CHILDREN'S EVIDENCE IN SEXUAL CASES IN THE CONTEXT OF

S v QN 2012 (1) SACR 380 (KZP)

1 Introduction

This case note considers a number of issues in the context of the case of *S v QN* (2012 (1) SACR 380 (KZP)). These are: the competence of a child witness, the admonishment of a child witness, the evaluation of evidence given by a child witness, the non-production of DNA evidence, and the procedures followed regarding the use of an intermediary in terms of section 170A of the Criminal Procedure Act 51 of 1977.

2 Judicial history

The appellant was convicted of the rape of a five-year old girl in the court *a quo*, and sentenced to life imprisonment. He appealed against conviction and sentence (par 1).

3 Facts

The complainant, who was six years old at the time she gave evidence, testified that she had been raped by the appellant when she was five years old. Her testimony was that she had been playing with her siblings at a neighbour's house, when the appellant had lured her away and promised her sweets. He raped her, and threatened her with death if she told anyone about the incident. The complainant described oral, anal and vaginal rape, using anatomically correct dolls. She was also able to describe how her and the appellant's clothes were positioned at various times, which was consistent with how the acts could have been performed. The complainant testified that later that evening, when she was getting ready to bath, her mother noticed blood on her panties and asked her what had happened. The complainant then reported the incident. The complaint knew the appellant, as he was a person who played dice at their house, and worked at the nearby taxi rank. She was therefore able to tell her mother who the perpetrator was (par 2).

The matter was immediately reported to the police, and the complainant was examined by a doctor, who completed a J88 medico-legal form. The doctor's evidence showed that the medical evidence was consistent with the complainant's allegations. She had a tear in her rectum, blood in her faeces, and her vagina was sufficiently wide to have been penetrated. The complainant's mother confirmed those aspects of the complainant's evidence of which she had knowledge (par 3).

The appellant did not introduce his defence until he commenced with his cross examination of the complainant. No significance was attached to this. However, what was of significance was that he gave multiple different versions of the events. He presented one scenario when cross-examining the complainant, another when cross-examining the complainant's mother, yet another when he testified in his own defence, and a final version when he was cross-examined. The court therefore confirmed that the magistrate had correctly rejected his evidence as false beyond any reasonable doubt (par 4).

4 Argument

4 1 Factual guilt

The appellant's first argument was that the trial court had erred in assessing the evidence, and in finding him factually guilty. The appellant questioned whether there had even been a rape. However, when it was pointed out that the appellant had himself conceded that the rape had taken place, this point was not pursued (par 5).The appellant also argued that the prosecutorial evidence should be rejected on the basis that the J88 medico-legal form was dated a month after the incident was alleged to have occurred. The appellant argued that this impacted negatively on the credibility and reliability of the prosecution evidence. However, the court rejected this, finding that it was simply an insignificant error in recording the month accurately (par 5).

The appellant also challenged the state's case on the basis of its failure to produce the real evidence (DNA samples) which had been collected during the investigation (par 6).

4 2 Procedural irregularities

Further, the appellant alleged fatal procedural irregularities in the trial. He argued that they had rendered the complainant's evidence inadmissible, and that had resulted in a failure of justice. Specifically, the appellant argued that the complainant was not a competent witness and had not been properly sworn in, and that the intermediary used in the case had not been sworn in as required (par 9, 10 and 14).

4 2 1 Oath/admonishment/competence

The appellant argued that, since the court *a quo* had not determined that the complainant understood the nature and import of the oath, section 162 of the Criminal Procedure Act (51 of 1977) had not been complied with, and the complainant was thus an incompetent witness whose evidence was therefore inadmissible. This argument rested on the assumption that an oath was administered to the complainant, which was factually wrong (par 9). There was no oath administered. Instead the complainant was admonished to tell the truth in terms of section 164 of the Criminal Procedure Act (51 of 1977) (par 10). This section provides that a child who is unable to understand the oath is not required to take the oath, and will still be a

competent witness as long as she is admonished to give truthful evidence. It is correct that the magistrate did not explicitly ask the complainant whether she knew or understood the oath, but it is well established that there need not be a formal enquiry into this question (*S v B* 2003 (1) SACR 52 SCA par 15). The presiding officer may reach that conclusion simply by virtue of the young age of the child (*DPP, KZN v Mekka* 2003 (2) SACR 1 SCA par 11). In *casu*, the magistrate conducted an enquiry and concluded that the witness, due to her tender age, would not be able to understand the nature of the oath.

The court *a quo* then established the complainant's competence to testify by satisfying itself that she understood the difference between truth and falsehood, that she had sufficient maturity to understand questions put to her, and that she could formulate appropriate answers in response (par 11). The court *a quo* then proceeded to administer the admonishment.

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 (par 10). 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" (par 11).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 (par 11).

