

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA**

04/04/2016

CASE NO: A 433/15

Not reportable

Not of interest to other judges

Revised

In the matter between:

ALBERT SHAKA MKHARI

Appellant

and

THE STATE

Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] The appellant was convicted in the Nelspruit Regional Court, Mpumalanga on a count of rape of a minor child and was sentenced to life imprisonment.

[2] The appeal is against both conviction and sentence.

POINT *IN LIMINE*

[3] The appellant contends that the State failed to comply with the provisions of section 162 of the Criminal Procedure Act, 51 of 1977 ("the Act"), which section prescribes the administering of the oath to witnesses. According to the appellant, failure to properly administer the oath in terms of section 162, renders the proceedings irregular.

[4] The point *in limine* pertains to the evidence of two state witnesses and two defence witnesses.

[5] Firstly and in respect of the evidence of the complainant the following appears from the record:

"COURT: *How old are you?*

WITNESS: *On the 8th of September I am turning 16.*

COURT: *Ja. Thank you swear her in.*

.....

INTERPRETER: *This witness is sworn in your Worship."*

[6] The second state witness, T. X. Z. ("T..."), testified through an intermediary and the following appears from the record:

"COURT: *Thank you the full names of the witness.*

WITNESS: *T. X. Z.*

COURT: *Thank you, how old are you?*

WITNESS: *(indistinct)*

COURT: *We cannot hear you, how old are you?*

WITNESS: *Eleven*

COURT: *That is better thank you where do you stay?*

WITNESS: *Barberton*

COURT: *Thank you and how many brothers and sisters do you have?*

WITNESS: *I have one brother I do not have a sister.*

COURT: *Thank you do you go to school?*

WITNESS: *Yes.*

COURT: *Which grade are you?*

WITNESS: *Grade 7.*

COURT: *And do you go to church?*

WITNESS: *Yes*

COURT: *And are you taught about God?*

WITNESS: *Yes.*

COURT: *Now if you go home today and you say you were here with Ms Mthethwa will that be the truth or will it be a lie?*

WITNESS: *The truth.*

COURT: *And are you allowed to tell lies?*

WITNESS: *No.*

COURT: *Now do you realise that if you tell lies you can be punished?*

WITNESS: *Yes.*

COURT: *Now if you take the, or let me put it this way do you believe in God?*

WITNESS: *Yes*

COURT: *Now if you take the oath and you call God as your witness that you*

Speak the truth and nothing else but the truth do you understand it?

WITNESS: Yes

COURT: And if you tell lies you can be punished?

WITNESS: Yes.

COURT: Thank you swear him in.

WITNESS: So help me God."

[7] Thirdly and in respect of the appellant, the record reflects the following:

"COURT: Full names?

WITNESS: Albert Mkhari

COURT: Swear him in. Thank you mister, is he sworn in?

WITNESS: So help me God."

[8] Lastly, the appellant's wife, Dorah Tivani, was sworn in as follows:

"COURT: Full names?

WITNESS: Dorah Tivani before Court.

COURT: The surname is?

WITNESS: Tivani Your Worship.

COURT: Please swear her in.

WITNESS: So help me God."

[9] Mr Van As, counsel for the appellant, referred to several reported cases in support of the point *in limine*. In *Mashaba and Another v The State* (20401/2014) [2015] ZASCA 16, the Supreme Court of Appeal explained the necessity of deducing evidence under oath in para 10 of the judgment:

"And the testimony of a witness who has not been placed under oath properly, has not made a proper affirmation or has not been properly admonished to speak the truth as provided for in the Act, lacks the status and character of evidence and is inadmissible. (footnotes omitted)"

[10] In *Motsisi v The State* (513/11) [2012] ZASCA 59, the Supreme Court of Appeal dealt with the provisions of section 165 of the Act, which section reads as follows:

"Where the person concerned is to give his evidence through an interpreter or an intermediary appointed under 107A (1), the oath, affirmation or admonition under 162, 163 or 164 shall be administered by the presiding Judge or Judicial officer or the Registrar of the court, as the case may be, through the interpreter or intermediary or by the interpreter or intermediary in the presence or under the eyes of the presiding Judge or Judicial officer as the case may be."

[11] In the *Motsisi* matter, *supra*, the complainant in the matter was mentally retarded and after asking the complainant a few questions, the following appears in para 13 of

the judgment

'COURT: Tell me L, how old are you?

MS K: I am 17 - years old [her mother had testified that she was born 22 June 1982 which meant that she was approximately 24 years at the time].

COURT: Can you give me the date on which you were born, do you know it?

MS K: No Your Worship, I do not know.

COURT: Now tell me what to do? Do you attend school or do you work, or do you merely stay at home or what do you do?

MS K: Your Worship no, I do [am] not attending school at this moment, but I was attending at I[...] School.

COURT: What are you doing presently?

MS K: I am staying at home.

COURT: Yes now L, you are going to be asked questions relating to something that transpired some time ago, something that happened to you which is what we are going to ask about. Now as you should answer the questions freely without any fear as nothing is going to happen to you and that relates to the accused, between yourself and the accused.

MS K: Yes Your Worship.

