

SOUTH AFRICA / JUDGMENT

De Klerk v S (A434/2011) [2015] ZAGPPHC 80 (25 February 2015) [2015] ZAGPPHC 80

COURT

North Gauteng High Court, Pretoria

BEFORE

J W Louw, E M Kubushi

CASE / FILE NUMBER

A434/2011

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REPUBLIC
OF SOUTH AFRICA
IN THE GAUTENG
DIVISION OF THE HIGH COURT, PRETORIA
CASE No. A434/2011
DATE: 25 FEBRUARY
2015
NOT REPORTABLE
NOT OF INTEREST TO
OTHER JUDGES

DATE HEARD: 13/02/2014
In the matter

between: PIETER
JOHANNES DE
KLERK.....Appellant
and
THE
STATE.....Res
pondent

JUDGMENT

J W LOUW J

- [1] The appellant was convicted on 20 December 2007 in the Regional Court, Evander on two counts of indecent assault of a fourteen year old girl during April 2006. He was sentenced on 27 February 2008 to ten years imprisonment on count one and to two years imprisonment on count two. The sentence on count two was ordered to run concurrently with the sentence on count one. Leave to appeal against the convictions and sentences was granted by the trial court on 6 March 2008.
- [2] The reason why the appeal is only now, 7 years later, being heard, is partly that problems were encountered in obtaining a transcript of the full record and that parts of the record had to be reconstructed. It, however, appears from a document signed by the magistrate who presided at the trial that the reconstructed record, which was prepared by the learned magistrate assisted by the prosecutor and the defence attorney, was received by the clerk of the court at Evander during March 2011 and has been lying there ever since. It appears therefore that the excessive delay of a further four years may have been caused by the failure of the clerk of the court to do his or her work. This is clearly unacceptable and not in the interests of justice.
- [3] The complainant was sixteen years old at the time of the trial. She attended a school for handicapped children and children with learning disabilities. The evidence of one of the complainant's teachers, a Ms Oosthuizen, was that the complainant was a slow learner and that she could not read properly. Although she was 16 years old, she had only progressed to grade 6.
- [4] The complainant gave her evidence through an intermediary and in camera. It was submitted by the appellant's counsel that the trial court committed a serious irregularity by allowing a social worker, Ms van Rensburg, to sit with the complainant in a room from where the complainant gave her evidence as the complainant was already assisted by an intermediary. It, however, appears from the transcribed record of the proceedings that the complainant had requested the court to allow Ms van Rensburg, who accompanied the complainant to court, to sit with her in the room. The court ordered Ms van Rensburg to sit on a chair behind the complainant and the intermediary and further ordered Ms van Rensburg to sit still and that she should not at any stage say anything. There is no indication on record that the complainant was in any way assisted or influenced by Ms van Rensburg when she gave her evidence. In my view, there is no merit in the submission that an irregularity was committed.

- [5] The evidence of the complainant was that the appellant and his wife were friends of her parents. On the day in question, at about 16:00, the appellant's wife asked the complainant's mother whether the complainant could come and visit them and stay over. The purpose apparently was so that she could play with the appellant's and his wife's two small children. The appellant and his wife then fetched the appellant with their motorcar.
- [6] That evening, the two children went to bed first. A bed was made for the complainant on a mattress which was placed in the lounge. The appellant's wife went to sleep in their bedroom. The appellant told the complainant he was going to watch television, which was in the bedroom. After the complainant went to sleep, the appellant came to her while she was lying on her stomach and penetrated her anus with his penis. She demonstrated the incident in court by using dolls which were provided to her. Her evidence was that when the appellant heard his wife move in the bedroom, he jumped up and ran to the bathroom and thereafter went to the bedroom.
- [7] The complainant testified about a second incident when the appellant turned her on her back and then put his hand inside the boxer short she was wearing and proceeded to put his finger into her vagina and moving it quicker and quicker. After taking his finger out, he did the same thing again. When the complainant thereafter went to the bathroom, she saw what she called white stuff ("wit goeters") running down her legs. She wiped it off and went back to bed.
- [8] The complainant was taken back home the next day by the appellant and his wife. She did not tell her parents about the incident because she was afraid that they would give her a hiding. On the second day, she decided to tell Ms Candice Hamburg about what had happened to her. Ms Hamburg was at that stage residing with the complainant's parents and had a good relationship with the complainant. Ms Hamburg then informed the complainant's mother. The mother's evidence was that she only informed the complainant's father a week later because of fear and denial on her part that this could have happened to her child. The complainant's father then went to the appellant's house and accused him of raping the complainant. The appellant testified that the complainant's father wanted to assault him and that he then suggested that they go to the father's house to sort out the problem or that they go to the police station. They ended up going to the police station and the appellant was then arrested.
- [9] The complainant was examined medically ten days after the incident. The doctor who examined her, and who gave evidence, recorded in the form J88 which he completed that the complainant was emotionally disturbed but physically fit. He found no physical lesions but her hymen was absent for which, he said, there could be many reasons, such as sexual intercourse or accidental rupturing during physical exercise or cleaning by putting a finger inside the vagina. The medical evidence was therefore of no assistance.

