

**IN THE HIGH COURT OF SOUTH-AFRICA
(NORTHERN CAPE DIVISION)**

KIMBERLEY

CASE NO.:K/S 66 /200

DATE:26-02- 2001

THE STATE

versus

JOHANNES MBELO

CORAM: MAJIEDT R.

REASONS FOR JUDGMENT

MAJIEDT R:

1. This matter came before me for sentence in terms of the provisions contained in section 52(1)(a) of the Criminal Law Amendment Act (“*the Act*”). The accused had been convicted in the regional court of rape of a 14 year old girl. The magistrate then stopped the proceedings and committed the accused for

sentence to this court.

2. Mr. Muhlohlonyi, who appeared for the accused, has submitted that the committal for sentence was irregular and that this matter does not fall within the ambit of section 52(1) of the Act. I have ruled that the committal was regular and that the matter was properly before me for sentence. I indicated at the time that I would furnish full reasons for my decision later.

These are they.

3. Section 52(1) of the Act reads as follows: -

“52 Committal of accused for sentence by High Court after plea of guilty or trial in regional court

“(1) If a regional court, after it has convicted an accused of an offence referred to

in Schedule 2 following on-

- (a) a plea of guilty, or***
- (b) a plea of not guilty,***

but before sentence, is of the opinion that the offence in respect of which the accused has been convicted merits punishment in excess of the jurisdiction of a regional court in terms of section 51, the court shall stop the proceedings and commit the accused for sentence by a High Court having jurisdiction.”

Mr. Muhlohlonyi has submitted that neither the age of the complainant nor the age of the accused had been properly proved in the regional court proceedings.

It is therefore not a matter where sentence would exceed the jurisdiction of the regional court as contemplated in section 52(1), read with section 51(1) of the Act.

Section 51(1) of the Act reads as follows:

“51 Minimum sentences for certain serious offences

(1) Notwithstanding any other law but subject to subsections (3) and (6), a High Court shall, if it has convicted a person of an offence referred to in Part I of Schedule 2, sentence the person to imprisonment for life.”

Section 51(6) of the Act reads:

“The provisions of this section shall not be applicable in respect of a child who was under the age of 16 years at the time of the commission of the act which constituted the offence in question.”

One of the offences contained in Part 1 of Schedule 2 is:

“Rape, when committed where the victim is a girl under the age of 16 years.”

- 4. The accused was represented by an attorney in the regional court. The accused pleaded guilty and on his behalf his attorney submitted a written explanation of plea in terms of section 112(2) of the Criminal Procedure Act, 51 of 1977, which was:**
 - a) signed by the accused by affixing his right thumbprint thereon;**
 - b) read into the record by the attorney;**
 - c) admitted into evidence as exhibit “A”, after the accused had again orally confirmed the correctness thereof to the magistrate.**

5. I quote verbatim the salient portion of the said plea explanation:

“Ek die ondergetekende, Johannes Mbelo, verklaar:

(1)

Ek erken dat ek op 16 Oktober 1999 te Perseel 4F10, Hartswater in hierdie streekafdeling vir (klaagster), ‘n 14 jarige meisie wederregtelik verkrag het. . . ‘

(My own emphasis).

6. Immediately after the explanation of plea had been read into the record by the attorney, and after the Magistrate had confirmed the correctness thereof from the accused, the attorney formally admitted that the complainant is 14 years of age. A baptismal certificate confirming this was then handed in as an exhibit by agreement between the parties.

7. With regard to the age of the accused, the following transpired: -

7.1 When the charges were read out to the accused at the commencement of the hearing, the magistrate enquired from the accused about his age and the

latter replied that he was 17 years old. The magistrate then asked the father of the accused, Mr. Frans Zali, to confirm this and Mr. Zali did so.

7.2 The matter was adjourned for sentence to obtain a probation officer's pre-sentencing report – at the resumed hearing the prosecutor handed in as an exhibit by agreement with the defence attorney, a baptismal certificate of the accused reflecting that he was born on 18 December 1981 (i.e. that he was indeed 17 years old at the time of the commission of the offence). The attorney furthermore confirmed that the contents of the said certificate is admitted.

