**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

Case no**:** 148/12

In the matter between:

**GEALLAL RAGHUBAR** **APPELLANT**

and

**THE STATE** **RESPONDENT**

**Neutral citation:** ***Geallal Raghubar v The State*** **(148/12) [2012] ZASCA 188 (30 November 2012)**

**Coram:** **Ponnan and Tshiqi JJA and Mbha AJA**

**Heard:** **1 November 2012**

**Delivered:** **30 November 2012**

**Summary: Indecent assault – complainant 14 years old – failure to comply with s 164 read with sections 162 and 163 of the Criminal Procedure Act 51 of 1977 – failure to comply with – effect of.**

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**ORDER**

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**On appeal from:** KwaZulu–Natal, Pietermaritzburg (Nicholson J and Vahed AJ sitting as court of appeal):

1. The appeal is upheld.
2. The conviction and sentence are set aside.

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**JUDGMENT**

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**TSHIQI JA (PONNAN JJA AND MBHA AJA CONCURRING):**

[1] The appellant was charged with indecent assault in the Verulam Regional Court, KwaZulu-Natal on 18 February 2009. It was alleged that 'FROM 2000-2004 at or near PHOENIX in the district of Inanda, Regional Division of KZN, [he] did unlawfully and intentionally commit an assault of an indecent character upon P[1] (6 YEARS) by INSERTING HIS PENIS INTO HIS ANUS'. He was convicted and sentenced to a term of ten years' imprisonment. His appeal to the KwaZulu-Natal High Court, Pietermaritzburg on both conviction and sentence was dismissed. His appeal is now before us with the leave of this court.

[2] The complainant was 14 years old at the time of the trial. The indecent assault was alleged to have been committed approximately eight years ago. His date of birth was confirmed by his mother and through his birth certificate which showed that he was born on 18 July 1994. He testified through an intermediary and both the complainant

[1] To protect the identity of the minor child I shall refer to him as P.

and the intermediary were seated in a separate room with him testifying with the aid of a closed circuit camera.

[3] An issue that occasioned concern to us on perusing the appeal record in the matter was whether there had been proper compliance by the trial court with the provisions of s 164 read with sections 162 and 163 of the Criminal Procedure Act 51 of 1977 in respect of the complainant, the minor child P. Both counsel were invited to file supplementary heads of argument and advised that at the hearing of the matter they had to be prepared to address argument on that issue.

[4] Sections 162–164 of the Criminal Procedure Act provide as follows:

'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.'

The reason for giving evidence under oath (s162), affirmation (s163) or admonishment (s164) is to ensure that the evidence given is reliable.[2]

[5] 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.[3] It is the duty of the presiding officer to satisfy himself

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[2] See *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & others* 2009 (2) SACR 130 (CC) para 166.

[3] *S v L* 1973 (1) SA 344 (C) at 348A–C; Alfred V. Lansdown and Jean Campbell *South African Criminal Law and Procedure* vol 5 at p 740.

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.[4] The language used in all three sections is peremptory.

[6] The following exchange is recorded between the magistrate and P when the latter entered the witness stand:

'COURT: P, please state your full names, your date of birth if you know, your age and the grade that you are presently in.

INTERMEDIARY: What are your full names, sir?

WITNESS: P.

INTERMEDIARY: You have to speak aloud.

WITNESS: P.

INTERMEDIARY: And what age are you? How old are you?

WITNESS: 14.

INTERMEDIARY: Your date of birth? When you were born?

WITNESS: 1994

INTERMEDIARY: The date.

WITNESS: 1994, 7th month, 18

[4] Alfred V. Lansdown & Jean Campbell *South African Criminal Law and Procedure*, note 3 above at p 740.

INTERMEDIARY: What grade are you doing now?

WITNESS: Nine

INTERMEDIARY: Grade 9.

COURT: 1994/7 and what day?

INTERMEDIARY: You said what date you were born?

WITNESS: 18 July.

COURT: 18.

WITNESS: July.

The magistrate then directed the following question to the appellant's legal representative:

'COURT: Okay. Mr Ramouthar, are you prepared to accept the witness is competent to give evidence?

MR RAMOUTHAR: That's correct, Your Worship.'

