

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

REVIEW JUDGMENT

Case no: CR 40/2018

In the matter between:

THE STATE

v

VENASIU NAMIDI

ACCUSED

(High Court Review Case No. 316/2018)

Neutral citation: *S v Namidi* (CR 40/2018) [2018] NAHCNLD 89 (21 September 2018)

Coram: JANUARY J *et* SALIONGA A J

Delivered: 21 September 2018

Flynote: Criminal Procedure — Evidence — Competence of child witness — Application of section 164 of Act 51 of 1977 — Admissibility of unsworn evidence — Court to be satisfied that witness understands what speaking truth means — Unsworn evidence cannot be admitted without such enquiry.

Sentence — Accused charged with two separate offences — Convicted on two counts for which one sentence imposed — Review — Counts not taken together for sentence. Irregularity committed.

Summary: The accused was convicted of two counts of assault with intent to do grievous bodily harm and was sentenced to 12 months imprisonment wholly suspended for 5 years on condition accused is not convicted of assault with intent to do grievous bodily harm committed during the period of suspension. Complainants were 17 and 12 years old respectively when they testified. No inquiry was recorded but they were admonished. The evidence does prove a case beyond reasonable doubt save the omission by the magistrate to record the questions and answers from the enquiry. I take it that no proper admonishment was done. The magistrate could not have been satisfied that the witnesses could discern between truth and lies or untruths. The accused was convicted of two counts committed against two complainants on the same date and magistrate imposed one sentence. Counts were not taken together for sentencing purposes.

Failure by the magistrate amounts to irregularity that vitiates the proceedings. The convictions and sentence are set aside. Matter remitted to the magistrate to comply with s 164 of the Act.

ORDER

1. The conviction and sentence are set aside;
2. The matter is remitted to the magistrate to comply with the provisions of section 164 of the Act and to finalise the matter accordingly.

JUDGMENT

SALIONGA AJ (JANUARY J concurring):

Introduction

[1] Accused in this matter was convicted in the Ondangwa Magistrate Court on two counts of assault with intent to do grievous bodily harm read with the provisions of Act 4 of 2003. He was convicted and sentenced on 3 January 2018 to 24 months imprisonment of which 12 months are suspended for 5 years on condition accused is not convicted of assault with intent to do grievous bodily harm committed during the period of suspension.

[2] The accused was not represented at the trial and R Andima appeared for the State.

[3] When the matter came before me on automatic review in terms of section 302 of the Criminal Procedure Act.¹ I directed the following query to the learned magistrate 'on what basis the two minor witnesses were admonished in terms of s 164 of the Criminal Procedure Act if no enquiry was conducted in this case'.

[4] In her reply the learned magistrate responded that an enquiry was held when the court found that the two witnesses were not able to understand the nature of an oath or affirmation before they were admonished to speak the truth. She however stated that it was an oversight on her part not to include such enquiry on record and according to her she was of the opinion that it was enough to simply state 'admonished'. In this regard she stands to be guided as to the correct procedure. Notwithstanding the above it is also not clear if the sentence imposed on two counts were taken together for sentencing purposes or not.

Oath and Affirmation and admonition

[5] Section 164 of the Criminal Procedure Act, Act 51 of 1977 (the CPA) provides:

'164 When unsworn or un-affirmed evidence admissible

(1) Any person-

¹ Act 51 of 1977.

(a) who, from ignorance arising from 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.

[Subsec (1) substituted by sec 2(a) of Act 24 of 2003.]

(2)

(3) Notwithstanding anything to the contrary in this Act or any other law contained, the evidence of any witness required to be admonished in terms of the proviso to subsection (1) shall be received unless it appears to the presiding judge or judicial officer that such witness is incapable of giving intelligible testimony. (my emphasis)

[Subsec (3) added by sec 2(b) of Act 24 of 2003.]

(4)

[Subsec (4) added by sec 2(b) of Act 24 of 2003.]

[6] I agree with the interpretation of the relevant portion i.e. sections 164 (a) and (b) by Hannah J and Silungwe J where they stated:

'The application of the provisions of this section entails, firstly an enquiry by the trial court into whether a child, or any other potential witness who might not have the required capacity, understands the meaning of taking an oath. If the court finds that such potential witness does not understand the meaning of taking an oath the next step is to ascertain whether he or she understands what it means to speak the truth. If the Court answers this question in the

affirmative then the third step is to admonish. The position is set out in *Hoffmann and Zeffert 1988* (4th ed) at 375-377 and the following passage at the foot of 376 is of particular relevance:

“In each case the judge or magistrate must satisfy himself that the child understands what it means to speak the truth. If the child does not have the intelligence to distinguish between what is true and false, and to recognise the danger and wickedness of lying, he cannot be admonished to tell the truth – he is an incompetent witness.”²

[7] I further agree with Silungwe J and Van Niekerk J when they pronounced themselves in *S v VM* as follows.³

‘Before unsworn or un-affirmed evidence can be admitted in terms of section 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 reasons specified in s 164(1)(a) of the Act. 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 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 652 d-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.’

