

SOUTH AFRICA / JUDGMENT

Ngxabazi v S - Appeal (CA&R 188/19)

[2023] ZAECMKHC 124 (7 November 2023)

[2023] ZAECMKHC 124**COURT**

Eastern Cape High Court, Makhanda

BEFORE

Cengani-Mbakaza, V P Noncembu

CASE / FILE NUMBER

CA&R 188/19

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Source record

IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN CAPE
DIVISION, MAKHANDA)
APPEAL
CASE NO: CA&R 188/19

REPORTABLE:YES/NO
In**the matter between:**ASANDA
NGXABAZI
APPELLANT
and
THE
STATE
RESPONDENT**JUDGMENT**

CENGANI-MBAKAZA AJ

Introduction

- [1] The appellant along with his co-accused stood trial in the Regional Court in Queenstown (the trial court) on a charge of rape in contravention of Section 3 of the Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007 read with the provisions of Section 51 (1) of the Criminal Law Amendment Act 105 of 1997 as amended. He was convicted and sentenced to life imprisonment.
- [2] Discontented by the sentence imposed, the appellant exercised his automatic right of appeal[1] and appealed against the sentence only. Subsequently, he filed an amended notice of appeal and appealed against conviction as well.

Factual

background

- [3] The complainant, NS[...] is a child who was deprived of the opportunity to attend school and receive a formal education. At the time she testified, she could neither read nor write and was inexact about her age. She was raised by her grandmother and no birth certificate was submitted to prove her age. This notwithstanding, it was admitted that she was between the ages of 13 and 14 when the alleged offence was committed.
- [4] In the early evening of 1 of May 2012, she went to Molly's place, a tavern, to look for her grandmother and aunt. She found them drinking liquor and at some point, they all proceeded to Mxeshe location where her grandmother and aunt continued to drink liquor at a certain house.
- [5] Since it was becoming dark NS[...] signalled that it was time to go home. Her grandmother and aunt refused to leave instead they asked her to carry their box of wine home. NS[...] left carrying this box of wine on her back. On the way, she met the appellant who was accompanied by a group of other young men. The appellant grabbed her. She screamed and tried to free herself from the grip of the appellant. The appellant assaulted her with a pipe and further dragged her while the other young men were hurling insults at her. They forced her to go to a certain house where a certain girl ZM[...]

opened for them. NS[...] was forced to sit on a couch and drink the wine she was carrying. The appellant proceeded to assault and continued to assault her whenever she refused to carry out his instructions which included drinking the wine she had in her

possession.

- [6] Whilst intoxicated from the wine, she noticed the appellant pulling her in the direction of the bedroom

where he proceeded to rape her. The other young men entered the bedroom and one of them was instructed to have sexual intercourse

with her by the appellant, which he did. NS[...] testified that she was scared and could not resist when the other young man was raping her.

- [7] She later put her clothes on and found ZM[...] sleeping on another bed with her sibling. She was accompanied by one of the young man who was in the house while she was being raped.
- [8] On the way home, she met her grandmother and aunt who were looking for her. She informed them of what had happened to her. A police van coincidentally passed by. They stopped the police car and reported the matter to the police whereafter a case was formally opened. NS[...] was later examined by the Doctor who noted injuries in her genitals.
- [9] In cross-examination, NS[...] denied that she had a relationship with the appellant. She further denied that there was consensual sexual intercourse between them. She could not remember which part of her body was assaulted but testified that she felt pains.
- [10] The state further led the evidence of the young man who accompanied NS[...] on her way home. Since the young man was declared a hostile witness, his evidence was (discarded) disregarded by the trial court. ZM[...] testified that she did not know NS[...] prior to the incident. She confirmed seeing the appellant getting in her home with a group of young men on the night in question. She saw the appellant assaulting NS[...] with a pipe. She testified that NS[...] was in the same bed with the appellant; she heard them having sexual intercourse, however, NS[...] was crying when she left the house.
- [11] NS[...]’s aunt informed the court that the girl’s eyes were red when she informed her about the rape incident. She observed signs that she had consumed heavy amounts of liquor.
- [12] On 02 May 2012, Dr Mabele examined NS[...]. His findings were recorded in the medical report (J88) that was submitted by consent between the parties. The doctor observed no physical findings of trauma on the body or bones. He observed that NS[...] suffered some bruises on her genitals. The doctor concluded that the findings were consistent with a history of sexual activity and forceful penetration of the vagina. The Doctor also obtained the DNA sample for forensic analysis. The contents of the medical report were never placed in dispute by the defence.
- [13] The evidence of the DNA forensic analysis was submitted by consent between the parties. The analyst confirmed that the DNA sample that was obtained from NS[...]’s underwear matches that of the appellant. The state led no further evidence and the appellant did not testify in his defence.

