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**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION: MAKHANDA]**

CASE NO.CA&R 100/2021

In the matter between:

THEMBA FRANS

Appellant

And

THE STATE

Respondent

JUDGMENT

JOLWANA J

Introduction

[1] This matter represents an ignominious but unfortunately not so uncommon feature of cases which become doomed to fail from inception. Some of these cases become a comedy of sometimes fatal errors due to lack of attention by prosecutors and unfortunately even presiding judicial officers in some instances. This

unfortunate trend is a regrettable betrayal of the principle of criminal accountability on which so much premium and hope is placed by the citizenry. The inevitable result is the failure of justice with dire consequences for the victims of crime who would have taken all the trouble to report the crimes to the police. The victims of crime would also have re-lived their trauma during consultations with prosecutors and again re-lived it when they testify which often entails that they are sometimes subjected to unavoidable cross examination in which their stories are questioned. Victims of crime follow the whole process in search of justice and in recognition of the importance of the criminal justice system protecting them from brazen criminality. Fortunately, these types of cases represent a small fraction of cases that are heard in our courts daily with many prosecutors and presiding judicial officers diligently doing what they took their oaths of office to do and displaying amazing dedication to their duties. Be that as it may, when the criminal justice system fails in one case due to lack of diligence and care or even ineptitude, reference to many cases that are successfully prosecuted and to the many criminals that are convicted and are sentenced to long periods of imprisonment, all of that is unfortunately cold solace to those victims of crimes whose cases do not get successfully prosecuted. Their only hopes are, in the result dashed when criminals are released even before they would have come to terms with what was done to them and have figured out how to carry on with their lives.

Factual background

[2] Appellant was arraigned in the Regional Court in Makhanda for the very serious crime of contravening various provisions of the Criminal Law Amendment Act 32 of 2007 (the Sexual Offences and Related Matters Amendment Act) further read with section 51(1) and (2) and Schedule 2 of the Criminal Law Amendment Act 105 of

1997 (the Minimum Sentences Act). It was alleged that on or about 28 September 2020 and at or near Transit Camp in Makhanda appellant unlawfully and intentionally committed an act of sexual penetration with the complainant who was 17 years old at the time, by inserting his penis into her vagina without her consent.

[3] Before appellant was asked to plead, he was informed about the implications of the state's invocation of the Minimum Sentences Act. He confirmed that he understood the charge that was preferred against him and the implications of the state having invoked section 51(2) of the Minimum Sentences Act and the applicable minimum sentences. Appellant pleaded not guilty to the charge and went on to explain that he never had sexual intercourse with the complainant. At the conclusion of the trial he was, however, convicted and sentenced to 10 years imprisonment.

First procedural irregularity

[4] The charge sheet, as read to the appellant by the prosecutor, did not reflect the basis on which the provisions of section 51(2) read with Schedule 2 of the Minimum Sentences Act were invoked. The court did not correct this error nor did the legal representative of the appellant point this out to the court so that it may be corrected in the interests of justice. I do need to emphasise that it is simply not enough for a prosecutor, in charging an accused person, to merely refer to section 51 and the applicable schedule. The basis on which section 51 is invoked must be explained to the accused person. This is very important and not mere pedantry to ensure that an accused person understands, right at the beginning of the trial, all the elements of the criminal charge on which the state intends to rely in proving its case against him. All the aspects of the case that may be relevant during trial and to the extent that

they may be a fundamental consideration at the sentencing stage should the accused be convicted must be disclosed.

[5] In *Baloyi*¹ the Supreme Court of Appeal explained this principle as follows:

“A minimum sentence imposed will stand only if the accused had been properly apprised in the charge sheet and informed by the court of the relevant provisions of the CLAA before the trial begins. Furthermore, the state will not be relieved of the duty to prove planning or premeditation before the verdict. In that event, the accused will be made aware of which evidence will be led and the kind of sentence likely to be imposed. That will allow the accused to prepare his defence and cross-examination of the state witnesses accordingly... .”

