

SOUTH AFRICA / JUDGMENT

Munyai v S (A598/12) [2013] ZAGPPHC 153 (12 June 2013)

[2013] ZAGPPHC 153

COURT

North Gauteng High Court, Pretoria

BEFORE

Mathopo, EM Kubushi, P van der Byl

CASE / FILE NUMBER

A598/12

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NORTH

GAUTENG HIGH COURT, PRETORIA

CASE:A598/12

DATE:12/06/2013

In

the matter between:

ELIAS THOMAS

MUNYAI.....Appellant

and

THE

STATE.....Respondent

JUDGMENT

MATHOPO J:

- [1] The principal issue in this appeal is whether the trial court having decided not to have the complainant take the oath or affirmation in terms of sections 162 and 163 of the Criminal Procedure Act 51 of 1977, properly administered the admonition in due compliance with section 164 and 165 of the Act. Another issue is whether the state succeeded in proving beyond reasonable doubt that the appellant was guilty as charged.
- [2] It is necessary to set out a brief narrative of certain facts and circumstances giving rise to the conviction and sentence.

- [3] On 4 August 2004, the appellant was convicted of rape of his daughter who was 7 years old at that time of the offence. Upon conviction and in terms of section 51(1) b of the Criminal Law Amendment Act 105 of 1997, the appellant was referred to the High Court for sentencing. The High Court (per Smit J) sitting on circuit in the Northern Circuit District confirmed the conviction on the 15 August 2005. On the 15 June 2006 he was sentenced to Life Imprisonment, the court having found that there were no substantial and compelling circumstances justifying or warranting the imposition of a lesser sentence.
- [4] Aggrieved by the conviction and sentence, the appellant applied for leave to appeal against both conviction and sentence. Shongwe J refused leave to appeal. The appellant then approached the Supreme Court of Appeal on petition and leave to appeal against both conviction and sentence was granted to this court.
- [5] At the commencement of the trial, the Prosecutor after discussing, the J88 (medical report) with the defence, read the contents into the record. When the trial commenced, the Prosecutor informed the Magistrate that the complainant was able to testify without the help of an intermediary and suggested that her evidence be recorded via a closed circuit television set. The Magistrate without proper investigation accepted the prosecutor's say-so and proceeded to admonish/caution the complainant to tell the truth. It is this admonishment or caution which principally forms the subject matter of this appeal.
- [6] To appreciate fully what transpired before the complainant gave evidence it is necessary that the following exchange between the Magistrate and complainant be set out.

Court: Venus (complainant) how old are you?

Ms M: I do not know

Court: Okay V, you must take your hand down so that we can hear what you are saying, okay? Now today you cannot see us but we can see you. You are on television today. You are here to testify against a person by the name of E Munyai. Do you know E Munyai?

Ms V: Yes

Court: Who is he?

Ms V: He is my father

Court: Okay and now listen are you already in school?

Ms V: Yes

Court: In what grade are you?

MS v: "B"

Court: Sub-"B" now V today you must tell us the truth. We do not want stories or what other people told you to come and tell me.

