THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 156/14

Not reportable

In the matter between:

PETRUS RAMMBUDA **APPELLANT**

And

THE STATE **RESPONDENT**

Neutral citation*:* *Rammbuda v The State* (156/14) [2014] ZASCA 146 (26 September 2014)

Coram: PONNAN, SALDULKER JJA and DAMBUZA AJA

Heard: 12 September 2014

Delivered: 26 September 2014

Summary: Evidence – witnesses - competence of – child witness – manner of questioning by presiding officer in an enquiry in terms of sections 162 and 164 of the Criminal Procedure Act 51 of 1977.

ORDER

On appeal from: L.impopo High Court, Thohoyandou (Hetisani J) sitting as a court of first instance.

1. The appeal is upheld.

2. The conviction and sentence are set aside.

JUDGMENT

Saldulker JA (Ponnan JA and Dambuza AJA concurring):

[1] The appellant, Mr Petrus Rammbuda, was convicted on 4 November 2002 in the regional court, Thohoyandou of the rape of a seven year old girl. Following the conviction, the regional magistrate stopped the proceedings and committed the appellant for sentencing by the high court in terms of section 52(1)*(b)* of the Criminal Law Amendment Act 105 of 1997. In the high court, Hetisani J confirmed the conviction and sentenced the appellant to life imprisonment. The appellant appeals to this court against the conviction and sentence with the leave of the high court.

[2] Before us it was argued that two of the child witnesses, including the complainant on the rape charge, had not been properly sworn or admonished in terms of s 164 read with s 162 of the Criminal Procedure Act 51 of 1977 prior to them testifying in support of the State's case. Furthermore, it was submitted that even if the evidence of the complainant had been properly received by the trial court, it was riddled with contradictions and inconsistencies. Accordingly, so the argument went, the conviction fell to be overturned.

[3] In regard to the complainant, the record reads:

‘Court: Right are you PN?

PN: Correct.

Court PN are you already in school?

PN: Yes.

Court: In what standard or grade are you now?

PN: Grade 2.

Court: Grade 2. Now at this stage PN what it means to tell truth, what is the difference between the truth and a lie?

PN: Yes I know

Court: In court we only tell the truth and you do not tell us lies right. What is also important do not come and tell us what other people told you to come and tell us, we only want what you have seen and what you have experienced, is that clear?

PN: Correct.

Court: You are caution to tell the truth.’

[4] Sections 162 to 164 of the Criminal Procedure Act provide:

‘162. Witness to be examined under oath.

(1) Subject to the provisions of sections 163 and 164, no person shall be examined as a witness in criminal proceedings unless he is under oath, which shall be administered by the presiding judicial officer or, in the case of a superior court, by the presiding judge or the registrar of the court, and which shall be in the following form:

“I swear that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God.”

(2) If any person to whom the oath is administered wishes to take the oath with uplifted hand, he shall be permitted to do so.

163. Affirmation in lieu of oath.

(1) Any person who is or may be required to take the oath and**–**

(a) who objects to taking the oath;

(b) who objects to taking the oath in the prescribed form;

(c) who does not consider the oath in the prescribed form to be binding on his conscience; or

(d) who informs the presiding judge or, as the case may be, 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 an affirmation in the following words in lieu of the oath and at the direction of the presiding judicial officer or, in the case of a superior court, the presiding judge or the registrar of the court:

"I solemnly affirm that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth".

(2) Such affirmation shall have the same legal force and effect as if the person making it had taken the oath.

(3) The validity of an oath duly taken by a witness shall not be affected if such witness does not on any of the grounds referred to in subsection (1) decline to take the oath.

164. When unsworn or unaffirmed evidence admissible.

(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 or affirmation, be admonished by the presiding judge or judicial officer to speak the truth.

(2) If such person wilfully and falsely states anything which, if sworn, would have amounted to the offence of perjury or any statutory offence punishable as perjury, he shall be deemed to have committed that offence, and shall, upon conviction, be liable to such punishment as is by law provided as a punishment for that offence.'

[5] In *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & others* 2009 (4) SA 222 (CC) paras 165–167, the Constitutional Court said:

‘The practice followed in 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's understanding of the abstract concepts of truth and falsehood. The questioning may at times be very confusing and even terrifying for a child. The result is that the judicial officer may be left with the impression that the child does not understand what it means to speak the truth and then disqualify the child from giving evidence. Yet with skilful questioning, that child may be able to convey in his or her own child language, to the presiding officer that he or she understands what it means to speak the truth. What the section requires is not the knowledge of abstract concepts of truth and falsehood. What the proviso requires is that the child will speak the truth. As the High Court observed, the child may not know the intellectual concepts of truth or falsehood, but will understand what it means to be required to relate what happened and nothing else.

… When a child, in the court's words, cannot convey the appreciation of the abstract concepts of truth and falsehood to the court, the solution does not lie in allowing every child to testify in court. The solution lies in the proper questioning of children; in particular, younger children. The purpose of questioning a child is not to get the child to demonstrate knowledge of the abstract concepts of truth and falsehood. The purpose is to determine whether the child understands what it means to speak the truth.’

[6] In *S v Raghubar* 2013 (1) SACR 398 (SCA) paras 4–5 the following is stated:

‘The reason for giving evidence under oath (s 162), affirmation (s 163) or admonishment (s 164) is to ensure that the evidence given is reliable.