Grounds of Appeal

- [14] The appeal is premised on the following grounds:

14.1 The complainant was an illiterate minor child and the presiding officer did not admonish her in terms of Section 164 of the Criminal Procedure Act 51 of 1977(CPA).

14.2 During the complainant's swearing-in process, the court failed to assess her capacity to understand the nature and import of taking an oath. The court failed to assess whether NS[...] can differentiate between right and wrong.

14.3 The complainant contradicted herself and her evidence was also contradicted by the evidence of a witness who was present in the house where the incident occurred.

14.5 The sentence of life imprisonment is shockingly inappropriate.

[15] Counsel for the state opposed the appeal on the basis that the complainant was sworn in with the assistance of the interpreter. He contended that no difficulties were experienced with the complainant's understanding of what it meant to tell the truth, the whole truth and nothing but the truth when she was sworn in.

[16] Although the amended notice of appeal is directed at the ability of NS[...] to take an oath or affirmation, it is noted that the girl child, ZM[...] who was also a witness in the proceedings was a child and a similar approach was followed by the trial court. Before she gave her testimony, she was also sworn in and her ability to understand the import of taking an oath was never assessed. The witnesses' ages were calculated at 16 years when they testified before the trial court.

Issues

[17] The ability of NS[...] to understand the import of taking an oath as a witness is a broader issue for determination. In line with the principle of the appellant's right to a fair trial, it is also imperative to examine whether ZM[...]’s ability to take an oath was properly assessed by the trial court.

[18] On the merits, the issues up for debate are whether the trial court properly assessed the evidence in light of the contradictions in the testimonies of both child witnesses and whether the state had proved beyond reasonable doubt that there was no consensual sexual intercourse between the NS[...] and the appellant.

The Legal Principles

[19] Section 192 of the CPA provides that every person not expressly excluded by this Act from giving evidence shall, subject to the provisions of section 206, be competent and compellable to give evidence in criminal proceedings.

[20] In terms of section 193 of the CPA, a court is obliged to decide on the competency or compellability of any witness to give evidence. Evidence is normally given under oath. When a witness is called to testify, an oath is administered to ensure that he does not speak carelessly and frivolously; rather he evaluates his words to convey the gravity of the situation and most importantly, oath is administered to provide a penalty against untruthfulness. Section 162 of the CPA is couched as follows:

“Witness to be examined under oath:

- (1) Subject to the provisions of Section 163 and 164, no person shall be examined as a witness in criminal proceedings unless he is under oath, which shall be administered by the presiding judicial officer or, in case of a superior court, by the presiding judge or the registrar of the court, and which shall be in the following form:

‘I swear that the evidence I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God’

- [21] It is well settled that the testimony of a witness who has not been placed under oath properly, has not made a proper affirmation or has not been admonished to speak the truth as provided for in the Act, lacks the status and character of evidence and is inadmissible.[2]

- [22] The provisions of Section 162 are peremptory, however, they may be departed from the circumstances set out in Sections 163 and 164 of the CPA. Any person, who is found not to understand the nature and import of the oath or affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation, provided that such person in lieu of the oath or affirmation is admonished by the presiding judge or judicial officer to speak the truth.[3]

- [23] Section 164(1) is resorted to when a court is dealing with the admission of evidence of a witness who from obliviousness arising from youth, a sub-standard education or other cause, is found not to understand the nature and significance of the oath or the affirmation. The words ‘is found’ in section 164(1) have been held to indicate that a proper enquiry must be conducted in order to determine whether an oath can be administered to the witness.[4] The first duty of the court, therefore, is to enquire whether a child tendered as a witness understands the meaning and religious sanction of an oath.[5] In *S v N*[6] Van Reen J held:

