

SOUTH AFRICA / JUDGMENT

Botha v S (A157/2019) [2020] ZAGPPHC 318 (17 June 2020)

[2020] ZAGPPHC 318

COURT

North Gauteng High Court, Pretoria

BEFORE

Maritz, E van der Schyff

CASE / FILE NUMBER

A157/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

(1)

REPORTABLE:

YES/NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED:

NO

Case

No: A157/2019

17/6/2020

In

the matter between:

FREDERICK

CORNELIUS BOTHA

Appellant

and

THE

STATE

Respondent

JUDGMENT

MARITZ AJ:

- [1] This an appeal against the convictions and sentences by a Regional Court, on twelve different counts of criminal sexual conduct. The offences were all alleged to have been committed against the same complainant - a young boy - over a matter of years - from 2005 to 2011. This was a period when complainant's age ranged from 5 to 11 years old. The age of the appellant during the same years would have ranged between 34 and 40 years old.
- [2] During the relevant period, the appellant was in a romantic relationship and cohabiting with the grandmother of the complainant.
- [3] The charges can be summarised as follows:
- a. Count 1 - Committing an indecent act with a person under the age of 16 in contravention of section 14(1) of Act 23 of 1957, committed during 2005.
 - b. Counts 2 and 3 - Two counts of Indecent Assault committed in 2006 and 2007 respectively, by touching the complainant's private parts;
 - c. Counts 4 and 5 -Two counts of Sexual Violation in contravention of section 5(1) of Act 32 of 2007 committed in December of 2007 and in 2006 respectively;
 - d. Count 6- Rape in that the appellant had penetrated the mouth of the complainant with his penis in 2008;
 - e. Counts 7 and 8 - Two more counts of Rape, in that the appellant had penetrated the anus of the complainant with his penis in 2008 and in 2009 respectively.
 - f. Counts 9, 10, 11 and 12 - Four more counts of sexual violation in contravention of section 5(1) of Act 32 of 2007, in that the appellant had touched the private parts of the complainant and had made the complainant to touch his (appellant's) private part in 2009, 2010 again in 2010 and 2011.
- [4] The appellant had pled not guilty, while electing not to furnish any explanation of his plea.
- [5] The complainant was called as first state witness. At the time of the trial, the complainant was about 14 years old. At the outset, the Regional Court ruled that the complainant should present his testimony through an intermediary and appointed Ms Adriana van Deventer as such. She was employed by the Department of Justice as an intermediary. This appointment occurred with the concurrence and approval of the attorney acting for the appellant at the time, Mr Mogashoa.

- [6] The magistrate briefly enquired from the complainant whether he understood the difference between the truth and lies, illustrated with an example of a false accusation. The complainant confirmed he did, although he did not really understand the concept of an oath. Again, Mr Magashoa for the appellant agreed that the complainant was a competent witness and the Regional Court found and ruled as much.
- [7] The complainant testified that, since 2005, the appellant started to "fiddle" with him, meaning to touch the complainant's private parts. This occurred regularly until
2011. He said the appellant usually said they were going to "pull wire". He continued to say that, on some of those occasions, the appellant had put his private part in the complainant's mouth and also in his "bum". At times the appellant would also tell the complainant to play with his (appellant's) private parts, which the complainant then did. This and other sexual conduct between the complainant and the appellant occurred until and including 2011. According to the complainant, the sexual conduct of the appellant always happened under a threat from the appellant that, if the complainant did not participate, the appellant would kill the complainant and his whole family and that "... there is stuff going to happen..." between the appellant and the complainant's grandmother.
- [8] According to the complainant, these sexual acts always occurred while he was staying with his grandmother and the appellant, which was mostly during school holidays - but not always. (The evidence was not articulate about the exact times of the years in question when the complainant had stayed with his grandmother and the appellant. The complainant did not say whether this occurred during December holidays, Easter holidays, Spring breaks or some other time, or perhaps all of those times). What the complainant was clear about was that he had stayed with his grandmother and the appellant during the years when the appellant and the complainant's grandmother were staying in their own house - no longer on the premises of the complainant's aunt - Denise.
- [9] Under cross-examination by the appellant's legal representative - Mr Magashoa - some further clarity was elicited. He put it to the complainant that the appellant and the complainant's grandmother had been staying with the complainant's aunt (Denise) from October 2005 until March 2007. In response, the complainant accepted that the sexual conduct complained of happened while his grandmother and the appellant no longer stayed with aunt Denise, but he maintained that the couple had been staying in their own house from 2005.
- [10] In answer to a direct question by the appellant's representative, the complainant conceded that the thing of the appellant putting his penis in the complaint's "bum", had happened only once. Upon further questioning, the complainant stated that this had happened during either 2007 or 2008, he was not sure. When asked to explain exactly what the appellant had done on that occasion, the complainant said that the appellant had put his penis "... in and out, him moved forwards and backwards." He explains that this hurt him a lot but he did not scream.