[6] To the sentiments expressed by the court in *Baloyi*, I can only add that it is not enough for the charge sheet and therefore the prosecutor as well as the court to fleetingly make reference to section 51 and the relevant subsection and schedule. The basis on which the state will rely on section 51 and the relevant subsection and the applicable schedule if he or she is convicted must be explained to the accused. All of this is part of fully informing the accused what evidence the state intends to rely on will be and why it intends to apply for the imposition of a particular sentence if the accused is convicted. Armed with all this information, an accused person becomes well informed, therefore forewarned and is placed in a better position to defend himself before he tenders his or her plea and about the possible consequences of a conviction on that particular charge. This enables him to deal with that aspect of the state's case during cross-examination of the state witnesses and to also deal with it when and if he testifies in his defence.

[7] In this matter, the prosecutor merely referred to section 51(2) and Schedule 2 without giving reasons why this was the case. The court, while it correctly explained

¹ *Baloyi v S* 2022 (1) SACR 557 (SCA) para 25.

to the appellant the implications of section 51(2) having been invoked, however did not ask the prosecutor to deal with this short coming in the charge sheet or explain why section 51(2) was said to be implicated. In this regard the court committed a misdirection which, in my view was quite significant. What the consequences may be in respect of any particular misdirection will always depend on the facts of each case as not all misdirections may result in the accused person not receiving a fair trial and therefore the quashing of the conviction and sentence on appeal.

Second procedural irregularity

[8] The second and most egregious misdirection on the part of the presiding judicial officer was in respect of the very first witness called by the state which happened to be the complainant herself. This is in respect of the way the oath or affirmation was or was not dealt with by the court. In this regard it is apposite to start by referring to the relevant provisions of the Criminal Procedure Act 51 of 1977 (the CPA). I quote sections 162, 163 and 164 sequentially hereunder:

“162 Witnesses to be examined under oath

- (1) Subject to the provisions of sections 163 and 164, no person shall be examined as a witness in criminal proceedings unless he is under oath, which shall be administered by the presiding judicial officer or, in the case of a superior court, by the presiding judge or the registrar of the court, and which shall be in the following form:
‘I swear that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God.’
- (2) If any person to whom the oath is administered wishes to take the oath with uplifted hand, he shall be permitted to do so.

163 Affirmation in lieu of oath

- (1) Any person who is or may be required to take the oath and –
 - (a) who objects to taking the oath;

- (b) who objects to taking the oath in the prescribed form;
- (c) who does not consider the oath in the prescribed form to be binding on his conscience; or
- (d) who informs the presiding judge or, as the case may be, the presiding judicial officer, that he has no religious belief or that the taking of the oath is contrary to his religious belief,

shall make an affirmation in the following words in lieu of the oath and at the direction of the presiding judicial officer or, in the case of a superior court, the presiding judge or the registrar of the court:

‘I solemnly affirm that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth’.

- (2) Such affirmation shall have the same legal force and effect as if the person making it had taken the oath.
- (3) The validity of an oath duly taken by a witness shall not be affected if such witness does not on any of the grounds referred to in subsection (1) decline to take the oath.

164 When unsworn or unaffirmed evidence admissible

- (1) Any person, who is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth.
- (2) If such person wilfully and falsely states anything which, if sworn, would have amounted to the offence of perjury or any statutory offence punishable as perjury, he shall be deemed to have committed that offence, and shall, upon conviction, be liable to such punishment as is by law provided as a punishment for that offence.”

[9] With these provisions in mind, I now deal with the relevant aspects of the court proceedings in the court a quo. After the prosecutor put the charges to the appellant, the court correctly confirmed with the appellant that he understood the charge. When it comes to the provisions of section 51(2) of the Minimum Sentences Act having been invoked by the state, the court explained the implications thereof but

did not explain the reasons for its invocation. From this point onwards, and subsequent to appellant's legal representative having confirmed that the plea of not guilty tendered by the appellant was in accordance with her instructions and a brief outline of the basis for the appellant's plea of not guilty having been given, the state called the complainant to the witness stand to testify.

[10] The transcribed record of the proceedings for that day reflect that portion of the proceedings as follows:

"PROCEEDINGS HELD IN CAMERA

COURT: Name and surname. Be seated.

WITNESS: S[...] M[...].

COURT: Any objections to the taking of the oath?

WITNESS: No objection Your Worship.

COURT: Thank you, Madam you will have to speak up, and clear so that you can be heard. You are speaking through the mask that we are wearing. Makes it difficult for one to be heard and for one to be audible so speak up.

WITNESS: Yes Your Worship.

COURT: Thank you may be seated.

