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IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: REV69/2022

REPORTABLE

OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:

NQOUVI SIMON SITHOLE

APPLICANT

And

THE REGIONAL MAGISTRATE: A SWANEPOEL

1st RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS,

POLOKWANE

2nd RESPONDENT

REVIEW JUDGMENT

NAUDE-ODENDAAL J:

BACKGROUND FACTS:

[1] This is a review application in terms whereof the Applicant applies that the decision of the 1st Respondent to allow the 2nd Respondent to re-open its case be reviewed and set aside. The review application is opposed by the 2nd Respondent.

[2] The Applicant is charged with two counts. The first count being rape in that it is alleged that he is guilty of the crime of contravention of the provisions of Section 3 read with Sections 1, 55, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law Amendment Act (Sexual Offences and Related Matters) 32 of 2007 read with Sections 256, 256, 257 and 261 of the Criminal Procedure Act 51 of 1977, the

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provisions of Sections 51 and 52 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended as well as Sections 92(2) and 94 of the Criminal Procedure Act 51 of 1977, in that in 2012 and 2013 and at or near Seshego in the Regional Division of Limpopo the Applicant did unlawfully and intentionally commit an act of sexual penetration with a female person to wit, M.M (11 years at the time of the incident) (victim's name concealed to protect the victim's identity) by inserting his penis into her vagina several times over a period without her consent.

[3] The Charge Sheet in respect of Count 1 also stipulated the following:-

- Section 51(1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended by Section 33 of Act 62 of 2000 and Section 36 of Act 12 of 2004 and further amended by Act 38 of 2007 is applicable in that the Complainant was below 16 years.
- If the Accused is convicted of the above charge of Part 1 Schedule 2, Section 51(1) makes provision for a minimum sentence of life imprisonment.

[4] The second count leveled against the Applicant is one of Sexual Assault. It is alleged that the Applicant is guilty of the crime of contravention of the provisions of Section 5(1) read with Sections 1, 2, 50, 56(1), 56A, 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, as amended. Further read with Sections 120 of the Children's Act, 38 of 2005, in that in 2012 and 2013 and at or near Seshego in the Regional Division of Limpopo the Applicant did unlawfully and intentionally sexually violate the complainant, to wit the

said M.M. (11yrs) by touching her breasts and vagina without the consent of the said complainant several times over a period.

[5] The Applicant pleaded not guilty to the charges against him and the matter is still pending in the Regional Court as a partly heard matter. The Applicant has been legally represented throughout the trial.

[6] The 2nd Respondent led evidence of five state witnesses and further documentary evidence and closed its case. After the closure of the State's case, the Applicant applied for a discharge in terms of Section 174 of the Criminal Procedure Act, 51 of 1977 in respect of both charges against him. The application was dismissed.

[7] Pursuant to the dismissal of the application to be discharged, the Applicant opened his case and testified in his own defense. The Applicant closed his case on 6 April 2022. The matter was then postponed for argument to 3 May 2022.

[8] On 3 May 2022, the 2nd Respondent made an application to re-open the State's Case. The application was opposed by the Applicant. On 17 May 2022, the 1st Respondent made a ruling in favour of the 2nd Respondent by allowing the 2nd Respondent to re-open its case. It is this ruling by the 1st Respondent to allow the 2nd Respondent to re-open its case that is the subject matter of this review application.

THE APPLICANT'S SUBMISSIONS:

[9] It is submitted on behalf of the Applicant that the order of the 1st Respondent in allowing the 2nd Respondent to re-open its case is grossly irregular and would lead to a failure of justice on the following grounds:-

- (a) It is common cause that the 1st Respondent did not lead evidence
- (b) pertaining to the age of the complainant during its case. The contention made by the 2nd Respondent during the application for re-opening of its case and in its affidavit filed in the present matter, is that there was a *bona fide* mistake and an oversight on the part of the prosecution by not leading evidence pertaining the age of the complainant.
- (c) It is submitted that the reasons advanced by the 2nd Respondent in this regard are not reasonably sufficient explanation to allow for the re-opening of its case.
- (d) It is submitted that the finding that the 1st Respondent made in accepting the submission by the 2nd Respondent that the prosecution realized during preparation for arguments that it failed to lead evidence pertaining to the age of the complainant is inconceivable and therefore, not excusable.
- (e) The basis for this contention is based on the fact that the submission of the 2nd Respondent in this regard is disingenuous in saying that he realized

when he was preparing for argument²² that the state did not lead evidence regarding the age of the complainant. Mr. Phelane, on behalf of the 2nd Respondent, was the prosecutor of record throughout the proceedings and even on the day that the 1st Respondent brought up the aspect that the 2nd Respondent, did not prove the age of the complainant beyond a reasonable doubt immediately after the Applicant closed his case.

