

SOUTH AFRICA / JUDGMENT

Mabalane v S (CA41/19) [2023]

ZANWHC 97 (15 June 2023)

[2023] ZANWHC 97**COURT**

North West High Court, Mafikeng

BEFORE

Petersen, Reddy

CASE / FILE NUMBER

CA41/19

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****NORTH****WEST DIVISION – MAHIKENG****CASE****NO: CA41/19****Reportable:**NO
Circulate
to Judges: NO
Circulate
to Magistrates: NO
Circulate
to Regional Magistrates: NO
In**the matter between:**KENNETH
MABALANE
Appellant
and
THE
STATE
Respondent**CORAM:**PETERSEN J & REDDY AJ
DATE
OF HEARING
:
10 February 2023
DATE

OF JUDGMENT :

15 June 2023

JUDGMENT

REDDY AJ

Introduction

- [1] A child victim in a sexual offence who testifies without the assistance of an intermediary faces a high risk of exposure to undue mental stress or suffering. The object of s170A of the Criminal Procedure Act 51 of 1977 as amended ("the CPA") read with s170A(3) of the CPA is designed precisely to impede the risk of exposure. It achieves this by making provision for a child under the biological age of eighteen (18) years to testify through an intermediary.
- [2] The essence of this appeal brings into sharp focus the procedural nuances that are peremptory in order to provide protection for a child victim when testifying in criminal proceedings to give effect to the spirit of s170A of the CPA in respect of both counts. In respect of count 2, the reliability of the evidence of identification also engages the attention of this Court.
- [3] The appellant was charged before the Regional Court Ga-Rankuwa with two counts, a contravention of s55(a) read with Chapter 2, 3, 4 and ss 55, 56, 57, 58, 59, 60, 61 and 71(2), (2) and 6 of the Sexual Offences and Related Matters Act 32 of 2007 ("SORMA") - attempt to commit a sexual offence (count 1); and the offence of contravening s3 read with ss 1, 19(a), (b)/or (c), 57, 58, 59, 60 and 61 of SORMA — rape (count 2). At trial, the appellant, duly represented pleaded not guilty to both counts.
- [4] On 27 March 2017, the appellant was convicted in the words of the court a quo on count 1 of "attempted rape" and in respect of count 2 of "having sexual intercourse with a minor child more than once."
- [5] On 4 May 2017 the appellant was sentenced as follows:

Count 1: Six years imprisonment.

Count 2: Life imprisonment.

- [6] Additional ancillary orders were made which included the appellant being declared unfit to possess a firearm in terms of s103 of the Firearms Control Act 60 of 2000; and that the appellant's name be entered in the Sexual Offences Register.
- [7] The appellant filed a Notice of Appeal on 15 May 2017 in which he assailed the conviction on both counts and the respective sentences imposed. By virtue of the life imprisonment imposed in respect of count 2, the appellant has an automatic right of appeal to this Court in terms of s309(1) of the Criminal Procedure Act 51 of 1977 (the CPA), read with SIO and s43(2) of the Judicial Matters Amendment Act 42 of 2013. Once the Regional Court imposed the

sentence of life imprisonment, the appellant was entitled to an automatic right of appeal to the Full Bench of this Division. Before this Court, the appellant appears to have changed tact. He no longer assails the sentences imposed but challenges only the convictions on alleged misdirections on the part of the court a quo. The grounds of appeal against conviction are set out later in the judgment.

Background

facts

Count 1

[8] On 16 October 2010, PM, three (3) years old at the time was waiting at a corner whilst her siblings proceeded to a store. Whilst waiting, the appellant grabbed PM and took her to a nearby field where he undressed her T-shirt only. Direct evidence confirms that the appellant was interrupted in the process of attempting to commit a sexual offence on PM when she screamed and was rescued by an unknown female. As the appellant fled and before his escape could gain any momentum he was fortuitously knocked down by a Toyota Hi-Lux motor vehicle, which consequently resulted in his immediate arrest. On 15 December 2010, some two months after his arrest, the appellant was released on bail of R600-00. The reliability of this evidence on count 1 has not been assailed. The challenge on appeal is premised on a purely technical ground.

