FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ no: 55

PARTIES:
MNCEDI DAYIMANI **APPELLANT**

VS

THE STATE **RESPONDENT**

REFERENCE NUMBERS -

- Registrar: **CA&R75/06**
- Magistrate:
- Supreme Court of Appeal/Constitutional Court:

DATE HEARD: **03/05/06**
DATE DELIVERED: **15/5/2006**

JUDGE(S): **C. PLASKET J**

LEGAL REPRESENTATIVES -
Appearances

:

- for the State/Applicant(s)/Appellant(s): **ADV. GCINGCA**
- for the accused/respondent(s): **DPP**

Instructing attorneys:

- Applicant(s)/Appellant(s):
- Respondent(s):

CASE INFORMATION -

- *Nature of proceedings* : **CRIMINAL APPEAL**

- *Topic*:

- Keywords:

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION)

CASE NO: CA&R75/06
DATE DELIVERED:5/5/06

In the matter between:

MNCEDI DAYIMANI **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

PLASKET J

[1] The appellant was convicted in the Regional Court, East London, of having raped the complainant. He was sentenced to 10 years imprisonment. He appeals against his conviction only. He was unrepresented during his trial.

[2] The only direct evidence against the appellant was given by the complainant. She was a single witness. The State also called her grandmother who testified that the complainant had reported the rape to her. In addition, the State called two other witnesses. The first was a clinical psychologist, Dr Fransie Scnell, who testified, inter alia, that the complainant was what she described as 'moderately mentally retarded' and that 'her

mental ability is so poor that she reacted like a three to four year old'. The second was Inspector Archibald Harrison Charles, the investigating officer, who testified that the appellant had made a statement to him in which he admitted having had consensual sexual intercourse with the complainant on the day in question.

[3] The appellant's version was that he had wanted to have sexual intercourse with the complainant when he found her alone at her home, that he had proposed that they have sexual intercourse, that she had refused and that he had then left her home. He accordingly denied having had sexual intercourse with her and, consequently, having raped her.

[4] On the view I take of the matter, there is no need to deal with the factual findings made by the magistrate or the issues of the admissibility of the admission allegedly made to Inspector Charles, as well as one allegedly made to the complainant's grandmother. The reason for this is that three interrelated irregularities in the trial require us to set aside the appellant's conviction.

[5] The first irregularity is that the evidence of the complainant was given with the assistance of an intermediary even though no application was made for this to be done and the unrepresented appellant was not apprised of the procedure postulated by s 170A of the Criminal Procedure Act 51 of 1977. Obviously, in these circumstances, he also was not given the opportunity to oppose the use of an intermediary or to address the magistrate on this issue.

[6] In *S v Stefaans* 1999 (1) SACR 182 (C), 187i-188i, Mitchell AJ set out a number of guideline 'as to how and in what circumstances the section should be invoked'. The sixth and seventh of these are applicable to the present matter. They are:

‘6. An unrepresented accused should have his right to oppose the application carefully explained to him by the presiding judicial officer and, as in the case of a plea of guilty, if any doubt exists as to the accused’s understanding of the matter, the application should be treated as opposed.

7. If the application is opposed, the presiding judicial officer should require that appropriate evidence be adduced to enable him to exercise a proper discretion as to whether this section should be invoked or not. …’

See too the judgment of Mogoeng JP in *S v Booi and another* 2005 (1) SACR 599 (B).

[7] Adherence to the guidelines, Mitchell AJ stated, would ‘reduce the risk of the accused not being afforded a fair trial’ (at 188i-j). He stated obiter, and with reference to *S v Mathebula* 1996 (2) SACR 231 (T), that where an ‘unrepresented accused had not been afforded an opportunity to object to an application that the provisions of the section be used’ that would constitute an irregularity in the proceedings and a failure of justice (at 187h).

[8] Because of the absence of an application for the complainant’s evidence to be given with the assistance of an intermediary, the failure of the magistrate to explain to the appellant his right to oppose such an application and the consequent failure on the part of the magistrate to apply his mind to whether the section should be invoked or not, the proceedings were irregular and the appellant’s trial was unfair.

[9] The second irregularity is related to the first. Section 170A of the Criminal Procedure Act only authorises the use of an intermediary in instances in which the witness is ‘under the age of 18 years’. In this case the evidence that was led about the age of the complainant was to the effect that she was older than 18 years of age. For instance, Dr Schnell gave the complainant’s date of

birth as 14 March 1985. If this evidence is to be accepted, it would mean that the complainant was about 18 and a half years old when the offence was committed and about 19 and a half years old when she testified. (It appears to me that the latter date is the date of importance for purposes of the application of s 170A.) The complainant's grandmother testified that the complainant was 21 years old at the time of the trial. There is no suggestion anywhere in the record that the complainant was under the age of 18 years.

