

Reportable: Yes / No
Circulate to Judges: Yes / No
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IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Provincial Division)

Case no: KS 60/02
Date heard: 2008-09-01
Date delivered: 2008-09-12

In the appeal of:

DANIËL MTHETHO HANS

APPELLANT

versus

THE STATE

RESPONDENT

Coram: MAJIEDT J *et* OLIVIER J *et* MOLOI AJ

JUDGMENT ON APPEAL

MAJIEDT J:

1. The Appellant was convicted of rape in the local Regional Court and the matter was referred to this Court for sentence in terms of the provisions contained in s52(1)(b) of Act 105 of 1997, prior to its amendment by s1 of Act 38 of 2007. The presiding Judge having been satisfied that the proceedings in the Regional Court were in accordance with justice, confirmed the conviction and sentenced the Appellant to 18 years imprisonment.

2. The Appellant was granted leave to appeal against conviction and sentence by my colleague Olivier J (the Acting Judge who had confirmed the conviction and imposed the sentence, was no longer acting in this Division at the time).
3. Having perused the record, Olivier J on behalf of the Court, addressed a memorandum to the Registrar requesting that the record of the proceedings be submitted to the Regional Magistrate who had conducted the trial, for his comment with regard to the fact that the intermediary who relayed the complainant's evidence to the Trial Court was apparently not sworn in. The Regional Magistrate was also requested to comment whether the admonition issued to the complainant by him at the commencement of her evidence, had been interpreted to her by the official interpreter in the complainant's language and whether she had heard the said admonition from the official interpreter (and not only from the intermediary) before she responded thereto. The Regional Magistrate has commented as requested. I deal firstly with this very important aspect in this judgment.
4. The complainant was 9 years old at the time of the incident and 10 years old by the time she had to testify in the trial. The State's application for her to testify through an intermediary in terms of the provisions contained in s170A of the Criminal Procedure Act, 51 of 1977 (*"the Act"*) was granted. It is common cause that the Regional Magistrate correctly found that the provisions of s170A of the Act are applicable and that the intermediary was properly qualified in terms of the Act. The problem arises with the fact that, as is common cause between the parties, the intermediary had not

been sworn in prior to her commencing to relay the evidence of the complainant to the Court. Mr. Van Tonder, on behalf of the Appellant, has submitted that this omission constitutes a fatal irregularity in the proceedings, whereas Mr. Mashuga, for the State, has argued that the Appellant has suffered no prejudice, since the admonition issued by the Court to the complainant prior to her testimony, was in fact interpreted to her in isiXhosa (her home language) by the official interpreter.

5. It has been held in **S v Booï and Another 2005(1) SACR 599(B)** and in **S v Motaung 2007(1) SACR 476(SECLD)** that the failure to administer an oath or affirmation to an intermediary at a trial constitutes an irregularity. I am in respectful agreement with these two decisions.
6. In his detailed response to the query by Olivier J, referred to *supra*, the Regional Magistrate makes the following points:
 - a) That the judgments in **Booi** and **Motaung**, referred to above and alluded to by Olivier J in his aforementioned memorandum, had been decided subsequent to the trial in this matter which had been conducted in 2002 (the Regional Magistrate, however, conveyed his concurrence in the correctness of those judgments);
 - b) That, having listened to the tapes, he was of the view that he did not ensure throughout the trial that the official interpreter translate all the relevant testimony between the intermediary and the complainant at all times;

- c) That the sound quality of the communications between the intermediary and the complainant is extremely poor on the tapes;
 - d) That the answers by the complainant were in all instances relevant to the questions posed, from which he infers that the information gleaned by the complainant from the intermediary were in all instances correct and relevant, so that fears of a possible wrong interpretation were thereby obviated;
 - e) The Regional Magistrate also took the view that the set of facts herein accord with those in the **Motaung** matter, *supra*;
 - f) That the official interpreter at the trial is no longer in the employ of the Department of Justice and could not be approached for an input in the matter, but having listened to the tapes, the Regional Magistrate states that he can hear the voice of the official interpreter translating the admonition conveyed by the Regional Magistrate to the complainant and thereafter he hears the answer of the complainant in isiXhosa. Afterwards the official interpreter interprets in Afrikaans what the complainant had said.
7. After the hearing my two colleagues and I who presided in this appeal have, at the suggestion of both Mr. Van Tonder and Mr. Mashuga (who had both listened to the tapes and had found it to be inconclusive on this aspect of the admonition to the complainant by the Regional Magistrate), listened to the relevant

