

SOUTH AFRICA / JUDGMENT

Dipheko v S (CA34/19) [2020] ZANWHC 87 (12 November 2020)

[2020] ZANWHC 87

COURT

North West High Court, Mafikeng

BEFORE

M Z Makoti, R D Hendricks

CASE / FILE NUMBER

CA34/19

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION - MAHIKENG

CASE NO: CA34/19

In

the matter between:

MOGOMOTSANE
KENNETH DIPHEKO
Appellant
and
THE
STATE
Respondent
CRIMINAL APPEAL
HENDRICKS DJP &
MAKOTI AJ

JUDGMENT

MAKOTI AJ

Introduction

- [1] On 19 February 2019 the Appellant was convicted of rape of a minor child of nine (9) years. He was sentenced to serve life imprisonment by Regional Magistrate Phako sitting at the periodical court in Madikwe. He appeals against his conviction, having been granted leave to do so by the court below.
- [2] The appeal is predicated on the provisions of section 170A(1) of the Criminal Procedure Act[1] ('the CPA'), it being contended that the procedures that were followed by the court below in reaching its verdict did not comply with the said legislative provisions. The Appellant prays for the setting aside of his conviction and his immediate release from prison.

Background facts

- [3] The evidence in this matter can be succinctly summarised as follows:

3.1 The complainant and the Appellant live in neighbouring houses at Tlokweng village, and that they know each other;

3.2 The Appellant admitted that on the fateful day of 29 November 2017 he was at his parental house;

3.3 The Appellant denied having seen the complainant on that day and that he ever had sexual intercourse with her.

- [4] When the trial started on 06 August 2018, the prosecutor applied to the court to use intermediary services to assist the minor child when testifying. In making the application, the prosecutor advanced the following reasons:

"... the State has an application in terms of Section 170A of the Criminal Procedure Act that the State applies that it is going to lead

evidence of a minor that he be assisted by an Intermediary Officer giving evidence inside intermediary room which is adjacent to the court, by the CCTV Your Worship, the reason being that Your Worship the State is afraid that the minor might be subjected to undue mental stress as during consultation Your Worship the State had difficulty in consultation, to such an extent that the preparatory officer was

engaged, as it was not easy for the child interaction during interview Your Worship, as the Court pleases." (Emphasis added)

- [5] The defence did not oppose the application. The court accepted that the minor will be subjected to mental stress if she testified in open court and granted the application. Having granted the application,

the court administered an oath to OMOLEMO JAPHTA MAFOKO ('Mafoko'), a qualified Social Worker, who is employed by the Department of Justice and Constitutional Development as a court interpreter, to perform intermediary services.

[6] The record shows the following interaction between the court and Mafoko, inter alia:

"COURT: Are you raised fit social worker?"

MAFOKO: Correct Your Worship."

COURT: Raised up in terms of Social Worker Act 110 of 1997? You are raised up in terms of that Section?

MAFOKO: Correct Your Worship.

COURT: Are you still registered?

MAFOKO: Correct Your Worship I registered ..."

[7] The court was satisfied that Mafoko falls under the listed category of persons to be used in intermediary proceedings, hence he was sworn to perform the service. Around 13H00 on 06 August 2018 the State

advised the court that it will not be leading the minor's evidence on that day as it had been observed that the child was

tired.

[8] The next day, on 07 August 2018, the evidence of the minor was led. Before proceedings could begin the State reminded the court that an intermediary was going to be used in line with the application that

had been granted the previous day. Evidence of the minor was then taken with the help of Mafoko as intermediary.

[9] The Appellant impugns the procedures followed, contending that they were irregular because the court did not, on 07 August 2018, swear in Mafoko as intermediary. Relying on the judgement of the Full Court of this division in *Sello Lazarus Ramontja v The State* ('Ramontja'),[2] the Appellant prays that his conviction should be set aside and for his immediate release from prison.

Consideration of the facts and legal principles

[10] It is generally accepted that the adversarial nature of the South African criminal procedure, with its usual aggressive cross-examination of a witness by legal practitioners, tends to expose child witnesses to undue mental stress or suffering when having to testify in open court, more so in the presence of an accused. This gave rise to the enactment of s 170A(1) of the CPA, with the intent being to protect child witnesses from mental strain when they have to testify in court. The provision reads thus:

“(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.” (Emphasis added)

[11] Section 170A(1) empowers a court to, if it appears that the proceedings would expose any witness under the biological or mental age of eighteen years to undue mental stress or suffering if he or she testify at such hearing, appoint a competent person as an intermediary in order for the witness to give evidence through that intermediary.

[12] The fundamental purpose of section 170A of the Criminal Procedure Act, as was espoused in *Kerkhoff v Minister of Justice and Constitutional Development*,^[3] is to determine whether an intermediary should be appointed in order to prevent a child from being exposed to undue mental stress or suffering whilst having to testify. The court held that an enquiry in terms of section 170A has a narrow focus, to determine whether it is in the best interests of the child that an intermediary be appointed.

[13] The requirements for the use of intermediary service were articulated in *S v Booie*^[4] in which 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. The appointment of an intermediary does not constitute a once off appointment to be used in every other case where such services are required. Every application has to be considered afresh” (Emphasis added)

[14] The Full Court in *Ramontja* found that the failure by the Regional Magistrate to appoint and swear in the intermediary amounted to an irregularity, which rendered

the proceedings a nullity. The result was that the Full Court upheld the appeal. When upholding the appeal, the Full Court found inter alia as follows:^[5]

“The record of proceedings in this matter does not indicate the name of the intermediary and the qualifications as set out in Booï, 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. The record refers to a person appointed by the court but there is no record of such an appointment. The duty on the court is to appoint an intermediary for each witness.”

[15] The facts in this case are distinguishable from those in Ramontja for the following reasons:

15.1 the court a quo granted an order for the use of an intermediary after satisfying itself that the service was warranted to assist a child witness to testify;

15.2 the intermediary, Mafoko, is a Social Worker who has been raised up in terms of Act 110 of 1997;

15.3 the court a quo heard evidence that Mafoko had been registered and fell within the category of competent persons since 2016; and

15.4 the record shows that Mafoko took an oath in accordance with which he undertook to correctly convey to the court information communicated to her by the witness.

[16] The distinction of facts in this appeal and those in Ramontja, supra, is concrete. Under the circumstances, reliance by the Appellant on the judgement of the Full Court in Ramontja is misplaced. The appeal must fail and the conviction must be confirmed.

Order

[16] The following order is made:

- (a) The appeal is dismissed.
- (b) The conviction is confirmed.

M Z MAKOTI

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

I agree

R.D. HENDRICKS

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

APPEARANCES

DATE OF HEARING

: 06 NOVEMBER 2020

JUDGMENT

DATE

: 12 NOVEMBER 2020

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[1] Act No. 51 of 1977.

[2] Ramontja v S 2020 (1) SACR 556 (NWM) (13 February 2020).

[3] Kerkhoff v Minister of Justice and Constitutional Development 2011 2 SACR 109 (GP).

[4] 2005

(1) SACR 599 (BD).

[5] Ramontja, at par [9].

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