(f) When the matter was postponed for argument, the 2nd Respondent was fully aware that it did not prove the age of the complainant beyond a reasonable doubt. This was induced as the result of the conduct of the 1st Respondent. It was, therefore, submitted by the Applicant that the *bona fide* mistake and oversight by not proving the age of the complainant was not realized through the initiative of the 2nd Respondent itself in preparation for argument as it was alleged.

(g) It was submitted by the Applicant further, that the 2nd Respondent in its affidavit submitted and conceded in paragraph 21 that the 1st Respondent reminded the prosecution that the age of the complainant has not been proven.

(h) The Applicant submitted that the 1st Respondent impermissibly descended into the arena by reminding the prosecution that it did not prove the age of the complainant. The age of a complainant is an element which the prosecution had to prove beyond reasonable doubt. The age of the complainant has a bearing upon sentence upon conviction.

(i) The Applicant further submitted that the contention that the 1st Respondent descended into the arena is demonstrated by the record of the trial proceedings. Firstly, the 1st Respondent directed the prosecution to start

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by proving the age of the complainant and which directive the prosecution followed. Secondly, when the 1st Respondent realized that the prosecution failed to prove the age of the complainant in its case despite the directive, the 1st Respondent descended into the arena again by cross-examining the Applicant, and even going to an extent of putting the version of the complainant to the applicant. This was irregular. It was, therefore, submitted that the questions asked by the 1st Respondent in this regard were not clarity seeking questions, and these questions amounted to cross-examination of the Applicant by the 1st Respondent. This contention is based on the fact that there was no evidence that emanated from the Applicant regarding the age of the complainant, and further that the 2nd Respondent did not cross examine the Applicant regarding the age of the complainant, at all. It was submitted further that the conduct of the 1st Respondent in asking the Applicant and cross-examining him on the age of the complainant, was in pursuit to fill in the gap or the missing link in the prosecution's case by assisting the 2nd Respondent in proving the age of the complainant.

U) Thirdly, when the 1st Respondent realized that there was no satisfactory evidence on the part of the testimony of the Applicant regarding the age of the complainant, the 1st Respondent descended into the arena once more by bringing it to the attention of the prosecution that age of the complainant was not proven and even enquired about the birth certificate of the complainant before postponing the matter for argument.

(k) It was submitted on behalf of the Applicant that for the above reasons, the conduct of the 1st Respondent in directing the prosecution to start by proving the age of the complainant. cross examining the Applicant on the age of the complainant and reminding the prosecution that it did not prove the age of the complainant, cannot be regarded as conduct that sought clarity on the

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evidence during trial and that the conduct of the 1st Respondent cannot be regarded as conduct that sought that justice should be seen to be done as submitted by the 2nd Respondent.

(l) It was submitted that the 1st Respondent committed a gross irregularity by descending into the arena and thereafter assuming a prosecutorial role in the case by allowing for the re-opening of the 2nd Respondent's case and that the 1st Respondent did not exercise her discretion judicially properly in granting the application in favour of the 2nd Respondent.

[10] It is common cause that the Applicant did not make any admission during trial in terms of Section 220 of Act 51 of 1977, in respect of the complainant's age and, therefore, the 2nd Respondent had a duty to prove the age of the complainant during its case.

[11] The Applicant's legal representative submitted that the Applicant has already suffered prejudice in the present matter. Firstly, as a result that the application for the re-opening of the case for the prosecution has been triggered by the conduct of the 1st Respondent and secondly, as a result that his version is already on record. It was submitted by the Applicant that this is prejudicial to his defence and grossly infringes on his Constitutional Right to challenge the evidence the state tendered.

THE 2nd RESPONDENT'S SUBMISSIONS:

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[12] The legal representative acting on behalf of the 2nd Respondent submitted that the main issue is whether the 1st Respondent's conduct by granting a decision in favour of the prosecution to re-open its case after the defence has closed its case constitutes an irregularity, and whether such irregularity vitiates the proceedings.

[13] The 2nd Respondent further submitted that it is common cause that it was agreed at the pre-trial that the age of the victim was not going to be a dispute during the trial. It therefore follows that what was only required to prove the age of the victim was by a mere production of the victim's birth certificate or by *viva voce* evidence through the mother.

[14] The 2nd Respondent submitted, with reference to **S v Rudman: S v Johnson: S v Xaso: Xaso v Van Wyk NO & Another 1989 SA 368 (E)**, that the right to a fair trial is not the test of an irregularity or illegality. The enquiry is whether there has been an irregularity or illegality, that is, a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted.