- [11] The complainant's mother was called as a witness, mainly to testify about a report the complainant had made to her in April of 2012. She testified that at that time, the complainant told her that the very first incident where he had been molested by the appellant occurred on a day when the appellant had fixed the complainant's bicycle. At that time, so the mother testified, the complainant said that the appellant had taught him to masturbate or to "... trek draad ... ". The complainant's mother could not fix a time for any of the deeds reported to her. She did say, however, that she had taken the complainant to see a psychologist after she had found the complainant trying to sodomise his cousin. She believed this had been in 2005. The complainant's mother, however, confirmed the version as put to the complainant namely that it had been about 2008 - not 2005, when the appellant and the complainant's grandmother had moved into their own house i.e. no longer stayed with the aunt, Denise.
- [12] A psychologist - Jacqueline van Staden - was called as next State witness. She confirmed that she first consulted the complainant on 21 July 2008 . This was the visit the mother said had occurred in 2005. At that time she (Ms Van Staden) found no sign of trauma attached to any sexual activity with the complainant. The complainant's behaviour was very different the second time she consulted him - in 2012, when he was "terribly agitated and upset and he was terrified that his mother had found about this just the previous day ..."
- [13] This was - in essence - the case for the state.
- [14] The appellant was personally called to testify in his own defence. His evidence was a bare denial of all wrongdoing. He did not attempt to fix the date when he and the complainant's grandmother moved out of the house of the aunt, Denise into their own.
- [15] The aunt, Denise, was called as witness for the defence. She confirmed that, from 2005 until early 2007, the appellant and the complainant's grandmother stayed with her. The complainant never stayed over with the appellant and the complainant's grandmother during that time - there would not have been enough room in the dwelling occupied by the complainant's grandmother and the appellant for that to happen. Early 2007, the complainant's grandmother and the appellant moved to their own house. However, for the year 2007, the complainant's own mother had not been employed and it would therefore not have been necessary for the complainant to stay with his grandmother and the appellant during
2007. This only became necessary from the end of 2007, when the complainant's mother became employed. (The aunt was no more specific about the time when the complainant's mother had been employed).
- [16] On this evidence, the appellant was convicted on all counts as charged.

- [17] In this appeal, we have only been favoured with a "Supplementary Notice of Appeal" - no initial Notice of Appeal. This was accompanied by a supplementary application for condonation, as both the initial appeal and the additional notice of appeal were filed out of time. (The initial application for condonation is not on the file in this appeal either).
- [18] The explanation given for the lateness is firstly that the appellant could not afford legal assistance and only obtained Legal Aid towards July 2018 and, secondly, that the clerk of the Regional Court had failed to prepare and file the record earlier, despite numerous requests and reminders.
- [19] I find the reasons advanced for the appellant's delay to be adequate under the specific circumstances. As also appears below, there is some merit in the appeal. I would therefore grant condonation for the late noting of the appeal.
- [20] The grounds of appeal, such as are contained in the supplementary notice of appeal, can be summarised as follows:
- a. Firstly, that the magistrate had not explained the nature and consequences of the oath to the complainant, on account of which his evidence should not have been accepted at all;
 - b. Secondly, that the appellant had not enjoyed proper legal representation, in that his representative had failed to object to the charges and had failed to request further particulars.
 - c. Concerning specific counts:
 - i) In respect of count 1: That it had not been proved that the offence of an indecent deed with a person younger than 16 years old had been committed in 2005, and that the evidence only showed that the appellant had touched the complainant's private parts.
 - ii) In respect of Counts 2 and 3: There was no specific evidence to attribute a specific incident to specific charges and the appellant should not have been convicted;
 - iii) In respect of Counts 4, 5, 9, 11 and 12: Inasmuch as some of these charges related to a time before 16 December 2007 (count 5 specifically) the conviction could not stand as the Act creating the particular statutory offence only came into effect on that date.
 - iv) In respect of Counts 6, 7 and 8: That the evidence only showed one instance of rape per anum, and one where the appellant had penetrated the mouth of the complainant. In any event, so the argument goes, the evidence shows that no molestation could have taken place before 2008, as the psychologist had not seen any signs of sexual trauma by that time.
 - v) In respect of sentence: Generally, that the sentence was shockingly inappropriate.
- [21] On the question of the competency of the complainant as a witness, I am of the view that the enquiry into the competency of the complainant by the Regional Court, and the subsequent admonishment to speak the truth, were sufficient to pass muster. The Regional Magistrate briefly questioned the complainant, to ascertain whether he knew the difference between

the truth and a lie. The complainant clearly knew the difference, although he seemed not to understand the nature of an oath. Section 164 of the Criminal Procedure Act makes it quite clear that, under such circumstances, a witness may be admitted to give evidence in criminal proceedings. The admonishment required by that section was also clearly done by the Regional Court. That court's finding, that the complainant was a competent witness, cannot be faulted.