[7] Firstly, it cannot be accepted that the magistrate managed to determine merely from such an elementary line of questioning pertaining to the complainant's age, date of birth and level of education that the complainant was competent to testify. Secondly, the appellant's legal representative was not qualified to express an opinion on the complainant's competency. It is not clear on what basis his opinion was solicited by the magistrate nor on what basis he expressed it. The magistrate reverted to the complainant and posed the following questions:

'COURT: Do you believe in God, P?

WITNESS: Yes.

COURT: And do you believe that if you promised God that you would speak the truth about something, that you took an oath to God to speak the truth, do you believe that if you then went

on and spoke lies, made up stories, getting somebody into big trouble, do you believe that God would know that you are telling lies and that God would punish you for doing that?

WITNESS: Yes I do.'

[8] The above leading, compound question posed by the court is also not helpful. It was impossible to gather from it whether the complainant understood what it means to speak the truth; what the oath means; and, the difference between the truth and falsehood, nor the consequences if he did not speak the truth. All that the complainant could say in response to the question was 'yes' or 'no'. The magistrate felt compelled to undertake an enquiry. No doubt on seeing the child in the witness stand she entertained certain doubts that caused her to embark upon that enquiry. What was required of her in embarking upon that enquiry has been spelt out by the Constitutional Court (per Ngcobo J) in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & others* 2009 (2) SACR 130 (CC) paras 165, 167 and 168 as follows:

'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. Here the manner in which the child is questioned is crucial to the enquiry. It is here where the role of an intermediary becomes vital. The intermediary will ensure that questions by the court to the child are conveyed in a manner that the child can comprehend and that the answers given by the child are conveyed in a manner that the court will understand.

As pointed out earlier, questioning a child requires a special skill. Not many judicial officers have this skill, although there are some who, over the years and because of their constant contact with child witnesses, have developed a particular skill in questioning children. This illustrates the importance of using intermediaries where young children are called upon to testify. They have particular skills in questioning and communicating with children. Counsel for the Centre for Child Law and Childline was quite correct when, in her reply, she submitted that everything seems to turn upon the need for intermediaries when young children testify in court. Properly trained intermediaries are key to ensuring the fairness of the trial. Their integrity and skill will be vital in ensuring both that innocent people are not wrongly convicted and that guilty people are properly held to account.'

[9] Counsel for the State was ultimately constrained to concede that the enquiry undertaken by the magistrate fell far short of meeting that suggested by the Constitutional Court. Thus as Ngcobo J made plain in *Director of Public Prosecutions,Transvaal v Minister of Justice and Constitutional Development* (para 166):

'(T)he 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 s 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.'

It follows that as no reliance can be placed on the evidence of the complainant, the conviction cannot stand.

[10] However, even assuming that there was due compliance with the above provisions of the Criminal Procedure Act, the conviction of the appellant could not be sustained on the evidence. This case is one of those cases where even on the merits there were clear and blatant misdirections by the trial court. Only a few of those will be mentioned below, to illustrate the point.

[11] The cautionary rule was applicable to the evidence of the complainant. He was a single witness to the alleged indecent assault and he was very young when the offences were allegedly committed and during the trial. It appears, however, that the court merely paid lip service to the cautionary rule because it ignored several contradictions in his own testimony and that of the other State witnesses. His evidence was confusing and very difficult to follow. The charge sheet seems to refer to a single incident of indecent assault that occurred between the years 2000-2004, yet the complainant when he testified started by relating several incidents of sexual abuse that allegedly occurred when he was still six years old. He could not state specifically when those incidents occurred. Nor was it clear from the evidence of the complainant or that of his mother or grandmother when the first or the last incident occurred. The other concern is that according to him he was neither invited by the appellant nor coerced to visit the appellant's home, yet he was unable to explain why he kept on going back to the appellant's home at his own instance for at least the four years stipulated in the charge sheet.

[12] Whilst I accept that it is not unusual for young children to experience difficulties when relating to the court what actually happened with the precision expected of an adult, especially pertaining to incidents concerning sexual behaviour as well as incidents that occurred a while ago. The need for caution cannot be ignored. In *Viveiros v S* [2000] 2 All SA 86 (A) para 2, this court stated:

'In view of the nature of the charges and the age of the complainants it is well to remind oneself at the outset that, whilst there is no statutory requirement that a child's evidence must be corroborated, it has long been accepted that the evidence of young children should be treated

with caution (*R v Manda* 1951 (3) SA 158 (A) at 163C; *Woji v Santam Insurance Co Limited* 1981 (1) SA 1020 (A) at 1028B–D); and that the evidence in a particular case involving sexual misconduct may call for a cautionary approach (*S v J* 1998 (2) SA 984 (A) at 1009B). For reasons which will presently emerge the present case is plainly one which calls for caution.'

