

SOUTH AFRICA / JUDGMENT

Mosia v S (CA 03/2021) [2023] ZANWHC 138 (18 August 2023)

[2023] ZANWHC 138

COURT

North West High Court, Mafikeng

BEFORE

Hendricks, Petersen

CASE / FILE NUMBER

CA 03/2021

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IN

THE NORTH WEST HIGH COURT, MAFIKENG

CASE

NO: CA 03/2021

Reportable:

YES

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to Judges:

YES

/ NO

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to Magistrates:

YES / NO

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to Regional Magistrates: YES / NO

In

the matter between: MOSIA
JOSEPH
Appellant
and
THE
STATE
Respondent

CORAM: HENDRICKS JP et PETERSEN ADJP
DATE
OF HEARING
: 04
AUGUST 2023
DATE
OF JUDGMENT
: 18
AUGUST 2023
FOR
THE APPELLANT
: MR.
THUWE
FOR
THE RESPONDENT
: ADV.
NTSALA

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be 10h00AM on 18 August 2023.

ORDER

Resultantly, the following order is made:

- (i) The appeal against conviction is dismissed.
- (ii) The conviction and sentence are confirmed.

HENDRICKS JP

Introduction

- [1] This is an appeal against the conviction of the appellant on 08 December 2020 in the Regional Court, Mahikeng on a charge of rape committed between 26 and 27 July 2019. The conviction is assailed on the basis that the Regional Magistrate erred in allowing the State Prosecutor to read into the record the assessment report, when an application was made that the complainant, who was a child witness, testify through the assistance of an

intermediary in terms of the provisions of Section 170 A of the Criminal Procedure Act 51 of 1977, as amended (“CPA”). This is the only ground of appeal addressed in the heads of argument filed on behalf of the appellant. It was agreed between the parties that the matter be disposed of without hearing oral arguments, in terms of Section 19

(a) of the Superior Court Act 10 of 2013.

[2] A brief synopsis of the facts found proven by the court a quo, is that the appellant and the mother of the complainant were cohabitating. On the day of the incident, when the mother returned

from work, she and the appellant indulged in alcoholic beverages. At some stage, the appellant offered the complainant, who was eleven

(11) years of age, wine to drink. This led to a disagreement between the appellant and the complainant’s mother. The complainant’s mother became intoxicated and went to bed. When she woke up, she found the appellant in the complainant’s bed. The complainant’s panty was removed and the appellant’s penis was between the legs of the complainant. Medical evidence presented corroborates the evidence of the complainant that the appellant choked and sexually violated her. The version of the appellant who denied that he choked and raped the complainant, and who created the impression that the complainant was sexually violated by someone else, was rejected by the Regional Magistrate.

[3] As alluded to earlier, the only ground of appeal proffered is that a material misdirection was committed by the Regional Magistrate, who allowed the assessment report to be read into the record. An exposé of the transcribed record in this regard is of cardinal importance. It reads thus:

“Prosecutor: The last application Your Worship is in terms of section 170 A the state requested that this child be assisted by the appointment of an intermediary, hence Your Worship there is a likelihood that she might suffer from undue mental stress, and in support of the state’s application the state is in possession of a document which is a social worker’s report supporting there, it is a forensic worker assessment report supporting the state’s applications Your Worship and I beg leave from the court to read same in to record.

Court: Do you have objection to this application?

Ms. Matshogo: I have no objection your worship

Court: You do not, okay and, are you aware of the social worker’s report?

Ms. Matshogo: Yes I am aware.

Court: Do you have any objection to the handing in of the report?

Ms. Matshogo: No your worship.

Court: None, you may proceed sir.”

- [4] The contention by the appellant is that his constitutional fair trial rights was violated, in that he was deprived of an opportunity to test and challenge the credibility of such evidence through cross-examination. This submission by counsel deserves scrutiny. Section 170 A of the CPA, prior to amendment in part by Act 12 of 2021, with effect from 5 August 2022, provided:

“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 psychological, mental or emotional 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.

