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

APPEAL CASE NO: CA&R 23/2025

REPORTABLE

In the matter between**:**

JACOB SEPTEMBER **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

Noncembu J

[1] The appellant was convicted on a charge of rape in contravention of Section 3 of the Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007. The offence fell under the ambit of section 51 (1) of the Criminal Law Amendment Act 105 of 1997 as amended, in that it was committed on diverse occasions between the

period of 2016 and 2019, and the complainant was 6 years old at the time of offence. He was sentenced to imprisonment for life on 19 October 2021.

[2] In exercising his automatic right of appeal,[1] he is now appealing against both his conviction and sentence.

The grounds of appeal

[3] On the merits, the appellant contends that the court a quo failed to administer the oath on the complainant or to properly admonish her before her testimony was taken in court, thus rendering her evidence inadmissible. It is further contended that the court failed to properly assess the evidence tendered and to apply the necessary caution in assessing the evidence of the complainant who was a single witness and a child at the time of testifying in court. The submission is that the court erred in finding that the state proved its case beyond reasonable doubt, given the material contradictions in its case.

[4] In respect of sentence, it is contended that the court a quo erred in not considering the personal circumstances of the appellant, specifically and of material significance, his advanced age which inter alia, constituted substantial and compelling circumstances.

Factual background

[5] It was common cause between the parties that the complainant was 6 years old at the time of the offences and 11 years when she testified in court. As can be

[1] Section 309(1)(a) of the Criminal Procedure Act no 51 of 1977 (the Act).

ascribed to her young age, she could not recall the specific dates and times of the offences when she testified in court. Summarily, her evidence was that she was raped by two people, one uncle Jimmy and uncle Jacky (the appellant), during the period 2016 and 2019. The appellant raped her on four occasions but her testimony in court pertained to two incidences only.

[6] On the first occasion, she was at home when the appellant came to her bedroom. She could not recall if this was during the day or during the night. Her maternal grandmother (Reona), who was married to the appellant and with whom she was staying together with the appellant, was drunk and sleeping in the other bedroom. Inside the bedroom the appellant asked her to pull her pants down and when she refused, he pulled them down himself and pulled down his own. He laid the complainant on the bed on her back and had sexual intercourse with her. When she wanted to scream, he threatened to kill her with an okapi knife which was under the pillow.

[7] The second incident occurred on another day during the day. Her grandmother was not at home as she had gone to the shop. On this day the appellant called her to his bedroom. Once they were inside the bedroom, he asked her to pull down her pants. She refused and the appellant pulled them down himself. He also pulled his own pants down and had sexual intercourse with her anally. She did not tell her grandmother (Reona) about these incidences.

[8] Much later on a date she could not recall, she reported the rape incidences to her paternal grandmother, Patricia when she was visiting her in Perseverance.

[9] Patricia testified and told the court that the complainant came to stay with her during the hard covid lockdown between March and April 2020. In the course of her stay, Patricia noticed that there were some changes in the behaviour of the complainant, who used to be a friendly child before. She had become aggressive and was fighting with the other children. She took her to a pastor (who is now late) who was conducting some counselling sessions at the time. After the intervention of the pastor the complainant reported to her that she had been raped by the appellant.

[10] The report was that one morning her maternal grandmother (Reona) had gone to the shop to buy lunch for her (the complainant). As she was getting ready for school, the appellant grabbed her from behind, threw her on the floor and had sexual intercourse with her. When her grandmother came back, they both stood up and the complainant ran to the toilet as she was bleeding. She never reported the incident to her grandmother (Reona).

[11] Patricia took the complainant to Dora Nginza hospital where she was examined. The forensic nurse who examined the complainant at the Thuthuzela centre situated at the hospital, Mr Fezile Mtini (Mr Mtini), also testified in court. His qualifications and expertise were not placed in issue.

[12] Mr Mtini told the court that he examined the complainant on 1 May 2020 at 10 in the morning. He did not collect any DNA samples or clothing from her. The complainant was 10 years old and accompanied by her grandmother Patricia. The history he was given by the grandmother was that the child had been sexually assaulted by a known male who was a family friend on 26 April 2020 around 12 noon.

