[REPORTABLE]

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A299/07

In the appeal of:

FREDERICK SWARTZ Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED ON 17 APRIL 2008

STEYN AJ:

[1] The appellant, Mr Frederick Swartz, was convicted on 22 March 2006, in the regional court Parow, on a charge of indecent assault in that he indecently assaulted the complainant, a young boy, 4 years old. At the trial he pleaded not guilty and tendered a plea explanation wherein he denied having had any knowledge of the offence. He was found guilty and sentenced on the 21 August 2006 to three years correctional supervision in terms of section 276(1)(h) of the Criminal Procedure Act 51 of 1977 ("the Act").

[2] Appellant appealed to this court against his conviction on the aforementioned charge. For purposes of this judgment it is important to note that Mr Tredoux, acting on behalf of the appellant, challenged the trial court's findings on the merits of the case. In my view the challenge was misdirected and should rather have been directed at the procedural irregularity that occurred when the evidence of the complainant was led.

[3] In light of the aforegoing view, Adv Theunissen, acting for the State, was asked to address us on the procedure used to determine competency when the young witness testified. Ms Theunissen conceded that the procedure used *ex facie* the record appeared to be problematic for the state's case but requested that this court grants the state the opportunity to listen to the tapes and verify that what is reflected on the record is indeed a true reflection of the proceedings.

We were not persuaded to grant such an order for a number of reasons: (a) This court remains a court of record and as such has to rely on the record submitted to us; (b) The record is certified as a true copy of the proceedings in the regional court; (c) The magistrate in her judgment never referred to any competency

finding of the witness. Granting the request would therefore not have remedied the irregularity.

[4] I shall now turn to the relevant facts which gave rise to this conviction, as testified to by the complainant. It can be summarised as follows: the complainant was indecently assaulted by the appellant in that the appellant fondled his penis, in the appellant's bedroom; the outside braai area and in the appellant's kitchen in the year 2003. At the time of these incidents the complainant was merely four years old.

[5] At the commencement of the trial, the state lodged an application in terms of s 170A of the Act for the evidence to be led through an intermediary including the use of closed circuit television with the complainant being in a separate room. In support of the application a social worker testified for the State that the child was young and she also furnished various reasons justifying the appointment of an intermediary. The defence had no objection to the use of the intermediary and accordingly the application was granted.

[6] After the order in terms of s 170A was made the following extract from the record reveals what transpired in the proceedings leading up to the complainant, who was by then seven years old, being sworn to give testimony:

Hof : *me Harrison, kan u ons hoor?---Ja, U Edele.*
Sê vir X ons sê môre.---Die landdros sê goeie môre.

X : *Goeie môre.*

Hof : *Me Magopani, kan u hom en me Harrison duidelik sien en hoor?*

Aanklaer : *Ek kan hulle duidelik sien Agbare, dit is so.*

Hof : *Mnr Broadway?*

Mnr Broadway: Ek bevestig dankie, Edelagbare.

Hof : *Mnr Swartz, kan u duidelik sien en hoor?*

Beskuldigde : *(Onduidelik)*

Minderjarige getuie ingesweer

X : *(Verklaar onder eed)*

Hof : *Kan jy onthou dat jy met 'n dame vanoggend by die hof gepraat het oor die saak?---Nee*
Okay. Wil u haar sien?---Toemaar
Is dit all right?--- (Geen hoorbare antwoord)
As u nie omgee nie sy sal net daar inloer, kom wys wie is sy. Okay u kan maar gaan.

Masjien afgeskakel – Met hervatting

Hof : *Sy kom om te wys wie is sy. Okay, nou onthou hy?*

Okay, so nou gaan sy vir jou vrae vra, verstaan?

Ondervraging deur Aanklaer:

Môre weer X--- Goeie môre.

Hof : *Okay, sê net vir hom want hy lyk 'n bietjie gespanne oor die mikrofoon. Sê vir hom hy kan maar los want dit tel sy stem op. U kan voortgaan.*

(Record pages 14 and 15)

[7] The court then proceeded with the trial and allowed the witness to testify without making any inquiry or finding on whether the witness, age seven, could differentiate between the truth and lies. The youthfulness of the child should have served as sufficient indication to the regional magistrate that the child is likely to be ignorant of the meaning of the oath and that some consideration should be given to the application of s 164 of the Act. (See ***S v Chalale*** 2004 (2) SACR 264 (W) at 265i-j)

[8] It is trite law that only admissible evidence can be accepted as evidence and hence it is required of presiding officers when dealing with young witnesses to determine whether they have the necessary competency to testify. In the given circumstances the

regional magistrate was required to determine whether the witness, a child of seven years of age, was a competent witness to give sworn evidence in terms of s 162 of the Act.

