



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

CASE NO. AR5502/19

In the matter between:

SITHEMBISO SYDWELL KHUMALO

APPELLANT

and

THE STATE

RESPONDENT

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date and time for hand down is deemed to be 10h00 on 5 November 2020.

ORDER

The following order shall issue:

1. The appellant's appeal against his convictions and sentence is upheld.
2. The convictions and sentence are set aside.
3. The immediate release of the appellant is hereby ordered.

JUDGMENT

Steyn J (Jappie JP concurring):

[1] This appeal was originally set down to be heard on 3 June 2020. The record was however incomplete and the matter was referred back to the court a quo for the

record to be reconstructed in accordance with the guidelines as laid down in *S v Leslie*¹ and *S v Zondi*.²

[2] The matter returned to the high court on 19 August 2020 for hearing, however, the record was in a shoddy state and to make the matter worse, the order of Madondo DJP issued on 3 June 2020 was simply ignored. After a search through the papers attached to the record, an email was discovered purporting to be from the presiding regional magistrate. It states the following:

‘Please tell the parties that after perusing the court record I found that Appellant’s evidence is complete (sic) from pages 123-131 and not page 73. On page 73 no evidence is missing as the whole record starts at line 5.

The recording of 19 May 2014 is missing and record starts on 18 August 2014 at page 132 where Appellant’s evidence under cross-examination is missing.

Kindly request Sneller for this evidence.’

[3] On 19 October 2020, I asked the registrar to request the clerk of the criminal court, Kokstad to give reasons for the non-compliance with the order issued on 3 June 2020, especially since it was ordered by the high court that the trial magistrate furnish a memorandum regarding the reconstruction and that all other parties file affidavits.

[4] Pursuant to this query, the learned regional magistrate furnished the following reasons in an affidavit deposed to on 22 October 2020. For the sake of completeness, I shall quote from the affidavit in full since it clearly does not comply with the earlier order or the dicta that should have been observed. The relevant paragraphs read:

‘3.

I received the record herein on 1 July 2020 from the Clerk of the Criminal Court with Court Order that the record reconstruction shall be finalised on or before 31 August 2020 and copies thereof shall be furnished to all parties and the Registrar of this Honourable Court on or before 30 September 2020.

4.

¹ *S v Leslie* 2000 (1) SACR 347 (W).

² *S v Zondi* 2003 (2) SACR 227 (W).

Due to Covid-19 and lockdown pandemic and personal health issues I missed the stipulated time frames due to no fault on (sic) my own. Nevertheless, I sincerely apologise for the late response herein no disrespect was intended.

5.

After a diligent and thorough search for my notes I could not find same. Due to long time lapse I have no independent recollection of the evidence of the parties. Unfortunately, I am unable to assist with the record reconstruction in this case especially Appellant's missing evidence under-cross examination on 18 August 2014. No evidence is missing on 19 May 2014 remand recordings are on page 44 of the record. This recording and other remands were not mechanical recorded but recorded by hand and they all appear on the record none is missing.

6.

I contacted both the Public Prosecutor and defence attorney enquiring if they have their notes for use in reconstructing the record but only the Public Prosecutor advised me that he misplaced his notes and also have deposed to an affidavit to that effect and no response was received from the Appellant's legal representative despite numerous request.'

[5] It is clear to me that the learned magistrate failed in his duty to comply with the earlier order. No court was constituted to deal with the reconstruction, despite the fact that the learned magistrate was directed to do so.

[6] The record remains incomplete but in my view, justice should not be delayed since the appellant has a constitutional right to have his appeal heard without further delay. I am satisfied that the available record, despite the sorry state that it is in, is sufficiently adequate to address the issues raised against the appellant's convictions.³

Ad appeal

[7] The appellant was convicted on four counts of rape and a count of kidnapping, read with s 51(1) and Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997. On 28 August 2014, he was sentenced to life imprisonment. All the counts were taken as one for purposes of sentence. The

³ See *Bulose v S* (AR672/18) [2020] ZAKZPHC 13 (19 May 2020).

appellant exercises his automatic right to an appeal and appeals against his convictions and sentence.

[8] It was submitted on behalf of the appellant that the competency test was not properly conducted nor was it established that the complainant understood the nature and import of taking the oath. It was further submitted that the learned magistrate never ruled on the competency of the child witness, and accordingly, the court was misdirected on the law as well as the facts. The trial court never observed the cautionary rule nor did it look for safeguards against a wrongful conviction.⁴

[9] I shall now turn to the proceedings on the day that the fifteen-year-old complainant testified before the court a quo. Ex facie the record the learned regional magistrate conducted a competency enquiry and this is what was asked:

COURT: Do you know the meaning of speaking the truth?

