

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

Case No: A387/2002

[REPORTABLE]

In the matter between:

**BERTRAM LEWIS
TOM PHILANDER**

**First Appellant
Second Appellant**

and

THE STATE

Respondent

JUDGMENT DELIVERED: WEDNESDAY, 5 JUNE 2003

YEKISO, J

The first and second appellant appeared as accused no's 1 and 2 respectively in the district court, Oudtshoorn on a charge of robbery with aggravating circumstances. The State alleged that on the 26 May, 2001 and at Begonia Avenue, Toekomsrus, within the magisterial district of Oudtshoorn, the appellants wrongfully and unlawfully robbed the complainant, one Vuyisile Mntwini of certain items of clothing together with cash in an amount of R2.00.

Both the first and the second appellant appeared in person and pleaded not guilty to the charge against them. After evidence was led, they were each convicted of robbery with aggravating circumstances as charged.

Because the magistrate was of the view that the offence in respect of which the appellants were convicted merited punishment in excess of his jurisdiction, the

matter was referred to the Regional Court for the imposition of an appropriate sentence.

On the 17 January, 2002 and at the Regional Court, Oudtshoorn the first appellant was sentenced to five (5) years imprisonment in terms of section 276 (1) (i) of the Criminal Procedure Act, 51 of 1977 whilst the second appellant was sentenced to seven (7) years imprisonment. The appeal by both appellants is against conviction only.

The State called two witnesses, the complainant in the person of the said Vuyisile Mntwini and one Elricho Forch, who was fourteen (14) years of age as at the time he tendered evidence in court. Whilst both the appellants elected not to testify in their own defence, the first appellant called one witness in the person of one Ellen Jonkers.

The evidence tendered before the court is briefly as follows:

The complainant testified about the robbery itself. He confirmed in his evidence that he was robbed of the items referred to in the charge sheet; that because he was under the influence of intoxicating liquor at the time, he could not identify any of the robbers and that he fled from the scene shortly after he had been robbed of his belongings.

The second witness called by the State was Elricho Forch who testified that whilst he and the complainant were walking along on their way to the complainant's place of residence, they were accosted by the second appellant and one Dirk Skilpad. The second appellant demanded that they stop. The second appellant, as also the said Dirk Skilpad, each had a knife in their possession. The second appellant and Dirk Skilpad searched both the complainant and the witness. The witness was not robbed of anything. The complainant was robbed of certain items of clothing and cash in an amount of R2.00.

The witness confirmed that the complainant fled from the scene shortly after the robbery whilst the witness proceeded walking towards the complainant's place of residence. Subsequent to the event, the complainant went to lay a charge of robbery with the police.

The role played by the first appellant in the commission of the offence is anything but clear. Elricho Forch does not make any reference in his evidence in chief as regards any degree of participation by the first appellant in the commission of the offence. Only when questioned by the court as to whether the first appellant had any weapon in his possession did this witness refer to the first appellant. His response to this question was that because the first appellant had stood far away from the scene of robbery, he could not see if the first appellant had any weapon in his possession.

A further reference to the first appellant by this witness was on a question by the prosecutor whether this witness could remember what clothing the first appellant had, to which question the witness responded by saying he could not recall.

How far the first appellant was from the scene of robbery and to what extent the first appellant participated in the commission of the robbery itself is anything but clear regard being had to the evidence on record.

Before dealing with the merits of the appeal itself, it is perhaps appropriate to deal with a matter raised by *Mr Pothier*, counsel for both the appellants, in argument before court at the hearing of the appeal. The issue raised by *Mr Pothier* relates to what he contends was an irregularity by the magistrate in the application of the provisions of section 164 (1) of the Criminal Procedure Act. *Mr Pothier* makes a point in his submissions that the evidence by Elricho Forch who, as has already been pointed out elsewhere in this judgment, was fourteen (14) years of age at the time he tendered his evidence, ought to be excluded on the basis that the magistrate did not administer the requisite oath to the witness nor did the magistrate conduct any enquiry to establish whether or not the witness understood the nature and the import of the oath or affirmation as was required in terms of the provisions of section 164 (1) of the Criminal Procedure Act.

Mr Pothier submitted that in terms of section 164 (1) of the Act, properly interpreted, before the witness referred to in this section is allowed to testify, the magistrate is required to make a finding whether the witness concerned is capable of understanding the nature and the import of the oath or affirmation, and that, invariably, such a finding ought to be preceded by an enquiry to establish whether or not the witness is capable of understanding the nature and the import of the oath or affirmation. Because the magistrate omitted to make this enquiry, so *Mr Pothier* argued, the evidence tendered by Elricho Forch ought to be excluded from the record.

He submitted further that such an enquiry ought to be conducted, that the presiding judicial officer cannot just simply assume that a witness does not appreciate the nature and the import of the oath or affirmation and, based on that

assumption, proceed in admonishing the witness and allow the witness to give evidence without making the necessary enquiry.

Section 164 (1) of the Criminal Procedure Act provides as follows:

“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.”