There were no physical injuries noted on the clinical examination and everything was normal.

[13] On the gynaelogical examination he noted some healing bruises on the posterior fourchette and the vestibule fossa navicularis. The hymen was completely eroded. His conclusion was that the healing bruises and the absence of the hymen were consistent with sexual penetration which happened plus/minus 5 days ago. The injuries were noted on the schematic drawing in the J88 which formed part of the evidence. Mr Mtini also explained that the completely eroded hymen meant that penetration had happened on more than one occasion.

[14] The appellant denied raping the complainant, alleging that she may have been told by her paternal grandmother, Patricia, to implicate him as the perpetrator.

Failure to administer the oath and whether the complainant was properly admonished

[15] Counsel for the appellant argued that the conduct of the regional magistrate in failing to administer the oath on the complainant, after finding that she understood the nature and import of the oath, rendered her testimony inadmissible. In addition, it is counsel's contention that the child witness was not properly admonished, thus, even on that score her testimony did not bear the status and character of evidence before court.

[16] The court, after conducting the competency test and satisfying itself that the complainant, who was testifying via an intermediary, was a competent witness, went further and conducted an enquiry into whether or not the complainant understood the

nature and import of the oath. It is necessary to recount the enquiry that ensued in order to properly contextualise the argument raised by counsel for the appellant. It proceeded as follows:[2]

Court : 'JDJ [. . .] do you know what it means to take an oath?

JDJ[. . .]: No your worship.

Court: Okay, do you go to church?

JDJ [. . .]: Yes

Court: Okay, and which church do you go to?

JDJ [. . .]: Evangelie

Court: Okay, thank you. Do you believe in God?

JDJ […]: Yes, your worship.

Court: Do you know what it means when a person makes a promise to God?

JDJ [. . .]: Yes, your worship.

Court: Please tell me what it means.

JDJ […]: You must not lie, your worship, for an elderly or to God as well.

Court: Do you know what will happen if a person makes a promise to God to tell the truth and that person does not keep that promise?

JDJ [. . .]: You go to hell. You go to devil…

Court: Okay, okay, and in court, do you know what it means to take an oath?

JDJ […]: No.

Court: Okay, You have never been in court?

JDJ […]: No.

Court: Okay. Okay. Any questions on the oath?

[2] In order to protect the identity of the complainant who was a child witness, she is referred to as JDJ for purposes of this judgment.

Prosecutor: Not from my side your worship.

Mr Nyoka: None, your worship.

Court: Thank you. The court finds that the witness understand the nature and import of the oath. However, she does not understand the court, the oath in court. I will, I have also proceeded in terms of section 164 of the Criminal Procedure Act 51 of 1977.'

[17] At this juncture, the court proceeded with the enquiry as to whether or not the witness can distinguish between the truth and falsity. The enquiry proceeded thus –

'JDJ [. . .]: Do you know what is the difference between a truth and a lie.

JDJ [. . .] : Yes.

Court: Please tell me what it is?

JDJ [. . .]: So, if you say to a person something had happened that did not happen, then you must know it is a lie.

Court: Okay. So, what is the colour of the clothes you are wearing?

JDJ [. . .]: Black.

Court: Okay. If I tell you that you are wearing red clothes today, will I be telling a truth or a lie?

JDJ [. . .]: It is a lie.

Court: Is it a good thing or a bad thing to tell lies?

JDJ [. . .] It is a wrong thing.

Court: Okay. At school are you allowed to tell lies?

JDJ [. . .]: No.

Court: Okay. What happens to a child if that child tells lies at school?

JDJ [. . .]: I do not know yet.

Court: Have you ever told lies at school?

JDJ [. . .]: No.

Court: If another child is telling lies at school, does the teacher do anything to that child?

JDJ [. . .]: That child would be taken to the office.

Court: Okay. So you have been a good child, you have never been taken to the office because you are telling lies at school?

JDJ [. . .]: Yes.

