

SOUTH AFRICA / JUDGMENT

J.G v S (CA&R 133/2012) [2014] ZAECHGC 112 (19 November 2014)

[2014] ZAECHGC 112

COURT

Eastern Cape High Court, Grahamstown

BEFORE

E Revelas, JW Eksteen

CASE / FILE NUMBER

CA&R 133/2012

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

Source record

SAFLII

Note: Certain

personal/private details of parties or witnesses have been
redacted from this document in compliance with the law
and SAFLII

Policy

Reportable/Not

Reportable

IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION – GRAHAMSTOWN

CA&R

133/2012

In

the matter between:

J[...]

G[...]

.....Appellant

and

THE

STATE

.....Respondent

JUDGMENT

REVELAS J

- [1] The appellant, a 54-year-old man, was charged with seven counts of unlawful sexual misconduct involving two minor girls in the Uitenhage Regional Court, allegedly committed during the period 2007 to 2009. The appellant pleaded not guilty to the charges on 5 August 2010. On 6 September 2011 he was convicted as charged on five counts of indecent assault, formulated in terms of the common law (counts 1-5), and two counts of sexual assault in contravention of section 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 (counts 6 and 7).
- [2] On 24 September 2011, the appellant was sentenced to eighteen months' imprisonment on each count. The regional magistrate ordered the sentences on counts 5-7 to run concurrently with the sentences imposed in respect of counts 1-4, resulting in an effective term of six years imprisonment. With leave of the trial court, the appellant challenged the convictions and the sentences imposed in respect of them in the present appeal.
- [3] The first three counts related to the first complainant, MG, aged twelve and the last four counts related her younger sister, GG, who was nine and ten years old at the relevant times. The evidence of the two complainants about the events which gave rise to five of the charges (counts 1-4 and count 6), was briefly that during 2007, the appellant would come into their rooms while they were asleep, lift the bedcovers and touch their genitalia on some occasions, and lick them on others. They would pretend to be sleeping whilst this was going on. Mr G, their father testified that he on three occasions found the appellant outside the children's bedroom.
- [4] Count 5 related to an allegation that the appellant, during 2008, indecently exposed himself to GG while she and a friend were playing with their dolls. Count 7 related to an incident in 2009 where the appellant, in a public place in Despatch, allegedly touched GG's genitalia.
- [5] The appellant amended his notice of appeal to include further grounds of appeal, to the effect that the magistrate did not comply with the provisions of section 164 read with sections 162 and 163 of the Criminal Procedure Act, 51 of 1997 ("the Act"). The appellant contended that the magistrate failed to determine whether the two complainants had the ability to distinguish between truth and untruth and whether they knew what it meant to tell the truth. It was submitted that the questions asked in relation to the complainants' age and level of education, were insufficient to determine whether they were competent to testify.

The Oath and Admonition

- [6] Sections 162 and 164 of the Criminal Procedure Act provide as follows:

"162. Witness to be examined under oath.

- (1) Subject to the provisions of sections 163 and 164, no person shall be examined as a witness in criminal proceedings unless he is under oath, which shall be administered by the presiding judicial officer, or in the case of a superior court, by the presiding judge or the registrar of the court, and which shall be in the following form:

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.
- (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”.

- [7] The provisions of section 162 are peremptory and if a presiding officer fails to establish at the outset whether a witness understands the nature and import of the oath, the evidence of that witness is inadmissible.[1]

- [8] When MG testified in this matter she was fifteen years old. When the magistrate canvassed with her what it meant to take the oath, the following exchange took place between them after she told the magistrate that she was in Grade 9 and her subjects were inter alia Afrikaans, English, Mathematics.

Court: “As ek vir jou vra om die eed te neem sal jy weet waarnvan ek praat?”

MG: “Om te sweer.”

Court: “Wat is haar antwoord?”

Intermediary: “Sy vra is dit om te sweer.”