- [22] The assertion that the appellant had not had a fair trial on account of the failure by his legal presentative to request further particulars and/or to object to the charges contains no merit at all and requires no further discussion.
- [23] About the evidence in general, I remark that the complainant seems to have been wrong in his assessment that the molestations at the hands of the appellant had started in 2005. It is clear from the evidence of the complainant's mother and the aunt Denise that the earliest time when the complainant would have stayed with his grandmother and the appellant for a school holiday, would have been December of 2007. It was only in that year that the couple had moved to their own home while the complainant's mother only started working in December of that year, which is when it would have become necessary for the complainant to stay with the couple. Given that the complainant was only 7 years old at the time, this wrong estimate by him cannot reflect adversely on his credibility in general.
- [24] Counts 1, 3 and 5 all related to conduct allegedly committed in 2005 and 2006 - therefore all before December
2007. Count 1 was of alleged contravention of section 14(1)(b) of Act 23 of 1957 (indecent act with a person under 16 years of age). Count 3 was one of Indecent Assault at Common Law about 2006, while count 5 was of alleged sexual violation in the same year (2006), in contravention of section 5(1) of Act 32 of 2007. There is simply no reliable evidence of any sexual molestation of the complainant by the appellant before December 2007. For the reason already stated, the complainant's assertion the appellant had started "fiddling" with him from 2005 is clearly wrong.
- [25] The evidence nevertheless showed that the specific conduct alleged in count 3 had in fact been committed on numerous occasions since December 2007. Such evidence can be accepted in terms of section 92(2) of the Criminal Procedure Act, as the Common Law crime of Indecent Assault existed at all relevant times.
- [26] With counts 1 and 5 it is different. No specific sexual act was alleged in count 1 as constituting the "indecent act". It is impossible to say that evidence of some indecent act after December 2007 would constitute proof of count 1, where the conduct in question is not identified and therefore where one would not know whether the appellant had already been convicted in respect of such same conduct, on another count. On count 5, it could definitely prejudice the appellant if evidence of conduct during a period more than three months before or after the period alleged was to be accepted as proof of the charge. This is because the offence was only created by the legislature with effect from 16 December 2007, which

also makes time of the essence. Therefore, the provisions of section 92(2) of the Criminal Procedure could not have been applied in respect of counts 1 and 5. The convictions on counts 1 and 5 can therefore not stand.

[27] Counts 2 and 4 both related to conduct which had allegedly occurred in 2007. Count 2 was of Indecent Assault at Common Law, committed "about 2007", by allegedly touching the complainant's private parts. Count 4 was allegedly committed "about 131 December 2007", by touching the complainant's private parts and making the complainant touch the appellant's, in contravention of section 5(1) of Act 32 of 2007. The reason for the specific dates alleged in count 4 is obviously because Act 32 of 2007 only came into effect on 16 December of that year. For this reason, the exact date upon which this conduct was committed is crucially important. The evidence was simply not articulate enough to prove that the appellant had sexually violated the complainant after 16 December, not before that day. The appellant could therefore not have been convicted as charged on count 4. He could, theoretically, have been convicted of Common Assault, as competent verdict on count 4, in terms of section 261(2)(a) of the Criminal Procedure Act. However, the result of that would be a conviction of Indecent Assault (count 2) and Common Assault (count 4), both in respect of December 2007 and on the same evidence of seemingly one occurrence. This would have amounted to a duplication of convictions. See: *S v Benjamin and another* 1980(1) SA 950 (A) at 956E-H. Consequently, the conviction on count 4 cannot stand.

[28] On count 6, the appellant was convicted of Rape, by sexually penetrating the mouth of the complainant during

2008. The evidence of the complainant was unequivocal, that such had indeed occurred, although no indication whatsoever was given of the day when or period during which this had happened. The evidence presented was woefully inarticulate on this aspect. On the complainant's ipse dixit the penetration per mouth could have occurred between 2005 and 2011. However, for the reason already stated, I find that it could not have happened before at the earliest December 2007. But, even so, there is still no way of knowing whether this happened before or after 16 December 2007. The date is critically important as, before that date, the crime of Rape could not have been committed by one male person penetrating the mouth of another with his penis. Such conduct could only constitute the crime of Rape from the date when Act 32 of 2007 took effect which was on 16 December 2007. Accordingly, the offence as charged with in count 6 had not been proved. The only competent verdict on that charge would be Common Assault, in terms of section 261(1)(b) of the Criminal Procedure Act. The conviction on count 6 must therefore be amended accordingly. That being the case, the mandatory life sentence prescribed by section 51(1) read with Part I of Schedule 2 to Act 105 of 1997 would no longer apply to count 6 and a new sentence needs to be imposed.

