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**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

CASE NO. CA&R 31/2023

In the matter between:

M[...] J[...]

Appellant

and

THE STATE

Respondent

JUDGMENT

LAING J

[1] This is an appeal against the appellant's conviction for the rape of a minor, decided in the Gqeberha Regional Court. The appellant also appeals against his sentence of eight years' imprisonment.

Proceedings in the court *a quo*

[2] It was alleged that, during 2018, the appellant raped the complainant, SM, when she was nine years old. The appellant had been 14 years old at the time. He pleaded not guilty to the charge and the matter proceeded to trial.

[3] The state led the evidence of the complainant in camera via an intermediary. She testified that she had visited her friend's house sometime in 2018. It had been late in the day, after sunset. The complainant had knocked on the door and had been admitted inside by her friend's brother, the appellant. He told her that her friend was at home and that she would find her in the bedroom. The complainant went to the bedroom but was followed by the appellant. Her friend was not inside. The appellant closed the bedroom door, forced the complainant onto the bed, undressed her, and placed his penis inside her vagina. She testified that she had screamed because of the pain. She left the house after the appellant had warned her not to tell anyone. During cross-examination, the complainant described the house where the incident had taken place, mentioning that there was a dog that she had feared because it used to bite. The dog had been tied up at the time of the incident. She never mentioned the rape to anyone because she had been afraid that the appellant would repeat what he had done. The complainant testified that she had later told representatives from the No Means No- educational programme ('the programme'), by letter, about the incident.

[4] A representative from the programme, Ms Siphokasi Zdiya, stated that she had been at the complainant's school on 8 April 2021. The complainant had approached her in tears, with a friend, and had presented the letter. Ms Zdiya confirmed that the programme had encouraged children to speak up about sexual and emotional abuse and to do so by placing such information in writing. The complainant had consequently told Ms Zdiya, when the police visited the school, that the appellant had raped her. Under cross-examination, Ms Zdiya indicated that the aim of the programme was to provide a platform for young girls to enable them to deal with aspects of gender-based violence, including sexual grooming and rape. She explained that she had not reported the matter immediately. This was because she had first wished to obtain the complainant's consent, which was a concept that they taught to the children as part of the programme.

[5] A forensic nurse, Ms Nompelo Vellum, testified that she had examined the complainant on 21 April 2021. She stated that she had completed a J88 medico-legal

report and confirmed that she had not found any external injuries to the complainant's genitalia. She had observed, however, that the complainant's hymen had been ruptured; the associated cleft indicated an old injury. Ms Vellum said, in general, that children healed quickly after sustaining gynaecological injuries, requiring no more than a week or so to recover physically. She stated, during cross-examination, that an injury to the vagina could be caused by anything that resembled a penis. She could not, in relation to the complainant, exclude the possibility of sexual penetration.

[6] The appellant testified on his own behalf. He said that he was one of six children, all of whom stayed with his parents. The youngest child was a friend of the complainant, whom he knew, but not well. There was a gate to his parents' property that was kept unlocked, but for anyone to enter it would have been necessary for them to have called out. This was because his parents kept a pair of dogs, which would bite visitors. It would not have been possible for the complainant to have knocked on the front door as she had alleged. The appellant denied that the incident had taken place. He indicated that his mother and a brother were usually at home during the day, the entire family was at home in the evenings. He accused the complainant of having fabricated the incident. Under cross-examination, the appellant stated that his mother operated a tuck shop from the house. She would tie up the dogs before allowing a customer to enter the property. The appellant emphasised that no-one knocked at the door to the house because it was well-known in the area that the dogs would bite. He admitted that the complainant was a regular visitor to the house and knew the dogs, but pointed out that the dogs were not used to people. The complainant would call out from the gate when she visited. It would not have been possible for her to have entered the property and knocked at the front door. The appellant denied that he had raped the complainant. She had never visited the house when he was alone. He admitted that there had been no problems at all between himself and the complainant. He further stated, during re-examination, that the complainant had subsequently visited his sister at the house after the year during which the incident is alleged to have taken place.

