IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR 713/17

In the matter between:

G M DLAMINI Appellant

and

THE STATE Respondent

Order made on 9 November 2018

(a) The appeal succeeds;

(b) The appellant's conviction and sentence are set aside; and the decision of the court a quo is altered to read:

'The accused is found not guilty and is discharged'.

JUDGMENT

MASIPA J (OLSEN J concurring):

Introduction

[1] On 9 November 2018, this court granted the order set out above and undertook to provide reasons for its decision in due course. Those appear from this judgment.

[2] This is an appeal in terms of s 309(1) of Criminal Procedure Act 51 of 1977 ('the CPA'). The appellant was charged and convicted on a charge of rape of a ten year old girl and was sentenced to life imprisonment. He appeals against both conviction and sentence.

[3] The appellant raised two main points as the basis for his appeal. The first one relates to compliance with s 164 of the CPA. In respect of this point, it is contended that the elementary questions asked by the court a quo to the complainant fell short of the requirements set out in s 164. In order for the court a quo to satisfy itself that the complainant, who was eight years old at the time of her evidence, could distinguish between the truth and untruths, a proper enquiry had to be held to establish her competence. Relying on *Mhlongo v S* (AR272/14) [2015] ZAKZPHC 16 (27 February 2015), Ms *Hulley*, counsel for the appellant submitted that it was the responses provided from the enquiry which would demonstrate whether the child understands and can differentiate between the truth and untruths and the consequences of telling untruths.

[4] Ms *Hulley* contended that the duty on the presiding officer is to consider the maturity of the child, the intelligence and whether the child possesses a proper appreciation of the duty to speak the truth. She referred to *S v Raghubar* 2013 (1) SACR 398 (SCA). She submitted that the court a quo failed to satisfy itself that the complainant understood the nature and import of the oath as required in s 162 of the CPA and failed to conduct a competency test.

[5] Mr *Xaba, counsel for the respondent* argued that all persons are competent witnesses in terms of s 192 of the CPA. It is common cause that no person may testify unless under oath. See S v *Raghubar* and *S v Matshivha* 2014 (1) SACR 29 (SCA). Mr *Xaba* submitted that there are exceptions to the norm being the failure by the witness

to understand the import of the oath. It is contended that this was apparent to the court a quo after it conducted its enquiry in terms of s 164 of the CPA.

[6] It is apparent from a reading of the provisions of s 162 of the CPA that compliance with the section is compulsory except where s 163, alternatively s 164 of the CPA are complied with. The relevant part of the record with the exchange between the court a quo and the complainant reveals that the court a quo enquired from the complainant if the complainant knew what it meant to take the oath and her response was that she did not. There was no decision by the court a quo in respect of compliance with s 162 and nothing to state that, in view of the complainant's inability to comply with the provisions of s 162, it was embarking on an enquiry in accordance with s 164.

[7] Section 164(1) of the CPA provides as follows:

'(1) 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 person shall, in lieu of the oath affirmation, be admonished by the presiding judge or judicial officer to speak the truth.'

[8] I conclude from the questions that followed the complainant's response in respect of the oath that the court a quo embarked on an enquiry to admonish the complainant. Amongst the questions asked by the court a quo to the complainant, having established that she was wearing a pink jacket, was whether it was true to say that she was wearing a white jacket, which she said would be a lie. She was asked whether it was good to lie and she replied that it was not. She was asked if it was a good thing to tell the truth and she agreed that it was. She was then told that the court expected her to tell the truth in respect of what she saw and not what she heard, which she agreed to. Following from this, she was admonished to tell the truth and her evidence was led.

[9] As stated in *Director for Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & others* 2009 (2) SACR 130 (CC) and *S v Raghubar*

the purpose of testifying under oath, affirmation or admonishment is to ensure that the evidence given is reliable.

[10] In *Director for Public Prosecution* para 167, the court stated that where a child witness cannot convey the appreciation of the abstract concepts of truth and falsehood to the court, the solution does not lie in allowing them to testify but lies in proper questioning to determine whether the child understands what it means to speak the truth.

[11] In *Matshivha* para 10, the court stated that where a witness testifies without taking the oath properly, or making a proper affirmation or being properly admonished, their evidence lacks the status and character of evidence and is inadmissible. This principle was followed in *S v Machaba & another* [2015] JOL 33133 (SCA).

