IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A422/2009

DATE: 10 SEPTEMBER 2010

In the matter between:

CLINT CLOETE Appellant

and

THE STATE Respondent

JUDGMENT

ROSE-INNES, AJ:

The appellant was charged in the Regional Court Bredasdorp with four counts of rape and three counts of indecent assault. He was legally represented and pleaded not guilty on all charges. He testified on his own behalf, but did not call other witnesses. In evidence he denied the allegations of indecent assault and rape.

The appellant was acquitted on count 3 (a rape charge). The magistrate found that the evidence of the complainant in relation to that count, C. L., was not sufficiently reliable to sustain a conviction. The appellant was convicted on the other six counts.

The complainant in those six counts is B. J. ("B."). She is the appellant's [....], although she lived, until a period shortly before the alleged offences, with her mother. B. was 13 years of age at the time. She was 15 when she testified and gave evidence through an intermediary. The appellant was sentenced to 18 years imprisonment with the counts being taken together for purposes of sentence The appeal today lies against the conviction.

This appeal was initially on the roll for hearing on 4 December 2009, but there was no appearance on that day on behalf of the appellant. At the commencement of the appeal today, Mr Filand. on behalf of the appellant, sought the reinstatement of the appeal in the circumstances set out in an affidavit that was filed. This was granted. The appellant commenced serving his sentence on 22 February 2010

The three counts of rape (counts 1, 4 and 6) are alleged to have taken place in 2004, on or about 30 March 2005 and on or about 31 March 2005. The three counts of indecent assault (counts 2, 5 and 7) are alleged to have taken place during 2004, on or about 30 March 2005 and on or about 31 March 2005.

The convictions rest on the evidence of a single witness. While this requires the exercise of caution in accordance with the established approach set out, inter alia, in S v Sauls & Others 1981(3) SA 172 (A) at 180, the trial court must weight the evidence, consider the merits and demerits and decide whether it is trustworthy and that the truth as been told. The evidence is also that of a child and in respect of sexual offences. In this regard too, a measure of caution may be required.

A careful evaluation of B.'s evidence is, therefore, necessary. She lived with her mother and stepfather in K., A.. The appellant resided at the time in Bredasdorp. During 2004 it

was arranged that B. would go to the appellant after school where her mother would then collect her after work. When her mother was on leave later that year, she spent the week at the appellant's house, sleeping there overnight.

The appellant lived at home with his wife and two young children. When she stayed with the appellant, B. slept alone in a room. She testified that at a stage in 2004 the appellant came to her bedroom and lay with her, holding her tight. She told him to leave her alone. The first few occasions he lay with her and then returned to his own room.

In the course of her evidence, B. then referred to various occasions on which, so she testified, the appellant had sexually assaulted or raped her. I will refer to these in the sequence in which they were dealt with in her evidence.

At a later stage in 2004, the appellant touched her breasts and panty. B. testified that she did not initially tell anyone, because she was afraid. B. then related how after her mother had gone on maternity leave in 2004, another incident occurred. On this occasion the appellant came to her room, licked her ears and vagina and kissed her neck. These incidents in 2004 relate to count 2, the indecent assault allegedly committed in 2004.

The prosecutor then asked B. whether anything else occurred in the period January to April 2005. At that stage, in leading her, the prosecutor moved from the events of 2004 to 2005. No further evidence was given in relation to anything else happening in 2004. In particular there was no specific evidence of any rape during 2004 as is alleged in count 1.

B. then proceeded to testify in relation to other incidents which occurred during the first few months of 2005. The appellant came to her room on an occasion, again touched her breasts, pulled down her panty and inserted his finger into her vagina. He also lay on top of her and inserted his penis in her vagina and had sex with her. It was painful and she felt as if something had been taken away from her. When asked in evidence, B. thought that this occurred after her mother was on maternity leave. She was, however, uncertain

whether this was in 2004 or 2005.

There is in the circumstances uncertainty in relation to the first count of rape. This uncertainty may have been occasioned by the manner in which the evidence was led by the prosecutor, but there is uncertainty nonetheless. B. initial evidence is that nothing further occurred in 2005. She was thereafter uncertain as to whether the first rape occurred in 2004 and 2005. Her evidence in this regard has to be approached with the requisite degree of caution. It was submitted by Mr Filand. in his comprehensive written and oral argument, that there was no basis for finding the appellant guilty of count 1. The State, in argument, conceded that the evidence could not sustain such a conviction. In the circumstances the evidence does not establish the commission of count 1 beyond reasonable doubt and the magistrate misdirected herself in convicting the appellant on count 1.

