

**FORM A**

**FILING SHEET FOR SOUTH EASTERN CAPE LOCAL DIVISION**  
**JUDGMENT**

**PARTIES:**

- Case Number: **CA 143/2008**
- High Court: **Grahamstown**
- DATE HEARD: **16 November 2009**

DATE DELIVERED: **19 November 2009**

JUDGE(S): **Jones, Chetty and Pillay JJ**

**LEGAL REPRESENTATIVES –**

*Appearances:*

- for the Appellant(s): **Adv Cilliers**
- for the Respondent(s): **Adv Swanepoel**

*Instructing attorneys:*

- Plaintiff(s):
- Defendant:
- 

**CASE INFORMATION -**

- *Nature of proceedings:* **Appeal**
- **Topic:**
- **Key Words:**

Criminal Procedure – Evidence – Witnesses –  
Calling, examination and refutation of – The Oath  
– Admonition to speak the truth – Mere  
youthfulness can justify finding that witness did  
not understand nature and import of oath or  
affirmation due to ignorance arising from youth,  
defective education or other cause –  
Complainant's evidence admissible – Appeal  
dismissed

**REPORTABLE  
IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE, PORT ELIZABETH)**

**Case No: CA 143/2008**

In the matter between:

**JOSEPH WILLIAMS**

**Appellant**

**AND**

**THE STATE**

**Respondent**

Coram: **Jones, Chetty and Pillay JJ**

Date Heard: **16 November 2009**

Date Delivered: **19 November 2009**

Summary: Criminal Procedure – Evidence – Witnesses – Calling, examination and refutation of – The Oath – Admonition to speak the truth – Mere youthfulness can justify finding that witness did not understand nature and import of oath or affirmation due to ignorance arising from youth, defective education or other cause – Complainant's evidence admissible – Appeal dismissed

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**JUDGMENT**

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**CHETTY, J**

[1] The appellant was arraigned for trial in the court below before Van der Byl AJ on charges of rape and indecent assault. He was duly convicted on the charge of rape and sentenced to imprisonment for life. He was found not guilty

and acquitted on the indecent assault charge by reason of an insufficiency of evidence which proved the commission of the offence charged as a separate and distinct act. The appeal is before us with leave of the Supreme Court of Appeal on a limited basis, the issue circumscribed as –

“Whether in the light of the applicable constitutional principles and the decisions in *S v B* 2003 (1) SA 552 (SCA) and *DPP, KwaZulu – Natal v Mekka* 2003 (4) SA 275 (SCA), the evidence of the complainant was properly admitted at the trial of the appellant; and, if not, whether there was sufficient evidence to sustain the conviction; and, if not, what the appropriate order should be.”

[2] The Constitution guarantees an accused the right to a fair trial and implicit therein is the overriding requirement that evidence adduced in a criminal trial must strictly conform thereto. Thus section 35 (5) of the Constitution requires any evidence to be excluded if its admission would render the trial unfair. As Kriegler J pointed out in **S v Dlamini; S v Joubert; S v Skietegat; S v Dladla**<sup>1</sup> –

*“Under the Constitution the more pervasive and important question is whether the admission of the resultant evidentiary material would impair the fairness of the trial. If it would, the evidence ought generally to be excluded”*

[3] At the same time there may be occasions where evidence, though technically irregularly received would nonetheless be admissible where its

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<sup>1</sup> 1999 (4) SA 623 (CC) at para [98]

exclusion would otherwise be detrimental to the proper administration of justice.

As Kriegler J himself adverted to in **Key v Attorney- General, Cape of Good Hope Provincial Division**<sup>2</sup>

*"[13] In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or prosecution of crime.*

*But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial. Ultimately, as was held in Ferreira v Levin , fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision.*

*At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted."*

[4] The appellant's conviction flowed largely from the trial court's acceptance of the complainant's direct testimony that the appellant had raped her. The learned judge found corroboration for such evidence in the testimony of the complainant's mother and the medical evidence. It is common cause that the complainant's evidence was not however tendered under oath, a clear infraction

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<sup>2</sup> 1996 (4) SA 187 (CC) at para [13]

of the peremptory provisions of section 162 (1) of the **Criminal Procedure Act** (the Act)<sup>3</sup> which provides as follows –

*"(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.'."*

[5] What in fact occurred appears from the transcript of the proceedings as follows –

