

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

NOT REPORTABLE

Case no: A 118/2006

In the matter between:

Date: 16/1/2008

JOHN NKOSI

Appellant

and

THE STATE

Respondent

JUDGEMENT

1 The Appellant was charged with 3 different counts as follows:

- 1.1 Count 1 :that on or about 5 May 2000, and at or near Benoni, the appellant unlawfully assaulted and had sexual intercourse with ZS, a 17 year old, against her will;
- 1.2 Count 2: that during 13 June 2003 and 14 June 2003 at or near Benoni the appellant indecently assaulted NS, a 2 year old;
- 1.3 Count 3: that during 13 June 2003 and 14 June 2003 at or near Benoni the appellant unlawfully and maliciously assaulted NS by burning him and hitting him with a towel and so intending to do him grievous bodily harm.

2 The Appellant was represented during his trial and pleaded not guilty to the first two charges. As to the third charge a plea explanation was given that: "*.. .the child was burned accidentally as the appellant uses a primer stove in his house and the child blew over across into the flame and the flames engulfed [him] from the primer stove*"

And later

".. .he was playing around, the primer stove and the accused did not notice that he went over that the child blew into the primer stove while it was busy on or and the flames engulfed up into the air and therefore the child got burnt in the face. "

3. The appellant was acquitted on Counts 1 and 2 and was convicted of assault with intent to do grievous bodily harm and sentenced to 8 years imprisonment.

4. Leave to appeal was granted against both conviction and sentence.
5. The evidence presented on Count 3 was the following:
 - 5.1 the complainant was Z S and she is the mother of the child.
She testified that the child was born on 23 January 2001.
 - 5.2 During or about April 2005, and when she was in Gabon, the appellant took the child to live with him. She had heard that the child was ill-treated by the appellant but when she went to visit him, she was chased away by the appellant. After the appellant's arrest, she saw that her son had burn and scratch marks on his face.
 - 5.3 Fibile Radebe then testified that the appellant's shack was diagonally across from hers and she saw that the child had burn marks on his face. On a different occasion she saw the appellant hitting the child with a wet wash rag all over his body. She also testified that she often heard the child crying in the early hours of the morning and heard the appellant shout at the child. She witnessed the appellant hitting the child.
 - 5.4 Ms Radebe lastly testified that one Friday night she heard the child crying and the following day, when she returned from work, the child was not at the appellant's house and she then called the police. They found the child at Tabo Memorial Hospital in Boksburg and "*.. he was swollen and injured and at the back he was sort of bruised and he had scratch marks*" on his buttocks.
 - 5.5 Cross-examination of this witness, as with most of the others, was brief, and did not disturb the import of her evidence.
 - 5.6 David Masaba then testified that his shack was approximately 3m from that of the appellant. He also testified of the abuse of the child, but, save for the towel incident, had never actually seen it take place. He also testified that his girlfriend went to the police to report the abuse, but that nothing came of the complaint.
 - 5.7 Dr Alagale testified that he worked at "Tembo" Memorial Hospital and on 14 June 2003 he saw the child and suspected a case of child abuse which he reported: there were facial abrasions, injuries around the thighs at the back of both thighs, injuries (abrasions) on the buttocks and around the perineal region. He testified that these could have been the result of assault such as smacking or whipping but not burns. He also testified that the injuries were fresh.

- 5.7 Cross-examination of this witness did nothing to dispel the impact of his testimony.
- 5.8 Dr Legotsho is the district surgeon testified that the child's right buttock was severely bruised and swollen and tender and looked recent and fresh. His forehead was swollen, bruised and tender and there were severe scratches which were healing. The right lower limb was tender and both sides of the face were bruised with friction abrasions. Both wrists were tender and he was unable to stand. He testified that the injuries appeared to have been sustained at different times - some appeared to be healing and some were recent such as the ones on the buttocks.
- 5.9 admitted that some of the abrasions could have been caused by contact with a rough surface or hitting the child with a something rough. Dr Legotsho also testified that he saw no burn marks.
- 6 The State closed its case and the appellant then applied for a discharge on counts 1 and 2 which was granted.
- 7 The appellant then testified on his behalf in respect of count 3. He denied assaulting the child and testified that he was burned when he blew on the primer stove and the flames then burned him. The appellant testified that he put a wet cloth on the burns and then went to his neighbours to get a "*blue medicine*" which he applied to the burns. It is noteworthy that this was not put to any of the State witnesses. He testified further that the following morning the child woke up with blisters on the thigh area where he had been burned.
- 8 Under cross-examination the appellant stated that he did not actually see the child blow on the flame of the primer stove, but that he had heard a noise and saw the child land on his knees and knock his forehead on the floor. He stated that this only caused a small mark and that the skin had peeled off when he wiped it. This was the first time that this came out in evidence and was certainly not part of any plea explanation.
- 9 The appellant denied seeing injuries on the child's right buttocks and denied knowledge of the "*severe*" bruising. He denied having knowledge of the scratch marks on the thighs and testified that he took the child to the hospital because he had a running stomach and complained of a painful anus. This was the first time that this evidence came to light as well.
- 10 The appellant also testified that he did not take the child to the hospital at the time he was burned and that this was approximately 2 weeks before

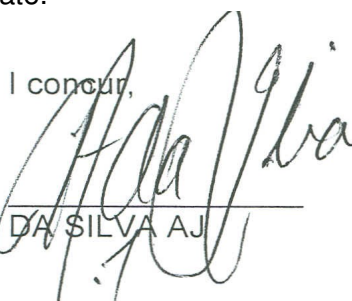
Dr Alagale and Dr Legotsho had examined the child.

- 11 It is clear from the appellant's evidence that he was the child's sole caregiver at the time.
- 12 The learned Magistrate summarized all the evidence that was placed before him and found the appellant guilty of the third count and convicted him of assault with intent to do grievous bodily harm.
- 13 I can find no fault with this finding: the State witnesses were credible and their testimony stood under cross-examination. The evidence of the two doctors was particularly damning.
- 14 The appellant, on the other hand, denied any knowledge of any injuries to the child, save for burn wounds, which when weighed up with the rest of the evidence regarding the extent of the child's injuries, is clearly not true. His explanation of the primer stove incident also does not ring true and his version is rejected as being implausible and I find that it is not reasonably possibly true.
- 15 As far as sentence is concerned, the Magistrate took into account the fact that the appellant had previous convictions, but also took into account the appellant's personal circumstances and found that it would be, as he put it, "*shockingly inappropriate*" to impose the minimum sentence prescribed by Act 105 of 1007 and instead imposed a sentence of 8 years imprisonment.
- 16 Here too I can find no fault. Taking into account the extent of the injuries suffered by this 2 year old baby at the hands of the appellant, I am of the view that the sentence is not inappropriate.

ORDER

Accordingly, the appeal is dismissed.

NEUKIRCHER AJ

I concur,

DA SILVA AJ