

SOUTH AFRICA / JUDGMENT

# Ngaka v S (Appeal) (CA13/2019)

## [2025] ZANWHC 137 (7 August 2025)

**[2025] ZANWHC 137****COURT**

North West High Court, Mafikeng

**BEFORE**

R D Hendricks, M Morgan

**CASE / FILE NUMBER**

CA13/2019

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**Source record****Latest****amended version: 8 August 2025****SAFLII****Note: Certain****personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII****Policy****IN****THE NORTH WEST HIGH COURT, MAHIKENG****CASE NO:**

CA13/2019

Reportable: NO

Circulate to Judges: NO

**Circulate to Magistrates:**

NO

Circulate to Regional

Magistrates: NO

In the matter between:      NGAKA  
                                         THATO  
                                         Appellant  
                                         AND  
                                         THE  
                                         STATE  
                                         Respondent  
                                         DATE  
                                         OF HEARING  
                                         : 16 MAY  
                                         2025  
                                         DATE  
                                         OF JUDGMENT  
                                         : 07  
                                         AUGUST 2025  
                                         FOR THE  
                                         APPELLANT  
                                         : MR.  
                                         GONYANE  
                                         FOR THE  
                                         RESPONDENT  
                                         : ADV.  
                                         CHULU

## JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via email. The date and time for hand-down is deemed to be 10h00 on 07 August 2025.

## ORDER

Resultantly, the following order is made:

- (i) The appeal against conviction is upheld.
- (ii) The conviction and sentence, as well as the ancillary orders made in terms of Section 103 of Act 60 of 2000 and Section 50 of Act 32 of 2007, are set aside.
- (iii) The appellant must be released from custody with immediate effect.

## Summary

Section 164 Of the Criminal Procedure Act 51 of 1977, as amended - it's applicability and importance. Failure to hold an effective enquiry on whether a witness understand the difference between the truth and a lie. Witness not properly admonished - effect on the value of such evidence.

HENDRICKS JP

## Introduction

- [1] This is an appeal against conviction and sentence. The appellant, Mr. Thato Ngake and his co-accused were arraigned before the Regional Court, Klerksdorp on a charge of rape read with the provisions of Section 51 (1) and Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (CLAA). He, and some of his co-accused were convicted. He was sentenced to life imprisonment. It was also declared that he is unfit to possess a fire-arm in terms of Section 103 of act 60 of 2000 and that his particulars be entered into the National Register of Sex Offenders in terms of Section 50 of Act 32 of 2007. The sentence of life imprisonment automatically entitles the appellant to an appeal in terms of Section 309 of the Criminal Procedure Act 51 of 1977 (CPA), as amended.
- [2] The appellant apply for condonation for the late noting and prosecution of his appeal, which application is not opposed by the State, as respondent. This Court is satisfied with the explanation of the delay proffered and the requisite condonation should therefore be granted.
- [3] Amongst the grounds of appeal in terms of which the conviction is assailed, is the failure by the Regional Magistrate to conduct a proper enquiry upon the complainant as a witness, as to whether she understand the importance of being admonished, and the difference between the truth and a lie, having regard to her age of 16 years.
- [4] Section 164 of the Criminal Procedure Act provides:
- “164 When unsworn or unaffirmed evidence admissible*
- (1) Any person, who 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: 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.

[Sub-s. (1) substituted by s. 68 of Act 32 of 2007 (wef 16 December 2007).]

- (2) If such person wilfully and falsely states anything which, if sworn, would have amounted to the offence of perjury or any statutory offence punishable as perjury, he shall be deemed to have committed that offence, and shall, upon conviction, be liable to such punishment as is by law provided as a punishment for that offence.”
- [5] The following is an extract from the record what transpired when the complainant was called as a witness.

*“PROSECUTOR: The complainant S[...] M[...] Your Worship.*

COURT: Good morning.

WITNESS: Morning Your Worship.

COURT: Which language do you prefer to use?

WITNESS: Setswana.

COURT: What are your full names?

WITNESS: S[...] M[...].

COURT: How old are you S[...]

WITNESS: 16 years.

COURT: So in November this year you will be turning 17 years.

WITNESS: Yes.

COURT: Tell me S[...] do you understand the meaning and import of an oath, in other words do you know what it entails if a person is asked to say something under oath?

WITNESS: No I do not know.

COURT: What Grade are you doing?

WITNESS: I am not at school Your Worship.

COURT: The last Grade you were doing what Grade was that?

WITNESS: Grade 7.

COURT: When was it?

WITNESS: 2013.

COURT: But you appreciate the difference between the truth and falsehood.

COURT: You further understand the implication to tell the truth.

COURT: You are therefore admonished by this Court to tell the truth, the whole truth, nothing but the truth.

WITNESS: Understand.

S[...] M[...] admonish.”

[6] It is contended on behalf of the appellant that this enquiry fall far too short of what is required. The trial court asked the complainant whether she understand the meaning and import of taking an oath and what it entails if a person is asked to say something under oath and she said: ‘No I do not know.’ Furthermore, it is contended that the trial court failed to ascertain whether the complainant understood the difference between telling the truth and a lie, rather than relying on the affirmative answer given by the complainant. The trial court also failed to ascertain whether the complainant understood the implications (dangers) of telling a lie.