[15] The 2nd Respondent further submitted that an irregularity is a wrongful or irregular deviation from the formalities and rules of procedures aimed at ensuring a fair trial. It is clear from the record that there is no indication that this evidence was deliberately withheld by the prosecution. In fact, the charge sheet and proceedings held on 10 February 2021 indicates that there was no dispute regarding the age of

the victim although this did not absolve or ~~22~~ generate the prosecution from proving the age of the victim during the trial.

[16] The 2nd Respondent further submitted that the conduct of the 1st Respondent was in accordance with notion and the principles of dispensing justice. The 1st Respondent had to avoid a miscarriage of justice happening in court as a judge or magistrate is an administrator of justice and not merely a figurehead. A judge or magistrate does not only have to direct and control proceedings according to recognized rules of procedure, but also has to see that justice is done.

[17] Counsel for the 2nd Respondent, Adv. Mabapa, argued that the Applicant will not suffer any prejudice because he in any event never intended from the onset to place the age of the victim in dispute. It was submitted that the 1st Respondent exercised her discretion properly and judicially and there is no irregularity that has been committed.

[18] It was submitted that the Applicant is charged with an offence which makes provision for the imposition of a sentence of life imprisonment, should the Applicant be convicted. In the absence of the age of the victim being proved to being below the age of sixteen (16) years, the Applicant may only be sentenced to a minimum of 10 years imprisonment in the *event* of conviction. There will therefore be a serious miscarriage of justice should the matter be allowed to continue without the age of the victim being proven.

[19] The Respondent submitted that they intend on calling the mother of the victim as a witness who will testify regarding the age of the victim. It was argued that litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different positions clearly, plainly and without tricks.

[20] The Respondent applied that the re-opening of the state's case be allowed and further that should the Applicant wish to challenge the evidence and reopen his case, he be allowed to do so.

THE LAW AND APPLICATION OF THE LAW TO THE FACTS:

[21] **Section 22(1) of the Superior Courts Act, 10 of 2013** stipulates as follows:-

"(1) The grounds upon which the proceedings of any Magistrate's Court may be brought under review before a court of a Division are:-

(a) absence of jurisdiction on the part of the court;

(b) interest in the cause, bias, malice or corruption on the part of the presiding officer;

(c) gross irregularity;

(d) *the admission of inadmissible or ~~in~~ competent evidence or the rejection of admissible evidence."*

[22] The question to be answered in the present proceedings is whether the 1st Respondent's decision to allow the 2nd Respondent to re-open its case after the defence has closed his case constitutes a gross irregularity and whether such irregularity vitiates the proceedings.

[23] In **S v Ndweni & Others 1999 (2) SACR 225 (SCA) at 227E** the following was said:-

"An application seeking to re-open a case and lead further evidence will generally be required to satisfy the following requirements:

(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.

(b) There should be a prima facie likelihood of the truth of the evidence.

(c) The evidence should be materially relevant to the outcome of the trial."

[24] The court *a quo* may in the exercise of its discretion and at any stage of the proceedings, grant leave to a party to the proceedings to re-open its case. The State

in providing its reasons for the reopening of ~~22~~ 22- State's case stated that there was an unintentional "mistake" on the prosecutor's part to hand in the birth certificate of the victim. The State submitted that they only realized during preparation for argument going through his notes that he omitted to prove the victim's age. According to the prosecutor this evidence was omitted through mere inadvertence.

[25] Although it might be true that the prosecutor failed to lead evidence on the victim's age due to an unintentional "mistake" or inadvertence, it cannot be said that the prosecutor only realized when preparing for argument that this material evidence was not led.

[26] The court *a quo* on the 6th of April 2022 in questions put by the court to the Applicant, asked the following questions:-

"Court: Sir, you had two biological children with your wife?"

Accused: Court: Accused: Court: Accused: Court: Accused: Court: Accused: Court:

Accused:

Yes.

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The ex-wife, the ex-wife, sorry. Yes.

You said the eldest was born in 2004. Correct.

The younger one? 2007

M[...]?

I am not sure whether it is 2000 or 2001.

And by the time you married your ex-wife, how old was M[...]?

Around 2-years, Your Worship."

[27] The court *a quo* then went further during the arrangement for postponement for argument by the parties, said the following:-

"Before I am going to stand the matter down I want to know, does the State have a birth certificate of the complainant? Will there be an objection of the defence if that birth certificate may be handed in?"

[28] The prosecutor should therefore have realized already on the 6th of April 2022 that there was an issue with the victim's evidence and that it had not been proven,

alternatively had not been proven sufficiently. The omission by the prosecutor can, however, not be said to be deliberate.

[29] The evidence of the mother, the state intends on leading, is most likely true and in respect of the birth certificate to be handed in - there can be no doubt that it is indeed true in respect of the date of birth of the victim. This evidence is indeed material and of extreme importance to the present matter especially when it comes to sentence.