[13] In *Stevens v S* [2005] 1 All SA 1 (SCA) para 1 this court cautioned:

'Courts in civil or criminal cases faced with the legitimate complaints of persons who are victims of sexually inappropriate behaviour are obliged in terms of the Constitution to respond in a manner that affords the appropriate redress and protection. Vulnerable sections of the community, who often fall prey to such behaviour, are entitled to expect no less from the judiciary. However, in considering whether or not claims are justified, care should be taken to ensure that evidentiary rules and procedural safeguards are properly applied and adhered to.'

In para 17 it further stated:

'As indicated above, each of the complainants was a single witness in respect of the alleged indecent assault upon her. In terms of section 208 of the Criminal Procedure Act 51 of 1977, an accused can be convicted of any offence on the single evidence of any competent witness. It is, however, a well-established judicial practice that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility (see, for example, *S v Webber* 1971 (3) SA 754 (A) at 758G–H). The correct approach to the application of this so-called "cautionary rule" was set out by Diemont JA in *S v Sauls and others* 1981 (3) SA 172 (A) at 180E–G as follows:

"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in *S v Webber …*). The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 [in *R v Mokoena* 1932 OPD 79 at 80] may be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well-founded" (per Schreiner JA in *R v Nhlapo* (AD 10 November 1952) quoted in *R v Bellingham* 1955 (2) SA 566 (A) at 569.) It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.' (See further all the other authorities referred to therein.)

[14] The further evidence led by the State did not add to the evidence of the complainant. An evaluation of the medical evidence is a convenient starting point. The medical evidence does not prove the elements of the offence, ie that there was anal penetration as alleged on approximately seven to eight times. The medical report completed by the medical doctor who examined the complainant (J88) was admitted into evidence by agreement. The medical doctor was not called. He had since died. He noted his clinical findings 'on anal examination on the skin surrounding the orifice' as an 'old bruise, no swelling, nor fissures/cracks'. He noted no abnormalities on the orifice itself and noted that the tone was good. In his conclusions he recorded that 'On clinical examination the features are consistent with anal intercourse.' There is no explanation of what feature(s) he was referring to; but assuming that the feature was the old bruising in the anal area, it is not clear how that established beyond reasonable doubt that anal intercourse had indeed occurred. There was no evidence on the nature of the old bruise and it was not established how an old bruise on the skin surrounding the orifice was consistent with the alleged seven to eight incidents of indecent assault. The medical report did not, as the trial court held, strengthen the State's case. On the contrary it may have detracted from his version. At best for the State, when viewed against the totality of all of the evidence, the medical report was simply a neutral factor.

[15] The evidence of both the mother and the grandmother also had its own shortcomings. Their individual evidence was contradictory and they also contradicted each other on pertinent issues. It is difficult to discern from the convoluted manner in which they testified when exactly the first and the last incident occurred; what it is that raised his mother's suspicion that the complainant was abused; when she first noticed the abuse; and whether the complainant voluntarily disclosed it to the grandmother, or whether the mother observed strange behaviour on his part and because of that requested his grandmother to question the complainant.

[16] The difficulties encountered with the mother's evidence can be illustrated through the following excerpts from her evidence:

'When was it when you saw those love bites --- When he was nine years old, he had a love bite in his neck here.

When was it? Before you overheard the conversation? --- Yes. I saw the baby quite a few times with love bite, but I didn't think of anything. So, when I asked the baby, P, he told me, "Mummy, Uncle Roy." So I confronted the guy and I called him and asked him, "Why did you do that to my child". He says, "No, because my child is so nice and chubby, who wouldn't want to do that to a baby like that".

When was it when you confronted him? --- When the baby was little. The baby was little, he used to have those love bites and when the baby was nine years, P was nine years, he used to also have those love bites in between his bodies.

What I want to know, as to when was it when you confronted him? --- The man

Yes. --- That time, that very first time when I saw the love bites on baby, baby was about seven years.