[10] This being so the magistrate erred fundamentally in allowing the evidence of the complainant to be given with the assistance of an intermediary. Section 170A of the Criminal Procedure Act simply had no application in this matter and could not have been invoked. It follows, in my view, that this defect renders the evidence of the complainant inadmissible. See in this regard the analogous case of *S v Sydow* 2003 (2) SACR 302 (C), 308e in which it was held that evidence given by a complainant through an interpreter who had not taken the oath in terms of rule 68 of the Magistrates' Courts Rules was inadmissible. See too *S v Booi and another* supra, para 29 in which Mogoeng JP held that where intermediaries had been improperly appointed because they were not qualified and the magistrate had not complied with the requirements of s 170A, the accused had not been given a fair trial and their convictions had to be set aside.

[11] Once the complainant's evidence is disregarded because it is inadmissible, there is no admissible evidence of the rape of the complainant. The evidence given by her grandmother to the effect that the complainant reported a rape to her, and that given by Dr Schnell of her consultation with the complainant when she was told of the rape, constitutes hearsay and is inadmissible on that account.

[12] The irregularities to which I have alluded thus far impact on the conviction of rape. In my view, that conviction cannot stand for the reasons given above.

A further aspect requires consideration. That is whether the appellant could, nonetheless, be convicted of the competent verdict, set out in s 261(1)(f)(i) of the Criminal Procedure Act of 'unlawful carnal Intercourse with a female idiot or imbecile', as contemplated by s 15(a) of the Sexual Offences Act 23 of 1957. It is necessary to consider this in the light of the evidence of Inspector Charles that the appellant admitted to him in a statement that he had engaged in consensual sexual intercourse with the complainant.

[13] It is evident from the record that the magistrate, at no stage, warned the appellant of the possibility of him being convicted for this or any other competent verdict.

[14] In *S v Fielies and another* 2006 (1) SACR 302 (C), paras 7-9, Griesel J set out the legal position as follows:

> '[7] It is a time-hallowed principle of our criminal procedure that an accused is entitled to be informed with sufficient detail and clarity of the charges against him or her. This principle is now enshrined in s 35(3)(a) of the Constitution of the Republic of South Africa, 1996, which entitles every accused person – as an essential part of the right to a fair trial – to be informed of the charge with sufficient detail to answer it.
>
> [8] The position with regard to competent verdicts has engaged our courts over the years, particularly insofar as it relates to the position of an unrepresented accused. The dilemma created by ss 256-270 of the Criminal Procedure Act 51 of 1977 is that it enables the court to convict the accused of an offence with which he or she had not originally been charged. *Prima facie*, this appears to be in conflict with the right referred to in the preceding paragraph.
>
> [9] In order to guard against the potential prejudice lurking in these provisions, the courts have over the years developed certain safeguards. The relevant principles in this regard may for present purposes be summarised as follows:

‘(a) The constitutional right to be informed of the charge includes the right to be informed of competent verdicts on the charge.

(b) While it is not essential to refer to competent verdicts in the charge sheet, it is extremely desirable that an undefended accused be informed timeously of any competent verdicts that might be returned on conviction. This requires the court to “to diligently, deliberately and painstakingly inform the said unrepresented accused of his rights and to ensure and confirm that the accused understands his rights”.

(c) In order to give efficacy to this right, it is important that the accused be informed of competent verdicts before pleading.

(d) These principles have particular relevance – but are not limited to this situation – where a statutory provision places an *onus* on the accused.

(e) Failure to inform an accused of a competent verdict does not *per se* preclude the court from recording such competent verdict. Everything will depend upon the facts of each particular case and the extent to which an accused may or may not be prejudiced in the conduct of his or her defence by such omission. Where there is the likelihood of prejudice to the unrepresented accused, the return of a competent verdict would not be sanctioned.

(f) In the ultimate analyses, the enquiry is simply whether the accused has been given a fair trial.’

[15] The magistrate’s failure at any stage, and particularly when Inspector Charles testified about the statement made by the appellant, to inform the appellant of the competent verdict and to explain this to him constitutes an

irregularity. In my view, the unrepresented accused was left to flounder and this resulted in an unfair trial. (I may add that it appears to me too that the admissibility of the statement was in issue and that this should have been determined by way of a trial within a trial.)

[16] For the reasons set out above it is my view that the appellant's conviction of rape must be set aside and that there is no basis upon which this court may substitute the competent verdict of a contravention of s 15(a) of the Sexual Offences Act. I leave open whether the appellant can be tried again on the charge in this matter, as we heard no argument on this issue. It will be up to the Director of Public Prosecutions to decide whether he is able to follow this course or not.

[17] In the result, the appellant's conviction and sentence are hereby set aside.

_____

C. PLASKET

JUDGE OF THE HIGH COURT

I agree:

_____

D. CHETTY

JUDGE OF THE HIGH COURT