In the High Court of South Africa
(Western Cape High Court, Cape Town)

Case No: A446/09

In the matter between:

Len Melgis — Appellant

And

The State — Respondent

Judgment delivered: 29 October 2010

Brusser, AJ

[1] This is an appeal against the decision of the Regional Court in Wynberg more than nine years ago on 23 July 2001 in terms whereof the Appellant was convicted of one count of indecent assault, two counts of rape and one of assault with the intent to do grievous bodily harm and on 24 July 2001, was sentenced to an effective twenty years imprisonment.

[2] The Appellant appeals against the conviction and the sentence with the leave of the court a quo which was granted on 2 October 2008.

[3] The complainant who is the appellant's step daughter, Anthea Dick, was almost 11 years old when the incident occurred in respect of which the Appellant was convicted of indecent assault and younger then 16 during the period when the incidents occurred in respect of which the Appellant was convicted of her rape and also assault

with a knife.

[4] The complainant and her aunt gave evidence for the state and the Appellant, his wife, who is also the mother of the complainant, and one John Malgas gave evidence on behalf of the Appellant.

[5] The record of the proceedings a quo is incomplete in that the evidence in chief and part of her evidence under cross-examination of the complainant is absent therefrom. We were informed by Mr. van Wyk who appeared on behalf of the state that this was because the tapes containing this evidence were missing.

[6] The senior administrative clerk of the Wynberg magistrates' court deposed to an affidavit and indicated that the record could not be reconstructed because of the loss of the two tapes containing the missing evidence. The magistrate and prosecutor were also not able to be of any assistance because they no longer had their notes of the trial.

[7] It was contended on behalf of the state that the even though the record was admittedly incomplete there was sufficient information there for a proper consideration of the appeal.

[8] Whilst it is possible to deduce much of the complainant's missing evidence from the magistrate's judgment, without a proper record of the complainant's actual evidence delivered at the trial, which evidence was disputed by the appellant and the witnesses on his behalf, this court cannot consider the entire appeal properly.

[9] In S v Marais 1966 (2) SA 514 (T) there was a similar impasse - a lost record with no prospect of reconstructing one. That being the situation, the court at 517A-B

observed that:

> 'If during a trial anything happens which results in prejudice to an accused of such a nature that there has been a failure of justice, the conviction cannot stand. It seems to me that if something happens, affecting the appeal, as happened in this case, which makes a just hearing of the appeal impossible, through no fault on the part of the appellant, then likewise the appellant is prejudiced, and there may be a failure of justice. If this failure cannot be rectified, as in this case, it seems to me that the conviction cannot stand.'(See also: In S v Joubert 1991 (1)SA119(A))

[10] This principle applies only where 'the lost portion (of the record) contains evidence which is of material importance to the adjudication of an appeal.' (See: S v Fredericks 1992 (1) 561 (c) at 562 b-c.)

[11] The missing evidence of the complainant is 'of material importance' to a determination of the appeal on the charges of indecent assault, rape (save for what is set out hereunder) and assault with the intent to do grievous bodily harm.

[12] Furthermore there was no suggestion by the state that the portion of the record that went missing was the fault of the Appellant.

[13] Plainly the aforementioned factors also have Constitutional implications. (See section 35 (3) (O) of the Constitution)

[14] As regards the charges of rape, it was common cause at the trial and on appeal

that

a) The Appellant had sexual intercourse with the complainant on a number of occasions, and at least on two such occasions, prior to the birth of her child on 20 May 1997 when she was fifteen years old;

b) The Appellant was the father of the child; and

(c)The complainant was born on 26 February 1982.

[15] The common cause evidence is therefore that the complainant was to the knowledge of the appellant under the age of 16 when he had sexual intercourse with her. At the time he was in his late 30s and was married to the complainant's mother.

[16] Ms Bayat, who appeared on behalf of the appellant on appeal, stated that she agreed with the submission on behalf of the state that the appellant is guilty of contravening the then section 14 of the Sexual Offences Act 23 of 1957, which was a competent verdict on a charge of rape.

[17] In the circumstances:

a) The appeal against the conviction and sentence in regard to the indecent assault, and the assault with the intent to do grievous bodily harm must be allowed; and

b) The appeal against the conviction in regard to the two counts of rape is successful but only to the extent that the appellant must be convicted of two counts of statutory rape.

[18] The appellant must be sentenced afresh on the two convictions under section 14 (1) (a) of Act 23 of 1959. The conduct of the appellant has been atrocious on his own version. He took advantage of a young girl in a most callous way. A sentence of four years imprisonment is, in the circumstances an appropriate sentence.

The following orders are consequently proposed:

1. The appeals against the conviction on the counts of indecent assault and assault with the intent to do grievous bodily harm succeed and the convictions and sentences on those counts are set aside.

2. The conviction on two counts of rape is set aside and the appellant is convicted on two counts of contravening section 14 (1) (a) of Act 23 of 1957.

3. On the latter two counts the appellant is sentenced to 4 years imprisonment on each count, such sentences to commence on 24 July 2001 and be served consecutively.

BRUSSER, AJ

Acting Judge of the High Court

I agree and it is so ordered.

LOUW, J

Judge of the High Court