[7] The next witness for the defence was the appellant's mother, Ms N[...] J[...]. She testified that she sold items to children from a stand that she operated at the property.

She was adamant that no-one would gain access to the property on his or her own. A visitor would call out from the gate because of the dogs. Ms J[...] confirmed that the complainant would visit her youngest child from time to time, and that this had continued to happen even after the year of the alleged incident. She also confirmed that she cooked supper for the family in the evenings. It was very seldom that someone was not at home. She confirmed, too, that the dogs would bite. Children could only enter the property if the dogs were controlled by a member of the family or if they were tied up. It would have been impossible for the complainant to have entered the property and to have knocked at the door. The dogs were known for their aggression and were feared by the community. Ms J[...] admitted, under cross-examination, that there were times when she was not at the house, and that it was possible that the appellant could have been at home on his own. She was unable to dispute that the complainant could indeed have been at the house, alone with the appellant. There had, however, never been any problems with the complainant; she was not a regular visitor.

[8] The final witness for the defence was the investigating officer, Mr Luleka Hlangane. He testified that he had received a report on the incident on 23 April 2021 and had interviewed the complainant a few weeks later. She had told him that her friend's brother was responsible. They had then gone to the appellant's home on 12 July 2021 where the complainant had identified the appellant without hesitation.

Findings on the merits

[9] The court *a quo* held that it was common cause that the complainant and the appellant were known to each other. The complainant was a friend of the appellant's sister and would visit the house to play and to watch television. It was also not in dispute that the complainant had been raped. The court *a quo* held that the question to be decided was whether the appellant was responsible for the offence.

[10] Whereas the complainant's evidence was that of a single witness, the court *a quo* found that she had given credible and reliable testimony. It also found, with

reference to section 59 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ('SORMA'), that no inference could be drawn solely from the length of delay between the alleged commission of the offence and the reporting thereof. The complainant had provided a plausible explanation for such delay.

[11] The court *a quo* found that, too, Ms Dziya and Ms Vellum had been credible and reliable witnesses. In contrast, the appellant and Ms J[...] had been evasive; they had failed to respond to questions, had not been willing to make concessions, and had contradicted each other. The court *a quo* found that the appellant's version had been highly improbable, it had not been reasonably possibly true. It found, ultimately, that the state had proved its case beyond reasonable doubt.

Decision on sentence

[12] A pre-sentence report informed the proceedings in relation to sentence. The probation officer who compiled the report, a Mr Lindile Melamane, investigated a range of possible options. He noted, firstly, that direct imprisonment would not be inappropriate but should be implemented only as a measure of last resort and for the shortest possible period. He noted, secondly, that correctional supervision would be in the best interests of the appellant for several reasons, notwithstanding the fact that he had not accepted responsibility for the offence. He noted, thirdly, that a postponed sentence was a suitable option, provided that the appellant was placed under the supervision of a probation officer. Mr Melamane recommended, ultimately, that the provisions of section 78(3) of the Child Justice Act 35 of 2008 ('CJA') be applied; these pertained to the postponement of the passing of sentence.

[13] The court *a quo* mentioned the sentencing provisions contained in chapter 10 of the CJA, especially the objectives and related factors indicated under section 69. It held that the impact of the offence on the complainant had not been properly considered by either Mr Melamane or the defence. Moreover, neither had properly considered the

interests of society. The court *a quo* found that serious aggravating factors had been present, far outweighing the mitigating factors, and that the appellant had showed no remorse. It criticised Mr Melamane's recommendation and held that a sentence imposed in terms of section 78(3) of the CJA would have been inappropriate.

[14] The appellant was sentenced in accordance with the provisions of section 77(1) of the CJA to eight years' imprisonment. The sentence was subject to review.

Grounds of appeal

[15] The appellant filed his appeal late but applied for condonation. The state did not oppose. This court was satisfied that the appellant had set out a basis for the relief sought and granted an order to that effect.