B. then proceeded to testify in relation to other incidents in 2005. There was an occasion at a later stage when C. L. told her that the appellant had had sexual intercourse with her. B. informed her that she would not get pregnant as her […] had told her that he can no longer have children. Charne slept with B. at the appellant's house that night. The appellant came to their room and touched B.. She rolled away. The appellant slept in their bed that night.

On 30 March 2005, B. was in A.. The appellant contacted her telephonically to say that she should come to Bredasdorp, which she did. B. testified that that night the appellant indecently assaulted her by licking her ears. When he tried to kiss her, she pulled away. He also licked her vagina and inserted his finger. She testified further that he had sexual intercourse with her. This evidence relates to counts 4 and 5. The following day, 31 March 2005, B. told S. M., according to her, what had occurred.

On the evening of 31 March 2005, B. again spent the night at the appellant's house. She testified that on that occasion too, he inserted his penis in her vagina and again had sexual

intercourse with her. Count 6 relates to this evidence.

Count 7 is a further charge of indecent assault. It is alleged that the appellant also indecently assaulted B. on 31 March 2005. No further evidence was, however, led in this regard. The conviction of count 7 must, as the State accepted, be set aside.

B. thereafter told her mother what had happened. She was taken to the police station and medically examined.

I have dealt above with the fact that the evidence cannot support the rape conviction in respect of count 1 and the indecent assault in respect of count 7. it is necessary to consider whether the learned magistrate misdirected herself in respect of the remaining counts of rape (counts 4 and 6) and indecent assault (counts 2 and 5).

The trial court had the benefit of observing B. and assessing her demeanour, as it did in relation to the appellant. She made a favourable impression and gave her evidence in what the court describes as a satisfactory manner. She was at times understandably emotional, but answered the questions that were posed of her. She was found by the trial court to be a truthful witness, who had no motive falsely to implicate the appellant. The trial court could no find material contradictions or inconsistencies in the evidence given by her in relation to the commission of the offences about which she testified. The magistrate found a measure of corroboration. She pointed to the evidence of B.'s mother, who described her distress at the time when asked to go to the appellant's house.

On behalf of the appellant, it was argued that B.'s evidence was vague in certain respects. Vagueness in itself does not necessarily indicate untruthfulness. B.'s evidence in relation to the commission of the offences was not in the circumstances vague and certainly not so vague as to justify the rejection of that evidence. It was also submitted on behalf of the appellant that there were improbabilities in relation to B.'s evidence, which demonstrate that she was not a truthful witness. I am unable to agree or find that the magistrate was

wrong in accepting B.'s evidence as truthful.

As far as the appellant's evidence is concerned, he denied the allegations of indecent assault and rape. He did, however, acknowledge that he would on occasions lie next to B. on her bed. He did not impress the trial court as a witness and the magistrate describes him as being uncomfortable in the witness box and as giving his evidence in an unconvincing fashion. His explanation that B. may have falsely implicated him, because she had gone to Caledon, was found by the trial court to be unacceptable. The court, after evaluating his evidence, rejected it as false where it directly conflicted with that of B..

In the circumstances the trial court did not, in relation to the convictions on counts 2, 4, 5 and 6 misdirect itself. I cannot find any reason to interfere with these convictions.

Although there is no appeal against sentence, it is necessary to reconsider the sentence of 18 years imprisonment in the light of the fact that two of the convictions are to be set aside. The convictions on two counts of rape and two counts of indecent assault which the magistrate took as one for the purposes of sentence, are very serious offences. An appropriate sentence must reflect this. They were committed by a father on his young daughter. It must have had a profound psychological and emotional effect on her. This is borne out by B.'s subsequent attempts to take her own life.

The magistrate took all relevant considerations into account in assessing the sentence. I have had regard to the approach that she adopted. She, however, determined a sentence in respect of six counts. Having regard to the offences committed, the personal circumstances of the appellant and the interests of the community, a substantial period of imprisonment is clearly warranted in this case. In view of the fact that two of the convictions are to be set aside, the period of imprisonment should, in my view, be reduced. It should nonetheless reflect the seriousness with which a court should regard crimes of this nature. In the circumstances a period of 15 years imprisonment is an appropriate sentence for the four counts taken together, where the convictions are confirmed.

I would accordingly make the following order:

1. The appeal in respect of the convictions on count 1 (rape) and count 7 (indecent assault) is upheld and the convictions on counts 1 and 7 are set aside.

2. The appeal against the convictions on the remaining counts is dismissed. The convictions on count 2 (indecent assault), count 4 (rape), count 5 (indecent assault) and count 6 (rape) are confirmed.

3. The sentence of 18 years imprisonment is set aside and substituted with a sentence of 15 years imprisonment.

ROSE-INNES, AJ

ZONDI, J: I concur and it is so ordered.

ZONDI, J