IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

AR NO: 272/14

In the matter between:

ZAMOKWAKHE MHLONGO Appellant

and

THE STATE Respondent

Order:

(i) The appeal is accordingly upheld.

(ii) The conviction and sentence is set aside.

(iii) The matter is referred to the DPP KZN, to consider whether the appellant should be prosecuted.

APPEAL JUDGMENT

K PILLAY J (Chili J concurring)

[1] On 6 January 2011 the appellant was convicted in the Regional Court at Nongoma of Rape read with the provisions of Sections 51 and Schedule 2

of the Criminal Law Amendment Act 105 of 1997 (CLAA) (as amended) and sentenced to life imprisonment.

[2] This appeal is pursuant to Sections 10 and 43 of the Judicial Matters Amendment Act 42 of 2013 and is directed at both conviction and sentence.

[3] The background facts giving rise to the conviction and sentence are summarised as follows.

[4] P[…] N[…], (P[…]) who was 12 years old at the time of testifying, alleged that she was raped twice by the appellant who was known to her. He did so by threatening to cut her throat as was done to her grandmother. It was the same threat that ensured her silence until the second rape occasion when a relative M[…] N[…] with whom she bathed, saw her blood stained panty and drew its attention to her mother who, with a certain amount of coaxing, elicited from the complainant the accounts of the two incidents of rape. Her mother and M[…] N[…] supported her versions insofar as it related to them. The appellant denied any involvement in the commission of the offences.

[6] The proceedings in the Court *a quo* are impugned on the basis that it is bedevilled by a number of shortcomings which render the evidence of the complainant inadmissible. These shortcomings *inter alia* are:

(i) No application was made in terms of Section 170 A of the Criminal Procedure Act 51 of 1977 (the Act) for the use of an intermediary.

(ii) The intermediary's qualification and competency are not placed on record.

(iii) No competency test was conducted in respect of the complainant who was 12 years old prior to administering the oath.

[7] In order to consider these issues, a careful scrutiny of exactly what transpired in the trial Court is required.

[8] Prior to Pethelo's evidence being adduced, she was asked by the trial Magistrate:

> *Court:* *Pethelo are you going to be able to understand the nature and import of an oath?*
>
> *Pethelo:* *Yes your Worship.*

Thereafter the trial Magistrate says the following:

> *'The witness understands the nature and import of the oath and the witness may be sworn in please.'*

[9] The record then reflects that the witness was sworn in through the intermediary and interpreter.

[10] Section 170 A (1) provides:

> 'Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological or mental age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.'

[11] It is clear from the above that before an intermediary is appointed the following pre-requisites have to be present.

(a) The witness must be under the biological or mental age of 18 years.

(b) There must be sufficient details to enable the court to conclude that the child witness will be exposed to undue mental stress or suffering if he/she had to testify in the normal manner.

[12] Both the accused and the prosecutor have a right to make in put before any direction is made in terms of Section 170 A.

[13] In this case, there appeared to be no objection by the defence to the use of an intermediary, at any stage during the trial. In addition the qualifications of the intermediary were not placed on record and no challenge as to whether the intermediary fell into the categories of persons who are determined by the Minister of Justice in terms of Section 170 A (4) (a) to be completed, was ever raised by the defence.

[14] The pivotal attack against the conviction is directed at the trial Court's failure to conduct a competency test prior to the complainant being sworn in. The complainant was 12 years old at the time. It is submitted that the aforesaid failure thus rendered the complainant's testimony inadmissible against the appellant.

[15] Section 162 (subject to Sections 163 and 164) of the Criminal Procedure Act prescribes that no person shall be examined in criminal proceedings unless he/she is under oath.

[16] Section 163 provides for the making of an affirmation in lieu of an oath if there is an objection to taking the oath. Section 164 allows for the admonishment of a witness by a judicial officer to speak the truth where it is found that such a witness did not understand the nature of the oath or affirmation. The need for evidence to be given under oath, affirmation or admonishment was summed up by the Constitutional Court in *DPP, Transvaal v Minister of Justice and Constitutional Development 2009(2) SACR 130* at para 166 as follows:

> '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 precondition 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 violation of s 28(2) 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 it means to speak the truth to testify. This would indeed have serious consequences for the administration of justice.'

[17] It follows therefore that for a child witness to be considered a competent witness, he or she must be able to demonstrate that he or she understands the difference between truth and lies.

[18] In this case no attempt whatsoever was made by the trial Magistrate to establish whether the child, who was 12 years old, knew the difference between truth and lies. He also failed to question the child on whether she understood the nature and import of an oath. The child's level of intelligence was not canvassed. It is not clear whether she attends school.

[19] At no stage during the entire trial was the child's competency considered. The trial Court in my view misdirected itself by simply accepting the say so of the young complainant that she knew what it meant to take the oath. In this regard he clearly ignored the statutory and evidentiary requirements concerning child witnesses.

[20] Whilst the need for flexibility regarding the establishment of competence and the administration of the oath to a child witness was affirmed in Mangoma v S [2013] ZASCA 205 it still requires at the very least some enquiry into whether child witnesses understand the meaning of telling the truth. The absence of such an enquiry in this case resulted, in the evidence being inadmissible and in my view a failure of justice. There is unfortunately no other evidence implicating the appellant in the commission of the crime

[21] However, that said, this aspect related to a procedural issue and the interests of justice require that this matter be referred back to the DPP KZN, to consider whether the appellant should be prosecuted.

[22] I accordingly make the following order:

(iv) The appeal is accordingly upheld.
(v) The conviction and sentence is set aside.

(vi) The matter is referred to the DPP KZN, to consider whether the appellant should be prosecuted.

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K Pillay J

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Chili J

Appearances

For the Appellant:	Irshaad Khan c/o PMB Justice Centre Pietermaritzburg 3201
For the Respondent:	A Harrison The Director of Public Prosecutions DURBAN 4000
Date of Hearing:	19 February 2015
Date of Judgment:	27 February 2015