[16] In his appeal, the appellant contends, at the outset, that the court *a quo* failed to apply, properly, the provisions of section 164 of the Criminal Procedure Act 51 of 1977 ('CPA'). He asserts that the court *a quo* did not ascertain whether the complainant had been competent to give evidence truthfully and administered the prescribed oath inappropriately.

[17] The appellant goes on to say that the court *a quo* failed to appreciate the contradictions between the complainant's letter to Ms Dziya and her testimony at trial. The court *a quo* also failed to exercise the cautionary rule in relation to, *inter alia*, the complainant's admission that she had told lies. The court *a quo* ought to have found that the complainant's allegations of rape had been influenced by the suggestive nature of the No Means No- programme and had therefore been unreliable.

[18] The appellant argues that the court *a quo* erred in not finding that his version had been reasonably possibly true, and in finding (ultimately) that the state had proved its case beyond reasonable doubt.

[19] A further point taken by the appellant is that he did not receive adequate legal representation. His attorney had failed to cross-examine the complainant properly and had failed to put his version to the various witnesses so that it could be tested properly. Consequently, asserts the appellant, he did not receive a fair trial.

[20] Regarding sentence, the appellant contends that the court *a quo* over-emphasized the seriousness of the offence and ignored the interests of the appellant, who had been 14 years old at the time. The probation officer's recommended sentence had been appropriate to the circumstances, there had been no aggravating circumstances to have justified direct imprisonment. The appellant points out that the court *a quo* failed to explain its findings in relation to his alleged lack of remorse. There had been no evidence to that effect.

Issues for determination

[21] The first point to be determined, on appeal, is whether the complainant had been a competent witness. If so, then it must be decided whether the court *a quo* had misdirected itself in finding that the state had proved its case beyond reasonable doubt. This will entail a consideration of the factors mentioned by the appellant, viz. the alleged contradictions in the complainant's evidence, the reliability thereof, and the proper exercise of the cautionary rule. It will also be necessary to consider the adequacy of the appellant's legal representation.

[22] The second point to be determined, but only if there is no basis to the appellant's contentions regarding conviction, is whether the court *a quo* misdirected itself in relation to sentence. This will entail a consideration of the relevant provisions of the CJA and the case law.

[23] A brief discussion of the general principles follows.

Legal framework

[24] The principles to guide an appeal court when dealing with an appeal purely on fact were usefully set out by Davis AJA in *R v Dhumayo and another*.¹ They include the following:

‘...3. The trial Judge has advantages- which the appellate court cannot have- in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked.

4. Consequently the appellate court is very reluctant to upset the findings of the trial Judge.

...8. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.

9. In such a case, if the appellate court is merely left in doubt as to the correctness of the conclusion, then it will uphold it.

10. There may be a misdirection on fact by the trial Judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such a misdirection also where, though the reasons as far as they go are satisfactory, he is shown to have overlooked other facts or probabilities.

11. The appellate court is then at large to disregard his findings on fact, even though based on credibility, in whole or in part according to the nature of the misdirection and the circumstances of the particular case, and so come to its own conclusion on the matter.

12. An appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial Judge. No judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered.

13. Where the appellate court is constrained to decide the case purely on the record, the question of onus becomes all-important, whether in a civil or criminal case...’²

¹ 1948 (2) SA 677 (A).

[25] An appeal court will not readily disturb the factual findings of the trial court in relation to oral evidence unless there are sound reasons for doing so.³ More recently, the erstwhile Appellate Division held, in *S v Francis*,⁴ that:

‘The powers of a court to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection the trial court’s conclusion, including its acceptance of a witness’s evidence, is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the court of appeal on adequate grounds that the trial court was wrong in accepting the witness’s evidence- a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the court of appeal will be entitled to interfere with a trial court’s evaluation of oral testimony.’⁵

[26] Where the factual findings of the trial court are clearly wrong, the appeal court must indeed interfere.⁶ The principle hardly needs restating. Similarly, it is trite that an appeal court will not interfere lightly with the trial court’s exercise of its discretion in relation to sentence.⁷

[27] The above principles comprise the basic framework for the determination of the issues identified earlier. Their application is set out below, beginning with the impact of the CJA on the matter.