[7] It appears from the record that the trial court formed an opinion that the complainant did understand the difference between telling the truth and a lie and the implications (dangers) of telling a lie. However, there is nothing from the record indicating what would be the reason why the trial court formed such opinion. What is important is the fact that the court must first satisfy itself or be convinced that the child has the ability to distinguish between the truth and a lie and the implications (dangers) of telling a lie. The enquiry should be done before the witness is sworn in, affirmed or admonished

in order to give evidence. In this case, the trial court misdirected itself by simply admonishing the complainant, before her capacity to differentiate the difference between the truth and a lie and before ascertaining whether the complainant understood the implications

(dangers) of telling a lie was established.

[8] The testimony of a witness who has not been placed under oath properly, has not made a proper affirmation or has not been properly admonished to speak the truth, lacks the status and character of evidence and is inadmissible. It is further emphasized that the enquiry should not be superficially, when determining whether the witness has sufficient intelligence to appreciate the distinction between right and wrong, truth and falsehood, and to recognize the implications (dangers) of saying what is not true.

[9] In *Mantshiva v S*[1] it was held that it is peremptory for all witnesses in criminal trials, with the exception of certain categories of witnesses falling

either under Section 163 or Section 164, to be examined under oath. The Regional Magistrate has failed to properly establish whether the complainant would not understand the nature and import of taking an oath or affirmation. The questions asked in the admonishing were also not sufficient to reflect the lack of understanding on the part of the complainant.[2]

[10] For purpose of reliability of such evidence, it is crucial for a witness to either give his or her evidence under oath (S 162) or affirmation (S 163) or admonishment (S 164). What was required of the Regional Magistrate in an enquiry was canvassed comprehensively by the Constitutional Court in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & Others*[3].

*“[165] The reason for evidence to be given under oath or affirmation or for a person to be admonished to speak the truth is to ensure that the evidence given is reliable. Knowledge that a child knows and understands what it means to tell the truth gives the assurance that the evidence can be relied upon. It is in fact a pre-condition for admonishing a child to tell the truth that the child can comprehend what it means to tell the truth.124 The evidence of a child who does not understand what it means to tell the truth is not reliable. It would undermine the accused’s right to a fair trial were such evidence to be admitted. To my mind, it does not amount to a violation of section 28(2) to exclude the evidence of such a child. The 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. This would indeed have serious consequences for the administration of justice.

- [166] When a child, in the court's words, cannot convey the appreciation of the abstract concepts of truth and falsehood to the court, the solution does not lie in allowing every child to testify in court. The solution lies in the proper questioning of children; in particular, younger children. The purpose of questioning a child is not to get the child to demonstrate knowledge of the abstract concepts of truth and falsehood. The purpose is to determine whether the child understands what it means to speak the truth. Here the manner in which the child is questioned is crucial to the enquiry. It is here where the role of an intermediary becomes vital. The intermediary will ensure that questions by the court to the child are conveyed in a manner that the child can comprehend and that the answers given by the child are conveyed in a manner that the court will understand.
- [167] As pointed out earlier, questioning a child requires a special skill. Not many judicial officers have this skill, although there are some who, over the years and because of their constant contact with child witnesses, have developed a particular skill in questioning children. This illustrates the importance of using intermediaries where young children are called upon to testify. They have particular skills in questioning and communicating with children. Counsel for the Centre for Child Law and Childline was quite correct when, in her reply, she submitted that everything seems to turn upon the need for intermediaries when young children testify in court. Properly trained intermediaries are key to ensuring the fairness of the trial. Their integrity and skill will be vital in ensuring both that innocent people are not wrongly convicted and that guilty people are properly held to account.
- [168] The conclusion by the High Court that the proviso to section 164(1) violates section 28(2) of the Constitution cannot, therefore, be sustained."
- [11] The effect of not conducting an extensive and comprehensive enquiry as required by Section 164 has the inevitable effect that there is no evidence tendered by the complainant. The absence of the evidence of the complainant necessitate a determination whether the remaining evidence adduced by the State, is sufficient to sustain the conviction of the appellant. An in-depth and careful analysis of the remaining evidence tendered by the State proves the contrary. The evidence of the first report witness, Angelina Siziswe, the complainants' mother M[...] L[...] M[...], and the police officers who affected the arrest and who took the buccal swaps (samples) does not take the State's case any further. The high watermark of it all is that the DNA results taken from the buccal sample of the appellant and compared to the vaginal swab taken from the complainant to test for the presence of semen of the appellant proves negative.
- [12] It is quite apparent that the guilt of the appellant as an accused person was not proved beyond reasonable doubt. The onus is on the State to prove the guilt of an accused person beyond reasonable doubt. This is trite. In the absence thereof, the accused is entitled to his acquittal. Although a court of appeal will not lightly interfere with the factual findings of a

trial court, it is abundantly clear that the failure to properly admonishing the complainant in terms of the dictates of Section 164, is a fatal misdirection. The appeal against conviction should be upheld on this basis alone. To evaluate any of the evidence further in detail will be superfluous. It follow axiomatically that the sentence and ancillary orders made should also be set aside.

#### Order

[13] Resultantly, the following order is made:

- (i) The appeal against conviction is upheld.
- (ii) The conviction and sentence, as well as the ancillary orders made in terms of Section 103 of Act 60 of 2000 and Section 50 of Act 32 of 2007, are set aside.
- (iii) The appellant must be released from custody with immediate effect.

R D HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

I agree

M MORGAN

ACTING JUDGE OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

[1] [2014]

(2) All SA 141 (SCA).

[2] See: MAKUMNA v S (CA & R 49/2013) [2016] ZANCHC 86 (23 September 2016).

[3] 2009

(2) SACR 130 (CC).

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