4 2 2 Intermediary

The appellant then argued that the evidence of the complainant was inadmissible because the intermediary, appointed in terms of section 170A of the Criminal Procedure Act (51 of 1977), had not been sworn in prior to assuming duty (par 15).

There is no provision in the Criminal Procedure Act (51 of 1977), nor in the rules of court, that require that an intermediary must be sworn in. However, the court in the case of *S v Booi* (2005 (1) SACR 599 (B)) reasoned that, since an intermediary played a role analogous to that of an interpreter, the rules requiring that an interpreter be sworn in should be interpreted as applying equally to intermediaries. The court in *Booi's case* did not specify exactly what form the administration of the oath/affirmation should take, but held that the intermediary had to be required to "specifically undertake to convey correctly and to the best of his/her ability the general purport of what is being said to the witness before s/he begins to help the witness. An intermediary needs to be reminded or cautioned that his/her role in court is, generally speaking, just as important as and similar to that of an

interpreter" (*S v Booi supra* par 25). The court found that failing to swear an intermediary in was such a fundamental flaw in the proceedings that it rendered the evidence of the child complainant inadmissible. This judgment was criticized (see, eg, Whitear-Nel "Intermediaries Appointed in Terms of Section 170A of the Criminal Procedure Act 51 of 1977: New Developments?" 2006 19(3) SAJCJ 334). However, the finding was confirmed in the case of *S v Motaung* (2007 (1) SACR 476 (SE)), subject to the proviso that the irregularity in failing to swear in the intermediary would not necessarily always result in the complainant's evidence being declared inadmissible. In *Motaung's* case, the court found that this failure did not render the complainant's evidence inadmissible, because the intermediary had not acted as an interpreter, but simply as a conduit for the child's evidence (*S v Motaung supra* par 10). The court in *QN's* case criticized *Motaung*'s case, holding that it was inconsistent with the finding in *S v Naidoo* (1962 (2) SA 625 (A)) (*S v QN supra* par 24).

The court noted that the appellant's submission was based on the argument that the failure to swear the intermediary in was a fatal irregularity in itself. The appellant did not argue the second part of the enquiry as enunciated in *Motaung's case* (*S v QN supra* par 16).

The court also noted that neither court in the *Booi* or *Motaung* case had analysed the precise role envisaged for an intermediary in terms of section 170A of the Criminal Procedure Act (51 of 1977) before reaching the conclusion that an intermediary had to be sworn in as with an interpreter (*S v QN supra* par 19). The court held that when one considered that the role of the intermediary was to alleviate any undue mental stress and suffering resulting from the complaint testifying in court, it became clear that the role of the intermediary was to convey the general purport of questions put to the child witness, but not to convey or interpret what was said by the witness. The court held "the purpose of the section is met by mediating the questions put, not the answers given … it is not as if the witness will be unduly stressed if the answer is not conveyed by the intermediary. Neither is it the case that the court would require the answer to be phrased in a way that it understands" (par 21).

The court thus found that the analogy between an intermediary and an interpreter was false "unless the intermediary is permitted to supplant the role of the interpreter in conveying the evidence … to the court" (par 22). The court thus held that the failure to swear in the intermediary did not constitute an irregularity in the proceedings, and that this finding was consistent with the legislative intent as deduced from the fact that the legislature did not include a provision requiring an intermediary to be sworn in, and that section 170A(5) of the Criminal Procedure Act (51 of 1977) specifically provided that evidence given *via* an incompetent intermediary would not be rendered inadmissible solely on the basis that the intermediary was not competent to be appointed. The court reasoned further that since *Naidoo's* case had established the principle that evidence given through an unqualified interpreter was inadmissible, the legislature could not have envisaged the functions of an interpreter and intermediary as comparable (*S v QN supra* par 25). Interestingly, however, the court then added that it did not wish to denigrate the practice that had developed in the courts to swear

in intermediaries. The court held that, given the important function that an intermediary fulfilled, it was salutary practice to require the intermediary to discharge his/her function under oath. The court emphasized, however, that if this were not done, it would not amount to an irregularity in the proceedings. As to the form of the recommended oath, the court held that the intermediary should be required to commit to fulfilling her functions "honestly and faithfully and to the best of her ability" (par 26).

Finally, the court held that even if it had erred, and the failure to swear an intermediary in was an irregularity, it was not a fatal irregularity on the facts before it because it had not resulted in a failure of justice. The court noted that "the interpreter heard what was put to the [complainant] by the intermediary, as did the appellant's legal representative. Neither of them saw fit to intervene to correct any inaccuracies. The interpreter interpreted the answers given to the questions by the [complainant] without the involvement of the intermediary. The record nowhere indicates any incongruity between the questions put, and the answers given which may support an inference that the intermediary did not perform her function adequately" (par 27).