The CJA

² At 705-6.

³ See *Swain v Society of Advocates, Natal* 1973 (4) SA 784 (A), at 790H.

⁴ 1991 (1) SACR 198 (A).

⁵ At 198j-199g.

⁶ Du Toit (et al), *Commentary on the Criminal Procedure Act* (Jutastat, RS 66, 2021 ch30- p40). The learned writers also refer to *S v Siphoro* (unreported, GJ case no A399/2012, 14 August 2014), at [7], relying on *Santam Bpk v Biddulph* 2004 (5) SA 586 (SCA) and *Roux v Hattingh* 2012 (6) SA 428 (SCA).

⁷ See *S v Romer* 2011 (2) SACR 153 (SCA); *S v Hewitt* 2017 (1) SACR 309 (SCA); and *S v Livanje* 2020 (2) SACR 451 (SCA).

[28] Of immediate concern is that the appellant was 17 years old at the time that he pleaded to the charge on 6 December 2021.⁸ The court *a quo* required him to plead without first having explained to him the allegations made against him, his rights, or the procedures that would follow. After the state had read the charge, the following exchange ensued:

‘COURT:	Mr J[...], do you understand the charge against you?
ACCUSED:	Yes, Your Worship.
COURT:	How do you plead to the charge?
ACCUSED:	I plead not guilty, Your Worship.’

[29] It is apparent from the record that a preliminary enquiry was held, but that is a separate matter entirely.⁹ The CJA provides in peremptory terms that the presiding officer must, before plea in a child justice court, inform the child of the nature of the allegations against him or her, inform the child of his or her rights, and explain to the child the further procedures to be followed in terms of the CJA.¹⁰ This must all be done in the prescribed manner.¹¹ It cannot be said, in the present matter, that there was compliance.

[30] It was not disputed, furthermore, that the complainant had been 13 years old at the time that she had been called to give evidence. The appellant contends that the court *a quo* failed to apply, properly, the provisions of section 164 of the CPA. The relevant portion states as follows:

⁸ The appellant’s date of birth, from the record, is 4 January 2004.

⁹ Section 47 of the CJA.

¹⁰ Section 63(3). See, too, *S v LJ* 2023 (1) SACR 396 (WCC), at paragraph [44].

¹¹ The prescribed manner is set out under regulation 37 of the Regulations relating to Child Justice, GNR. 251 of 31 March 2010.

‘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) ...’

[31] The above provisions came under scrutiny in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and others*.¹² The High Court had previously found that section 164(1) was inconsistent with section 28(2) of the Constitution,¹³ but in a closely reasoned judgment, the Constitutional Court held that the High Court’s finding could not be sustained. Ngcobo J stated:

‘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 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 or 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.

...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

¹² 2009 (2) SACR 130 (CC).

¹³ Section 28(2) provides that a child’s best interests are of paramount importance in every matter concerning the child.

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.¹⁴

[32] The Constitutional Court made it clear that the purpose of section 164(1) was to ensure that the evidence of a child witness was reliable. This entailed a determination of whether the child understood what it meant to speak the truth.

[33] It is critical, however, for a distinction to be drawn between the determination of whether a child understands the difference between truth and a falsehood, and whether a child understands the nature and import of the oath or affirmation. The first enquiry pertains to the competency of a child witness, the second pertains to whether the child must be admonished, as required by section 164(1).¹⁵ The two enquiries must not be conflated.

[34] The distinction was highlighted by the Supreme Court of Appeal in *S v Matshivha*.¹⁶ In that matter, the state's case had rested entirely on the identification evidence of the complainant and her brother, who had been eight and 13 years old, respectively, when they had testified. Zondi AJA held:

'Section 164(1) is resorted to when a court is dealing with the admission of evidence of a witness, 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. Such a witness must instead of being sworn in or affirmed, be admonished by the judicial officer to speak the truth. It is clear from the reading of section 164(1) that for it to be triggered there must be a finding that the witness does not understand the nature and import of the oath. The finding must be preceded by some form of enquiry by the judicial officer, to establish whether the witness understands the nature and import of the oath. If the judicial officer should find after such an enquiry that the witness does not

¹⁴ At paragraphs [165] and [166].

