

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



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

CASE NO.: CA&R/21/2021

Matter heard on: 4 November 2022

Judgement delivered on: 8 November 2022

In the matter between:

S T

APPELLANT

and

THE STATE

RESPONDENT

APPEAL JUDGMENT

CHITHI AJ:

[1] The Appellant was charged in the Mdantsane Regional Court with rape in contravention of s 3 read with ss 1, 2, 50, 56(1) 56A, 57, 58, 59, 60 and 61 of the Criminal Law (Sexual

Offences and Related Matters) Amendment Act¹ ('SORMA'). This charge was further read with provisions of ss 256 and 261 of the Criminal Procedure Act² ('CPA'), s 51(1) and Schedule 2 of the Criminal Law Amendment Act³ ('CLAA') as well as s 120 of the Children's Act.⁴

[2] The offence is alleged to have occurred on 1 November 2018 at or near NU5, Mdantsane. The state alleged that the appellant unlawfully and intentionally committed an act of sexual penetration with the complainant, who was at the time 14 years of age, by inserting his penis into her vagina, without her consent.

[3] When the trial started on 30 October 2019, the appellant pleaded not guilty and asserted that he and the complainant had consensual sexual intercourse. The state successfully applied, in terms of s 170A of the CPA, for the complainant to testify in a separate room adjoining the court room via a closed-circuit television with the assistance of an intermediary, Ms Phumla Tshona. The complainant was 15 years old at the time.

[4] On 10 February 2020, the appellant was found guilty as charged and on 10 March 2020 he was sentenced to undergo eighteen (18) years imprisonment. The appellant appeals to this court against his conviction with the leave of the court *a quo*.

[5] The complainant testified that while she and her two companions were standing in the street, the appellant emerged driving in a motor vehicle. The appellant and the complainant knew each other as they resided in the same section in Mdantsane, namely NU 5A. The appellant was more like a family friend as he would from time to time be requested by the complainant's mother to run her errands. The appellant requested the complainant to accompany him to the Highway taxi rank. The complainant boarded the motor vehicle and the appellant drove to the Highway taxi rank. There he dropped off a person. He thereafter drove to the taxi rank at NU 6 where he dropped off another person. He then drove to a shack that belonged to Phumlani Ncuncwa ('Phumlani'). The appellant then dragged the complainant from the motor

¹ 32 of 2007

² 51 of 1977

³ Act 105 of 1997

⁴ 38 of 2005

vehicle to the shack. Phumlani then went out and locked the appellant and the complainant from outside, after having spoken to the appellant in a language the complainant did not understand. The appellant then had sexual intercourse with the complainant without her consent. When Phumlani came back after approximately ten minutes, the appellant told him to return at 19:00. Phumlani returned at 19:00 and the appellant dragged her into the car. The appellant then drove to the garage where they met persons named Bobby and Luyanda, who told the complainant that her mother was looking for her. From the garage, the appellant drove off and stopped by a pole, alighted from the vehicle, and spoke to certain gentlemen who told him that the police were looking for him. The appellant then sped off. He was blocked by two vehicles when he was about to drive past the complainant's home. This is where the complainant's mother found them.

[6] The complainant's mother corroborated her evidence in relation to the incident after the appellant's motor vehicle was blocked just behind her home. She confirmed that the appellant came over to her car and apologised. She also confirmed that the complainant reported to her that she was raped by the appellant. She then went to NU1 police station to open the case against the appellant. She then took the complainant to Cecelia Makiwane Hospital where she was examined and tested for HIV and AIDS and given medication. The complainant was in the process of starting a support group of rape victims and she is starting to open up about being a rape victim.

[7] The doctor who examined the complainant was not called to testify. However, his medical report was admitted into evidence by consent. The doctor's conclusions were that there was no hymen, there were also fresh tears at 3, 6 and 9 o'clock respectively, the vaginal fascia was grossly bruised and there was a bump at 7 and 5 o'clock respectively. The doctor concluded that these findings were suggestive of forceful entry. He added that sexual assault cannot be excluded.

