REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE: 29/8/2016

CASE NO: A906/2015

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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In the matter between:

HENDRIK VAN VUUREN OOSTHUIZEN Appellant

and

THE STATE Respondent

JUDGMENT

AC BASSON, J

[1] The appellant, a 72 year old male and […] two young children, was arraigned in the Region Court in Nelspruit with two accounts of rape in that he penetrated the vagina of A. (three years old) and B. (18 months old) with an unknown object that can include a penis or a finger.

[2] The appellant was convicted and sentenced to life imprisonment on both counts in terms of the Criminal Law Amendment Act.[1] The court ordered the two life sentences to run concurrently.

[3] Before I briefly turn to the merits of the appeal, I should point out that the State conceded that there was not sufficient evidence before the Court to have convicted the appellant in respect of B. (18 months old). The concession is in my view well made. The appeal against the conviction and sentencing in respect of B. is consequently upheld.

[4] The legal representative on behalf of the appellant explained the competent verdicts to the appellant prior to the commencement of the proceedings. On the request from the magistrate they were again explained to the appellant in court whereafter he confirmed that he understood the charged preferred against him as well as the competent verdicts. The appellant pleaded not guilty to both charges and denied that he had committed the offences.

[5] The first witness on behalf of the state Ms C. confirmed that the appellant is her […] and that the two children (A. and B.) are her children with her husband Mr D. (the … of the appellant).

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[1] Act 105 of 1997.

[6] She confirmed that on 19 November 2011 the appellant came to her house and fetched the two children in order to take them with him to town. The children were returned to their home around midday on the same day. Upon their return she saw that the pants of A. were the wrong way round and that B's trousers were unbuttoned. She asked A why her pants were on the wrong side to which she responded that "..." had taken of her pants and that he had placed his hands between her legs. Upon hearing this her husband grabbed A. and ran with her to their room. Ms C. confirmed that the appellant did not respond to these allegations.

[7] Ms C testified that the appellant was in close proximity when A. uttered these words but that he merely turned around and went to his vehicle without saying a word. She went to the bedroom where her husband was with A. When she turned around to open the door with the intention of going to the Police Station, she found the appellant at the door eavesdropping on the conversation her husband had with B. The appellant was, according to her, standing so close to the door that she bumped into him. She thereafter went to the Police Station and reported the incident. Both children were thereafter examined by a nurse. Ms C. confirmed that the appellant was alone when he fetched and returned the children.

[8] Sister Lyesha Debbie Moodley confirmed that she is a forensic nurse and that she worked at Baberton Hospital. She confirmed that she examined both children and that she completed the two J88's. In respect of A. she confirmed that the hymen appeared swollen and bruised and that she concluded that the injuries were consistent with forceful penetration by a penis or any other object such as a finger. She testified that the mere fact that the hymen was not torn did not mean that there was no penetration.

[9] In respect of B. she testified that there was an absence of injuries but that that did not exclude the possibility of penetration by a penis or any other object. B. presented with redness of the vestibule which is just inside the labia of the vagina. She, however, conceded that because B. was only 18 months old at the time she could have had some form of infection. She

nonetheless did not exclude the possibility of a penetration. I have already pointed out that it was conceded on behalf of the State that the evidence in respect of B. does not support a conviction.

[10] The appellant denied that he had sexually assaulted the two children. He testified that he only took B. home with him and that she played with his wife. According to him B. fell over in the car whilst he was driving and that it was then that he grabbed her in his words “op haar vrouedele om te keer dat sy nie seerkry nie”. He admitted that he did not tell Ms C. about the incident when he brought her home. He also denied that he eavesdropped at the door.

[11] The presiding magistrate accepted the evidence of Sister Moodley that there was penetration in respect of A. especially if regard is had to the injuries sustained by her. The presiding magistrate also rejected the version of the appellant in respect of how B. sustained the injury.

[12] A. was not called as a witness consequent to a competency report stating that she had difficulty in answering questions and that she only remembered that her “...” took off her trousers but that she could not give details of what happened after that.

[13] B. therefore did not give evidence. Her statement to her parents regarding to what the appellant allegedly did to her is therefore inadmissible. The question before the court was whether the remaining circumstantial evidence was sufficient to prove the guilt of the appellant beyond reasonable doubt. In deciding this question it is useful to have regard to what the Court in *S v Mathikinca*[2] held:

> “[12] I should add that I have also considered the provisions of s 3 of the Law of Evidence Amendment Act 45 of 1988, which make provision for the admittance of hearsay evidence in certain prescribed

[2] See the decision in *S v Mathikinca* 2-16 (1) SACT 240 (WCC) and the authorities cited therein.

circumstances. However, at the trial the state did not attempt to lay any basis for the invocation of this statutory provision. Nor can it be said that the defence has specifically agreed to the introduction of the complaint, being hearsay evidence, in terms of the provisions of s 3*(a)* of the Law of Evidence Amendment Act supra. A reading of the record rather shows that all the parties involved, including the presiding magistrate, simply did not consider the issue of the admissibility of this evidence.

[13] It follows that the statements made by the complainant to her mother and the medical practitioner could not be relied upon by the state in their quest to prove the guilt of the appellant. In the circumstances, counsel appearing for the state at the appeal was constrained to submit that the remaining circumstantial evidence was sufficient to prove the guilt of the appellant beyond reasonable doubt. The defence, on the other hand, submitted that a careful reading of the record shows that the circumstantial evidence does not exclude the reasonable inference that the injuries to the complainant's private parts could have been caused in a manner unrelated to any conduct on the part of the appellant."

[14] The only evidence before the court was the medical evidence which pointed to sexual assault and the fact that the appellant fetched A. and took her to his house where, according to him, she played with his wife.

[15] I am not persuaded that the circumstantial evidence, even if regard is had to the unsatisfactory evidence tendered by the appellant as to how A. may have been injured, is sufficient to conclude beyond reasonable doubt that the appellant sexually assaulted A.

[16] I should also briefly refer to the fact that it was submitted on behalf of the appellant that he could not follow the proceedings because it was conducted in English. There is no basis for this submission. It is clear from the record that the appellant followed the proceedings. Moreover, the presiding magistrate was aware of the fact that the appellant was Afrikaans speaking

and was at pains to ensure that the appellant understood English. For example, when Sister Moodley testified the appellant was pertinently asked by the presiding magistrate in Afrikaans whether he understood English whereupon he confirmed that he did understood English (p 97).

[17] The order that I propose is the following:

The conviction and sentence in respect of both B. and A. are set aside and substituted with the following:

"The accused is found not guilty and is discharged."

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AC BASSON

JUDGE OF THE HIGH COURT

I agree and it is so ordered

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CP RABIE

JUDGE OF THE HIGH COURT

Appearances:

For the appellant	:	Adv. R Kriel
Instructed by	:	Legal Aid South Africa
For the respondent	:	Adv. PCB Luyt
Instructed by	:	The State Attorney