PROSECUTOR: May I then proceed Your Worship?

COURT: Okay."

[11] The court record reflects very clearly that while the complainant indicated that she had no objection in taking the prescribed oath, no such oath was administered at all to her. Instead, the prosecutor proceeded to lead the evidence of the complainant and neither the legal representative of the appellant nor the presiding magistrate corrected this egregiously serious procedural irregularity. At the end of the trial with more evidence having been led and appellant having testified, appellant was

convicted and sentenced to 10 years imprisonment. Appellant applied for leave to appeal against his conviction only. That application was refused by the court a quo. He was subsequently granted leave to appeal against his conviction by this Court on petition to the Judge President.

[12] In the court a quo's verdict convicting appellant, the presiding judicial officer expressed himself as follows before he analysed the evidence:

“In this matter the provisions of Section 162 were invoked, it was found that the complainant understands what an oath is and the import of the oath. She took to the stand and testified in the provisions of section 153 of the Criminal Procedure Act, 51 of 1977 as amended was invoked in taking the evidence of the complainant.”

[13] The basis on which the magistrate asserted that section 162 was complied with is unclear as the transcribed record bears no evidence of this having been done. However, even if it was so that the complainant understood what an oath is and its import, that would not have been nearly enough. This is because it was necessary for the complainant, as a witness as is the case with all witnesses, to actually take the prescribed oath. Secondly and in any event, the record does not reflect it being enquired if the complainant understood what an oath is and its import. That simply did not happen. Therefore, the basis on which the magistrate said he made that enquiry is difficult to understand as it is not born out by the record. What did happen was that the complainant was asked if she had any objection in taking the prescribed oath to which she said she had no objection. Thereafter, the evidence of the complainant was elicited without her taking an oath.

[14] Non-compliance with any of the provisions set out in sections 162, 163 and 164 was raised as a misdirection by appellant in his amended notice of appeal. It was contended that appellant's conviction should be set aside on the basis

foreshadowed. As a result, when the appeal was supposed to be heard on 23 April 2025 it could not be heard. Instead, the matter had to be removed from the roll. In addition to removing the matter from the roll the court issued an order for the presiding magistrate to look for and find his bench notes in respect of the proceedings of the day on which the trial commenced. He was further ordered to provide the said notes under oath and to express his views on whether, having perused his notes, his final view was that the complainant was in fact sworn or not sworn in. The court further set out other processes to establish factually what actually transpired regarding the swearing in of the complainant regard being had to what the magistrate said in his judgment considered together with what the record reflected.

[15] The swearing in of the complainant was central to the entire case due to the nature of her evidence as the entire case was about what happened or did not happen to her. Appellant contended further in his amended notice of appeal that the complainant was 17 years old at the time of the incident and was 19 years old during the trial. The magistrate failed to satisfy himself whether or not she knew the meaning of the oath. In this regard the provisions of sections 162, 163 and 164 of the CPA were raised pointedly and in some detail with reference to the court record and how appellant contended, none of those provisions were complied with.

[16] As ordered by court, the presiding magistrate filed an affidavit. It appears therefrom that he misunderstood the nature of the issue that was raised in the enquiry made in the court order directing him to file an affidavit. In his affidavit he started by referring to his own judgment in confirming that the oath was administered to the complainant. This, notwithstanding the fact that it was the inconsistency between the court record and his judgment regarding the observance or otherwise of

the provisions of section 162 that was at issue. Therefore, reference to his judgment did not make sense. In any event, he had been asked to look for his bench notes and file an affidavit based on what he would have recorded in his bench notes. He also referred to the audio recording of the day in question and said that he listened to it and that it had a low volume with inaudibles all of which he said were due to a technical error. He then submitted that decided cases did not require a perfect record but a record that is adequate for a proper consideration of the appeal.

[17] However, there could have been no objective basis for the submission that the court record reflected that the oath was administered when he had been asked to find his handwritten notes of the court proceedings of that day and he had failed to do so. There is something else that I find disturbing, if not incredible about the contents of the magistrate's affidavit. It is that the magistrate also said that he had found his notes but had misplaced them again. The suggestion in this regard appears to be that his view that the oath was administered to the complainant was based on what he would have gleaned from his notes which he had found and had subsequently misplaced again. With this, he then submitted that the appeal court should deal with the appeal record based on his found but later misplaced notes. For his confirmation that the prescribed oath was administered to the complainant there was absolutely no objective basis beyond his mere *ipse dixit*.

