



REPORTABLE:	YES/NO
CIRCULATE TO JUDGES	YES/NO
CIRCULATE TO MAGISTRATES	YES/NO

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGH COURT, KIMBERLEY)**

*Case no: 1721/2017
HEARD ON: 07-05-2018
DELIVERED: 15-06-2018*

In the matter between:

The National Director of Public Prosecutions Applicant

And

Regional Court Magistrate:

Memory Qomoyi

Edward Vuyisili Tshibidi

Lethlogonolo Christopher Kgakane

1st Respondent

2nd Respondent

3rd Respondent

CORAM: WILLIAMS ADJP et OLIVIER J

J U D G M E N T

WILLIAMS ADJP

1. This is a review application in which the applicant, the National Director of Public Prosecutions (NDPP), seeks relief in the following terms:

- “(1) Reviewing and setting aside the proceedings of the 14th and 15th March 2017 in case number RCZ 310/2016;*
- (2) Reviewing and setting aside the ruling of the 1st respondent that the complainant is not a competent witness;*
- (3) That the criminal trial should start de novo before a different magistrate;*
- (4) That the respondents be ordered to pay the costs of this application if it is opposed.*
2. The review application is not opposed by any of the respondents. Mr Van Tonder however appeared for the 2nd respondent in support of the review.
3. The 1st Respondent is Ms Qomoyi, the regional magistrate presiding over the criminal trial in which the 2nd and 3rd respondents face charges of rape and kidnapping. It is alleged in the indictment that the 2nd and 3rd respondents unlawfully and intentionally deprived the 16 year old female complainant of her freedom by taking her from the street into a shack where they took turns raping her.
4. The trial commenced in the Regional Court, Kimberley on 14 March 2017. The 2nd and 3rd respondents who were both legally represented pleaded not guilty to the charges. The 2nd

respondent gave a plea explanation alleging consent, whereas the 3rd respondent invoked his right to remain silent.

5. The first witness called by the state was the complainant, who by then was 17 years of age. The issues arising in this review stem from the 1st respondent's enquiry into the competency of the complainant to give evidence and the subsequent ruling on 15 March 2017 that she was not a competent witness.
6. The applicant's grounds for review are to be found in section 22(1) (c) and (d) of the Superior Courts Act, 10 of 2013 which read as follows:

"22 Grounds for review of proceedings of Magistrates Courts

(1) The grounds upon which the proceedings of any Magistrates Court may be brought under review before a court of a Division are –

(a) . . .

(b) . . .

*(c) **Gross irregularity in the proceedings; and***

*(d) **The admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence."***

7. The ground of gross irregularity in the proceedings relate to the manner in which the 1st respondent conducted the enquiry to determine the complainant's competency to testify, *inter alia* the manner of questioning the child witness, the failure to consider

the appointment of an intermediary and the involvement of the 2nd and 3rd respondents' legal representatives in the enquiry.

8. The ground under section 22(1) (d) is self-explanatory and relates to the 1st respondent's rejection of the complainant's "*competent evidence*".
9. It needs to be mentioned from the outset that s 192 of the Criminal Procedure Act 51 of 1977 (the Act) declares generally that all persons shall be competent and compellable to give evidence in criminal proceedings unless expressly excluded by the Act. Young children are not so excluded.
10. Evidence may be given in three ways – under oath, under affirmation or under admonition, as regulated by sections 162, 163, and 164 of the Act. Section 163 deals with evidence under affirmation, which has little relevance *in casu* and I therefore reproduce only sections 162 and 164. Section 162 provides as follows:

"Witness to be examined under oath

162 (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."*

and

Section 164 the following:

"When unsworn or unaffirmed evidence admissible

164 (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.*

[Sub-s. (1) substituted by s 68 of Act No. 32 of 2007.]

(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."*

11. Section 164(1) allows a court to allow a person, who does not understand the nature or the importance of an oath or a solemn affirmation, to give evidence without taking an oath or making an affirmation. However the proviso to the subsection requires the presiding officer to admonish the person the speak the truth. It is implicit if not explicit, in the proviso that the person must understand what it means to speak the truth.

The practise 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. See *DPP v*

Minister of Justice and Constitutional Development, and Others
2009(2) SACR 130 (CC) at 186 (b - e).