[8] The state closed its case and the appellant thereafter testified. His testimony was largely consonant with that of the complainant, except that he alleged that the sexual intercourse was consensual. Moreover, he denied dragging the complainant to and from Phumlani's shack. The appellant further adduced the evidence of Phumlani, who confirmed having met the appellant

and the complainant on his way to the shop. He further confirmed having allowed the appellant to use his shack to sleep with the complainant and that he had locked the shack from outside.

[9] The appellant's appeal was initially founded on the following grounds:

9.1 The trial court erred in finding that the state proved its case against him beyond reasonable doubt.

9.2 The trial court erred in finding that the evidence of the complainant was clear in all material respects.

9.3 The trial court erred in failing to approach the evidence of the complainant with caution in view of her not only being a child witness, but also a single witness.

9.4 The trial court erred in finding that his evidence and that of his witness was not clear and satisfactory and that it was filled with contradictions, even though those contradictions were not material.

9.5 The trial court erred in finding that his version was so improbable that it cannot be said to be reasonably possibly true.

[10] The appellant later refined his grounds of appeal by way of his amended notice of appeal, in terms of which he relied only on the ground that the court *a quo* did not comply with the peremptory requirement to admonish the complainant, who was a child witness. Consequently, the complainant's evidence was neither given under oath nor under admonishment and was therefore inadmissible.

[11] Although the appeal, therefore, turns on whether the court *a quo* conducted a proper enquiry to determine whether the complainant understood the nature and the import of an oath, neither counsel supplemented their heads of argument to reflect that the appellant was now appealing only against the court *a quo*'s failure to comply with the peremptory requirement to

admonish the complainant before she testified. Thus, in order to avoid any prejudice to the appellant, we shall consider the appeal on the basis of the following issues:

- 10.1 whether the court *a quo* conducted a proper enquiry whether the complainant understood the nature and the import of the oath; and
- 10.2 whether the state was able to prove its case against the appellant beyond reasonable doubt.

[12] Ms Dyantyi, on behalf of the appellant, contends that the court *a quo* did not comply with the peremptory requirement to admonish the complainant who was a child witness; the complainant did not understand the nature and the import of taking the oath, and the court *a quo* should therefore have made the enquiry in terms of s 164(1) of the CPA. She relies in this regard on *Director of Public Prosecutions, KZN v Mekka*.⁵ Ms Dyantyi contends that the court *a quo* did not satisfy itself that the complainant understood the adverse consequences which would befall her if she lied. Ms Jodwana-Blayi, on behalf of the state, on the other hand, submitted that the complainant was sworn in after the court *a quo* had established that she understood the meaning of an oath. She, therefore, submitted that the complainant's evidence was admissible.

[13] It is trite law that only admissible evidence can be accepted as evidence in a court of law. It is therefore required of judicial officers, when dealing with child witnesses, to determine whether they have the competency to testify. The court *a quo* was therefore enjoined to determine if the complainant was able to distinguish between the truth and falsehood. For the purposes of this judgment, in order to protect the identity of the complainant I would refer to her as either as the complainant or A. The approach which the court adopted before the complainant testified is as set forth in the following extract:

COURT: Good morning, A. How are you this morning?

A: I am fine thanks and you

COURT: I am fine. A, do you understand what it means to take an oath?

⁵ 2003(2) SACR 1 (SCA) para 12.

A: Yes;

COURT: What does it mean to take an oath?

A: To promise that you will be telling the whole truth.

COURT: And if you do not tell the whole truth, is it right?

A: No, it is not right

INTERVENTION

A: (Duly Sworn States)

After the short adjournment:

COURT: Ms Tshona, can you hear us? Ms Tshona and A can you hear us?

MS TSHONA: Yes, Your Worship.

COURT: Are you now in, how do you feel now?

A: I feel better.

COURT: If you are uncomfortable, please notify the Court so that we can again take an adjournment.

A: (Warned still under former oath)

A: Yes.

COURT: Thank you.