[12] In *Matshivha* para 11*,* Zondi AJA stated that for s 164 to be triggered, there must be a finding that the witness does not understand the nature and import of the oath. This finding had to be preceded by some form of an enquiry to determine a witness's capacity to understand the nature and import of the oath. Where it is found that the witness lacks such capacity, the judicial officer should establish whether the witness can distinguish between truths and lies. If such capacity exists, then the witness should be admonished.

[13] In my view, the process set out in *Matshivha*, in determining whether to apply the provisions of ss 162, 163 and 164, is that there must firstly be an enquiry by the judicial officer to determine whether the witness understands the nature and import of the oath. Secondly, a finding must be made from that enquiry, which finding would determine whether or not to admonish the witness. The court a quo did not follow this route and without enquiring sufficiently on issues related to s 162 and making its findings, it proceeded to implement s 164.

[14] Since the court a quo admonished the complainant, the question is whether its failure to conduct an enquiry and issue a ruling in terms of s 162 constitutes an irregularity. In my view, it does not. I say so because the provisions of s 162 provide compliance with s 164 as an option. However, this court must be satisfied that the

provisions of s 164 have been complied with. The enquiry conducted by the court a quo is sufficient compliance, as the court a quo was satisfied ino established whether the complainant's capacity to understand the nature and import of the oath or their ability to distinguish between truth and lies. The *Director of Public Prosecutions* and *Raghubar* set out that the purpose of ss 162, 163 and 164 are to ensure that evidence is given reliably.

[15] In *Mangoma v S* (155/13) [2013] ZASCA 205 (2 December 2013), the court preferred a flexible approach in the establishment of competence and administration of the oath to children. The magistrate was satisfied that the witness was competent to give reliable evidence. In view of this and the cases referred to above, I am of the view that the finding of the magistrate that the complainant was a competent witness and therefore that her evidence was admissible, was correct.

[16] The second issue in respect of conviction relates to the identity of the accused and the application of the cautionary rule on the basis of the complainant being a single child witness. The complainant, who was six years of age at the time of the rape, testified that on the day of the incident, during or about 5 October 2010, she left her home to buy snacks when an unknown person asked her to show him a place called Canaan. Having directed him to that place, the male asked that she accompany him there.

[17] According to the complainant, when the accused approached her, there were nearby homesteads but the people in those homesteads were unable to see them as they were inside the houses. On their way there, they walked through a forest. The male unzipped his trousers and strangled her. He told her to undress herself while he undressed himself lowering his trousers and underwear to knee high. He then lay on top of her, moistened his penis with his saliva and inserted his penis into her vagina and raped her. She felt excruciating pain. She was rescued by her aunts whom she heard calling out for her. The man dressed up and she dressed up and went to her aunts.

[18] The complainant could not recall whether she had told her aunt about what the unknown male did to her. She could not describe the man's height but mentioned that

he was light in complexion. She attended a pointing out where she pointed the accused as the person that raped her. She also made a dock identification. She could not recall her aunt asking her anything about the incident on their way home. On arrival at home, she could not remember if she was asked anything about the unknown male. Her aunt and other ladies who were in their company inspected her vagina to see if she had any injuries. The complainant's evidence was that she did not tell her aunt as to what happened to her.

[19] When the accused was arrested, the complainant was not present. Her evidence was, however, that the police passed her home to fetch her and her aunt. They were taken to the police station. She could not deny that the appellant was photographed at the time of his arrest and that the photographs were shown to her and said that she did not remember. She accepted the proposition that it was easy for her to identify the accused as she had seen the photos.

[20] The evidence of the accused's aunt, Ngcobile Bridget Mncwango, confirmed the events of the day. In addition to this, she stated that she became worried when she realised at 17h00, 30 minutes after the complainant left the house, that she had not returned and went out to look for her. Her immediate neighbours had not seen the complainant. Since it was sunset and getting dark, she told all her neighbours that the complainant was missing and they went out in numbers to search for her. They shouted out her name and she responded downwards from a bushy area and was found at 19h30. As the complainant approached, Mncwango observed that she was shaking and she kept falling down.

[21] According to Mncwango, she asked the complainant why she was there and the complainant relayed to her of her encounter with the unknown male person. She added that the complainant informed her that while on top of her, the unknown male had moved several times. She carried the complainant on her back and they returned home. On their arrival, she and another lady inspected the complainant and found a swelling and some tears showing that something was either inserted or pushed into the complainant's vagina. Although the complainant did not complain of pains, she was shaking. She corroborated the complainant's version that there was no blood on her panties.

