IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

APPEAL CASE NO: **AR528/2017**

In the matter between:

SPHELELE PRINCE NDABA **Appellant**

and

THE STATE **Respondent**

APPEAL JUDGMENT

Delivered: 18 May 2018

MBATHA J (Mnguni J concurring):

[1] The appellant was arraigned in the regional court, Vryheid, on one count of rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Sexual Offences Act).

[2] The appellant tendered a plea of not guilty. On 17 February 2017, he was convicted of rape and sentenced to 15 years imprisonment. The appellant successfully petitioned this court for leave to appeal against the conviction.

[3] The appeal turns on whether the court a quo conducted an enquiry to determine whether the complainant understood the nature and importance of the

oath and whether the state was able to prove the case against the appellant beyond a reasonable doubt.

[4] It is trite that only admissible evidence can be accepted as evidence in a court of law. It is therefore required of presiding officers when dealing with child witnesses to determine whether they have the competency to testify. The court a quo was bound to determine if the complainant was able to distinguish between the truth and falsehood. The approach by the court a quo was as follows:

> 'Court: What are the names of the child? Just repeat. (through interpreter and intermediary)
> B: B …(inaudible)
> Court: B – just, what is her surname?
> Witness: Z., Your Worship.
> Court: How old are you, B?
> Witness: I am 11 years old, Your Worship
> Court: Where do you stay? Just repeat.
> I think the volume is too loud, Your Worship. I cannot hear the witness. I am – what was your answer? I said during the year 2013, how old were you? --- I was eight years old.
> When do you celebrate your birthday? --- It is on 7 July.
> Where were you residing during 2012/2013? --- Here at Vryheid?
> Where about here at Vryheid? --- At Kwattas[?], Emakwattas[?].
> Whom were you residing with? --- Aunt, grandmother and uncle.
> Were you schooling in 2013? --- Yes.
> What grade were you doing? --- Grade 2.'

[5] From then onwards, the learned magistrate went on to ask the complainant about the incident which occurred during 2012 or 2013, by stating as follows:

> 'Please tell this Court what happened or rather, do you still remember the exact date as to when did the incident took place?'

[6] The above extract from the record reflects that the court was aware of the complainant's tender age of 11 years before requesting her to relate what happened to her. Despite this, the magistrate failed to conduct the competency test, which is the precursor to admonishing a child witness.

[7] The competency test is often used in relation to child witnesses to determine if they understand the difference between truth and falsehood. This is a prerequisite for the oath, affirmation and an admonition in terms of s 164 of the Criminal Procedure Act 51 of 1977 (the CPA). P J Schwikkard and S E van der Merwe Principles *of Evidence* 4 ed (2016) at 451 state as follows:

> 'Even very young children may testify provided that they *(a)* appreciate the duty of speaking the truth; *(b)* have sufficient intelligence; and *(c)* and can communicate effectively.' (Footnote omitted.)

Nowhere in the record does it reflect that the learned Magistrate tried to establish if she could distinguish between falsehood and the truth.

[8] Section 192 of the CPA, goes further to state that if a child does not have the ability to distinguish between the truth and untruth, such 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 the truth and untruth. The maturity and understanding of the child must be established by the judicial officer, who must ascertain the level of intelligence for the child to give evidence in the trial proceedings.

[9] The Supreme Court of Appeal in *Matshivha v S*[1] emphasised that it is necessary for the court, before it admonishes the witness in terms of s 164 to establish whether the witness is able to distinguish between the truth and falsehood. In Matshiva the court emphasised that the two enquiries should not be conflated, to establish the competency of the witness and the ability to understand the nature and purpose of the oath.

[10] It also turns out that having failed to establish if she could differentiate between the truth and falsehood that the complainant was not admonished at all. Section 162 of the CPA, requires that all evidence be given under oath. The provisions of s 162 to 164 of the CPA, specifically state that the witness will be examined under oath, affirmation or admonishment to ensure that the evidence is reliable.

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[1] *Matshivha v S* (656/12) [2013] ZASCA 124; 2014 (1) SACR 29 (SCA); [2014] 2 All SA 141 (SCA) (23 September 2013)

[11] The person testifying must understand the nature and import of the oath. Section 164 (1) of the CPA, as amended caters for certain exceptional circumstances and provides as follows:

> 'Any person, who is found not to understand the nature and import of the oath or 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.'

[12] The provisions of s 164 of the CPA are peremptory as the words '*that such person shall*' appears in the wording thereof. Such a failure to admonish the child witness as conceded to by the state counsel render the evidence of the complainant inadmissible. It is trite that where there has been failure to admonish the child witness, such evidence should be inadmissible.[2]

[13] The Constitutional Court in *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others*[3] echoed the same sentiments expressed above, in the following manner:

> '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 a 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 pre-condition for admonishing a child to tell the truth that the child can comprehend what it means 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. To my mind, it does not amount to a violation of section 28(2) to exclude the evidence of such a child. The risk of a conviction based on unreliable evidence is too great to permit a child who does not understand what it means to speak the truth to testify. This would indeed have serious consequences for the administration of justice.'

[13] In *S v Nedzamba*[4], the court echoed the same trite principles that I have alluded to above. It expressed the following:

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[2] *S v B* 2003 (1) SASV 52 (HHA).

[3] *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others* (CCT 36/08) [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (2) SACR 130 (CC); 2009 (7) BCL 637 (CC) (1 April 2009) para 166

[4] *S v Nedzamba* 2013 (2) SACR 333 SCA para 26

> ‘First, the complainant was 14 years old at the time of the trial. She was a child witness with whom care should have been taken at the outset. No thought was given to whether the child understood the nature and import of the oath. It was not determined at the outset whether the child knew what it meant to speak the truth.’
>
> It went on to say that the ‘purpose is to ensure that the evidence given is reliable. To admit the evidence of the child who does not understand what it means to tell the truth undermines the accused’s right to a fair trial.’

[14] It is my view that it is not necessary to canvas the merits of the appeal as the irregularities are of such a nature that the evidence given by the complainant at the trial is inadmissible. Such a fundamental misdirection lead to only one conclusion that the appeal against conviction should be upheld.

[15] Accordingly, the following order is made:

1) The appeal is upheld.
2) The conviction and sentence imposed by the regional court magistrate are quashed and set aside.

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MBATHA J

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MNGUNI J

Date of hearing	:	18 May 2018
Date delivered	:	18 May 2018

Appearances:

For the Appellant	:	Adv I Khan
Instructed by	:	Justice Centre Pietermaritzburg
For the Respondent	:	Adv A Watt
Instructed by	:	The Director of Public Prosecutions Pietermaritzburg