12. In order to fully grasp the complaints raised by the applicant *in casu*, it is unfortunately necessary to reproduce the complete exchange between the 1st respondent and the complainant (who shall be referred to as BK), after she had entered the witness box.

HOF: Volle name en van vir die rekord, asseblief?

BK: BK.

HOF: Hoe oud is u?

BK: 17.

HOF: BK, voor u kan getuig in 'n hof moet die hof u insweer, met ander woorde u moet die eed aflê. Can you interpret? Weet u wat dit behels om die eed af te lê?

BK: No.

COURT: Okay, I am going to do the competency test. I will conduct it in English, then you can interpret to her. Are you still at school?

BK: Yes.

COURT: In which grade are you?

BK: 10.

COURT: Do you know what it is to tell the truth?

BK: Ja.

COURT: Tell me what it means to tell the truth?

BK: Dit beteken as jy praat, dan moet jy die hele waarheid sê.

COURT: Can you tell me what it is to tell a lie? Or when does a person tell a lie?

BK: As jy geskrik is en as jy nou nie weet wat om te sê nie.

COURT: Okay, what is it to tell a lie? I want to know from you if you know the difference between a truth and a lie. Can you tell me in your own words what is the truth and what is a lie?

BK: Ek sal nie dit kan antwoord nie.

COURT: What is the truth?

BK: As jy 'n persoon, as jy miskien nou iets gesteel het by 'n persoon en die persoon bel miskien nou die Polisie en dit moet nou op 'n statement kom en jy miskien die waarheid kom praat voor die hof.

COURT: Meaning when you come and tell the truth, what does that mean? What do you do?

BK: Jy sweer voor die magistraat.

COURT: Why do you swear?

BK: Om die waarheid te vertel.

COURT: And when does a person tell the truth? Or what do you mean when you say that the person will swear to tell the truth? What is a lie?

BK: Leuens, as jy nou leuens vertel vir iemand wat nou niks sin maak nie of enigiets wat jy van praat.

COURT: What is a lie? You can sit down.

BK: Ek sal nie kan hierdie question antwoord nie.

COURT: The difference between truth and a lie or a falsehood. What is the difference between the truth? What is the difference between the two?

BK: Waarheid.

COURT: What is the difference between the truth and a lie.

BK: Dit ... (tussenkoms).

COURT: Between telling the truth and telling a lie, which is the correct thing to do? Look at me.

BK: Die waarheid.

COURT: Why do you say so?

BK: Want dit is beter om die waarheid te praat in 'n hof in.

COURT: Why?

BK: As wat jy moet leuens vertel.

COURT: Why? Just speak louder.

BK: Want 'n mens weet nooit wat gebeur as jy gaan leuens vertel.

COURT: What happens if you tell a lie?

BK: Jy word gestraf.

COURT: So what is a lie?

BK: Jy mag nooit iemand leuens vertel wat altyd die waarheid ken nie.

COURT: Can you explain that to me?

BK: Ek sal nie kan nie.

COURT: If I do not know the truth and I ask you to tell me the truth, does it mean you can lie to me?

BK: Nee.

COURT: So why do you say that you cannot lie to somebody who knows the truth? Can you lie to somebody who does not know the truth?

BK: Nee.

COURT: Are you allowed to lie at all?

BK: Nee.

COURT: What is wrong with lying? Why can I not just lie?

BK: Ek sal nie kan antwoord nie.

COURT: You have to tell me. I am not going to proceed before you tell me. You must answer all my questions before we proceed, otherwise we will be unable to proceed. So please answer all my questions. Remember you said when you come to Court you take an oath – that is what you said – to tell the truth.

BK: Ja.

COURT: So what did you mean? How will you take the oath if you cannot tell me what it means to tell the truth?

BK: Ek sal dit nie kan ... (interjection).

COURT: Okay. What subjects do you take?

BK: Physics, Jogs, History, Maths Lit and Life Science.

COURT: Which are your favourite subjects?

BK: History and Jogs.

COURT: Do you do any languages?

BK: Nee.

COURT: You do not do English, you do not do Afrikaans?

BK: Ek doen dit, ja.

COURT: Why did you say no when I asked you if you are doing any languages?

BK: Ek het gedog daar was ander soorte tale wat u van praat.

COURT: Do you partake in sports?

