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REPORTABLE

IN THE NORTH GAUTENG HIGH COURT,

PRETORIA [REPUBLIC OF SOUTH AFRICA]

CASE:A1029/11

CASE NO.: PSH 122/11

DATE:14/12/2011

In the matter between

THE STATE

and

S I N

SPECIAL REVIEW IN TERMS OF SECTION 304 A OF THE CRIMINAL PROCEDURE ACT
51 OF 1977

REVIEW JUDGMENT

MOTHLE J:

[1] Before me is a matter that is been sent to the High Court on special review by the Magistrate Court district Ermelo, held at Piet Retief.

[2] Mr N (the accused) aged 15 is charged with the crime of rape for which he has pleaded not guilty. During the trial the State presented witnesses who by their age are minors. One of the witnesses, the complainant in the case, is also a minor of 14 years.

[3] In hearing the evidence of the minors, the Court, at the request of the State Prosecutor, and acting in terms of Section 170A of the Criminal Procedure Act 51 of 1977 (CPA), appointed one Winile Perseverance Mhlanga (Mhlanga) as an intermediary. Her role as intermediary was basically to assist in and facilitate communication between the minor witnesses including the complainant, on the one side and the Court on the other side.

[4] At the end of the testimony of the complainant, the State Prosecutor intended to call additional witnesses who are also minors and happen not to be at Court on that day. The trial was postponed to enable the State to make available those witnesses. When the trial resumed on the date to which it was postponed, the prosecution disclosed to the presiding officer that it has come to his attention that the intermediary who had been used up to that point in the trial, did not have the required qualifications of intermediaries as proclaimed by the Minister in the Government Gazette. The Court noted that at the end of the proceedings the matter will be referred to the High Court for special review, for the latter to determine and decide whether the use of Mhlanga as intermediary has or has not affected the conduct of the proceedings and what should be the fate of these proceedings. The trial proceeded with the services of Mhlanga as intermediary.

[5] Section 170A of the CPA provides thus:

"(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 18 years to undue mental stress or suffering if he or she testifies as 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/her evidence through that intermediary.

[6] Subsection (4)(a) provides thus:

"the Minister may by notice in the gazette determine the persons or the category or class of persons who are competent to be appointed as intermediaries"

[7] Acting in terms of this subsection, and in July 1993 the Minister has promulgated categories of persons who can be appointed as intermediaries. That promulgation was amended in February 1997 as well as July 2001.

[8] In terms of Government Notice No. R1374 of 30 July 1993 published in Government Gazette No. 15024 of 30 July 1993, the Minister determined the classes of persons who are competent to be appointed as intermediaries. These classes include medical practitioners, family counsellors who are appointed as such under Section 3 of the Mediation in Certain Divorce Matters Act 24 of 1987, child care workers who have successfully completed a 2 year course in Child and Youth Care approved by National Association of Child Care Workers and who have 4 years experience in child care, social workers with 2 years experience, teachers who are classified in qualification category c-g and psychologists who are registered as clinical educational or counselling psychologists.

[9] The Government Notice R360 published in the Government Gazette No. 17822 of 28 February 1997, extended the class of educators to include any educator who has 4 years experience in teaching and who has not at any stage for whatever reason being suspended or dismissed from service in teaching. A further amendment was made in Government Notice R597 published in the Government Gazette No. 22435 of 2 July 2001, in which the Minister qualified the various classes or categories of persons to include the following: 'Paragraph (d) Child Care Workers who have successfully completed a 2 year course in Child and Youth Care approved by the National Association of Child Care Workers and who have 2 years experience in child care.

Paragraph (e)(i) Social Workers who are registered as such under Section 17 of the Social Service Professions Act 1978, and who have 2 years experience in Social Work and (ii) persons who obtained a Masters Degree in Social Work and who have 2 years experience in Social Work. "

[10] The Curriculum Vitae of Miss Mhlanga shows that she has a good level of language proficiency in English, IsiZulu and IsiXhosa. She also took the language Afrikaans for her Senior Certificate which she passed in 2001 at Piet Retief High School. In 2006 she completed her Bachelor of Social Sciences Degree at the University of Fort Hare. She also successfully completed a Theoretical Course in HIV/Aids Care and Counselling for which she studied for 6 months with the University of South Africa. She attained a certificate in Short Course in Managing the Employment process with centre for Business Management University of South Africa. This is a 3 months course. Last year in October 2010 she completed a course and was awarded a certificate in "Introducing the Child Witness". This

course is offered by the Institute for Child Witness Research and Training.