The court therefore dismissed the appeal against conviction. The court upheld the appeal against sentence and remitted the case back to the court *a quo* for a proper determination in this regard (par 29). This aspect is beyond the scope of this case note.

5 Comment

5 1 Anatomically correct dolls

Section 162(1) of the Criminal Procedure Act (51 of 1977) is wide enough to allow the use of anatomically correct dolls to facilitate testimony by a child, and the six-year old complainant in this case did make use of such dolls (par 2). The idea behind the use of such dolls is that they help children to bridge the gap between what they know, or have experienced, and what they are able to articulate. The assumption is that the physical object (doll) will assist a child witness to understand what is being asked of them, and that it will facilitate a complete and accurate account of events by providing a means of expression other than by verbalizing what will inevitably be distressing or unfamiliar information (Poole and Bruck "Divining Testimony? The Impact of Interviewing Props on Children's Reports on Touching" 2012 32 *Developmental Review* 165 166–170).

The use of anatomically correct dolls for forensic purposes is highly controversial. There is strong empirical evidence which shows that false reports of crimes increase when dolls are used, probably simply because children are curious and the dolls have features which permit experimentation. This is especially true of children five years and younger, and the danger increases dramatically when suggestive questions are asked with reference to the dolls (Poole and Bruck 2012 32 *Developmental Review* 171–172). The overall consensus appears to be that while such dolls have their value, they are not reliable for diagnostic purposes, and should be introduced only after a clear report of abuse (Poole and Bruck 2012 32 *Developmental Review* 171–172).

There is no detail in the judgment in *QN's case* regarding the protocol that was followed with the dolls. However, the medical evidence established conclusively that rape had taken place, and thus there was no danger of placing over-reliance on the dolls as a diagnostic tool. In fact, given the appellant's concession early on that the rape had taken place, the only issue regarding substantive guilt was the identity of the appellant.

5 2 Competence

The court *a quo* established the competence of the complainant by interacting with the child. The magistrate started by asking "Do your parents ever give you a hiding?" to which the complainant replied, "Yes. My mother assaults me if ever I am naughty at home." The magistrate continued: "... What do you mean naughty?" to which the complainant replied, "My mother gives me a hiding when I am telling lies". Lastly, the magistrate asked, "So is it a good or a bad thing to tell lies?" the reply to which was "It's a bad thing, Your Worship" (par 11).

In our view, this exchange does not in fact establish that the complainant understands the difference between truth and lies. There is no exploration of what it is to tell a lie, which involves deliberately deceiving another by providing inaccurate, incomplete or otherwise misleading information.

This need not (and should not) be done in an overly technical manner (*DPP, Tvl v Minister of Justice and Constitutional Development* 2009 (2) SACR (CC) par 164). International literature suggests the use of simple identification questions that reduce the use of language in assessing children's understanding of the concept of truthfulness is most effective. For example, a simple scenario is put to the child, who is then asked to identify who is lying and who is telling the truth (Klemfuss and Ceci "Legal and Psychological Perspectives on Children's Competence to Testify in Court" 2012 32 *Developmental Review* 268 277).

Currently, there is no standard test used in South African courts – and this leads to inconsistencies, and exacerbates the danger that haphazard questions with no tested reliability and validity are used. In any event, research shows that there is little correlation between a child's performance on the truth/lie-distinguishing test, and their actual truth-telling behaviour. It also suggests that even children who are unable to articulate the distinction between truth and lies are able to identify true and false statement, and indicate a preference for the truth (Klemfuss and Ceci 2012 32 *Developmental Review* 275–276).

Some of these issues were raised in the case of *S v Mokoena, S v Phaswane* (2008 (2) SACR 230 (T)), where it was argued that even a child who could not distinguish between truth and falsehood might be able to provide reliable evidence, and that the competency test (implicit in s 164(1) of the Criminal Procedure Act 51 of 1977) should therefore be abolished. The Constitutional Court rejected this argument, holding that "the evidence of a child who does not understand what it means to tell the truth is not reliable … and [t]he risk of a conviction based on unreliable evidence is too great to permit a child who does not understand what it means to speak the truth to testify" *DPP, Tvl v Minister of Justice and Constitutional*

Development (*supra* par 165). It is interesting to note that, faced with similar arguments, the Canadian courts abolished the competency test for children (Klemfuss and Ceci 2012 32 *Developmental Review* 283).

5 3 Admonishment

In the case *of S v Mokoena, S v Phaswane* (*supra*) the High Court concluded that the proviso to section 164(1) of the Criminal Procedure Act (51 of 1977), requiring that a child exempted from taking the oath, be admonished to tell the truth, violated section 28(2) of the Constitution and was thus invalid. The Constitutional court did not confirm this declaration of invalidity (*DPP, Tvl v Minister of Justice and Constitutional Development supra* par 168).