- [10] The complainant did not see the appellant or his wife again. When she went to the appellant's sister in law, with whom she had a good relationship, to collect her teddy bear, she was given a letter which had been written by the appellant's wife. The complainant gave the letter to her mother. The letter is addressed to the complainant. In the letter the appellant's wife apologises for what the appellant had done to her. The appellant's wife says in the letter that the complainant had done nothing wrong and that the appellant was the cause of what had happened. She also apologises to the appellant's father on behalf of the appellant. She further says that although she felt that she should hate the appellant, she couldn't, and still loved him.
- [11] The complainant was asked by the court why she did not cry out for help. She answered that the appellant had said to her that if she called out, he would hurt her with a cigarette.
- [12] It is not clear from the complainant's evidence when the second incident occurred. During her evidence in chief she first said that when the appellant went to the bedroom after the first incident, he came back after a while and was then busy with his finger. She immediately added that this did not happen on the same night. She was asked how long after the first incident the second incident occurred, but was unable to say. The complainant's evidence was that she did sleep over at the appellant's house on a second occasion. She said that the reason why she again went there was because the appellant's wife had asked her mother whether the complainant could sleep over to look after their children as she and the appellant had to go out for the evening. During cross-examination she said that the second incident occurred two or three days after the first incident when she went to sleep at the appellant's place for the second time. Later she said that the first incident happened in January and the second on 18 April and that she only made a report after the second incident. The trial court found that, in view of the complainant's limited mental capacity, it was not surprising that she could not remember the events in detail or to express herself logically and chronologically about exactly what happened.
- [13] It was put to the complainant that the appellant would testify that she wanted a relationship with the appellant and on the night of the incident she put her hand on his private parts. He then took out her hand and asked her not to do that. The complainant denied this.
- [14] Ms Hamburg's evidence was that the report by the complainant was made to her the day after the incident, which she said was a Tuesday. Her evidence was that the complainant told her that the appellant had fiddled with her from the front and the back. She did not give her much detail, but told her that the appellant had put his finger inside her vagina and that he had turned her around and lay on her back and that his penis was behind her. She did not tell her that the appellant penetrated her anus with his penis. The complainant was sad when she related to Ms Hamburg what had happened. She did not ask the complainant many questions. Ms Hamburg then informed the complainant's mother the same evening of what she had been told by the complainant.

