



**IN THE HIGH OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **YES**

Date: **17 April 2025**

Signature: 

Case No: **A137/2015**

In the matter between:

RAYMOND MKHABELA

Appellant

and

THE STATE

Respondent

JUDGMENT

NEUKIRCHER J:

1] The appellant was charged with two counts of rape of an eight-year old female minor child. If convicted, the appellant stood to be sentenced to a minimum of life imprisonment in terms of s51 of the Criminal Law Amendment Act 105 of 1997.

2] At the commencement of the proceedings in the Regional Court, Benoni on 23 September 2014, the presiding magistrate stated the following:

“...the appearances in this matter is as follows; the presiding office is Mr Makamu, the court in this instance is sitting with two assessors, Mrs Ntlam (?) and Mrs Sheboshego (?) and for the state is Mr Marisham and for the defence Mrs Clarence and the interpreter is Ms Khumalo.” (sic)

3] It appears that the charges were then read to the appellant, who pleaded not guilty, who denied all the allegations made against him, and who elected not to give a plea explanation. The trial then commenced and over the following month, the State and the appellant put on their respective cases and called their respective witnesses.

4] On 15 October 2014, the appellant was found guilty on both counts of rape. In convicting the appellant, the court stated:

“And the decision is unanimous with the two assessors and the conclusion is that the accused is the person that penetrated the complainant twice...”

5] On the same date he was sentenced to twenty-five years' imprisonment for both counts, taken together for purposes of sentencing, and also found unfit to possess a firearm in terms of s103(1) of the Firearms Control Act 60 of 2000. Lastly, it was ordered that the appellant's name is to be recorded in the National Register of Sexual Offenders.

6] It is to be noted that the appellant was in custody throughout the proceedings, having been arrested on 27 January 2014 and has remained in custody to date.

7] It is as against both convention and sentence that this appeal serves before this court with leave of the court *a quo*.

8] It is firstly with utter dismay that this court notes that it has taken this appeal more than 10 years to find its way to this date of hearing on 16 April 2025. There is absolutely no information provided for this lapse, other than appellant's counsel noting that there may have been an issue with the proper transcription of the matter being obtained. Whatever the reason, this is unacceptable. But given the outcome of this judgment, and the reasons provided, at this stage we say nothing more on this issue.

9] The main issue is that it appears that the presiding Magistrate appointed two assessors to sit with him. One can only assume that this was done in terms of s93ter of the Magistrate's Court Act 32 of 1944 (the MCA) – as the record does not state the reason for the appointment

10] It is however unclear from the record when the assessors were appointed by the court, their full names, whether they had been properly sworn in, or indeed how and whether they participated in any decision-making process on the facts as they were required to do. From the time when the case first came before court on 28 January 2014, it was postponed no fewer than on ten occasions before it finally proceeded on trial on 23 September 2014. After the complainant's evidence and cross-examination was concluded, the matter was adjourned to 8 October 2014 and then to 9 October 2014 where several other witnesses for the State testified, as did the appellant and his one witness. The matter was then postponed to 15 October 2014 for argument and judgment on conviction and sentence.

11] Apart from the recording on 23 September 2014, there is no indication on the Magistrate's notes, or on the transcript itself, that the appointed assessors were present on any of the prior or subsequent occasions, that they participated in the proceedings or how they participated in the eventual findings and conviction. This, in my view, constitutes an irregularity that taints the entire proceedings and which renders the proceedings a nullity as it is not clear from the record that the court was properly constituted at all times.