COURT: Due to the lateness of the hour, the matter is now remanded for continuation. Stand up, sir. I am told also the witnesses are writing exams so we need to give them a chance and then once they are done then. Where is the witness so that I can warn the witness not to, where is the witness?

PROSECUTOR: Your Worship?

COURT: The one that is still under oath. Ms Tshona, please.

PROSECUTOR: Your Worship, she is the guardian of that witness, this one.

COURT: Yes, I have got to warn her that she is still under oath.

PROSECUTOR: But she cannot come inside here.

COURT: No, no, I want her back to the intermediary room. Yes, and the name of the person that has been...[indistinct]. A, the Court is now warning you to be back in Court on 25 November. You are now given an opportunity to go and write your exams and then you come back. You must not discuss this case with any other person because you are still under oath.

A: No problem.

COURT: Thank you, sir, ma'am, you are excused.

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EVIDENCE FOR THE STATE CONTINUES)

COURT: (inaudible). Madam, A - good day. On the 30 of October, this Court did a competency test, and the Court was satisfied that you are a competent witness and the Court was satisfied that you understand, you know the difference between the truth and the lie. Today, I am – I now admonish you to speak the truth, and nothing but the truth, in terms of Section 164(1)(?) of the Criminal Procedure Act 51 of 1997.

A: (Admonished) (Through interpreter).

COURT: Do you understand madam?

A: Yes

COURT: Thank you, madam. Yes, Mr Siganeko, you may be seated.

COURT: Ma'am, we will take lunch adjournment, it's 10 to 1 now, we will take lunch adjournment, then we will be back at 2 o'clock is that fine Mr Jack ...(inaudible)?

PROSECUTOR: Yes ---(inaudible).

COURT: Inspector, please tell the witness to return to where she was...(inaudible). A, you must not discuss this case with other witnesses, and you must – can you hear ma'am? Let me first establish, can you hear us there - A can you hear us?

A: Yes.

COURT: Okay, thank you. The matter will stand down until 2 o'clock.

ON RESUMPTION AFTER LUNCH ADJOURNMENT

COURT: A, good afternoon, are you in a position that we can proceed, now?

A: Yes, we can proceed.

COURT: I again admonish you to speak the truth and nothing but the truth, understand?
Understand?

A: Yes.

COURT: Okay. Yes.

A: (Warned still under former oath) (Through interpreter)'

[14] What is set out above is the exchange between the complainant and the court *a quo* in relation to the swearing-in of the complainant to speak the truth or the admonishment of the complainant to speak the truth. Section 162(1) of the CPA provides that subject to ss 163 and 164, no person shall be examined as a witness in criminal proceedings unless he is under oath. Section 163 of the CPA on the other hand provides for an affirmation to be taken *in lieu* of an oath, where a person does not believe in God or subscribes to taking an oath.

[15] Section 164 (1) of the CPA provides that any person, who is found not to understand the nature and import of the oath or the affirmation may be permitted to give evidence in criminal proceedings without taking the oath or making the affirmation: provided that such a person shall, *in lieu* of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth.

[16] This section enjoins the court to satisfy itself that the witness understands the nature and import of the oath or affirmation first before deciding to have them admonished. The presiding officer must first make a finding regarding a witness's competency before a witness can either be sworn in or take affirmation. The same applies to children called to testify.

[17] ‘Even very young children may testify provided that they (a) appreciate the duty of speaking the truth; (b) have sufficient intelligence; (c) and can communicate effectively.’⁶

[18] Section 192 of the CPA on the other hand goes further to state that if a child does not have the ability to distinguish between the 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 the truth and untruth. The maturity and understanding of the child must be established by the judicial officer, who must ascertain a level of intelligence for the child to give evidence in the trial proceedings.

[19] In *S v QN*⁷ Gorven J (as he then was) Wallis J and Ngwenya AJ concurring held that: ‘In essence there is a need to establish whether or not the child is capable of distinguishing between truth and falsehood. There is no minimum age required for a competent witness; it must be adjudged whether each witness meets the requirements of competence.’