[22] Upon questioning the complainant, Mncwango was told that the male was wearing white trousers and black shoes and had her father's stature. One of the ladies who was present said that there was someone that she had seen around at the time when the complainant disappeared and she suspected that person to be the perpetrator. Following from this, Mncwango phoned the police who arrived at her home and took them to the police station and then to the hospital the next morning.

[23] Ms Mncwango confirmed that she was present at the identity parade and witnessed the complainant pointing out the accused who was unknown to her. Her evidence was that she and the complainant were not present when the accused was arrested. The arrest was pursuant to the father reporting the rape to the induna. Although she did not attend the scene of the incident, she was aware that a handkerchief was found there together with the 50 cent coin she had given to the complainant to buy snacks. Mncwango's evidence was that after the incident, the complainant developed loose bladder syndrome, meaning she cannot control her bladder and urinates on herself.

[24] Since Mncwango was not present when the accused was arrested, she could not deny his version that there were members of the public who took photographs of the appellant with their cellular phones and that these people were allowed to board the police van with the appellant and had continued photographing him.

[25] The second point relates to the issue of the identity of the appellant as the perpetrator of the offence. The provisions of s 208 of the CPA provide that an accused may be convicted on the evidence of a single witness if the evidence given is satisfactory and given by a competent witness. In *S v Chabalala* 2003 (1) SACR 134 (SCA) which provided that when dealing with a young single witness, the correct approach was to weigh up all the elements pointing towards the guilt of the accused against those which are indicative of his innocence, taking proper account of the inherent strengths and weaknesses, probabilities and improbabilities on both sides and decide whether the balance weighs heavily in favour of the State. See *S v Sauls &* others 1981 (3) SA 172 (A) and *S v Van der Meyden* 1999 (1) SACR 447 (W).

[26] As argued by Ms *Hulley*, the complainant was a single witness and in terms of the cautionary rule, her evidence must be clear and satisfactory on all material respects. The complainant's evidence that she had been raped was supported by the medical evidence. Ms *Hulley's* argument that the injuries to the complainant's vagina were as a result of the examination conducted by Mngcwango cannot be sustained since this was raised with the doctor and was refuted.

[27] There was no evidence led by the State to say how the appellant was identified as the perpetrator of the offence which resulted in his arrest. The appellant was unknown to the complainant and the only means of identification she tendered was that he was wearing white trousers and was built like her father. There was no evidence to suggest that there were any distinct features on the complaintant's father which would have resulted in the appellant being identified as the perpetrator.

[28] The complainant accepted that she had seen the photographs depicting the appellant prior to attending the identity parade. It was of course worrying that when she attended the identification parade, despite there being at least nine people in the room, when she was allowed into the room, she walked straight to the appellant without looking at the other people who were participating in the identification parade.

[29] In *S v Mthethwa* 1972 (3) SA 766 (A) at 768, the court set out the criteria to be applied in identification cases. Holmes JA accepted the need for caution when dealing with evidence of identification and said that due to the fallible nature of human beings, it was not enough that the identifying witness was honest. The reliability of his observation must be tested. Factors to consider include lighting, visibility, eyesight, the proximity of the witness, his opportunity for observation both as to time and situation, the extent of this prior knowledge of the accused, mobility of the scene, corroboration, suggestibility, the accused' face, voice, built, gait, dress, identification parade and the evidence on behalf of the accused. See also *S v Maphumulo & another* 2010 (2) SACR 550 (KZP).

[30] In respect of dock identification, in *S v Mdlongwa* 2010 (2) SACR 419 (SCA), it was held that generally this carries little weight but that it cannot be discounted altogether. Taking into account the fact that the complainant had seen the appellant's

photographs, had participated in an identification parade and was of course seeing the appellant in the dock, are all factors which would have influenced her dock identification.

[31] On the facts of this matter, it cannot be said that the state had proved the guilt of the appellant beyond a reasonable doubt. I find that the decision arrived at by the magistrate was wrong and that there was no evidence to link the appellant to the commission of the offence. Consequently, I find that the court a quo misdirected itself in convicting the appellant. Thus the order of 9 November 2018.

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MASIPA, J

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OLSEN, J

APPEARANCES:

For the Applicant:	Ms Hulley
Instructed by:	Justice Centre – Legal Aid South Africa, Durban.
For the Respondent:	Mr Xaba
Instructed by:	Director of Public Prosecution, Durban.
Matter heard on:	9 November 2018.
Judgment delivered:	9 November 2018.
Reasons for Judgment:	27 November 2018.