

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION – MAHIKENG**

APPEAL CASE NO: CA 34/2016

In the matter between:

SAMUEL OMPIE MATOKONYANE

Appellant

And

THE STATE

Respondent

CRIMINAL APPEAL

Quorum: DJAJE DJP & SCHOLTZ AJ

Heard: **28 NOVEMBER 2023**

Delivered: The date for the hand-down is deemed to be on **16
FEBRUARY 2024**

ORDER

The following order is made:

1. The appeal against conviction is upheld.
2. The conviction and sentence are set aside.
3. The immediate release of the appellant is ordered.

APPEAL JUDGMENT

DJAJE DJP

- [1] This is an appeal against conviction and sentence where the appellant was arraigned before the Regional Court sitting in Taung. The appellant was charged with two counts of rape. After conviction he was sentenced to life imprisonment. He now exercises his automatic right of appeal against conviction and sentence. This appeal was decided on paper as requested by the parties.
- [2] The main ground of appeal raised by the appellant was that there was no compliance with the provisions of section 170A(4)(a) of the Criminal Procedure Act 51 of 1977 in that it was not clear from the record in which category of person mentioned in the Act does the intermediary appointed fall. It was further submitted that there was no evidence of the qualifications, experience and whether the intermediary would convey the true purport of the evidence to the witness and the court. The appellant's case is that failure to comply with section 170A is a misdirection and the conviction should be set aside.

[3] In contention, the respondent submitted that the intermediary was properly sworn in and there was compliance with section 170A of the Act.

[4] According to the charge sheet the complainant in both counts was fifteen years old at the time the alleged sexual intercourse happened. At the time she testified in court she was sixteen years old. She was unable to testify in open court and the state made an application for her to testify through an intermediary. The court ruled that she could testify through an intermediary in terms of section 170A of the Criminal Procedure Act. The following appears on the record in relation to the appointment of the intermediary:

“COURT: Mr Manamela, do you confirm that you have been appointed, officially appointed as an intermediary in terms of section 170A(4) and you are in fulltime employment of the state?”

MR MANAMELA: I confirm, my worship.

COURT: Thank you. Mr Manamela, do you swear that in your duties as intermediary in case RC 57/13, the State versus Samuel Ompie Matokonyane, you will do your duties or perform your duty as intermediary to the best of your ability and in instances where you would have to act as an interpreter you also do that to the best of your ability? If so raise your right hand and say so help me God.

MR MANAMELA: So help me God.

MR MANAMELA DULY SWORN IN AS INTERMEDIARY

COURT: Thank you, you have been appointed as intermediary in the proceedings before the court, case RC 57/13.”

[5] Section 170A (1) and (2)(a) of the Criminal Procedure Act states that:

“170A. Evidence through intermediaries

(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) *No examination, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary under subsection (1), except examination by the court, shall take place in any manner other than through that intermediary.”*

[6] Subsection (4) states that the Minister shall from time to time by notice in the Gazette determine the persons or the category of person who may be appointed as intermediaries.

[7] In **S v Booii 2005 (1) SACR 599 (BD)** it was held that:

“The court has to fulfil the requirements for the appointment of an intermediary as laid down by section 170A of the Criminal Procedure Act 51 of 1977. The record had to reflect that an application was made, the name of the intermediary, the profession or qualification of the intermediary, the period served in such class or category as established by the Minister, the fact that the oath or affirmation was administered before testimony was led. Further the record should reflect that the intermediary undertook to convey correctly to the court information communicated to her by the witness before evidence is led.”

- [8] Section 170A of the Criminal Procedure Act is clear that the court may appoint a competent person as an intermediary. This imposes a duty on the court to satisfy itself that the person to be appointed as an intermediary is competent and will convey the general purport of any question to the relevant witness. The record of proceedings in this matter only indicates the surname of the intermediary but does not reflect the qualifications and experience as set out in **Booi supra**. Further, the record does not reflect that the intermediary undertook to convey to the witness the general purport of any questions put to her.
- [9] The Regional Magistrate just confirmed with the intermediary that he was appointed fulltime by the state as an intermediary. In taking the oath the intermediary was informed to do his duties as an intermediary to the best of his ability. Section 170A clearly places a duty on the court to appoint a competent person to act as an intermediary. This can only mean that the court must be satisfied that the person to be appointed has the qualifications and experience as stated in the Gazette by the Minister.
- [10] The failure by the Regional Magistrate in this matter to establish whether the person to be appointed is indeed qualified to be appointed as an intermediary is an irregularity and not in compliance with section 170A of the Criminal Procedure Act. This renders the proceedings a *nullity* and the evidence of the complainant is not properly before court and cannot be relied on.
- [11] The other evidence in this matter was that of the complainant's mother who received a report from the complainants and did not

witness anything. The doctor was not called to testify, and the state only handed in the completed medical certificate without reading the contents thereof into the record. What appears on the medical report is “sexual assault”. As such there can be no reliance on the medical evidence. Apart from the evidence of the complainant, there is no other evidence that could be relied on to prove that the appellant indeed has sexual intercourse with the complainant.

[12] In view of the above, there was indeed a misdirection by the trial court that warrants interference by this court and the convictions on the two counts of rape, stands to be set aside. As a result of the conviction being set aside, it follows automatically that the sentence should also be set aside and not be dealt with.

Order

[13] Consequently, the following order is made:

1. The appeal against conviction is upheld.
2. The conviction and sentence are set aside.
3. The immediate release of the appellant is ordered.

J T DJAJE
DEPUTY JUDGE PRESIDENT
NORTH WEST DIVISION
MAHIKENG

I AGREE

H SCHOLTZ

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

DATE OF HEARING : 28 NOVEMBER 2023

DATE OF JUDGMENT : 16 FEBRUARY 2024

COUNSEL FOR THE APPELLANT : MR THULE

COUNSEL FOR THE RESPONDENT : ADV MZAMO