

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No: CA & R 49/2013
Heard on: 12/09/2016
Delivered on: 23/09/2016

In the matter between:

POLOKO MAKUMU

APPELLANT

AND

THE STATE

RESPONDENT

Coram: Olivier J et Mamosebo J

JUDGMENT

MAMOSEBO J

- [1] The appellant was charged with rape in the Kuruman Regional Court. It was alleged that on 09 February 2011 at or near Bankara in the Kuruman

district, Regional Division of Northern Cape, he unlawfully and intentionally committed an act of sexual penetration with the complainant, KD a 12 year old boy, by penetrating his anus with his penis without his consent. He was convicted and sentenced to a term of ten years' imprisonment. This appeal is against both the conviction and sentence and is with leave of the Regional Magistrate, Mr BB Mbalu. The complainant testified through an intermediary.

[2] The appellant raised the following grounds of appeal:

- 2.1 Whether the provisions of s 170A of the Criminal Procedure Act 51 of 1977 (the CPA) were met with regard to the intermediary;
- 2.2 Whether the complainant was duly sworn in;
- 2.3 Whether the identity of the appellant was proven beyond reasonable doubt; and
- 2.4 Whether the offence has been proved beyond reasonable doubt.

[3] The appeal came before Williams J et Olivier J who were concerned, on perusing the appeal record in the matter, whether there had been proper compliance by the trial court with the provisions of s 164 read with sections 162, 163 and 170A of the Criminal Procedure Act 51 of 1977. The learned Judges issued an order on 13 September 2013 in the following terms:

“[1] The notice of appeal is amended by inserting a paragraph 3 therein, which reads as follows:

3. The following irregularities occurred during proceedings:

3.1 In the evidence of the complainant use was made of the services of an intermediary without any preceding enquiry into whether testifying in open court would expose the complainant to ‘undue mental stress or suffering’ as

envisaged in section 170A (1) of the Criminal Procedure Act, 51 of 1977, and without the intermediary having actually been appointed or sworn in.

3.2 The complainant was admonished to speak the truth, instead of being required to swear or affirm as envisaged in sections 162 and 163 of the Criminal Procedure Act, without any preceding finding that the complainant did not understand the nature and import of the oath or the affirmation, as envisaged in section 164(1) of the Criminal Procedure Act.

3.3 No proper enquiry was conducted into the complainant's competency as a witness.

[2] The Clerk of the Court must furnish the Regional Magistrate with the amended notice of appeal in order to afford the Regional Magistrate the opportunity of any possible further comments and reasons in respect thereof.

[3] The appeal is postponed sine die and either party may set it down again on notice and in accordance with the applicable rules and practice in this regard."

[4] It is disconcerting that the Regional Magistrate, Mr Mbalu, only responded to the Court's order dated 13 September 2013 on 05 March 2014, six months later, without either an explanation or an apology for the unwarranted lengthy delay. The response to the query was to the following effect:

"Ad Par 1(3): The state prosecutor applied for the services of an intermediary without a preceding enquiry into whether testifying in open court would expose the complainant to "endure (sic) mental stress or suffering" as envisaged in section 170A (1) of the Criminal Procedure

Act 51 of 1977 on the assumption that this was dealt with by the court preparation officer in view of the age of the victim and this application was not opposed by the defence.

The intermediary had previously been appointed and sworn in and is in full-time employment of the State and it was not yet clear to the Court that she should be sworn in every case and this oversight is regretted.

Ad par 1.3.2: In view of the age of the victim and [his] lack of understanding of the nature and importance of the oath or affirmation, [he] was admonished to speak the truth.

[5] Sec 170A (1) of the CPA stipulates:

“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.*

It is common cause that the intermediary was not appointed by the Regional Magistrate as it appears from the aforementioned response and was therefore not in accordance with the relevant (quoted) provisions of the CPA.

[6] In addition to hearing the evidence of the complainant through an intermediary, the Regional Magistrate also admonished the witness by asking him the following questions:

“Court : What is the name of the victim, of the witness?

Mr D: K

Court: K who?

Mr D: D

Court: D

Mr D: D

Court: How old are you K?

Mr D: 14

Court: Are you schooling?

Mr D: No

Court: Why?

Mr D: My mother did not buy me school clothes, your Honour, uniform.

Court: How far did you go at school?

Mr D: Grade 5

Court: Do you know what it means to tell the truth?

Mr D: Yes

Court: Do you know what it means to tell an untruth?

Mr D: Yes your worship.

Court: Are you going to speak the truth?

Mr D: Yes

Court: Now you must tell the Court what you saw with your own eyes, what you perceived with your senses and do not tell the Court what you have been told by another person.

Mr D: Yes your Honour.”

It is after these questions were posed to the complainant that the Regional Magistrate then asked the State to commence with its evidence- in- chief.

[7] Sections 162–164 of the Criminal Procedure Act provide as follows:

“162 Witness to be examined under oath

(1) Subject to the provisions of sections 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 the 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 that I shall give shall be the truth, the whole truth and nothing but the truth, so help me God.”

(2) If any person to whom the oath is administered wishes to take the oath with uplifted hand, he shall be permitted to do so.