Count 2

[9] On 12 August 2011 between 15h00pm and 16h00pm, SK a seven (7) old girl was walking in the company of her younger sibling proceeding to what was referred to as Bios's place. The appellant approached and instructed SK's sibling to return home. SK was taken to a desolated area in the vicinity of a bridge. A red cloth was inserted in SK's mouth. The appellant proceeded to make a cellular phone call and on termination of the call, he ordered SK to undress. When SK refused,

the appellant took it upon himself to undress SK of her pants, cycling shorts and underwear. SK was ordered to lie on the ground in a supine position. The appellant then penetrated SK vaginally with his penis.

[10] In the process of dressing after the sexual violation (rape), SK tried to make good her escape. Unfortunately, the appellant grabbed hold of her. The appellant then made his way with SK to a hall. At this hall, the appellant again vaginally penetrated SK.

- [11] Upon leaving the hall after sexually violating (raping) SK for a second time, the appellant left SK in a street in Makahung, where she happened to come across her mother. A report was immediately made by SK to her mother about her ordeal. SK did not know her assailant but testified to only seeing his face. She gave no description to her mother when she reported her ordeal to her. The matter was thereupon reported to the South African Police Service. SK's mother was not called to testify as a first report.
- [12] The appellant was pointed out by SK some days later and arrested after she claims to have seen him and reported same to her mother who told her the said person's name was Kenny. As to the circumstances surrounding the arrest of the appellant, a police officer, Benjamin Wolve testified that he was on duty at Garankuwa Police Station when SK's mother arrived and informed him that she was a complainant in a rape case where the child who was raped is seven years old. SK's mother went on to inform him that she saw the suspect in some bushes near George Mokhari Hospital where he was cooking. When asked how she knew the suspect, she informed Mr Wolve that she had known him for a long time as they are both residents of Makau. Mr Wolve and a colleague, detective Molekwa, accompanied SK's mother where she pointed out the appellant as one Kenny.
- [13] The only evidence of identification of the appellant by SK following the incident is when she was invited into the courtroom from the intermediary room. The appellant was made to sit between his legal representative and another prosecutor in court and pointed out by SK. Under cross examination when asked what exactly about the appellant's face SK saw, she offered no response. When asked if she had an answer, SK responded that she had no answer. No clear and specific evidence of identification was given by SK as to why she believed the appellant to be the perpetrator.
- [14] A medical examination followed three days later, on 15 August 2011. The findings of the medical examination was introduced into evidence by a medical practitioner other than the examining medical practitioner. The core findings on the general examination and gynaecological examination remained undisturbed and unchallenged. On general examination, SK presented with a head abrasion on the left zygomatic region. The gynaecological examination revealed erythematous bruising of the labia majora, labia minora, posterior forchette and fossa navicularis. The hymen was normal in configuration but swollen and bruised. Notwithstanding the taking of DNA specimens which were handed to the police officer accompanying SK to the medical practitioner, no DNA evidence was adduced. The court a quo was acutely aware of the lack of DNA evidence as appears from its

judgment.

The grounds of appeal on conviction

- [15] Peculiarly in the heads of argument, counsel for the appellant sets out the averments which form the substratum on which the convictions are assailed in a document incorrectly titled "Ad Sentence". It reads as follows:

"B. AD SENTENCE

2. It will be argued on behalf of the Applicant that the trial court erred not properly appointing the intermediary in terms of section of the Criminal Procedure Act which provides that the court may appoint a competent person as an intermediary in order to allow a witness the opportunity to testify through the intermediary.
 3. It will further be argued on behalf of the Appellant that this specific day in respect of count two the intermediary was not properly sworn in neither was her experience and qualifications placed on record.
 4. The Honourable court further erred in making any finding about the fact whether the intermediary was competent to be appointed as an intermediary in terms of section 5(b) in order for evidence given through her/him to be admissible.
 5. Section 170,4 (5) AND (6) does not help the situation either because there is nothing on record which shows the date of the witness in terms Government Gazette No. 15024, The Minister determines classes of persons who are competent to be appointed as intermediaries.
 6. Accordingly it is submitted that failure by the Honourable court to properly sworn in the intermediary rendered the whole trial unfair or evidence so testified through the intermediary inadmissible and as such Appeal stands to succeed and conviction set aside."
- [16] For the purposes of this appeal the appellant has crystallised the salient issue which was for determination by relying on a misdirection by the Regional Court Magistrate which rendered the trial unfair. The fulcrum of which is whether the court a quo, followed the trite procedure that finds application in the implementation of the provisions of section 170A of the CPA. I may hasten to add, that a further issue in this appeal turns on the reliability of the evidence of identification by SK.