[30] It is common cause that the Applicant will suffer prejudice if the evidence is called in that in the event of conviction, instead of a 10 years minimum sentence, he will be facing a sentence of possible life imprisonment. However, the victim's Constitutional Rights and prejudice to be suffered, as well as the interest of justice, must also be considered in weighing up the prejudice to be suffered. The Applicant knew from the onset that the charges leveled against him were that he raped and/or sexually assaulted a child below the age of 16 years old. This was also not put in dispute during the pre-trial conference according to the parties' submissions.

[31] During the State's case, the Doctor testified that the victim was approximately 12 years old. The victim was born on 19 April 2001 and the sexual assault started according to the general history on the J88 in March 2013. This was not disputed or put in dispute by the Applicant or the Applicant's legal representative in cross-examination and therefore stands uncontested.

[32] Also the Clinical Psychologist, Mrs. Madiba testified that the victim was born on 19 April 2001 and the incidents happened during 2013 when she was 12 years old. This was also not disputed by the Applicant (Defence) in cross-examination. Mrs. Madiba's report was further handed in as an exhibit by consent between the parties.

[33] In cross-examination, the Applicant's legal representative also put a question to Ms. Mathebe, a professional nurse and friend of the victim's family in terms whereof it was clear that the Defence did not dispute that the child's age is below 16 years of age. The question was as follows: *"And with the little experience that you have given before this Court, about the first encounter in sexual intercourse, for a grown up man of the accused, vis-a-vis a child of 11, obviously the child should be injured on her genetalia?"*

[34] In examination in chief, the Complainant testified that she was born on 19 April 2001. Mr. Mathebula, on behalf of the Applicant in cross-examination of the Complainant (victim) also put to the victim the following:-

"MR MATHEBULA: 2008, you were seven years of age?

MS. MOTHATA: Yes"

[35] Although the Applicant never formally admitted the age of the victim, it is abundantly clear from the above that the Applicant never disputed or intended to dispute the victim's age.

[36] The Applicant himself testified during his examination in chief that the victim was about 2 years old when he became involved with her mother. They were married around 2005 after the birth of his first born child with the mother of the victim. The Applicant further testified in examination in chief that the victim was attending primary school in Seshego. Under cross-examination, the Applicant himself testified that the children were all minors and were sleeping on the floor.

[37] The court's questions put to the Applicant, as quoted here above, can therefore not be seen to amount to cross-examination of the Applicant, and were indeed clarity seeking questions. The court a quo did not infringe on the Applicant's rights to a fair trial and did not descend into the arena with the questions asked to the Applicant.

[38] That a trial court has a general discretion in both civil and criminal cases to reopen it and to lead evidence at any time up to judgment is beyond doubt. The proper approach is that the Court's discretion should be exercised judicially upon a consideration of all the facts of each particular case, having due regard to the consideration mentioned in the cases and applying them as guidelines and not as inflexible rules. In **Mkwanazi v Van der Merwe and Another 1970 (1)SA 609 (A)**, **Holmes JA** stated the correct approach thus at **616B-D** is:-

"It is inappropriate for judicial decision to lay down immutable conditions which have to be satisfied before the relief sought can be granted. Over the years the Courts have indicated certain guiding considerations or factors, but they must not be regarded as inflexible requirements, or as being individually decisive. Some are more cogent than others; but they should all be weighed in the scales, the pros against the cons."

[39] The evidence the State intends on leading cannot be said to supplement the State's case. It is however in the interest of justice that certainty be obtained in respect of the victim's age.

CONCLUSION:

[40] Having considered all the above facts and factors, it cannot be said that the court *a quo* misdirected itself in allowing the prosecution to reopen its case. The ruling to reopen the state's case before argument in the present matter does not constitute an irregularity in such a sense that it vitiates the proceedings. In the result the review application stands to be dismissed.

[41] In the result this court makes the following order:-

1. The application is dismissed. - 22 -

2. The matter is referred back to the Magistrate's Court, Seshego, for finalization of the trial without any further delay.

M. NAUDE-ODENDAAL

JUDGE OF LIMPOPO DIVISION OF

THE HIGH COURT,

POLOKWANE

I AGREE:

M.G. PHATUDI

JUDGE PRESIDENT OF

THE LIMPOPO DIVISION OF

THE HIGH COURT,

POLOKWANE

APPEARANCES:

HEARD ON: 01 DECEMBER 2023

JUDGMENT DELIVERED ON: 26 FEBRUARY 2024

For the Applicant: Mr. D.J. Nonyane and/or Mr. M.P. Legodi

Instructed by: Legal Aid South Africa, Polokwane

For the 1st Respondent: None on record.

For the 2nd Respondent: Adv. T.E. Mabapa and/or Adv. M Ratshibvumo

Instructed by: The Director of Public Prosecutions, Polokwane