“It is self-evident that that purpose is not attainable where a witness lacks the capacity to understand and assume the religious obligation of the oath. Accordingly, a court before administering the oath to a child or any person who is lacking in formal education or for any other reason might not have the required capacity, enquire whether such a witness understands the meaning of and possess the capacity to appreciate and accept the religious sanction of the oath. If after such an enquiry, the court finds that the witness does not possess the required capacity, it should establish whether he or she understands what it means to speak the truth as in the absence of the capacity to distinguish between ‘truth and falsity....and to recognise the danger of wickedness of lying..., he or she is not a competent witness. The capacity to distinguish between the truth and falsity is furthermore a prerequisite for the making of an affirmation or an admonition in terms of Ss163 and 164 of the Act.” (Emphasis added)

Discussion

- [24] Counsel for the state submitted that the trial court saw and heard the complainant. Therefore the appeal court, so he argued, is in no position to question the correctness of the trial court’s approach on whether she was competent to take an oath. Counsel further argued that NS[...] gave a clear and satisfactory account of events hence the trial court never

doubted her competency as a witness. The trial court had no obligation to embark on an enquiry to assess the competency of the complainant to take an oath, so the argument continued.

[25] There are views expressed on whether an inquiry must first be held before an oath is administered to a child.[7] In *S v B*[8], it was held:

“Section 164 required nothing more than that the presiding judicial officer had to form an opinion that the witness did not understand the nature and import of an oath or affirmation due to ignorance arising from youth, defective education or other cause and that the section did not expressly require that an investigation be held in all circumstances.” (Accentuation added)

[26] The Supreme Court of Appeal in *Tshimbudzi v The State*[9], said the following:

At paragraph 7, ‘a further irregularity relates to whether the complainant was validly sworn in in terms of s162 of the Criminal Procedure Act 51 of 1977(CPA) before she testified. The record shows that she was sworn in (‘d.s.s’). However this is not enough as the complainant was a minor. Given the age of the complainant it was essential that the regional magistrate make some enquiry to satisfy himself that the complainant understood and appreciated the distinction of telling the truth and a lie. Only in the event that the magistrate was satisfied that the minor possessed this ability should the magistrate then have proceeded to determine whether the said minor fully understood the nature and import of giving evidence under oath. The magistrate conducted none of these enquiries and as a consequence the complainant’s evidence is inadmissible.’

[27] The most recent pronouncement on whether an enquiry must first be held before an oath is administered to a child witness was made in the matter of *SJ v S*[10] per Stretch J at paragraph 25:

‘I venture to add that by the same token , particularly when one is dealing with an older child such as L[...] thorough questioning should also be aimed at determining whether the oath should be administered. If the court is persuaded that the oath should be administered, it must do so, and not merely admonish the child witness’.

[28] In the *SJ*[11] matter, the court re-iterated the views that were endorsed in *S v M*[12] where Dambuza JA (at [19] said the following:

‘An enquiry into whether a potential witness can distinguish between truth and falsity goes to whether the witness is competent in the first place. On the other hand, a question directed to a witness on whether he or she understands the nature and import of the oath and affirmation goes to whether the witness should be caused to take the oath or affirmation, or should be admonished to speak the truth’.

[29] In the matter under consideration, the crisp issue is whether judging from the circumstances of the case, the trial court made a proper assessment of whether the two minor children had a required capacity to understand the nature and import of the oath before the oath was administered to them. Even though it may not always be a requirement,

a finding that the child understands the nature and import of an oath or whether she understands the difference between the truth and falsity before she can be admonished must appear ex-facie the record.[13]

[30] The record was reconstructed, however, on pages 13-14 of the original record the following excerpts are noted:

“EVIDENCE FOR THE STATE

NS (sworn states) (Through interpreter)

COURT: Thank you Mr Khaketla

EXAMINATION BY PROSECUTOR

PROSECUTOR: Thank you, Worship, Ms S are you schooling? No your Worship

How old are you: 16 years of age?

