

SOUTH AFRICA / JUDGMENT

Soares and Another v S (CAF26/2016) [2017] ZANWHC 24 (15 June 2017)

[2017] ZANWHC 24

COURT

North West High Court, Mafikeng

BEFORE

JT Djaje, RD Hendricks

CASE / FILE NUMBER

CAF26/2016

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IN THE HIGH COURT OF

SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

CASE

NO: CA 26/2016

In

the matter between:

MORAIS

SOARES 1ST

Appellant

EMMANUEL

SOARES 2ND

Appellant

And

THE

STATE Respondent

HENDRICKS

J, DJAJE J

DATE

OF HEARING : 12 MAY 2017

DATE

OF JUDGMENT : 15 JUNE 2017

COUNSEL
FOR THE APPELLANT : MR GOONYANE
COUNSEL
FOR THE RESPONDENT : ADV NDI MANDE

JUDGMENT

DJAJE J

Introduction

- [1] The two Appellants were each convicted of one count of rape in the Regional Court sitting in Garankuwa. They were both sentenced to twenty five (25) years imprisonment. They were granted leave to appeal both their conviction and sentence by the Regional Court.
- [2] The application for condonation for the late noting of the appeal was not opposed by the Respondent and subsequently granted by this Court.

Factual

Background

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

The Appellants were charged with the rape of two complainants but only one testified before court. At the time of testifying the complainant (the first complainant) was eleven (11) years old. She testified that on the day of the incident the two Appellants, who are [...], called her together with her sister (the other complainant) to their house where they were both raped by the two Appellants. Thereafter they went home and the incident was eventually reported to E. K. in whose custody the two complainants were in the absence of their parents. The police were called and the two Appellants were arrested.

- [4] E. K. testified that she indeed saw the two Appellants with the complainants in the house and she asked them what they were doing with the complainants. The two Appellants just laughed at her. As a result of her suspicion she examined the two complainants on their private parts and noticed that they were reddish and open. The two complainants then reported to her that they were each raped by the two Appellants once.
- [5] The doctor testified that the clinical findings of both complainants indicated forceful penetration. The conclusion of the doctor was based on the swelling and torn hymen of each of the complainants.
- [6] The two Appellants testified that they are [...] to the complainants. They were with them on the 5th and 6th January 2004 and they denied having sexual intercourse with them. They were surprised to be arrested for raping the complainants.

AD CONVICTION

[7] The submissions on behalf of the Appellants were about the contradictions between the evidence of the first report E. K. and

that of the complainant in relation to how the incident was reported. It was correctly pointed out that according to the complainant the report was made after the examination of their private parts, whereas E. said it was after. It was further argued on behalf of the Appellants that the report made to E. was not voluntary and the court misdirected itself by accepting such evidence.

[8] It is clear from the record that the second complainant did not testify. Mr Goonyane for the Appellants argued that evidence of the first complainant that she assumed that the second complainant was penetrated as she was crying is not sufficient to sustain a conviction without the second complainant testifying or some supporting evidence. Further that the doctor who testified admitted

during cross examination that the conditions of the injuries on the two complainants may have been caused by a possibility of allergy

and/or chemicals.

[9] During argument Mr Goonyane (for the Appellant) was engaged on the issue of the way the complainant who testified was sworn in. It was his submission that such was not done properly and this Court should also on that basis interfere. Counsel for the Respondent conceded that the procedure adopted by the trial court in swearing in the complainant who was eleven (11) years old at the time of testifying was not in accordance with the provisions of section 170A and 164 of the Criminal Procedure Act 51 of 1977, as amended.

[10] Section 164 (1) of the Criminal Procedure Act provides:

“(1) Any person who, is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth.”

This section requires that the court should at first satisfy itself that the witness understands the nature and import of the oath or the affirmation before deciding to admonish a witness. There is therefore a discretion on the presiding officer to first make a finding on whether or not the witness understand what an oath is before a witness can either be sworn in or take affirmation. The same applies to children called to testify.

[11] In the case of *S v QN 2012 (1) SACR 380 (KZP)* Gorven J (Wallis J and Ngwenya AJ concurring) held that:

“In essence there is a need to establish whether or not the child is capable of distinguishing between truth and falsehood. There is no minimum age required for a competent witness; it must be adjudged whether each witness meets the requirement of competence.”

