NORTH WEST HIGH COURT, MAFIKENG

CASE NO. CAF 03/2012

In the matter between:

KABELO SAMSON PELEGA APPELLANT

and

THE STATE RESPONDENT

FULL BENCH APPEAL

GUTTA J.

A. INTRODUCTION

[1] The appellant was convicted of rape at the Mmabatho Regional Court on 31 October 2002. The matter was transferred to the High Court for sentencing and on 14 December 2009, the conviction was confirmed by Moloto AJ and the appellant was sentenced to 20 years imprisonment.

[2] The appellant applied for leave to appeal and the Court granted the appellant leave to appeal the conviction and sentence.

B. GROUNDS OF APPEAL

[3] On conviction, the appellant raised the following grounds:

3.1 the complainant was not properly admonished in terms of Section 164 of the Criminal Procedure Act 51 of 1977 ("the CPA");

3.2 the identity of the assailant was not proven beyond a reasonable doubt;

3.3 the complainant was a single witness and her evidence did not pass the cautionary test;

3.4 there were material contradictions in the State case;

3.5 the appellant's version was reasonably possibly true.

C. THE COMPLAINANT'S VERSION

[4] The complainant was 12 years old when the crime was committed. Her version of events is that on the evening of 05 March 2002 she was asleep in the bedroom with her mother, Naledi Sechoaro ("Naledi"). They were sharing a bed. The appellant entered the bedroom and throttled her

mother, who lost consciousness. He then covered the complainant's mouth and nose with one hand and with the other hand he undressed her, whereafter he raped her. Thereafter, the appellant told her that his hat had fallen down and while he was searching for his hat, the complainant struck a match and saw the appellant's face. The appellant was a metre away and he quickly blew the flame out. She then hid in the wardrobe until her mother regained consciousness and called out to her. She first reported to her mother and the police the following morning. She knew the appellant for a long time as he is their next door neighbour. She also spoke to him when he visited their parental place twice a week.

[5] The complainant's mother, Naledi, testified that on 05 March 2002, she was asleep on the bed with the complainant when she was throttled and lost consciousness. When she regained consciousness, she called out for the complainant, who was in the wardrobe and who reported to her that she had been raped by the appellant, who she identified when she lit the match.

D. THE APPELLANT'S VERSION

[6] Briefly, the appellant's version is that on 05 March 2002, at 17h00, after work he met with his colleague, Johannes Mosweu ("Mosweu"), who was in the company of the complainant's mother. He testified that Mosweu and Naledi are having a sexual relationship. He left them and returned home at 18h00, where he remained for the rest of the evening. He denied any involvement in the rape.

[7] He testified further that Mosweu confirmed to him the next day, that he was in the company of Naledi for the whole night and she only returned home at 06h00 the next morning.

[8] Mosweu testified for the defence and he confirmed that on 05 March 2002, Naledi spent the night with him at his home and returned the next morning at 06h00.

E. WAS THE COMPLAINANT PROPERLY ADMONISHED?

[9] Counsel for the appellant, Mr Skibi, submitted that the complainant was not admonished by the Magistrate, in terms of Section 164 of the CPA and that it is in the interest of justice if the conviction and sentence are set aside and the trial commence *de novo*.

[10] Counsel for the State, Mr Maila, submitted that the Magistrate questioned the complainant and then admonished her to speak the truth. He, however, conceded that the Court failed to establish whether the complainant knows the difference between truth and lies and the consequences of not telling the truth.

[11] The record of proceedings read as follows:

> "PROSECUTOR: As the Court pleases, the State will call to the stand Dorcas Sechoaro. And th[*sic*] State would also like to put it in record, that the victim is 12 years old and the proceedings will be held in camera.

COURT: Can I have your full names.

WITNESS: Dorcas Sechoaro.

COURT: Dorcas do you attend school?

WITNESS: Yes

COURT: In which Grade are you?

MS D SECHOARO: Grade 7 your Worship.

COURT: At which school?

MS D SECHOARO: Mantsa Primary School.

COURT: Who is your principal there?

MS D SECHOARO: Mrs Mokalaka.

COURT: Right do you know when you were born?

MS D SECHOARO: 26th June 1989.

COURT: Tell me do you know why you are here before this Court today?

MS D SECHOARO: Yes your Worship.

COURT: You should know that the Court would like you to tell us what you know about the incident in question. And it should be only that which happened, we do not want to anything about what you heard from someone, or you might have been told to tell us. Do you understand?

MS D SECHOARO: Yes your Worship.

COURT: Again you should do that without hiding anything away from this Court, and it should be done freely and voluntarily. You should fear anything. You should know as well that in this Court room, we call a spade a spade, we do not assign names to things, if a thing has a name, you call it by the name, is that clear?