[9] *Ex facie* the record no such enquiry was held. The record only reveals that the young witness, once sworn, explained what had happened to him when the appellant indecently assaulted him. No enquiry was ever held by the regional magistrate regarding the witness's competency nor were there any other proceedings upon which the regional magistrate could reasonably determine whether the witness understood the nature of the oath, before the oath was administered to him. In my view an enquiry establishing that the young witness appreciates to speak the truth should have preceded the process of administering the oath.

[10] In the judgment of the regional magistrate no reference is made to any competency finding of the young witness. The only comment in the judgment that appears to be in support of the capacity of the witness to testify is the following:

> *"When in court, X presented himself quietly and courteously, he was alert and appeared to understand the necessity for telling the truth."* (See record at 153, my emphasis)

[11] The following statement by the presiding judicial officer in her judgment is even more erroneous in light of the absence of any enquiry or finding on whether the young witness could distinguish between truth and falsehood:

> *"Section 208 of the Criminal procedure Act makes provision for the conviction of a person on the evidence of a single competent witness. Because X was four years old at the time of he incident, his competency is necessarily an issue."* (My emphasis).

Further the regional magistrate states after dealing with s 208 the following in her judgment: "There is no further statutory provision relating to the acceptance of a child' testimony. Moreover, there is no necessity for adopting caution unless it is indicated in the facts of the case itself." (See record at 153) This statement indicates that there was no due consideration of ss 162,163, 164 and 193 of the Act by the regional magistrate.

[12] The question that arises, however, is whether it was proper for the regional magistrate to have accepted the sworn testimony of the child without having enquired into and without determening whether the child understood, firstly, the difference beween lies and the truth, and secondly the nature of the import of the oath.

[13] Section 162 of the Act provides that no person shall be examined as a witness in criminal proceedings unless he is under oath administered by the presiding judicial officer, judge or registrar of the Court, as the case may be. This provision is peremptory. It is expressly made subject to the further provisions of s 163 which provide for the making of an affirmation to tell the truth in lieu of an oath in certain circumstances mentioned in the section, and subject to s 164 which provides as follows:

> *"164(1) 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 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."*

[14] The capacity to understand the difference between truth and falsehood is thus a prerequisite for the oath, the affirmation and an admonition in terms of s 164. Because of this requirement s 164 can only be resorted to in order to procure the evidence of a child if a child does not understand the nature and the religious sanction of the oath. (Also see s 41 of the Civil Proceedings and Evidence Act, 25 of 1965)

[15] In **S v Vumazonke** 2000 (1) SACR 619 (C) **Jali J** held that an enquiry of some kind should be held before a court can resort to the application of s 164. In ***S v B*** 2003 (1) SA 52 (SCA) the Supreme Court of Appeal, however, held that the view as expressed in *Vumazonke* was based on a too narrow interpretation of the said section. (Also see ***S v Sikhipa*** 2006 (2) SACR 439 (SCA)) The direction from the Supreme Court of Appeal in ***B,*** *supra,* is that a witness needs to understand the nature of the oath and if through youthfulness, defective education or any other cause, it is found that he or she does not understand the nature and the import of the oath or the affirmation, then such witness should be admonished to tell the truth. Nothing in the record shows that the proceedings were in accordance with any of the aforementioned *dicta.*

[16] It is my view that the reason why courts require that witnesses testifying in court should be competent is basically to ensure that the witness is capable of giving reliable testimony. An examination of competency tests in most Anglo American jurisdictions shows that what these competency tests should account for is the likelihood that the child has an accurate memory of the event to be recalled and whether it is possible for the child to communicate the recalled information accurately. Our criminal justice system requires competency when dealing with child witnesses as opposed to intelligibility as required by some other jurisdictions. (Cf. s 52 of England's Criminal Justice Act 1991)

[17] What is discernible from an analysis of South Africa's competency rule is that age is not a decisive factor in the decision of the child's competency as witness. (See **Schwikkard and Van der Merwe** *'Principles of Evidence'* (2002) at 393.)