COURT: Mr Khaketla just before we proceed, they stay at- she is still a minor, do you want her to testify in open court or are we going to have his evidence taken in camera?

PROSECUTOR: Your Worship that is precisely the case, when I consulted with her she was fairly well in consulting but there were stages where I felt, but because Your Worship I thought she would be confident....(intervention)

COURT: But that has got nothing to do with the fact that she is still a minor (underlining added)

PROSECUTOR: Yes

COURT: Does the defence have a problem with the order that her evidence be taken in camera? I will allow her parents if they are present to remain.

MR GIWU: As far as I'm concerned I think it is a court's decision, it is mandatory

.....Because I do not know whether there is a birth certificate for her because according to my statement at the time she was 15.”

[31] After the swearing-in process was conducted by the interpreter, the court at page 15, paragraph 20 of the original record went on to establish NS[...]’s age. NS[...] indicated that she was born in 1999 but did not know her date of birth. The public prosecutor informed the court that the birth certificate was unavailable. From the onset, NS[...] placed it on record that she never went to school to receive formal education and she could neither read nor write. The court estimated her age to have been around 13 or 14 years at the time of the alleged incident.

[32] Gleaning from the record, the proposition by counsel for the state that the court was satisfied that NS[...] understood what it means “to tell the truth, the whole truth and nothing but the truth” is not substantiated. The proceedings were adjourned on more than one occasion and NS[...] was reminded to abide by the oath that she took earlier through the

interpreter. Nowhere in the record does it reflect that the trial court embarked on neither of the enquiries under ss162 and 164 of the CPA. The contention that NS[...] gave evidence clearly and coherently has no bearing on the issues raised.

- [33] The court record reflects the trial court's acknowledgement of NS[...]’s youthfulness and ignorance. This notwithstanding, the trial court failed to comply with the statutory and evidential requirements governing a proper assessment of NS[...]’s capability who appeared from the beginning of the proceedings that she was a minor, had acquired no formal education and may not understand the nature and import of an oath.
- [34] In essence, the trial court's assumption that the minor child, who was illiterate, understood the nature and import of the oath was a serious misdirection on her part. The fact that a similar approach was followed when ZM[...]’s evidence was obtained is unfortunate.
- [35] Following Tshiva’s[14] matter, the testimonies of both NS[...] and ZM[...] lacked the character and status of evidence and should have accordingly been ruled inadmissible.
- [36] The question is whether the remainder of the evidence supports the conviction of the appellant. The issue is whether the appellant had consensual sexual intercourse with NS[...]. Section 58 of the Criminal Law Sexual Offences and Related Matters Amendment Act[15] provides that evidence relating to previous consistent statements by a complainant shall be admissible in criminal proceedings involving the alleged commission of sexual offence, provided that the court may not draw any inference only from the absence of such previous consistent statement.
- [37] NS[...] informed her aunt about the rape incident at the very first reasonable opportunity. She appeared to be terrified by the incident at the time of her reporting. Her statement would have constituted a previous consistent statement, had the evidence of NS[...] been admitted. In the absence of evidence of NS[...], the aunt's evidence carries no probative weight in the proceedings. Similarly, the medical report is not substantiated by salient facts.
- [38] It would be remiss not to comment on other issues which drew our attention in the proceedings of the trial court. It is apparent from the record that both children were not at ease when they presented their testimonies in court. On page 63 of the original record, the following is noted:

“PROSECUTOR: What exactly did accused no 4 do to you? I know what you told us what no1 told him to do, but tell us what he; accused no4 did to you?-he took down his zip as well Your Worship and he climbed on top of me.

AND-? ---He then continued Your Worship

To do what?

COURT: Continued with what? ---he did what Asanda did Your Worship.’

At this moment the court said: "Tell us what he did Madam. My darling do not be scared, do not be afraid, we are all known to it, we are all adults here."

[39] The discomfort of ZM[...] to testify can be observed at page 171 of the reconstructed record. ZM[...] gave her evidence in an open court and started to cry. She informed the court that she was scared and that it was her first time to appear in court. At that moment the court remarked:

"Court orders that the witness evidence be taken in camera as she is still a minor."

