Z M v THE STATE

CASE NO. CA 23/2003

2005/06/01

Maritz, J. *et* Mtabanengwe, A.J.

CRIMINAL PROCEDURE

Criminal Procedure – s. 74 of CPA – presence of juvenile accused's parents or guardian at trial – purpose of – real risk of prejudice if denied protection and assistance – serious infringement of juvenile accused's right to fair trial – irregularity rendered proceedings null and void

CASE NO. CA 23/2003

IN THE HIGH COURT OF NAMIBIA

**Z M** **Appellant**

versus

**THE STATE** **Respondent**

**CORAM: MARITZ, J. et MTABANENGWE, A.J.**

Heard on: 2003/06/19

Delivered on: 2005/06/01

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**APPEAL JUDGMENT**

**MARITZ, J.:** The appellant, a boy aged 16, was tried and convicted by the regional magistrate, Otjiwarongo, of the statutory rape of an 8 year old boy in contravention of s 2 of the Combating of Rape Act, 2000. He was sentenced to 10 years imprisonment. This is an appeal against that conviction and sentence.

Ms Pearson, who appears *amicus curiae* for the appellant, submits that the appellant's trial was so fraught with irregularities that neither the conviction nor the sentence should be allowed to stand. Amongst those referred to by her in argument are the regional magistrate's failure (a) to inform the appellant of and afford him his right to the attendance of a parent or guardian as contemplated in s 74 of the Criminal Procedure Act, 1977 (the "Act"); (b) to inform the appellant of his right to be assisted by his parents or guardian as provided for in s 73(3) of the Act; (c) to hold the proceedings *in camera* as required by s 153(4) of the Act; (d) to assist the appellant, an unrepresented juvenile, in the conduct of his defence; and (e) to inform the appellant of his right to police docket discovery and assisting him to obtain access to those documents. She submits that these irregularities, when their effects are considered singly or in conjunction with one another, so prejudiced the appellant that they vitiate the proceedings. Ms Herunga concedes the appeal on behalf of the State.

At the outset of the proceedings the following exchange took place between the appellant and the regional magistrate:

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|---|---|
| "Court: | Yes, how old are you? |
| Accused: | 12 years old, Your Worship. |
| Court: | Where are your parents? |
| Accused: | At Epalela, Your Worship. |
| Court: | Where is that? |
| Accused: | It is in Ruacana. |
| Court: | Do you have any guardian around here? |
| Accused: | He is also in custody. |
| Court: | That is not much of a guardian. So you are on your own? |
| Accused: | That's correct, Your Worship. |
| Court: | He is in custody on a different case? … |
| Accused: | He is in custody in another case in Otjiwarongo. Here in Otjiwarongo." |

The appellant's trial, I must point out, also took place in Otjiwarongo. The magistrate's enquiry thereupon turned to the issue of legal representation: The appellant had applied for legal aid and he confirmed that he still wished to be represented by a lawyer. His earlier application for legal aid had apparently been lost and when the court was about to postpone the case for another two months to give him an opportunity to re-apply, the appellant indicated that he'd rather prefer the trial to proceed without legal representation. The magistrate advised him against such a course, reminding him that he was young and the charge against him a very serious one. He pointed out though that the final decision to be taken in that regard

was with the appellant. When the appellant reconfirmed that he would conduct his defence in person, the trial proceeded.

S 74 of the Act requires in peremptory terms that the presence of a juvenile accused's parents or guardian be secured for purposes of his trial under certain circumstances:

> "(1) Where an accused is under the age of eighteen years, a parent or, as the case may be, the guardian of the accused shall be warned, in accordance with the provisions of subsection (2), to attend the relevant criminal proceedings.
> (2) The parent or the guardian of the accused, if such parent or guardian is known to be within the magisterial district in question and can be traced without undue delay, shall, for the purposes of subsection (1), be warned to attend the proceedings in question-
> (a) in any case in which the accused is arrested, by the peace officer effecting the arrest or, where the arrest is effected by a person other than a peace officer, the police official to whom the accused is handed over, and such peace officer or police official, as the case may be, shall inform the parent or guardian, as the case may be, of the place and date and time at which the accused is to appear; …
> (5) If a parent or guardian has not been warned under subsection (2), the court before which the relevant proceedings are pending may at any time during the proceedings direct any person to warn the parent or guardian of the accused to attend such proceedings."

The purpose of this section, Le Roux CJ pointed out in *S v Ramadzanga*, 1988(2) SA 816 (V) at 818E, seems to be the protection of juvenile accused. I

agree, especially if it is read together with s 73(3) which allows their parents or guardians to assist them in criminal proceedings. It is doubtful whether juveniles below that age are capable of conducting their own defence (cf. *S v Lambert,* 1993 NR 303 (HC) at 303H) and there is a real risk, especially in the case of serious crimes or complicated cases, that juvenile accused may be prejudiced if they are denied the protection and assistance that ss 73 and 74 of the Act are designed to afford them. This much was recognised by Gibson J in *S v Lukas*, 1999 NR 394 (HC) at 395I – 396B when, referring to s 73(3) she remarked:

> "This provision is an important pillar of the foundation of a fair trial when a juvenile is involved. It is a matter well within the Court's experience that lay litigants appearing in the Courts are quite often cowed and intimidated by the mere appearance at Court.
>
> This is bound to be made worse in an accused person whose experience of the workings of the courts is limited or non-existent.
>
> The result is that such person may not understand the nature and content of questions put to him or her. Where the lay litigant is a juvenile the chances of his/her awareness of the type of information that would be necessary to put before the Court are very few. The odds are weighted against the juvenile because the manner of conducting proceedings in the courts is far from being a matter of common sense or public knowledge."

