REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
(GAUTENG DIVISION, PRETORIA)

CASE NO: A612/14

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

28/10/2016
DATE

SIGNATURE

In the matter between:

SAMKELO SOLWANDLE Appellant

and

THE STATE Respondent

J U D G M E N T

TEFFO, J:

[1] The appellant was convicted in the Regional Court, Benoni on 8 February 2013 on one count of rape of a 14 year old girl in contravention of section 3 of the Sexual Offences and Related Matters Act, 32 of 2007 read with the provisions of sections 51 and Schedule 2 of the Criminal Law

Amendment Act 105 of 1997. He was sentenced to imprisonment for life. He now appeals against his conviction and sentence with the leave of the court below.

[2] The background facts giving rise to the conviction and sentence are summarised as follows: T S (the complainant) alleged that she was raped by the appellant who was known to her. On the day of the alleged incident her mother and stepfather were at work. She did not go to school. She was at her homestead with her two siblings who are younger than her. The appellant visited them. He asked her about the whereabouts of her mother and stepfather and subsequent to her informing him that they were at work, he asked L, one of her siblings, to show him their bedroom. Immediately thereafter he gave L 50 cents and sent her to go and buy chips. After L had left to buy chips, he dragged T S to the bedroom and raped her. She bathed after she observed some white stuff and blood coming from her vagina.

[3] The incident happened on a Tuesday. She kept quiet about it until on Saturday after her mother decided to check her private parts and started asking her questions. She still did not report anything to her. Her mother could see that something was wrong with her. She threatened to beat her. It was only after being threatened that she reported that she was raped by the appellant. Eventually the matter was reported to the police. While the appellant admitted that he visited the complainant's homestead on the day in question, he denied his involvement in the commission of the offence.

[4] The conviction of the appellant was challenged on the basis that the trial court did not properly admonish the complainant in terms of section 164 of the Criminal Procedure Act 51 of 1977 prior to her testifying. It was argued that even if the evidence of the complainant had been properly received by the trial court, it was riddled with contradictions and inconsistencies. It could not, so it was argued, sustain a conviction of the appellant. It was accordingly submitted that the conviction of the appellant fell to be set aside.

[5] Although the state disagreed with the submissions made on behalf of the appellant, at some stage counsel for the state conceded that there were contradictions in the evidence of the complainant.

[6] In considering this issue, a careful scrutiny of what transpired in the court below is required.

[7] Before the complainant testified the following was recorded:

"*COURT:* *Your full names? Madam the full names of the victim? Your full names please, the victim, the witness?*

WITNESS: *My full name is T S.*

COURT: *How old are you today?*

WITNESS: *15 years old.*

COURT: *Do you know what is it to take an oath?*

WITNESS: *No I do not know.*

COURT: *But you can differentiate between wrong and right?*

WITNESS: *Yes.*

COURT: *I admonish you to tell the truth, the whole truth and nothing else but the truth.*

WITNESS: *Yes."*

[8] 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.

[9] 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.

[10] 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 (CC) 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."

[11] Section 192 of the Criminal Procedure Act declares generally that unless specially excluded, all persons are both competent and compellable witnesses. A witness is competent to testify if his or her evidence may properly be put before the court. If a child does not have the ability to distinguish between truth and untruth, such a child is not a competent witness. It is the duty of the presiding officer to satisfy himself or herself that the child can distinguish between truth and untruth. The court can also hear evidence as to the competence of the child to testify. Such evidence assists the court in deciding (a) whether the evidence of the child is to be admitted; and (b) the weight (value) to be attached to that evidence. The maturity and understanding of the particular child must be considered by the presiding judicial officer, who must determine whether the child has sufficient intelligence to testify and a proper appreciation of the duty to speak the truth. The court may not merely accept assurances of competency from counsel. The language used in all three sections is peremptory.

[12] Before proceeding with the evidence of the complainant, the prosecution handed the report of the psychiatrist, Dr B A Pangela, to the court with the consent of the defence. Para 4 of the report reads:

"ASSESSMENT RESULTS

Due to T's poor cooperation and an extremely sluggish pace, a psychometric assessment could not yield reliable results. A clinical assessment indicates that T is mentally retarded and appears to be functioning below the age of 10 years. This indicates that T's ability to distinguish between right and wrong is compromised to the age below 10 years."