[Sub-s

- (1) as it read prior to amendment by s 8(a) of Act 12 of 2021 (wef 5 August 2022).]
- (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, may take place in any manner other than through that intermediary.

[Para (a) as it read prior to being substituted by s 8(b) of Act 12 of 2021 (wef 5 August 2022).]

- (b) The said intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness.
- (3) If a court appoints an intermediary under subsection (1), the court may direct that the relevant witness shall give his or her evidence at any place—
- (a) which is informally arranged to set that witness at ease;
- (b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and
- (c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his or her testimony.
- (4) (a) The Minister may by notice in the Gazette determine the persons or the category or class of persons who are competent to be appointed as intermediaries.
- (b) An intermediary who is not in the full-time employment of the State shall be paid such travelling and subsistence and other allowances in respect of the services rendered by him or her as the Minister, with the concurrence of the Minister of Finance, may determine.

- (5) (a) No oath, affirmation or admonition which has been administered through an intermediary in terms of section 165 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.
- (c) If in any proceedings it appears to a court that an oath, affirmation or admonition was administered or that evidence has been presented through an 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 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.
- (6) (a) Subsection (5) does not prevent the prosecution from presenting anew any evidence which was presented through an intermediary referred to in that subsection.
- (b) The provisions of subsection (5) shall also be applicable in respect of all cases where an intermediary referred to in that subsection has been appointed, and in respect of which, at the time of the commencement of that subsection—
- (i) the trial court; or
- (ii) the court considering an appeal or review, has not delivered judgment.
- (7) (a) The court must provide reasons for refusing any application or request by the public prosecutor for the appointment of an intermediary in respect of child complainants below the age of 14 years, immediately upon refusal and such reasons shall be entered into the record of the proceedings.

[Sub-s

- (7) prior to being substituted by s 8(c) of Act 12 of 2021 (wef 5 August 2022).]
- (8) An intermediary referred to in subsection (1) shall be summoned to appear in court on a specified date and at a specified place and time to act as an intermediary.

[Sub-s

- (8) added by s 68 of Act 32 of 2007 (wef 16 December 2007).]
- (9) If, at the commencement of or at any stage before the completion of the proceedings concerned, an intermediary appointed by the court—
- (a) is for any reason absent;
 - (b) becomes unable to act as an intermediary in the opinion of the court; or
 - (c) dies, the court may, in the interests of justice and after due consideration of the arguments put forward by the accused person and the prosecutor—
 - (i) postpone the proceedings in order to obtain the intermediary's presence;
 - (ii) summons the intermediary to appear before the court to advance reasons for being absent;
 - (iii) direct that the appointment of the intermediary be revoked and appoint another intermediary; or
 - (iv) direct that the appointment of the intermediary be revoked and that the proceedings continue in the absence of an intermediary.

[Sub-s

- (9) added by s 68 of Act 32 of 2007 (wef 16 December 2007).]
- (10) The court shall immediately give reasons for any direction or order referred to in subsection (9)(iv), which reasons shall be entered into the record of the proceedings.

[Sub-s

- (10) added by s 68 of Act 32 of 2007 (wef 16 December 2007).]
- (12) (a) Subject to subsection (13), before a person is appointed to perform the functions of an intermediary—
- (i) in a magistrate's court for any district or for any regional division, the magistrate presiding over the proceedings; or
 - (ii) in a Superior Court, the judicial officer presiding over the proceedings, must enquire into the competence of the person to be appointed as an intermediary.
- (b) The enquiry contemplated in paragraph (a) must include, but is not limited to, the person's—
- (i) fitness as a person to be an intermediary;
 - (ii) experience which has a bearing on the role and functions of an intermediary;
 - (iii) qualifications;
 - (iv) knowledge which has a bearing on the role and functions of an intermediary;
 - (v) language and communication proficiency; and

(vi) ability to interact with a witness under the biological or mental age of eighteen years or a witness who suffers from a physical, psychological, mental or emotional condition, or a witness who is an older person as defined in section 1 of the Older Persons Act, 2006.