We only want the truth Ms V: Yes

Court: Okay cautioned to tell the truth

Court: You do not lie in court hoor – yes

- [7] The appellant's contention is that the foregoing questions by the Magistrate were irrelevant and clearly did not demonstrate to the court whether the complainant was able to testify and more importantly whether she was able to distinguish between the truth and falsehood. Relying on the following cases *S v Motsiri* (2012) ZASCA 59 and *S v Ragubar* (2012) ZASCA 188. Counsel on behalf of the appellant submitted that the evidence of the complainant was inadmissible and unreliable. In essence the gravamen of the appellant's contention is that properly construed the enquiry conducted by the Magistrate fell short of the standard required of a judicial officer when dealing with child witnesses from determining whether they are able to distinguish between the truth and falsehood.
- [8] The State conceded that the questioning by the Magistrate was a short one. On the authority of *S vs B* 2003 (1) SACR 52 SCA argued that a formal enquiry into a witness's ability to understand the oath or affirmation is unnecessary and that the court may after forming the opinion that the witness does not possess the necessary understanding, admonish the witness to tell the truth. In essence, what the state contend is that despite the laconic questions, a sufficient and proper enquiry was conducted by the Magistrate to determine whether the complainant was able to make the necessary distinction between truth and falsehood and accordingly competent to give evidence.
- [9] It is difficult to fathom how a child witness who is unable to tell her age can make a proper determination between truth and falsehood. The child witness at the time of the offence was 7 and 9 when she testified. She was a child witness with whom care should have been given at the outset. It would appear to me that owing to the absence of an intermediary, she must have been understandably overwhelmed and traumatised by the court experience. As soon as she appeared not able to tell her age, it should have been palpably clear to the Magistrate that more was required with regard to the determination whether she was able to make a distinction between truth and falsity. No thought was given to the desirability of receiving her evidence through an intermediary to protect her. See: *Nedzamba v S* (911/2012) [2013] SA SCA 19 (27 May 2013).
- [10] This cursory and superficial line of questioning by the Magistrate was clearly not enough given her initial responses before she was ultimately cautioned. Again the purported exercise by the Magistrate did not address the competency of the child witness to give reliable evidence. This problem was compounded by the fact that the Magistrate seemed to have relied on the prosecutor's say-so that the intermediary was unnecessary. What is not clear from the record is why the Magistrate dispensed with the need for an intermediary. It is desirable that an intermediary be appointed in all cases involving minor children in order to avoid further trauma to the child. The fact that the Magistrate utilized the services of an interpreter to communicate with the complainant does not relieve the Magistrate of the duty

to perform his function properly. The duty to ensure that a witness comprehend what is meant

to speak the truth lies with the presiding officer. The role of the interpreter is limited to ensuring that questions by the court to the child witness are conveyed in a manner that the child can comprehend and that the answers given by the child witness are conveyed in a manner that the court will understand. It is cold comfort that the complainant was allowed to testify through a closed circuit television. See: *Director of Public Prosecution Transvaal v Minister of Justice and Constitutional Development and Others* 2009 (2) SACR 130 (cc) at para 165, 167 and 168

“[165] 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 may be able to convey in his or her own child language, to the presiding 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.

[167] 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 every 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. Here the manner in which the child is questioned is crucial to the enquiry. It is here where the role of an intermediary becomes vital. The intermediary will ensure that questions by the court to the child are conveyed in a manner that the child can comprehend and that the answers given by the child are conveyed in a manner that the court will understand. E

[168] As pointed out earlier, questioning a child requires a special skill. Not many judicial officers have this skill, although there are some who, over the years and because of their constant contact with child witnesses, have developed a particular skill in questioning children. This illustrates the importance of using intermediaries where young children are called upon to testify. They have particular skills in questioning and communicating with children. Counsel for the Centre for Child Law and Chi Id line was quite correct when, in her reply, she submitted that everything seems to turn upon the need for intermediaries when young

children testify in court. Properly trained intermediaries are key to ensuring the fairness of the trial. Their integrity and skill will be vital in ensuring both that innocent people are not wrongly convicted and that guilty people are properly held to account

- [11] As soon as the complainant was not able to tell her age alarm bells should have rang in the mind of the Magistrate to conduct a proper enquiry. Quite clearly given her age of 7 years (at the time of the offence) and 9 years (when she testified) the complainant was still immature and needed proper guidance from the court before she testified. To demonstrate that the exercise conducted by the Magistrate was unhelpful and further glaringly exposed her immaturity or lack of appreciation between the truth and falsehood, when asked by the prosecutor where she was staying during 2002 i.e. the year of the alleged incident she responded by saying Mashane, later when asked the following leading questions she responded as follows:

Prosecutor: So your mother was staying at Basane and you were staying with your dad

Court: Do you know why they, the mother and the father was no longer staying together

Ms V: I do not know

Court: Why did you not go ask your mother

Ms V: It was before that

This response is not only meaningless but clearly demonstrates the complainant's lack of appreciation and understanding of the questions asked.

- [12] It does not appear from the record that the Magistrate satisfied himself that the complainant was sufficiently intelligent to distinguish between truth and falsehood. A more detailed investigation should have been done this is especially so because the

complainant testified two years after the incident. Her powers of recollection particularly because she is a minor and still immature

cannot be satisfactorily relied absent any proper enquiry. Quite clearly the Magistrate failed to make the necessary determination in terms of Section 164 and 165 of the Criminal Procedure Act 51 of

1977. The capacity to understand the difference between truth and falsehood is a prerequisite in terms of Section 164. At para 165, the Constitutional Court in *Director of Public Prosecution Transvaal v Minister of Justice and Constitutional Development and Others* indicated what Section 164 of the Criminal Procedure Act requires is not the knowledge of abstract concepts of truth and falsehood. What the provision requires that the child will speak the truth, the child may not know the intellectual concepts of truth and falsehood, but will understand what it means to be required to tell what happened and nothing else.