BK: Nee.

COURT: If I say that you are 15 years old, will I be telling the truth or will I be lying?

BK: Nie die waarheid nie.

COURT: Why do you say so?

BK: Because it will not be my age.

COURT: Okay, if I say that you are in Grade 12, will I be telling the truth or will I be lying?

BK: Nie die waarheid nie.

COURT: Why do you say so?

BK: Want ek is nie in daai graad nie.

COURT: If I say that you are a girl child, will I be telling the truth or will I be lying?

BK: 'n Waarheid.

COURT: Now why did you say I will be lying if I say you are 15 years old?

BK: Want dit is nie my age nie en ek is nie daai ouderdom nie.

COURT: So what is a lie? If you say I am lying if I say so, what is a lie?

BK: 'n Leuens is as jy miskien by die skool is en jy het iets aangevang en 'n Juffrou vra jou miskien wat het jy gedoen en jy sê nou nie miskien die waarheid nie, dit meen dat jy die Juffrou gelieg het en dat sy die meneer ... (tussenkoms).

COURT: Speak up, everybody must hear you.

BK: As jy miskien by die skool is en die Juffrou roep jou en die Juffrou vra jou wat het aangevang of vra waar is jy en jy sê miskien nou leuens vir die Juffrou en jy sê nou miskien die Juffrou moet jou ma roep en jy roep nie jou ma nie en dan vra die Juffrou waar was jou kind of wat het sy gedoen by die huis en jou ma sê nou miskien die waarheid.

COURT: And what is the truth? What do you mean when your mother will be telling the truth? What is it to speak the truth?

BK: Is om altyd die regte goete te praat.

COURT: Speak up?

BK: Dit is om altyd die regte goete te praat en die waarheid te sê wat gebeur het.

COURT: What is it to tell a lie? Speak up.

BK: As jou ma miskien vir jou vra waar was jy die weekend en dan lieg jy miskien vir jou ma om te sê jy was by 'n vriend se huis.

COURT: So what is it to tell a lie? Do not give me an example. I have got your example. Just tell me what it is. You have told me now what it is to tell the truth. Now tell me what is it to tell a lie. You have given me an example, now I just want you to explain in your own words what it is.

BK: Dit is nie mooi om leuens te praat nie, as wat jy moet die waarheid praat.

HOF: Wat is leuens? You can interpret that. Wanneer vertel 'n mens 'n leuen?

BK: As jy nou geskrik gaan is as jy gaan praat met iemand.

HOF: As jy geskrik is dan vertel jy 'n leuen?

BK: Ja.

HOF: En wat is 'n leuen? Wat is dit om 'n leuen te vertel? Wat beteken dit om te lieg? BK, wat beteken dit om te lieg? I am waiting for an answer.

BK: Ek het nie een nie.

COURT: What is the colour of the dress you are wearing or the top?

BK: Swart en wit.

COURT: What is the colour of the dress the lady there is wearing?

BK: Dit is 'n kleurvolle rok.

COURT: What is the colour of the top the gentleman is wearing.

BK: Ligte blou.

COURT: If I say you are wearing a pink top, will I be telling the truth or will I be lying?

BK: Leuens.

COURT: If I say the gentleman there is wearing a blue top, will I be telling the truth or will I be lying?

BK: Waarheid.

COURT: Why would you say that I would be lying if I say that you are wearing a pink top?

BK: Want ek het nie 'n pienk top aan nie, ek het 'n swart en wit top aan.

COURT: Do you go to church.

BK: Ja.

COURT: Do they teach you about telling truth or lies?

BK: Om die waarheid te praat.

COURT: What do they say?

BK: Hulle sê altyd ... (tussenkoms).

COURT: Speak up.

BK: Hulle sê altyd as jy in 'n kerk, voor in 'n kerk in staan, jy moet altyd die waarheid praat as wat jy moet die leuens gaan sê.

COURT: Did they tell you what is the truth or what it is, what it means to tell the truth?

BK: Nee.

COURT: At school?

BK: Ja.

COURT: What do they say?

BK: Hulle sê ons altyd ons moet nooit lieg vir 'n onderwyser nie.

COURT: Why?

BK: Want dit is nie mooi om te lieg nie.

COURT: What are your views? Is this a competent witness or not?"