The portion of the record of the proceedings complained of in the district court, which precedes the evidence by Elricho Forch, is recorded as follows:

“Aanklaer:	Elricho Forch
Hof:	Wat is jou naam en van?
Getuie:	Elricho Forch
Hof:	Hoe oud is jy?
Getuie:	14
Hof:	Jy is nou 14 jaar oud jy word nou geroep om te kom getuig oor ‘n voorval wat plaasgevind het. Die hof waarsku nou vandag vir jou om net die waarheid, die hele waarheid en niks anders as die waarheid te praat nie. Met ander woorde jy moet nie vandag kom getuig oor dinge wat jy gehoor het nie maar net oor dinge wat jy gesien het, reg so?
Elricho Forch:	Bevestig.
Hof:	Goed SA?
Ondervraging deur Aanklaer:	Elricho gaan jy skool ? --- Ja, edele.”

When one looks at the portion of the record of the proceedings cited above it is quite evident that the evidence tendered by Elricho Forch was not preceded by any form of an enquiry specifically with a view to establishing whether or not the

witness understood the nature and the import of the oath or the affirmation. The question that calls for determination, therefore, is whether the evidence by this witness ought to be excluded from the record because of the omission by the magistrate to conduct an enquiry with a view to establishing if the witness, at the time he tendered his evidence in court, understood the import of the oath or the affirmation, as, according *Mr Pothier's* submissions, the magistrate is expressly required to do in terms of provisions of section 164 (1) of the Act before admonishing the witness to speak the truth, the whole truth and nothing other than the truth.

In a series of judgments delivered by the various Provincial Divisions of the High Court, the trend appears to have been that a witness, in terms of section 164 (1) of the Act, cannot be admonished unless he or she comprehends what it is to speak the truth and to shun falsehood in his or her evidence. It has further been held in a number of decisions that before the section is invoked, the court must make the necessary finding that the witness concerned does not understand the nature and the import of the oath or affirmation and that this finding entails the holding of an enquiry which should precede such a finding. (See in this regard *S v V 1998 SACR 651 (C)*; *S v Vumazonke 2001 (1) SACR 619 (C)* ; *S v Malinga 2002 (1) SACR 615 (N)* and *Du Toit et al Commentary on the Criminal Procedure Act 22 – 19 to 22 – 20* and other authorities cited therein.)

In *S v B 2003 (1) SA 552 (SCA)* the Supreme Court of Appeal had to consider a question of law referred to it by the Transvaal Provincial Division in terms of section 319 of the Criminal Procedure Act. The question the court had to determine was whether the evidence of a witness who was merely admonished to tell the truth without any prior investigation and a subsequent determination that the witness did not appreciate the nature and the import of the oath or affirmation due to youth, defective education or any other cause, could not be regarded as admissible evidence.

In answer to this question, the Supreme Court of Appeal held that an enquiry is not always necessary in order to make a finding required by section 164 of the Criminal Procedure Act. It further held that the mere youthfulness of a witness, without such an enquiry being held, may indeed justify such a finding. The court remarked as follows in paragraph 15 at pages 562 F-G to 563 A – D:

“Dit is duidelik dat art 164 ‘n bevinding vereis dat ‘n persoon weens onkunde voorspruitende 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 228g – h); *S v Vumazonke 2000 (1) SASV 619 (K)* op 622f – 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. Dit kan by voorbeeld gebeur dat, wanneer gepoog word om die eed op te le 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 (sien *S v*

Stefaans 1999 (1) SASV 182 (K) op 185i).

This approach has recently been confirmed by the Supreme Court of Appeal in an as yet unreported judgment handed down on the 26 March 2003 in the matter of *The Director of Public Prosecutions: Kwazulu – Natal v John Mekka*, SCA Case No. 57/2002. In this case the respondent was convicted of rape and indecent assault and sentenced to 10 years imprisonment by the Regional Court in Durban. An appeal was noted to the Natal Provincial Division on the basis that the magistrate failed to inquire from the complainant whether she understood the nature and import of the oath and that such failure constituted an irregularity rendering the complainant's evidence inadmissible. As there was no other evidence led to establish the guilt of the accused, the conviction and sentence was set aside, the court holding that failure to hold such an enquiry constituted an irregularity rendering the complainant's evidence inadmissible.

The State noted an appeal against this finding in terms of section 311 of the Criminal Procedure Act to the Supreme Court of Appeal. Following its earlier decision in *S v B* supra, the court held that failure to hold the enquiry did not constitute an irregularity. The appeal by the State was thus upheld. The conviction and sentence imposed by the Regional Court was re-instated.

In the light of the decisions by the Supreme Court of Appeal in both the matters of *S v B* and *The Director of Public Prosecutions: Kwazulu – Natal v John Mekka* supra, it would appear that nothing more is required of the presiding judicial officer than to form an opinion that the witness does not understand the nature and the import of the oath or affirmation due to ignorance, arising from youthfulness, defective education or any such like cause.