- [12] In *Director of Public Prosecutions Transvaal v Minister of Justice and Constitutional Development and others* 2009 (2) SACR 130 (CC) Ngcobo J at paragraph 164, 165 and 166 stated as follows:

“Section 164 (1) allows a court to allow a person, who does not understand the nature or the importance of an oath or a solemn affirmation, to give evidence without taking an oath or making an affirmation. However, the proviso to the subsection requires the presiding officer to admonish the person to speak the truth. It is implicit, if not explicit, in the proviso that the person must understand what it means to speak the truth.....”

- [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 understands of the abstract concepts of truth and falsehood.....

- [166] The reason for evidence to be given under oath or affirmation or for a person to be admonished to speak the truth is to ensure that the evidence given is reliable. Knowledge that a child knows and understands what it means to tell the truth gives the assurance that the evidence can be relied upon. It is in fact a precondition for admonishing a child to tell the truth that the child can comprehend what it means to tell the truth. The evidence of a child who does not understand what it means to tell the truth is not reliable. It would undermine the accused’s right to a fair trial were such evidence to be admitted. To my mind, it does not amount to a violation of s28(2) to exclude the evidence of such a child. The risk of a conviction based on unreliable evidence is too great to permit a child who does not understand what it means to speak the truth to testify. This would indeed have serious consequences for the administration of justice.”

- [13] In this matter before the complainant of eleven (11) years could testify the Regional Magistrate asked her the following questions:

“COURT: R., can you hear me? There is no reaction. Just turn that microphone a little bit to the front please. The accused may be seated.

(Inaudible).... Good morning R.. How old are you?

WITNESS: I am 11 years old.

COURT: Do you go to school?

WITNESS: Yes, I attend school.

COURT: In which Grade are you?

WITNESS: I am in Grade 4.

COURT: Now have you heard about the truth and about lies?

WITNESS: Yes.

COURT: Now I am going to give you an example and you must tell me whether it is the truth or a lie.

COURT: Do you have a sister?

WITNESS: No.

COURT: Do you have a friend at school?

WITNESS: Yes, I have got a friend at school.

COURT: What is her name?

WITNESS: K. is the name of my friend.

COURT: And is there a teacher that you favour at school?

COURT: What is her surname?

WITNESS: Ghobane.

COURT: Now if you go to Miss Ghobane and you tell her that K. stole her purse out of her handbag, but you did not see it and it did not

happen, is that the truth or a lie?

COURT: No what? Is that the truth or a lie? Is that the truth or a lie?

WITNESS: It is a lie.

COURT: And what happens if you lie? What will the teacher do to you?

WITNESS: (inaudible) K. to enquire from her whether what I have said is the truth and she is going to talk to another student as well (inaudible) did not see my pen or something.

COURT: And if you lie, what is she going to do with you?

WITNESS: She is going to instruct me to ask for forgiveness from the other student, because I would have spoken lies.

COURT: That is right. Now if you saw her stealing that purse and you and you tell her that she stole the purse, what will you be doing then?

WITNESS: That will be the truth.

COURT: Questions Mrs Baloyi?

PROSECUTOR: None Your Worship.

COURT: Questions Mr Modise?

MR MODISE: None Your Worship.

COURT: Any address by any of the parties?

COURT: The court is satisfied that this witness can distinguish between truthfulness and lie. The court finds to be competent witness.”

[14] A close reading of the questions referred to above does not indicate that the Regional Magistrate established from the witness what it means to tell the truth. In paragraph 167 of *Director of Public Prosecutions Transvaal v Minister of Justice and Constitutional Development and others* (supra) Ngcobo J went on further to state that:

“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.”

Failure by the Regional Magistrate to ensure that the witness understood what it means to tell the truth was fatal and impacted on the evidence of the complainant. The complainant made serious assumptions about the second complainant being penetrated even though she was not in a position to see exactly what happened. This means the witness did not understand what it meant to tell the truth and this renders her evidence unreliable.

[15] The Regional Magistrate made a ruling that the witness can distinguish between truthfulness and a lie. Thereafter the following

appears from the record:

COURT: The court is satisfied that this witness can distinguish between truthfulness and lie. The court finds to be competent witness. Do you know what it is to take an oath?

WITNESS: She will only ask me who took these things and I would say and say no, it is me.”

COURT: She knows what it is to take the oath. Swear that the... Does she consider the oath to be binding on her conscience?

COURT: Swear that the evidence you are about to give will be the truth, the whole truth and nothing but the truth. Put up your right hand and say so help me God.

INTERPRETER: Sworn in Your Worship.”

[16] It appears from the above that when the witness was asked if she knows what it is to take an oath, she did not understand the question as the response thereto is completely unrelated to taking the oath. Thereafter, despite the answer given by the witness, the Regional Magistrate concluded that the witness understood what it is to take an oath and proceeded to swear her in, in terms of section 162 of the Criminal Procedure Act. However, from the questions by the trial court and the response thereto, the witness did not understand what it is to take an oath. The trial court should have admonished the witness to tell the truth.