[29] On counts 7 and 8, the appellant was convicted on two separate charges of Rape on the complainant per anum, as defined in section 3(1) read with section 1 of Act 32 of 2007, allegedly committed in 2008 and 2009. The evidence of the complainant was, however, clear.

He testified that he had been penetrated in this manner only once, although he was not sure exactly when that had happened - it was either 2007 or 2008. This creates the same deficit in the evidence as was the case with count 6. The incident of penetration per anum could have occurred before or after 16 December 2007. If before, then the crime of Rape could not have been committed by one male person penetrating the anus of another with his penis. If after, then the crime of Rape - in terms of the wider definition introduced from 16 December 2007 by Act 32 of 2007, could have been committed. The evidence was simply not articulate enough to determine this issue beyond reasonable doubt. However, the evidence did prove the crime of Assault with the Intent to do Grievous Bodily Harm. The conviction on count 7 must therefore be altered accordingly. That being the case, the mandatory life sentence prescribed by section 51(1) read with Part I of Schedule 2 to Act 105 of 1997 would no longer apply on count 7 and a new sentence needs to be imposed. The second conviction of Rape per anum - on count 8 - cannot stand at all as it is just not supported by the evidence. (I add that one may perhaps be tempted to argue that the conviction of Rape on count 8 may stand - as charged - and that the conviction on count 7 should be set aside. This would, however, deprive the appellant of the benefit of the doubt that exists, to which he is entitled).

[30] Counts 9, 10, 11 and 12 are all charges of Sexual Violation in contravention of section 5(1) of Act 32 of 2007, in that the appellant had allegedly touched the complainant's private part and made the complainant to touch his private part, in 2009, twice in 2010 and in 2011. The evidence to prove all of these charges was nothing more than the a very general notion apparent from the following exchange between the complainant and the prosecutor during evidence in chief:

" PROSECUTOR:" How often this one of you playing with his private parts last?

MR LE ROUX: I do not know but all of these things that he did to me the playing and which I did to him and that we did with ourselves where more than 30 times.

PROSECUTOR: Dimitri it appears from your evidence all of these things happened to each and every year from 2005 until 2011 am I correct?

MR LE ROUX: Yes.

PROSECUTOR : So it was happening every year?

MR LE ROUX: Every year in the school holidays about.

[31] It is clear from the context of this exchange that the conduct under discussion here was the touching of the complainant's private part by the appellant and making the complainant touch the appellant's, which is the exact conduct alleged in counts 9 to 12. About the repetition of these acts, every year, the question by the prosecutor was very much leading. Nevertheless, the estimate of 30 times was the complainant's own evidence. The complainant was adamant throughout his evidence - also without a leading question - that the molestation by the appellant happened on a regular basis until and including

2011. The evidence is totally inarticulate about the exact times when the events alleged in these counts occurred. However, these exact times were not of the essence and appellant could not be prejudiced by the vagueness thereof. The evidence is sufficient to conclude that conduct as alleged in these charges occurred at least once, during at least one school holiday in each of the years 2009, 2010 and again
2011. It cannot be concluded from the evidence that such conduct happened more than once in 2010. Therefore, the conviction on count 11 cannot stand.
- [32] The sentences imposed by the Regional Court - on each count - are not shockingly inappropriate , given the age of the complainant being - on the evidence as discussed above - between 6 and 11 years old when so abhorrently and repeatedly abused by the appellant.
- [33] On counts 6 and 7, which should in my view be altered to Common Assault and Assault with the Intention to do Grievous Bodily Harm respectively, sentences of 5 years' imprisonment and 10 years' imprisonment should be imposed respectively.

ORDER

Accordingly, I propose that the following order be made:

- "1. The convictions and sentences on counts 1, 4, 5, 8 and 11 are set aside.
2. The conviction of an offence of Rape on count 6 is set aside and substituted with a conviction on the offence of Common Assault. The life sentence imposed on count 6 is set aside and substituted with a sentence of five years' imprisonment.
3. The conviction of an offence of Rape on count 7 is set aside and substituted with a conviction on the offence of Assault with the Intention to do Grievous Bodily Harm. The life sentence imposed on count 7 is set aside and substituted with a sentence of ten years' imprisonment.
4. The appeal against the convictions and sentences on counts 2, 3, 9, 10 and 12 is dismissed."

JD Maritz

Acting Judge of the High Court of South Africa

Gauteng Division, Pretoria

I agree, and it is so ordered.

E van der Schyff

Judge of the High Court of South Africa

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