Application of the law to the facts

[8] It is clear from the Criminal Procedure Act and the aforementioned precedents that any presiding officer must first be satisfied that, particularly a child witness, or any witness who does not comprehend the religious sanction of the oath, must be able to comprehend what it is to speak the truth and be able to shun falsehood from the truth.

² *S v Boois* 2004 NR 74 at 75 E – H with reference and approval to *S v L* 1973 (1) SA 344 (C); *S v T* 1973 (3) SA 794(A).

³ 2009 (2) NR 766 at 767 G-768 A.

Before a witness is allowed to testify, the presiding officer must also be satisfied that such witness is capable of giving intelligible testimony by holding an enquiry which should be reflected on record.

[9] In relation to the admonishment in the instant case the following appears on record:

State witness 1 Antonia David, 17 years of age, and again 'Rachel Lazarus, 12 years, 'admonished'. Thereafter complainants gave their testimony in chief. Complainant in the first count is 17 years and whether or not the provisions of section 164 applied to her is not clear.

[10] In this case, there is nothing indicated on record that an enquiry was held to establish if the complainant understood the religious obligation of the oath and as such, red lights are flickering on whether the complainants were intelligible to discern the truth from falsehood. It was common cause that complainant in the first case was 17 years old and complainant in count 2 was 12 years old and the offence was committed in 2017 the same year when they testified in court.

[11] The first requirement in this regard was for the learned magistrate to establish and to be convinced that the complainant was apprehensive of discerning truth from falsehood and expressly make a finding. This court can just speculate in this regard as no enquiry was and findings were made. I considered looking at the evidence of the complainant to make a finding in relation to her level of intelligence to discern between falsehoods and the truth. I was however precluded from doing that by realizing that before I consider the evidence, it should first be established that a child witness or any witness for that matter, in a trial should be competent for the evidence to be admissible.

[12] I agree with Hannah J where he stated in *S v Boois*⁴ on Ms Lategan's (who appeared on behalf of the respondent), submission that this Court should look at the actual evidence given by the complainant and, having done so consider whether she was capable of distinguishing the truth from falsehood. 'That is not an approach which commends itself to me. It is quite clear from all the authorities that this question must be

⁴ 2004 NR 74 at 75 E-H.

addressed by the trial magistrate or Judge after an appropriate enquiry made before the witness testifies. Furthermore, I do not regard the duty to admonish a witness as a mere technicality, as was submitted by counsel. As was said by Van Reenen J in *S v N*⁵ that;

“The admission of evidence given otherwise than after an oath duly taken, an affirmation or an admonition to speak the truth, in my view, constitutes a failure of justice *per se* of such magnitude as to exclude the operation of the provisions of the proviso to ss 3 of s 309 of the Act.” ‘

[13] The admonishment of any witness not competent to take the oath must be appropriately done. Any presiding officer must be satisfied that any witness is competent to discern truth from falsehood before he/she is allowed to continue testifying which, was not established beyond reasonable doubt. Should the magistrate have done the enquiry in this matter she would have found complainant in count 1 competent to take oath instead of admonishing her. In light of this I conclude that firstly the complainant was not properly admonished to tell the truth and secondly that the learned magistrate could not have been satisfied that the witnesses were competent to discern between the truth and lies, and the implications thereof. Furthermore the magistrate did not apply the law properly with regard to admonishing a 17 years old witness, contrary to the law.

[14] Considering the fact that the learned magistrate failed to record questions and answers posed at the enquiry, that he admonished complainant in count 1 contrary to law and failure to indicate whether the two counts were taken together for sentencing purposes, in my view constitute an irregularity that vitiates the proceedings and should be set aside.

[15] As a result:

1. The conviction and sentence are set aside;

⁵ 1996 (2) SACR 225 (C) at 230 f.

2. The matter is remitted to the magistrate to comply with the provisions of section 164 of the Act and finalise the matter accordingly.

J T SALIONGA
ACTING JUDGE

I agree,

H C JANUARY
JUDGE