Court: And at home, does your grandmother allow a child to tell lies?

JDJ [. . .]: No.

Court: If a child tells lies at home, what happens to that child?

JDJ [. . .]: They go straight to hell.

Court: Okay. Any questions, Mr Van Biljon?

Prosecutor: None from the state. Thank you your worship . . .

Court: Mister . . .(intervention)?

Mr Nyoka: None, your worship.

Court: Okay. The court is satisfied that the child does understand the difference between a truth and a lie and the consequences thereof. JDJ [. . .], I am going to warn you today to please tell the truth and nothing else but the truth.

… (admonished through intermediary)

Court: Okay. And unlike at school, here you will not be taken to the office. You are only required to tell what you saw with your own eyes and not what you were told by somebody else.

JDJ [. . .]: Yes, your worship.'

[18] Two primary concerns immediately loom from the above two enquiries. Whilst I cannot fault the questioning of the regional magistrate in respect of the first enquiry (whether the child understands the nature and import of the oath), her finding at the end is somewhat convoluted. She finds on the one hand, that the child understands the nature and import of the oath. However, on the same score she goes further and make a finding that the child does not understand *an oath in court.* (Emphasis intended)

[19] This is the crux of the argument by counsel for the appellant. He contends that, having found that the child understood the nature and import of the oath, the court was required to swear her in as provided for in terms of the law before taking her testimony. And having failed to do so, it means that the child's testimony was not under oath, and therefore inadmissible.

[20] The second challenge mounted by counsel for the appellant, is the manner in which the child was admonished by the court. The court in admonishing the child took away the very essence of the warning that is engendered in admonishing a witness ie. the consequence of not telling the truth in court.[3] She warns the child that whilst she is required to tell only the truth in court, unlike at school, she will not be taken to the office if she does not comply. This statement can be construed to imply, especially to an 11-year-old young mind, that unlike at school, in court there are no consequences for not telling the truth.

[3] Section 164(2) of the CPA.

The Legal Principles

[21] Section 192 of the CPA provides that every person not expressly excluded by this Act from giving evidence shall, subject to the provisions of section 206, be competent and compellable to give evidence in criminal proceedings.

[22] In terms of section 193 of the CPA, a court is obliged to decide on the competency or compellability of any witness to give evidence. Evidence is normally given under oath. When a witness is called to testify, an oath is administered to ensure that he does not speak carelessly and frivolously, rather s/he evaluates her/his words to convey the gravity of the situation and **most importantly, the oath is administered to provide a penalty against untruthfulness. (**Emphasis intended)

[23] Section 162 of the CPA provides as follows:

> 'Witness to be examined under oath:
>
> (1) Subject to the provisions of Section 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 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 I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God." '

[24] It is settled in our law that the testimony of a witness who has not been placed under oath properly, has not made a proper affirmation or has not been admonished to speak the truth as provided for in the Act, lacks the status and character of evidence and is inadmissible.[4]

[25] The provisions of Section 162 are peremptory; however, they may be departed from under the circumstances set out in sections 163 and 164 of the CPA. Any person, **who is found not to understand the nature and import of the oath or affirmation,** may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation, **provided that such person in lieu of the oath or affirmation is admonished by the presiding judge or judicial officer to speak the truth.**[5] (Emphasis intended).

[26] Discernible from the above is that section 164(1) is resorted to when a court is dealing with the admission of evidence of a witness who, from obliviousness or ignorance arising from youth, defective or sub-standard education or other cause, is found not to understand the nature and significance 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 the provision that for it to be triggered there must be a finding that the witness does not understand the nature and import of the oath.[6]**

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[4] *S v Matshiva* 2014 (1) SACR 29 (SCA) at [10]; *Henderson v S* 1997 (1) All SA594 (C), *S v Bezuidenhout* 2002 (4) All SA 230F.

[5] Section 164 of the CPA.

[6] *S v Matshiva* (supra) at [11].

