e-MANTSHI

A KZNJETCOM Newsletter

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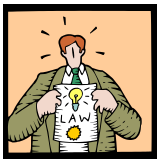
Welcome to the hundredth and fortieth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is a search facility available on the Justice Forum website which can be used to search back issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.

"e-Mantshi" is the isiZulu equivalent of "electronic Magistrate or e-Magistrate", whereas the correct spelling "iMantshi" is isiZulu for "the Magistrate". The deliberate choice of the expression: "EMantshi", (pronounced E! Mantshi) also has the connotation of respectful acknowledgement of and salute to a person of stature, viz. iMantshi."

Any feedback in respect of the newsletter can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. In accordance with Rule 241(1)(b) of the Rules of the National Assembly of the Parliament of the Republic of South Africa a notice was published in Government Gazette no 41498 dated 16 March 2018 whereby notice is given that the Minister of Cooperative Governance and Traditional Affairs intends to introduce the Customary Initiation Bill, 2018 in the National Assembly. This Bill seeks to provide for the effective regulation of customary initiation practices. The main objectives of the Bill are-

(a) to protect, promote and regulate initiation;

(b) to provide acceptable norms and standards with a view to ensure that initiation takes place in a controlled and safe environment; and

(c) to provide for the protection of life and the prevention of any abuse.

The Bill consists of five chapters:

(a) Chapter 1 deals with matters relating to interpretation (definitions); application; objectives; prohibitions; and guiding principles.

(b) Chapter 2 deals with oversight and coordinating structures. Provision is made for a National Initiation Oversight Committee (NIOC) and Provincial Initiation Coordinating Committees (PICCs).

(c) Chapter 3 deals with the responsibilities, roles and functions of key role-players, including government, traditional leaders and houses of traditional leaders.

(d) Chapter 4 deals with governance aspects relating to initiation schools and includes provisions relating to consent, prohibitions, age and circumcision.

(e) Chapter 5 deals with general matters such as offences, appeals, regulations, monitoring, provincial peculiarities and interim arrangements.

Electronic copies of the Bill and the Memorandum on the Objects of the Bill can be obtained from RinaldiB@cogta.gov.za, TrishaR@cogta.gov.za or Danie@cogta.gov.za.

2. The Minister of Justice and Correctional Services has issued a notice that he intends to create magisterial districts and establish district courts in the Kwazulu Natal Province, the Eastern Cape Province and the Northern Cape Province as part of the rationalisation of magisterial districts. The notice to this effect was published in Government Gazette no 41552 dated 29 March 2018. Comments regarding the proposed districts, sub -districts and appointment of courts and places for the holding of a court may be submitted in writing on or before 15 May 2018 to the following address: The Director General, Department of Justice and Constitutional Development. Private Bag X81, Pretoria. 0001 for the attention of Mr. M Moagi; email. makmoagi @justice.gov.za. The notice can be accessed here: http://www.justice.gov.za/legislation/notices/2018/20180329-gg41552_gon407-MDkzn.pdf

Recent Court Cases

1. S V FLOBELA (17258) [2018] ZAWCHC 31 (12 MARCH 2018)

The Court should explain to an unrepresented accused the nature of any hearsay evidence, the purpose for which the prosecutor wants to tender such evidence and the prejudice and consequences that might flow from the admission of such evidence. It should further inform the accused that there is no obligation upon him or her to agree or to admit to such evidence, because the onus rests on the State to prove such evidence beyond reasonable doubt.

Henney J

[1] This is a matter that was submitted for automatic review before Van Staden AJ on 5 April 2017. This was after the accused had been convicted by the Magistrate of Cape Town on a charge of housebreaking with intent to steal and theft, that was committed on 24 August 2016. The allegations against him was that he broke into a residential premises belonging to the complainant and stole one bicycle, to the value of R10,000.

[2] He was also charged in the alternative on one count of the contravention of section 36 of the General Law Amendment Act 62 of 1955, in that he was found in possession of stolen property referred to in the main charge on the date, time and place as mentioned in the main charge ("Possession of stolen property").

[3] At the first appearance of the accused before the Magistrate, the accused elected to conduct his own defence and not to acquire any legal representation. The accused pleaded not guilty, on the main as well as the alternative charge. After his rights were explained by the Magistrate during the plea proceedings, he elected to remain silent.

[4] The Magistrate, however, found the accused guilty on the main charge of housebreaking with the intent to steal and theft. He was acquitted on alternative charge. And he was sentenced to 24 months, imprisonment. At the time when Van Staden AJ was seized with the matter, he immediately ordered that the accused be released from custody and referred the matter back to the Magistrate with some queries. These are:1) the Magistrate was informed that the complainant had passed away, because it seemed that the complainant had passed away on 7 December

2016 before the trial commenced on 18 January 2017. And at that time, no discussion took place that the complainant had passed away; 2) whether it was fair and in the interests of justice to expect of an undefended accused to agree that the affidavit of the complainant be accepted as evidence; 3) whether the accused should not at that stage when it was discovered that the complainant passed away have been advised of his right to legal representation before he was expected to agree to the Statement of the deceased being allowed as evidence; 4) whether the evidence in this matter justify a conviction of the accused on a charge of housebreaking, when the charge sheet revealed that the accused had the intention to steal, break open and enter a residential premises. Especially, in the light of the fact that in the Statement of the complainant that was admitted into evidence, he stated that the garage door was open, but he could not say how this happened. Lastly, he enquired whether the allegations in the affidavit of the deceased complainant were sufficient to sustain the conviction of the accused in the charge of housebreaking.

[6] The Magistrate in his response to the query regarding his admission of the hearsay evidence, States that he was advised by the prosecutor that the accused would elect to conduct his own defence, prior to the commencement of the trial. He was also advised at that stage by the prosecutor that the complainant had passed away, and that the State intended bringing an application to make use of hearsay evidence.

[7] He further stated that he was duly aware of the technical nature of the Law of Evidence Amendment Act 45 of 1988, which regulates the admission of hearsay evidence during a trial. When this happened, he stated that he once again warned the accused of his rights to legal representation and it took some time to explain the technical nature of the application.

[8] He also at that stage went so far to summon the assistance of a legal aid practitioner, who once again informed the accused that he qualified for Legal Aid and who was prepared to assist him but the accused declined the offer. The accused was adamant that he wanted to conduct his own defence. The uptake of what the Magistrate said was that as soon as he became aware of the fact that the complainant had passed away, and that the State intended to present this hearsay evidence, he went out of his way to encourage the accused to make use of the services of a legal representative.

[9] He further stated that he made the accused aware of his fair trial rights which included an explanation of his rights after the State had concluded its case. This included his right to remain silent, the right to testify and call witnesses. He also explained to him the consequences of closing his case without leading any evidence.

[10] As to the question whether on the hearsay evidence, he admitted, whether the State had proven that the accused had indeed broken into the garage, the Magistrate

says that on a conspectus of evidence based on this affidavit, the only reasonable inference to which the Court could come to was that in order for the accused to have come into the possession of this bicycle, he had to break into the garage.

The Evidence

[11] The first witness, Holger Doepke testified for the State, that he is a member of the local Neighbourhood Watch. On 24 August 2016, he received information over the radio that someone had broken into a property and have stolen a bicycle. According to this information, the person was wearing a black pants, had a pink backpack on his back and he was riding the stolen bicycle.

[12] He further received information that the person was travelling down Blaauwberg road into the direction of Potsdam road. This witness testified that he was travelling on a motorcycle and it was easy for him to travel through the traffic, when he arrived at the corner of Blaauwberg and Potsdam road, he tried to stop the suspect, who refused to adhere to his instruction. The suspect, however, ran straight into the arms of another member of the Neighbourhood Watch. He was arrested and handed over to the law enforcement officers of the City of Cape Town who later appeared on the scene.

[13] He further testified that the accused never said to him that the bicycle was given to him by some unknown white person. The witness also stated that he was present at the police station when the owner of the bicycle came to lay a charge.

[14] The next witness, Alfonso Williams, is a law enforcement officer for the Melkbos area. He holds the rank of constable. On 24 August 2016, he was on duty doing patrols in the Milnerton area. On the corner of Blaauwberg and Potsdam roads, he observed that a number of people were standing in the roadway. He came across two gentlemen belonging to the local Neighbourhood Watch, who held on to the accused. They required his assistance to take the accused to the local police station because he was suspected of having stolen a bicycle. There was a bicycle on the scene, which according to his knowledge was a mountain bicycle, it was black and the word “Silverback” was written on the side thereof. There was also a helmet and a water bottle mounted to the bicycle.