[11] Mhlanga was appointed intermediary at level 7 on 1 January 2011 by the Department of Justice and Constitutional Development. Prior to that, between 2005 and 2006 she worked for Mondi Packaging SA as Human Resource Trainee and joined the Department of Justice between February 2007 and December 2009 as Senior Administration Clerk level 4. In that capacity she dealt with issues of maintenance and domestic violence. Since the 25 January 2011 she is registered by the South African Council for Social Services Professions. She is presently registered with the University of South Africa for a National Diploma in the field of Marriage Guidance Basic Counselling Skills and Social Welfare Law.

[12] Though she has a Bachelor of Social Work degree, and is presently registered with the South African Council for Social Services Professions, Mhlanga does not have the two years experience in Social Work as required by paragraph (e)(i) of Government Notice 22435 of 2 July 2001 nor a qualification of a two year course in Child and Youth Care approved by the National Association of Child Care Workers, as contemplated in paragraph (d) of the same Government Notice. Her qualifications falls short of the requirement as stated in the Government Notice.

[13] The question before me now is whether the use of Mhlanga's services as an intermediary, whose qualifications falls short of the requirements published in the Government Gazette, has vitiated the proceedings.

[14] Section 170A of CPA provides that a judicial officer presiding over a trial where minors, in particular a complainant minor is to testify, may appoint an intermediary. In doing so, the Court

has to satisfy itself that the child, if called to testify in open court, would be exposed to undue mental stress and suffering. See in this regard S v F 1999 (1) SACR 571 (c).

[15] Ngcobo J (as he then was) in Director of Public Prosecutions v Minister of Justice and Constitutional Development 2009 (4)

SA 222 (CC) at page 265 paragraph 111, had this to say:

"what the subsection (subsection (1) of section 17 OA of the CPA) contemplates is that a child will be assessed prior to testifying in court in order to determine whether the services of an intermediary should be used. If the assessment reveals that the services of an intermediary are needed, then 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. "

[16] If the assessment of the child's fitness to testify in open court has been conducted by an expert such as Social Worker or Psychiatrist, the prosecution must make the evidence of such expert available to the Court in order to assist the Court to exercise its discretion correctly. The Court in DPP v Minister of Justice and Constitutional Development supra stated further as follows on in paragraph 128:

"these subsections contemplate that in all cases of sexual offences involving a child complainant, the Court will enquire into the desirability or otherwise of appointing an intermediary. This enquiry must be conducted with due regard to the principle that the child's best interest are of paramount importance in criminal proceedings concerning a sexual offence against the child. "

[17] The Constitutional Court further described the object of section 170A (1) on page 261

paragraph 96 of the Judgment by Ngcobo J as follows:

"its object is to reduce to the minimum the degree of stress and create an atmosphere that is conducive for a child to speak freely about the events relating to the offence committed against him/her. The provisions of an intermediary is intended to create this atmosphere. The child conveys his/her experiences to a person skilled in dealing with children. This person knows how to communicate with a child and to do so in a manner that is neither intimidating nor embarrassing to the child. But at the same time, this person is able to communicate what the child has conveyed to him or her to the adults in Court. In short, this person acts as a link to bridge the communication gap between the child and the Court. "

[18] The object of Section 170A (1) was found to be consistent with the provisions of Section 28 of the Constitution of the Republic of South Africa Act, 1996.

[19] In referring this matter for review, the Magistrate had this to say about Mhlanga as an intermediary:

"Me. W. P. Mhlanga is met ingang van 1 January 2011 deur die Department van Justisie, Streekkantoor in Mpumalanga aangestel as permanente tussenganger te Piet Relief. Sy is destyds ingesweer as tussenganger. Ek kan uiteraard nie onthou wat betreffende haar kwalifikasies voorgehou is nie. Ondertussen werk sy al 'n geruime tyd as tussenganger in die Streekhof te Piet Retief. Ek moet ook meld dat sy uiters bekwaam is en die werk wat my betref met onderskeiding verrig.

Dit het egter ondertussen onder die hoofaanklaer te Witbank se aandag gekom dat sy waarskynlik nie kwalifiseer ingevolge die bepalings van die relevante Staatskoerant om as tussenganger op te tree nie. "

[20] From her curriculum vitae however it is clear that she did not have the requisite 2 years experience as a registered Social Worker alternatively a Masters Degree with 2 years experience. She also does not have the required certificate in Child Care, although she obtained a certificate for successfully completing a course "Introducing the Child Witness" with the institute for Child Witness Research and Training. It is not clear for how long was this course and what its content entailed.

[21] The fact that she does not have the required two years experience, her appointment as an intermediary does not meet with the requirements of the regulation as published in the Gazette.

[22] A full bench of the Cape Provincial Division sitting on review in the matter of State v Bongani 2001 (1) SACR 670 (CPD) was seized with the problem where an intermediary appointed by the Court was a retired educator. After examining the definition of educators, the Court concluded that the intermediary so appointed was not qualified, as the class of intermediaries educators did not include retired educators.