[17] When the complainant was called to testify, the state made an application to the trial court that she testifies through closed

circuit television in terms of section 158 of the Criminal Procedure Act. The reason for the application by the state was that the witness was afraid to testify in an open court and further that she might suffer undue mental stress. The Regional Magistrate did grant the application in terms of section 158. Thereafter the Regional Magistrate appointed a certain “Cynthia” to act as a guardian to the complainant in this case.

[18] 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.”

[19] The wording of section 170A of the Criminal Procedure Act is such that the court has a discretion whether to appoint an intermediary or not. In the matter of Director of Public Prosecutions Transvaal v Minister of Justice and Constitutional Development and others, *supra*, Ngcobo J at paragraphs 128, 129 and 130 dealt as follows with the issue of discretion to appoint an intermediary by the court:

“[128] The answer, in my view, lies in the proper interpretation and application of subsections 170A (1) and 170A (3). These subsections contemplate that in all cases of sexual offences involving a child complainant, the court will be enquire into desirability or otherwise of appointing an intermediary. This enquiry must be conducted with due regard to the principle that the child’s best interests are of paramount importance in criminal proceedings concerning a sexual offence against a child.

[129] For all these reasons, the discretion conferred on the judicial officers on whether to appoint an intermediary is not inconsistent with s 28 (2). It follows, therefore, that the challenge based on discretion must be rejected.

[130] To conclude, therefore, s 170A (1) is designed to ensure the paramountcy of the best interests of the child complainant in criminal proceedings in which the child testifies. Properly interpreted and applied in the light of s 28 (2) of the Constitution and its objective, as it must be, the subsection achieves that end. It does not exclude the protection that s 28 (2) requires to be afforded to children.”

[20] It is not clear from the record why the Regional Magistrate decided not to appoint an intermediary for the witness, despite the submission by the prosecutor that the complainant would suffer undue mental stress if she testified in an open court. This matter involves a sexual offence committed against a complainant of eleven (11) years at the time of testifying. Instead of appointing an intermediary, the Regional Magistrate decided to appoint a guardian for the complainant. There is no indication in terms of which statutory provision was such an appointment made and why. The record indicates that a person known as “Cynthia” was appointed. As to whom the person was and how she related to the witness is not clear. It is highly unacceptable that the Regional Magistrate did not provide any basis for the appointment of such a person to act as guardian. The question might as well be asked as to what influence such a person had on the testimony given by the witness. This again is another aspect which renders the evidence of the witness unreliable.

[21] The trial court found as follows on page 102 line 13 to 19:

“The State endeavoured to call the second complainant in this matter, the complainant M. in respect of count 2. This witness came to court, but was totally hysterical. The court could not succeed in even getting her to testify through an intermediary through closed circuit television. She was no in an emotional state to testify. The State made do with this witness’ evidence.”

However, on the record it does not appear that the court did make any attempts to determine the inability of the second complainant to give evidence.

[22] The finding of the court is completely unfounded and unsubstantiated. It is based on something that did not happen in court as it does not appear on the record of proceedings. A record should reflect all the proceedings as they happened in court.

[23] The second complainant did not testify. The trial court relied on the evidence of the complainant who testified, which evidence was not properly before court and therefore unreliable. In the absence of the evidence of the complainant, the trial court is left with the medical evidence only. However, such evidence cannot be relied upon because of the concession by the doctor that the injuries on the private parts of the complainants could have been caused by allergies and/or chemicals. The conclusion by the doctor on its own was not conclusive for the trial court to have accepted that there was indeed sexual intercourse with the complainants.

[24] It can also not be said that the trial court could rely on the evidence of the first report as there were some material contradictions between her evidence and that of the complainant.

[25] The onus is on the State to prove the guilt of the accused beyond reasonable doubt. See: *S v Jackson* 1998 (1) SACR 470 (SCA) @ 476e-f. Material contradictions may lead to a rejection of a witness’ evidence.

[26] In view of the above, the court a quo misdirected itself and that warrants interference by this Court. The conviction and sentence stands to be set aside.

[27] Consequently, the following order is made:

1. The appeal is upheld.
2. The conviction and sentence are set aside.
3. The immediate release of the Appellants is ordered.

J T DJAJE

JUDGE OF THE HIGH COURT

I agree

R D HENDRICKS

ACTING DEPUTYJUDGE PRESIDENT

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