[15] After he had taken the accused to the police station in Table View, the owner of the bicycle arrived at the police station. The owner identified the bicycle as his. The accused was asked to give an explanation for his possession of the bicycle and he said that he got it from his wife. The accused did not tell him that he got the bicycle from a white woman.

[16] The Magistrate thereafter took it upon himself to ask this witness a few questions from which the following evidence emerged:

That the house was broken into on 24 August 2016; That he had spoken to the owner at the police station said, who said it is his bicycle; That the owner did not give him a time when the property was broken into and when his bicycle was stolen; That the owner identified the bike and the helmet and he was also looking for a water bottle and a speedometer; That subsequently this speedometer was found in the helmet; That the bike was in a fairly good condition and that it was not old or broken; That the owner did not say what the value of the bicycle was, but in his opinion, the value thereof would most probably be between R10 000 and R15000. The matter was thereafter postponed after the prosecutor requested an adjournment 17 February 2017.

[17] The prosecutor informed the Magistrate that he will be bringing an application that the hearsay evidence of the deceased complainant be admitted into evidence, in the words of the prosecutor in terms of *"Hearsay Evidence Act, section 2 (C) (1) to submit a Statement of the complainant who passed away, who passed on."* As a result of this, the Magistrate explained the following to the accused (record page 31); "*Mr Flabela let me just explain to you what is happening now. The State is saying that the State wants to adduce evidence of a person, but that person has subsequently died. But the law makes provision that the State can bring an application that hearsay evidence be allowed. The problem is that that person, the State wants to call for the hearsay evidence to be allowed is the investigating officer and he is not available."*

[18] Then the Magistrate further explains to the accused (record page 32): "The *second issue is the State is asking that if you agree that, that Statement be handed in, then it will not be necessary to bring an application in terms of the Law of Evidence Amendment Act to allow the hearsay evidence. In other words, the Statement will be handed in by consent. Those are the two issues. The first issue is the request for a postponement to get, the witness year. Is there anything you would like to say with regard to that issue."*

[19] In answering the Magistrate, the accused says that he would like to continue with the case because he has been in jail for a long time. The Magistrate then asked him if he would have any objection if the said Statement is handed in. The accused then said that he did not have a problem with that. After a further explanation, the Magistrate persisted in asking the accused if he has any objection if the Statement of the witness would be handed in. The accused once again said that he would not have any problem if the Statement is admitted into evidence. It was as a result of this answer that the Magistrate admitted the Statement into evidence. The Statement was read into the record.

[20] In the Statement of the deceased witness he says that on Wednesday 24 August 2016 at approximately op is five, he heard a door bell ringing. He went outside and he saw one African male driving a white bicycle. He observed that this person was driving out immediately (sic). The garage door was widely (sic) open, but

the gate (sic) for the property was still locked. He further says the bicycle was in the garage and he does not know how the person opened the garage door. (p35). This witness, further Stated that luckily there was a woman who was working down the street and she notified the Neighbourhood Watch. He says further that the suspect was caught later by a member of the Neighbourhood Watch with his bicycle. Lastly, he says the bicycle was black, with tyres valued at R10 000.

[21] A second Statement of this deceased witness also admitted into evidence, wherein he states that he pointed out his bicycle, to the police. The bicycle is black in colour and that the make is Silverback. He further identified a black helmet, a transparent water bottle and a broadband speedometer, as his property.

[22] The accused in his evidence says that the bicycle was given to him as a gift, and he was unaware of the fact that it was stolen. He was on his way home from the shop when he was approached by the Neighbourhood Watch people who arrested him. He was taken to Table View police station and requested them to take him back to the person who gave him the bicycle, but they refused to do that.

[23] He does not deny that he was driving the bicycle. He further testified that he does not know anything about the garage door of the complainant that was open. He further does not dispute that the bicycle that was found in his position was the bicycle complainant described as his. He further says he did not see the complainant at the police station.

Discussion

[24] The Magistrate in his reasons, supplied as well as his judgment relied heavily on the hearsay evidence of the deceased witness. From this Statement he came to certain conclusions and made some findings as to the guilt of the accused and more especially the decision that the accused had broken into the garage of the complainant to steal his bicycle.

[25] It further seems that the prosecutor in cross-examining the accused relied heavily on the Statement of the deceased complainant (Record page 42). If there was no such evidence, it seems that the Magistrate would not have come to such a conclusion. It is not clear on what basis the Magistrate admitted the Statement of the deceased witness into evidence. The reasons for this confusion is because the Magistrate said to the accused if he agrees that the Statement can be handed in, then there would be no need for the prosecutor to bring an application in terms of the provisions of the Law of Evidence Amendment Act 45 of 1988 to have the Statement admitted into evidence.

[26] It is not clear whether he wanted the accused to make an admission in terms

of provisions of section 220[1] of the Criminal Procedure Act 51 of 1977 ("the CPA"), that the contents of the Statement be admitted into evidence in terms of the provisions of section 222[2] of the CPA. Or whether such hearsay Statement can be admitted in terms of section 3 (1) (a) of the Law of Evidence Amendment Act[3], where a party against such evidence is presented may agrees to the admission thereof.

[27] If the purpose of the Magistrate was to extract an admission in terms of the provisions of section 220 of the CPA, he failed to comply with the provisions said section, because the admission was not formally made. It was also not formally recorded. The Court also did not explain the content and the consequences that would follow if the Statement is admitted against the accused. The learned authors Schmidt and Rademeyer: Law of Evidence at 7-11 says… "*The requirement that the admission be made "formally" obliges the Court to record it fully and accurately. If it is not so recorded, Court of Appeal may possibly not be able to take cognizance of it. Not only the content of an admission has to be recorded, but also, where relevant, the Court explanation to the accused of the consequences of an admission of his right to remain silent."*
The Court should be more cautious in the case of an unrepresented accused. In this regard, the learned authors State the following at 7-10…" *When an accused is not represented the Court must proceed with caution. The accused must know the implications of a formal admission and must realise that he has no obligation to admit any fact. "*

[28] In *S v Daniels 1983(3) 275 (A)* and *S v Mavundla 1976(4) SA 731*, the principle has long been established that when an accused person wants to make an admission, but he lacks legal representation, the judicial officer trying must satisfy him or herself before accepting such admission that the accused decision to make it has been taken with the full understanding of its meaning and effect.

[29] The same principle would be applicable where an undefended accused person as in this case would agree to evidence being admitted against him in terms of the Law of Evidence Amendment Act. It has been said that[4] …"*Such consent may, however, be given without a full appreciation of the nature and extent of the prejudice*

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[1] Section 220, **Admissions**… " *An accused or his or legal advisor or the prosecutor may in criminal proceedings admit any fact placed in issue at such proceedings, and any such admission shall be sufficient proof of such fact."*

[2] **Section 222: Application to criminal proceedings of certain provisions of civil proceedings evidence act, 1965, relating to documentary evidence…"** *The provisions of sections 33 to 38 inclusive, of the Civil Proceedings Evidence Act, 1965 (Ac and t25 of 1965), shall mutatis mutandis apply with reference to criminal proceedings"*

[3] Section 3.(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

(a) Each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings.

[4] Commentary on the Criminal Procedure Act: Du Toit. De Jager,Paizes, Skeen and Van Der Merwe(vol2) [service 57,2016] at 24-49

that might ensue. *It is submitted that it will be a salutary practice, before this evidence is received against an accused in a criminal trial, the Courts to warn the accused of this danger, particularly when he is unrepresented. It would be preferable, too, to insist on his express consent and not to construe failure to object its reception as implied or tacit consent. There is, moreover, a duty on a judicial officer, when he becomes aware that the witness is-either deliberately or out of ignorance-giving hearsay evidence to explain the rule against hearsay to him in simple terms. (see S v Zimmierie en 'n ander 1989(3) SA 484 (C) v Congola 2002(2) SACR 383 (T) at* 386 c-e). *This duty assumes particular importance when the accused is unrepresented (see S V Ngwani 1990 (1) SACR 449(N)."*

In *Ngwani (supra) Didcott J* at 449 said: "*The only evidence linking the accused with the dagga, one thus sees, was blatantly hearsay in character. Endeavouring in reply to the review query to justify the conviction all the same, the magistrate maintains that s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 rendered the evidence admissible. But I am far from sure that the tests set by paras (iv) and (vi) of the subsection were met by such evidence in a case where everything turned on its admission and acceptance. To decide the question is, however, unnecessary. For the following seems inescapable. The accused, who was unrepresented, had to have the effect of the subsection fully explained to him, in contrast with the legal position were it not invoked. He had then to be heard on the important one raised by para (vi), the issue whether he would be prejudiced were it to be invoked. None of this happened*".