[13] The Supreme Court of Appeal in *S v Matshivha* 2014 (1) SACR 29 (SCA), at para [11] analysed the provisions of section 164(1) as follows:

"Section 164(1) is resorted to when a court is dealing with the admission of evidence of a witness who, from ignorance arising from youth, defective education or other cause, is found not to understand the nature and import of the oath or the affirmation. Such a witness must, instead of being sworn in or affirmed, be admonished by the judicial officer to speak the truth. It is clear from the reading of s 164(1) that for it to be triggered there must be a finding that the witness does not understand the nature and import of the oath. The finding must be preceded by some form of enquiry by the judicial officer to establish whether the witness understands the nature and import of the oath. If the judicial officer should find after such an enquiry that the witness does not possess the required capacity to understand the nature and import of the oath, he or she should establish whether the witness can distinguish between truth and lies and, if the enquiry yields a positive outcome admonish the witness to speak the truth."

[14] It was clear from the enquiry by the magistrate that the complainant who was 15 years old at the time she testified, did not understand the nature and import of the oath. It follows that for such a child to be considered a competent witness, she must be able to demonstrate that she understands the difference between the truth and lies. There was no attempt whatsoever by the magistrate to establish whether the complainant could differentiate between the truth and lies. There is no indication on the record that before the

complainant was admonished to tell the truth, the magistrate satisfied himself upon proper enquiry that the complainant knew the difference between the truth and lies.

[15] The magistrate was obliged to satisfy himself before admonishing the complainant to tell the truth that she was a competent witness in that she could distinguish between the truth and lies especially if one takes into account the contents of Dr Pangela's report who concluded after assessing the complainant that she was mentally retarded, appeared to be functioning below the age of 10 years and that her ability to distinguish between right and wrong was compromised to the age below 10 years.

[16] It was argued on behalf of the state that the report by Dr Pangela was handed in to determine whether the complainant was capable of testifying in court. It was further pointed out that whereas the report stated that the complainant's ability to distinguish between right and wrong was compromised to the age below 10 years, she could distinguish between right and wrong, was a capable witness and that the court was expected to apply the same level of caution when evaluating her evidence as it would when evaluating the evidence of a child under the age of 10 years.

[17] In my view there is no merit in the argument on behalf of the state. The handing in of the report did not take away the duty of the magistrate as judicial officer to satisfy himself prior to admonishing the complainant to tell the truth that she was a competent witness. Instead the report required more from the

magistrate. He failed to conduct a proper enquiry as was required of him in terms of the provisions of section 164(1). He did not ensure that the evidence given by the complainant was reliable. He did not determine whether the complainant had sufficient intelligence to testify and a proper appreciation of the duty to speak the truth. The evidence presented by the complainant at the court below is therefore not reliable. The absence of an enquiry into whether a child witness understands the meaning of telling the truth results in such evidence being inadmissible (see *Mangoma v S* [2013] ZASCA 205). Admitting such evidence would undermine the accused's right to a fair trial (see Constitutional Court in *DPP, Transvaal v Minister of Justice and Constitutional Development supra*).

[18] Although the above issue is regarded as a procedural issue, concerns were also raised that even if the complainant's evidence was properly received by the trial court, there were inconsistencies in her evidence and the evidence of the other state witnesses, in particular, Sister Christina Ronald who examined her after the alleged rape and who compiled the J88 medical report. Reference was also made to the psychosocial report compiled by Ms Matsimela in respect of the appellant and it was argued on behalf of the appellant that although the complainant disclosed to Ms Matsimela, according to the report, that the appellant had been raping her since 2008 and that he had threatened to kill her should she report the rape to anyone, the appellant reported to Ms Matsimela that he suffers from HIV/AIDS and according to Ms Matsimela the complainant tested negative for HIV. If one is to accept that the complainant was raped by the appellant since 2008 until 2009, she would

have contracted the disease (HIV), so was it argued. The fact that the complainant did not report the rape at her first available opportunity but only after her mother threatened her, was one of the other concerns raised on behalf of the appellant.