Condonation

- [17] The appellant seeks condonation for the late prosecution of the appeal in this Court. This Court is seized with a judicial discretion, which must be exercised on a proper consideration of the facts being fully alive to the attainment of fairness to both sides See: Civil Procedure in the Superior Court, Harms at B27.6.
- [18] In *Melane v Saniam Insurance co Ltd* 1962 (4) SA 531 (A) at 532 C - F it was held that:

"Among the facts usually relevant, are the degree of lateness, the explanation therefore, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects success there will be no point in granting condonation. What is needed is an objective conspectus of all the facts. "

[19] In *Grootboom v National Prosecuting Authority*, 2014 (2) SA CC expanded the principles applicable when dealing with condonation applications and referred to with approval in *Steenkamp and Others v Edcon Limited*, 2019 (7) BCLR CC stated the following:

"[36] Granting condonation must be in the interests of justice. This court in *Grootboom* set out the factors that must be considered in determining whether or not it is in the interests of justice to grant condonation:

[22] ...[T]he standard for considering an application for condonation is the interests of justice. However, the concept "interests of justice" is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both *Brummer* and *Van Wyk* emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are

relevant.

[23] It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.

[51] The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success'. "

[20] In light of the conclusion reached in this appeal, the prospects of success militate in favour of condoning the lateness of the prosecution of the appeal. Accordingly, the application for condonation is granted.

Discretion of the Appeal Court

[21] It is settled law that a court of appeal will not likely interfere with credibility and factual findings of the trial court. In the absence of an irregularity or misdirection, the court of appeal is bound by such findings, unless it is convinced that the findings are clearly incorrect or unless an examination of the record reveals that those findings are patently wrong. (*S v Francis* 1991 (1) SACR 198 (A) at 204c-e, *S v Mkohle* 1990 (1) SACR (A) at 100e).

[22] In *S v Hadebe* 1997 (2) SACR 641 (SCA) at 645 e-f Marais JA stated as follows.

"Before considering these submissions it would be as well to recall yet again that there are well established principles governing the hearing of the appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial Court its findings are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. The reasons why this deference is shown by appellant Court to factual findings of the trial court are well known that restatement is unnecessary."

[23] In *S v Monyane and Others* 2008 (1) SACR 543 at paragraph [15] Ponnann JA stated:

"This court's powers to interfere on appeal with the findings of fact of a trial court are limited... In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and it will only be disregarded if the recorded evidence shows them to be clearly wrong. '

[24] In essence, the appellant does not assail the factual findings of the court a quo. As stated above the central or salient issue in this appeal is the application of s170A of the CPA where same is invoked.

[25] Notwithstanding the approach of the appellant, a holistic approach to the appeal before this Court engages a trilogy of grounds, all of which result in the same conclusion. I propose to deal with each individually.

The identification of the appellant on count two

[26] The facts that formed the substratum of SK's evidence on the identification of the appellant is set out at paragraphs [12] and

[13] *supra*. These facts must be considered against the law on identification. There is a specific object for the consideration of the combined effect of the facts and the law. This is peremptory in finding whether the state has proved the guilt of the appellant beyond a reasonable doubt. See: *S v Ntsele* 1998 (2) SACR 178 (SCA), *Shackell v S* 2001 (4) ALL SA 279 (SCA). The honesty of SK is beyond question. It is the reliability of her evidence that must be carefully evaluated to determine if the appellant was correctly identified. This is further exacerbated by the absence of other evidence (of which is included forensic evidence in the form of DNA) to corroborate or provide an objective assurance for the subjective nature of SK's identification.