[30] The manner in which the Magistrate admitted the hearsay evidence in this particular case falls far short of what was required of him in terms of whatever provision such evidence were admitted, especially in a case like this where the accused was not legally represented. In fact, the Court should go further, and make an assessment, of the facts the accused places in dispute; consider the hearsay evidence that the State wants to present against the accused; and whether it would serve to prove the facts, upon which the onus rest on the State, the accused places in dispute.

[31] The Court should then explain to the accused, the nature of the hearsay evidence, the purpose for which the prosecutor wants to tender such evidence and the prejudice and consequences that might flow from the admission of such evidence. And further inform the accused that there is no obligation upon him or her to agree or to admit to such evidence, because the onus the rests on the State to prove such evidence beyond reasonable doubt.

[32] The Magistrate did not in any way explain to him the consequences of his decision; that he was not obliged to agree that such evidence could be admitted against him. And that the onus of proving the evidence as contained in the Statement was on the State. That it would be prejudicial to his case and most importantly, that

he would admit to evidence that would be harmful to his defence based on the fact that he denied he had broken into the garage and had stolen the bicycle of the complainant as alleged in the charge sheet.

[33] The Magistrate, it seems, did not take into account any of these considerations. And his failure to do so infringed the accused's right to fair trial in terms of section 35 (3) of the Constitution. It seems that the only reason why the accused agreed to have the Statement admitted into evidence was because he had been in custody for some time and wanted to finalise the matter, which may be convenient to the accused and expedite his right to a speedy trial, but it adversely affected his right to a fair trial.

[34] The Magistrate in relying on the hearsay evidence of the complainant, makes the following findings:

1) that the complainant heard his doorbell rang and went outside;
2) that he went outside and saw a person driving off with his bicycle;
3) that he gave a clear description of this person, the clothes, the person had on and a description of the bicycle;
4) that this description had been passed on Neighbourhood Watch immediately;
5) that a few minutes later the accused is apprehended and arrested based on the description by the owner immediately, with no time delay between.

[35] For the reasons as mentioned earlier on, the Magistrate in my view, committed a serious misdirection by admitting the hearsay evidence on the basis which he did. On the basis of this evidence, he made certain findings which resulted in the conviction on a charge of housebreaking with intent to steal and theft. Absent this evidence, he could not have made a finding that the accused had broken into the garage of the owner and it stolen the bicycle.

[36] It does not mean, however, that the accused is completely exonerated. The version of the accused as to how it came into possession of this bicycle, which the Magistrate correctly found was implausible, falls to be rejected and therefore not reasonably possibly true. His evidence as to why he came in possession of this bicycle is inconsistent and cannot be believed. It is not clear whether he had received this bicycle from a white man, a white woman or his wife.

[37] The Magistrate's findings in this regard, in my view, cannot be faulted. On the objective evidence, it is clear that moments before the accused was found in possession of this bicycle, it was stolen from the complainant by someone. It is not known who this person was. There is a great suspicion that it may have been the accused that could have stolen this bicycle, but there is no such evidence, to prove this fact beyond reasonable doubt. The State elected not to call in the absence of the complainant, the member of the Neighbourhood Watch, who had observed this person coming from the premises of the complainant with this bicycle. The link

between the theft of the bicycle and the subsequent finding of the accused in possession of the bicycle is missing.

[38] On the basis of this evidence, it is highly unlikely that this bicycle could have changed so easily from hand to hand. There is however, as said earlier, in the absence of the hearsay evidence, not any evidence upon which the Court could make a finding that there was a break-in at the house of the complainant. The explanation proffered by the accused as to his possession of this bicycle, is a dishonest one. He could not properly explain as to how he came into possession of this bicycle, and the only inference the Court can draw, which in my view, is the only reasonable inference, that the accused had stolen this bicycle from the complainant.

[39] I am therefore satisfied that the State has failed to prove that the accused had broken the garage of the complainant, but it has proven that the accused had stolen this bicycle. I would therefore set aside the conviction on the charge of housebreaking with intent to steal, but would confirm the conviction on the charge of theft of the bicycle.

[40] As regards sentence, when the matter was initially sent on the review before Van Staden AJ on 5 April 2017, by that time the accused had served 1 month and 16 days of sentence. At the time of his sentence on 17 February 2017, the accused was in custody since 25 August 2016, which was a period of almost 6 (5 months and 39 days) months. After this matter was sent back with the query to the Magistrate, it took more than 6 months before the Magistrate finalised the review query before he sent it back to the High Court.

[41] In his explanation that accompanied his reply to the query, he says that the reason for the late reply was because; the file had been erroneously misplaced in one of the Courts after it was supposed to be sent for typing. I find this explanation totally unacceptable. And that is once again one of those cases where the Magistrate has failed and neglected in a gross manner, to execute his duties as required by law.
Given the unsatisfactory explanation of the Magistrate, I am of the view that this matter should be brought under the attention of the Chief Magistrate of Cape Town, for his further consideration and possible action.

[42] In a recent judgment of this Court where it also dealt with delays in the finalisation of the matters from the Magistrate Court in *S v Jacobs: Swart; Davids; Jas; Klaasen; Swanepoel; and Xhantu 2017(2) SACR 546 (WCC)* at para 46 it was held… "*In Nyumbeka this Court previously held that even though the preparation of records for automatic review is primarily a function of the administrative component ie the clerk of each Magistrate's Court, it is ultimately the function of the Magistrate concerned to see to it that a proper and complete record of the proceedings and sentence that has been rendered in a particular matter that the Magistrate has presided in, is sent to the High Court. As was pointed out in Letsin a criminal matter*

which commences in the Magistrate's Court is not completed until any outstanding review in respect thereof has been concluded in the High Court and, in our view, in the same way as it is the Magistrate's duty to hand down a judgment timeously in respect of both the conviction as well as in respect of the sentence, in terms of Nyumbeka it is also accepted that post-sentence the Magistrate's duties include ensuring that the record is properly prepared and timeously dispatched to the High Court. As such, (as was pointed out in Letsin and Nyumbeka) Magistrates have duties and functions which go beyond merely adjudicating the matters before them. In terms of the Constitution and the law they have a duty to ensure that judgments of their Court and matters relating thereto are given effect to and they should not sit idly by and take it for granted that the administrative component of their Courts will implement and give effect to their directives."

[43] As a result of the delay by the Magistrate in submitting his reply, Van Staden AJ, had by that time completed his term as an acting judge, and the matter was sent to me to deal with. In the meantime, the accused had been released and in my view, the sentence imposed by the Magistrate, which was set aside by Van Staden AJ, has to be reconsidered, especially in light of the fact that the accused had been sentenced to 24 months, imprisonment on the charge of housebreaking with intent to steal and theft.

[44] Ideally, given the fact that the accused has a previous conviction, for housebreaking with intent to steal and theft, a sentence of direct imprisonment would not have been entirely inappropriate, but given the delay in the finalisation of this case and the fact that the accused had been freed from prison pending the finalisation of the review, it would be unfair and unjust to send him back to prison by imposing a sentence of direct imprisonment on review.

[45] I would therefore, make the following order:

1) that the conviction of the accused a charge of housebreaking with intent to steal and theft, is set aside and replaced with the following verdict:

The accused is found guilty on a charge of theft.

2) The sentence of 24 months imprisonment imposed by the Magistrate on 17 February 2017, is replaced with the following sentence:

Twelve (12) months imprisonment, which is suspended for a period of five (5) years on condition that the accused is not found guilty of theft, attempted theft or any competent verdict on a charge of theft and which is committed during the period of suspension.

3) that the registrar is requested to submit a copy of the judgment to the Chief Magistrate of Cape Town for his consideration and possible action against the Magistrate.

Phetoe v S (1361/2016) [2018] ZASCA 20 (16 March 2018)

In a conviction of an accused on a charge of rape as an accomplice all elements of the crime including mens rea has to be satisfied. The association or mere presence of the accused at the scene of the commission of the crime is not necessarily proof of assistance or encouragement.