MG: “Om te sweer dat ek nie sal lieg nie.”

Court: “Ja-nee, maar as ek jou vra om die eed te neem weet jy wat dit is?”

MG: “Ek verstaan nie.”

Intermediary: “Sy verstaan nie, sê sy, wat ‘n eed is.”

Court: “Goed. Ek kan net nie mooi hoor nie.”

(Trouble with the recording machine).

- [9] The magistrate then said he was satisfied that MG knew what the oath entailed and therefore it may be administered. When the oath was administered, MG responded:

“Okay. Ek sweer. So help my God”.

[10] Mr Koekemoer, on behalf of the appellant submitted that the magistrate ought to have explained the import of taking the oath and the consequences of not speaking the truth to MG. In my view, the magistrate was entitled to assume, as he obviously did, that MG understood those consequences, based on her level of education and her age when she testified. MG was perhaps not familiar with the actual word “eed” (oath), but clearly understood what it meant to swear to speak the truth.

[11] In *Matshiva (supra)*[2] it was held that for section 164 (1) to be triggered there must be a finding that the witness does not understand the nature and the impact of the oath. GG was admonished to speak the truth.

[12] Before GG was admonished, the magistrate, (as he did with MG), commenced his questions by establishing her age, level of education

and to name some of her school subjects first. She was twelve and in Grade six. The following exchange then took place

between them in pursuance of section 162 the magistrate’s obligations envisaged:

Court: “. . . ‘maar in elk geval as ek vir jou vra om die eed te neem sal jy weet waarvan ek praat . . .?’”

GG: “Nee”.

Court: “Weet jy wat dit is om die waarheid te praat? Wat dit is om ‘n leuen te praat?”

GG: “Ja”.

[13] Thereafter she was asked about the subjects she was taking at school. Because she mentioned that Afrikaans was one of her subjects, the magistrate asked her whether the learners still wrote essays and comprehension tests. When GG answered in the affirmative, the magistrate did not ask her any further questions but turned to Mr Malgas, the appellant’s

legal representative and the following exchange took place between them before GG was admonished to speak the truth:

Court: “Ja. Mnr Malgas wil u hê ek moet verder vrae vra?”

Mr Malgas: “Nee wat.”

Court: “Kyk, dit lyk vir my asof sy darem in ‘n akademiese skool is en die vakke die lyk darem ook vir ‘n mens asof sy darem vakke doen waar daaraan begrip redelik nodig al is op hierdie stadium. So sy is darem nie so oningelig op hierdie stadium. Nou goed.”

Mr Malgas: “Ek stem saam.”

Thereafter GG was admonished as follows:

Court: “Ek gaan vir jou vra [GG], volgens die wet word jy dan gewaarsku om die waarheid te praat en niks anders as die waarheid

nie nê? Ja.”

[14] Though not much turns on it in this matter, it is necessary to caution that the opinion of legal representative for the

accused, on whether a state witness knows the meaning of what it means to speak the truth, can never be a substitute for a failure by the magistrate to question the witness as envisaged in sections 162, 163 and 164 of the Act.

[15] With regard to the testimony of children, the duty of the presiding officer is to satisfy himself or herself that a child witness is able to distinguish between the truth and untruth and that the child understands what it means to speak the truth.[3] In my opinion the magistrate discharged his duties in this regard. He established GG’s level of education first, and then he ascertained whether she knew what it meant to speak the truth and what it meant to lie. The magistrate was not satisfied that GG knew what an oath meant since her answer was different to MG’s answer regarding her understanding of the meaning the oath. He therefore displayed the necessary caution by admonishing her. The magistrate was entitled to accept GG’s word that she knew the difference between truth and lies especially in the light of her age. An additional demonstration by GG of an understanding of what it meant to tell the truth was therefore unnecessary. GG was twelve years old when she gave evidence. As correctly pointed out by Mrs Turner for the state, a seven year old child might not have sufficient education of what it means to speak the truth, but a twelve year old girl with GG’s level of education would not fall in that category.

