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

REPORTABLE

CASE NO: AR 220/2018

In the matter between:

S S

Appellant

and

THE STATE

Respondent

ORDER

The appeal succeeds and the conviction and sentence are set aside.

JUDGMENT

Delivered on: 01 March 2019

PLOOS VAN AMSTEL J

[1] The appellant in this matter was found guilty by a regional magistrate of rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007, and sentenced to imprisonment for life. The appeal before us is in respect of both the conviction and sentence.

[2] The basis of the charge was that during the period 2012 to 2015 the appellant had committed acts of sexual penetration with a young girl, who was born on [...] March 2003. I shall refer to her as 'the complainant'. The evidence was that 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 her and her brother. It was alleged that 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 blankets with the complainant and have sexual intercourse with her. She was nine years old when this happened for the first time. She also described an incident (the last one) where the appellant entered a room where she was helping with the laundry. She said he threw her on 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.

[3] 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 who she was staying with, who was the appellant's cousin, discovered the letter amongst the complainant's clothes. She took her to a doctor to be examined and reported the matter to the police. This led to the appellant's arrest. I should add that in his evidence the appellant admitted that he used to visit the complainant's family, but denied that he ever interfered with her.

[4] Counsel for the appellant submitted that the complainant's evidence was inadmissible as it had not been established that she was a competent witness. The basis for this submission was that the magistrate had failed to establish that she understood the difference between the truth and lies, and the consequences of telling lies.

[5] The context here is section 164(1) of the *Criminal Procedure Act*¹, which provides as follows: ‘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’.

[6] In *DPP v Minister of Justice and Constitutional Development*² Ngcobo J said it is implicit, if not explicit, in the proviso that the person must understand what it means to speak the truth. If the child does not understand what it means to speak the truth, the child cannot be admonished to speak the truth and is therefore an incompetent witness and cannot testify. In *S v V*³ Rose Innes J said a witness cannot be admonished to speak the truth unless she comprehends what it is to speak the truth and to shun falsehood in her evidence.

[7] 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 the oath, but did not know what the consequences would be ‘after taking the oath’. The magistrate then asked her whether she knew the difference between telling lies and telling the truth. She answered ‘Yes’. He then proceeded to admonish her to tell the truth.

[8] I am satisfied that the magistrate was correct in not administering the oath to the complainant. The question however is whether he did enough to establish that she understood the difference between telling the truth and telling lies, and the potential consequences of telling lies.

[9] In *The South African Law of Evidence*⁴ the learned authors say there is no particular age beyond which children are competent to give evidence on oath. They refer to a judgment in which the court said this ‘depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from the answers to questions propounded by the court’.⁵ In *S v QN*⁶ Gorven J, writing for

¹ Act 51 of 1977

² *DPP v Minister of Justice and Constitutional Development* 2009 (4) SA 222 (CC) para 163

³ *S v V* 1998 (2) SACR 651 (CPD) at 652 h-i

⁴ *The South African Law of Evidence* 3rd ed, Zeffert and Paizes, at 935.

⁵ *R v Brasier* (1779) 1 Leach 199, 168 ER 202.

a Full Court, said in essence there is a need to establish whether or not the child is capable of distinguishing between truth and falsehood. He added that the court must be satisfied that the witness understands that an adverse sanction will generally follow the telling of a lie.

[10] In *DPP Ngcobo J* said⁷ 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. He explained that 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 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.

[11] 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. The result is that she could not have been admonished to speak the truth, and was not a competent witness. Her evidence was therefore inadmissible, and the conviction cannot stand.

[12] The appeal succeeds and the conviction and sentence are set aside.

Ploos van Amstel J

⁶ S v QN 2012 (1) SACR 380 (KZP) para 11.

⁷ Fn 2 para 164 and 165

Appearances:

For the Appellant : P Mkumbuzi

Instructed by : Durban Justice Centre
c/o Pietermaritzburg Justice Centre

For the Respondent : J Sibanyoni

Instructed by : The Director of Public Prosecutions
: Pietermaritzburg

Date of Judgment : 01 March 2019