[S 170A inserted by s 3 of Act 135 of 1991 (wef 30 July 1993) and substituted by s 1 of Act 17 of 2001 (wef 20 July 2001).]

See: Director of Public Prosecutions, Transvaal vs Minister of Justice and Constitutional Development and Others 2009 (2) SACR 130 (CC).

[5] In S vs Mabuza 2018 (2) SACR 54 (GP) at [23] – [26] the following is stated:

“[23] Ms Maseko had prepared competency reports in respect of AC, LK, CM and one JM (who does not feature in this matter). No report was compiled in respect of JC. The learned magistrate determined that competency report was not a prerequisite to making a ruling that JC's evidence may be presented through an intermediary. It was observed that nowhere in s 170A of the Criminal Procedure Act 51 of 1977 is there a provision that evidence of a social worker must be led to determine whether a child qualifies to give his or her evidence

through an intermediary. All that s 170A(1) provides is:

‘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.’

[24] The magistrate concluded:

‘To my mind this observation that the witness would be exposed to undue mental stress or suffering can be done without any evidence being presented by merely taking the ages and the nature of the charges into account.’

[25] In my view the magistrate was correct in the conclusion that he arrived at. (See also S v Peyani 2014

(2) SACR 127 (GP) at 128 – 130 paras 2.1 – 2.4.) The importance of this aspect is to highlight the purpose for which the so-called competency reports were compiled. It is evident that they were compiled solely for the purpose of determining whether the particular child witnesses should testify through an intermediary, and no other. The learned magistrate was concerned at defence counsel's reason for wanting Ms Maseko to testify when there was no objection to her reports as such, and said:

(emphasis added)

'The sole reason why Advocate Roets wanted the witness [Ms Maseko] called, so it appeared from cross-examination of both this witness and the relevant child witnesses whom she consulted, was to test the credibility of the child witness's evidence on the merits of the matter by questioning them about discrepancies between the evidence in court and what they had reported to the Social Worker when she consulted with them. This approach to my mind is highly unusual if not irregular for the following reasons:

A. One cannot use evidence that is effectively nothing but hearsay and definitely not a proper witness statement in order to test and discredit the evidence of a witness who allegedly made a report to a third person.

B. The consultation by Ms Maseko with the child witnesses does not fall within the exception at common law under which the hearsay evidence of the first report can be regarded as admissible.

C. Neither has any application been made by either the State or the Defence for the admission of her evidence as an exception under Section 3 of the Law of Evidence Amendment Act, 54 of 1988.

D. Hearsay evidence is by its very nature unreliable and I am sure that everyone knows that gossip which is nothing but hearsay changes from the first report onwards unless the original report has been put into writing by the person who made the report.'

[26] The court a quo found that the competency reports were not proper witness statements. Ms Maseko did not take the docket statement of any of the witnesses she consulted, neither did she take a signed statement from any one of them."

[6] Du Toit et al in Commentary on the Criminal Procedure Act at page 110 B [Revision Service 70, 2023 Chapter 22] states:

"It is not a requirement that a competency report be made before a court rules that a witness's evidence may be presented through an intermediary: S v Mabuza 2018 (2) SACR 54 (GP) at [23] – [26]. The observation that a witness would be exposed to undue mental stress or suffering can be made without any evidence even being presented by merely taking the ages and the nature of the charges into account (at [24]; see too S v Peyani 2014 (2) SACR 127 (GP) 128–130). Competency reports, where they are drawn up, are not proper witness statements. An intermediary is not, in such reports, supposed to get the witness's version of the events in question, and if he or she does so, then he or she would be going outside the ambit within which he or she is meant to operate. The report will not be evidence on which the witness may be cross-examined (see Mabuza at [27]).

The youthfulness of a witness is only one factor to be considered in deciding whether to appoint an intermediary. See also Müller

Prosecuting the Child Sex Offender (2001) 208. It is also necessary to afford the parties an opportunity to address the court before a decision is made; S Mathebula 1996 (2) SACR 231 (T)."