MS D SECHOARO: It is clear your Worship.

COURT: Do you promise to tell us the truth?

MS D SECHOARO: Yes your Worship.

COURT: Yes Ms Prosecutor you may proceed with your leading evidence."

[12] Section 162(1) of the CPA requires a witness to give his evidence on oath. A Judge has a duty to inquire whether a child understands the meaning and religious significance of an oath.

[13] Competence should not be confused with taking the oath, affirmation or admonition to tell the truth. In terms of Section 164 of the CPA, the Court may permit a child who is competent, but who is found not to understand the nature and import of the oath or affirmation, to give evidence without taking the oath or making an affirmation. But if the presiding officer does that, he must admonish the child to tell the truth.

[14] In ***S v V*** **1998 (2) SACR 651 (C) at paragraph 14**, Rose-Innes J held that:

> ". . . the court must enquire and satisfy itself whether the child **understands the oath and understands what it means to speak the truth** . . . If the child does not, it cannot be admonished under Section 164, it is an incompetent witness, whose evidence is inadmissible."
> (Own emphasis)

[15] The procedure adopted by judicial officers is to question the child. The legal representatives of the parties may put questions. There is, however, no requirement that an inquiry must be held in all circumstances since the mere youthfulness of a witness may sometimes be determinative.

See ***S v B*** **2003 (1) SACR 1 (SCA)**; ***Director of Public Prosecutions, Kwa-Zulu Natal v Mekkan*** **2003 (1) SACR 52 (SCA)**.

[16] In ***S v B*** *supra* **at paragraph 14**, the Court held that evidence received without a determination that the witness is unable to understand the formal requirements is inadmissible.

[17] A witness who is unable to understand the difference between truth and falsehood is incompetent to testify and the admission of such a witness' evidence has been held to be fundamentally irregular and a failure of justice. See ***S v V*** **1998 (2) SACR 651 (C)**; ***Henderson v S*** **[1997] 1 All SA 594 (C)**.

[18] In each case, the Judge or Magistrate must satisfy himself that the child understands what it means to tell the truth. A child will be an incompetent witness if he cannot distinguish between what is the truth and what is false and cannot recognize the dangers of lying. See ***S v T*** **1973 (3) SA 794 (A)**.

[19] In ***S v Mashava*** **1994 (1) SACR 224 (T)**, the Court found a warning to a 12 years old girl, without any enquiry as to whether she understood the nature and the import of the oath, to be irregular.

[20] Bertelsmann J in ***S v Mokoena***; ***S v Phaswane*** **[2003] JOL 21960 (T)** stated that:

> ". . . it is obviously in the interests of justice and in the interest of the paramountcy of children's rights to remove as many obstacles as possible that might prevent a child's evidence from being received."

[21] The testimony of a witness who has not been placed under oath properly, has not made a proper affirmation or has not properly been admonished to speak the truth as provided for in the CPA, lacks status and character of evidence and cannot support a conviction in a criminal trial. See ***Henderson v S*** **[1997] 1 All SA (C)**.

[22] Gardiner en Lansdown vol 1, 6 Edition page 502 said the following:

> "Where the Judge or Magistrate before whom the question arises concludes from an examination of the child that he has sufficient intelligence to appreciate the distinction between right and wrong, truth and falsehood and to recognize the danger and impiety of saying what is not true, he will usually be enabled to conclude that the child is capable of giving a truthful and intelligible account of the matter upon which he is called and will allow him to give evidence, leaving to argument the question of his credibility."

[23] The Constitutional Court in the case of ***Director of Public Prosecutions, Transvaal v Minister of Justice & Constitutional Development & Others*** **2009 (4) SA 222 (CC)**, added clarity to the requirements of Section 164(1), where it held **at paragraph 165, page 186g** that:

> "What the section (Section 164(1)) required was not knowledge of the abstract concepts of the truth and falsehood but that the child would speak the truth."

and **at paragraph 166**, that:

> "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 given 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 a 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."

[24] Counsel for the appellant, Mr Skibi, relied on a recent unreported Supreme Court of Appeal decision delivered on 02 April 2012, which originates from this Division, namely, ***Soul Ramokata Daddy Motsisi v The State*, under case number 513/2011**.

[25] The facts of the case ***Soul Ramokata Daddy Motsisi v The State*** *supra* are similar to those in *casu* in that the Magistrate, instead of obtaining sworn testimony, admonished the complainant in terms of Section 164(1) of the CPA. The Court held that the questions posed by the Magistrate 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.

[26] The questions posed by the Magistrate in *casu* are general questions and did not assist the Magistrate to arrive at the conclusion that the child

knows, understands what it means to tell the truth and can distinguish between the truth and falsehood.