12] Our courts have set aside proceedings in which the court had proceeded in the absence of appointed assessors:

a) in *S v Van der Merwe*¹ the magistrate sat with two assessors. The State case was concluded and after an adjournment the assessors were not present. Both the accused and the prosecutor agreed that the case should continue without the assessors. There was no evidence that the assessors had become unavailable or could not be traced. No reason was given for their non-attendance. The court was therefore not properly constituted and the verdict of guilty was tainted with irregularity. The conviction was set aside.²

b) in *S v Mngeni*³ The appellant appeared in a magistrate's court on a charge of assault with intent to do grievous bodily harm. He pleaded not

¹ 1997 (2) SACR 230 (T)

² The court relied on the statement in *R v Price* 1955 (1) SA 219 (A) at 224 (C): '*Prima facie when a decision is entrusted to a tribunal consisting of more than one person, every member of that tribunal shall take part in the consideration of the decision*'.

³ 2001 (2) SACR 20 (E) ; also *S v Daniels & another* 1997 (2) SACR 531 (C).

guilty and the trial proceeded before a magistrate and two assessors. Whilst the complainant was still under cross-examination, the matter was postponed. When the case was called after a further postponement, the assessors were absent and the clerk of the court was requested to contact them and advise them that the matter would be heard on a subsequent date. On that date the assessors were again absent and the court proceeded to hear the matter in their absence. No reason for their absence was given and the appellant was convicted and sentenced in the ensuing trial. The court found that if assessors absconded during the trial without good reason and the magistrate continued with the trial without them, this amounted to a fatal irregularity which vitiated the proceedings. And that the amended s 93ter(11) of the MCA did not change the legal position pertaining to the absence of assessors. Accordingly, the proceedings had to be set aside.

14] One last issue that requires comment is the fact that the intermediary that was appointed was not sworn in by the court. The record simply states the following:

“COURT: I know that you have appeared before this court and worked as an intermediary before and you are a competent and efficient intermediary and you are appointed as such in this matter...”

15] According to *Du Toit; Commentary on the Criminal Procedure Act*⁴

“In *S v QN* 2012 (1) SACR 380 (KZP), ... (t)he court in *QN* (supra) stressed, however, that it did not wish to denigrate the *practice* that had arisen since *Booi* and *Motaung* of

⁴ RS 72, 2024 ch22-p114B

swearing in an intermediary. Gorven J insisted that the function of an intermediary was extremely important—this being to minimise the mental stress or suffering of the witness by employing his or her specific expertise while the witness gave evidence. And, to require an intermediary to discharge this function under oath seemed to him a 'salutary practice' (at [26]). See, too, Banoobhai & Whitear-Nel 2013 *Obiter* 359 and 365, where the authors agree with the court and exhort the legislature to make provision for the swearing in of intermediaries subject to the proviso reflected in *Motaung* that the mere failure to swear in, or to swear in properly, an intermediary should not in itself render the witness's evidence inadmissible. The legislature has, in the new sub-s (11), met the wish for a provision for swearing in intermediaries, but has not added the proviso wished for by the authors.

S v QN was followed in *S v Mahlangu* (unreported, GP case no A382/2014, 17 July 2015), where the court disagreed with what was said to the contrary in *Booi*, although Jansen J accepted, too, that it was 'clearly preferable' that the intermediary be sworn in 'as a precaution to alert a mediator to the grave repercussions of misinterpreting or misrepresenting questions posed' (at [4])."

13] Thus it would appear that it was "clearly preferable' that the intermediary be sworn in. However, as a result of the fact that the court was not properly constituted and that this is an inescapable irregularity, nothing more need be said on the latter issue.

14] As a result, it is unnecessary to delve into the merits of this appeal. The result is that the conviction and sentence must be set aside.

ORDER

1. The conviction and sentence are set aside.
2. The appellant is to be released from custody immediately.



**NEUKIRCHER J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

I agree

A handwritten signature in black ink, appearing to be 'AJ Johnson'.

**JOHNSON AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Delivered: This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 17 April 2025.

Appearances:

For the plaintiff	:	Adv HL Alberts
Instructed by	:	Legal Aid, Pretoria

For the defendant	:	Adv EV Sihlangu
Instructed by	:	National Director of Public Prosecutions
Date of hearing	:	16 April 2025
Date of judgment	:	17 April 2025