The following is an edited version of the judgment in this case. The full judgment can be accessed here: http://www.saflii.org/za/cases/ZASCA/2018/20.html

Mocumie JA (Leach JA and Plasket AJA concurring):

The law and the facts: accomplice to rape

[12] In *Minister of Justice and Constitutional Development & another v Masingili & others 2014(1) SACR 437 (CC)* the Constitutional Court grappled with the meaning of the term 'accomplice'. Having considered the facts before it, it stated the following:
'An accomplice is someone whose actions do not satisfy all the requirements for criminal liability in the definition of an offence, but who nonetheless furthers the commission of a crime by someone else who does comply with all the requirements (the perpetrator).The intent required for accomplice liability is to further the specific crime committed by the perpetrator.'

[13] The learned author C R Snyman *Criminal Law* 6 ed (2014) at 266 describes the position as follows:
'Accomplice liability may be defined as follows:
1. A person is guilty of a crime as an accomplice if, although he does not satisfy all the requirements for liability contained in the definition of the crime and although the conduct required for a conviction is not imputed to him by virtue of the principles relating to common purpose, he unlawfully and intentionally engages in conduct whereby he furthers the commission of a crime by somebody else.
2. The word "furthers" in rule 1 above includes any conduct whereby a person facilitates, assists or encourages the commission of a crime, gives advice concerning its commission, orders its commission or makes it possible for another to commit it.'

[14] Against this background, it is necessary to examine Ms M.'s evidence. In my view, the clear identification of the appellant by Ms M. could not be refuted as she knew him well prior to the incident. She also had sufficient opportunity within the confines of a single-room shack to positively identify him as he came into the shack with his co-accused and when he was lying on the bed after the first rape had occurred.

[15] Reverting to the basis on which the full court confirmed the convictions, and

applying same to these facts, I have to agree with Dama AJ on his reasons mentioned above in para [9]. To convict the appellant on the basis of his mere presence is to subvert the principles of participation and liability as an accomplice in our criminal law. For criminal liability as an accomplice to be established, there must have been some form of conduct on the part of the appellant that facilitated or assisted or encouraged the commission of the rape of Ms M. during the two separate incidents in her shack. Ms M.'s evidence does not disclose any assistance rendered by the appellants in the commission of the rapes; and the conduct does not amount to facilitation, assistance or encouragement. That, in my view, should have been the end of the matter. The fact that the appellant laughed after being asked why they were 'doing such a thing' may be conduct that showed his approval of what was happening, but that is not enough to establish his liability as an accomplice. In *S v Nooroordien & andere*,*1998(2) SACR 510 NC* in which two persons had been present when a murder had been committed, the court stated:
'Alles wat gebeur het mag, en het in alle waarskynlikheid hulle goedkeuring weggedra. Dit is egter nie genoeg nie…'at 524f-g

[16] Before us, the State relied on *S v Kock 1998(1) SA 37 (A)* but also conceded that the facts of that case are distinguishable from the present appeal. In *Kock* the appellant was charged with rape together with his co-accused. During the rape of the complainant by the appellant's co-accused, the appellant stood guard with a panga while accused 1 was raping the complainant. In the appeal before us, the least that can be said about the appellant's conduct of laughing and doing nothing to prevent the rapes, is that it was morally reprehensible. That, and his mere presence at the scene, is not enough to justify a conviction as an accomplice to rape.

[17] As no *actus reus* has been established by the evidence, the appellant's convictions as an accomplice in respect of the rape of Ms M. cannot succeed. For the reasons set out immediately below, the appellant's conviction as an accomplice to the rape of Ms N. must also be set aside.

Common purpose on the remaining offences where the appellant was not present.

[18] In respect of the remaining charges of being an accomplice to rape, including the rape of Ms N., housebreaking, with intent to rob and robbery with aggravating circumstances, common assault and assault with intent to do grievous bodily harm, housebreaking with intent to rob and attempted robbery with aggravating circumstances and malicious injury to property, which were committed at other households, the trial court found that a prior agreement must have been reached by all those identified at any of the sites at which crimes had been committed. It was on this basis that the appellant was convicted even though he was only identified at Ms M.'s shack. It reached this conclusion by inferential reasoning: because so many offences were committed by so many people at so many places, those who were

identified must have agreed beforehand to the rampage and everything that it entailed. This is not, however, the only reasonable inference to be drawn and certainly in respect of the appellant, it cannot be said that because he was seen at Ms M.'s shack he was party to a prior agreement and was present at all of the other scenes.

[19] In the absence of any prior agreement, the State had to prove the following requirements of the doctrine of common purpose as set out in *S v Mgedezi 1988(1) SA 687(A)* in order for the appellant to be held criminally accountable. Firstly, the appellant was present at the scene of violence. Secondly, he was aware of the perpetration of such offences on the complainants in the other households. Thirdly, he had intended to make common cause with those who were actually perpetrating the offences. Fourthly, he manifested his sharing of a common purpose with the perpetrators of the offences by himself performing some act of association with the conduct of the others. Fifthly, he had the requisite mens rea i.e he intended to assault, break in and rob or must have foreseen the possibility of the commission of these offences and performed his own act of association with reckless disregard as to whether or not such eventuality ensued.

[20] In my view, there was no such evidence to prove that the appellant was present at the scenes of violence where the rapes, assaults, housebreakings, robberies and other offences were being committed other than at the household of Ms M. and Ms N. . Nor was it proven that he had the requisite mens rea, was aware of the violence taking place in the other households and had manifested his sharing of a common purpose with the perpetrators of the rapes, assaults, housebreakings, robberies and other offences. The Constitutional Court in *S v Molimi 2008(2) SACR (CC)* para 50 put it aptly as follows:
'It is a cardinal principle of our criminal law that when the State tries a person for allegedly committing an offence, it is required, where the incidence of proof is not altered by statute .., to prove the guilt of the accused beyond reasonable doubt. That standard of proof, "universally required in civilised systems of criminal justice," is a core component of the fundamental fair trial right that every person enjoys under s 35(3) of the Constitution. In *S v Zuma and Others*, this Court, *per* Kentridge AJ, held that it is always for the prosecution to prove the guilt of the accused person, and that the proof must be beyond reasonable doubt. The standard, borrowing the words used by Plasket J in *S v T*, "is not part of a charter for criminals and neither is it a mere technicality." When the State fails to discharge the onus at the end of the case against the accused, the latter is entitled to an acquittal. '
Thus the appellant ought not to have been convicted of all the other charges except the charge in respect of count 9.The concession in respect of count 9 was made correctly so. In my view, therefore, the trial court and the full court erred in convicting the appellant of any of the charges with the exception of count 9.

[21] The events of that night were aptly described by the full court as a 'reign of terror,

an orgy of violence and pillage which included a paralysis of fear, morbidity, hopelessness and a psychosis of defencelessness' in the complainants.' This court is sensitive and aware of these violent crimes perpetrated against women and children. But there is a more onerous duty on courts to ensure that there is an adherence to the rule of law to the extent envisaged by our Constitution where everyone is treated equally before the law. To use the words of Plasket J in *S v T*: *2005(2) SACR 318(E)* 'The State is required, when it tries a person for allegedly committing an offence, to prove the guilt of the accused beyond reasonable doubt. This high standard of proof – universally required in civilised systems of criminal justice – is a core component of the fundamental right that every person enjoys under the Constitution, and under the common law prior to 1994, to a fair trial. It is not a part of a charter for criminals and neither is it a mere technicality. When a court finds that the guilt of an accused has not been proved beyond reasonable doubt, that accused is entitled to an acquittal even if there may suspicions that he or she was, indeed, the perpetrator of the crime in question. That is an inevitable consequence of living in a society in which freedom and the dignity of the individual are properly protected and are respected. The inverse – convictions based on suspicion or speculation – is the hallmark of tyrannical systems of law. South Africans have bitter experience of such a system and where it leads to'.

From The Legal Journals

Couzens, M

"*Le Roux v Dey* and Children's Rights Approaches to Judging".

***PER* / *PELJ* 2018(21)**

Abstract

The South African jurisprudence on the rights of children is vibrant and generally progressive, and is supported by an enabling constitutional and statutory framework. The majority decision in Le Roux v Dey 2011 3 SA 274 (CC), however, ignores the rights of children, and this is in stark contrast to some of the minority judgments in the same case. This contrast is surprising, considering that all of the

judges applied the same legal framework. With reference to an emerging interest in defining children's rights approaches to judging, this article critically analyses the majority and minority judgments, and establishes their vulnerabilities and strengths as children's rights judgments. In the process, suggestions are made in relation to defining a children's rights approach to judging.

