

SOUTH AFRICA / JUDGMENT

Gilbert v S (CAF 04/2010) [2010] ZANWHC 28 (28 October 2010)

[2010] ZANWHC 28

COURT

North West High Court, Mafikeng

BEFORE

R D Hendricks, A A Landman, N Gutta

CASE / FILE NUMBER

CAF 04/2010

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: CAF 04/2010

In the matter between:-

JONGANE GILBERT Appellant

and

THE STATE Respondent

FULL BENCH APPEAL

HENDRICKS J; LANDMAN J; GUTTA AJ

DATE OF HEARING : 22 OCTOBER 2010

DATE OF JUDGMENT : 28 OCTOBER 2010

COUNSEL FOR THE APPELLANT : MR MOOKELETSI

COUNSEL FOR THE RESPONDENT: ADV MAKHAGA

JUDGMENT

HENDRICKS J

[A] Introduction:-

- [1] The Appellant was convicted in the Regional Court on two counts of rape. The matter was transferred to the High Court for sentence in terms of the provisions of Section 52 of the Criminal Law Amendment Act, Act 105 of 1997.

- [2] The conviction on both counts was confirmed and a sentence of eighteen (18) years imprisonment was imposed on each count but it was ordered to run concurrently. The Appellant appeals, with leave of the court a quo (per Gura J) the conviction. No appeal lies against the sentence imposed.

[B] The Facts:-

- [3] On the day of the incident during September 2004, the Appellant was in the company of the two complainants (aged four years and five years respectively) at their place of abode. The evidence tendered by S P (the complainant in count 1) is to the effect that the Appellant undressed her as well as her cousin P M (the complainant in count 2). He also undressed himself and put on a condom. He then in turn, had sexual intercourse with the two of them in the presence of each other. After having sexual intercourse with the complainants, he gave them sweets. S made a report to her brother and thereafter to her aunt about this incident. Both complainants were medically examined and the medical reports were handed by consent as exhibits during the trial.
- [4] The version of the Appellant is to the effect that he denies that he had sexual intercourse with the complainants as alleged.

[C] Grounds of Appeal:-

- [5] Two issues were raised during argument as grounds of appeal. First, it was contended that because P M, the complainant in count 2 did not testify, a conviction of rape cannot be sustained.
- [6] It was submitted that it was incumbent upon the complainant in a rape case to testify viva voce and say in no uncertain terms that she was penetrated with a penis otherwise rape would not be proven. I find myself unable to agree with this submission.
- [7] The complainant, who was a child of merely four (4) years old, refused to relate what happened to her. However, she was raped in the presence of S P (the complainant in count 1) who was a competent witness to testify about the rape of not only herself but also the complainant in count 2.
- [8] Circumstances may differ and each case must be decided on its own merits. There may well be situations where a complainant cannot testify about the rape she suffered. This may happen for example where a complainant is raped and so severely assaulted that she cannot speak after the ordeal or where, after being raped, the victim is murdered.
- [9] In such instances, if there is a eye witness(es) who can testify about the incident, a conviction may follow depending upon the evidence presented. If there is evidence allunde substantiating the evidence of forceful penetration, it will lend credence to the testimony of the eyewitness.

- [10] Not only was S P (the complainant in count 1) a victim in the same ordeal that also befell P M (the complainant in count 2) but she was a competent eye witness. Her evidence is corroborated by the medical evidence tendered, which brings me to the second ground of appeal.
- [11] As the second ground of appeal, it was contended that the medical evidence does not substantiate a finding that the two victims were indeed penetrated by the Appellant's penis, as testified and alluded to by S P.
- [12] Both medical reports states that there was "attempted penetration" because there were abrasions and bruises on the labia majora. The detection of the bruises on the labia majora is in my view, sufficient corroboration of S P's evidence that penetration did occur.
- [13] The slightest form of penetration constitutes penetration in the legal sense, sufficient to sustain a conviction on a rape charge. See in this regard Principles of Criminal Law, Third Edition by Burchell and Milton on page 706 read with footnote 47 where the learned authors explained what is meant by "slightest penetration" in the following words:- "Meaning that entry into the labia, the outermost part of the female genital organ, is sufficient entry."

The learned authors continue and state that:- "Once penetration has occurred the act of intercourse is complete for these purposes and it is thus irrelevant that the male does not emit semen, nor does it matter that the woman's hymen is not ruptured in the act".

See also:- S v F 1990 (1) SACR 238 (A) on page 244 g-j.

S v Dzukudu 2001 (2) SACR 244 (W) on page 252 b.

- [14] Furthermore, as far as the evidence of S (the complainant in count 2) is concerned, it was submitted that her evidence should not have been accepted by the trial court because she was told by her mother what to tell the court and her evidence was prompted by leading questions been put to her by the public prosecutor who acted on behalf of the State.
- [15] A careful examination of the record indicate that she was not told in minute detail by her mother what it is that she must relate to the court. It is understandable that a mother would, in an attempt to put her child at ease before she testified in court, encourage the child to some extent to relate to the court what had happened.
- [16] Similarly, the record proves that not much can be made about some of the leading questions posed to this witness. Her testimony, viewed holistically, is to the effect that she volunteered most of the essential evidence. She had a good understanding of what is meant by sexual intercourse and she was able to express herself clearly with regard to this aspect.

[D] Conclusion:-

- [17] In my view, the conviction of the Appellant on both counts is in order and the appeal against the conviction should therefore fail.

[E] Order:-

[18] Consequently, the following order is made:-

The appeal against the conviction on both counts is dismissed.

R D HENDRICKS

JUDGE OF THE HIGH COURT

I agree.

A A LANDMAN

N GUTTA

ACTING JUDGE OF THE HIGH COURT

ATTORNEYS FOR THE APPELLANT: S M MOOKELETSI ATTORNEYS

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZANWHC/2010/28.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/gilbert-v-s-unknown-topic-anwhc-2010>

Prepared on 11 October 2026 · Esheria