SOUTH AFRICA / JUDGMENT

S v Hartogh (SS183/2004) [2005] ZAWCHC 128 (23 May 2005)

[2005] ZAWCHC 128

COURT
Western Cape High Court, Cape Town

BEFORE
Zondi

CASE / FILE NUMBER
SS183/2004

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IN
THE HIGH COURT OF SOUTH
AFRICA
(WESTERN
CAPE HIGH COURT, CAPE TOWN)
CASE
NO: SS1
83/2004
DATE: 23
MAY 2005
In

the matter between: THE
STATE
and
JOSEPH
HARTOGH

JUDGMENT

ZONDl, AJ

The accused was referred to this court for sentence by the Regional Court after having been convicted of indecent assault and rape. The matter initially came before me on the 11th of March 2005. According to the charge sheet the accused faced the following charges:

1. That he is guilty of the crime of rape in that in/or about July 2001 and at/or near Valhalla Park in the regional division of the Cape he unlawfully and intentionally had sexual intercourse with Vernoline Hartogh without her consent and while she was 15 years old.
2. That the accused is guilty of a crime of attempted rape in that on or about the 26th of June 2001 and at/or near Valhalla Park in the regi on a I di v is i on of the Cape he unlawfully and intentionally attempted to have, sexual intercourse with Vernarita Middleway without her consent and while she was 10 years old.

In both counts the provision of section 51 of Act 105 of 1997 was said to be applicable. In terms of section 52(3)(b) of ; the Act, that is the Criminal Law and Procedure Act I had first to be satisfied that the proceedings in the Regional Court were in accordance with justice before sentencing the accused.

After perusing the court record I had some doubts regarding the correctness of the conviction in so far as it related to the charge of rape.

I accordingly requested the Regional magistrate to give reasons for convicting the accused, and in particular to comment on the

following:

1. To give reasons why he was of the opinion that the sexual intercourse had been proved;
2. Whether there was any liable corroborative evidence to support Vernolme's evidence.

The Regional magistrate has responded to my query as follows - it is contained in the statement dated the 5th of April 2005. He states as follows:

"1.1. It is Trite Law that the slightest vaginal penetration is sufficient to constitute rape;

1.2. The court accepted the complainant's version from which it is evident that vaginal penetration did take place.

And then he referred to what was portion of the record to support his findings.

> *"1.3 The court found that the doctor's finding (unfortunately he expresses himself rather awkwardly in English) that there were signs of partial penetration corroborates her version.*

And again he referred to certain portions in the record in which those findings were stated.

> *"2. Whether or not there was corroborative evidence to support Vernoline evidence the Regional magistrate had this to say:*

2.1. The court taking into account her youth and the fact that she was a single witness, and that ... (indistinct) cautionary rules

...(indistinct) appli-cation because of that concluded that she was a satisfactory witness in respect of all material respects.

2.2. As indicated above the evidence of the doctor corroborates her version.

2.3. It was also found that the similarities in the modus operandi of the accused

> *"In respect of both complainants and the conduct of Vernoline when she informed her mother of what had happened with her were corroborating*

features.

This in brief summarises the magistate's reason for conviction.

Now the court had perused the magistrate's reason for judgment and is still not satisfied that conviction of the rape charge was appropriate.

Ms Joubert who appeared for the State also conceded; that on the evidence presented in the Regional Court a conviction on the rape

could not be sustained. In particular reference was made to page 52, line 25 of the record. Vernoline was asked the following question:

> *"Was daar 'n stadium waar hy sy penis gevat het en dit binne-in jou wou sit? — Nee, mevrou."*

Now the medical evidence presented does not take the matter any further. On page 84, line 20 of the record Dr ...(indistinct) stated there was less possibility that complete sexual intercourse had taken place. He at the same time also stated that it was possible that the fingers or something else might have been put inside her.

In circumstances taking all the evidence presented in totality I am of the view that the conviction of rape was inappropriate. At most the evidence presented establishes that Vernoline was indecently assaulted.

ACCORDINGLY I SHALL SET ASIDE THE CONVICTION OF RAPE, AND SUBSTITUTE IT WITH ONE OF INDECENT ASSAULT.

THE ACCUSED HAVE BEEN ACQUITTED ON RAPE AND CONVICTED ON INDECENT ASSAULT BASED ON THE EVIDENCE THAT WAS PRESENTED.

I now find the accused GUILTY OF INDECENT ASSAULT

As far as the conviction on indecent assault of Vernarita I am satisfied that the proceedings in the Regional Court were in accordance with justice, and that the report insofar as it related thereto will stand and will be sufficient for sentencing.

ZONDI, AJ

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Prepared on 9 October 2026 · Esheria