¹⁵ The matter is discussed in detail in Du Toit (n 6 above, RS 70, 2023 ch22), at p70-74D *et seq*.

¹⁶ 2014 (1) SACR 29 (SCA).

possess the required capacity to understand the nature and import of the oath, he or she should establish whether the witness can distinguish between truth and lies and if the enquiry yields a positive outcome, admonish the witness to speak the truth.’¹⁷

[35] To summarise, a court must first decide whether a child witness is competent to give evidence. This necessitates a determination, using skilful questioning, of whether the child understands what it means to speak the truth. If so, then a court must decide, secondly, and for purposes of section 162(1),¹⁸ whether the child understands the nature and import of the oath or affirmation. If not, then the court must admonish the child to speak the truth before the child can be admitted to give evidence. The requirements of section 164(1) are peremptory.¹⁹ As apparent from Ngcobo J’s remarks in *Director of Public Prosecutions, Transvaal*, the difficulty lies not so much in the *what* of the process as the *how*. It requires unique skills that are not always possessed by a presiding officer.

[36] Turning to the matter at hand, the appellant asserts that the court *a quo* did not conduct proper questioning of the complainant to satisfy itself that she had been able to testify truthfully. The questioning had not revealed whether the complainant had understood what it meant to tell the truth, the difference between a truth and a falsehood, the consequences of not telling the truth, and the meaning of the oath.

[37] The record indicates that the presiding officer posed a series of elementary questions to the complainant, requiring nothing more than factual responses, which were accepted at face value and without further evaluation or assessment. This is illustrated in the following extract:

¹⁷ At paragraph [11].

¹⁸ In terms of section 162(1) of the CPA, no person shall be examined as a witness in criminal proceedings unless he or she is under oath, but subject to section 163, which provides for the making of an affirmation in lieu of the oath, and section 164, as already discussed.

¹⁹ See *S v Mbokazi* (unreported, KZP case no AR581/14, 17 July 2015), at paragraph [7]; *S v Ndaba* (unreported, KZP case no AR528/17, 18 May 2018), at paragraph [12]; and *S v SJ 2023 (1) SACR 380 (ECB)*, at paragraph [24].

'COURT: Do you go to school?

MS M: Yes.

COURT: And which school do you go to?

MS M: S[...] Primary School.

COURT: In which grade are you?

MS M: Grade 7.

COURT: What do you like to do at school?

MS M: English.

COURT: Is English your favourite subject?

MS M: Yes.

COURT: Do you do any sport or activities at school?

MS M: Sport.

COURT: Which sport do you participate in?

MS M: Netball.

COURT: Do you like netball?

MS M: Yes.

COURT: Do you have friends at school?

MS M: Yes.²⁰

[38] The same style of questioning was followed in relation to the complainant's home environment. The prosecutor declined to put any questions. The appellant's legal representative merely adopted a similar approach to that taken by the presiding officer, as apparent from the extract below.

²⁰ Sic. The identity of the complainant has been concealed.

'MS TASSEN: ...I would like to know how old her first cousin is, how old the cousin is, Your Worship.

MS M: 15 years of age.

MS TASSEN: And is the cousin a male or a female?

MS M: A girl.

MS TASSEN: And her younger cousin, how old are they?

MS M: 11 years of age.

MS TASSEN: And are they male or female?

MS M: A boy.

MS TASSEN: Does she play with her cousins?

MS M: Yes.

MS TASSEN: What games do they like to play?

MS M: Whatever we want to play.'

[39] It cannot be said, in any way, that a proper determination was made as to whether the complainant understood what it meant to speak the truth. The presiding officer concluded as follows:

'COURT: Thank you. The court finds that the witness has the ability to observe events, to recollect and communicate them, to understand the questions, and to formulate intelligent answers...'