(Hereafter the 1st respondent entertained a lengthy discussion with the legal representatives on their views of the competence of the complainant).

13. It is clear from the above that the questioning by the 1st respondent had gone way beyond an enquiry as to whether the witness could distinguish between the truth and a lie. That fact

had been established early on during their exchange. The 1st respondent herself acknowledged this during her discussion with the legal representatives where she stated that:

“So she understands the concept of the truth and she did indicate to the court that the correct thing to do is to tell the truth and not to tell –and not to lie. And she did say that when you tell a lie you will be punished. Meaning that she is aware of the consequences of telling a lie. And then I asked her several questions to establish if she knows what is truth and what is a lie and she answered all those questions correctly.”

14. The above quoted extract encapsulates all that was required for a finding of competency. However the 1st respondent's inordinate questioning of the child witness, her unfortunate insistence that the witness be able to define the abstract concepts of truth and lies with even more particularity than what she did and the unfortunate involvement of the legal representatives in the issue of competence, especially the legal representatives for the 2nd and 3rd respondents, who took advantage of the situation by climbing on the bandwagon to discredit the complainant, resulted in the situation where the wrong test was eventually applied.
15. In *DPP v Minister of Justice and Constitutional Development (supra)* Ngcobo J, as he then was said at paragraph 167 thereof:

“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.”

16. The 1st respondent in essence found (amongst others) that since the complainant responded to her questions about when a person tells lies with answers like *“when you are shocked and scared”* and *“to somebody who does not know the truth,”* that the complainant could not be relied upon to tell the truth in court. Or in the words of the 1st respondent, the complainant lacked the *“understanding and appreciation to act in accordance with that knowledge of the difference between the truth and a falsehood.”*

17. This finding by the 1st respondent in fact relates to the potential credibility of the complainant as a witness (completely unfounded and based on responses to improper questioning) and not on competence to testify, which is merely a determination whether a person can distinguish between truth and lies and realise that it is wrong to tell lies. If such a person should then, after being admonished to tell the truth, go ahead and tell lies during her evidence, s 164(2) of the Act provides the appropriate sanction.

18. Mr Van Tonder raised a further irregularity in the proceedings - that is that no enquiry was held to determine whether the complainant understood the nature and import of the oath. In *S v Matshiva* 2014(1) SACR 29 (SCA) it was held as follows at 34 g to 35 a (paragraph 11).

“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 s 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 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 lies³ and if the enquiry yields a positive outcome, admonish the witness to speak the truth.”

19. *In casu* the exchange between the 1st respondent and the complainant reveals only a perfunctory question as to whether the complainant understood what it meant to take the oath. After the complainant answered in the negative, no further enquiry was held and no finding was made in this regard before the 1st respondent proceeded with the competency test.
20. In *S v B* 2003(1) SACR 52 (SCA) at 63 b-d thereof, it was held however that one should guard against a too narrow interpretation of section 164 since it does not expressly require an enquiry to be held before the finding can be made that a witness does not understand the nature and import of the oath

(or affirmation) and that in certain instances such as the mere youthfulness of a witness, the court would be justified in making such a finding without an enquiry.

21. *In casu* however there was no reason for the 1st respondent to proceed with a competency test without a proper enquiry relating to the complainant's knowledge and understanding of the import of the oath. The complainant was 17 years old at the time and in grade 10. She was obviously not an ignorant youth and what is more, appeared during the course of the questioning by the 1st respondent to know what it meant to take the oath. Had a proper enquiry been done, the miscarriage of justice which followed could have been prevented.
22. In the circumstances I am of the view that the irregularities referred to above justify interference on review and that the proceedings of 14 and 15 March 2017 should be set aside.

The following orders are made:

- a) **The proceedings of 14 and 15 March 2017 under case no RCZ 310/16, including the ruling that the complainant is not a competent witness, are set aside.**
- b) **Should the Director of Public Prosecutions, Northern Cape be of the view that the criminal trial be reinstituted, the proceedings are to commence *de novo* before a different magistrate.**



CC WILLIAMS

ACTING DEPUTY JUDGE PRESIDENT

I concur



CJ OLIVIER

JUDGE

For Applicant

Ms Mankuroane
Office of the State Attorney

For 1st Respondent:

Mr A Van Tonder
Legal Aid SA