Electronic copies of any of the above articles can be requested from gvanrooyen@justice.gov.za)

Contributions from the Law School

Children: Competence and Oath Taking

Before a child witness may give evidence, the presiding officer must be satisfied that he or she is a competent witness. The term 'competence' refers the ability to give evidence in a court of law. If a witness is found to be incompetent by the court, the witness is denied the opportunity of taking the witness stand altogether[5]

There is a general presumption in our law that all potential witnesses are competent. This means that their competence is assumed, unless the contrary is proved. Section 192 of the Criminal Procedure Act 51 of 1977 provides that 'every person not expressly excluded from this Act from giving evidence shall, subject to the provisions of section 206, be competent and compellable to give evidence in criminal proceedings.' There is no express provision in the Act relating to the competence of children to give evidence in criminal courts. Section 206 of the Criminal Procedure Act 51 of 1977 provides that the law as to the competency, compellability or privilege of witnesses which was in force in respect of criminal proceedings on the thirtieth day of May 1961 shall apply in any case not expressly provided for in this Act or in any other law. This is thus the law which applies to the competence of children to give evidence in criminal court. In the case of children, the duty is on the witness to satisfy the court that he or she is competent.

In terms of the applicable law, children will be regarded as competent to give evidence only if the court is satisfied that the child understands what it means to tell the truth, and can understand and answer questions put to him/her.[6] There is no specific age at which a child can automatically be assumed to have competence to

[5] DT Zeffertt; AP Paizes & Skeen The South African Law of Evidence 1 ed, 2003 Lexis Nexis, Jhb at page 665.
[6] DT Zeffertt; AP Paizes & Skeen The South African Law of Evidence 1 ed, 2003 Lexis Nexis, Jhb at page 671.

testify. In each case the presiding officer must satisfy him or herself that the child has the necessary competence. [7]

The crucial question is whether, subjectively, the presiding officer is of the opinion that the child understands the concept of truthfulness. The presiding officer can satisfy himself or herself of this by asking questions of the child; counsel may also pose questions to this end.[8] Expert witnesses may also be called. In South African courts, children as young as three (3) have been found to be competent to testify in court.[9] But this is the exception rather than the norm. With younger children particularly, extraordinary skill is required to truly establish whether the witness understands what it means to tell the truth. It appears that many of the presiding officers in South African courts are woefully ill equipped to illicit the information required to make such an assessment.[10] The difficulty is compounded when an interpreter is used. It has been said that magistrates often lack any expertise in assessing the competency of children to testify.[11]

The consequences of the presiding officer not establishing the competence of the child witness are extremely serious. The child's evidence will be inadmissible – and this can lead to the conviction of the accused being set aside by a higher court. There are many examples of this in our case law. For example, in the case of *S v T*[12] it was clear that the trial court magistrate had not been convinced that the child understood the concept of truthfulness. That in itself was sufficient to render the proceedings irregular. The magistrate in the case erred further by allowing the five year old child to testify by whispering her answers to questions to her mother who then relayed them to court. There is nothing in our law which allows for this – and this too rendered the trial irregular. The conviction of the accused was thus set aside.

In a more recent case, *S v Kondile*[13] , the only question asked of the child witness to establish competence was: "Do you know what it means to tell the truth?" to which the child replied "Yes- it is to tell the truth". The magistrate accepted this as showing that the child was competent. However, when the case was taken on review, the high court found that there was no basis in the brief exchange to conclude that the child understood the concept of truthfulness. The conviction of the accused on one of the charges against him was set aside on this basis.

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[7] *S v L* 1973 (1) SA 344 (C); *S v T* 1973 (3) SA 794 (A).
[8] DT Zeffertt & AP Paizes The South African Law of Evidence 2 ed, 2009 Lexis Nexis, Jhb at page 813
[9] see, for example, *R v Manda* 1951 (3) SA 158 A; *R v Bell* 1929 CPD; *R v J* 1958 (3) SA 699.
[10] South African Law Commission, Issue Paper 10, Project 108, Sexual Offences Against Children at pg 70, fn 175.
[11] S v F 1989 1 SA 460 (ZH).
[12] *S v T* 1973 (3) SA 794
[13] *S v Kondile* 2003 (2) SACR 221 (CkH), discussed in N Whitear-Nel Evidence:Recent Cases 2004 17 South African Journal of Criminal Justice 131 at 133-4

Next I consider the administration of the oath.

Section 162 of the Criminal Procedure Act 51 of 1977 requires that all witnesses be sworn in before testifying. There are two exceptions to this rule, which are contained in sections 163 and 164 of the Criminal Procedure Act 51 of 1977. Section 163 provides that if the witness objects to taking the oath he or she may make an affirmation to tell the truth instead. The affirmation is phrased similarly to the oath, but omits any reference to God. Section 164 of the Criminal Procedure Act 51 of 1977 provides that if a person is unable to understand the nature and effect of the oath or affirmation, he or she may be allowed to testify provided the presiding officer simply admonishes the witness to tell the truth.

In *R v Manda*[14] it was observed that "A child may not understand the nature or recognise the obligation of an oath or an affirmation and yet may appear to the court to be more than ordinarily intelligent, observant and honest."

Prior to the admonishment being administered, the court must be satisfied that the child can distinguish between truth and lies.[15]

Prior to the landmark case of *S v B*[16] the court held that before a presiding officer would be legally justified in admonishing a child to tell the truth he would have to explicitly establish from the child that he or she did not understand the nature and sanctity of the oath or affirmation. The unfortunate legal consequence flowing from this approach was that in cases where presiding officers did not specifically ask the child witness whether he or she understood the oath – and simply proceeded to warn the child to tell the truth, the evidence given by the child witness was regarded as inadmissible.[17] Inadmissible evidence must be completely disregarded by the court. Thus, in cases in which the presiding officer had convicted the accused on the basis of the child's evidence, the conviction would be overturned by a higher court. This occurred in alarmingly many cases.[18]

The Supreme Court of Appeal in the case of *S v B* 2003 (1) SACR 52 SCA took a different approach to section 164 of the Criminal Procedure Act 51 of 1977, and held that the presiding officer does not have to hold an explicit enquiry to determine that a child witness does not comprehend the oath or affirmation before proceeding to admonish the witness to tell the truth. All that is required in terms of this approach is

[14] *R v Manda* 1951 (3) SA 158 (A) at 163
[15] *S v V* 1998 (2) SACR 651 (C), *Matshiva v The State* [2013] ZASCA 124
[16] *S v B* 2003 (1) SACR 52 (SCA)
[17] KD Muller God and Damnation: The Meaning and Religious Sanctity of the Oath (2013) 37:1 *De Jure* 135.
[18] See for example *S v Kondile* 2003 (2) SACR 221 CkH, *S v Malinga* 2002 (1) SACR 615 N, PJ Schwikkard The Abused Child: A Few Rules of Evidence Considered (1996) *Acta Juridica* 148; PJ Schwikkard Case Review: Evidence – Children's Testimony 2002 15:3 *South African Journal of Criminal Justice* 402.

that there be some rational basis to justify the presiding officer reaching the conclusion that the witness did not understand the oath or affirmation. The court held that in some cases the mere age of the witness would be sufficient to justify the conclusion that the child did not understand the oath – but did not specify at what age it could be assumed that the child could not comprehend the nature and sanctity of the oath. This decision was confirmed in *Director of Public Prosecutions, Kwa Zulu Natal v Mekka*.[19]

In the case of *S v Kondile* 2003 (2) SACR 221 (CkH), the accused was convicted of housebreaking with intent to assault, and assault. The conviction on the count of assault rested solely on the testimony of a ten year old child who was assaulted by the accused after he broke into the house. The case went on automatic review to the Ciskei high court. The court set aside the conviction on the count of assault on the basis that the complainant child's evidence was inadmissible. This was but a small victory for the accused as the court did not alter the original sentence imposed by the court a quo.

The magistrate in the court a quo admonished the witness to tell the truth, but was found not to have complied with s 164 of the Criminal Procedure Act 1977 in that he neglected to establish whether the child understood the nature of the oath or affirmation before electing to administer the admonition.

