delivered ✓
07/2/18

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: A526/16

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE:

(2) OF INTEREST TO OTHER JUDGES:

5/02/18 .....

DATE SIGNATURE

In the matter between:

BONGANI TSHEPO MALAMBU APPELLANT

and

THE STATE RESPONDENT

*Coram:* HUGHES J AND RANGATA AJ

JUDGMENT

RANGATA AJ

**Introduction**

[1] This is an appeal against both conviction and sentence imposed by the Regional Court Magistrate, Mr E Jonker sitting at Piet Retief against the appellant, Mr Bongani Tshepo Malambu on the following charges:
Count 1: Kidnapping;
Count 2: Assault (second complainant, Ms Thembelihle Lushaba);
Count 3: Assault with intent to do grievous bodily harm (first complainant, Ms Selindile Lushaba);
Count 4: Rape falling under Part I, Schedule 2 of Act 105 of 1997 of the Criminal Procedure Act in respect of the first complainant;
Count 5 and 6: Rape, both counts falling under Part I rape charge in respect of the second complainant.

[2] The appellant having been charged and convicted by the Regional Magistrate Court of the charges stated above, was sentenced to three years imprisonment in respect of counts 1, 2 and 3, all taken together for the purpose of sentence. With regard to count 4, the appellant was sentenced to 10 years imprisonment, the trial court having found that there were no compelling and substantial circumstances justifying a lesser sentence. As for counts 5 and 6, the appellant was sentenced to life imprisonment for each count. Similarly the trial court having found that there were no compelling and substantial circumstances justifying a lesser sentence, the sentences in counts 5 and 6 were ordered to run concurrently. The court further ordered that the sentences were to run concurrently with the sentence of life imprisonment. Furthermore, the appellant was declared unfit to possess a firearm as contemplated in section 103 (1) of Act 60 of 2000. The appellant was legally represented throughout the trial.

[3] In a nutshell, the evidence by the state was that the two complainants who are sharing the same surname were fetched at their home by the appellant on 8 December 2014, under the pretence that the appellant's father wanted to talk to them as regards allegations made against one Thokozane, the appellant's brother. On their way the appellant changed course and took them to his place of residence.

Upon having entered the house he locked the door and chased away his brother who was with them. There he ordered the complainants to undress and when they refused he attempted to assault the second complainant with an assegai. In the process, the first complainant was injured, as she tried to block the appellant from stabbing the second complainant.

[4] The appellant put his finger into the first complainant's vagina and when he discovered that she was menstruating, he hit her with an open hand. Thereafter, he went for the second complainant and raped her. The complainants could not leave for home as the appellant had locked his house. The following morning, on 9 December 2014, under guard the appellant ordered the complainants to go and fetch water. The complainants were unable to leave as he had in his possession the assegai at all times, threatening them with it if they raised an alarm.

[5] The evening of 9 December 2014, and in the early hours of 10 December 2014, the appellant continued to have sexual intercourse with the second complainant without her consent on more than one occasion. The second complainant's was rescued from the appellant by the arrival of three boys in the course of the morning of the 10 December 2014. He refused to allow the first complainant to leave together with the second complainant. Later that morning the first complainant's sister arrived and subsequently the first complainant was also rescued from the appellant's place.

[6] The appellant in his evidence did not deny that he had sexual intercourse with the second complainant as described, but contends that it was with her consent. This is with reference to count 5. With regard to count 6 it was his evidence that he does not know why the second complainant stated that he had sexual intercourse with her more than once. As regard to count 4 his version was that the first complainant was his girlfriend and that he had sexual intercourse with her consent on a Monday and that on Friday when he wanted to have sexual intercourse with her she indicated that she was menstruating. With regard to the kidnapping and the two assault charges, his evidence was a bare denial.

[7] This court is confronted with the following issues:

(a) Firstly, whether the alleged sexual intercourse with both the complainants took place with their consent;

(b) Secondly, whether the state has proven without a reasonable doubt that the kidnapping and the two assault charges indeed took place;

(c) Lastly, whether the usage of an intermediary with regards to the evidence of the second complainant was as contemplated in section 170A of the Criminal Procedure Act 51 of 1977 ( the Act) and if not, whether the entire proceedings have been vitiated by the non-compliance of the aforesaid provision.

[8] The relevant portions of section 170A of the Act are set out below:

"(1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological or mental age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court, may subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.

(2)*(a)*...

(3)...

(4)*(a)*...

(5)*(a)* No oath , affirmation or admonition which has been administered through an intermediary in terms of section 165 of the Act, shall be invalid and no evidence which has been presented through an intermediary shall be inadmissible solely on account of the fact that such intermediary was not competent to be appointed as an intermediary in terms of a regulation referred to in subsection (4)(a) , at the time when such oath , affirmation or admonition was administered or such evidence was presented.