Section 192 of the Criminal Procedure Act declares generally that unless specially excluded, all persons are both competent and compellable witnesses. A witness is competent to testify if his or her evidence may properly be put before the court. 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 to satisfy 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 language used in all three sections is peremptory.'

[7] *In S v Matshivha* 2014 (1) SACR 29 (SCA) paras 10–11, this court stated that:

'The reading of s 162(1) makes it clear that, with the exception of certain categories of witness falling under either s 163 or 164, it is peremptory for all witnesses in criminal trials to be examined under oath. And the testimony of a witness, who has not been placed under oath properly, has not made a proper affirmation or has not been properly admonished to speak the truth as provided for in the Act, lacks the status and character of evidence and is inadmissible.

Section 164(1) is resorted to when a court is dealing with the admission of evidence of a witness 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. Such a witness must, instead of being sworn in or affirmed, be admonished by the judicial officer to speak the truth. It is clear from the reading of s 164(1) that for it to be triggered there must be a finding that the witness does not understand the nature and import of the oath. The finding must be preceded by some form of enquiry by the judicial officer, to establish whether the witness understands the nature and import of the oath. If the judicial officer should find after such an enquiry that the witness does not possess the required capacity to understand the nature and import of the oath, he or she should establish whether the witness can distinguish between truth and lies and, if the enquiry yields a positive outcome, admonish the witness to speak the truth.'

[8] Here the enquiry conducted by the trial court into the competency of the complainant (who was eight years old when she testified) in terms of s 162 read with 164 was wholly inadequate. The questioning failed to establish whether the child had: (a) the capacity to distinguish truth and untruth; or (b) had a proper appreciation of these abstract concepts 'truth' and 'untruth' and was thus a competent witness. As was pointed out in *Matshiva* [i]t is clear from the reading of s 164(1) that for it [that section] to be triggered there must be a finding that the witness does not understand the nature and import of the oath'. There was no

such finding by the court in this instance. In any event, having concluded, it would seem, that the answers elicited in response to the questions posed, did not afford it an appropriate measure of comfort for the oath to be administered, the record reflects that the child was simply cautioned by the court to tell the truth. Cautioning the child to tell the truth (whatever that may mean) was far from sufficient to satisfy requirements of S 164 of the Act. That section imposed a duty on the presiding judicial officer to admonish the child to speak the truth. What occurred in this instance fell far short of a proper admonition. The testimony of the complainant thus lacked the status and character of evidence. Counsel for the State was constrained to concede as much.

[9] The same line of questioning appears to have been followed by the court in regard to the complainant's friend, PM who was also eight years old at the time of giving evidence, and thus the enquiry in regard to PM suffers the same deficiencies as that of the complainant.

[10] In any event, even if the evidence had been properly admitted by the trial court, it was insufficient to sustain a conviction in the charge of rape. The complainant's evidence and that of her aunt Ms Mchaba, to whom the first report of the rape was made, was not analysed, nor were the contradictions and the inconsistencies in their evidence properly considered and assessed by the trial court.

[11] The only evidence regarding the rape is that of the complainant herself. Her evidence was poor and unconvincing in material aspects. In her examination-in-chief, the complainant testified that during the rape, the accused undressed her, threatened her with a knife, brought her down onto the carpet and put some pieces of cloth inside her mouth. He then climbed on top of her and began 'abusing' her. She stated that although she was injured in her vagina, she did not

bleed but there was some ‘greenish thing flowing from her vagina’. When she arrived home after the incident, she was sent to buy liquor. She did not report the incident to her grandmother. The following day she was told by her grandmother not to go to school. Up to that stage she had not divulged her experience of the rape by the appellant to anyone. On the following day the complainant testified that her aunt Ms Mchaba arrived at her home. Her aunt examined her in the presence of both her mother and her grandmother. She was then taken to the hospital.

[12] However, when her aunt Ms Mchaba testified, her evidence as to what the complainant related to her differed materially from the complainant’s testimony. Ms Mchaba testified that on a date she could not recall, she noticed that the complainant was limping. She then questioned the complainant who informed her that she had visited the appellant’s homestead requesting the use of the toilet. The appellant then took her into his house, put her on top of a bed, climbed on top of her and ‘raped’ her. He had blocked her mouth with his hand and after raping her, he warned her not to tell anyone about it, threatening to kill her if she did. Ms Mchaba then examined the complainant and found that there was a cut in the complainant’s vagina, that she was bleeding and that there was a white discharge on her vagina. She then telephoned the complainant’s mother and went to the home of the complainant’s grandparents where she reported the rape incident. Thereafter the complainant was taken to hospital.

[13] Apart from the above contradictions in the evidence of the complainant and that of her aunt, the medical report relating to the complainant is also problematic. It is a troubling feature of this case that the medical doctor who examined the complainant, Dr Molala, was not called to testify. The medical report does not contain the date and the time of the medical examination of the complainant, nor the date when Dr Molala found the injury that he noted on the medical report.

[14] It must follow, as counsel for the State was constrained to concede, that the conviction cannot be sustained. In the result the appeal is upheld and the conviction and sentence are set aside.

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H SALDULKER

JUDGE OF APPEAL

Appearances:

For appellant: M.J Manwadu

Instructed by:

Justice Centre, Thohoyandou

For respondent: R.J Makhera

Instructed by:

Director of Public Prosecutions,

Thohoyandou