[40] A finding to the effect that the complainant could observe, recollect, and communicate events does not equate to a determination of whether the complainant understood the difference between truth and a falsehood. The same can be said in relation to a finding that the complainant could understand questions put to her and formulate intelligent answers. No determination was made regarding whether the complainant understood what it meant to speak the truth.

[41] The presiding officer then proceeded to explore the complainant's understanding of the oath. The following exchange is of importance:

COURT:	[Ms M], do you know what it means to take an oath?
MS M:	Yes.
COURT:	Please tell me?
MS M:	It is talking the truth in front of God.
COURT:	Do you [go] to church?
MS M:	Yes.
COURT:	Which church do you go to?
MS M:	Apostolic Church.
COURT:	Do you believe in God?
MS M:	A lot.
COURT:	If somebody promises to tell the truth before God and that person does not keep that promise, do you know what happens to the person?
MS M:	Yes.
COURT:	Please tell me.
MS M:	Being punished.
COURT:	Who punishes the person?
MS M:	God.
COURT:	You, yourself, have you ever made a promise before God and did not keep that promise?
MS M:	No, never.'

[42] It is apparent that the complainant knew, in broad terms, what it meant to take an oath. She also knew the consequences of breaking an oath. But such knowledge was demonstrated only within the context of her religious beliefs.

[43] The exchange continued as follows:

‘COURT:	So, do you know what it means to take an oath in court?
MS M:	No.
INTERPRETER:	She also demonstrates no.
COURT:	Do you watch TV?
MS M:	Yes.
COURT:	Have you ever watched any movies on TV where there will be a court that is appearing on the TV?
MS M:	No.
COURT:	Then it is fine...’

[44] The extract raises a red flag. The complainant clearly did not comprehend or appreciate the significance of taking an oath within the context of giving evidence in a criminal trial. The presiding officer embarked upon further investigation into the complainant’s understanding, only to abandon her efforts almost as soon as she had started. Quite why, is not apparent.

[45] The presiding officer thereupon invited comments from the state:

‘COURT:	...Mr van Biljon [indistinct].
PROSECUTOR:	Your Worship, I am of the view, it seems that she understands the meaning of an oath although she does not understand the terminology. She was able to distinguish between right and wrong, a truth and a lie, and understand the moral consequences thereof. That is my submission.’

[46] The submission is, of course, entirely inaccurate. The complainant plainly said that she did not understand what it meant to take an oath in court. There is no indication whatsoever from the record that the complainant could distinguish between right and wrong or between a truth and a lie. The presiding officer put questions to the complainant that required nothing more than a factual response, e.g., what was her date of birth, what school did she attend, who stayed with her at home. Similarly, the complainant's legal representative asked her the ages and gender of her cousins, what games she liked to play, and so forth. The prosecutor asked no questions at all. No investigation or determination was made in relation to whether the complainant understood what it meant to speak the truth. The complainant may well have understood, within the context of her religious beliefs, that God would punish a person who failed to keep his or her promise to tell the truth. This cannot, however, be said to reveal the complainant's morality, let alone her understanding of what it meant to take an oath within the context of court proceedings.

[47] Interestingly, the record indicates that the complainant's legal representative raised concerns with the presiding officer. These were, however, dismissed. The presiding officer found that the complainant had understood the nature and import of the oath, and that she had been a competent witness. The oath was consequently administered.

[48] Mindful of the purpose of section 164(1), as described in *Director of Public Prosecutions, Transvaal*, and the distinction to be drawn between the competency of a child witness and his or her understanding of the nature and import of the oath or affirmation, as highlighted in *Matshivha*, I am not satisfied that the court *a quo* made the necessary determinations before admitting the complainant's evidence. As the Supreme Court of Appeal found in *Haarhoff and another v Director of Public Prosecutions, Eastern Cape*,²¹ a court must deal with the question of the competency of a witness at

²¹ 2019 (1) SACR 371 (SCA), at paragraph [17].

the outset. That was simply never done in the present matter. The evidence given by the complainant was inadmissible.