*(b)* If in any proceedings it appears to a court that an oath, affirmation or admonition was administered or that evidence has been presented through intermediary who was appointed in good faith, but at the time of such appointment , was not qualified to be appointed as an intermediary in terms of a regulation referred to in subsection (4)(a), the court must make a finding as to the validity of that oath , affirmation or admonition or the admissibility of that evidence, as the case may be, with due regard to :

(i) the reason why the intermediary concerned was not qualified to be appointed as an intermediary , and the likelihood that the reason concerned will affect the reliability of the evidence so presented adversely;

(ii) the mental stress or suffering which the witness , in respect of whom that the intermediary was appointed, will be exposed to if that evidence is to be presented anew, whether by the witness in person or through another intermediary; and

(iii) the likelihood that real and substantial justice will be impaired if that evidence is admitted".

[9] Starting with the latter issue, it is important to make mention that the second complainant was 16 years at the commission of the offences and was just over 17 years old when she testified. At the request of the prosecution she testified in camera through an intermediary. Upon the enquiry by the court on the usage of an intermediary, the defence indicated that it had no objection. The court proceeded to admonish the second complainant to tell the truth after there was a clear misunderstanding between the court and the second complainant as to whether she knows what it meant to take an oath.

[10] Counsel for the appellant submitted that there is no evidence on record to show that the intermediary satisfied the requirements provided for in section 170A, in particular her qualification, her full names and occupation were not placed on record. Hence, the appellant sought to vitiate the entire proceedings as regards the testimony of the second complainant.

[11] In my view, the second complainant's evidence could not be impaired as the usage of an intermediary was done with the consent of the defence. Whilst, the second complainant in the course of questioning by the court indicated that she did not know what it means to take an oath, this cannot be seen as suggesting that she did not know the difference between truth and lie. Furthermore, the evidence of the second complainant was not standalone evidence, as it was materially corroborated in all respects by the first complaint. It is also so that she made a report of the incident at the first opportune time.

[12] In the case of **S v Booi and Another 2005 (1) SACR 599 (B)**, the court held that "whenever the oath or affirmation was actually administered to an intermediary and an intermediary was actually appointed, the names, qualifications and occupation of each intermediary used had to be captured somewhere in the record of the proceedings, to signify a proper administration of the oath or affirmation and the appointment of intermediaries. Had this procedure been followed the particulars of the intermediary and the substance of the oath would have been recorded in the court a quo".

[13] In the case of **S v. Motaung 2007 (1) SACR 476 (SE)**, the accused had been convicted of the rape of a 13 year old girl and the matter was remitted to the High

Court for sentencing. The preliminary question before the court was whether the proceedings had been fatally flawed because an intermediary, a duly appointed social worker, had not been sworn in. It was held by the court that although the magistrate's failure to swear in the intermediary was an irregularity, it did not mean that the proceedings were not in accordance with justice. There was no evidence that the proceedings had caused any prejudice for the accused.

[14] The record of the proceedings does not reflect any information on the intermediary as provided in section 170A. In my view, the function of the intermediary is to minimise the mental stress upon the witness by employing her special expertise whilst giving evidence.

[15] The fact that the appellant through his legal representative at the trial stated explicitly that he had no objection to the appointment of the intermediary, I find no grounds to hold that the accused was prejudiced by the use of an intermediary to the extent that he was not been afforded a fair trial. This view is further supported by the decision in **S v Sin [2012] JOL 29507 (GNP)** wherein, the court also had to decide the following, "whether the use of an intermediary amounted to an irregularity and resulted in the evidence of the complainant being inadmissible and if it did, whether the balance of evidence could sustain any of the convictions". The court found that even though the intermediary used was not qualified, he successfully and competently bridged the communication gap between the minor witnesses (including the complainant) and the officials of the court. Further, there was no irregularity or breach in the proceedings which could be so serious as to vitiate the entire proceedings.

[16] I am therefore of the view that the irregularity in the appointing and use of the intermediary without qualifying her as is required, prior to her assisting the complainant in this instance, does not render the evidence inadmissible. There is no evidence to suggest that failure to appoint the intermediary in accordance with section 170A has rendered the proceedings invalid and that the irregularity prejudiced the appellant. In my view, it cannot be that the mere fact that the intermediary was not appointed as provided for in the Act rendered that evidence through him inadmissible, solely on the basis that the intermediary was not qualified

as such. This failure will not in itself render the witness's evidence inadmissible and does not result in a failure of justice. I am therefore satisfied that the appellant had a fair trial, thus the *point in limine* must fail.

[17] As regards appeal against conviction, the two complainants corroborated each other in all material respects. Starting with the first complainant, there is nothing on record to suggest that she was not a credible and reliable witness. The evidence of the first complainant that the appellant inserted his finger into her vagina and that he got upset when he discovered that she was menstruating was corroborated by the second complainant.

