

IN THE HIGH COURT OF SWAZILAND

REVIEW CASE NO. 45/09

In the matter between

REX

VS

MFANUKHONA SIYAYA

ACCUSED

CORAM

MAMBA J

JUDGEMENT 30th

October, 2009

[1] The Accused Mfanukhona Siyaya appeared before the Senior Magistrate in Mbabane on 3 counts. The first count alleged that the accused was guilty of the crime of indecent assault in that he had unlawfully and intentionally assaulted X, an eleven year old girl, "by trying to remove her underwear and further touching her private parts." The rest of the counts were both of Housebreaking with intent to steal and theft and these are not relevant for purposes of this judgement as I am of the view that they were properly adjudicated upon by the court a quo.

[2] The accused who conducted his own defence, pleaded not guilty to all the charges.

[3] X was the first witness called by the Crown and she was twelve (12) years old at the time she testified. She was a Grade VII pupil at her community school. After telling the court this information, the following information was solicited and obtained from her: "CT - Do you understand what it means to take an Oath? PW1 - I do not. know.
CT - When one tell lies at home what happens to him/her (as a child)?
PW1 - My parents would beat me when I tell lies.

CT - What happens to someone who tell lies in court.

PW1 - I do not know.

CT - Are you able to differentiate between lies and truth? PW1 - Yes.

CT - To whom do you believe and how often do you go to church?

PW1 - God, and I go to church every Sunday. CT - What does God do to Sinners? PW1 - God do not allow them to heaven but they go to the devil.

CT - So what happens to one who does not tell the truth? PW1 - Goes to the devil.

CT - If the Court makes you to take Oath will you tell the truth.

PW1 - Yes.

PW1 - [X] on oath state in Siswati as follows:-"

She then narrated how the accused had sometime in December 2008 touched her genitals and attempted to undress her. She had managed to escape his clutches by escaping through a window after her brother who was younger than her had switched on the light in the house they were in.

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[4] In the above quoted excerpt or exchanges between X and the presiding officer the following three issues that are fundamental in a trial emerged :

- (a) That X does not know what an oath is or what it means to take an oath;
- (b) That X does not know "what happens to someone who tells lies in court" and these two matters or issues were not explained to her by the presiding officer.

[5] Section 217 of the Criminal Procedure and Evidence Act 67 of 1938 (hereinafter referred to as the Act), provides as follows :-

"(1) Any person other than a person described in Section 218 or 219 shall not be examined as a witness except upon Oath. (2) The Oath to be administered to any witness shall be administered in the form which most clearly conveys to him the meaning of such Oath, and which he considers to be binding on his conscience. (I have added the underlining or emphasis). The exception contained in section 218 of the Act pertains to persons who object to taking the oath. These have to take an affirmation or

declaration. Section 219 relates to persons who, when produced for purposes of giving evidence are "found not to understand the nature or to recognize the religious obligations, of an oath or affirmation", due to "ignorance arising from youth, defective education or other cause." This group of persons are admonished by the presiding officer to speak the truth, the whole truth, and nothing but the truth. Apart from such admonition, the presiding officer "shall -administer or cause to be administered to him any form of admonition which appears, either from his own statement or other source of information, to be calculated to impress his mind and bind his conscience, ..." (Again the emphasis has been added by me).

[6] In the case of **Jamludi Mkhwanazi vs R (Criminal Appeal 4/97**, judgement delivered on 1st October, 1998) at page 6, the Court of Appeal stated:

"...the presiding Judge is responsible for seeing that the Oath is properly taken. Where somebody other than him administers it, it is sufficient if it is done in the presence and under the supervision of the presiding Judge who will ensure that the oath is a proper one and one which the witness's conscience has been so bound that he feels constrained to speak the truth. ...As stated in Ndlela's case, it is where no oath "is taken" that what the witness says loses the character and status of evidence." (The emphasis and underlining are mine).

