NOT REPORTABLE

CASE NO.: CA 13/2010

IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI

In the matter between:

SHAAMENE IMMANUEL **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: **LIEBENBERG J & TOMMASI J**

Heard on: 27 /06/2011
Delivered on: 23/09/2011

APPEAL JUDGEMENT

TOMMASI J: [1] The appellant in this matter noted an appeal against conviction and sentence. The appellant was convicted of rape (having contravened section 2(1)(a) of the Combating of Rape Act, 8 of 2000 and sentenced to ten (10) years imprisonment. The appellant was unrepresented during the trial in the regional court.

[2] The appellant, represented by Mr Shakumu, brought a substantive application for condonation for the late filing of the Notice of Appeal. The appellant provided this Court with an acceptable explanation and has shown that there are reasonable prospects of success on appeal.

[3] The appellant raised the following ground of appeal:

> *"The trial court misdirected itself in that it failed to apply section 164 (b) of the Criminal Procedure Act, Act 51 of 1977"*

[4] The complainant was 14 years old at the time she testified and was in grade 7. The record does not reflect that the complainant was sworn in or admonished. The magistrate, in his statement in terms of rule 67(3) of the Magistrate's Court Rules, stated that:

> *"It is my practice, that in all minor witnesses, I conduct a competency exercise by comparing a book with a pen (as it is at hand in court) to establish whether the witness understand(s) the difference between telling the truth and telling a lie. I cannot explain how it came that it was not transcribed or recorded"*

[5] The possibility that the transcribers failed to transcribe or record the procedure as set out by the magistrate in his statement exists. The magistrate however compiled a certificate of accurate report of the proceedings wherein he certified that the transcribed record is an accurate report of the proceedings. This ground was brought under the attention of the magistrate. The mechanical recordings should be in the possession of

the clerk of the court and it would have been of some assistance to this Court if the magistrate indicated that he had verified, after listening to the mechanical recording, that the disputed part of the proceedings was not recorded or it was recorded but not transcribed. This was not indicated in the statement made by the magistrate. It is difficult for the Court under these circumstances to be sure that the procedure as described by the magistrate in his statement indeed took place and the record must be deemed to reflect what was recorded thereon.

[6] Counsel for the appellant submitted that procedure adopted by the magistrate as outlined in his statement in terms of Rule 67(3) was incorrect, given the fact that the complainant was 14 years old at the time i.e that the court erred by admonishing the complainant. This is not entirely a correct interpretation of section 164 (1). Section 164 (1) of the Criminal Procedure Act, 51 of 1977 as amended by the Criminal Procedure Amendment Act, 24 of 2003 reads as follow:

> *"Any person –*
>
> *(a) who, from ignorance arising from youth, defective education or other cause, is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation; and*
>
> *(b) who is younger than 14 years shall be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation:*
>
> *Provided that such person shall in lieu of the oath or affirmation be admonished by the presiding judge or judicial officer to speak the truth, the whole truth and nothing but the truth."*[my emphasis]

[7] If the judicial officer finds that the witness due to youthfulness, do not understand the nature and import of the oath or affirmation, such witness may be admonished. In S v VM 2009 (2) NR 766 (HC) Shilungwe J on page 767 in. para 5 stated the following:

> *"Before unsworn or unaffirmed evidence can be admitted in terms of s 164, the presiding judicial officer must make a finding that the witness does not understand the nature or import of the oath or the affirmation for any of the reasons specified in s 164(1)(a). This entails an enquiry. Once such a finding has been made, the witness must be admonished by the presiding judicial officer to speak the truth. A sufficient comprehension of the nature and import of the oath requires not only an understanding of the religious obligation of the oath, but also an understanding of the meaning of the truth, which is the subject of the oath, and the difference between speaking the truth and falsehood. Where a witness does not understand the religious sanction of the oath, and resort is had to s 164 to admonish the witness to speak the whole truth, such witness cannot be admonished unless she comprehends what it is to speak the truth and to shun falsehood in her evidence. This capacity to understand the difference between truth and falsehood is, therefore, a prerequisite for the oath, the affirmation and an admonition in terms of s 164. See S v V 1998 (2) SACR 651 (C) at 652d - j. The presiding court must thus make an enquiry and satisfy itself whether the child understands the oath and understands what it means to speak the truth.*[my emphasis]

[8] Even if this Court is prepared to consider the possibility that the magistrate followed the procedure as outlined in his statement, it would not change the fact that the magistrate erred by not conducting an enquiry to ascertain whether the complainant, who was 14 years old and in grade 7, was competent to take the oath. The purpose of the "*competency exercise*" is to ascertain whether the witness understands the import of the oath i.e whether the witness understands the religious sanction of the oath to be administered; and what it means to tell the truth. Once it is found that the

witness understands the religious sanction of the oath and has the capacity to understand the difference between truth and falsehood, such a witness should be sworn in or affirmed as the case may be. It is only if the witness is found not to understand the import of the oath that he/she would be admitted to give evidence without taking the oath provided such a witness is admonished. [See *S v PIENAAR EN ANDERE 2001 (1) SACR 391 (C*)] There is no indication by the magistrate in his statement whether the witness testified under oath or was admonished.

[9] In the absence of an indication that there has been compliance with the provisions of section 164(1), it must be inferred that the complainant was not duly sworn in or admonished. This constitutes an irregularity. The testimony of a witness who has not been placed under oath or admonished:

> *"lacks the status and character of evidence (see S v Ndlela (supra at 225F-G); S v Mashava (supra at 226g-h)) and cannot support a conviction in a criminal trial (see S v Bothma (supra at 345B); S v T (supra at 796H); S v Ndlela (supra at 225H)).*"
>
> [S v N 1996 (2) SACR 225 (C) at page 230, D-E]

[10] The complainant was a single witness in respect of the alleged rape. The irregularity, under these circumstances, tainted the entire proceedings as there was no other evidence on record which could support the conviction of the appellant.

[11] Given the afore-mentioned irregularity it becomes unnecessary to deal with the other grounds of appeal.

[12] In the premises the following order is made:

1. Condonation is granted for non compliance with the provisions of rule 67(1) of the Magistrate's Court Rules
2. The appeal against conviction is upheld and the conviction and sentence are hereby set aside.

_____
TOMMASI J

I concur

_____
LIEBENBERG J