[27] In the seminal authority on identification, Holmes JA held as follows in *S v Mthetwa* 1972 (3) SA 766 (A) at 768A-C:

"Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of

identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities.”

See also: *R v Masemang* 1950 (2) SA 488 (AD); *R v Dladla and Others* 1962 (1) SA 307 (AD) at page 310C; *S v Mehlahe*, 1963 (2) SA 29 (AD).

- [28] A conspectus of the evidence on the identification of the appellant based exclusively on SK's account does not meet the guidelines as set out in *Mthetwa*. It is unreliable for a myriad of reasons. SK did not know the appellant prior to her ordeal, she could not give a detailed description of her assailant, save for a reference to his face, and no identification parade was held following the arrest of the appellant.
- [29] The identification of the appellant during the subsistence of a trial is commonly known as a dock identification (which is not inadmissible). It is trite that such identification must be treated by a court with extreme caution. Generally, a dock identification carries little weight, unless it is shown to be sourced in independent preceding identification. (See *S v Tandwa and Others* 2008 (1) SACR 613 (SCA), paragraphs 129-131.) There is a danger that a lay person on seeing an accused in the dock, 'feels reassured that he is correct in his identification, even though this may not have been the position were they not there': and that 'ftlo any member of the public the fact that an accused is standing in the dock must naturally be suggestive of him being one of the parties involved in the crime, and no witness can be blamed for making such an assumption. even though it is incorrect'. *S v Maradu* 1994 (2) SACR 410 413j-414a. No meaningful evidential weight can be attached to this dock identification. Whilst the informal identification parade in the present matter was not technically a dock identification, the principles applicable to dock identifications remains apposite. No weight can be attached thereto in the absence of a prior, properly constituted identification parade. The appeal should succeed on the reliability of the evidence of identification.
- [30] I, however, for completeness, consider the second ground of appeal, which is the primary ground on which the appellant assails the conviction on count 2.

The proceedings underpinning the invoking of s170A application in the court a quo

- [31] To gain a sense of the process that led to the finding of the applicability of the provisions of s170A of the CPA, and the ultimate decision of the Regional Court Magistrate that these provisions warranted implementation, it is prudent to have regard to the transcribed court record. On 4 October 2016, the appellant, duly represented pleaded not guilty to both counts. Further thereto, the appellant denied the allegations on both counts. From a perusal of the Annexures to the charge sheet, it appeared *prima facie* that both of the victims were females of tender years, aged three (3) and seven years (7) years old respectively.

[32] Following the plea process the following is recorded (the names of the victims have been removed and replaced with acronyms employed supra to protect their identities):

"PROSECUTOR: Your worship before I proceed, I am having a report, two reports in respect of both complaints, that is PM and SK in respect of which a report was made on their ability to do something and the recommendation after consultation with Ms Maguma it was recommended that evidence of both complainants be heard through close circuit television after they have made through consultation.

The reports have been availed both to Mr Komane. (Inaudible) like to hand them in as exhibits for PK EXHIBIT A, for SK as complainant 2 as EXHIBIT B.

COURT: Defence do you have a...

MR KOMANE: As it please the court your worship, I do not have any objection.

COURT: All right. The exhibits are handed in as already indicated by the prosecutor. Let us go on.

PROSECUTOR: Thank you. In view of the recommendation by the probation officer in relation to both complaint, I would like to make an a lication in terms of Section 170A of the Criminal Procedure Act 51 1977 that both victims in this case that is PM and SK be testify through the assistance of the intermedia who is in-house here, who is a fulltime employee of the Department. I am havinq the necessary affidavit that may assist the court to appoint the intermedia for both cases Ms Salome Nqobeni, can vou call her.

COURT: Your names in full?

MS NGOBENI: Salome Moshidi Ngobeni.

COURT: Are you against taking the prescribed oath?

MS NGOBENI: No your worship.

COURT: Do you declare you that to the best of your knowledge and belief that you... or can you go through this statement, this affidavit?

MS NGOBENI: Must I read out?