[19] I have already indicated that the state conceded that there were some contradictions in the evidence of the complainant but submitted that it should be determined whether the contradictions are material or not. Further to this it was argued on behalf of the state that the criticism of the complainant's evidence relating to what she reported to Ms Matsimela is without merit because the judgment was handed down on 08 February 2013 and the report of Ms Matsimela although it forms part of the record is dated 12 April 2013.

[20] It is correct that although the complainant testified that she was a virgin at the time of the alleged rape, Sister Christina Ronald who examined her after the alleged rape and who compiled the J88 medical report, concluded that there was evidence of previous and recent forceful penetration. In my view these discrepancies in the state's evidence are material. Further to this the fact that the complainant disclosed to Ms Matsimela who compiled the psychosocial report in respect of the appellant for purposes of sentence, that the appellant raped her more than once, puts her credibility into question. This issue was raised for the first time in the psychosocial report. It was never raised in court and neither did the complainant report this to her mother when she reported the alleged rape to her. If it is true that the alleged rape started in 2008 as she had reported to Ms Matsimela, there is no explanation why she

did not report this to her mother all along. I say this taking into account how it came about that the complainant reported the alleged rape to her mother. She was allegedly raped on a Tuesday and she reported the rape on a Saturday after her mother threatened to beat her up subsequent to examining her and noticing that something was wrong with her.

[21] The complainant's report about the rape is not convincing as it did not happen voluntarily. She had to be threatened. It had to be suggested to her by her mother that she was no longer a virgin and that it meant that something happened to her. The appellant never disputed that the complainant was raped. What he disputed was that he was the perpetrator. The evidence of the complainant taking into account also the discrepancies between her evidence and that of Sister Ronald should have created doubt in the mind of the trial court as to whether the appellant was the perpetrator or whether the sexual intercourse was without consent. In my view the trial court misdirected itself in finding that the appellant raped the complainant. I do not find it necessary to refer the matter back to the court below because apart from the admonition issue, it is clear based on my reasoning above that the state's evidence was insufficient to convict the appellant. I am persuaded that the state failed to prove its case beyond a reasonable doubt against the appellant. The conviction of the appellant, in my view, falls to be set aside. It is therefore not necessary to address the issue of sentence.

[22] In the result I propose the following order:

22.1 The appeal is upheld.

22.2 The conviction and sentence of the appellant is set aside.

22.3 The appellant is found not guilty and discharged.

M J TEFFO
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree:

P MABUSE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree:

C PRETORIUS
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

MABUSE J,

[23] I have read the judgment by my colleague, Teffo J, in which Pretorius J concurred and feel impelled to comment on 164 (1) of the CPA. My

burning desire to comment arises, firstly, from the point *in limine* raised by advocate LA van Wyk, the appellant's counsel, in the appeal before us. In paragraph 5.3 of her heads of argument, and the argument with which she persisted at the hearing of the appeal, she stated that:

"TS (my own abbreviation) was simply admonished by the trial magistrate to tell the truth without a proper examination of her understanding of what the truth is versus a lie."

Mrs. van Wyk found the admonition of the witness T.S. by the presiding officer in the court a quo insufficient and submitted that the trial court misdirected itself in not establishing for itself whether the complainant had all *"the ability to distinguish between truth and falsity."*

[24] In support of her submission she relied on **S v Tshimbudzi 2013 (1) SACR 528 (SCA)**, in which the Supreme Court of Appeal, so she stated in her heads of argument, held that it was essential that a court makes some enquiries so as to satisfy itself that a juvenile witness understood and appreciated the distinction between the truth and a lie. She made no reference whatsoever to **S v B 2003 (1) SA SV 52 HHA**, to which I will refer later in this part of the judgment.

[25] The second reason I needed to comment was the manner in which my colleagues have expounded the meaning of s 164 (1) of the CPA.