[27] The words ‘is found’ in section 164(1) have been held to indicate that a proper enquiry must be conducted in order to determine whether an oath can be administered to the witness.[7] The first duty of the court, therefore, is to enquire whether a child tendered as a witness understands the meaning and religious sanction of an oath.[8] In *S v N* [9] Van Reen J held:

‘It is self -evident that that purpose is not attainable where a witness lacks the capacity to understand and assume the religious obligation of the oath. Accordingly, a court before administering the oath to a child or any person who is lacking in formal education or for any other reason might not have the required capacity, enquire whether such a witness understands the meaning of and possess the capacity to appreciate and accept the religious sanction of the oath. If after such an enquiry, the court finds that the witness does not possess the required capacity, it should establish whether he or she understands what it means to speak the truth as in the absence of the capacity to distinguish between “truth and falsity….and to recognise the danger of wickedness of lying…”, he or she is not a competent witness. The capacity to distinguish between the truth and falsity is furthermore a prerequisite for the making of an affirmation or an admonition in terms of sections163 and 164 of the Act.’

Discussion

[28] From the questions posed by the regional magistrate to the complainant in the present matter and the answers provided, it becomes readily apparent that the child has a full understanding of the meaning and religious sanction of the oath. Granted, the concept of ‘oath’ is an abstract to an 11-year-old. But broken down to its bare essentials, the child had a clear understanding of what it means and the religious

[7] *S v Pienaar* 2001 (1) SACR 39 (C) ;*S v Malinga* 2002 (1) SACR 615 (N).

[8] The South African Law of Evidence 3rd Edition, Ch 20 at page 935.

[9] 1996 (2) SACR 225 (C).

sanction that goes with it. In her own words she explained the religious obligation entailed in making a promise to God, and the religious sanction that follows should one fail to keep that promise. That in my view is the very essence of section 163, hence I am satisfied that a proper assessment was conducted, and a proper finding was made in this regard.

[29] To formulate a question about an 'oath in court' would be confusing even to an adult witness who has never been to court before, as it underscores an implication that an 'oath in court' is different to the concept of an 'oath' as explained above. Clearly, that is a misnomer. The complainant in the present matter clearly demonstrated that she had the requisite capacity to understand the nature and import of taking an oath. Therefore, she should have been sworn in before her testimony was taken.

[30] As stated above,[10] a witness can only be admonished if s/he is found not to understand the nature and import of the oath. The finding of the court clearly excluded the complainant from the latter category. This notwithstanding, the court went on to admonish the child. This, however, did not resolve the problem of unsworn testimony by the complainant.

[31] In admonishing the child the regional magistrate also told her that unlike at school, she would not be taken to the office if she does not tell the truth in court.[11] She then left that statement open without indicating that consequences of a different kind

[10] See para 26; see *S v N* supra.

[11] In *S v Mali* 2017 (2) SACR 378 (ECG) at para16, Malusi J described the phrase 'admonish' as meaning 'to reprimand firmly, urgently urge or warn' a witness.

apply in court. As stated before, anyone, especially an eleven-year-old child, could easily construe that statement to imply that unlike at school, no consequences follow when one tells an untruth in court. This puts paid to the very essence of an oath/affirmation/ admonishing a witness, which is to provide a penalty for untruthfulness.

[32] This in my view, means that even if one were to accept that it was proper for the court to admonish the complainant in terms of section 164, the enquiry process that was followed thwarted the very essence of the provision. In *S v Mali*[12] it was said that the 'importance of truthfulness is covered by an enquiry satisfying the court that the child witness understands that an adverse sanction will generally follow the telling of a lie.' The regional magistrate clearly attenuated this material feature when she was admonishing the child. Given these circumstances it is my view therefore that the child was not properly admonished.

[33] Now the question that one must answer is whether it can be said that this notwithstanding, admission of the said evidence would not be prejudicial to the rights of the appellant to a fair trial. In my view this question can only be answered in the negative. Given the many shortfalls in the state's case which I deal with below, admitting the unsworn testimony of the complainant who was not properly admonished, would be prejudicial to the appellant and render the trial unfair. Under these circumstances I find that the testimony of the complainant lacked the status and character of evidence and was therefore inadmissible.