[13] The Magistrate simply took for granted that the complainant understood the nature and import of the caution. In doing so ignored

the complainant's immaturity. A proper enquiry to determine that the child is sufficiently intelligent to testify and also whether the child has sufficient mental capacity is necessary for the proper administration of justice. The Supreme court of Appeal has cautioned strongly against the acceptance of the evidence of child witnesses where a proper enquiry was not conducted in *Motsiri and Ragabar supra* and more recently in *Nedzamba v S* (911/2012) [2013] SA SCA 19 (27 May 2013).

[14] The Magistrate misdirected himself when he lost sight of the evidentiary and statutory requirements regarding child witnesses. It is the duty of presiding officers to be more vigilant when accepting such evidence as reliable and truthful. It is wrong to ignore the competency requirements. It is important for the administration of justice that a child witness is able to give a coherent and accurate account of the event that happened and thus able to distinguish between the truth and falsity. The Magistrate simply did not address any of these concerns.

[15] In the circumstances relying on the complainant's evidence without having conducted the necessary enquiry or having made a finding regarding her competency as a witness was an irregularity that led to the irremediable prejudice being suffered by the appellant and which resulted in the infringement of his right to a fair trial. As no reliance can be placed on the evidence of the complainant, on this basis alone, the conviction cannot stand.

[16] As regards the merits the complainant testified that she was staying with her father at the time of the incident. According to her testimony the rapes took place at night and the appellant used to wake her up for the purpose of sexual intercourse. She testified that the appellant removed her panty and penetrated her on more than one occasion. She made a report to her grandmother and thereafter to her mother when she came to fetch her. To the social worker she reported that she was raped during the day. During evidence she again stated that she was raped repeatedly all day.

[17] The complainant's mother's evidence is that the latter was staying with the grandmother during December 2002 and she later established that she was in fact at the appellant's house. She stated that the appellant's mother was present at the appellant's place when she arrived to collect her. The appellant refused saying that the school had not yet closed and also refused to give her the complainant's clothes. She testified that the paternal grandmother insisted that she take the complainant. After taking her and on the way home, she noticed the complainant walking with some difficulty and when she confronted her, she reported that the appellant had raped her, she then took her to the Health Care Centre and later Elim Clinic where she was medically examined. During cross examination she admitted that she was not on talking terms with the appellant but stated that when she went to collect the complainant they were on talking terms.

- [18] In his testimony the appellant denied that he raped the complainant. In his evidence in chief he testified that the complainant never slept at his house but did come there in the afternoon to change her clothes. He further testified in cross examination that on some occasions when his mother was not at home, the complainant stayed with his neighbour on Saturday to Monday. Later on testified that he was staying with the complainant whenever she was not staying at his brother's house because she is his daughter. During cross examination, he testified that whenever his mother was not at home, the complainant would come and spend the night but at the cooking hut. The appellant further testified that the complainant was at his elder brother when the mother arrived. The grandmother confirmed this. This evidence was not challenged. No wonder the Magistrate made a remark when questioning the appellant "it must be either you or your elder brother".
- [19] The appellant's mother testified in support of the appellant. She denied that the complainant stayed with the appellant. When pressed to explain why her evidence was contradictory to that of the appellant she responded by saying that maybe the appellant was referring to the days when she was away at home or visiting another village. In essence she disputed the evidence of the complainant that the appellant stayed with her and further disputed the complainant's evidence that a report was made of her about the alleged rape.
- [20] The complainant was a single witness and the cautionary rule was applicable to her evidence. At the time of the incident she was 7 and 9 years old when she testified. The court merely paid lip service to the cautionary rule because the Magistrate ignored several leading questions and apparent contradictions in her evidence. Quite clearly the complainant was substantially assisted by the Prosecutor's leading questions which should not have been allowed.
- [21] The appellant assailed the appeal on the grounds that the evidence of the complainant substantially came from the mouth of the Prosecutor as a result of number leading questions which suggested some answers to the complainant. The following leading questions were asked by the prosecutor:

Prosecutor: Tell me what time was it? Was it in the morning, during the night or which time was it?