COURT: I would have expected you to complete your names and qualifications there. So madam in short you consider yourself to be a person falling under the class or category of persons who are competent to be appointed as intermediaries, is it so?

MS NGOBENI: yes you worship.

COURT: And you are not against taking a prescribed oath?

MS NGOBENI: Yes your worship.

COURT: If you consider it binding on your conscience.. (intervenes)

COURT...you may just say that so help me God.

MS NGOBENI: so help me God.

SALOME MOSHIDI NGOBENI.: duly sworn statement

COURT: Right in as far as the application is concerned, but in as far as the application is concerned, I see I am finished with the form also for the interpreter; I am not going to use that. Now can you further while under oath indicate to the court that you will to be best of your ability then the general purport of what the witness is saying to the court, in other words you will be able to indicate to the court the general purport of what the witness is saying to you?

COURT: If that is the case, then what language is that the witnesses are going to speak?

PROSECUTOR: Tswana.

MS NGOBENI: Tswana.

COURT: So you will be able to relate to the court from Tswana to whatever language you are called upon, if that is the case may you just say so help me God.

MS NGOBENI DULY SWORN IN AS INTERMEDIARY.

[33] The complete oaths of the intermediary as presented in the court a quo is set out below:

"APPLICATION FOR APPOINTMENT OF AN INTERMEDIARY I.T.O SECTION 170A OF CPA AFFIDAVIT IN TERMS OF SECTION 213 (1) - (6) OF ACT 51 OF-1977 (AS AMENDED)

I, Salome Moshibidu Ngobeni hereby declare that to the best of my knowledge and belief do make this statement knowing that if it were to be tendered in evidence, I would be liable to prosecution if I wilfully state in it anything I know to be false or what I do not believe to be true.

I hereby state that I obtained the following qualification (s) as an educator from SOUTH AFRICA COLLEGE OF TEACHERS EDUCATION (institution) in the year 1999

I have 5 years' experience as an educator and have not at any stage been dismissed as an educator due to misconduct.

I have further obtained the following qualification(s) CERTIFICATE IN COUNSELLING THE YOUNG AND ADOLESCENT from UNISA (Institution) in the year 2006 and have been in the employment of the Department of Justice and Correctional Services since 2003.

I therefore consider myself to be a person who falls under a class or category of persons who are competent to be appointed as intermediaries.

I know and understand the contents of the above declaration,

I do not have any objection taking the prescribed oath,

I consider the prescribed oath to be binding on my conscience.

Deponent's signature

I certify that the deponent has acknowledged that he/she knows and understands the contents of the declaration and has taken the

prescribed oath before me.

Thus done on this the..... day of

2016 at Ga-Rankuwa.

.....

Signature of Commissioner of Oaths

Full Names

.....

Business Address

OATH- INTERMEDIARY

I, SALOME MOSHIBIDU NGOBENI hereby solemnly swear/ affirm that I will interpret to the best of my ability, conveying the general purport of the questions to the witness unless the court - directs otherwise, in the case:

State v

So Help Me God.”

The historical development of the use of intermediaries

- [34] Children regrettably are regularly drawn into the criminal landscape in our country. Notwithstanding constitutional protection provided by the Interim and Final Constitutions, national and international legal instruments children and women still remain the most vulnerable groups in our society.
- [35] In our criminal justice system children as dramatis personae can be identified in three (3) primary groups; victims, witnesses and child offenders. Whilst I am alive to instances where the child victim is a single witness to an allegation, I separate the groups to identify the role that children may play to hone in with specific reference to a criminal trial where the victim is a child witness.
- [36] The evidence of children is in most instances, significant where a child is a victim of a sexual offence. The child victims evidence is central to the attainment of justice within the prism of a fair trial. This evidence in a criminal trial may be the primary evidence on which the state case is founded to rebut the constitutional presumption of innocence which an offender is clothed with. Previously, the cold environment of our adversarial system did little to bring about comfort to a child witness. Children were expected to provide gory and intimate details of a humiliating experience, thereby enduring secondary trauma through the entire process to attain justice.