[12] Ibid, at para 13; see also *S v Sangweni* 2019 (1) SACR 672 (KZP) at para 9; *S v QN* 2012 (1) SACR 380 (KZP).

[34] Having come to the above conclusion, it follows that the only evidence that remains is the first report evidence of Patricia (complainant's paternal grandmother) and the medical evidence of Mr Mtini. The question to be answered therefore, is whether this evidence can be said to be sufficient to sustain a conviction in the absence of the complainant's testimony. Whether it can be said that notwithstanding the absence of the complainant's evidence, the state proved the guilt of the appellant beyond reasonable doubt.

[35] In my view, even if the complainant's testimony was not excluded, to find that the state proved its case beyond reasonable doubt would be a far cry on the facts of this matter.

[36] In the first instance, the first report was not at all consistent with the evidence of the complainant. None of the two incidences that the complainant testified about unfolded in the manner in which the report was given. According to Patricia the complainant told her that she was grabbed from behind whilst getting ready for school, thrown to the floor and raped. This is totally inconsistent with the testimony of the complainant. On her version, both instances occurred when she was called to the bedroom where she was raped by the appellant, the only difference being that on the second occasion there was anal penetration. Given these vast disparities, the most likelihood is that the report Patricia testified about pertained to a totally unrelated incident.

[37] One must also be alive to the fact that the report was made only after the intervention of a pastor who could not be called to testify as he had demised. These

factors cumulatively raise the question of whether it can be said that the first report evidence complies with the requirements of section 58 of the Criminal law (Sexual Offences and Related Matters) Amendment Act.[13]

[38] The situation gets further compounded when one considers the evidence of Mr Mtini, the forensic nurse who examined the complainant. According to him the history given by Patricia was that the complainant was raped on 26 April 2020. In his findings after examining the complainant, he concluded that the gynaecological injuries he observed were consistent with sexual assault which occurred plus/minus five days ago (in line with the history given).

[39] With this evidence, one must also not lose sight of the fact that the offences for which the appellant was charged were committed between 2016 and 2019.[14] Whilst the medical evidence confirmed that the complainant was sexually assaulted on more than one occasion (in that the hymen was completely eroded), the only period that this evidence was specific about was April 2020, a period during which the appellant was not staying with the complainant according to the common cause evidence.[15]

[40] Another disturbing feature in this matter is that it became clear during the proceedings that somebody else (other than the appellant) who is known had sexually assaulted the complainant. In her earlier testimony the complainant mentioned a certain uncle Jimmy who had raped her. She was however carefully directed by the state to focus her evidence on the appellant before court. When Mr Nyoka attempted

[13] Act 32 of 2007.

[14] According to both the J15 and the testimony of the complainant.

[15] It is common cause that she was staying with Patricia in Perseverance during this period.

to cross examine her on previous sexual encounters he was stopped by the court after an objection was raised by the state. In upholding the objection, the regional magistrate relied on section 227 (2) of the CPA.

[41] The regional magistrate clearly misdirected herself in this regard, as the said evidence was first introduced by the state, and therefore fell under the exceptions provided for in the subsection.[16] Furthermore, when the state was examining Mr Mtini in chief, it was also mentioned that the complainant was allegedly raped by another man just before she was seen by Mr Mtini, although such evidence was not before court.[17] This seems to fall in line with the history given to Mr Mtini that the complainant was raped by a known male who was a family friend on 26 April 2020.[18] Why this evidence was not presented to court remains a mystery. More so given that Patricia made no mention in her testimony that the complainant was or had told her that she was raped whilst she was staying with her. Equally strange is the fact that Patricia failed to mention to Mr Mtini that the complainant had told her that she had been raped before the 26 April 2020 (by the appellant).

[42] I also find it to be an uncanny coincidence that the first name of the pastor who conducted counselling with the complainant (leading up to the first report being made to Patricia) was Jimmy,[19] when the complainant's evidence which was consciously not pursued by the state, was that she was also raped by 'uncle Jimmy'.

[16] Section 227 (2) (b).