The Ciskei high court held that it was apparent that s 164 required an enquiry before the decision to administer the admonition be taken. This finding runs counter to the decision by the Supreme Court of Appeal in the case of *S v B*[20] (confirmed in *Director of Public Prosecutions, KZN v Mekka*[21] to the effect that an investigation is not required - all that is required is that the presiding officer form the opinion that the witness does not understand the nature and import of the oath or affirmation.

In the present case there was no basis on which the presiding magistrate could have formed the opinion that the child could not understand the oath or affirmation, or that the child was a competent witness. This is because the only relevant question asked of the witness was 'Do you know what it means to tell the truth?' to which the child replied: 'Yes - it is to speak the truth.' The high court found that there was no basis in this exchange to conclude that the admonition should be administered, nor that the witness was competent.

The magistrate attempted to justify his omission by explaining that questions pertaining to a child witness's competence should be kept to a bare minimum to minimize the witness's stress. The high court correctly dismissed this reasoning as fundamentally flawed - stressing that competence and the justification for

[19] *Director of Public Prosecutions, KZN v Mekka* 2003 (4) SA 275 (SCA)
[20] *S v B* 2003 (1) SACR 52 (SCA)
[21] *Director of Public Prosecutions, KZN v Mekka* 2003 (4) SA 275 (SCA)

admonishing the witness must be established. It goes without saying that this should of course be done with the utmost sensitivity.

There is strong opinion to the effect that the general presumption of competence should apply to children - in which case it would still be necessary for the magistrate to comply with s 164 in establishing that the witness did not understand the nature and import of the oath and affirmation prior to administering the admonition. It would not however be necessary for him to establish that the child understands the meaning of telling the truth, can distinguish between right and wrong and can act in accordance with that appreciation. This would be presumed until the contrary is proved.

The conflicting approaches were tested in the case of *S v Chalale*[22] where the magistrate did not enquire as to whether two child witnesses understood the oath before proceeding to admonish them to tell the truth. The case went on review to a higher court and one of the grounds of review was that section 164 of the Criminal Procedure Act 51 of 1977 had not been complied with. The child witnesses in this case were aged fifteen (15) and seventeen (17). The magistrate argued that he had assumed on the basis of the witnesses' age that they lacked the capacity to comprehend the oath, and had thus proceeded to admonish them to tell the truth. The high court disagreed with the approach taken by the magistrate, holding that children of fifteen (15) and seventeen (17) usually do understand the nature and sanctity of the oath, and cannot therefore be presumed not to understand it. There was thus no rational basis for the magistrate to have concluded that the admonishment could be applied without enquiry into the witnesses understanding of the oath.

In the case of *S v Gallant*[23] the high court made a similar finding where the child witnesses were eleven (11) and fourteen (14) holding that the magistrate was not justified in simply assuming that they would not understand the oath in view of their ages. The court observed obiter that it would usually only be justified in assuming a lack of understanding of the oath from age seven downwards. The magistrate therefore acted irregularly in admonishing them without holding a formal enquiry into their appreciation of the oath. Another error made by the magistrate in this case was to assume that because certain of the witnesses were of the Islamic faith they would automatically object to taking the oath. Although the oath has a religious connotation – it is not linked to any one particular religion. In view of the irregularities in this case, the accused succeeded in the appeal against his conviction.

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[22] *S v Chalale* 2004 (2) SACR 264 (W), discussed in N Whitear-Nel Evidence Case Reviews 2005 18 South African Journal of Criminal Justice 106 at 106-7.

[23] *S v Gallant* 2008 (1) SACR 196 (ECD), discussed in N Whitear-Nel Evidence Case Reviews 2008 21 South African Journal of Criminal Justice 229 at 231-2.

There is no specific form that the admonishment must take. In the case of S v QN[24] the appellant argued that the complainant had not been correctly admonished, on the basis that section 164(2) of the Criminal Procedure Act (51 of 1977) had not specifically been referred to. This section provides that anything wilfully and falsely said under admonishment will result in the same penalties as if the evidence were sworn. The court held that the admonishment had not needed to refer specifically to the threat inherent in section 164(2) of the Criminal Procedure Act (51 of 1977) for it to be proper. In other words, there was no need to tell the six-year old complainant that punishment similar to that for perjury would follow if she wilfully and falsely stated an untruth.[25] The court held that all that was required was that the witness had to "understand that an adverse sanction will generally follow the telling of a lie."[26] This is correct, and it would be nonsensical to require a magistrate to warn a six-year old child (as the complainant was in this case) of the possibility of criminal sanctions for lying when such a child is in any event *doli incapax*. The court thus confirmed that the child was a competent witness, who had been properly admonished.[27]
In the case of *S v Matshivha*[28] , the appellant was convicted in the high court of rape and murder. He appealed against his conviction on both counts. It is the appeal against the conviction for rape that this discussion will focus on. The appellant's conviction of rape was based on the evidence of the complainant and her brother who were 8 and 13 years old respectively at the time of the trial. They both identified the appellant as the perpetrator of the crime. The Supreme Court of Appeal, *mero motu,* raised the question of whether the evidence given by the children was properly before the court in light of how the issue of their competence to testify was dealt with and how they were sworn in.

In order for a child to be a competent witness the child must be able to demonstrate that s/he understands the difference between truth and falsehood and must have sufficient cognitive ability, including the ability to understand questions put and formulate rational answers in response. There is no standard test for this.[29] If the child is competent the court must then proceed to swear the child in. The capacity to understand the distinction between truth and lies is a prerequisite for the oath or admonishment to be administered.[30]

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[24] *S v QN* 2012 1 SACR 1 SACR 380 (KZP), discussed in N Whitear-Nel & W Banoobhai Children's Evidence in Sexual Cases in the context of S v QN 2012 (1) SACR 380 KZP (2013) Obiter 359; N Whitear-Nel Evidence Case Reviews 2012 25 South Afrtican Journal of Criminal Justice 329 at 329-334..
[25] *S v QN* 2012 1 SACR 1 SACR 380 (KZP) at para 10. N Whitear-Nel & W Banoobhai Children's Evidence in Sexual Cases in the context of S v QN 2012 (1) SACR 380 KZP (2013) Obiter 359
At p 361
[26] *S v QN* 2012 1 SACR 1 SACR 380 (KZP) at para 11. N Whitear-Nel & W Banoobhai Children's Evidence in Sexual Cases in the context of S v QN 2012 (1) SACR 380 KZP (2013) Obiter 359
At p 361.
[27] *S v QN* 2012 1 SACR 1 SACR 380 (KZP) at para 11. N Whitear-Nel & W Banoobhai Children's Evidence in Sexual Cases in the context of S v QN 2012 (1) SACR 380 KZP (2013) Obiter 359
at p 361.
[28] *S v Matshivha* 2014 (1) SACR 29 (SCA)
[29] *S v Swartz* 2009 (1) SACR 452 (C) at para 20.
[30] *S v Swartz* 2009 (1) SACR 452 (C) at para 14.

The questioning of the child to establish whether she understands the difference between truth and lies should, in this author's submission, establish that the child understands that a lie involves deliberately deceiving another person by providing inaccurate, incomplete or otherwise misleading information. This need not be done in an overly technical manner.[31]

In this author's submission it would be desirable to develop a standard test to be used in South African courts to establish a child's competence to testify - although this would possibly raise the spectre of children being coached to 'pass' the test.