- [37] In 1991, the Criminal Law Amendment Act 135 of 1991 amended the Criminal Procedure Act 51 of 1977 by introducing s170A which allows children to testify through intermediaries. s170A commenced on 30 July 1993. It was subsequently amended by the Sexual Offences Amendment Act which inserted the words "biological or mental" before the words "age of eighteen years. The CPA and the Sexual Offences Amendment Act must therefore be read together in order to ascertain the object of s170A of the CPA, whilst not losing sight of s28 of the Constitution of the Republic of South Africa, Act 108 of 1996, which provides that "A child's best interests are of paramount importance in every matter concerning the child."
- [38] It must be emphasised that the present appeal impacts s170A of the CPA before recent far-reaching amendments by the legislature. On the implementation of s170A of the CPA, the apex court in *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others* (CCT 36/08) [2009] ZACC 8; 2009 (4) SA 222 (CC) dealt with the constitutionality of this impugned provision.

"110. What the subsection contemplates is that a child will be assessed prior to testifying in court in order to determine whether the services of an intermediary should be used. If the assessment reveals that the services of an intermediary are needed, then the state must arrange for an intermediary to be present in court when the accused goes on trial. At the commencement of the trial, the state must then apply under the subsection for the appointment of an intermediary. Indeed, this is the procedure that was followed in the *Mokoena* matter. The child was assessed by a social worker prior to testifying in court. Following that assessment, the social worker recommended that an intermediary should be appointed. On the date of the trial, and before the child testified, the state applied for the appointment of an intermediary.

111. This is the procedure that should ordinarily be followed in all matters involving child complainants in sexual offence cases. If this procedure were to be followed as a matter of practice, this would ensure that the objectives of both the subsection and section 28(2) are achieved. This should become a standard pre-occupation of all criminal courts dealing with child complainants in sexual offence cases. To the extent that current practice may fall short in this regard, proper regard for constitutional rights of children means that in every criminal trial in which a child complainant in a sexual offence case is to testify, the court must enquire into the need for the appointment of an intermediary where the state does not raise the issue. If necessary, the presiding judicial officer must initiate an enquiry into the desirability of appointing an intermediary.
112. What must be stressed here are two points already made: first, that the provisions of sections 170A (1) and 170,4 (3) were enacted to protect the child from the stress and trauma that may arise from testifying in court. The second is that section 28(2) is an injunction to courts to apply the principle that the best interests of the child are of paramount importance in all matters concerning the child. It is incumbent upon all those who are responsible for the administration of justice to apply the principles of our criminal law and criminal procedure so as to protect child complainants in sexual offence cases from secondary trauma that may arise from testifying in court. Judicial officers are therefore obliged to

apply the best interests principle by considering how the child's rights and interests are, or will be, affected by allowing the child complainant in a sexual offence case to testify without the aid of the intermediary. It follows from this, therefore, that where the prosecutor does not raise the matter, the judicial officer must, of his or her own accord, raise the need for an intermediary to assist the child complainant in a sexual offence case in giving his or her testimony. (Footnotes omitted)³

[39] Juxtaposing, the direction provided by the Constitutional Court, in *Director of Public Prosecutions, Transvaal*, the initial phases leading up to the application by the prosecution corroborated by the relevant reports uncontestably led to a finding by the Regional Court Magistrate that adheres with s170A(1) of the CPA. See: *K v Regional Court Magistrate NO and Others* 1996 (1) SACR 434 (EC), *S v Stefaans* 1999 (1) SACR 182 (C) at 187i- 188i. Correctly so, the appellant does not assail the findings relating to s170A (1) of the CPA.

[40] A factual finding made by the Regional Court Magistrate within the purview of s170A (1) of the CPA, had far-reaching consequences. It resulted in the Regional Court Magistrate having to follow the peremptory procedure, as set out in s170(4) of the CPA, which to the Regional Court's Magistrate credit was duly followed albeit only in respect of the child's evidence on count 1. Regrettably, the same cannot be said about count 2.