[17] Record p68, line 7 – 9.

[18] Record p67, lines 3 – 6.

[19] Record p52, line 12.

[43] The appellant denied raping the complainant, contending that the complainant was induced by her grandmother Patricia to point him out as the perpetrator. The fact that Patricia failed to mention in her evidence that the complainant was raped by a known male who was a family friend whilst she was staying with her, abetted by the state, whether consciously or unwittingly in keeping such evidence from the court, leaves one with the ineluctable inference that someone was being protected by her (Patricia). That in my view, renders the version of the appellant (that Patricia may have influenced/induced the complainant to point him out as the perpetrator), reasonably possibly true.

[44] The complainant (assuming for a moment that her evidence was admissible), was both a single witness and a child when she testified in court. It does not appear prima facie the record that any of the cautionary rules were applied by the court in assessing her evidence. It is well established in our law that the evidence of a child must be treated with caution.

[45] As demonstrated above, the complainant's evidence stood alone without any corroboration in this matter. Absent such corroboration, courts generally look for some feature in the evidence which gives the implication by a single child witness enough of a hallmark of trustworthiness to reduce substantially the risk of a wrong reliance upon her evidence.[20] No such feature existed in the present matter.

[20] *S v Artman* 1968 (3) SA 339 (A) at 340H.

[46] Over three decades ago the Appellate Division in *Woji v Santam Insurance Co Ltd*[21] cautioned courts on the dangers of believing a child where evidence stands alone without any corroboration. It also set out relevant factors to be considered by a court in determining whether the evidence of a child witness is trustworthy.[22] This division, in *S v Dyira*[23] also remarked on the pitfalls of accepting the evidence of a child witness, because of potential unreliability or untrustworthiness, as a result of lack of judgment, immaturity, inexperience, imaginativeness, susceptibility to influence and suggestion, inter alia. It does not appear on the record that the regional magistrate was alive to any of these considerations when she was assessing the complainant's evidence.

[47] Given the number of shortfalls in the state's case as highlighted above, in particular; the first report which is inconsistent with the complainant's evidence (over and above it being delayed and solicited under unclear circumstances shrouded in a cloud of suspicion), the omitted evidence of rape by another person known and friends to the complainant's paternal grandmother (Patricia), and the absence of any medical evidence (or any evidence at all) to corroborate the complainant's evidence of being raped by the appellant, I cannot find that the evidence of the complainant was reliable and trustworthy.

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[21] 1981 (1) SA 1020 (A) at p1027.

[22] 'Trustworthiness of a child depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified. His capacity of observation will depend on whether he appears intelligent enough to observe. Whether he had the capacity of recollection will depend again on whether he has sufficient years of discretion to remember what occurs whist the capacity of narration and communication raises the question whether the child has the capacity to understand the questions put, and to frame and express intelligent answers.'

[23] 2010 (1) SACR 78 (ECG); see also *S v Viveiros* [2000] 2 All SA 86 (SCA) para 2.

[48] Whilst it is clear from the medical evidence that the complainant was sexually assaulted on more than one occasion, the state however, failed to prove beyond reasonable doubt that the appellant was the person who raped her. In my view, nothing turns on the fact that the appellant had initially denied that the complainant stayed with them (him and Reona) at Kleinskool, an aspect which he later conceded. It is a trite principle of our law that an accused person bears no onus to prove his innocence in court. On the totality of the evidence presented, I cannot find that the state did establish the guilt of the appellant beyond reasonable doubt.

[49] The result therefore is that the conviction of the appellant and the subsequent sentence by the regional magistrate cannot be sustained. The appeal therefore must succeed.

Order

[50] In the result, the following order is made:

(a) The appeal is upheld.

(b) The conviction and sentence are set aside.

(c) The appellant must be released from custody with immediate effect.

V P NONCEMBU
JUDGE OF THE HIGH COURT

I agree.

N MOLONY
ACTING JUDGE OF THE HIGH COURT

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DATE OF HEARING	:	28 May 2025
DATE OF JUDGMENT	:	29 May 2025