Before you overheard the conversation of P and his grandmother, did you speak about the problem that P was having his grandmother? --- Yes, I spoke to him. He still refused to speak to me. P refused to speak to me. So, I was in tears. So, I said the only thing I could do is take the child to the doctor. So, I phoned the police, I got the police at the door and they asked me to take him and go to the doctor.

What I want to know is, before you overheard the conversation, did you speak to your mother-in-law about P?--- Yes, yes, after the child spoke to my mother-in-law.

No, before that? --- No.'

[17] The charge sheet is not without its problems. It alleges that the indecent assault was committed during 2000-2004, and prima facie refers to one incident. It does not specify when exactly the offence occurred. The evidence of the complainant on the other hand suggests that there were about seven to eight incidents. Whilst it would be unfair to expect such a young complainant to recall the exact dates and occurrences

with precision, it is equally difficult for an accused person to defend himself in such circumstances. It is unfair to criticise an accused who is faced with such sketchy details. It is not surprising that the appellant found it extremely difficult to proffer more detail in support of his denial of the incident.

[18] The problems with the evidence of the State witnesses are not the only issues that arise in this appeal. The judgment of the trial court is riddled with several misdirections in its evaluation of the evidence. The trial court adopted a skewed approach in the manner in which it analysed the evidence. All the contradictions in the State's case are explained and justified whilst the same generosity is not shown to the evidence of the appellant. The court was critical of the failure by the appellant to disclose his defence timeously and concluded that it must have been an after-thought on his part. Such criticism was unwarranted. As the court stated in *R v Mtembu* 1956 (4) SA 334 (T) at 335H-336B:

The magistrate in his reasons for judgment obviously takes the view that if the evidence of the traffic inspector is accepted then the accused was guilty of driving to the danger of the public. In coming to the conclusion that that evidence is to be accepted he said that the inspector either saw the accused drive as he says or he has come to court to commit perjury. That is not the correct approach. The remarks of the late MILLIN, J., in *Schulles v Pretoria City Council*, a judgment delivered on the 8th June, 1950, but not reported, are very pertinent to this point; he says:

'It is a wrong approach in a criminal case to say "Why should a witness for the prosecution come here to commit perjury?" It might equally be asked: "Why does the accused come here to commit perjury?" True, an accused is interested in not being convicted, but it may be that an inspector has an interest in securing a conviction. It is, therefore, quite a wrong approach to say "I ask myself whether this man has come here to commit perjury, and I can see no reason why he should have done that; therefore his evidence must be true and the accused must be convicted." The question is whether the accused's evidence raises a doubt.'[5]

[5]See also *S v Ramochela* 1997 (2) SACR 494 (O) at 496*a-e*; *S v Kubeka* 1982 (1) SA 534 (W) at 536D-537D and cases there cited.

[19] The appellant consistently denied the allegations and when asked by his counsel specifically why the complainant would implicate him falsely, he proffered two possible explanations. In *Van der Watt v S* [2010] 3 All SA 434 (SCA) para 16 this court stated:

'(I)t is trite that an accused may tender an explanation why he believes he has been falsely implicated and it may turn out another reason unknown to him exists or is more probable. The accused is called upon to speculate, not testify on a matter of fact. In such circumstances, he cannot be blamed if it turns out that his explanation is found to be wanting.[6] It would therefore be wrong to criticise the appellant if it turned out that this was not the reason. What is important is that the appellant was truthful when he relayed the incident to the court and the incident cannot be ruled out as a possible reason why the complainant laid false charges against him.'

In my view, when the appellant's version is compared to the evidence adduced by the state witnesses, there was no justification for the rejection of his evidence.

[20] It follows, on either approach, the conviction cannot be sustained. For even if all of the evidence was properly before the trial court, it did not establish the guilt of the appellant beyond a reasonable doubt.

1. The appeal is accordingly upheld.
2. The conviction and sentence are set aside.

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Z L L TSHIQI

JUDGE OF APPEAL

APPEARANCES:

| | |
|---|---|
| For Appellant: | S Mngadi |
| | Justice Centre, Durban |
| | Justice Centre, Bloemfontein |
| For Respondent: | T S Jacobs |
| | Instructed by: |
| | Director of Public Prosecutions, Pietermaritzburg |