- [15] The complainant's mother testified that when the complainant returned home the day after sleeping over at the appellant's house, she was withdrawn and very quiet. She asked the complainant what was wrong, but the complainant did not tell her anything.
- [16] It was put to the complainant's mother that the appellant would testify that the complainant's father offered to withdraw the case on condition that the appellant paid an amount of R50 000.00. She denied that and said that while the appellant was in jail, he phoned the complainant's father and asked what it would cost to withdraw the case. She and her husband never said that they would accept any amount of money.
- [17] The appellant's evidence was that from the first day he and his wife started visiting the complainant's parents, the complainant flirted with him by winking her eyes and that she then started asking to sleep over at their house. Eventually the complainant's mother asked that the complainant sleep over so that they could give her a hiding to discipline her as she didn't listen to her parents. While he was working on his car in the garage, the complainant started touching her private parts. According to the appellant this happened when the complainant visited them during the day. He then said that she must go home and he took her home. In regard to the night about which the complainant testified, the appellant said he was not even close to her, he was in his bedroom with his wife watching television. He went to the bathroom and when he came out the complainant took his hand and tried to put it on her private parts. He took her hand away and told her to go to sleep. He went back to bed. His wife was asleep before him but she was a light sleeper.
- [18] The appellant was asked what the reason might be why the complaint was laid against him. He said that he thought that the complainant's parents wanted to get money from him and that they tried the same thing with his brother. During cross-examination, he said that on the day he was incarcerated they obtained what he called a letter from an attorney according to which they would settle the matter for R100 000.00 and one of his Golf motorcars. They then reduced the demand to R50 000.00 and the car. They did not give his wife a copy of the letter. His father told him about this while he was in jail. His wife then asked her grandfather for the money but his father said they should not give the money and that they should fight the matter in court. The appellant also didn't think they should give the money and the car as the parents could still proceed with the case. He said that two weeks before, the complainant's parents also tried the same thing with his brother by threatening to lay a charge against his brother for doing similar things to the complainant. His brother however threatened to take the complainant's father to court for something which the father had done at work on the mine. The parents then didn't lay a charge against his brother.
- [19] The appellant was asked in cross-examination about his evidence that the complainant flirted with him. He said that she winked her eyes at him and rubbed her hands over her breasts and pulled her hand through her legs. She did this when she could not easily be seen by other people.

- [20] The appellant further testified that he told his wife about the complainant grabbing his hand and trying to put it on her private parts approximately two days after this happened. His wife then asked him why he didn't tell her immediately, then they would have taken the complainant home the same evening. He didn't tell his wife the same evening because he didn't know what her reaction would be.
- [21] The appellant said he knew about the letter which his wife had written, but that she had told him that she wrote the letter because she had been through a similar experience and not to say that he was guilty.
- [22] The appellant's wife testified on his behalf. She was asked what the reason was for the letter which she wrote. She said that she was upset because the appellant had been charged with rape and she wrote that she was sorry if this had happened, but that she did not believe he did it. The whole tone of the letter was that it did happen and she profusely apologised to the complainant and to the complainant's father for what had happened. When asked about this in cross-examination, her explanation was that she had been molested as a child and that she was upset. Her evidence was that the first time that she heard about the complainant being raped by the appellant was when the complainant's father came to their house and accused the appellant of raping the complainant.
- [23] It was argued on behalf of the appellant that there was no evidence which indicated that the appellant had admitted to his wife that he had raped the complainant. In this regard, reference was made to a paragraph in the letter in which she wrote that the appellant should admit to the complainant's parents that he did it, and that she would go to the appellant the following day so that he could tell her and tell her why he had hurt the complainant in that way. I agree that it is therefore possible that the appellant's wife, after hearing the complainant's father accusing the appellant of raping the complainant, assumed that it had in fact happened and that she did not again speak to the appellant after him being arrested and before writing the letter.
- [23] The appellant's wife denied during cross-examination that the appellant told her about the alleged conduct of the complainant of grabbing his hand and trying to put it on her private part. She said he told her nothing about this. This contradiction between the evidence of the appellant and that of his wife causes one to doubt the appellant's version of what happened.
- [24] The appellant's wife was asked whether she knew about the money and the motorcar about which the complainant's parents had approached the appellant's father. She said that the complainant's mother telephoned her and said that she had drawn up a settlement agreement and asked her to come and look at it and tell her what she thought of it. She went there and looked at the agreement. The car which was mentioned was still subject to a hire purchase agreement and she was not able to pay the R100 000.00. She was promised a copy of the agreement, but she never received one. The appellant's wife then went and discussed the settlement agreement with the appellant's father. He wanted to reach a settlement, but when he heard what the terms were, said that they should rather fight the court case.

