

S v Sangweni 2019 (1) SACR 672 (KZP)

KEY CONCEPTS	
Rape of 9-year-old	Rape by family member
Oath inquiry s162	Competency of 13-year-old
What constitutes competency examination	

Introduction

The appellant was found guilty in the regional court of rape in contravention of s3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and sentenced to life imprisonment. The appellant appealed in respect of both the conviction and the sentence.

Facts of the case

During the period 2012 – 2015 the appellant is alleged to have committed acts of sexual penetration with the complainant, a young girl. The appellant was related to the complainant's father and from time to time visited them to have tea and watch television in a separate rondavel occupied by the complainant and her brother. On some occasions he would switch off the light in the rondavel so as to create the impression that he had left, but would then get under the blanket with the complainant and have sexual intercourse with her. She was 9 years old when this happened for the first time. The complainant also described an incident (the last one) when the appellant entered the room where she was helping with the laundry. She said he threw her onto the bed, unzipped his pants and had sexual intercourse with her. He warned her not to tell anyone and threatened to kill her if she did.

The complainant later went to Johannesburg and stayed with a relative. By then she was 12 years old. She wrote a letter to her sister and told her what the appellant had done to her. The relative whom she was staying with (appellant's cousin) discovered the letter amongst her clothing. She took the complainant to the doctor to be examined and reported the matter to the police. The appellant was arrested.

The appellant admitted that he used to visit the complainant's family but denied that he had ever interfered with her.

Issue before the High Court

Counsel for the appellant submitted that the complainant's evidence was inadmissible as it had not been established that she was a competent witness. It was argued that the magistrate had failed to establish that she understood the difference between the truth and lies and the consequences of lying.

Discussion

The complainant was 13 years old when she testified. The magistrate asked her whether she knew what it meant to take the oath and whether she knew the consequences of taking the oath. She replied that she knew what the oath was but did not know what the consequences would be. He then asked her if she knew the difference between telling lies and the truth. She answered 'yes.' He then admonished her to tell the truth.

The High Court was satisfied that the magistrate was correct in not administering the oath to the complainant. The question is whether he did enough to establish that the complainant knew the difference between telling the truth and telling lies, and the potential consequences of telling lies. The practice is for the judicial officer to question the child in order to determine whether the child understands what it means to speak the truth. 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 the 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 mean 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.

The single question by the magistrate, whether the complainant knew the difference between telling lies and telling the truth, without more, was not enough to establish that she understood what it means to speak the truth, that it is important to speak the truth and that it is wrong to tell lies. She was, therefore, not admonished to tell the truth and is consequently not a competent witness. Her evidence was inadmissible and the conviction cannot stand.

Appeal succeeds and conviction and sentence set aside.