[49] If the court *a quo* had relied on the skills of a properly trained intermediary to make the necessary determinations, then the complainant's competency could well have been correctly decided. It is apposite to repeat the observations made by Ngcobo J in *Director of Public Prosecutions, Transvaal*:

'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.'²²

[50] Few presiding officers possess the necessary training or skills to engage with a child witness meaningfully. An intermediary, in contrast, is usually someone with qualifications or experience in the fields of psychology or social work or education, as was the case in the present matter.²³ He or she is significantly better equipped than a presiding officer to understand a child witness and to determine whether the child witness appreciates and realises what it means to speak the truth, especially within the context of court proceedings. Whereas the presiding officer retains the duty to make a final determination on the competency of a child witness, the intermediary can (and must) play a vital role in reaching such a decision.

²² *Director of Public Prosecutions, Transvaal*, at paragraph [167].

²³ The intermediary, Ms Lisiwe Tenge, testified that she had obtained a diploma in secondary education and an advanced certificate in education before working as an educator. She had then become an intermediary, employed by the Department of Justice and Constitutional Development. She indicated that she had gained experience in more than one hundred cases involving the rape of a minor.

Relief and order

[51] The record raises further concerns. It was common cause that the appellant's family had kept a pair of aggressive dogs on the property, notorious for biting visitors. The complainant herself testified that she had been afraid of the dogs. It was also common cause that most of the appellant's family had been at home in the evenings. Mindful of the above, it is difficult to believe, beyond reasonable doubt, that the complainant would have visited the property after dark, risked attack by the dogs, knocked on the door, and entered a house occupied solely by the appellant. Add to this the three-year delay in reporting the incident, the possible influence of the No Means No- programme, and the testimony of both the appellant and Ms J[...] that the complainant had continued to visit the property after 2018, and the appellant's version starts to look, increasingly, reasonably possibly true. I am not convinced that the state discharged the onus.

[52] Regarding sentence, it is necessary to remark that section 77(1)(b) of the CJA makes it abundantly clear that a sentence of imprisonment must be 'a measure of last resort and for the shortest appropriate period of time'. The expression, 'last resort', means when all else has failed.²⁴ The pre-sentence report recommended the imposition of a sentence in terms of section 78(3) of the CJA, but this was rejected by the court *a quo* predominantly because of the aggravating factors mentioned in the record and the appellant's alleged lack of remorse. It is not apparent that the court *a quo* considered, properly, the alternatives presented in the report, either individually or in combination, and why the court *a quo* deemed such alternatives to have been doomed to failure from the start. It is, in other words, not apparent why imprisonment was the last resort available to the court *a quo* in relation to the sentencing of the appellant.

²⁴ Judy Pearsall (ed), *The Concise Oxford Dictionary* (Oxford University Press, 10th revised edition, 2001), at 1219.

[53] Ultimately, however, the procedural irregularity in relation to the provisions of section 164(1) of the CPA remains an insurmountable hurdle. By reason of the centrality of the complainant's evidence to the state's case, the irregularity cannot simply be brushed aside. The court *a quo* misdirected itself in admitting the complainant's evidence without having establishing her competency as a child witness. The appellant's right to a fair trial, in terms of section 35(3) of the Constitution, was compromised. I am not persuaded that the conviction should be allowed to stand.

[54] In the circumstances, I would make the following order:

- (a) the appeal is upheld; and
- (b) the conviction and sentence are set aside.

JGA LAING
JUDGE OF THE HIGH COURT

I agree.

ZZ MATEBESE
ACTING JUDGE OF THE HIGH COURT

APPEARANCE

Counsel for the appellant : Mr. Charles, instructed by the Legal Aid Board, Makhanda.

Counsel for the respondent : Adv Mtsila, instructed by the Director of Public Prosecution, Makhanda.

Date of hearing : 06 September 2023.

Date of delivery of judgment : 11 October 2023.