[18] It is clear on all objective facts that the oath was not administered. What was required therefore was the magistrate honestly acknowledging that an error occurred in this regard, explain how the error occurred and then leave the matter to the court of appeal to deal with it. The objective fact is that section 162 of the CPA was not complied with nor was section 163 or section 164 for that matter if regard is had to the court record of the proceedings a quo. To the extent that in his affidavit the

magistrate sought to explain away this serious procedural short coming by relying on case law that deals with an incomplete record, he misdirected himself quite significantly in this regard too. He clearly did not understand the gravity of eliciting crucial evidence of the nature that the complainant gave which resulted in the appellant being convicted and sentenced to a lengthy period of incarceration.

[19] The provisions of sections 162, 163 and 164 have nothing to do with an incomplete, imperfect or even a missing portion of the record. They have everything to do with a presiding judicial officer ensuring that before any evidence is tendered by any witness he or she has taken an oath where he or she has no objection or an affirmation where the witness concerned objects to taking the prescribed oath or the witness being admonished to speak the truth, as the case may be. Therefore, the magistrate's reliance on all those decided cases referred to in his affidavit was in itself a misdirection used to explain away a grave miscarriage of justice.

[20] Sections 162, 163 and 164 were explained very succinctly in *Director of Public Prosecutions, Transvaal*² by the Constitutional Court as follows:

“[165] The reason for evidence to be given under oath or affirmation or for a person to be admonished to speak the truth is to ensure that the evidence given is reliable. Knowledge that a child knows and understands what it means to tell the truth gives the assurance that the evidence can be relied upon. It is in fact a pre-condition for admonishing a child to tell the truth that the child can comprehend what it means to tell the truth. The evidence of a child who does not understand what it means to tell the truth is not reliable. It would undermine the accused's right to a fair trial were such evidence to be admitted. To my mind, it does not amount to a violation of section 28(2) [of the Constitution] to exclude the evidence of such a child. The risk of a conviction based on unreliable evidence is too great to permit a child who does not understand what

² *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* 2009 (2) SACR 130 (CC).

it means to speak the truth to testify. This would indeed have serious consequences for the administration of justice.

[166] When a child, in the court's words, cannot convey the appreciation of the abstract concept of truth and falsehood to the court the solution does not lie in allowing every child to testify in court. The solution lies in the proper questioning of children, in particular younger children. The purpose of questioning a child is not to get the child to demonstrate knowledge of the abstract concepts of truth and falsehood. The purpose is to determine whether the child understands what it means to speak the truth. Here the manner in which the child is questioned is crucial to the enquiry. It is here where the role of an intermediary becomes vital. The intermediary will ensure that questions by the court to the child are conveyed in a manner that the child can comprehend and that the answers given by the child are conveyed in a manner that the court will understand.

[167] As pointed out earlier, questioning a child requires special skill. Not many judicial officers have this skill, although there are some who, over the years and because of their constant contact with child witnesses, have developed a particular skill in questioning children. This illustrates the importance of using intermediaries where young children are called upon to testify. They have particular skills in questioning and communicating with children. Counsel for the Centre for Child Law and Childline was quite correct when, in her reply, she submitted that everything seems to turn upon the need for intermediaries when young children testify in court. Properly trained intermediaries are key to ensuring the fairness of the trial. Their integrity and skill will be vital in ensuring both that innocent people are not wrongly convicted and that guilty people are properly held to account."

[21] This takes me back to the point I made earlier which is essentially about diligence and care by all concerned in how any trial is run and managed due to the ever present possibility of something being done in a procedurally irregular manner which many result in the failure of justice. That responsibility lies primarily with the presiding judicial officer. However, the prosecutor and indeed accused's legal representatives, as officers of the court, have an equally very important role in ensuring that the trial not only runs smoothly but also and most importantly, an

accused person receives a procedurally and substantively fair trial and evidence is properly and procedurally obtained from all witnesses. It is incorrect for these officers of the court to keep quiet and not bring to the attention of the presiding judicial officer where he might have overlooked certain procedural steps.