WITNESS: Yes.

COURT: What does that mean?

WITNESS: It means to tell the truth, Your Worship.

COURT: Do you know the meaning of speaking lies?

WITNESS: No.

COURT: I will put this question differently. If I say you are not at school am I telling the truth or lies?

WITNESS: That is lies, Your Worship.

COURT: And if I say you are in court today, am I telling the truth or lies?

WITNESS: That is the truth, Your Worship.

COURT: If I say it is raining outside, is that truth or lies?

WITNESS: That is the truth, Your Worship.

COURT: You say it is the truth that it is raining outside? Do you understand the question?

WITNESS: That is the truth, Your Worship.

COURT: If I say the sun is shining outside today, is that the truth or lies?

WITNESS: That is the truth, Your Worship.⁵ (My emphasis).

[10] It is clear from the aforesaid that the complainant did not know what it meant to tell lies nor could she show that she was a witness who could distinguish

⁴ *S v Weber* 1971 (3) SA 754 (A).

⁵ See page 64 line 7 to page 65 line 1 of the record.

between a lie and the truth. Despite her lack of understanding about the truth, the learned magistrate proceeded to admonish her to speak the truth without making any determination to her competency as a witness. No ruling was made before she was admonished nor was any reference made to her competency as a witness. How the learned magistrate determined that she was capable of giving a reliable testimony is beyond comprehension.⁶

[11] Mr *Sindane*, on behalf of the appellant, submitted that the trial court was misdirected on the law since the learned regional magistrate failed to evaluate cautiously the evidence of the complainant, who was not only a child witness, but also a single witness. An analysis of the judgment shows that the learned magistrate failed to look for safeguards against a wrongful conviction. In addition, it was submitted that the appellant was denied a fair trial when he was not allowed to tender the love letters written by the complainant.

[12] Mr *Mthembu*, for the respondent, conceded that the learned magistrate did not sufficiently determine if the witness understood what it meant to speak the truth or what it meant to take the oath. He relied on *S v Raghubar*.⁷ He also submitted that there were inconsistencies in the complainant's evidence. It was common cause that the appellant left for work every morning and that the complainant remained alone at his house. She however never attempted to escape or alert the neighbours that she was kept at the appellant's home against her will. Essentially, the respondent conceded that the evidence of the complainant was not clear and satisfactory in every material respect. Her evidence was contradictory and in conflict with the evidence of the defence witness, Ms Mavundla, who was an independent witness. The medical evidence was neutral since the complainant was sexually active.

[13] This court is indebted to both counsel whom on short notice filed heads of argument in order not to delay the matter any further or cause an injustice.

⁶ I do not intend to repeat the authorities already stated in *S v Swartz* 2009 (1) SACR 452 (C). They should have been followed. In addition, the more recent authorities of *S v Dladla* 2011 (1) SACR 80 (KZP). Also, see *S v Matshivha* 2014 (1) SACR 29 (SCA).

⁷ *S v Raghubar* 2013 (1) SACR 398 (SCA) para 8.

[14] The judgment of the learned regional magistrate shows that he misdirected himself on the law when he overlooked the statutory and evidentiary requirements regarding a child witness. It remains the duty of every presiding officer to receive only admissible evidence into the record. Competency is paramount since it serves as a safeguard that only evidence that is reliable and truthful forms part of the evidential material. The complainant in casu could not distinguish between truth and falsehood. In fact, had the court made a finding on the competency of the complainant, the appellant would never have been placed on his defence.

[15] Accordingly, the appeal against all of the convictions and sentence is upheld. This court issued the following order on 30 October 2020:

1. The appellant's appeal against his convictions and sentence is upheld.
2. The convictions and sentence are set aside.
3. The immediate release of the appellant is hereby ordered.

The aforementioned reasons informed the order issued.

Steyn J

I agree

Jappie JP

APPEARANCES

Counsel for the appellant	:	Mr X Sindane
Instructed by	:	Legal Aid South Africa, Pietermaritzburg Email: XolaniSi@legal-aid.co.za
Counsel for the respondent	:	Mr M Mthembu
Instructed by	:	Director of Public Prosecutions, Pietermaritzburg Email: mmthembu@npa.gov.za
Date of Hearing	:	30 October 2020
Date of Judgment	:	05 November 2020