[7] The assessment report is accompanied by the founding affidavit in terms of Section 170 A, which was compiled by Kelebogile Mafron Mabuda on 15 November 2019 in Mmabatho. The assessment report was read into the record. It reads thus:

“PROSECUTOR: As the court pleases Your Worship the report is accompanied by a founding affidavit in terms of section 170A which was compiled by Kelebogije Matron Mabuda on 15 November 2019 in Mmabatho. The declarant Your Worship obtained a degree in Bachelor of Arts in social work with the North West University in 2004.

She also obtained a masters degree in social work forensic practice in the North West University Potchefstroom Campus in 2014. She is also a member of the South African Council for Social Services Professionals with the registration number 10/23663 and other relevant training Your Worship she has been preparing children for court and introducing child witness.

Relevant work experience the declarant has 11 years work experience as a professional social worker she was employed in 2005 by the Department of Social Development as a generic social worker, duties attached to the post were as follows providing family and child care services to the vulnerable individuals statutory services.

In 2011 she served as a probation officer in crime prevention and victims support directorate in Department of Social Development and she was responsible for conducting assessment and placement of young offenders compiling pre-sentence report, attend children’s court inquiry and serving as an expert witness.

Your Worship the declarant also confirm that she conducted an interview with O[...] M[...] who is 11 years of age and has been advised by the investigating officer that O[...] M[...] is a complainant in a case of rape. Your Worship the said declarant also signed the affidavit and confirmed that the contents contained herein are true and correct.

The actual assessment report in respect of O[...] M[...] reads as follows firstly the introduction Your Worship it says that this is a competency assessment report in respect of O[...] M[...] in assessing the child’s competency to testify the following need to be considered capacity for truthfulness, mental capacity, sufficient memory retention and the ability to communicate. The evaluator does not act only in the interest of the child but instead provides an objective opinion based on appropriate evaluation therefore.

The mandate which is point 2 the case of O[...] M[...] was referred to the social worker by the Mmabatho Family Violence Child Protection

and Sexual Offences Unit on 6 August 2019. The case was referred to the forensic social worker to obtain victim statement to determine

the child’s ability to testify in an open court. To show objectivity of the assessment no information regarding the alleged

offence was received before by the undersigned.

Identifying details child concerned is O[...] M[...] date of birth 22 December 2007 age 11 years, residential address 1[...] S[...] H[...]. The biological mother is L[...] M[...] who was born on 21 June 1986 occupation she is just a general worker, residential address is still the same as the one of the complainant Your Worship.

Biological father is O[...] the surname is unknown date of birth is also unknown, his occupation he is a tutor in Gauteng. Siblings O[...] who is six years of age, T[...] who is also six years, B[...] who is three years of age. Forensic investigative process O[...] M[...] was assessed for one hour 30 minutes, L[...] M[...] for 30 minutes, O[...] M[...] was also assessed in a follow up secession for one hour L[...] M[...] collateral interview was for 30 minutes.

The cognitive development of the child concerned is 11 years of age according to Piaget's Theory children of this age functioning

within the concrete operational stage of cognitive development. Intelligence in the stage is demonstrated through logical and systematic manipulation of method related to concrete objects. Literature further indicate that the children are able to understand

the perspective of others through there, although they are still quite egocentric also begins to involve forethought and planning, and they are also beginning to make the connection between cause and effect.

In relating the facts of the incident the child stated that the perpetrator closed her mouth, her nose and her mouth she fainted

while she wanted to scream. She woke up in the morning she found the perpetrator sleeping next to her wearing a boxer short and a T-shirt, she realised the she is half naked. The child concerning speech is well developed she is able to communicate in Setswana, during the interview the child was able to provide facts of the alleged incident in sequence, the child does have a concept of days years and months.

Emotional aspect the child concerned was embarrassed when relating the facts of the alleged incident, the child concerned during the interview reported that she was scared at the perpetrator during the incident, her mother confirmed that as well. The mother reported that since the incident the child started to suffer from nightmares and become angry very easily, she also like to bully her sibling testifying in the presence of the alleged perpetrator could subject her into undue mental stress.