portion of the evidence on the tapes. The three of us are satisfied that, indeed, the Regional Magistrate's admonition to the complainant to testify only the truth, can be heard to be conveyed by the interpreter in isiXhosa to the complainant, who, after a short delay, replies in isiXhosa, which is interpreted by the official interpreter to the effect that she understands the admonition. During the slight delay, which I have referred to, between the interpreter's interpretation and the complainant's reply, it sounds vaguely as if another person (probably the intermediary) is also talking. My colleague, Moloi AJ, who is fluent in isiXhosa, confirms that the interpretation by the official interpreter is correct in all material respects. As a consequence we are satisfied that the admonition by the Regional Magistrate to the complainant to testify only the truth, was correctly conveyed by the official interpreter to the complainant, who replied in the affirmative in isiXhosa as interpreted to the Court by the official interpreter.

8. The aforementioned observations are of considerable importance, given the factual circumstances in the **Motaung** matter, *supra*. In that matter, Jones J held as follows at par. 9 and 10 (480 f – 481 a):

“[9] The transcript of the record of evidence shows, and the magistrate's reasons confirm, that after appointing the intermediary the magistrate swore the child in as witness. She then gave evidence in terms of ss 158(2)(a) and 170A(3)(c) of the Criminal Procedure Act in a room outside the court through the medium of closed-circuit television. Questions were put in English and were interpreted into isiXhosa by the interpreter. The interpretation was heard by the child and repeated by the intermediary in the course of assisting and supporting her during the course of her evidence. The intermediary's rendition of the

questions interpreted by the interpreter was audible to the interpreter and, if there had been any misunderstanding, he would have been aware of it and would have cleared it up in the course of his ordinary duties as an interpreter. The child gave her answers either in isiXhosa or Afrikaans, and the interpreter once again interpreted these into English. Everything was recorded and capable of verification.

[10] The complainant gave evidence after being properly sworn in as a witness by the magistrate himself, unlike in the Naidoo case supra where the oath was ineffective because it was administered by an unsworn interpreter. Here, the complainant's evidence is not inadmissible. As I understand the magistrate's reasons and as I read the record, the intermediary did not fulfil the role of interpreter. The magistrate is correct that she was merely a conduit. The complainant's evidence was conveyed through the intermediary, but was audible through the closed-circuit television system. It was recorded as part of the record and was interpreted to the court directly by the interpreter. On the facts there is no suggestion anywhere of any impropriety or any irregularity involving the presentation of evidence or its admissibility which operated to the detriment of the accused and which arose because the intermediary did not take an oath."

9. The facts in this matter are on all fours with the aforequoted exposition of the facts in **Motaung** by Jones J, save insofar as the communications between the intermediary and the complainant are hardly audible in the present matter (see para 6(c) and 7, *supra*). I am in respectful agreement with his conclusion that the irregularity of the intermediary not having been sworn in, is not fatal, given the fact that the proceedings were conducted before the Regional Magistrate through closed circuit television and given the fact that the official interpreter had conveyed the admonition to the complainant and had interpreted the rest of her evidence to the Trial Court.

10. In the premises, I hold that the proceedings in the Trial Court, although irregular, are not to the detriment of the Appellant for the reasons enunciated above.
11. I turn to a consideration of the merits of the conviction. Mr. Van Tonder has correctly drawn our attention to the fact that the complainant was a child witness and also a single witness concerning the rape allegedly perpetrated on her by the Appellant. A brief exposition of the facts is necessary in this regard. The common cause or proven facts, concisely stated, were as follows:
 - 11.1 The complainant and the Appellant were alone in the lounge, watching television in the complainant's grandmother's house. The said grandmother was asleep in her bedroom, in another part of the house.
 - 11.2 The complainant alleged that the Appellant had raped her in the lounge on a couch. The Appellant's denial in this regard was rejected as false beyond reasonable doubt by the Regional Magistrate.
 - 11.3 A State witness, one Walter Frans, testified that he had knocked on the front door of the residence (it is clear that this had happened around the time when the complainant was allegedly being raped). According to Mr Frans the door was locked and there was no reply to his knocking, although he could see that the television was on in the lounge. He left and returned a short while later. When he knocked again, the door was opened by the Appellant. Upon entering, Mr

Frans saw the complainant lying on a couch in the lounge; he testified that, somewhat unusually, the complainant's eyes were "*wide open*".