163 Affirmation in lieu of oath

(1) Any person who is or may be required to take the oath and—

(a) who objects to taking the oath;

(b) who objects to taking the oath in the prescribed form;

(c) who does not consider the oath in the prescribed form to be binding on his conscience; or

(d) who informs the presiding judge or, as the case may be, the presiding judicial officer, that he has no religious belief or that the taking of the oath is contrary to his religious belief, shall make an affirmation in the following words in lieu of the oath and at the direction of the presiding judicial officer or, in the case of a superior court, the presiding judge or the registrar of the court:

“I solemnly affirm that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth.”

(2) Such affirmation shall have the same legal force and effect as if the person making it had taken the oath.

(3) The validity of an oath duly taken by a witness shall not be affected if such witness does not on any of the grounds referred to in subsection (1) decline to take the oath.

164 When unsworn or unaffirmed evidence admissible

(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.

(2) If such person wilfully and falsely states anything which, if sworn, would have amounted to the offence of perjury or any statutory offence punishable as perjury, he shall be deemed to have committed that offence, and shall, upon conviction, be liable to such punishment as is by law provided as a punishment for that offence."

[8] In ***Matshiva v S*** [2014] 2 All SA 141 (SCA) the Court held that it is peremptory for all witnesses in criminal trials, with the exception of certain categories of witnesses falling either under s 163 or 164, to be examined under oath. In my view the Regional Magistrate has failed to establish whether KD would not understand the nature and import of taking an oath or affirmation. The questions asked in the admonition were also not sufficient to reflect the lack of understanding on the part of the complainant. It was further not discernible on the record whether the complainant would be exposed to 'undue mental stress or suffering' if he was to testify in open court.

[9] For purposes of reliability of such evidence, it is crucial for the witness to either give his or her evidence under oath (s162), or affirmation (s163) or admonishment (s164). See ***Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & others*** 2009 (2) SACR 130 (CC) para 166. What was required of the Regional Magistrate in embarking upon that enquiry has been articulated by the Constitutional Court (per Ngcobo J) in ***Director of Public Prosecutions,***

Transvaal v Minister of Justice and Constitutional Development & others at paras 165, 167 and 168 as follows:

“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's understanding of the abstract concepts of truth and falsehood. The questioning may at times be very confusing and even terrifying for a child. The result is that the judicial officer may be left with the impression that the child does not understand what it means to speak the truth and then disqualify the child from giving evidence. Yet with skilful questioning, that child may be able to convey in his or her own child language, to the presiding officer that he or she understands what it means to speak the truth. What the section requires is not the knowledge of abstract concepts of truth and falsehood. What the proviso requires is that the child will speak the truth. As the High Court observed, the child may not know the intellectual concepts of truth or falsehood, but will understand what it means to be required to relate what happened and nothing else.

...

When a child, in the court's words, cannot convey the appreciation of the abstract concepts of truth and falsehood to the court, the solution does not lie in allowing every child to testify in court. The solution lies in the proper questioning of children; in particular, younger children. 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. Here the manner in which the child is questioned is crucial to the enquiry. It is here where the role of an intermediary becomes vital. The intermediary will ensure that questions by the court to the child are

conveyed in a manner that the child can comprehend and that the answers given by the child are conveyed in a manner that the court will understand.

As pointed out earlier, questioning a child requires a special skill. Not many judicial officers have this skill, although there are some who, over the years and because of their constant contact with child witnesses, have developed a particular skill in questioning children. This illustrates the importance of using intermediaries where young children are called upon to testify. They have particular skills in questioning and communicating with children. Counsel for the Centre for Child Law and Childline was quite correct when, in her reply, she submitted that everything seems to turn upon the need for intermediaries when young children testify in court. Properly trained intermediaries are key to ensuring the fairness of the trial. Their integrity and skill will be vital in ensuring both that innocent people are not wrongly convicted and that guilty people are properly held to account.”

- [10] Counsel for the State was constrained to concede that the court’s failure to conduct an enquiry or proper enquiry as to whether testifying in an open court would cause the witness undue stress or mental suffering prior to appointing an intermediary was an irregularity. See ***S v Booï and Another*** 2005 (1) SACR 599 (B). The intermediary was also not sworn in as required by s 170A (1). Presiding officers in the lower courts are creatures of statute and must implement the legislation as required. In my view the failure by the Regional Magistrate to appoint or swear in the intermediary properly or at all, after having conducted an enquiry, amounts to a gross irregularity which vitiated the entire proceedings. See ***S v Felthun*** 1999 (1) SACR 481 (SCA) at 485g – 486e.

[11] In the result, the proceedings in the lower court stand to be set aside. The State is, however, at liberty to pursue the matter again, if it elects to do so.

ORDER

- 1. The appeal is upheld.**
- 2. The conviction and sentence are set aside.**

MAMOSEBO J
NORTHERN CAPE HIGH COURT

I concur

OLIVIER J
NORTHERN CAPE HIGH COURT

Appearances:

For the Appellant :	Mr A van Tonder
Instructed by:	Justice Centre, Kimberley
For the Respondent:	Adv NA Mxabo
Instructed by:	Office of the Director of Public Prosecutions