



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

**Case No: CA&R121/2023
Delivered: 4 August 2023**

In the matter between:

THE STATE

And

SIYABONGA NTOSE

SPECIAL REVIEW JUDGMENT

BESHE J:

[1] The Regional Magistrate, Gqeberha, placed the record of proceedings in this matter before this court for review presumably in terms of *Section 304 (4) of the Criminal Procedure Act 51 of 1977* which provides for a special review. *Section 304 (4)* provides that:

“(4) If in any criminal case in which a magistrate’s court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section.”

[2] The proceedings were halted at the stage when the complainant was still giving evidence. The accused not having been convicted at that stage, no sentence has been imposed. The complainant is a 17-year-old female who is

moderately mentally challenged with the mental age of 6 to 9 years. She was testifying with the assistance of an intermediary via the CCTV in terms of *Section 170A* of the *Criminal Procedure Act*. *Section 170A(1)* in turn provides 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.”

[3] The motivation for submitting the matter for review is encapsulated in the Regional Magistrate’s covering letter as follows:

“The court was in session doing a sexual offence case via an intermediary. While the court was in session with the witness testifying, another prosecutor entered the room where the witness and the intermediary were. She spoke to the intermediary not once but twice till the intermediary stated she was disturbed.

That is how the court was alerted to the situation. The defence attorney objected to that since the requirement is that only the witness and the intermediary should be in the CCTV room. The court agreed that this is the normal practice.

Due to the request from the defence not to create wrong impression to the accused, we decided to send this matter for a directive if what happened causes an irregularity or not.”

It is not clear where this “requirement” is provided for. It is also not clear why the Presiding Officer was not aware that another prosecutor had entered the witness room on two occasions or why the Presiding Officer did not intervene. Having been aware of that fact, it is not clear why the Presiding Officer did not enquire why the other public prosecutor was in the witness room and find out from the witness if she was able to proceed with her evidence.

[4] The prosecutor also made an application that the complainant should testify in camera in terms of *Section 153 of the Criminal Procedure Act* which provides that:

“(1) In addition to the provisions of section 63(5) of the Child Justice Act, 2008, if it appears to any court that it would, in any criminal proceedings pending before that court, be in the interests of the security of the State or of good order or of public morals or of the administration of justice that such proceedings be held behind closed doors, it may direct that the public or any class thereof shall not be present at such proceedings or any part thereof.

(2) If it appears to any court at criminal proceedings that there is a likelihood that harm might result to any person, other than an accused, if he testifies at such proceedings, the court may direct—

(a) that such person shall testify behind closed doors and that no person shall be present when such evidence is given unless his presence is necessary in connection with such proceedings or is authorised by the court;

(b) that the identity of such person shall not be revealed or that it shall not be revealed for a period specified by the court.

(3) In criminal proceedings relating to a charge that the accused committed or attempted to commit—

(a) any sexual offence as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, towards or in connection with any other person;

(b) any act for the purpose of furthering the commission of a sexual offence as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, towards or in connection with any other person; or

(c) extortion or any statutory offence of demanding from any other person some advantage which was not due and, by inspiring fear in the mind of such other person, compelling him to render such advantage,

the court before which such proceedings are pending may, at the request of such other person or, if he is a minor, at the request of his parent or guardian, direct that any person whose presence is not necessary at the proceedings or any person or class of persons mentioned in the request, shall not be present at the proceedings: Provided that judgment shall be delivered and sentence shall be passed in open court if the court is of the opinion that the identity of the other person concerned would not be revealed thereby.

(3A) Any person whose presence is not necessary at criminal proceedings referred to in paragraphs (a) and (b) of subsection (3), shall not be admitted at such proceedings while the

other person referred to in those paragraphs is giving evidence, unless such other person or, if he is a minor, his parent or guardian or a person in *loco parentis*, requests otherwise.

(4) ...

(5) Where a witness at criminal proceedings before any court is under the age of 18 years, the court may direct that no person, other than such witness and his parent or guardian or a person in *loco parentis*, shall be present at such proceedings, unless such person's presence is necessary in connection with such proceedings or is authorised by the court."

The order issued by the Magistrate in this regard was as follows:

"Then the court orders that the complainant can be taken to the room itself, where she will be testifying through CCTV."

Nothing was said about the proceedings being in camera and the implication thereof.

[5] According to the record, the intermediary explained to the court that she was being distracted by another prosecutor who presumably wanted to establish her availability for purposes of arranging a date in respect of another matter. She also stated that the matter was sorted out and the prosecutor had since left.

[6] There was no suggestion that the witness was flustered, upset or affected by the exchange between the intermediary and the other prosecutor or the prosecutor's presence in the room. Had the Magistrate been vigilant and in charge of the proceedings in her court, this would have been averted by her calling the second prosecutor to order. I am however not of the view that this resulted in an irregularity that vitiated the proceedings.

[7] Be that as it may, it is worrisome that it is not clear whether the proceedings were held in camera as provided for in *Section 153* of the *Act*. It is also of concern that there is no indication from the record that an oath or affirmation was administered to the intermediary. The transcribed record

reveals that after asking the intermediary questions to establish whether she qualifies to be appointed as such, the learned Magistrate stated as follows:

COURT: *Okay ma'am. Then after everything that you have given me, the Court is convinced that you are a competent person as determined by the gazette, Ms Nolithando Cew and it finds that you can act as an intermediary in this matter.*

PROSECUTOR: *As the Court pleases.*

MS KAPU: *As the Court pleases.*

COURT: *I have already sworn you in and now you can go and join the person that side.*

There is no indication from the record that **Ms Cewu**, the intermediary was sworn in, even for purposes of the enquiry into her suitability to act as an intermediary. It is therefore unclear what the Magistrate was referring to when she said, *"I have already sworn you in . . ."*.

[8] I am therefore of the view that the proceedings were not in accordance with justice and should be remitted back to the Regional Court to start *de novo* before another Magistrate. Even though the accused has not been convicted and no sentence has been imposed, in light of the anomalies pointed out hereinabove, it will be pointless and a waste of time to only review the proceedings at the conclusion of the trial.

[9] Accordingly, the matter is remitted back to the Regional Court for the trial to start *de novo* before another Magistrate.

N G BESHE
JUDGE OF THE HIGH COURT

BLOEM J

I agree.

G H BLOEM
JUDGE OF THE HIGH COURT