[16] The appellant’s challenge to the competency of the complainants as witnesses is unfounded. I now return to the merits of the convictions.

The Convictions

[17] The magistrate, in his judgment, did not analyse each count separately, with reference to the particular evidence in respect of each count, but found the appellant guilty on all counts collectively. The state properly conceded that the court a quo, upon a proper consideration of the evidence presented, ought not to have found that the prosecution had proved the offences committed against MG (counts 1, 2 and 3), beyond a reasonable doubt, given the insufficient corroboration which the circumstances of the case required, for her evidence to be relied upon. The state adopted the same approach with regard to GG’s evidence in respect of the count of indecent assault (count 5). GG’s friend, who was present when the appellant allegedly indecently

exposed himself to them was not called to testify.

- [18] It follows that the appellant must succeed with his appeal on counts 1, 2, 3 and 5 without any further discussion regarding those counts in this judgment. The state supported the appellant's conviction on counts 4, 6 and 7, on the basis that unlike the other counts, sufficient corroboration for GG's evidence was to be found in the evidence of her parents.

The Evidence on Counts 4, 6 and 7

- [19] The two complainants, MG and GG, are sisters and lived with their parents, Mr and Mrs G, in house in Despatch. Their parents often socialized with the appellant, who lived across the road from them in a flat. It was common cause that Mr and Mrs G engaged in sexual relations with certain of their visitors as social entertainment, an activity referred to as "swinging".

Alcohol and a sensory enhancing substance ("poppers") were also used during such episodes which occurred after the children had gone to bed. The appellant was a regular participant in these swinging activities which commenced in 2003. He also, at a later stage formed a romantic relationship with Mrs G, in the sense that the two of them enjoyed sex when Mr G was not present. Mr and Mrs G divorced in 2008 and Mrs G broke up with the appellant soon thereafter and formed a relationship with someone else. The children were living with her and her new boyfriend during 2009.

- [20] It was also common cause that MG was fully aware of the sexual proclivities of her parents and had at least on one occasion observed an example of such activities involving her parents and the appellant. According to her, GG was also aware of these

activities. Both sisters were also aware of the affair between their mother and the appellant but kept it secret from their father, even though they disapproved of the affair. In my view, one can accept that MG and GG were deeply affected by these influences in their lives.

- [21] During 2007, although they each had their own room, the two sisters always slept together in one of the rooms with the passage light on, because of GG fear of darkness. MG's room had a double bed and in GG's room there were two single beds.

- [22] GG's evidence regarding the first incident of alleged sexual assault (count 4) was that on an evening in 2007, she and her sister were sleeping in the double bed in her sister's room. She woke up to find that her sleeping shorts had been pulled down and the appellant was busy licking her vagina. She became frightened but pretended to sleep. Her father then came into the bedroom and asked the appellant to explain his presence in the room. When her mother followed her father shortly thereafter, enquiring about what the appellant had done, GG assured her mother that nothing happened. She explained that her lie was the result of her fear that if she told the truth, her parents would think it was her fault (MG gave the same explanation when she was asked about why she never came forward to report the appellant's alleged conduct).

The appellant denied GG's allegations in respect of this count.

- [23] With regard to count 6, GG testified that the second incident of sexual assault to which the appellant allegedly subjected her to, occurred on 31 December 2007 (she called it new Year's Day but it was common cause that was New Year's Eve). The appellant had come over for a braai. GG had gone to bed. She said while she lay sleeping next to her sister, she woke up and found that the appellant was busy licking her vagina. Her sister, Mr G and the appellant disputed that MG had gone to bed at the relevant time.
- [24] According to GG, her father also entered the room on this second occasion and asked the appellant to state his purpose for being in the room. Thereafter an altercation between her father and the appellant ensued and the latter left the house. Shortly thereafter Mr G left. It is common cause that the two men arranged on the telephone to meet at the municipal swimming pool where they engaged in a punch-up.
- [25] GG said that one of the reasons why her father left the house that night to meet the appellant was because "ons het vir my ma so 'n stukie vertel hoekom hy, (referring to the appellant) aan my gekrap (sic), toe vertel ons my ma". Asked about her use of the word "ons" she corrected herself and said that she alone told her mother about the appellant. She put it as follows:

"My ma het eerste vir my gevra het hy aan my gekrap, toe sê ek vir my ma ja, hy het aan my privaatdele geleë, en toe sê my suster vir my ma nee, dat hy nog nie aan haar gekrap het nie".

When the appeal was argued, it was accepted that the word "krap" in this context did not mean "scratch". In my opinion, the word "rub" would be an appropriate translation, in the context of the other evidence presented.

- [26] The appellant denied GG's allegations of sexual assault and maintained that his altercation with Mr G was because the latter had discovered that he was being cuckolded by the appellant and Mrs G. It was common cause that Mr and Mrs G agreed not to lay criminal charges against the appellant. Mrs G admitted that she asked GG to forgive the appellant which GG said she only pretended to do. The affair between the appellant and Mrs G continued thereafter.
- [27] Count 7: GG testified that one day in 2009, near the Engen Garage in Despatch, close to a water feature, she saw the appellant standing next to his car. She had just attended church and was on her way home to her mother. The appellant called her. She was reluctant to go to him but could not take another route home because she saw a group of persons whom she thought might harm her if she moved in their direction. The appellant then walked towards her and grabbed her. He placed his one hand over her mouth and placed his other hand on her vagina. She then kicked him in his genitals and ran away. She decided to go to her father instead of her mother.

- [28] After this incident GG wrote a note to one of her school friends, relating the appellant's conduct towards her. No evidence was lead about the contents of her note, but it found its way to one of her teachers who raised the matter with Mrs G. Mr and Mrs G decided at this point to lay criminal charges which eventually lead to the convictions under consideration.

Analysis

- [29] When dealing with the evidence of children, caution in the form of corroboration, may not be necessary in some cases. "In other cases however, a court may be unable to rely solely upon the evidence of a single witness" and corroboration would become a requirement.[4] This was such a case.
- [30] It is common cause that after the divorce, Mrs G took both complainants to a psychologist for counselling. The magistrate relied on the contents of the psychologist's report as corroboration for the evidence of the complainants of the actual offences. In the absence of him testifying, that was a misdirection. The state conceded as much.
- [31] In respect of count 4, the state led the evidence of GG's parents as corroboration. Mr G said that on an evening during 2007, when the adults were playing rummy and the children had gone to bed, the appellant left the table. He decided to get up as well. Mr G found the appellant a while later, in the vicinity of the children's room. The appellant's explanation for his presence outside the room was that he only wanted to tickle the children and referred to his boarding school days in Jansenville where such conduct was apparently common place. Both parents testified that they accepted the explanation at the time.
- [32] The testimonies of GG's parents do not provide sufficient corroboration for GG's testimony to sustain a conviction on count 4. There were five incidents of sexual assault allegedly perpetrated during 2007 on the complainants whilst they were in their beds. Mr G testified that he found the appellant outside the complainants' bedrooms on three occasions. Save for the incident of New Year's Eve, none of the incidents of alleged sexual assault can be linked in time, to any particular one of the incidents in respect of which Mr G said he observed the appellant outside or in the vicinity of one of the two rooms where GG was sleeping. On at least one of these occasions Mr G was likely to have been under the influence of poppers and alcohol which may have impaired his memory of events.
- [33] In addition, GG's evidence that her mother also came into the room to ask her what the appellant had done (after her father had been in the room) and that she reassured her mother that nothing happened, was not corroborated by Mrs G. According to Mr G, he never entered the bedroom on any of the occasions when he found the appellant in the vicinity of his daughters' bedroom as G had testified.
- [34] The allegation of unlawful sexual assault stipulated in the charge sheet in respect of count 6, is that the appellant touched the complainant's vagina. This is contrary to GG's evidence in court which was that the appellant licked her vagina. Two sets of charge sheets were drawn up in this matter. In the district court charge sheet, count 6 also refers to the sexual assault