11.4 Two days later, the complainant's aunt, Ms Sekweba, noticed blood on the complainant's panties and she reported this to the complainant's grandmother, the schoolteachers and the social workers. The complainant refused to tell any one of them what had happened to her. According to Ms Sekweba, the complainant's vagina was swollen. Eventually the complainant divulged to inspector Charlie Benn that she had been raped by the Appellant. Inspector Benn took down the complainant's statement and thereafter arrested the Appellant.

12. A double cautionary rule applies to the evidence of the complainant as a single witness and as a child witness. Her evidence contains a number of discrepancies, improbabilities and is in conflict in material respects with her witness statement. The main problem which I have with her evidence and which was emphasized by Mr. Van Tonder during argument, is the fact that the complainant had omitted to make mention in her witness statement about the fact that, as she testified in court, the Appellant had threatened her with a knife which he had in his possession. Her explanation that she had forgotten about this aspect in her statement, is highly improbable. At one stage in her evidence she insisted that she in fact told the policeman who took down her statement about the knife. This was controverted by Inspector Benn, who testified that if she had made mention of the

knife he would most certainly have recorded it in her statement. It is of some considerable importance to bear in mind that on the evidence presented to the Court by the State, the complainant, after having been confronted by her aunt who saw blood on her panties a few days after the incident, had refused to disclose to her aunt, her grandmother, her teachers at the school and the social workers what had happened to her. She was also not willing to talk to other police officials. Mr. Benn was the first person to whom she made the disclosure about the rape, after he had gained her confidence. It is therefore to be expected, given this considerable confidence she had in Mr. Benn, that she would have made mention of all relevant and important aspects of the incident. It is highly improbable in my view that a 10-year old child would forget about something as important as having been threatened with a knife, even during a rape ordeal.

13. Coupled to the aforementioned serious difficulty, is the fact that complainant's explanation as to why she did not approach or call out to her grandmother (who, as I have stated, was asleep in an adjoining bedroom), fails to convince. On her version she did not call out to her grandmother for help, because the latter had warned her not to make a noise so as not to interrupt her sleep. When she was confronted with the fact that her grandmother would not have approved of what the Appellant had done to her, the complainant adapted her evidence and then testified about the fact that the Appellant was in possession of a knife with which he had threatened her.
14. There are other improbabilities and discrepancies in her evidence,

particularly when compared to that of the State witness Walter Frans, but I do not deem it necessary to enumerate same here. In this regard the record speaks for itself.

- 15.1 In summary, I am of the view that the evidence of the complainant, as a child witness, does not pass muster when measured against the authority laid down in various decisions.

*See in this regard inter alia: **R v Manda 1951(3) SA158(A)** at 163 C;*

***S v V 2000(1) SACR 453 (SCA)** at 454 g.*

- 15.2 A Court can only convict on the uncorroborated evidence of a single witness if that evidence is satisfactory in all material respects.

*See: **S v Hlongwa 1991(1) SACR 583 (A)** at 587 a-c.*

16. The evidence of the witness Walter Frans, does not take the matter any further. He testified that he had knocked on the door of the house in which the Appellant and the complainant were on two separate occasions before he was granted access by the Appellant. He found the complainant lying on the couch and her eyes seemed unnaturally wide open, as if she was in shock. Furthermore, the medical evidence of the doctor does not provide corroboration that the complainant was in fact raped. Firstly the doctor testified that due to her very limited experience, she did not regard herself as an expert in rape matters. Furthermore she testified that the tears that she found on the complainant's private parts **may** fit in with rape. This opinion quite clearly does not exclude the fact that these injuries could have been caused to the

complainant's private parts by something other than sexual penetration.

17. Given the lack of corroboration therefore and the complainant's unsatisfactory evidence as a single witness to the alleged rape and in applying the cautionary rule which is applicable to child witnesses, I am of the view that, while there may be some suspicion that something untoward had occurred between the Appellant and the complainant in the lounge while they were alone, the conviction of rape cannot be sustained in law. In the premises I am of the view that the Court *a quo* erred in confirming the Appellant's conviction of rape. The appeal against conviction should consequently succeed.

18. I issue the following order:

18.1 The appeal succeeds.

18.2 The Appellant's conviction and sentence are set aside.

**SA MAJIEDT
JUDGE**

I concur:

**CJ OLIVIER
JUDGE**

I concur:

**KJ MOLOI
ACTING JUDGE**

FOR THE APPELLANT : MR A VAN TONDER
INSTRUCTED BY : JUSTICE CENTRE, KIMBERLEY

FOR THE RESPONDENT : ADV M MASHUGA
INSTRUCTED BY : DPP