[18] The appellant in his testimony confirmed that he inserted his finger into the vagina of the first complainant. He further testified that he had consensual sexual intercourse with the first complainant on the Monday and when he requested her to have sexual intercourse on Friday, the first complainant told him that she was menstruating. I am satisfied that the rape with reference to the first complainant took place as explained by both complainants.

[19] The appellant sort to suggest that the first complainant was with him at his place at her own will and that she was his girlfriend. This evidence can safely be rejected as false, seen in the light of corroborative evidence by the second complainant. The evidence of the complainants were also corroborated by the appellant's brother who testified that the appellant changed route as to where they were supposed to go and on arrival at the appellant's place, he chased him away. Furthermore, the evidence by the sister of the first complainant, who rescued the first complainant from the appellant, corroborated the evidence of both complainants. Therefore, the kidnapping charge in respect of both complainants was proven beyond reasonable doubt and the trial court was correct in convicting the appellant on count 1.

[20] With regards to count 3, which is assault with intent to do grievous bodily harm on the first complainant, her evidence was also corroborated by the second complainant, with regard to the circumstances under which she was stabbed with an assegai. It was when the first complainant tried to block the appellant from stabbing

the second complainant and despite her intension to do so, the appellant continued to stab the first complainant with the assegai. I am therefore satisfied that the appellant was correctly convicted with assault with intention to do bodily grievous harm on count 3.

[21] With regard to count 4, the appellant was convicted of a Part III rape. The appellant in his testimony admitted to inserting his finger into the first complainant's vagina. I am therefore satisfied that the appellant was correctly convicted with rape by the regional court. On count 2, the appellant was convicted of assaulting the second complainant. The second complainant testified that the appellant had ordered her and the first complaint to undress the first night when they arrived at his place. When the second complainant refused to undress, the appellant slapped her twice on her face. The first complainant corroborated the evidence of the second complainant. The appellant pleaded a bare denial to count 2. I am satisfied that the regional court correctly convicted the appellant with assault on count 2.

[22] I now turn to deal with counts 5 and 6. Though there are three rape charges only two were afforded life imprisonment, that being counts 5 and 6. There is no question that the state succeeded to prove the commission of the charges of rape against the appellant. According to the second complainant and also as corroborated by the first complainant, on the first night that the complainants were at the appellant's place, the second complainant was raped once. On the second night she was raped more than once which constitutes repeated rape as averred. I am satisfied that the appellant was correctly convicted in terms of Part I Schedule 2 rape in respect of counts 5 and 6.

[23] In addressing the issue of sentence I am mindful of the dicta in **S v Rabie 1975 (4) SA 855 (A) at 866 A-C** where Corbett JA states as follows:

"A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society, which contribute to criminality. It is in

the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case".

[24] In the case of **Director of Public Prosecutions v Mngoma (404/08) [2009] ZASCA 170, page 5 at para [11]**, Bosielo JA stated that:

"The powers of an appellate court to interfere with a sentence imposed by a lower court are circumscribed. This is consonant with the principle that the determination of an appropriate sentence in a criminal trial resides pre-eminently within the discretion of the trial court. As to when an appellate court may interfere with the sentence imposed by the trial court, Marais JA enunciated the test as follows in *S v Malgas 2001 (1) SACR 469 (SCA) at 478d-g:*

"A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an Appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate".'

[25] In the circumstances, in 2003 the appellant was previously convicted of assault and was sentenced to six months. I am mindful of the factors surrounding the offences that he was charged with as contained in counts 1, 2, 3, 4, 5 and 6 and convicted. In mitigation at the time of sentencing, it was submitted that the appellant was 23 years of age when he committed the offences and he has two minor children, aged 11 and 5 years. His highest level of education is standard 9 and prior to his arrest he was employed, supporting his two minor children.

[26] As stated in the case of **Ndlovu v S [2017] ZACC 19** at paragraph **[53]**, the court stated that, "*Mr Ndlovu' s crime was one of the most harrowing and malignant crime confronting South Africa today-rape. Rape is perhaps the most horrific and dehumanising violation that a person can live through and is a crime that not only violates the mind and body of a complainant, but also one that vexes the soul. This*

*crime is an inescapable and seemingly ever-present reality and scourge on the nation and the collective conscience of the people of South Africa".*

[27] There is no justification for this court to interfere with the conviction and the sentence of the regional court on counts 1, 2, 3, 4, 5 and 6. Having considered the personal circumstances of the appellant, and the seriousness of the offence committed, I confirm that there was no misdirection on the part of the trial court. I therefore confirm the sentence imposed by the Regional Magistrate on all counts.

[28] In the circumstances I make the following order:

(a) The appeal against conviction and sentence is dismissed.

B Rangata
Acting Judge of the High Court Gauteng, Pretoria

pp. Judge Hughes

W. Hughes
Judge of the High Court Gauteng, Pretoria