*"HOF: U naam is Marinda Wewers, is dit reg? --- My naam is Marinda Wewers.*

*Weet u dat u vandag by 'n hof is? Ek kan nie hoor wat sy sê nie, dra asseblief vir my oor wat sy sê? --- Sy sê sy ken nie die plek se naam nie.*

*Ek hoor nog steeds nie, wat sê u nie? --- Sy sê sy ken nie die plek se naam nie.*

*ME SWANEPOEL: Mevrouw kan u dalk die volume so bietjie harder stel? --- Is dit beter?*

*HOF: Kan ek maar vir u sê? Marinda, jy is vandag hier by 'n hof. ---Ja.*

*\_\_\_\_\_ Weet u hoekom u hier is? --- Ja mevrou.  
Gaan u skool? --- Ja mevrou.  
In watter standerd is u? --- Graad 3.*

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<sup>3</sup> Act No 51 of 1977

*Ek kan nie hoor nie? --- (Graad 3 meneer)*  
*Weet u wat dit beteken om die waarheid te*  
*vertel? --- Ja.*  
*En weet u wanneer 'n mens 'n leuen vertel? ---*  
*Ja.*  
*Nou goed, u moet alles wat u vandag hier vir*  
*my sê, moet die waarheid wees. Verstaan u? ---*  
*Ja.*  
*HOF: Goed sy is gewaarsku om die waarheid te praat."*

[6] It will be gleaned from the foregoing that the admonishment to the complainant that she speak the truth was done pursuant to the provisions of section 164 (1) of the Act which, provided as follows –

"(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 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, the whole truth and nothing but the truth."

What the learned judge however omitted to do was to either conduct an investigation or make a finding on the question whether or not the complainant understood the nature and import of the oath or affirmation due to ignorance arising from youth, defective education or other cause as prescribed by the section aforesaid. Earlier decisions held that such an omission rendered the evidence inadmissible<sup>4</sup>. It is now settled law that such an investigation and

<sup>4</sup> See *S v Mashara* 1994 (1) SACR 224 (T) at 228g-j; *S v Vumazonke* 2000 (1) SACR 619 at para [10]

finding thereanent, though preferred, is not required. In **S v B** <sup>5</sup>, Streicher JA, stated the legal position thus –

*"[15] Dit is duidelik dat art 164 'n bevinding vereis dat 'n persoon weens onkunde voortspruitende uit jeugdigheid, gebrekkige opvoeding of ander oorsaak nie die aard en betekenis van die eed of die bevestiging begryp nie. Soos in die geval van 'n aantal vroeëre uitsprake, het die Hof a quo beslis dat die feit dat 'n bevinding vereis word, noodwendig inhou dat 'n ondersoek die bevinding moet voorafgaan (sien S v Mashava ( supra op 228 g - h ); S v Vumazonke 2000 (1) SASV 619 (K) op 622 f - g ). Na my mening is dit 'n te enge uitleg van die artikel. Die artikel vereis nie uitdruklik dat so 'n ondersoek gehou word nie en 'n ondersoek is nie in alle omstandighede nodig ten einde so 'n bevinding te maak nie. Dit kan byvoorbeeld gebeur dat, wanneer gepoog word om die eed op te lê of om 'n bevestiging te verkry, dit aan die lig kom dat die betrokke persoon nie die aard en betekenis van die eed of die bevestiging verstaan nie. Die blote jeugdigheid van 'n kind kan so 'n bevinding regverdig. Na my mening word niks meer vereis as dat die voorsittende regterlike amptenaar 'n oordeel moet vel dat 'n getuie weens onkunde voortspruitende uit jeugdigheid, gebrekkige opvoeding of ander oorsaak nie die aard of betekenis van die eed of bevestiging begryp nie. Hoewel verkieslik, word geen formele genotuleerde bevinding vereis nie (sien S v Stefaans 1999 (1) SASV 182 (K) op 185 i )."*

In a further judgment clarifying his earlier order he held that –

*"[3]. . .  
1. . . .*

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<sup>5</sup> 2003 (1) SA 552 (SCA) at para [15]