The regional magistrate failed to recognise the import and purpose of these sections and that non-compliance might derogate from the appellant's constitutional right to a fair trial. He apparently disregarded availability of the

appellant's guardian in the same town where the appellant was standing trial. Just because the appellant's guardian was also awaiting trial in custody, the regional magistrate dismissed him without more as not being "much of a guardian" – as if mere detention without conviction reflects on the competency or suitability of a person to be the guardian of a juvenile. The regional magistrate knew the appellant was facing a most serious charge; that the common law concept of "rape" had been redefined for purposes of the Act and that a conviction would generally result in a substantial custodial sentence being imposed. Instead of being dismissive, the appellant's circumstances required of him to act with circumspection so as to give effect to the underlying purpose of ss 73 and 74 of the Act.

In *S v Lukas, supra,* this Court has been most critical of the magistrate's failure to apply the provisions of those sections in the circumstances of that case. It concluded (at 397E-G):

> "It is my view that it is a most serious infringement of a juvenile litigant's right to a fair trial to omit to give him an opportunity to have his/her parent or guardian in attendance at Court and, where this omission is accompanied by the neglect to inform the juvenile that he may be assisted by his parent or guardian at the criminal proceedings, the irregularity becomes a serious negation of a fair trial. Thus the whole proceeding is rendered null and void."

In the context of the Court's reasoning, I do not understand it's conclusion to mean that non-compliance with those provisions *per se* vitiates the proceedings under all circumstances (See: *S v Ramadzanga*, *supra* at 818A-C and the authorities referred to there). It is only where the nature of the irregularity is such that a failure of justice has resulted that a Court will set aside the conviction. The position is no different even if it is to be accepted that the irregularity had some bearing on the appellant's constitutional right to a fair trial. This much was decided by the Supreme Court in *S v Shikunga and Another,* 1997 NR 196 (SC) at 170I-171D:

> "It would appear to me that the test proposed by our common law is adequate in relation to both constitutional and non-constitutional errors. Where the irregularity is so fundamental that it can be said that in effect there was no trial at all, the conviction should be set aside. Where one is dealing with an irregularity of a less severe nature then, depending on the impact of the irregularity on the verdict, the conviction should either stand or be substituted with an acquittal on the merits. Essentially the question that one is asking in respect of constitutional and non-constitutional irregularities is whether the verdict has been tainted by such irregularity. Where this question is answered in the negative the verdict should stand. What one is doing is attempting to balance two equally compelling claims - the claim that society has that a guilty person should be convicted, and the claim that the integrity of the judicial process should be upheld. Where the irregularity is of a fundamental nature and where the irregularity, though less fundamental, taints the conviction the latter interest prevails. Where however the irregularity is such that it is not of a fundamental nature and it does not taint the verdict the former interest prevails. This does not detract from the caution which a court of appeal would ordinarily

> adopt in accepting the submission that a clearly established constitutional irregularity did not prejudice the accused in any way or taint the conviction which followed thereupon."

It is against this background that the regional magistrate's failure to apply ss 73 and 74 should be considered. On a reading of the record, I have little doubt that the trial would have taken a different course and that the appellant's defence would have been conducted differently if he had the counsel or assistance of a guardian. He could not read or understand English. He was not acquainted with the provisions of the Act under which he was being charged and had no comprehension of the consequences which might follow upon his conviction. His decision to rather conduct his defence in person than to wait a further two months in custody for a decision on his application for legal was as ill-considered as it was unwise. It is likely that a guardian would have counselled him differently. He did not know of his right to police docket discovery and, even if such discovery had been made, he would not have been able to read and use the contents of the statements in defence of his claimed innocence. Such discovery would have shown whether the police docket contained a medical report corroborating or contradicting the complainant's allegation of anal penetration. The appellant's guardian might well have questioned the competency of the complainant to distinguish between false and truthful statements – especially so because he admitted to the magistrate that he did not know the

difference between the two concepts; agreed with the magistrate that a white paper shown to him was black and said that he did not know what it meant to tell lies to other people.

In the premises I am satisfied that the regional magistrate's failure to explain the appellant's rights under and to apply the provisions of ss 73 and 74 of the Act constituted serious irregularities in the proceedings which, in the circumstances of this case, tainted the appellant's conviction and led to a miscarriage of justice. In the result, both his conviction and sentence falls to be set aside. It is, however, apparent from the evidence adduced against the appellant that the State has a strong *prima facie* case against him on, what is rightfully regarded as, a very serious offence. In the circumstances, I propose to remit the case for trial before another regional magistrate and to direct that the appellant shall remain in custody until then.

In the result, the following order is made:

1. The appellant's conviction and sentence in Case No. R/C 17/2002 (Otjiwarongo) are set aside.

2. The case is remitted to the Regional Court and it is directed -

2.1 that the case be called in that Court at Otjiwarongo before another Regional Magistrate within 14 days of the date of this order for the Prosecutor-General's decision whether to retry the appellant and for the matter to be further dealt with in accordance with law;

2.2 that the appellant remains in custody until that date;

2.3 that, in the event of the Prosecutor-General deciding to retry the appellant, the Clerk of that Court affords the appellant such assistance as he may require to apply to the Legal Aid Directorate in the Ministry of Justice for legal aid;

2.4 that in the event that of the appellant's conviction upon his retrial, both the period which he awaited trial and the sentence he served pursuant to the conviction set aside by this order be taken into consideration in the determination of an appropriate sentence.

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MARITZ, J

I concur.

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MTABANENGWE, A.J.