[41] s170(4) in the main empowers the Minister by notice in the Government Gazette to determine the persons or the category or class of persons who are competent to be appointed as an intermediary. Miss Ngobeni, the appointed intermediary met the benchmark to be appointed as such and the process that led to her appointment cannot be said to be tainted. There was no misdirection by the Regional Magistrate in her appointment. Miss Ngobeni was accordingly duly appointed in respect of count 1 governed by due process. Resultantly, the appeal stands to be dismissed in respect of count 1.

[42] I now turn to deal with the process followed before SK was called to testify regarding count 2. The following exchange occurred between the Regional Court Magistrate and the prosecution and defence:

"Prosecutor: May the witness in the meantime be authorised only SK Your worship, may I quickly go and tell the intermediary to bring SK

Court: Okay

Prosecutor: Thank you, worship

Prosecutor: Thank you. That is SK The application is already made and it was granted. She is assisted by our in house intermediary who has already been sworn in previously, Ms Salman Gobe.

Court: Defence do you have anything to put on record to say:

Mr Komani: No your worship.

Court: So you may proceed. Let me get the names in full..

[43] It is apparent from the record that two different intermediaries' were intended to be used, which I surmise is the correct application of the law. There is no underscoring that the appointment of each intermediary must be considered anew.

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

"The court has to fulfil the requirements for the appointment of an intermedia as laid down b section 170.4 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 cateqorv 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"

[45] Ex facie the record, the Regional Court Magistrate appears to have jettisoned the peremptory process he followed as set out in *Director of Public Prosecutions Transvaal and Boo* supra, in the appointment of the intermediary to assist the child victim in count 2. The Regional Court Magistrate resorted to a procedural

course which conflicts with trite legal principles. What stands out from the record is that two different intermediaries were used,

namely Salome Moshibidu Nqobeni and Salman Gobe. This is accepted as the correct legal protocol. Boo dispels, a once size fits all approach in the appointment of an intermediary, advocating, that each application for an intermediary be considered afresh. The prosecution spoke to of a previous oath that had been administered. The latter does not form part of the appeal record. It is inconceivable, the second intermediary would be suitable if she had not even consulted with the SK to determine if there had been a common language between them or impediment to their communication which may hamstrung SK from expressing the account of her ordeal.

[46] This constitutes a material misdirection. The evidence of SK, the child victim on the second count is accordingly inadmissible. On this basis, the appeal should succeed. However, I believe I have demonstrated that the conviction on count 2 in any event cannot be sustained on the evidence of SK or any other evidence aliunde on which it could be found that the State has surpassed the threshold of proving the guilt of the appellant beyond a reasonable doubt on count 2.

[47] I consider finally, the third ground, namely the application of the provisions of s 164 of the CPA. Whilst I make no definitive finding in this regard, given my foregoing findings, the following appears from the record preceding the evidence of SK:

"COURT: Defence do you have anything to put on record to say?

MR KOMANI: No your worship.

COURT: So you may proceed. Let me get the names in full?

WITNESS: SK.

COURT: There is no sound. Names?

INTERMEDIARY: Hallo? Hallo?

COURT: Yes, your names?

COURT: Your age?

WITNESS: 12 years old.

COURT: When were you born?

WITNESS: (Not interpreted).

COURT: You said the 27th June?

WITNESS: (Not interpreted).

COURT: And 27 June and the year?

WITNESS: (No response).

COURT: What grade are you doing?

WITNESS: Grade 5.

COURT: Who is your class teacher?

WITNESS: Ms Lefifi.

COURT: Ms Lefifi?

WITNESS: Yes.

COURT: So if someone come and say your class teacher is not Ms Lefifi will that person be telling the truth or not?

WITNESS: The person is telling lies.

COURT: And at school what happens if a person tells lies?

WITNESS: The person is taken to the principal.

COURT: And what would the principal do with such a person?

WITNESS: Sometimes they will chase away your worship, or they will be punished

COURT: So if a person is telling a lie that kind of a person who do be punished in one way or another at school?

WITNESS: Correct.

COURT: Now what do you think here in court what do you think the court will do with a person who is not telling the truth?

WITNESS: They will arrest that person.

COURT: And after arresting that person what would happen to him or her?

WITNESS: They then assault him.

COURT: Do you attend church?

COURT: Which church are you attending?