- [25] The appellant's wife was asked whether she at any stage saw the complainant rubbing over her breasts and over her private parts and winking at the appellant. She said that she saw it happen once while in the company of people.
- [26] The trial court took into account that the complainant was a single witness, but found that, taking her mental abilities into account, it was not surprising that she was not able to remember the events in fine detail or to express herself logically and chronologically about what had happened but that, in essence, her version was very clear. The court found that, having regard to the complainant's mental capabilities, there were aspects of her evidence that she would not have been able to fabricate, e.g. that when she went to the bathroom after the appellant had penetrated her anally, she saw white stuff running down her legs.
- It also referred to her evidence that when it sounded as if the appellant's wife was waking up, the appellant jumped up and ran to the bathroom.
- [27] The court further found that the evidence of Ms Hamburg was to the point and that her credibility could not be questioned. The complainant's mother impressed the court as a credible witness and accepted her evidence that the 'complainant was quiet and withdrawn the day after the incident. The court also took account of the evidence of the complainant's teacher Ms Oosthuizen that the complainant was not able to consistently persist with a lie.
- [28] The court rejected the allegations of the appellant that the complainant's father had attempted to falsely incriminate the appellant's brother 2 weeks before in order to make money. The court found that if that were true, it would have been expected that a full incriminating version would have been placed before the court.
- [30] It was argued on behalf of the appellant that the trial court did not apply the cautionary rule in respect of the evidence of the complainant who was a single witness as the court did not find that her evidence was clear and satisfactory in every respect. Reference was made in this regard to the contradictions in the complainant's evidence about when the two incidents took place, to which I have referred above. Reference was also made to the complainant's first statement to the police in which she said that the two incidents happened on the same occasion, and to her third statement to the police in which she did not mention that the appellant had penetrated her anus with his penis, but stated that he used his finger. The statements which the complainant made to the police were not objected to by the prosecutor and were admitted in evidence by the court.
- [31] Further contradictions in the complainant's evidence were the following. In her evidence in chief she said that when the appellant put his finger into her vagina, he pulled her short down. Then she said that he didn't pull the short down but put his hand inside the short. Her evidence was also contradicted in important respects by that of Ms Hamburg. The complainant's evidence was that the first incident occurred on a Saturday night which, if her evidence that the second incident occurred on 18 April 2006 was correct, would have been on 15 April 2006. Ms Hamburg's evidence was that the incident occurred on the Monday night, which would have been the 17th of April, and that the complainant reported it to her

the following day. Her evidence was further that the complainant told her that the appellant had put his finger inside her vagina and that he had turned her around and lay on her back and penetrated her anus with his penis. The complainant's evidence in cross-examination was that when she made the report to Ms Hamburg, she was referring to the first incident and that she did not tell her about the second incident.

[32] In my view, the trial court did not pay sufficient regard to the contradictions in the evidence presented by the state and erred in its finding that the state proved its case beyond reasonable doubt. The evidence of the complainant was not clear and satisfactory in every material aspect. It was not simply a question, as was found by the court, of the complainant, because of her mental capacity, not being able to remember the events in fine detail or to express herself logically and chronologically about what had happened.

[33] Although I have serious doubts about the veracity of the appellant's version, it is trite that there is no onus on an accused to convince a court that his version is true. All that is required is that it must reasonably possibly be true. He must be given the benefit of the doubt even if the court does not believe him. In this regard, it must be pointed out that the court found that the appellant and his wife were not mendacious witnesses and that there were no material contradictions in their evidence. The court, however, rejected their evidence as being improbable. That, of course, is not the correct test to be applied.

[34] In the result, the appeal must in my view succeed. I propose that the following order be made:

[i] The appeal is upheld.

[ii] The conviction and sentence imposed by the court a quo are set aside and replaced with the following order:

"The accused is found not guilty and is discharged"

I agree

E.M. KUBUSHI

JUDGE OF THE HIGH COURT

J.W. LOUW

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