

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO:

A731/2008

DATE:

1 AUGUST 2008

5 In the matter between:

THE STATE

versus

GAVIN JACOBS

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JUDGMENT

(Appeal against both convictions and sentence imposed)

ALLIE, J:

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The appellant was charged in the Wynberg regional court with ten counts of indecent assault spanning the period 1997 to 2006, and one count of rape.

20 He was convicted on 31 October 2007 and on
1 November 2007 he was sentenced to five years imprisonment for attempted rape and three years imprisonment for the remaining counts of indecent assault. The sentence was ordered to run concurrently.

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The appellant now appeals against both the convictions and the sentence imposed.

5 The complainant testified that the appellant, who is her father's sister's husband, indecently assaulted her by touching her breasts and her vagina over her clothing since approximately 1997 until 2003 when she moved out of her grandmother's property. She said that it occurred twice a 10 week once she began to live at her grandmother's house. She alleged that it, however, commenced at a time when she merely visited her grandmother over weekends. The complainant also described the indecent assaults as having occurred in the house, in the back yard and in a back 15 storeroom at times when the premises were being occupied by no less than six adults and numerous children. She further described the indecent assaults as follows: her uncle hugged her tightly and touched her breasts and sometimes brushed past her. She further described her uncle as having 20 indecently assaulted her, and I quote:-

“Like I would be alone and he would touch me all the time.”

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This further description directly contradicts her earlier description where she said it occurred two or three times a week. Her initial description of him touching her over her clothes contradicts her later allegation that he hugged her tightly and brushed up against her. The latter allegation is, however, the description given by both her mother and father as to what they saw and perceived as being indecent assaults. Her parents went so far as to raise these incidents with the appellant and his wife in the presence of the complainant who clearly believed from a young age that her uncle's hugs and kisses were inappropriate. This directly impacts on the cogency of her belief that the appellant indecently assaulted her.

15 It is clear that the State had not proved that the indecent assaults occurred over a period of ten years, as alleged in the charge sheet. The alleged nature and manner of the indecent assaults are so varied and contradictory that it cannot be said that they have been proved beyond a reasonable doubt.

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The complainant's description of the alleged attempted rape in February or March 2006 deserves special consideration. She testified that at the time she was only 12. That could clearly not have been her correct age, as she was born in November 25 1988 and would have been 17 years old at the time. She

alleged that she was alone with the appellant in her grandmother's house when he called her to his room. She stood at the door of his room. He allegedly grabbed her by the shoulder and took her to his bed. He lay her down on the bed and kissed her on her neck. She told him to let her go, but he did not do so. He unzipped her top, unbuttoned her shirt and took off her pants and panty. He pulled down his own pants and underpants and climbed on top of her. He tried to penetrate her vagina, but she pushed him off, stood up and left. In this description the only mention of physical force is that he grabbed her by the shoulders and led her to his bed. She had the physical strength to push him off later, but no explanation is offered as to why she did not have the strength to do so earlier. At the time she was 17 years old and on her testimony had already endured at least six years of indecent assault by him. It is highly unlikely that at that stage when he led her to his bed, she did not fear that a sexual assault of some nature was about to occur. This version of the complainant therefore does not accord with the probabilities.

20 The State prosecutor did nothing to clarify the glaring discrepancies in the case. This Court is bound by this record and we cannot ignore the material discrepancies mentioned earlier.

It is clear that there is a history of animosity between the mother of the complainant, to some extent the father too, and the appellant, his wife and her parents. The Court *a quo* should accordingly have approached the testimony of the parents, aunt and grandparents of the complainant with great caution.

The regional magistrate clearly misdirected herself in finding that the evidence of the teachers and social worker corroborated the evidence of the complainant as they were the first people to whom she allegedly reported the incidents. They serve merely to demonstrate consistency, but in this case they also contradict her evidence.

15 In the circumstances, this Court should place more reliance on the testimony of the complainant and the appellant and look at the circumstantial evidence to see whose version it favours. The evidence of the remaining witnesses should be considered primarily where the evidence of the complainant and the appellant contradict each other in material respects.

The evidence of the teachers, Ms Kimmie and Ms Africa, do not accord with that of the complainant concerning what she reported to them. The complainant had testified approximately one year after the alleged attempted rape

occurred.

The evidence of the social worker, Ms R Kemp, is that the complainant told her that the appellant commenced indecently assaulting her at the age of 13, whereas the complainant testified that it occurred when she was nine or ten years old. The State adduced no evidence to clarify this huge and material discrepancy. Ms Kemp made the point that the complainant was very emotional at the time when she reported the incident of attempted rape.

During cross-examination Ms Kemp, however, conceded that there were many other factors that could have contributed to the complainant's emotional state. The evidence of the teacher, Ms Kimmie, was that the parents of the complainant were involved in divorce proceedings. The mother of the complainant testified that the complainant was pregnant during 2006. These are also factors that could contribute to the emotional state of the complainant.

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When questioned on how the complainant came to lodge a complaint, she testified as follows:-

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"Just when I woke up one day, I wasn't feeling well and I, like it had all got too much for me, and then I

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went to school. I was crying and then I spoke to the school counsellor. That night I had a bad dream and when I - that's why I wasn't feeling well when I got up, and I don't know why, but I managed to talk to her because she kept asking me what was the matter and I eventually told her."

The report was not made immediately after the alleged attempted rape, nor was the report spontaneously made.

In the case of S v Trainor, 2003(1) SACR 35 at 41B to C, the Court said the following concerning the evaluation of evidence:-

"A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence of course must be evaluated against the onus on any particular issue or in respect of the case in its

entirety. The compartmentalised and fragmented approach of the magistrate is illogical and wrong."

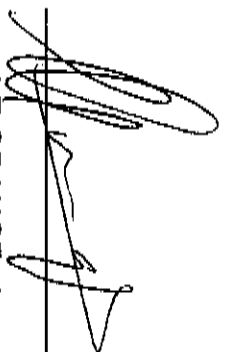
10 *In casu* an evaluation of the evidence as a whole leads one to
the conclusion that the version of the State is evenly balanced
against the version of the defence. Both contain biased
accounts and both contain equally possible scenarios of what
transpired. The onus, however, rests on the State to prove
its case beyond a reasonable doubt. It does not have to do so
beyond a shadow of doubt, but merely beyond a reasonable
doubt.

15 In the circumstances, I am not persuaded that the State has
discharged its onus at all in relation to the ten counts of
indecent assault, nor that it has removed the reasonable doubt
created by the defence's version supported by the common
cause fact extracted from the witnesses for both sides that
were family members in relation to the attempted rape charge.

20 In the circumstances I would SET ASIDE the convictions and
concomitantly the sentence imposed by the Court *a quo*.

I agree.

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LE GRANGE, J

And it is so ordered:

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ALLIE, J

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