

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

REPORTABLE

IN THE HIGH COURT OF NORTH GAUTENG, PRETORIA

REPUBLIC OF SOUTH AFRICA

CASE NO: A533/2011

DATE:24/02/2012

In the matter between:

CT

Appellant

and

THE STATE

Respondent

JUDGMENT

Ismail J:

[1] The appellant was convicted of rape where the victim was below the age of 16 years. The complainant in the matter was his 9 year old daughter.

[2] He was convicted and the trial court found that substantial and compelling circumstances existed which permitted it to deviate from the prescribed minimum sentence of life

imprisonment and in its place imposed a sentence of 20 years imprisonment.

[3] The appellant was granted leave to appeal to this court in respect of conviction, however leave was refused on the aspect of sentence.

[4] A petition was thereafter lodged where leave to appeal in respect of sentence was also sought. The petition was unsuccessful.

[5] The appellant seeks to review the proceedings and submits that the proceedings be set aside on the basis that there was not a fair trial in that the complainant who was 9 years old did not testify in terms of section 170A of the Criminal Procedure Act 51 of 1977. The appellant relies upon the decision of Director of Public Prosecutions, *Transvaal v Minister for Justice and Constitutional Development and Others*, 2009 (2) SACR 130, particularly paragraphs [112] and [113] of the judgment.

[6] At paragraph [111] of the judgment referred to above, the court stated :

" [111]At the commencement of the trial the State must arrange for an intermediary to be present in court when the accused goes on trial. At the commencement of the trial, the State must then apply under the subsection for the appointment of an intermediary. Indeed, this the procedure that was followed in the Mokoena matter..... "

[112] This is the procedure that should ordinarily be followed in all matters involving child complainants in sexual offence cases. If this procedure were to be followed as matters of practice, this would ensure that the objectives of both the subsection and s 28(2) are achieved. To the extent that current practice may fall short in this regard, proper regard for

constitutional rights of children mean that in every criminal trial in which a child complainant in a sexual offence case is to testify, the court must enquire into the appointment of an intermediary where the State does not raise the issue. If necessary, the presiding judicial officer must initiate an enquiry into the desirability of appointing an intermediary.

[113] what must be stressed here are two points already made: first, that the provisions of ss 170A(1) and 170A(3) were enacted to protect the child from the stress and trauma that may arise from testifying in court. The second is that s28 (2) is an injunction to courts to apply the principle that the best interest of the child are of paramount importance in all matters concerning the child. It is incumbent upon all those who responsible for the administration of justice to apply the principles of our criminal law and criminal procedure so as to protect child complainants in sexual offence cases from secondary trauma that may arise from testifying in court. Judicial officers are therefore obliged to apply the best-interest principle by considering how the child's right and interest are, or will be affected by allowing the child complainant in a sexual offence case to testifying without the aid of the intermediary. It follows from this, therefore, that where the prosecutors does not raise the matter, the judicial officer must, of his or her accord, raise the need for an intermediary to assist the child complainant in a sexual offences case in giving his or her testimony."

[7] During the trial the victim gave evidence by means of CCTV proceedings in terms of s 158 and an interpreter was used. No intermediary was used during the proceedings. It was submitted on behalf of the appellant that the prosecution had a social workers report which recommended that the complainant testify through an intermediary and notwithstanding the recommendation to that effect it was not done. This failure, coupled with the magistrate not complying with what the constitutional court recommended in the passages referred to supra,

suggest that a fair trial procedure was not followed.

[8] It is clear from the record that the magistrate did not raise the issue that the victim should testify through an intermediary as recommended by the Constitutional court.

[9] The question which needs to be answered is whether the irregularity rendered the trial unfair and concomitantly whether the conviction should be set aside. In *S v May* 2005 (2) SACR 331 (SCA) at paragraph [7] stated:

* What needs to be stressed immediately is that the failure by a presiding judicial officer to inform an unrepresented accused of his right to legal representation, if found to be an irregularity, does not per se result in an unfair trial necessitating the setting aside of the conviction on appeal. In addition it must be shown that the conviction has been tainted by irregularity- that the appellant has been prejudiced."

[10] The fact that there was a failure to adhere to the child's evidence being relayed through an intermediary on its own does not render the trial unfair. The prosecution in its heads of argument raised the issue of prejudice. In the instant matter the question to be answered is what prejudice was there to the appellant in that the victim did not testify as in terms of the Constitutional court's ruling. In my view there could be no prejudice-to the appellant.

[11] Mohamed CJ in *S v Shiunga and Another* 1997 (2) SACR 470 at 484 stated that:

"Essentially the question that one is asking in respect of constitutional and non-constitutional irregularities is whether the verdict has been tainted by such irregularity"

[12] In *Key v Attorney-General, Cape Provincial Division, and another* 1996 (2) SACR 113

(CC) at paragraph [13] Kriegler J stated:

In any democratic criminal justice system there is a tension between, on the one hand the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all... what the Constitution demands is that the accused be given a fair trial. Ultimately, as was held in *Ferreira v Levin*, fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted.."

[13] Accordingly I am of the view that the question review of the proceedings have no merit, and that the review proceedings on this score, namely that an intermediary was not used, cannot be sustained and the review should be dismissed.

[14] Apart from the review referred to above the appellant also appealed against the conviction on several grounds.

[15] On the merits the appellant denied that he raped his daughter. The appellant when he testified stated that he accepted that the child was raped however, he disputed that he was the perpetrator of the crime. His version was that because he and his wife had just been divorced and the settlement agreement reflected that the joint estate should be divided. His wife orchestrated that the child incriminated him so that he would be incarcerated and she would thereby obtain the home. The trial court in its judgment dealt with this aspect of the appellant's version and it in my view correctly rejected it as not being reasonably possibly true and found that it was false beyond reasonable doubt.

[16] It is true that there was confusion in the evidence of the victim and the evidence of the victim's mother regarding the date of the offence. Reliance regarding the date of the offence can be placed on the evidence of the mother, as she gave a clear version of the date. The child was obviously very young, traumatized and frightened and this must have led to the confusion of the date.

[17] Nurse Maluleke testified that the discharge and redness to the victim's vagina could have been caused by an infection. Her evidence in this regard merely indicated that the symptoms of the redness and whitish discharge could have been as a result of an infection. I did not understand her evidence to imply that it was indeed the case.

In fact she was of the view that the injuries were consistent with penetration. The victim testified that her father inserted his penis in her vagina. The appellant himself was of the view that the child was raped by some other party.

[18] The sole issue in this matter which needed to be determined was whether the state had proved that the appellant was responsible or culpable of the crime. In other words the issue of identity of the perpetrator had to be proved beyond reasonable doubt. This aspect was also dealt with by the trial court and it is not necessary for me to repeat the courts views apart endorsing my agreement of the court's reasoning in that regard.

[19] For these reasons I would recommend that the appeal on conviction should also be dismissed, as the conviction in my view was both sound and proved beyond reasonable doubt.

Ismail J

I agree

Khumalo AJ

Appearances:

For the Appellant: Mr J O van Schalkwyk, BDK Attorneys, Johannesburg

For the respondent: Adv M M Mashuga, Director of Public Prosecutions, Pretoria.

Date of Appeal: 24 February 2012