[20] In *Director of Public Prosecutions Transvaal v Minister of Justice and Constitutional Development and Others*⁸ Ngcobo J (as he then was) stated as follows:

‘Section 164 (1) allows a Court to allow a person, who does not understand the nature or the importance of an oath or a solemn affirmation, to give evidence without taking an oath or making an affirmation. However, the proviso to the subsection requires the presiding officer to admonish the person to speak the truth. It is implicit, if not explicit, in the proviso that the person must understand what it means to speak the truth.....

The practice followed in the courts is for the judicial officer to question the child in order to determine whether the child understands what it means to speak the truth. As pointed out above, some of these questions are very theoretical and seek to determine the child understands of the abstract concepts of truth and falsehood

The reason for the 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

⁶ P J Schwikkard and S E van der Merwe Principles of Evidence 4ed (2016) at 451.

⁷ 2012 (1) SACR 380 (KZP) para 11.

⁸ 2009 (2) SACR 130 (CC) para 164 - 166

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 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.' In this matter before the complainant could testify the Regional Court Magistrate asked the questions which I have referred to above.'

[21] If one carefully considers the questions which are referred to above, in particular those posed to the complainant before she testified, although the regional court magistrate did not first make a finding that the complainant understood the nature and import of the oath or affirmation, she was satisfied that the witness appreciated the duty to speak the truth and that she had sufficient intelligence and could communicate effectively. She was therefore entitled to administer an oath which appears to have been duly done by the interpreter. At every stage, after each adjournment, the witness was reminded that she was still under oath, to tell the truth.

[22] Before the commencement of the proceedings on 5 December 2019, the regional magistrate once again adverted to the issue of the competency of the witness, to tell the truth. She stated that she was satisfied that the witness could distinguish the difference between the truth and a lie. Accordingly, she admonished the complainant in terms of s 164(1) of the CPA to speak the truth.

[23] Although the regional magistrate appeared to have conflated the administering of an oath in terms of section 163 and the admonishment in terms of section 164(1), it appears that she was satisfied that the witness was able to distinguish between the truth and falsehood. This she repeats in her judgment when she indicates that the complainant testified that she was fifteen (15) years old and understood what it means to take an oath.

[24] Moreover, if one considers the general tenor of the complainant's evidence when she testified in chief and under cross-examination, there is no doubt that the complainant appreciated the duty of speaking the truth, had sufficient intelligence and could communicate effectively. In my view the regional magistrate exercised her discretion properly by swearing in the complainant instead of admonishing her. The record amply demonstrates that the complainant understood what it meant to speak the truth and as such there was no misdirection by the court *a quo* in accepting her evidence.

[25] Ms Dyantyi's reliance on the case of *Mekka* was not helpful to her case. In *Mekka* the Supreme Court of Appeal refers to its previous decision in *S v B 2003 (1) SA 552 (SCA) para 15* where the following was stated:

'The finding by the Court *a quo* that the fact that a finding was required necessarily implied that an investigation had to precede the finding was too narrow an interpretation of the section. The section did not expressly require that an investigation be held and an investigation was not required in all circumstances in order to make such a finding. For example, it could happen that when an attempt is made to administer the oath or to obtain the affirmation it came to light that the person involved did not understand the nature and import of the oath or the affirmation. The mere youthfulness of a child could justify such a finding. Nothing was required more than that the presiding judicial officer had to form an opinion that the witness did not understand the nature and import of the oath or the affirmation due to ignorance arising from youth, defective education or other cause. Although preferred, a formally noted finding was not required.'

[26] Now turning to the question of whether the state has established its case beyond reasonable doubt the starting point would be to consider the facts which are common cause between the appellant and the respondent which are the following:

26.1 The complainant and the appellant were known to each other. They both resided at NU 5A in Mdantsane.

26.2 While the complainant was standing in the street together with two of her companions, the appellant emerged, driving a motor vehicle.

26.3 The appellant then stopped his motor vehicle and requested the complainant to accompany him to the Highway taxi rank.