Ms V: It was at night.

Prosecutor: So does he use to wake you up?

Prosecutor: And were you dressed by then when he wakes you up?

The Magistrate rightly objected and cautioned the prosecutor from asking leading questions. Another troubling aspect of the leading questions by the Prosecutor is to be found at page 12 of the second line 6: Prosecutor: "yes he inserted his penis inside your vagina what else did he do" What is remarkable is that nowhere on record had the complainant testified about the appellant inserting his penis into her vagina. The Magistrate did not caution the Prosecutor for leading such damning and critical evidence against the appellant. The record is replete with leading

questions asked by the prosecutor which continued, despite repeated warnings by the Magistrate. Even though the appellant was legally represented at the trial, it remained the duty of the Magistrate to ensure that the appellant receives a fair trial.

[22] The complainant was a single witness. In *S v Sauls* 1981 (3) SA 172 (A) it was held that when it comes to the consideration of the credibility of a single witness, the trial judge will weigh the

evidence, consider its merits and demerits and having done so will decide whether despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told, furthermore, the exercise of caution must not be allowed to displace the exercise of common sense.

[23] Another disconcerting feature of her evidence which the Magistrate applying cautionary rule should have found to be unreliable relates to her description of the rape itself, when asked to recall or tell what the appellant was doing, her response was not only incomprehensible but unconvincing. This was also accompanied by another leading question from the Prosecutor. Another illustration of her unreliability emerged when she was asked when she started staying with her father and her response was "I do not know".

Furthermore when asked where she was staying with her mother when her mother come to fetch her, her response was "I was staying at my mother's place." This response indicates a lack of understanding of the questions. The question to be asked is, whether in the light of these questions, can it be said that her evidence is clear, reliable and satisfactory in all material aspects. I do not think so.

[24] Although I fully accept the difficulties encountered by young children when giving evidence pertaining to incidents of a sexual

nature. In the present matter the incident occurred in 2002 and the complainant testified in 2004. The evidence of the complainant was not clear and satisfactory in all material respects. The prosecutor failed to explore the complainant's version of what had occurred and instead suggested answers by way of leading questions in aspects crucial to the conviction. Her evidence throughout the trial indicates that she had serious difficulties understanding the questions asked with the result gave incomprehensible answers. This in my view illustrates the unfortunate difficulty of subjecting a child witness through the rigours of the trial without assistance of the intermediary. That she was to a large extent assisted by the prosecutor's relentless leading questions is without doubt. The record reflects that on more than one occasion the Magistrate cautioned the prosecutor from asking leading questions. In my view the Magistrate should have disallowed all the leading questions. The need for caution cannot be ignored and evidentiary and procedural rules should be properly applied and adhered to lest the appellant's rights to a fair trial are compromised.

[25] The appellant's evidence was criticised unduly by the Magistrate yet the contradictions in the state's case were

explained and accepted with liberality. The appellant consistently denied the allegations and proffered possible explanations as to who could have committed the offence. It would appear that the Magistrate treated these explanations glibly. The appellant's explanations were reasonably possibly true and the Magistrate should have afforded him the benefit of the doubt. The record reflects that a possibility existed that the complainant could have been sexually molested by other people. The Magistrate, when questioning the appellant made the following remark "It must be either you or your elder brother". Evidently in the mind of the Magistrate doubt existed as to who could be the perpetrator. This notwithstanding he proceeded to convict the appellant.

[26] I am not satisfied that given the poor quality of the evidence of the complainant the conviction accounts for all the proven facts. It follows that the conviction cannot be sustained and the state did not establish the guilt of the appellant beyond a reasonable doubt.

I therefore make the following order:

1. The appeal is accordingly upheld;
2. The conviction and sentence are set aside and substituted with the following:
 - The appellant succeeds and the conviction is quashed and the sentence is set aside.

R MATHOPO J

I agree ._____ ,

EM KUBUSHI J

I agree _____

P VAN DER BYL AJ

Appearances:

For the Appellant: Adv JP Marais

Instructed by

For the defendant: Adv S MAHOMED

Instructed by: Office of the Director of Public Prosecutions

Date of hearing: 8 MAY 2013

Date of Judgment: 12 June 2013

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