[23] Conradie J, delivering the judgment for the Court stated the following in obiter:

"whether or not proceedings in a trial in which a non competent intermediary has been used will be invalid, would depend on the circumstances. In our days we turn to ask whether an accused has had a fair trial. Formally, the question was more often asked whether an irregularity in the proceedings was sufficiently serious to have vitiated them. The answer to this question depended on whether or not the accused had been prejudiced.... No conviction or sentence is to be reversed or altered on appeal as a result of any irregularity of or defect in

the record of proceedings unless it appears that a failure of justice has resulted from such irregularity or defect. "

[24] The decision in *State v Bongani supra*, was handed down on 13 March 2001. In the same year, Parliament, through the Criminal Law Amendment Act 17 of 2001, added subsections 5 and 6 to Section 170 A of the CPA.

[25] Subsection (5)(a) and (b) of Section 170A of the CPA provides as follows:

"(5)(ct) no oath, affirmation or admonition which has been administered through an intermediary in terms of Section 165 shall be invalid and no evidence which has been presented through an intermediary shall be inadmissible solely on account of the fact that such intermediary was not competent to be appointed as an intermediary in terms of a regulation referred to in Subsection (4)(a), at a time when such oath, affirmation or admonition was administered or such evidence was presented.

(b) if in any proceedings it appears to a Court that an oath, affirmation or admonition was administered or that evidence is being presented through an intermediary who was appointed in good faith but, at the time of such appointment, was not qualified to be appointed as an intermediary in terms of a regulation referred to in Subsection (4) (a), the Court must make a finding as to the validity of that oath, affirmation or admonition or the admissibility of that evidence, as the case may be, with due regard to:-

(i) the reason why the intermediary concerned was not qualified to be appointed as an intermediary, and the likelihood that the reason concerned will affect the reliability of the evidence so presented adversely;

(ii) the mental stress or suffering which the witness, in respect of whom that intermediary was appointed, will be exposed to if that evidence is to be presented anew, whether by the witness in person or through another intermediary; and

(in) the likelihood that real and substantial justice will be impaired if that evidence is admitted.

"

[26] In so far as the trial itself is concerned I perused the transcript thereof and it appears to me that there was no breakdown in communication, irregularity or breach of procedure when Mhlanga acted as intermediary. I am unable to opine on the question whether or not the witnesses were subjected to mental stress or experienced suffering during the trial. The mere lack of qualifications as proclaimed does not per se vitiate the proceedings. The Court, however, on realising the absence of appropriate qualifications, must make a finding as to the validity of the oath administered or evidence admitted.

[27] It seems to me when looking at the record of the proceedings in the trial, Mhlanga, even though not qualified as intermediary, successfully and competently bridged the communication gap between the minor witnesses (including the complainant) and the officials in Court which include the State Prosecutor and the attorney defending the accused. There appears in my view, no irregularity or breach in the proceedings which could be so serious as to vitiate the entire proceedings.

[28] However, the decision as to whether the witnesses as minors were subjected to mental stress or suffering which consequently affected the validity of the proceedings in terms of

Section 170A (5) rests with the Magistrate. He has to make a finding in terms of Subsection (5)(b) of Section 170A of the CPA, as to the admissibility of the evidence in the trial, with due regard to:-

(i) the reason why the intermediary concerned was not qualified to be appointed as an intermediary and the likelihood that the reason concerned will affect the reliability of the evidence so presented adversely;

(ii) the mental stress or suffering which the witness, in respect of whom that intermediary was appointed, will be exposed to if that evidence will be presented anew, whether by the witness in person or through another intermediary; and

(iii) the likelihood that real and substantial justice will be impaired if that evidence is admitted.

[29] I have dealt with the reason why the intermediary was not qualified in paragraph [12] of this judgment. The rest of the issues can only be decided by the Magistrate who presided in the trial. If the presiding officer is satisfied that there was no breach of the proceedings or contamination of the evidence or that the minor witnesses were not subjected to mental stress and/or suffering, in my view the proceedings should be validated in terms of Subsection (5)(a) of Section 170A of the CPA. As I have already stated, this is the finding that the Magistrate should make, as he is better placed as the presiding officer in the trial, to do so.

[30] Considering the provisions of this subsection, I am of the view that the enactment of subsections 5 and 6 of Section 170A, makes it unnecessary in future to refer the issue of an unqualified

intermediary for special review. The trial Court is empowered to deal with such situations wherever they arise.

[31] The matter is accordingly referred back to the Magistrate Court to make a finding in terms of Section 170A (5) of Act 51 of 1977.

JUDGE S. P MOTHLE

JUDGE OF THE HIGH COURT

I agree.

JUDGE M. F. LEGODI

JUDGE OF THE HIGH COURT