

**IN THE HIGH COURT OF SOUTH AFRICA  
[GAUTENG DIVISION, PRETORIA]**

29/4/16

**CASE NO: A441/2015**

In the matter between:-

**ANDRIES MBUISELO MANZANA**

Appellant

and

**THE STATE**

Respondent

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**JUDGMENT**

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**SKOSANA AJ**

[1] The appellant appeals against the judgment of the learned magistrate, Mr Mkhwentla. The appeal is against conviction and sentence. The appellant was found guilty of a rape of an 8 year old girl and sentenced to 20 years' imprisonment.

[2] The relevant facts are that on 12 July 2014, the complainant, an 8 year old girl, together with her two female siblings were at their home that night at Alberton. Their mother was away to attend a tombstone unveiling ceremony and did not return that night.

[3] The appellant arrived that night and the eldest of the sibling, who was 10 years of

age opened for him. He came and slept with the 3 girls. During the night when it was dark and under the blanket, the complainant felt something poking her vagina and felt pain. Her elder sister screamed at that point in time and the appellant offered R 10 to the complainant so that the sister will stop screaming.

[4] The following morning the complainant and her siblings went to play with their peers at their neighbour. The complainant told her peers about the incident, who in turn told their mother, one Ms M[...]. Ms M[...] could not tell the complainant's mother when she arrived later that afternoon because the complainant's mother was inebriate.

[5] The appellant in his testimony denied that he inserted any part of his body into the private parts of the complainant. He also testified that he had used a different blanket from the one used by the girls. When asked why he had slept with the girls on the same bed, he stated that he did not want to wake them up as it was late at night and for him to sleep on the floor, he would have to pull out a sponge under mattress on which they were sleeping which required him waking them up.

[6] There are unclear statements made by the complainant that the appellant had followed them to the floor when they left the bed he was sleeping on that night. Although the complainant stated that the appellant had taken off her trousers, she later stated that she did not see the complainant taking her trousers off.

[7] The complainant also could not see what was poking her, whether a figure, a penis or any other object as it was dark and under the blanket. According to the medical report, which was handed in by agreement, the complainant suffered minor bruises on the labia majora but there was no indication of any penetration into her vagina.

[8] The complainant also stated that she did not know why her sister was screaming that night and did not see the appellant inserting anything into her. It must be noted that the appellant was facing the opposite direction to the girls on the bed. It seems therefore that if he had been trying to insert his penis into the complainant's vagina, his attempts would have been clear to the complainant and her sister.

[9] In view of the facts summarized above, it seems that there is no proof beyond

reasonable doubt of the following facts:

[9.1] That the appellant inserted or tried to insert his penis into the complainant's vagina;

[9.2] That the finger or any part of the body of the appellant penetrated the genital organs of the complainant as contemplated in Act 32 of 2007. This is supported by the medical report which recorded an observation of minor bruises on the outside of the complainant's vagina. The definition of '*sexual penetration*', contained in section 1 of Act 32 of 2007 reads:

*""sexual penetration' includes any act which causes penetration to any extent whatsoever by-*

- (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;*
- (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or*
- (c) the genital organs of an animal, into or beyond the mouth of another person, or"*

[10] Section 3 of that Act requires sexual penetration without the consent of the complainant for an offence of rape to be committed. In my view, in this case there was no proof beyond reasonable doubt of any penetration to any extent by any part of the body of the appellant into or beyond the genital organs of the complainant.

[11] The appellant was also charged, as an alternative charge with sexual assault in terms of section 5 of the Act. This offence requires sexual violation which is defined in the Act as including any act which causes "*a direct or indirect contact between the genital organs of one person and any part of body of another person*"<sup>1</sup>. In my view, there was indeed a contact between the genital organs of the complainant and a part of the body of the appellant.

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<sup>1</sup> See section 1 para (a)(i) of the definition of 'Sexual violation '

[12] As stated by the learned Magistrate, the appellant exhibited sinister motives and intentions by sleeping with 3 female children, none of whom was his biological child in the absence of their mother on one bed. That combined with the allegations that he had followed them to the floor and back onto the bed as well as offering R 10 to the complainant's sister strengthens the conclusion that the appellant had bad intentions. It has therefore been proved beyond reasonable doubt that it could not have anyone else but him who touched or poked the genital organs of the complainant that day. His body therefore was in contact with such organs of the complainant. In other words, if penetration had been established rape would have been proved. In my view, regard being had to the conspectus of evidence in this case, only contact, and not penetration, by the appellant was proved beyond reasonable doubt.

[13] In the circumstances, the appellant is guilty of sexual assault.

[14] Sexual assault does not fall under schedule I or II of the Criminal Law Amendment Act 105 of 1997 (Minimum Sentences Act). There is therefore no minimum sentence prescribed for such offence.

[15] In the circumstances, I am of the view that a sentence of 5 years' direct imprisonment is appropriate in these circumstances. In the result, the following order is made:

[15.1] The appeal is upheld.

[15.2] The judgments on conviction and sentence are set aside and replaced with the following order:

- "1. The appellant is found guilty of sexual assault of P[...], a female under the age of 16 years.
  2. The appellant is sentenced to 5 years imprisonment.
  3. The aforesaid sentence is antedated to the date of their initial sentence, being 26 February 2015. "
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DT SKOSANA

Acting Judge of the High Court

I concur.

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M JANSEN

Judge of the High Court