The child concerned was able to recall and relate the facts of the incident in acquiring manner she consistently identified Joseph as the perpetrator. Suggestibility is the quality of being inclined to accept an act on the suggestion of hours during the assessment the child could not take any suggestions when relating the facts of the incident.

Sexual knowledge and body organs during the assessment the child was given gingerbread body outline a drawing to complete the following body parts to name all body parts and its function she did as requested. The child is knowledgeable about the female and sexual organs she referred to the female part as mapili and the male organ as private part.

The child understands the difference between truth and lie as well as the moral implication of telling lies. She indicated that if a person lies she gets punishment and lying is unacceptable, during the assessment she verbalised her commitment to tell the truth the child maintain to have been abused by Joseph. The child's mother confirm to have seen Joseph in the morning sleeping with the child concerned being naked. She further reported that she was in a relationship with the alleged perpetrator hence the perpetrator is well known to the child.

Evaluation the child concerned is in the cognitive development stage called concrete operational stage, in this stage children are able to understand the perspective of others they are also beginning to develop hypothetical thought process, but still very concrete in the way they think and communicate. The child is able to differentiate between truth and lie, the communication skill is well developed she was able to relate the facts of the alleged incident in a chronological and coherent manner during the assessment.

The child concerned was shy to talk about the alleged incident the child was consistent in relating the facts of the incident she identified Joseph as the perpetrator. The child reported that she was scared when the incident happened the mother confirmed that since the incident happened the child started to suffer from sleeping problem and easily become angry.

The child at times become aggressive towards her sibling and she is also said to be fearful of the perpetrator that indicates fear and anger has some specific behaviours of children who experience sexual abuse, it can be a direct communication that states I am never going to be hurt again.

Testifying in the presence of the alleged perpetrator could subject the child to undue mental stress the child concerned testimony depends on the skills and knowledge of the person who will be interviewing her during the trial. Due to her age leading and multiple questions should be avoided rather specific questions be asked in order to obtain necessary information.

Conclusion

O[...] M[...] is competent to testify in court about the alleged incident when thoroughly prepared prior to court proceedings and when testifying with an intermediary. Recommendation in view of the above facts it is recommended that the child concerned be given a chance to testify in court via the assistance of an intermediary as prescribed in terms of section 170A of act 51 of 1997.

The child be referred for court preparation prior to the court proceedings the child be referred to trauma counselling after the

court proceeding is completed, the counselling services will be provided at Department of Social Development. The compiler of the

report Your Worship has also signed the report and is dated 15 November 2019 to confirm that the contents contained herein Your

Worship are true and correct, and I beg leave from court to hand in same that will be EXHIBIT A if am not mistaken.

COURT: Okay and Ms you confirmed that you did not have an objection, it is in terms of section 213, this handing in?

MS MATSHOGO: Yes Your Worship there is no objection.

COURT: Right the report is admitted and accepted as evidence it is marked EXHIBIT A for purposes of the application in terms of section 170A.”

[8] The contention is that the Regional Magistrate erred in admitting this report as evidence against the appellant. This contention is without merit. The report was accepted as evidence based on the fact that the appellant, as stated through his legal representative, had no objection to the report being accepted and admitted as evidence. It was therefore handed in by consent. However, this does not detract from the fact that the appellant, as an accused, has a constitutionally entrenched right to a fair trial. The contents of the assessment report was not taken into consideration by the Regional Magistrate in arriving at a verdict. This in my view, does not vitiate the entire proceedings, and it cannot be argued that the appellant did not have a fair trial.

[9] Consequently, the appeal against conviction must fail, and the conviction and sentence should be confirmed.

Order

[10] Resultantly, the following order is made:

(i) The appeal against conviction is dismissed.

(ii) The conviction and sentence are confirmed.

R D HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA,

NORTH WEST DIVISION, MAHIKENG

I agree

A H PETERSEN

ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA, NORTH WEST DIVISION, MAHIKENG

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