as being that the appellant had touched GG's vagina. This is a material discrepancy as it relates to the actual act which constitutes the offence. An inference that she told the person who took the statement from her, that the appellant had touched her, as opposed to licking her is a reasonable one. It may be that her mother's reference to rubbing had a bearing on GG's description of events, but the contradiction stands. At this point it would be impermissible to adopt the approach that her testimony in court cured the defect in the charge sheet as submitted by the state.

- [35] Also in respect of count 7, there are material contradictions between GG's evidence in court and what she told the social worker who took her statement during the police investigation. According to this statement, the appellant was in his car when she saw him and that he approached her, followed her and called her, while he was in his blue bakkie and, while still in his bakkie, invited her to accompany him ("saam met hom te ry").
- [36] In court GG denied the correctness of this statement and was adamant that the appellant was standing outside his car when she saw him and that he approached her on foot. She also did not mention in her statement that the appellant had clasped her month closed as she did in court. The corroboration relied upon by the state in respect of count 7, was Mr G's testimony that she came to his flat one Sunday and was upset. He assumed she had an argument with a friend. Unfortunately, this corroboration does not carry much weight in the light of the aforesaid contradictions. The appellant, who had not been living in Despatch at the time in question, denied the allegations made against him. It also appears somewhat unlikely that the appellant would have behaved in this way in public.
- [37] GG testified about events which occurred two to three years ago (except for count 7) when she was nine and ten years old, which might explain some of the discrepancies. There can be little doubt that the flaws in GG's testimony are to a large extent attributable to the fact that she was deeply affected by many aspects of her parents' life-style and their divorce. She also said that she hated the appellant.
- [38] Insofar as count 6 is concerned, there was indeed some corroboration for GG's testimony by her family. The discrepancy between GG's evidence in court and her police statement would not, viewed on its own, have undermined her credibility, if her evidence in relation to the other counts was reliable. This was not the case as illustrated above. Whenever contradictory evidence was pointed out to GG she would ardently persist in her version, even in the face of irrefutable evidence to the contrary. For example, the evidence of the appellant, the parents and MG was that MG was not asleep with her in the bed at the time, but GG insisted that she was. The effect of the shortcomings in GG's evidence in respect of all three counts under discussion is not diminished by the limited corroboration provided by her parents on count 6, in my view.
- [39] Consequently I am not satisfied GG was a reliable witness even in respect of count 6. The appeal must therefore succeed.

[40] Accordingly, it is ordered that the appellant's convictions on all seven counts and the sentences imposed in respect of them, be set aside.

E REVELAS

Judge of the High Court

Eksteen J: I agree.

JW EKSTEEN

For the Appellant, Adv J Koekemoer, instructed by Coltmans Attorneys.

For the respondent, Adv N Turner, instructed by The Director of Public Prosecution.

Date Heard: 29 October 2014

Date Delivered: 19 November 2014

[1] S v Matshiva 2014 (1) SACR 29 (SCA); Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & Others 2009 (4) SA 222 (CC) at paras 165-167; S v Ragubar 2013

(1) SACR 398 (SCA); S v Vumazonke 2000

(1) SA 619 (C).

[2] At para [11].

[3] See: Director of Public Prosecutions (supra) footnote 1.

[4] Director of Public Prosecutions v S 2000

(2) SA 711, per Kirk-Cohen J at 716 B-C

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/ZAECGHC/2014/112.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/jg-v-s-unknown-topic-aecghc-2014>

Prepared on 10 October 2026 · Esheria