Third procedural irregularity

[22] Another unfortunate error in the never-ending comedy of errors committed in this matter was in respect of the way the evidence contained in the J88 medico legal report was dealt with. The J88 medico legal report was handed up by agreement between the prosecutor and the legal representative of appellant. The remarkable thing about the J88 medico legal report was that it was unfortunately very tersely and scantily completed by the doctor and therefore the evidence contained therein was very difficult to understand. For example, somewhere in the J88, it is recorded “*apparent sexual assault*”. The issue that the doctor needed to clarify was whether and on what basis he came to the conclusion that the complainant was sexually assaulted. It was not enough for him to merely record that sexual assault was apparent with no indication of the basis for that conclusion. This required the doctor who examined the complainant and completed the J88 medico legal report to be called to testify so that he could explain to the court his entries therein and what they meant in relation to what was alleged to have happened. This did not happen notwithstanding the lack of detail in that document. The magistrate also simply accepted it as evidence without ensuring that appellant received a fair trial or that the evidence reflected therein was properly understood and was reliable.

[23] In *Tshimbudzi*³ the Supreme Court of Appeal explained the importance of some of these procedures which are sometimes mistakenly seen as mere pedantry. It said:

[6] “[I]t is an essential requirement of the Act for the appellant to be convicted of rape under s 51(1) read with Part I of Schedule 2 of the Act that there had to be admissible evidence that the complainant was below the age of 16 years. There was none. The doctor also recorded in the medical report that she was 13 years old. The opinion by the medical doctor, which is contained in the medical report, the J88, is inadequate as it is not supported by any facts. The doctor did not testify. Ordinarily, one would have expected the medical doctor to lay down a basis for his opinion perhaps by reference to the medical examination which he conducted. Absent such evidence, we find that notwithstanding the fact that the medical report was admitted by consent, it is not adequate to prove the complainant’s age satisfactorily. The age of the complainant is crucial in determining the precise nature of the offence for which the appellant is charged and the possible sentence to be imposed upon his conviction.

[7] A further irregularity relates to whether the complainant was validly sworn in in terms of s162 of the Criminal Procedure Act 51 of 1977 (CPA) before she testified. The record shows that she was sworn in (d.s.s.). However, this is not enough as the complainant was a minor. Given the age of the complainant, it was essential that the regional magistrate make some enquiry to satisfy himself that the complainant understood and appreciated the distinction of telling the truth and a lie. Only in the event that the magistrate was satisfied that the minor possessed this ability should the magistrate then have proceeded to determine whether the said minor fully understood the nature and import of giving evidence under oath. The magistrate conducted none of these enquiries and as consequence the complainant’s evidence was rendered inadmissible.”

[24] The complainant in this matter was a single witness as it is normally the case with most sexual assault cases. On her evidence, she was at the appellant’s place of residence with the appellant only at the time of the incident. Her evidence was also that from appellant’s place of residence she ran naked straight to her home after

³ *S v Tshimbudzi* 2013 (1) SACR 528 (SCA).

having been sexually assaulted by him. The crucial issue was whether or not she was raped and if so by whom. This was even more important as appellant's plea explanation was that he never had sexual intercourse with the complainant. Complainant testified without having been sworn in or having taken an affirmation according to the transcribed court record. This rendered all her evidence unreliable and most importantly, inadmissible hearsay. Counsel for the state also conceded this unfortunate reality in her supplementary heads of argument in which it was indicated, were prepared after having listened to the audio recording and consequently did not support the conviction of appellant.

Conclusion

[25] Therefore, the conviction of appellant in circumstances in which the complainant, on whose crucial evidence the entire case of the state largely depended for his conviction, was irregular having as its foundation, the complainant testifying without having taken an oath or an affirmation or even been admonished. This rendered the very trial itself unfair and therefore his conviction not being in accordance with justice as it was solely based on unreliable evidence. In all the circumstances the conviction and sentence of the appellant stand to be set aside.

Result.

[26] In the result the following order is issued.

1. The appeal is upheld.
2. The conviction and sentence of appellant are both set aside.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

I agree:

N. NTLAMA-MAKHANYA

JUDGE OF THE HIGH COURT (ACTING)

Appearances:

Counsel for the appellant : D. Geldenhuys

Instructed by : Legal Aid South Africa

Makhanda

Counsel for the respondent: N.P. Phikiso

Instructed by : Director of Public Prosecution

Makhanda

Date heard : 25 February 2026

Date delivered : 17 March 2026