[26] In the record of the proceedings in the court *a quo* the following transpired:

"Court: *How old are you today?*

Witness: *15 years old.*

Court: *Do you know what it is to take an oath?*

Witness: *No, I do not know.*

Court: *But can you differentiate between wrong and right?*

Witness: *Yes.*

Court: *I admonish you to tell the truth, the whole truth and nothing else but the truth.*

Witness: *Yes."*

[27] The child was, without much ado, allowed by the court a quo to testify. In my view, the child was allowed to testify not because she could distinguish between right and wrong nor because the presiding officer had made an enquiry in which he satisfied himself that the child could distinguish between right and wrong but because, after she had told the court that she did not know what it was to take an oath, she was allowed to testify. Section 164(1) provides as follows:

"Any person who is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation, provided that such a person shall, in view of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth."

[28] The court *a quo* made a finding after the witness had indicated to it that she did not understand the nature and import of the oath. It

admonished the witness to speak the truth and admitted her to give evidence. If the child does not understand the oath, he or she ought to be admonished to speak the truth. In **S v B 2003(1) SA SV 52 HHA paragraph 30** the Court stated that:

"[13] Artikel 164(1) van die Wet het betrekking op 'n persoon wat weens onbekende voortspruitend uit jeugdigheid, gebrekkige opvoeding of 'n ander oorsaak, bevind word om nie die aard of betekenis van die eed of die bevestiging te begryp nie. So 'n persoon kan, nadat hy op die voorgeskrewe wyse gewaarsku is om die waarheid te praat, toegelaat word om te getuig sonder om dit onder eed te doen of dit te verstaan. (my own underlining)"

My understanding of this paragraph is that it is sufficient that the presiding officer is satisfied that the witness does not understand the oath. The presiding officer does not have to enquire into why such a witness does not understand the oath nor does he have to enquire as to whether the witness knows the distinction between right and wrong. As soon as the witness responds that he or she does not understand the oath, the presiding officer may, without much ado, warn such a witness to speak the truth.

[27] This correct legal procedure is supported by what appears in paragraphs [15] and [16] of the said authority of S v. B supra. I will quote these two paragraphs copiously and highlight the heart of the matter. In paragraph 15 the Court stated as follows:

"(15) *Dit is duidelik dat artikel 164 'n bevinding vereis dat 'n persoon weens onkunde voortspruitende uit jeugdigheid, gebrekkige opvoeding of ander oorsaak nie die aard en betekenis van die eed of die bevestiging begryp nie. Soos in die geval van 'n aantal vroëere uitsprake, het die Hof* a quo *beslis dat die feit dat 'n bevinding vereis word, noodwendig inhou dat 'n ondersoek die bevinding moet voorafgaan. (Sien S v. Mashava (supra) op 228 G-H); S v. Vuma Zonke 2000 (1) SA SV 619 (K) op 622 F-G). Na my mening is dit 'n te enge uitleg van die artikel. Die artikel vereis nie uitdruklik dat so 'n ondersoek gehou word nie en 'n ondersoek is nie in alle omstandighede nodig dat u nie so 'n bevinding hoef te maak nie. Dit kan byvoorbeeld gebeur dat, wanneer gepoog word om die eed op te lê of om 'n bevestiging te kry, dit aan die lig kom dat die betrokke persoon nie die aard en betekenis van die eed of die bevestiging verstaan nie. Die blote jeugdigheid van 'n kind kan so 'n bevinding regverdig. Na my mening word niks meer vereis as dat die voorsittende regtilike amptenaar 'n oordeel moet fel dat 'n getuie weens onkunde voortspruitend uit jeugdigheid, gebrekkige opvoeding of 'n ander oorsaak nie die aard of betekenis van die eed of bevestiging begryp nie. Hoewel verkieslik, word geen formele genotuleerde bevinding vereis nie. Sien S v. Stefaans 1999 (1) SA CV 182 J op 185 I).*