[18] In this case the trial court took it for granted that a witness of seven years of age understands the nature and import of the oath. By doing so the court ignored the witness's youth and whether the child was capable of distinguishing between right and wrong. The regional magistrate had lost sight of the importance of this

distinction which ensures that a witness is capable of comprehending the consequesnes of false testimony and perjury.

[19] Given the peculiar circumstances of the case, namely that the child was only four at the time of the offence, the trial court should have been acutely aware and alive to the dangers of accepting the evidence of a child witness without establishing the ability of the witness to make the distinction between lies and truth.

[20] An analysis of the South African case law pertaining to child witnesses reveals that there is no universal test, which can be applied by the courts in determining whether a child witness is sufficiently competent to testify. The guiding provision is that courts are obliged in terms of s 193 of the Act to decide upon the competency of witnesses before they testify. It is for this very reason that parties are for example not permitted to consent to the admission of evidence of incompetent witnesses. (See **S v Thurston** 1968 (3) SA 284 (A) and **Schwikkard et al** *op cit* at 392)

[21] The judgment of the regional magistrate shows that she misdirected herself when she lost sight of the statutory and evidentiary requirements regarding child witnesses. Whilst it is in

the interests of justice that child witnesses not be unnecessarily excluded as witnesses, it remains the duty of each presiding officer to be vigilant when accepting any evidence as reliable and truthful. Competency requirements cannot be abandoned simply because they appear to operate unfairly. The requirement is not to merely determine that a child can give a coherent and accurate account of the event that happened but that he or she can distinguish between truth and falsity.

[22] The statutory requirements provide that a court will have to determine on the facts of each case, whether the child is sufficiently intelligent to testify and whether the child has sufficient mental capacity to testify. This means that a court will have to enquire whether a child witness understands the oath and whether the child understands what it means to speak the truth. (See ***Henderson v S*** (1997) 1 All SA 594 (C) at 597d-g; ***S v Stefaans*** 1999 (1) SACR 182 (C); ***S v V*** 1998 (2) SACR 651 (C); ***S v B*** *supra;* ***S v Gallant*** 2008 (1) SACR 196 (ECD))

[23] There was no finding recorded by the presiding judicial officer as to whether or not the complainant understood the nature or import of the oath, which is not surprising since there had been

no enquiry. The admission of the evidence of the young complainant in the circumstances was a grave irregularity. The question is whether the irregularity *per se* invalidated the proceedings at the trial? (Cf. **S v Hendricks en 'n Ander** 1995 (1) SACR 37 (C)) The judgment of the regional magistrate shows that if the evidence of the complainant is found to be inadmissible then there is no other evidence on the record to support the contention that the complainant had been indecently assaulted.

[24] Furthermore the record does not display that the merits as well as the demerits of the complainant's testimony, him being a child witness and a single witness, were considered with sufficient caution by the magistrate. Given the circumstances of this case, a cautious approach was clearly required and would have been in accordance with the direction of the Supreme Court of Appeal as in **S v Jackson** 1998 (1) SACR 470 (SCA). The judgment reveals that the regional magistrate glossed over the discrepancies when she merely stated:

> *"The Court is aware that there are discrepancies, but not such as to shake the Court's evaluation of X's evidence as being reliable"* (See record at 155)

[25] Our Constitution provides for fair trial rights and where the evidence of a particular case requires a cautionary approach, such fair trial rights mean that a court is required to ensure that the accused received a fair trial in the sense that there should be no conviction unless the court is satisfied that the prosecution has proved the guilt of an accused person beyond reasonable doubt.

[26] In my view, the trial court's conviction of the appellant relying on the complainant's evidence without conducting the enquiry referred to or making a finding regarding the child's competency was an irregularity which led to irremediable prejudice being suffered by the appellant which resulted in an infringement of his fair trial rights and a failure of justice.

[27] In the event I would uphold the appeal.

E J S STEYN

HLOPHE JP: I agree. The appeal is allowed and the Judgment of the court *a quo* is set aside.

M J HLOPHE JP