COURT: Yes, now you should try and tell us all that happened?

MS K: Yes, L admonished (through the Interpreter)

COURT: Yes the witness has been admonished. You may proceed Mr Prosecutor."

[12] The Court commented in para [14] on the above excerpt from the record:

"The above questions were irrelevant and clearly did not demonstrate to the court whether the complainant was able to testify and importantly, whether she was able to distinguish between truth and falsehood.

[13] The function of the presiding officer in respect of witnesses, whose evidence falls within the purview of section 165, was described as follows in para [15]:

"The duty to ensure that a witness has properly taken the oath, affirmation or admonition is imposed on a presiding judicial officer. It is the judicial officer who has to be satisfied that the witness comprehends what it means to speak the truth. The fact that a judicial officer may utilise the services of an interpreter or an intermediary or a registrar of the court to communicate with a witness does not relieve the judicial officer of the duty to perform this function, but what it does is that it provides the judicial officer with a means of utilising the assistance of the functionaries to perform his or her functions ...: A judicial officer cannot simply abdicate his or her responsibilities and hope that an

interpreter or intermediary will be able to admonish a witness, as it appears to have been the case in this particular matter."

[14] Mr Mnisi, counsel on behalf of the state, argued that the Motsisi matter is distinguishable from the facts in the present matter. In the present matter, the court *a quo* firstly satisfied itself that the child witness knew what it meant to tell the truth and only thereafter requested the intermediary to swear him in.

[15] It is important to bear in mind that section 165 provides for two distinct situations. Firstly a presiding official may administer the oath through the interpreter or intermediary and secondly the oath maybe administered by the interpreter or intermediary as long as it transpires in the presence of or under the eyes of the presiding judicial officer.

[16] In the present instance, the court *a quo* administered the oath by requesting the intermediary, in respect of the child witness and the interpreter, in respect of the other three witnesses, to administer the oath. The oath was duly administered in the presence of and under the eyes of the magistrate. The magistrate clearly did not simply abdicate these duties to the intermediary and interpreter, but remained in control of the administering of the oath.

[17] In the premises, I am satisfied that there was due compliance with the requirements of section 162 read with section 165 of the Act.

[18] In my view, the point *in limine* should be dismissed.

CONVICTION

[19] It appears from the evidence that the complainant, T., a friend C. M. ("C.") and the appellant were all living on a farm in Baberton in 2009. The complainant testified that on the day in question she went with T., C. and the appellant to a sugar cane field on a nearby farm. I pause to mention that the complainant was twelve years of age in 2009 and that both T. and C. were younger than her.

[20] Upon their arrival at the sugar cane field the appellant ordered T. and C. to go to another side of the sugar cane field, leaving the complainant alone in his company. As soon as the complainant and the appellant were alone, the appellant unzipped his trousers and raped the complainant.

[21] The complainant cried out for help, whereupon T. and C. came running towards the complainant and the appellant. According to the complainant, the appellant stood up and walked away.

[22] T., *in essence* confirmed the version of the complainant and testified that the complainant was crying upon their arrival at the scene. She was busy putting on her underwear and told Trevor that the appellant had raped her. There were minor

contradictions in their versions, which contradictions were properly considered by the court *a quo* in its judgment.

[23] Dr Carl van Ramesdonk, who examined the complainant, testified that the complainant had a sexually transmitted disease and that she had three tears in her hymen.

[24] The appellant denied any knowledge of the rape and testified that he was living in Bushbuckridge at the time. He stated that he moved to Bushbuckridge during 2009 because of a quarrel he had with the family of the complainant. The appellant's wife testified in his defence, but differed with his evidence in respect of the timeline of events.

[25] The court *a quo* correctly accepted the complainant's version, which version was confirmed by T. and the medical facts. The appellant and his wife endeavoured to convince the court *a quo* that the charge was falsely laid against the appellant due to the quarrel they had with the complainant's family. In view of the reliable evidence produced by the State and the inherent improbabilities in the version of the appellant, the appellant's conviction followed.

[26] I am satisfied that the conviction is in order.

SENTENCE

[27] Having found no substantial and compelling circumstances, the court *a quo* imposed the minimum sentence of life imprisonment.

[28] The complainant was a mere 12 years old at the time of the offence. Save for the inherent trauma and emotional scarring that accompanies rape, she also contracted a sexually transmitted disease, which disease had still not cleared up at time of the trial, some four years later.

[29] The appellant's personal circumstances were not of such a nature that it outweighed the seriousness of the offence and the interests of the community. Having regard to all the circumstances, I am satisfied that the sentence is not disproportioned to the crime committed. I am of the view, that the appeal against sentence should be dismissed.

ORDER

I propose the following order:

The appeal against conviction and sentence is dismissed.

N JANSE VAN NIEUWENHUIZEN

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION,
PRETORIA**

I agree.

D T SKOSANA AJ

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA GAUTENG
DIVISION, PRETORIA**

It is so ordered.

Appearances:

Counsel for the Appellant:

Advocate F Van As

Instructed by:

Pretoria Justice Centre

Counsel for the state:

Advocate Mnisi

Instructed by:

The State