

A 98/10
IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

Date: 11/02/2010

High Court Ref No.: 1596
Magistrate's Serial No.: 2/09
Case No.: SHS19/2008

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE :	YES /NO
(2) OF INTEREST TO OTHER JUDGES :	YES /NO
(3) REVISED	
DATE <u>25-1-10</u>	<u>BR Suthu</u> SIGNATURE

MAGISTRATE
MPUMALANGA (held at MIDDELBURG)

THE STATE v RIAAN COETZEE

REVIEW JUDGMENT

SOUTHWOOD J

- [1] This is a special review in terms of section 304 of Act 51 of 1977 ('the Act') in respect of the appointment of an intermediary in terms of section 170A(1) of the Act in a case where the accused is charged with rape, *crimen iniuria* and indecent assault and the victim is about 7 years old. Despite the fact that the accused does not oppose the appointment of an intermediary to assist the complainant the appointment of the intermediary is questioned because the state did not formally apply for the intermediary to be appointed.

- [2] The appointment of an intermediary in terms of the Act takes place in terms of section 170A(1) which reads as follows:

'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 18 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.'

It will be noted that no procedure is provided for the appointment of an intermediary and the Act does not provide expressly or by implication that the state must apply, formally or informally, for the appointment. There is also no clear indication in the subsection that the accused can object to the appointment, and if so, what procedure must be followed in dealing with such an objection.

- [3] In *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others* 2009 (2) SACR 130 (CC) the Constitutional Court dealt exhaustively with the constitutionality, meaning and implementation of section 170A(1) of the Act. With regard to implementation the court stated that while the subsection contemplates an assessment of the child prior to testifying and a formal application by the state if the appointment of an intermediary is indicated (para 111), that this is the procedure that ordinarily should be followed in all matters involving child complainants in sexual offence cases (para

112) it remains the duty of the court to consider whether an intermediary is required – the judicial officer must of his or her own accord raise the need for an intermediary to assist the child where the prosecutor does not raise the matter (paras 113 and 114). The court also emphasised that the enquiry does not involve a burden of proof. The court will appoint an intermediary where this is necessary to protect the constitutional rights of the child. From the Constitutional Court's review of the effect of court proceedings, particularly in a case of sexual assault, on a child, it seems axiomatic that a complainant of 7 years old will require the assistance of an intermediary (paras 100-109). This does not mean that the court cannot or should not receive evidence on the issue.

- [4] The state was not required to apply for the appointment of an intermediary in terms of section 170A(1) of the Act. The court was obliged to consider the issue and make an appointment even if the state did not address the issue. If the accused does not object to the appointment of an intermediary it is not clear why he insists on compliance with the subsection.
- [5] The learned regional magistrate should enquire from the accused precisely why the issue is raised now and then deal with the issue in the light of the Constitutional Court judgment.
- [6] The papers are returned to the regional magistrate for the matter to proceed.

I agree



B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT



E. BERTELSMANN
JUDGE OF THE HIGH COURT