In the case of *S v Mokoena, S v Phaswane*[32] it was argued that the competency test should be abolished since even a child who could not demonstrate to the court that she understood the distinction between truth and lies might be capable of providing reliable testimony. This argument is in line with international research which suggests that there is little correlation between a demonstrated ability to distinguish truth and lies and actual truth telling.[33] This argument was however rejected by the Constitutional Court in the case of *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development*[34] where the Court held that the risk of false convictions was too high to abolish the competency test.[35]

The court must establish whether the child has the ability to understand the nature and the import of the oath. If so, the child may be sworn in in the usual way. If not, then the court must simply admonish the child to tell the truth. The admonishment must convey to the child that s/he is required to tell the truth and that there will be negative consequences if s/he does not. There is no set format for the admonishment. Empirical research suggests that truth telling is promoted by simply asking the child, in a developmentally appropriate way, to tell the truth.[36]

In *Matshivha's case*[37], it was established that the transcript did not contain the full record of all that had transpired between the judge and the child witnesses before they testified. The transcript was thus supplemented with an affidavit prepared after listening to the audio recording of the proceedings. The court assumed, without

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[31] *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 (2) SACR 130 (CC) at para 164.
[32] *S v Mokoena, S v Phaswane* 2008 (2) SACR 216 (T)
[33] JZ Klemfuss and SJ Ceci 'Legal and psychological perspectives on children's competence to testify in court' (2012) 32 *Developmental Review* 268 at 277.
[34] *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 (2) SACR 130 (CC)
[35] *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 (2) SACR 130 (CC) at para 165
[36] JZ Klemfuss and SJ Ceci 'Legal and psychological perspectives on children's competence to testify in court' (2012) 32 *Developmental Review* 268 at 275.
[37] *S v Matshivha* 2014 (1) SACR 29 (SCA)

deciding, that the affidavit could be taken into account in deciding on the question of the admissibility of the children's evidence.[38]

The Supreme Court of Appeal held that it was clear from the wording of s 164(1) of the Criminal Procedure Act 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 court held that the finding must be 'preceded by some kind of enquiry by the judicial officer to establish whether the
witness understands the nature and import of the oath.'[39]

If the enquiry shows that the child does not understand it, the court must establish whether the child can differentiate truth and lies, and if so, proceed to admonish the witness.[40] In analysing the questions put to the child witnesses, the court was not satisfied that there was a clear purpose behind the questions asked of the children. The court found further that the witnesses were 'simply sworn in before their capacity to understand the nature and import of the oath was established.'[41] The court referred to the case of *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development*[42]in which the Constitutional Court held that the reason it is imperative for a child witness to show that he understands the concept of truth is that a child who cannot show this is not reliable. In consequence the admission of the child's evidence in these circumstances would jeopardise the accused's right to a fair trial. The Constitutional Court held that what the court should be trying to ascertain is not whether the child has an understanding of abstract notions of truth and falsehood but simply that the child understands what it means to tell the truth.

With respect, the extracts quoted from the Constitutional Court case in *Matshivha* supra do not deal with the issue which was before it, which was whether it had been established that the children understood the nature and import of the oath before they were sworn In.[43] The court *a quo* had questioned the complainant about the distinction between truth and lies and she had said that she spoke truth not lies.[44] The court *a quo* had questioned the complainant's brother in this regard too and although the child clearly did not understand the judge's initial questions the child eventually said that when a person is telling the truth, he is saying things that he is sure of. This is a good definition of truthfulness, and the presiding officer was clearly impressed with the boy in this regard.

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[38] *S v Matshivha* 2014 (1) SACR 29 (SCA) at para 4.
[39] *S v Matshivha* 2014 (1) SACR 29 (SCA) at para 11.
[40] *S v Matshivha* 2014 (1) SACR 29 (SCA) at para 11.
[41] *S v Matshivha* 2014 (1) SACR 29 (SCA) at para 12.
[42] *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 (2) SACR 130 (CC)
[43] *S v Matshivha* 2014 (1) SACR 29 (SCA) at para 12.
[44] *S v Matshivha* 2014 (1) SACR 29 (SCA) at para 7.

It is clear from the supplemented transcript that the court *a quo* did not question the complainant at all on her understanding of the oath. However in respect of her brother, there was an attempt made to explain the concept of oath taking to him in a way he would understand. After the oath was administered the child said 'God help me to tell the truth.'[45]

Nevertheless, the Supreme Court of Appeal found that the questions put to the children were insufficient to establish that they understood the nature of the oath, and their evidence was thus set aside as inadmissible. Since their evidence formed the basis of the appellant's conviction, the conviction was set aside.

The decision in *Matshivha*[46] stands in contrast to that in the case *of Mangoma v S.*[47] In the *Mangoma* case[48] the appellant appealed against his conviction for the rape of his 13-year-old daughter. One of the grounds of the appeal was that the complainant and her brother, who were 13 and 12 years old respectively at the time of the incident, were not properly sworn in or admonished to tell the truth and that their evidence was thus inadmissible and unable to support the conviction.[49] In the heads of argument, the state conceded that the two child witnesses had not been properly sworn in and were not admonished to tell the truth. The court found that the concession was unwarranted, and the state then conceded that it had been made without proper thought and due to a misreading of the record.[50] (at para [3]). The record revealed that the children were sworn in, and that thereafter a very short enquiry into whether each of them understood the meaning of the truth had followed. The Supreme Court of Appeal noted that the sequence was wrong: the ability of a witness to understand the distinction between truth and falsehood must precede the oath or admonishment.[51] The Supreme Court of Appeal noted also that had there been any doubt about whether the children understood the nature and import of the oath, the admonishment ought to have been administered.[52] However the court found that there was nothing on the record to indicate that any doubt about whether the children understood the difference between truth and falsehood ought to have been entertained, and that notwithstanding the fact that the oath had been administered prior to establishing the children's competence, the principles established in the case of *S v B*[53] (and confirmed in *Director of Public Prosecutions, KwaZulu Natal v Mekka*[54]) ought to have been followed, namely: that all that was required was for the presiding officer to form an opinion that the children understood the oath, that a formal enquiry need not be held into this, and that the finding need not be noted.[55]

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[45] *S v Matshivha* 2014 (1) SACR 29 (SCA) at para 8.
[46] *S v Matshivha* 2014 (1) SACR 29 (SCA).
[47] *Mangoma v S* (155/13) [2013] ZASCA 205 (2 December 2013).
[48] *Mangoma v S* (155/13) [2013] ZASCA 205 (2 December 2013).
[49] *Mangoma v S* (155/13) [2013] ZASCA 205 (2 December 2013) at para 4.
[50] *Mangoma v S* (155/13) [2013] ZASCA 205 (2 December 2013) at para 3.
[51] *Mangoma v S* (155/13) [2013] ZASCA 205 (2 December 2013) at para 5.
[52] *Mangoma v S* (155/13) [2013] ZASCA 205 (2 December 2013) at para 5.
[53] *S v B* 2003 (1) SACR 52 (SCA).
[54] *Director of Public Prosecutions, KwaZulu Natal v Mekka* 2003 (2) SACR 1 (SCA).
[55] *Mangoma v S* (155/13) [2013] ZASCA 205 (2 December 2013) at para 15.

Accordingly the Supreme Court of Appeal found that there had been no irregularity regarding the admission of the children's evidence. The state conceded this point and agreed that the case should be decided on its merits.[56]

In the case of *S v Mudau*[57] the Supreme Court of Appeal commented that 'our country is plainly facing a crisis of epidemic proportions in respect of rape, particularly of young children. The rape statistics induce of sense of shock and disbelief.'[58] In such a climate, it is submitted that the evidence of child witnesses should not be excluded unnecessarily. The flexibility regarding the establishment of competence and the administration of the oath to children in *Mangoma*[59] is to be preferred to the more rigid approach shown in the *Matshivha* case.[60] It is in the interests of justice that child witnesses not be excluded unnecessarily.[61]

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[56] *Mangoma v S* (155/13) [2013] ZASCA 205 (2 December 2013) at para 5.
[57] *S v Mudau* 2013 (2) SACR 292 (SCA).
[58] *S v Mudau* 2013 (2) SACR 292 (SCA) at para 14.
[59] *Mangoma v S* (155/13) [2013] ZASCA 205 (2 December 2013)
[60] *S v Matshivha* 2014 (1) SACR 29 (SCA)
[61] *S v Swartz* 2009 (1) SACR 452 (C) at para 21.

Matters of Interest to Magistrates

Maintenance Act: May the prosecution decline to prosecute a s 31(1) matter?

By Marlene Lamprecht

Section 31(1) of the Maintenance Act 99 of 1998 creates the offence of failing to make payment in accordance with a maintenance order.
Section 31(1) states: 'Subject to the provisions of subsection (2), any person who fails to make any particular payment in accordance with a maintenance order shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years or to such imprisonment without the option of a fine.'
Section 31(2) states that a defence of 'lack of means', will not succeed if the prosecution proves that the failure to pay was due to the accused's 'unwillingness to work or misconduct'.
Regulation 22 of the Maintenance Act sets out the procedure that the complainant must follow in instituting a prosecution for failing to comply with a maintenance order: 'A complaint regarding a failure to make a payment in accordance with a maintenance order shall substantially correspond with Form Q of the Annexure.'
Form Q requires the complainant to state under oath, *inter alia:* 'The complainant is in arrears with his/her maintenance payments to the following extent.'
Form Q further requires the complainant to either: Attach 'A certified copy of the existing maintenance order' or to indicate that the order is 'on file at the Maintenance Court'.
Section 31(1) sets out two requirements for institution of a prosecution, namely:

- A court order.
- Evidence that the respondent has failed to comply with the court order.