(16) *Die hof a quo was ook van mening, weereens in oorstemming met 'n aantal gewysigdes, dat indien 'n persoon nie die aard en*

betekenis van die eed of die bevestiging verstaan nie, ook vasgestel moet word or hy artikel 164 gewaarsku kan word om die waarheid te praat (sien S v. L 1973 (1) SA 344 (K) op 347 H-349B, S v. N (supra) op 229e-g , S v. Vumazonke (supra) op 622g-h). (In S v L is gehandel met die vereiste van artikel 222 van die Strafproses Wet 56 van 1955, die voorloper van artikel 164. Die bewoording van artikel 164 verskil aansienlik van die van artikel 222.) Of so 'n ondersoek gehou moet word hoef egter nie deur ons beslis te word nie aangesien die hof a quo *bevind het dat dit wel gedoen is is die vraag of dit wil gedoen word nie deur die voorbehoue regsvrae geopper word nie."*

[28] The enquiry is , in my view, whether the presiding officer in the court a *quo* complied with the provisions of s 164 (1) of the CPA in the sense of following the law as set out in S v B *supra.* If he did, *cadit quaestio.* If he did not, the enquiry will in that regard be, in what respect did he not comply with the said s 164 or S v. B *supra.* In conclusion on this point I do not agree with the submission made by counsel for the appellant that the trial court committed a misdirection in not establishing for itself whether the complainant was a competent witness before admonishing her. It was unnecessary, according to S v B supra, to do so.

[29] The last point that I wish to address is the aspect relating to the report by Dr. Phangela. Despite the report by Dr. Phangela that the witness

T.S *" is mentally retarded and appears to be functioning below the age of 10 years"*, the court made no adverse remarks about the witness her and her evidence.

"3. The trial judge has advantages – which the Appellate Court cannot have – in seeing and hearing the witnesses, in being steeped in the atmosphere of the trial court. Not only has he had the opportunity of observing their demeanour but also their appearances and whole personality. This should never be overlooked.

6. Even in drawing inferences the trial judge may be in a better position than the Appellate Court, in that he may be more able to estimate what is probable or improbable in relation to the particular people whom he has observed at the trial.

8. Where there has been no misdirection on fact by the trial judge, the presumption is that his own conclusion is correct; the Appellate Court will only reverse it where it is convinced that it is wrong.

12. An Appellate Court should not seek anxiously to discover reasons adverse to the conclusions of the trial judge. No judgment can ever be perfect and all-embracing, and it does not necessary follow that, because something has not been mentioned, therefore it has not been considered."

See in this regard **R v. Dhlumayo and Another 1948 (2) SA 678 AD at pages 705-6.**

[30] The trial court was aware of the remarks made by Dr. Phangela in her report about the witness. It would obviously have been alert. Where no adverse remarks were made by the trial court, the appeal court should find that the trial court was satisfied with the evidence of the witness. That it is so, is clear from the following remarks made by the Court a quo:

"I do not have any reason why I should not believe that the victim told the truth that the person who penetrated her was the accused and I have got no reason not to believe Zoleka's evidence and Ms. Ngose and it was also not disputed that the accused had the tendency of going there even while he knew that the victim's mother may not be there."

[31] In this regard I am therefore satisfied that the court a quo was correct in making no adverse remarks about T.S., herself and her evidence and in not allowing the report of Dr Phangela to unduly influence it.

[32] I have already pointed out that in her heads of argument, Ms. van Wyk did not refer to the authority of S v B *supra*. This case dealt specifically with s 164(1) of the CPA whereas S v. Tshimbudzi supra dealt with s. 162 of the CPA. Accordingly the case of S v. Tshimbudzi is no authority for the provisions of s. 164 (1) of the CPA.

[33] I am however in agreement with my colleagues on the conclusion arrived at.

P.M. MABUSE
JUDGE OF THE HIGH COURT

APPEARANCES

FOR THE APPELLANT	L A VAN WYK
INSTRUCTED BY	LEGAL AID SA
FOR THE RESPONDENT	ARNO J ROSSOUW
INSTRUCTED BY	THE DIRECTOR OF PUBLIC PROSECUTIONS
HEARD ON	12 AUGUST 2016
HANDED DOWN ON	OCTOBER 2016