

SOUTH AFRICA / JUDGMENT

Ramontja v S (CAF04/2005) [2020] ZANWHC 10; 2020 (1) SACR 556 (NWM) (13 February 2020) [2020] ZANWHC 10

COURT

North West High Court, Mafikeng

BEFORE

J T Djaje, R D Hendricks, P L Nobanda

CASE / FILE NUMBER

CAF04/2005

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Policy

IN THE HIGH COURT OF

SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

CASE NO: CAF04/2005

In

the matter between:

SELLO

LAZARUS RAMONTJA

Appellant

AND

THE

STATE

Respondent

CRIMINAL

APPEAL

HENDRICKS

DJP, DJAJE J & NOBANDA AJ

JUDGMENT

DJAJE J

Introduction

- [1] The appellant was convicted of two counts of rape in the Regional Court sitting in Rustenburg. After conviction the matter was transferred to the High Court for sentence in terms of the then applicable legislation. The convictions were confirmed by the High Court and the appellant was sentenced to life imprisonment for each count. He now appeals against the conviction on both counts, with leave of this Court.

Factual

Background

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

On 29 February 2004 the two complainants both aged nine (9) years old were walking together when they met the appellant. He asked them to go with him to his place to get bread and cold drink and dragged them to his place. On arrival he gave them bread and cold drink. When they refused he thereafter instructed both of them to undress and get on top of the bed. The appellant had sexual intercourse with the one complainant whilst the other one was laying on the bed watching. When he was done with the first one, he had sexual intercourse with the second one. After the sexual intercourse, the appellant released the two complainants and threatened to assault them if they reported the incident to anyone. They proceeded home and reported to the mother of the one complainant. Both complainants were

taken for medical examination.

- [3] The complainant's mother testified and confirmed the report made to her by her daughter that she was raped by the appellant. The State handed in the medical forms of both complainants without calling the doctor to testify. The doctor, after examination of the two complainants, found that there was redness all over their private parts and their hymens were absent. The conclusion by the doctor was that there was sexual intercourse perpetrated on both complainants.
- [4] The appellant denied raping the two complainants. His evidence was that on the day in question he met the two complainants asking him for maize meal and later on he saw them at the tavern with some two boys. He denied dragging the complainants to his place.

AD CONVICTION

- [5] In essence the main ground of appeal is that the trial court did not properly appoint the intermediary in terms of section 170A of the Criminal Procedure Act 51 of 1977 for both the complainants. The respondent conceded that there was non-compliance with the provisions of section 170A of the Criminal Procedure Act resulting in a misdirection by the trial court. The following appears on the record of proceedings when the first complainant was called to testify:

“PROSECUTOR: Your worship the state will ask Z[...] S[...], G[...] J[...] and a witness as mentioned on the form the court signed when the court appointed an intermediary, those three witnesses to testify through an intermediary without obtaining a desirability report your worship?”

COURT: Mr Makhadi do you have any objection?

MR MAKHADI: None your worship.

PROSECUTOR: Thank you your worship. The state calls Z[...] S[...].

PROSECUTOR: she is not sitting worship can I just ask her to go and have a seat?

COURT: Yes. Apparently she is not even in that room, can you switch off that tape. Madam can you hear me now, what is the name of the child?”

- [6] The second complainant testified immediately after the first one and the following appears on the record:

“PROSECUTOR: The state will call G[...] J[...], can they just swop in the playroom please, the two children.

COURT: Madam what is the child's names?

G[...] J[...]... (Through intermediary).”

- [7] Section 170A (1) and (2)(a) of the Criminal Procedure Act states that:

“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 mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.

(2)

- (a) No examination, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary

under subsection (1), except examination by the court, shall take place in any manner other than through that intermediary.”

[8] 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 intermediary as laid down by section 170A of the Criminal Procedure Act 51 of 1977. The record had to reflect that an application was made, the name of the intermediary, the profession or qualification of the intermediary, the period served in such class or category as established by the Minister, the fact that the oath or affirmation

was administered before testimony was led. Further the record should reflect that the intermediary undertook to convey correctly to the court information communicated to her by the witness before evidence is led. The appointment of an intermediary does not constitute a once off appointment to be used in every other case where such services are required. Every application has to be considered afresh”

[9] Section 170A of the Criminal Procedure Act is clear that the court may appoint a competent person as an intermediary. This imposes a duty on the court to satisfy itself that the person to be appointed as an intermediary is competent and will convey the general purport of any question to the relevant witness. The record of proceedings in this matter does not indicate the name of the intermediary and the qualifications as set out in *Booi*, supra. Further, the record does not reflect that the intermediary undertook to convey to the witness the general purport of any questions put to her. The record refers to a person appointed by the court but there is no record of such an appointment. The duty on the court is to appoint an intermediary for each witness.

[10] The failure by the Regional Magistrate in this matter to appoint and swear in the intermediary is an irregularity which renders the proceedings a nullity. The evidence of the two complainants was therefore not properly before the court and could not be relied upon.

[11] The other evidence in this matter was that of the complainant’s friend who saw them going away with the appellant. She could however not testify about what happened to the complainants as she was not at the appellant’s place. The mother as well only received a report from the complainants and did not witness anything on the day of the incident. These witnesses’ evidence cannot assist in linking the appellant with the offences perpetrated on the two complainants. The doctor was not called to testify and the State only handed in the completed medical certificate without reading the contents thereof into the record. No reliance can be placed on the medical evidence as well.

[12] In view of the above, there was indeed a material misdirection by the trial court that warrants interference by this Court. The conviction stands to be set aside.

Order

[13] Consequently, the following order is made:

- i. The appeal against conviction is upheld.
- ii. The conviction and sentence are set aside.

iii. The immediate release of the appellant is granted.

J T DJAJE

JUDGE OF THE HIGH COURT

I agree

R D HENDRICKS

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

P.L NOBANDA

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING

: 07 FEBRUARY 2020

DATE OF JUDGMENT

: 13 FEBRUARY 2020

COUNSEL FOR THE APPELLANT : MR GONYANE

COUNSEL FOR THE RESPONDENT : ADV RASAKANYA

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