[7] From the above provisions of the Act, it seems plain to me that a person produced as a witness may only be examined on oath if that person knows what the oath is or what is meant by taking an oath. Over and above that, the person must consider the Oath binding on his conscience. The binding nature of the Oath is central to the whole exercise. Although the person produced to give evidence may know what the oath is, or what is meant by taking an Oath, if he does not consider the oath to be binding on his conscience, he may not take such an Oath. It would be meaningless, valueless and ineffectual. By taking the oath, a witness is obliged to tell the truth, the whole truth and nothing else but the truth. The obligation to do so

is placed upon him by judicial authority of the person who administers the oath.

[8] In casu, the oath to which X was subjected to - subjected to because she did not know what it meant - was totally of no force and effect because she did not know what it meant and therefore could not realistically have regarded it as binding on her conscience.

[9] It is also to be noted or observed that having opted to administer the oath to X, the presiding officer did not and was not entitled to admonish her as stipulated under section 219 of the Act. The result is that X did not take or make an affirmation or declaration and she was not admonished. Having established that X was able to differentiate between truth and falsehood and the consequences of telling either or these, the presiding officer should not have caused X to take the oath but should have admonished her in terms of s219 of the Act. He did not and her evidence is tantamount to no evidence at all. The purported oath taken by X was no oath at all. In **S v Ndlela, 1984 (1) SA 223 (N), Didcott J**, referring to Section 162 of the South African Criminal Procedure Act 51 of 1977, which is similarly worded to our Section 217, stated:

"...The result, where no oath is taken by a witness of whom one is required, is that what he then says has neither the character nor the status of evidence.

Since this went for all the witnesses in the present case, it means that there was no evidence on which the accused could competently have been convicted."

[10] The only other witness who was in the room where X was allegedly indecently assaulted is her brother who was six (6) years old when he testified. He did not say anything about the indecent assault on X. Consequently, in the absence of admissible evidence on the assault on X, the Accused should not have been convicted on this count and his conviction is set aside and he is acquitted and discharged.

[11] The testimony of X's brother was also dealt with in a rather unsatisfactory fashion by the learned presiding officer. He was a preschool child and was 6 years old. Nothing at all was said to him about the Oath, its meaning, import or significance. After telling the presiding officer that he was a regular Sunday church-goer and could differentiate between the truth and a lie, he was asked:

"Are you going to tell the truth? His 'Yes' answer was sufficient, without any further ado, to have him take the Oath. This is clearly inadequate and improper, more especially for a child of his age. He had to be questioned whether or not he knew what the oath is, its meaning purport and significance and whether if he knew all these things; he considered it, that is to say, the Oath, binding on his young conscience. Again, the judicial obligation to testify as per the oath is missing here. The court a quo missed and confused the two enquiries herein, namely, the nature and meaning of the oath on the one hand, and the meaning and significance of the truth and a lie on the other.

[12] Commenting on the provisions of Section 164 of the Criminal Procedure Act 51 of 1977 in South Africa, **Du Toit et al**, COMMENTARY ON THE CRIMINAL PROCEDURE ACT (1995 edition), at page 22 - 19 has this to say:

"Where there is no enquiry as to whether a witness understands the nature and import of the oath and where the warning is not in the form prescribed in this section, the evidence given by the witness is inadmissible (S v Mashava, 1994 (1) SACR224).

I, with due respect, agree with this exposition of the law. See also the following cases which are to the same effect. **S v Seymour, 1998 (1) SACR 66 (N)**, **S v Stefaans, 1999 (1) SACR 182 (C)**, **S v Vumazorike, 2000 (1) SACR 619** and **S v Pienaar en andere, 2001 (1) SACR 391**.

[13] For the foregoing reasons, I make the following order:

- (a) The conviction of the Accused and the sentence imposed on him on count, one are set aside and he is acquitted thereon.
- (b) His conviction and sentence on count three are hereby confirmed.
- (c) The Court a quo is ordered to execute all documents and do all acts to give effect to this judgement.

MAMBA J