

Haarhoff & Another v Director of Public Prosecutions, Supreme Court of Appeal, Eastern Cape (Grahamstown) (1192/17) [2018] ZASCA 184 (11 December 2018)

KEY CONCEPTS	
Persons with mental disabilities	Competency examination of person with mental disability
Rape	Evidence of clinical psychologist on competency
Competency test s164	

This is an appeal against conviction and sentence on a charge of rape. The complainant in the case was 24 years old and it was argued on behalf of the appellants that, although the complainant had the ability to differentiate between truth and lies, she did not understand the moral obligation of the necessity to speak the truth as was evident was from her responses to the court during the competency examination.

The complainant had been assessed by a clinical psychologist to determine her mental ability and her ability to testify. The clinical psychologist testified that, having assessed the complainant's cognitive functioning and her thinking with psychometric tests, there was a considerable discrepancy between the complainant's biological and mental age, and she was of the opinion that the complainant's mental age was that of a 10 year old. According to the clinical psychologist, the complainant was able to testify in court and had the cognitive capacity suitable to being admonished by the court. The clinical psychologist also expressed the view that, despite the complainant's intellectual challenges, she did not fall within the definition of mentally disabled person as stipulated in s 1 of the Sexual Offences Act, because she understood what it meant to have sexual intercourse and was able to appreciate the nature and reasonably foreseeable consequences of sexual intercourse. She was, accordingly, able to express her consent, or otherwise, to sexual intercourse.

The relevant competency examination took place as follows:

COURT: Please ask her name?
WITNESS: S. P.
COURT: How old are you?
WITNESS: She does not know how old she is M'Lady.
COURT: S. do you know the difference between what is true and what is not true, that is the difference between truth and lies?
WITNESS: Yes M'Lady.
COURT: If I say to you are a boy am I telling the truth?
WITNESS: No.
COURT: Do you know what happens to someone who does not tell the truth?
WITNESS: No M'Lady.
COURT: Is it good to tell lies?
WITNESS: Yes M'Lady.

COURT: Do you know what happens, okay you have already answered that, now we have asked you to come here today because we want you to tell us the truth. Are you going to tell us the truth?

WITNESS: Yes M'Lady.

COURT: Any questions, I have asked those questions just to establish whether she understands the difference between the truth and lies, I don't know if either of you want to pose any further questions before I swear her in?

PROSECUTOR: M'Lady can we ask one or two questions just to.....?

COURT: Okay.

PROSECUTOR: S you indicated earlier that if a person says you are a boy that person would be telling a lie.

WITNESS: Yes.

PROSECUTOR: And if a person says you are a girl, is he telling the truth or is he telling a lie?

WITNESS: He is telling the truth.

PROSECUTOR: That is all M'Lady.'

The court was in agreement that the purpose of the enquiry prior to admonition, in terms of s164 of the Criminal Procedure Act 51 of 1977, is not to merely determine whether a witness can understand the abstract concepts of truth and falsehood or can give a coherent and accurate account of the events but to determine whether he or she can distinguish between truth and falsity. It must be evident that the witness recognises the danger and wickedness of lying. The court referred to the case of **Gealall Raghubar v The State 2012 ZASCA 188** where Tshiqi JA stated:

'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 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 court found that the trial court had received expert evidence not only on the general competence of the complainant to testify, but was also provided with expert opinion on whether the complainant was able to understand what it meant to tell the truth, what it meant to lie, and that she could be admonished like any 10 year old child.

The court found that the criticism directed at the trial court's enquiry preceding the admonition that it was cursory or inadequate was without merit as it failed to take into account the proper context in which the questioning was undertaken. This critical context is that the court's questioning was preceded by detailed testimony of an expert who had not only interviewed the complainant but also evaluated her mental capabilities by performing recognised IQ tests. What has to be borne in mind in this case is that the clinical psychologist's conclusion that the complainant was able to distinguish between the truth and falsehood and would be able to understand what it meant to relate what happened and

nothing else, was based on scientific tests and was uncontroverted. The court's later questioning of the complainant must be seen in that light.

"It was clear that the clinical psychologist's uncontested evidence weighed heavily with the trial court and it was satisfied that the complainant comprehended the difference between truth and falsehood and comprehended the duty to speak the truth. She was clearly too immature to appreciate the significance of the oath. The later extracts of the complainant's answers to questions by the trial court before she was admonished, referred to above must be seen in proper perspective. First, her answers to the initial questions showed an ability to distinguish between truth and falsehood. Her subsequent answers appeared to indicate the contrary. It must be appreciated that this was apparently her first time in a court and this must have made her nervous. Her susceptibility to nervousness and its effects are aspects I will revert to later in this judgment. Seen against that background, the trial court's decision to admonish the complainant to speak the truth was correctly made. Having considered the trial court's questioning in the context of the psychologist's evidence, I am satisfied that the court a quo rightly admonished the complainant. The argument that the complainant's evidence was not properly taken therefore has no merit."

From this judgement it would appear that the competency of a witness can be deduced from the actual competency examination which can be supplemented by evidence from an expert.