WITNESS: Apostle Church.

COURT: What do they say will happen to a person who is not telling the truth?

WITNESS: God won't assault him, punish him.

COURT: Have you heard about a person committing a sin?

WITNESS: Yes.

COURT: Where does such a person go?

WITNESS: He is taken to the police.

COURT: You haven't heard about God the Satan or duiwel?

WITNESS: I heard. your worship.

COURT: You were never told about a devil with a big fork and who is putting people on fire if they are living?

WITNESS: I once heard your worship, about it.

COURT: Who are the people who go there normally?

WITNESS: (No response)

COURT: Do you regard telling a lie as a sin or not? WITNESS: (No response).

COURT: Do you have Sunday school at your church?

WITNESS: No, your worship.

COURT: so you ... (inaudible) about going to hell or going to heaven, the role that is played by Jesus you have never heard about that?

WITNESS: No, worship.

COURT: Right. An comment from the state and defence can she take an oath?

PROSECUTOR: Your worship she is not a witness that can take an oath. She should rather be ... (inaudible) to tell the truth.

MR KOMANE: (Inaudible).

COURT: Yes, you know the inquiry is too pronq in the first leq of the in ui was to determine whether she know the distinction between a lie and the truth, she performed well but the problem is whether she understands the legal that accompanies an oath. The importance of taking an oath which it doesn't look like it is a case. (Inaudible) undertake to tell us the truth and nothing else but the truth?

WITNESS: Yes

COURT: Right you must proceed telling us the truth throughout. (inaudible) punishment for that.

(NOTE: A VERY DISTURBING NOISE ON THE RECORDING DUE TO CELL PHONES NOT SWITCHED OFF CONTINUOUSLY MAKES IT IMPOSSIBLE TO HEAR THE PARTIES.)

WITNESS: YES

SK: confirms (through interpreter)

PROSECUTOR: Before I could proceed to leading this witness I would like to make an amendment to the charge sheet that relates to the date. The date in the charge

[48] In *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & others* 2009 (4) SA 222 (CC) paras 165–167, the Constitutional Court said:

"The practice followed in courts is for the judicial officer to question the child in order to determine whether the child understands what it means to speak the truth. As pointed out above, some of these questions are very theoretical and seek to determine the child's understanding of the abstract concepts of truth and falsehood. The questioning may at times be very confusing and even terrifying for a child. The result is that the judicial officer may be left with the impression that the child does not understand what it means to speak the truth and then disqualify the child from giving evidence. Yet with skilful questioning that child maybe able to convey in his or her own child language to the residing officer that he or she understands what it means to speak the truth. What the section requires is not the knowledge of abstract concepts of truth and falsehood. What the proviso requires is that the child will speak the truth. As the High Court observed, the child may not know the intellectual concepts of truth or falsehood but will understand what it means to be required to relate what happened and nothing else.

...

When a child in the court's words cannot convey the appreciation of the abstract concepts of truth and falsehood to the court the solution does not lie in allowing eve child to testify in court. The solution lies in the proper questioning of children in particular, younger children. The purpose of questioning a child is not to get the child to demonstrate knowledge of the abstract concepts of truth and falsehood. The purpose is to determine whether the child understands what it means to speak the truth. "

[49] Consequently, the appeal in respect of count 2 stands to be upheld with the conviction and sentence being set aside.

Order

[50] In the premise, the following order is made:

- (i) The appeal against the conviction and sentence on count 1 is dismissed.
- (ii) The appeal against the conviction and sentence on count 2 succeeds.
- (iii) The conviction and sentence on count 2 is accordingly set aside.
- (iv) The order in terms of s103 (1) of the Firearms Control 60 of 2000 is confirmed.
- (v) The order that the appellant's name be entered in the Sexual Offences Register is confirmed.

A REDDY

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

I agree.

AH PETERSEN

JUDGE OF THE HIGH COURT

APPEARANCES

For the Appellant Mr O. Madiba Instructed by Legal Aid South Africa For the Respondent : Adv. A Mzamo Instructed by : DPP, Mmabatho Date of Hearing 02 February 2023 Date of Judgment 15 June 2023

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