May the prosecution insist on further and better evidence?
In many courts the practice has arisen that the National Prosecuting Authority (NPA), before instituting a s 31(1) prosecution, will require evidence that the defaulting party, at the time of the default, had the means to comply with the court order.
This additional requirement conflicts with the provisions of s 31(2).
The NPA relied on *S v Magagula* 2001 (2) SACR 123 (T) as being the authority, which introduced this additional requirement.

The *Magagula* case

At para 105, Stegmann J held in order to establish a contravention by the accused of failing to comply with maintenance order that the following elements must be proved –

'(1) a maintenance order directed to the accused;
(2) a failure by the accused to make a particular payment required by the order:
(3)(*a*) that at the time of his default, the accused had the means to comply with the order; or
(*b*) … if the accused has raised the defence of a lack of means, that the accused's lack of means was caused by his own unwillingness to work, or by his misconduct; and
(4) a guilty mind on the part of the accused (including knowledge of unlawfulness).'

It appears as though the NPA – when insisting on this additional requirement – did not distinguish between the institution of a prosecution and a conviction for the contravention.

Effect of the additional requirement

The practical difficulty of this additional requirement is that it is not always easy to produce satisfactory evidence that the defaulter had the means to comply with the court order. This is knowledge that is peculiarly within the knowledge of the defaulter.

Often, when the NPA is of the opinion that there is insufficient evidence to prove that 'the accused had the means to comply with the order', it will decline to prosecute the matter.

Effect of a *nolle prosequi*

The institution of criminal proceedings is usually the last resort of the complainant. It comes after the civil remedies for defaulting on a maintenance order, warrant of executions, emoluments attachment orders and attachment of debts have been unsuccessful or have not been able to be utilised.

Once the NPA has declined to prosecute the matter the applicant is often left without any relief. The ball is now in the hands of the defaulting respondent. The respondent may, in theory, apply in terms of s 19 of the Maintenance Act for the order to be varied or set aside. The difficulty with this solution is:

- Does the respondent know this should be done?
- Does the respondent want to do this?
- Is the respondent not paying because of inability or because they do not want to pay?
- Does the respondent's conduct amount to misconduct?
- Does the respondent have a guilty mind?

A *nolle prosequi* also means that the respondent is denied the opportunity of showing the criminal court that the lack of means was not due to any 'unwillingness to work or misconduct' on their part.

The practical effect of a *nolle prosequi* decision is that the maintenance court proceedings grind to a halt. Often the only hope available to the complainant is for the

respondent to change their mind, to resign or retire and to receive a lump payment or to die and leave something of value in the estate.

What about a s 41 conversion?

Section 41(*a*) provides for the conversion of criminal proceedings into a maintenance inquiry.

If during the course of any proceedings in a magistrate's court in respect of an offence referred to in s 31(1) it appears on good cause shown that it is desirable that a maintenance inquiry be held, the court may, of its own accord or at the request of the public prosecutor, convert the proceedings into such inquiry.

The institution of a criminal prosecution for failing to comply with a maintenance court order is distinguishable from an ordinary prosecution because the purpose of the prosecution is twofold –

- to determine whether the respondent committed an offence; or
- to determine whether the matter should be converted into a maintenance inquiry.

The institution of a criminal prosecution should not be seen only as a punitive measure, but also an opportunity of providing the respondent the right to have the maintenance inquiry re-opened.

The NPA by insisting on proof, before instituting a prosecution, that the respondent had the means to comply with the order, is limiting the application of the s 41 conversion and this has the effect of frustrating the purpose of s 41.

One of the main purposes of s 41 is to identify and assist respondents who either do not have the means to pay the maintenance court order or who have been wrongly ordered to make such a payment. A s 41 conversion may sometimes be seen as tantamount to a review of the original decision.

In criminal proceedings s 41 conversions are unique to maintenance defaulters.

Benefits of a s 41 conversion

A maintenance court, after hearing evidence, may substitute the original order or even discharge it. A criminal court, even if a person is found, 'not guilty', does not have the authority to discharge or substitute the maintenance order.

The role of the NPA in the *Magagula* decision

In the *Magagula* case, no fault was found on the part of the NPA in charging the accused for failing to comply with the maintenance order and relying only on –

- existence of a court order, and
- evidence under oath of a failure to comply with the court order.
-

The role of the magistrate in the *Magagula* decision

Criticism was leveled against the magistrate for –

- failing to establish that all the elements necessary for a conviction were either admitted or proved during the course of the criminal proceedings; and
- failing to convert the proceedings into an inquiry.

What if the NPA had declined to prosecute in *Magagula*?

If the NPA had declined to institute proceedings against Mr Magagula, the maintenance order would have continued to be of force and effect until set aside by a maintenance court. The arrear maintenance would have continued to accumulate. The complainant would have been entitled to institute civil proceedings for the recovery of the arrear maintenance. Should Mr Magagula have resigned or retired and received a lump sum payment the complainant would have been entitled to apply for an attachment of debt.

All in all, the best thing that happened to Mr Magagula and his other dependents was the institution of criminal proceedings.

Focus of the NPA

A policy of the prosecution aimed more at securing convictions rather than instituting a prosecution is problematic in the case of maintenance defaulters. A successful prosecution is not always the best outcome. Sometimes the best outcome is a conversion.

Rights of the child

One must not lose sight of the fact that a maintenance order is more than a civil judgment; it is the basis of a relationship between a child and the parents. A maintenance order is the embodiment of the right of a child to be maintained by their parents.

All organs of state must endeavour to ensure that there is compliance of s 9 of the Children's Act 38 of 2005.

In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied.

Conclusion

The NPA does not have the right to decline to prosecute a s 31(1) complaint if there is evidence of a valid court order and evidence under oath that the accused has failed to comply with the court order.

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A Last Thought

South African lower courts through the eyes of a candidate legal practitioner

Janet Reno once said: 'Being a lawyer is not merely a vocation. It is a public trust, and each of us has an obligation to give back to our communities.' Being a legal practitioner is an amazing opportunity to fight for the rights of those who cannot fight their battles themselves. It is an opportunity to fend for the people of South Africa.

I knew that my two years of articles was not going to be a 'walk in the park'. Everyone warned me. 'Working eight to five is tiring', they said. 'Dealing with all types of different people requires special skills', they said. 'You are going to be one of the lowest people in the food chain', they said. To be quite frank, I really accepted all of the above when I commenced my law studies.

I prepared myself for the worst: An uncomfortable working environment, being faced with a matter, which I do not know anything about, sounding like an inexperienced toddler if I decided to voice my opinion and all other types of different, distasteful scenarios. What I did not prepare myself for, is the manner in which things are done at court.

First of all, the courts are not concerned with time. It does not matter whether you have a taxation scheduled for 10:00 am or a trial that was set down, months ago, for 09:00 am. If you have to go to court you most definitely know that you are going to spend at least half a day there.

Secondly, the court clerks only assist you if they approve of your face. I am not being dramatic, it is really my take on the matter. The worst of all is the fact that they may like your face on Monday but despise it on Wednesday. This leads to documents that cannot be filed, papers that cannot be paginated, summonses and warrants that are not issued and stressed candidate legal practitioners who cannot explain to their principals why their work is not done.

Thirdly, it is an extraordinary day if the court personnel are actually available. In the past few weeks I have been confronted with closed or locked doors on more than one occasion, situations where I walked from floor to floor, and building to building where even the supervisor could not inform me of the whereabouts of her personnel. Then to add insult to injury, some of the personnel only pitched up at the office at 10:55 am and refused to help, because they were now entitled to a tea break.

Fourthly, a handful of court personnel are actually prepared to work. Adam says it's Eve and Eve says it is the snake. You get referred to so many different people, and each and every one tells you exactly the same thing: 'It is not my job and I am not prepared to assist you with this. You should rather ask person A on the fourth floor'. Once you finally find person A's office, person A informs you that they no longer deal with s 65 Applications and that you should go back to person B on the first floor.

We all have the opportunity to better the life of South Africans. When I say we, I am referring to candidate attorneys, attorneys, advocates, magistrates, judges, clerks and court personnel. We are confronted with desperate and helpless people on a regular basis and delaying the court process only adds to the burdens that so many people have to carry.

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