In *casu* the magistrate was informed that the witness was fourteen (14) years of age before

tendering his evidence, and arising from such information had formed an opinion that the witness did not understand the nature and import of the oath or affirmation. Based on this opinion the magistrate proceeded to admonish the witness to speak the truth, the whole truth and nothing other than the truth. It follows, therefore, that *Mr Pothier's* contention that evidence by Elricho Forch is inadmissible because the magistrate omitted to hold an enquiry before he formed an opinion that the witness did not understand the nature and the import of the oath or affirmation is without substance.

Accordingly, in the words of Streicher JA in *The Director of Public Prosecutions:Kwazulu – Natal v John Mekka* supra at p8 “the magistrate did not commit an irregularity by allowing the witness to testify after having warned him to tell the truth.”

I have had an opportunity to ascertain what the position in other jurisdictions is as regards whether some form of an enquiry is called for in circumstances where the evidence of a child below the age of fourteen (14) is to be tendered. In Canada, it appears that in terms of section 16 of the *Canada Evidence Act*, a court is required, before permitting a child below the age of fourteen (14) years to give evidence, to conduct an enquiry to determine whether the child concerned (a) understands the nature of an oath or affirmation and (b) whether the child is able to communicate the evidence. If the child does not meet requirement (a) but does meet requirement (b) the child may testify on promising to tell the truth. However, there is proposed a change in this approach in the form of the proposed *Child Evidence Act*. In terms of the proposed change, a child's evidence will be admissible if (a) he or she promises to tell the truth and (b) the court is of the opinion that the child understands what it means to tell the truth and is able to communicate the evidence. The Bill incorporating the proposed change, was introduced in the second session of the Canadian parliament during 2002. It would appear that the approach by the Supreme Court of Appeal is in line with the change proposed in Canada if such change is not yet law.

Having said that this then calls for the determination of the merits of this appeal. As regards the first appellant I have already made the observation that no specific reference was made to him with regards to his degree of participation in the commission of the offence, if the first appellant did participate in the commission of the offence at all. On only three occasions does the eye witness Elricho Forch specifically refer to the first appellant. This was on the two occasions when asked by the court as regards whether the first appellant had any weapon in his possession and the witness had replied that the first appellant had stood at a distance from the scene of crime and could therefore not see whether first appellant had any weapon in his possession; the second occasion was when asked by the court where first appellant lived and the witness had replied that he also lived in Swart Street. The third occasion was a question by the prosecutor as regards what clothing the first appellant had and the witness had replied that he could not remember.

In the course of his judgment, the magistrate concluded that the first appellant placed himself on the scene of crime in the course of cross-examination of the witness, Elricho Forch. This is because of certain statements the first appellant put to this witness as regards certain events at the scene of crime.

Although not explicit on the record, it appears that Elricho Forch had met and had a conversation with the first appellant whilst the latter was still in custody after

arrest. This is apparent on the first appellant's notice of appeal addressed to the Chief Magistrate, Oudtshoorn. In his notice of appeal, first appellant states how Elricho Forch had told him (the first appellant) as regards how far Ericho Forch was from the scene of crime when same was committed, the direction he had come from when he approached the scene of crime, the fact that he (Elricho Forch) had heard the first appellant's nickname (Betty) mentioned by one of the robbers, how surprised Elricho Forch was to learn that the first appellant was linked to the commission of the offence and even went further to say that he would make a statement to the investigating officer in order to have charges against first appellant withdrawn.

The first appellant, naturally, put these statements to Elricho Forch in the course of his cross-examination based, as they are, on the conversation he had with this witness whilst first appellant was still in custody. Based on this line of cross-examination of the witness by the first appellant, the magistrate concluded that the first appellant placed himself on the scene of the robbery. Based on this conclusion, the magistrate drew an inference that the first appellant was one of the persons who had robbed the complainant of his belongings.

I am in agreement with the submission by *Mr Pothier* that the inference drawn by the magistrate that the first appellant had placed himself on the scene in the process of cross-examination of the witness, is not only inaccurate but also incorrect. It is indeed so that what the first appellant

merely put to this witness was what the latter had informed the first appellant in their conversation whilst the first appellant was still in custody after arrest.

In my view, there is doubt whether the first appellant participated in the commission of the offence, due regard had to the totality of the evidence on record. However, not the same could be said as far as the second appellant is concerned.

Elricho Forch describes in graphic detail the role played by the second appellant in the commission of the robbery. He was close to the second appellant all the time and had every opportunity to observe him. Moreso, the second appellant was known to Elricho Forch and there is no suggestion at all, as the record shows, that Elricho Forch could be making a mistake as far as the identity of the second appellant is concerned.

In my view, the state has not succeeded in proving the guilt of the first appellant beyond reasonable doubt and he ought to have been found not guilty and discharged. As regards the second appellant it is my view that the state succeeded in proving that he did commit the robbery in question and, accordingly, he was correctly convicted.

In the result I would make the following order:

- (a) The appeal by the first appellant is upheld and his conviction is thus set aside;
- (b) The appeal by the second appellant is dismissed and the conviction is confirmed.

YEKISO, J

I agree.

HLOPHE, JP