7.3 In the probation officer's report the date of birth of the accused was recorded as being 18 December 1982, such information having been obtained from the accused himself. The probation officer noted that she did not have documentary proof of this.

8. It is patently obvious that the age of the complainant as

well as the age of the accused is of material importance in this matter. Where the age of either an accused or a complainant is material to either the offence or to sentence, hearsay evidence thereof is inadmissible;

See inter alia:

S v Moeketsi 1976(4) SA 838(O) at 840E;

S v Magqabudi 1983(4) SA 54(TK).

9. Mr. Muhlohlonyi is clearly correct (and Mr. Hinana, who appears for the State, has conceded as much), that a baptismal certificate is not sufficient proof of age;

See: R v K 1951(3) SA 180 (SWA) at 182B;

S v Moeketsi (*supra*) at 840D-E.

It is also correct that the information furnished by the accused and his father as the age of the accused was unattested and did not constitute evidence.

The information contained in the probation officer's report relating to the accused's age, is nothing other than hearsay.

- 10.1 The matter does not, however, end there. As I have indicated, the accused had been legally represented and certain formal admissions had been made by his

attorney. These related to both the complainant's age and that of the accused.

10.2 It is well-established that an accused/litigant is bound by the admissions made on his/her behalf by his/her legal representative, unless:

- a) such legal representative has not been properly instructed; or**
- b) the admission was made as a result of a *bona fide* mistake.**

See: Dlamini v Minister of Law & Order 1986(4)

SA 342(D);

S v Malebo en andere 1979(2) SA 636(B) at 644.

10.3 Such an admission constitutes sufficient (albeit not conclusive) proof of the admitted fact/s;

See: S v Seleke en 'n ander 1980(3) SA 745(A) at 754G;

S v Sesetse en 'n ander 1981(3) SA 353(A) at 374.

10.4 Mr. Muhlohlonyi relies on neither of the abovementioned grounds for his attack on the admissions made at the hearing. He has submitted instead that the attorney had made the admissions without a proper appreciation of the fact that a baptismal certificate does not constitute sufficient proof of age.

He relies on the following dictum of Thirion J in S v Naidoo 1985(2) SA 32 (N) at 37I-J, for his submission that the admission was made without proper knowledge of the facts and without a proper appreciation of the sufficiency of proof: -

“Where, however, the accused admits facts of which he has no personal knowledge further considerations arise. In such a case the considerations which have been mentioned earlier on in this judgment such as the sufficiency of the accused’s source of knowledge may become of decisive importance.”

The Naidoo case is clearly distinguishable on the facts –

it was a review matter and the accused had not been legally represented.

10.5 Counsel or an attorney, once duly instructed, is in full control of his/her client's case, while that mandate endures.

See: R v Matonsi 1958(2) SA 450(A).

Where an accused has failed to terminate the mandate of his/her legal representative or where he/she fails to withdraw or object to an averment or admission made during proceedings on his/her behalf, a Court is fully entitled to rely on such averment or admission.

See: S v Gope & others 1993(2) SACR 92(CK).

This is indeed the case here.

10.6 I am not aware of any decided case where an accused has successfully attacked admissions made on his/her behalf by his/her legal representative on the basis of the latter's incompetence or lack of knowledge of the law.

Mr. Muhlohlonyi has also not been able to refer me to any such authority and, as I have pointed out to him during argument, there is in fact authority to the contrary.

In S v Bennett 1994(1) SACR 391(C) (a matter in which I was on the receiving end as Counsel), the Court ruled that incompetence of a legal representative at the trial of an accused person, can, generally speaking not be raised to challenge the correctness of a verdict subsequently, in circumstances where Counsel's mandate had not been terminated during the trial.

10.7 There is nothing on the record, nor has any additional evidence been adduced to persuade me that the admissions had not been properly made by the attorney on behalf of the accused. Moreover, the record reflects that in each of the two instances where the relevant admissions as to age had been made, the magistrate enquired from the accused who confirmed the correctness of the said admissions.

11. For these reasons, I was satisfied that the committal had been regular and that the matter was properly before me. I accordingly proceeded to impose sentence on the accused.

S.A MAJIEDT

JUDGE

Counsel for the State: Mr. S. Hinana

Counsel for Accused: Mr. M Muhlohlonyi