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

THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

Reportable

Case No: 57/2002

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS

KWAZULU-NATAL Appellant

and

JOHN MEKKA Respondent

Coram: Vivier ADP, Olivier, Streicher, Farlam JJA and Jones AJA

Heard: 20 March 2003

Delivered: 26 March 2003

Section 164 of Act 51 of 1977 – finding that witness did not understand the nature and import of the oath – inquiry preceding finding not always necessary- court bound by its earlier decision in *S v B* 2003 (1) SA 552 (SCA).

J U D G M E N T

STREICHER JA/

STREICHER JA:

[1] The respondent was convicted of rape and indecent assault and sentenced to 10 years imprisonment by the regional court in Durban. On appeal the Natal Provincial Division held that the magistrate failed to inquire from the complainant whether she understood the nature and import of the oath and that such failure constituted an irregularity rendering the complainant's evidence inadmissible. In the result and as the other evidence led at the trial did not establish the guilt of the respondent, the conviction and sentence were set aside. This is an appeal in terms of s 311 of the Criminal Procedure Act 51of 1977 ('the Act') against the setting aside of the conviction and sentence.

[2] Section 162 of the Act provides that subject to the provisions of ss 163 and 164 no person shall be examined as a witness in criminal proceedings unless he is under oath. In terms of s 163 a person who objects to taking the oath or who does not consider the oath in the prescribed form as binding on his conscience or who informs the presiding judicial officer that he has no religious belief or that the taking of the oath is contrary to his religious belief, shall make the affirmation prescribed by the section.

[3] Section 164(1) of the Act provides as follows:

'Any person 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, 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 or

affirmation, be admonished by the presiding judge or judicial officer to speak the truth, the whole truth and nothing but the truth.'

[4] The proceedings in the regional court preceding the complainant's testimony, were recorded as follows:

'COURT M. how old are you?

. . .

M.N. I'm nine years.

. . .

COURT Do you go to school?

M.N. Yes.

COURT What standard are you in or class?

M.N. Standard 2.

COURT You're a clever girl. All right, do you know the difference between truth and lies?

M.N. Yes.

COURT What happens to you at school if your teacher finds out you're telling lies?

M.N. You get punished.

COURT All right, its very important you tell us the truth today in court and you're warned to tell the truth.'

[5] In her reasons for judgment the magistrate said:

'3.1 I do concede that the court never enquired from M. the complainant whether she understood the nature and import of the oath or whether she considered the oath to be binding on her conscience before admonishing her to tell the truth.

3.2 The court believed that due to her tender age she would not have understood the nature and import of the oath and therefore merely admonished her to tell the truth after she was found to be a competent witness who knew the difference between truth and falsehood.'

[6] The court *a quo* relied on *S v N* 1996 (2) SACR 225 (C) at 229*e* and *S v Malinga* 2002 (1) SACR 615 (N), a judgment of the full bench of the Natal Provincial Division which was binding on it. It consequently held that a finding in terms of the section had to be preceded by some form of

inquiry; that it was clear that the magistrate did not inquire from the complainant whether she understood the nature and import of the oath; and that the evidence of the complainant was therefore inadmissible. However, in its judgment granting leave to appeal the court *a quo* said:

'It seems to me that there are reasonable prospects of the Supreme Court of Appeal concluding that in the circumstances of this case the presiding magistrate, by clear implication, made a finding which was based on her observation that the witness, because of her self-evident youth and immaturity, could not understand the actual nature and import of the oath and accordingly it was only necessary to admonish and warn her and then hear her testimony.'

[7] Since the judgments by the court *a quo* were delivered this court has held in *S v B* 2003 (1) SA 552 (SCA) that an inquiry is not always necessary in order to make the finding required by s 164 and that the mere youthfulness of a witness may indeed justify such a finding. In para [15] of the judgment this court said:

'Dit is duidelik dat art 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 vroeëre 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 Vumazonke* 2000 (1) SASV 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 ten einde so `n bevinding te maak nie. Dit kan byvoorbeeld gebeur dat, wanneer gepoog word om die eed op te lê of om `n bevestiging te verkry, 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 regterlike amptenaar `n oordeel moet vel dat `n getuie weens onkunde voortspruitende uit jeugdigheid, gebrekkige opvoeding of 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) SASV 182

(K) op 185*i*).'

[8] Counsel for the respondent submitted that the court's remarks on this point were *obiter* and that they should in any event be departed from as they were wrong. He submitted that we should rather follow the Provincial Division decisions in which it was held that an inquiry was always necessary.

[9] There is no merit in the contention that the decision constituted an *obiter dictum*. Questions of law were reserved for decision by this court. One of the questions so reserved was whether the failure of the trial court to have conducted an inquiry resulted in the evidence of the witness concerned being rendered inadmissible (see para 10). This court was therefore called upon to decide whether or not s 164 required an inquiry to be conducted.

[10] As regards the invitation to depart from the decision in *S v B* I need go no further than to refer to what Harms JA said in *Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd and Others* 2003 (2) SA 253 (SCA) para 9:

'The approach of this Court to *stare decisis* is well known and we are not here merely in order to pay lip service to it. It suffices to underscore the formulation in *Bloemfontein Town Council v Richter* 1938 AD 195 at 232:

"The ordinary rule is that this Court is bound by its own decisions and unless a decision has been arrived at on some manifest oversight or misunderstanding, that is there has been something in the nature of a palpable mistake, a subsequently constituted Court has no right to prefer its own reasoning to that of its predecessors – such preference, if allowed, would produce endless uncertainty and confusion."'

I am in any event of the view that the decision in *S v B* was correct.

[11] The fact that the magistrate after having established the age of the complainant proceeded to inquire whether she understood the difference between truth and lies and then warned her to tell the truth is in my view a clear indication that she considered that the complainant, due to her

youthfulness, did not understand the nature and import of the oath. In her additional reasons the magistrate confirms that to have been the case. The magistrate did, therefore, make a finding that the complainant was a person who, from ignorance arising from her youthfulness, did not understand the nature and import of the oath. The magistrate saw and heard the complainant and this court is in no position to question the correctness of her finding.

[12] The respondent submitted that the trial court also had to inquire whether the complainant understood the difference between truth and falsehood. Whether such an inquiry need be held is a question that was not decided in *S v B* and need not be decided in this case as it is clear that the magistrate conducted such an inquiry. The complainant said that she understood the difference and that one got punished if one were to tell a lie thereby indicating that she knew that it was wrong to tell a lie. It was on the basis of these answers that the magistrate concluded, as she was in my view entitled to do, that the complainant understood the difference between truth and falsehood.

[13] It follows that the magistrate did not commit an irregularity by allowing the complainant to testify after having warned her to tell the truth.

[14] Having decided the matter in issue in favour of the appellant this court may in terms of s 311(1) set aside or vary the decision appealed from and re-instate the conviction and sentence of the regional court. In my view the magistrate correctly convicted the respondent and sentenced him to 10 years imprisonment. No submissions to the contrary were made on behalf of the respondent. The regional court's conviction and sentence of the respondent should therefore be re-instated.

[15] For these reasons the appeal is upheld, the order made by the court *a quo* is set aside and the conviction and sentence imposed by the regional

court are re-instated.

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P E STREICHER

Judge of Appeal

Vivier ADP)

Olivier JA)

Farlam JA)

Jones JA) concur