Interestingly, empirical research clearly indicates that truth-telling behaviour is significantly promoted by simply asking a child, in a developmentally appropriate way, to promise to tell the truth. Paradoxically, this holds true even where a child is unable to demonstrate that she understands the difference between telling the truth and telling lies. There is on-going research exploring the relationship between truth-lie understanding, promises to tell the truth and truth-telling behaviour in children (Klemfus and Ceci 2012 32 *Developmental Review* 275).

5 4 Intermediaries

We agree with the court that, as the law stands, there is no legal requirement for an intermediary to be sworn in. We also agree that intermediaries should be sworn in. This position is supported by research which shows that promises to behave in a particular way are powerful motivators for that behaviour (Klemfuss and Ceci 2012 32 *Developmental Review* 275). Thus we suggest that the legislature makes provision for this, subject to the *proviso* foreshadowed by *Motaung's* case (*supra*), namely that the mere failure to swear in, or to swear in an intermediary properly will not in itself render the witness's evidence inadmissible.

5 5 Cautionary rule

The cautionary rules applicable to children, identification evidence and single witnesses, were not mentioned by the court in *QN's* case. It is trite that a cautionary rule does not have to be named – it is sufficient for the presiding officer to demonstrate that caution has been taken before accepting the evidence, so this omission is not problematic in itself.

The application of the cautionary rule to children's evidence is highly controversial, possibly the most contentious area of psycho-legal research. However, increasingly, empirical evidence reveals that, although children are no more likely to lie than an adult, they are highly suggestible to the most subtle of cues and suggestions (Brainerd and Reyna "Reliability of Children's Testimony in the Area of Developmental Reversals" 2012 32 *Developmental Review* 224 227 and 258–259). These suggestions and cues are often unintentionally conveyed by people with whom the child interacts in both

formal and informal settings, including caretakers, peers, investigators and other role players (Principe and Schindewolf "Natural Conversation as a Source of False Memory in Children: Implications for the Testimony of Young Witnesses" 2012 32 *Developmental Review* 205 206). This is an especially concerning issue in South Africa where it is unusual for detailed information regarding the investigation process to be available.

QN's case was not typical of the child-rape cases which routinely come before South African courts – or of child-rape cases generally. The distinguishing feature of *QN's* case was the incontrovertible medical evidence of the rape. The only real issue was the appellant's identity. As it turned out, the appellant testified and the poor quality of his evidence provided the necessary basis for the court to satisfy itself that he had committed the heinous acts. If the appellant had not testified, the outcome of the case might well have been different. There was no corroboration of the identification evidence, provided by a single child witness who was five at the time. The reliability of the identification would have hinged on precisely what words were exchanged between the mother and the child immediately before the report, and the quality of the subsequent investigations.

5 6 DNA evidence

Given that the identification of the appellant was a crucial issue, it is of extreme concern that the results of the DNA testing were not placed in evidence. The appellant argued that these results would have exonerated him. The state could not explain why the results were not available, saying only that it did not have them. The prosecutor undertook to make enquiries to establish what had happened to the DNA tests, but no further evidence or information was forthcoming. Nevertheless, the court found that there was nothing to suggest that the results of the DNA tests had been deliberately withheld from the court as there was no evidence that the results had been made available to the prosecution. Thus the court concluded that no adverse inference could be drawn against the state on this basis (par 6). This is also of extreme concern. It is rare for there to be real (forensic) evidence of a rape, and equally rare for there to be witnesses to the crime (Benson, Horne and Coetzee "The Significance of the Crime Scene in the Investigation of Child Rape Cases" 2010 11(1) *CARSA* 16 27; Horne and Benson "The Significance of Evidence Recognition in Child Rape Cases" 2011 12(1) *CARSA* 1. It is inexcusable for this evidence to disappear, and for this to be ignored by the court. The court's reasoning that the non-production of the evidence could be "excused" because it had not been provided to the prosecutor is not a sufficient safeguard of the appellant's rights. It may be that the police had withheld the results from the prosecution services, or that they had deliberately been "lost". This was not canvassed. There have been many cases in which the courts have decried the failure to produce real evidence, and where they have suggested that it might be subversive of proper criminal justice (see, eg, *S v Msane* 1977 (4) SA 758 (N)).

6 Conclusion

Given the nature of most child-rape cases, the existence of DNA evidence often informs the decision as to whether to prosecute the alleged crime or not. If the case is prosecuted, the DNA evidence has enormous probative value. In *QN's case* DNA samples were taken from the complainant and the appellant was also sampled. Yet the evidence was not produced in court, with no explanation for this either required or given. This is unacceptable, and symptomatic of a dysfunctional criminal justice system. In such a system, the spectres of innocent people being convicted, and of guilty people going free loom large.

W Banoobhai and N Whitear-Nel
University of KwaZulu-Natal, Pietermaritzburg