[27] This Court cannot conclude that there is a reasonable possibility that the account of the complainant was truthful or reliable.

[28] I am accordingly of the view that, because of the Magistrate's failure as aforesaid, the evidence of the complainant is not reliable and if admitted would undermine the appellant's rights to a fair trial.

[29] As the State's case rest solely on the evidence of the complainant, the medical evidence recorded that, "the hymen is intact", and if the complainant's evidence is disregarded, as it should in the circumstances be, then there is no evidence to support the conviction, and the conviction cannot stand.

[30] In the circumstances, the conviction and sentence should be set aside.

F. FAILURE TO ALLOW FURTHER QUESTIONING

[31] Although this was not a ground of appeal, this Court on perusal of the record, became aware of a further irregularity committed by the presiding Magistrate, Mr Motsomane, namely, his failure to allow the appellant's counsel to pose questions to a witness arising from the Court's questioning of a witness.

[32] After re-examination of a defence witness, Mosweu, the presiding officer

questioned the witness. After completing his questions, the Magistrate refused to allow the defence counsel to question Mosweu. Neither the defence nor the State were afforded the opportunity to pose questions arising from the Court's questions:

> "COURT: Okay you may stand down.
>
> MS L GURA: Your Worship with due respect, the Defence has picked up the question, from the Worship's question, I would like to pose it to the witness your Worship.
>
> COURT: No ma'am you are not allowed to ask questions, that is why the Court is the last to ask questions. I am not asking questions to open up new cross examination. You may stand down. You may proceed then Ms Gura."

[33] Section 35(3) of the Constitution guarantees the right to a fair trial. This includes the right to adduce and challenge evidence.

[34] The Court has a right to question a witness at any stage of the proceedings and often the main purpose of such questioning is to clear up any points that may be obscure.

[35] The law requires not only that a judicial officer must conduct the trial open-mindedly, impartially and freely, but that such conduct must be manifest, especially to the accused. See ***S v Le Grange & Others*** **2009 (1) SACR 125 (SCA)**.

[36] Ponnan JA in ***S v Le Grange & Others*** *supra* held that the requirement that justice must be done and must be seen to be done has been recognized as lying at the heart of the right to a fair trial. The right

requires fairness to the accused as well as to the public as represented by the State.

[37] Section 167 of the CPA gives the Court the power to examine witnesses if his evidence appears to the Court to be essential to just decision of the case. If a Court examines any person in terms of Section 167, the prosecution and the accused may put questions arising from such further questioning by the Court. See ***S v Mseleku & Others*** **2006 (2) SACR 237 (N)**.

[38] The presiding Magistrate's refusal to allow the appellant's attorney to pose questions arising from the Court's questions to the defence witness is an irregularity.

[39] The next question for consideration is whether the irregularity caused a failure of justice? If the irregularity in the proceedings do not result in a failure of justice *per se*, a Court of appeal will apply the following test to determine whether there was a failure of justice:

> "Does the evidence unaffected by the irregularity, show proof of guilt beyond reasonable doubt? If the court considers that it does the irregularity did not bring about a failure of justice?"

See ***S v Felthun*** **1999 (1) SACR 481 (SCA) 485i–486h**.

[40] An appeal Court hearing an appeal based on an alleged irregularity has to consider the nature of such irregularity and its effect on the result of the trial. This is the correct approach in both constitutional and non-

constitutional matters. See ***S v Shikunga*** **1997 (2) SACR 470 (NMS) 483**.

[41] Mosweu's evidence related to Naledi's whereabouts on the night when the complainant was raped and it is relevant in so far as the complainant testified that Naledi was in the room with her and had been strangled by the appellant, rendering her unconscious.

[42] Because of my finding *supra*, namely, that the complainant was not properly admonished and the conviction cannot stand, it is not necessary to apply the test of whether the evidence unaffected by the irregularity shows proof of guilt beyond reasonable doubt. However, it must be stressed that under different circumstances, this type of irregularity may result in a conviction being set aside.

G. ORDER

[43] In the circumstances, I make the following order:

a) The appeal is allowed and the conviction and sentence are set aside.

_____

N. GUTTA
JUDGE OF THE HIGH COURT

I agree

_____
M.M. LEEUW
JUDGE PRESIDENT OF THE HIGH COURT

I agree

_____
A.A. LANDMAN
JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING	: 11 MAY 2012
DATE OF JUDGMENT	: 01 JUNE 2012
COUNSEL FOR APPELLANT	: ADV N.L. SKIBI
COUNSEL FOR RESPONDENT	: ADV K.P. MAILA
ATTORNEYS FOR APPELLANT	: MAFIKENG JUSTICE CENTRE
ATTORNEYS FOR RESPONDENT	: DIRECTOR OF PUBLIC PROSECUTIONS