*Die afwesigheid van 'n bevinding, uitdruklik of stilswyend, deur 'n verhoorhof dat 'n getuie weens onkunde voortspruitend uit jeugdigheid, gebrekkige opvoeding of ander oorsaak, nie die aard en betekenis van die eed of die bevestiging begryp nie, het noodwendig die effek dat die getuienis wat daarna, nadat die getuie gewaarsku is om die waarheid te praat, nie as getuienis beskou kan word nie maar nie dat dit by beoordeling van die meriete van die saak ingevolge art 52(3) van die Strafregwysigingswet 105 van 1997 geheel en al buite rekening gelaat moet word nie. Die afwesigheid van 'n ondersoek om te bepaal of dit die geval is het egter nie noodwendig daardie effek nie.'"*

[7] The full court of the Supreme Court of Appeal confirmed the correctness of its judgment in **S v B** in **Director of Public Prosecutions, Kwa-Zulu Natal v Mekka** <sup>6</sup> where the full court was invited to revisit and depart from the decision encapsulated in the aforementioned paragraph of the judgment in **S v B** (*supra*). Writing for the full court, Streicher JA resisted the invitation, holding that **S v B** (*supra*) was correctly decided. The factual matrix which preceded the magistrate's admonishment to the complainant in **Mekka** (*supra*) to speak the truth is analogous to those in *casu*. The transcript of the proceedings indicates the following exchange between the magistrate and the complainant –

"[4] . . .

Court: M, how old are you?

. . .

M: I'm nine years.

. . .

Court: Do you go to school?

M: Yes.

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<sup>6</sup> 2003 (4) SA 275 (SCA) at para [11]

*Court: What standard are you in or class?*

*M: Standard 2.*

*Court: You're a clever girl. All right, do you know the difference between truth and lies?*

*M: Yes.*

*Court: What happens to you at school if your teacher finds out you're telling lies?*

*M: You get punished.*

*Court: All right, its very important you tell us the truth today in court and you're warned to tell the truth.'"*

[8] As adumbrated earlier the complainant was ten years of age when she testified. Prior to the judge ordering that her evidence be tendered through an intermediary in terms of section 170A of the Act he had heard the evidence of a social worker Ms. *Phillips*, who had interviewed the complainant shortly after the incident as a prelude to compiling a psycho-social assessment report, admitted in evidence as exhibit "A". Following upon an intensive and painstaking process at establishing trust between her and the complainant the latter disclosed fully what had befallen her. Ms. *Phillips* concluded that the complainant ". . . is able to distinguish between the truth and a lie. She is able to distinguish between right and wrong and knows what it means to tell a lie. She is able to relate what had happened to her and she is able to testify with the assistance of an intermediary. She is a reliable witness."

[9] When the complainant was called upon to testify the uncontroverted evidence of Ms. *Phillips* that the complainant had the intellectual capacity to differentiate between the truth and a falsehood had already been led and must

obviously have weighed heavily with the judge. Consequently it is axiomatic that the judge's admonishment that the complainant speak the truth, flowed directly from his conviction that by reason of her youth the complainant did not understand the nature and import of the oath. Experience shows that even in cases where witnesses are much older than the complainant the word "oath" remains a nebulous concept whereas the invocation to speak the truth is more readily appreciated and understood. The transcript demonstrates unequivocally that the judge was satisfied that the complainant comprehended the difference between truth and falsehood and his admonishment that she speak the truth was in my view sufficient to render the complainant's evidence admissible. As Streicher JA stated in **Mekka** (*supra*) at para [11] –

*"[11] The fact that the magistrate, after having established the age of the complainant, proceeded to enquire whether she understood the difference between truth and lies and then warned her to tell the truth is, in my view, a clear indication that she considered that the complainant, due to her youthfulness, did not understand the nature and import of the oath. In her additional reasons the magistrate confirms that to have been the case. The magistrate did, therefore, make a finding that the complainant was a person who, from ignorance arising from her youthfulness, did not understand the nature and import of the oath. The magistrate saw and heard the complainant and this Court is in no position to question the correctness of her finding."*

[10] The appeal is dismissed.

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**D.CHETTY**  
**JUDGE OF THE HIGH COURT**

Jones J,

I agree.

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**R.W.J JONES**  
**JUDGE OF THE HIGH COURT**

Pillay J,

I agree.

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**R PILLAY**  
**JUDGE OF THE HIGH COURT**

Obo the Appellant: Adv Cilliers  
Obo the Respondent: Adv Swanepoel