[40] It is apparent from the record that both child witnesses presented their testimonies in an open court, without the assistance of an intermediary and no closed-circuit television was utilised. The purpose of section 170 A of the CPA[16] is to guard against a child experiencing undue mental stress or suffering while testifying.

[41] The court in *S v Elton Lenting and 19 others*[17] referred to a research by the South African Law Commission ("SALRC") where it was emphasized that child witnesses must be protected and that they should testify in a child-friendly environment as opposed to the traditional courtroom with the attired court which resulted in children being afraid and confused.

[42] In *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and others*[18], it was held, that, when properly construed, s 170A (1) read with s 170A

(3) contemplated that, in every trial in which a child was to testify and the prosecutor did not raise the matter, the judicial officer, of his or her own accord, had to raise the need for an intermediary to assist the child in giving his or her testimony.[19] In every case in which a child was to testify, therefore, the court is required to enquire into the desirability of appointing

an intermediary. The exercise of judicial discretion in the appointment of an intermediary allowed a judicial officer to assess

the individual needs, wishes and feelings of each child. That conformed to the principle that the best interests of the child

were of paramount importance in matters concerning the child.[20]

[43] In casu, the Public Prosecutor was interrupted by the court when he expressed his reservations about the posture and confidence of NS[...] as a witness. The trial court acknowledged that both child witnesses were uneasy when they presented their evidence in an open court. Despite this, the appointment of an intermediary to assist the two minor children to present their testimonies in a child-friendly environment was never given a thought. The haphazard manner in which the evidence of these two children was obtained is frowned upon by this court

[44] The ultimate result is that the appeal against both conviction and sentence must succeed.

Order

[45] In the result I make the following order:

- [1] The appeal is upheld.
- [2] The conviction and sentence are set aside.
- [3] The immediate release of the appellant is to be expedited.

N CENGANI-MBAKAZA

ACTING JUDGE OF THE HIGH COURT

I agree.

V P NONCEMBU

JUDGE OF THE HIGH COURT

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MAKHANDA Counsel for the Respondent T SOGA Instructed by Director of Public Prosecutions
MAKHANDA DATE OF HEARING 04 October 2023 DATE OF JUDGMENT 07 November 2023

- [1] Section 309(1)(a) of the Criminal Procedure Act no 51 of 1977, the Act
- [2] S v Matshiva 2014 (1) SACR 29 (SCA) paragraph 10, Henderson v S 1997
- (1) All SA594 (C), S v Bezuidenhout 2002 (4) All SA 230F.
- [3] Section 164 of the CPA.
- [4] S v Pienaar 2001 (1) SACR 39 (C) ;S v Malinga 2002 (1) SACR 615 (N).
- [5] The South African Law of Evidence 3rd Edition, Ch 20 at page 935.
- [6] 1996
- (2) SACR 225 (C).
- [8] 2003
- (1) SACR 52 (SCA), 2003 (1) SA 552. S v Malinga, S v Pienaar fn 4 (supra); S v N supra note.
- [9] Case number (137/2012) [2012] ZASCA
- [10] (CA&R 26/21)[2022] ZAECBHC 44; 2023(1) SACR 380 (ECB) (6 December 2022)
- [11] Supra fn 11
- [12] 2018(2) SACR 573 SCA
- [13] Law of Evidence , lexis Nexis, Butterworths, ISSUE 9, pages 9-39.
- [14] Supra note 2.

[15] Act 32 of 2007.

[16] Before 05 August 2022, the provisions of Section 170 A of the CPA provided as follows: '(1) Whenever criminal proceedings are pending before any court and it appears to each 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. (2) No examination, cross-examination or re-examination of any witness in respect of whom a court has appointed as an intermediary under subsection (1), except examination by the court shall take place in any manner other than through that intermediary.....Section 170A(1) was amended by the Criminal Law Amendment Act 12 of 2021, however, the amendments did not change the essence of the provision as aforementioned..

[17] Case no: CC08/2019, unreported judgment delivered on 14 September 2023.

[18] 2009 (2) SACR 130 (CC).

[19] Supra note 15 paras [113] and [114].

[20] Paragraph [123] at 176b.)

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