiate a conviction if a failure of justice resulted therefrom. A failure of justice would be established where an accused suffers actual or substantial prejudice[7] • Prejudice in this context means prejudice in the conduct of a party's case. If that kind of prejudice may reasonably result, the proceedings must be set aside [8].

[21] The appellant was legally represented throughout the proceedings in the court *a quo.* It does not appear from the record nor was it suggested during the appeal hearing that his defence was affected in any material way by the irregularity. Thus, there was no prejudice in the conduct of the appellant's case due to the irregularity.

[22] The irregularity is procedural and technical in nature. In my view, the finding by the regional magistrate that the State had proven the guilt of the appellant beyond a reasonable doubt cannot be faulted. I found no merit in the grounds of appeal advanced by the appellant. This view is predicated on the complainant's evidence being admissible.

[23] I hold the firm view that this case is one of those where the irregularity should be corrected in the interests of justice. Neither of the parties is at fault for the error made by the regional magistrate. Nor will either party be prejudiced by correction of the irregularity. The interests of justice should prevail on the facts of this case in light of my view that the guilt of the appellant has been proved save for the irregularity. The correction of the irregularity will not infringe on the appellant's constitutional right to a fair trial nor will it be a miscarriage of justice. It is apposite to recall the words of Streicher JA that "... *it was important to keep in mind that justice did not only require that an innocent person not be incorrectly convicted but also that a person who committed a crime*

was properly punished". ***[9]***

[24] I intend to issue an order as contemplated *S v B:*

"By oorweging van die vraag welke van die bevoegdhede vermeld in art 52(3)(e) deur die Hof *a quo* uitgeoefen moes word, is die getuienis wat deur die klaagster

> gelewer is van wesenlike belang en kan dit nie buite rekening gelaat word nie. Haar getuienis was ontoelaatbaar omrede daar 'n moontlikheid bestaan dat sy die aard en betekenis van die eed of bevestiging verstaan het, in welke geval sy of moes sweer of moes bevestig dat sy die waarheid sou praat. Indien sy dit nie verstaan het nie sou die waarskuwing wat sy ontvang het wel voldoende gewees het om haar getuienis toelaatbaar te maak. Begrip aan die kant van die klaagster van die aard en betekenis van die eed en bevestiging kan beswaarlik die getuienis wat sy afgele het minder betroubaar maak. Die

beswaar teen die toelaatbaarheid van haar getuienis is gevolglik van 'n tegniese aard en is te wyte aan 'n fout wat deur die landdros begaan is. In die lig van die voorgaande moes die Hof *a quo* na my mening oorweging daaraan geskenk het of dit nie 'n geval was waar, sonder om inbreuk te maak op die respondent se reg op 'n billike verhoor, die gebrek reggestel kon word en in belang van geregtigheid reggestel moes word nie. Die regstelling kon moontlik geskied deur die tersydestelling van die skuldigbevinding, die aanhoor van verdere getuienis, of self of deur die streekhof wat die respondent skuldig bevind het. Die getuienis kon bestaan uit 'n bevestiging deur die klaagster van haar vroeere getuienis nadat aan die bepalings van arts 162, 163 en 164 voldoen is, of uit 'n herhaling van sodanige getuienis en kruisondervraging van die klaagster vir saver dit nodig mag wees om te voldoen aan die grondwetlike vereiste van 'n billike verhoor.[10] In die verband is dit belangrik om in gedagte te hou dat geregtigheid nie alleen vereis dat 'n onskuldige person nie verkeerdelik skuldig bevind word nie maar oak dat 'n person wat 'n misdaad gepleeg het behoorlik vir die pleging van die misdaad gestraf word".

[25] In my view it will be a salutary practice for the regional magistrate to record his opinion or finding that the complainant did not understand the oath or affirmation due to youthfulness. It is necessary that the enquiry required by section 164 to determine whether the complainant can distinguish between truth and lies be conducted again. The regional magistrate is urged to consider what is stated in paragraph 16 above when admonishing the complainant. It will not be necessary for the complainant to adduce her evidence *de nova.* It will suffice if the evidence is read to her and she confirms it. Thereafter, the trial must proceed in light of all the evidence already adduced by the State and the defence.

[26] In the result, the following order is issued:

26.1 The conviction and sentence of the appellant are set aside.

26.2 The matter is remitted to the Regional Court:

(a) for the complainant to be properly admonished in accordance with section 164 of the Criminal Procedure Act 51 Of 1977;

(b) for the evidence of the complainant to be read to her and for her to confirm it;

(c) for the further conduct of the trial.

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T MALUSI

Judge of the High Court

Molony AJ: I agree.

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N Molony

Acting Judge of the High Court

Counsel for the appellant, Mr MT Solani instructed by Legal Aid, Grahamstown.

Counsel for the respondent, Adv S Hendricks instructed by Director of Public Prosecution, Grahamstown.

Date Heard: 19 April 2017

Date Delivered: 16 May 2017

[1] *S v B* 2003(1) SA 552 (SCA) at paragraph 15; *DPP, KZN v Mekka* 2003(2) SACR 1 (SCA) at paragraph 7; *5 v Sikhipha* 2006(2) SACR 439 (SCA) at paragraph 13; *5 v Williams* 2010(1) SACR 493 (ECG) at paragraph 6.

[2] *S v Matshiva* 2014(1) SACR 29 (SCA) at paragraph 11.

[3] *Turnbull-Jackson v Hibiscus Coast Municipality and Others* 2014(6) SA 592 (CC) at paragraph 54-56; *Contract Forwarding /Pty} Ltd v Chester/in /Pty) Ltd and Others* 2003(2) SA 253 (SCA) at paragraph 9.

[4] *DPP, Transvaal v Minister of Justice and Constitutional Development and Others* 2009(2) SACR 130 (CC) at paragraph 165.

[5] *Mekka ibid* at paragraph 12; *Ndokwane v State* 2012(1) SACR 380 (KZP) at paragraph 12.

[6] *Matshiva ibid* at paragraph 10.

[7] *Hlantlalala and Others v Dyantyi NO* 1999(2) SACR 541 {SCA) at paragraph 8 and 9; *5 v May* 2005(2) SACR 331 (SCA) at paragraph 7 and 8.

[8] *S v Siyotula* 2003(1) SACR 154 (E) at 159 d. The judgment relates to a failure to swear in an interpreter but the principle applies with equal force in *casu.*

[9] See: S *v B ibid* at page 56 i (headnote).

[10] Dit beteken nie noodwendig dat die klaagster se kruisondervraging weer die hele veld van haar getuienis moet dek nie