26.4 The complainant boarded the motor vehicle.

26.5 The appellant drove the motor vehicle to the Highway taxi rank. At the Highway taxi rank, he dropped off a person. He thereafter drove to the taxi rank at NU 6 where he dropped off another person.

26.6 He then drove to the shack which belonged to Phumlani Ncuncwa ('Phumlani').

26.7 The appellant and the complainant entered the shack.

26.8 Phumlani then went out and locked the appellant and the complainant from outside.

26.9 The appellant and the complainant then had sexual intercourse.

[27] The following are the issues which are in dispute between the appellant and the respondent:

27.1 whether they had consensual sex.

27.2 whether the complainant was dragged into and from Phumlani's shack.

[28] It is trite law that a court of appeal will not lightly interfere with findings of fact by the trial court unless the presiding officer had misdirected himself or herself. In my view, there has not been any misdirection whatsoever on the part of the learned regional magistrate. She has correctly evaluated the evidence and her conclusions are based on solid reasoning.

[29] The Appellant's attempt to assail his conviction on the basis that the magistrate has failed to approach the complainant's evidence with caution is not borne out by judgment. The learned regional magistrate adverted in her judgment to the effect that 'the Court should be aware of the dangers of accepting the evidence of a child because of potential unreliability and untrustworthiness. As the result of lack of judgment, immaturity, inexperience, suggestibility to influence, and the capacity of the child to convince himself of the truth of the statement it may not be true – or entirely true. A court will articulate a meaning of caution in general and the reference for a particular case. A court will examine the evidence in order to satisfy itself that the evidence given by the witness is clear and substantially satisfactory in all material respects.'

[30] In addition, the learned regional court magistrate went on not only to caution herself because the complainant was a child witness, but also because she was a single witness. Consequently, the appellant's complaint that the complainant's evidence had not been treated with caution is not justified.

[31] It is contended on behalf of the appellant that the mere fact that the complainant left her two companions and boarded the appellant's motor vehicle is consistent with the conduct of a person who was in all probability in a love relationship with the appellant. This contention is not sustainable. It is common cause that the appellant was a family friend. He was often asked to do errands on behalf of the complainant's mother.

[32] What stands out as an anomaly in the appellant's evidence and that of his witness is the reason they proffered as to why the door to the shack was locked from the outside. As much as the appellant and his witness, Phumlani, proffered the reason and motivation for this as the desire to ensure that Phumlani's mother would not think that he was inside the shack. In my view this explanation is nonsensical. There would not have been any reason for him to lock the shack from outside if indeed the appellant and complainant were voluntarily engaging in consensual sexual intercourse. Clearly, the reason could only have been to ensure that the complainant would not be able to escape. As if this was not enough, the appellant's and Phumlani's evidence differed diametrically in that the appellant testified that when Phumlani returned to the shack he found

him sleeping and he spoke to the complainant. Phumlani on the other hand testified when he returned to the shack he spoke to the appellant and the appellant said that he must return at 19:00. It is unnecessary for me to refer to the numerous other material contradictions between the appellant's and Phumlani's evidence. Those are explicitly set out by the learned regional court magistrate in her judgment.

[33] In addition, the complainant's version is corroborated in material respects by the common cause medical evidence. The injuries described in that report clearly support the conclusion that there was forceful penetration and are irreconcilable with his assertion that they had consensual sexual intercourse.

[34] Furthermore, the appellant's contention that he was unaware of the complainant's age is also demonstrably contrived and false. It was common cause that they grew up together and knew each other very well. As mentioned, he was virtually a family friend and they attended the same school. It was consequently preposterous for him to claim that he did not know that she was only 14 years old at the time.

[35] I am therefore of the view that the magistrate correctly rejected the appellant's version as improbable, contrived and patently false. Her conclusion that the state had proved the appellant's guilt beyond a reasonable doubt can therefore not be faulted. The appeal must consequently fail.

[36] In the result the following order issues:

1. The appeal is dismissed.

M. M. CHITHI

ACTING JUDGE OF THE HIGH COURT

I concur.

J. E. SMITH

JUDGE OF THE HIGH COURT

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