Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case Number A748/2010

In the matter of:

LLEWELLYN CARELSE	Appellant
versus	
THE STATE	Respondent

Judgment delivered: 9 May 2011

ZONDI, J

Introduction

[1] The appellant appeared in the Oudtshoorn Regional Court on 19 February 2009 facing three counts of rape and one of indecent assault.

[2] With regard to the first count of rape and indecent assault it is

alleged by the state that the appellant on or about 1 June 2007 and in Oudtshoorn he raped the female complainant who was 14 years old at the time by penetrating her vaginally and anally respectively.

[3] The third count of rape which involves the same complainant relates to the occurrence which took place during June 2007 and December 2007 and at Eersterivier. The fourth count of rape also involving the sexual assault on the same complainant is alleged to have taken place between January 2008 and March 2008 and at Eersterivier.

[4] The provisions of Section 51 of Act 105 of 1997 are said to apply to all the charges.

[5] The appellant who was legally represented at the trial pleaded not guilty to all counts but notwithstanding his plea he was convicted on all the counts and sentenced as follows:

Count 1 – ten (10) years imprisonment
Count 2 – five (5) years imprisonment
Count 3 – ten (10) years imprisonment
Count 4 – ten (10) years imprisonment

The sentence on count 2 was ordered to run concurrently with the sentence on count 1. Effectively the appellant was sentenced to thirty (30) years imprisonment.

[6] With the leave granted by this Court on petition the appellant appeals against both convictions and sentences.

[7] The evidence which formed the basis of the appellant's convictions was to the following effect.

[8] The complainant, who was about 15 years old and in grade 9 when the trial started in March 2009, testified that on 1 June 2007, her family had gone to Oudtshoorn to attend the funeral of her mother's aunt. The funeral was to take place on 2 June 2007. Her family slept over at her grandmother's house. This is a two roomed house.

[9] She and her 8 year old sister slept on the double bed with her grandmother and her brothers slept on the double bunk bed in her grandmother's room. Her parents slept in the dinning room.

[10] The appellant, her uncle, had gone out to a friend when she went to bed. He returned about an hour later. After undressing himself he climbed onto the double bed where the complainant was and lay at the bottom end of the bed. While the complainant was sleeping she felt a hand pulling down her pants. She kicked at the appellant telling him to stop it. The appellant moved up and squeezed himself in a space between the complainant and the wall. The appellant touched her on her vagina and when she told him to stop he put his hand over her mouth. After managing to place himself on top of the complainant he tried to put his penis into her vagina but she held her legs tightly together to prevent penetration and the appellant pulled out his penis and got off and lay again on the side of the bed.

[11] While on the side the appellant put his penis into her anus (and he pushed it further into her vagina). She cried softly. Thereafter the appellant withdrew his penis. She went to the bathroom and the

appellant followed her. She did not report this incident to her mother because she was afraid and thought she would not believe her. She telephoned her friend, Nicole and told her there was something she wanted to tell her when she returned home. Her evidence relates to counts 1 and 2 of the charge sheet and will be referred to as "Oudtshoorn incident".

[12] The complainant also testified about another incident which also occurred in June 2007 when the appellant made an unexpected visit at her home in Eersterivier. On this occasion the appellant took her into her room and locked it. He asked her to suck his penis. She refused. He pulled down her pants and thereafter raped her. She also reported this incident to her friend, Nicole. This evidence relates to the third count.

[13] She also testified about the incident which occurred in her brother's room when the appellant approached her and asked for sex. He lifted her dress up, pulled down her panty and had sex with her while she was standing. This incident occurred on a Saturday.

[14] Another incident of sexual assault, which relates to the fourth count, occurred in the living room while she was watching TV at her home. On that occasion the appellant had come to visit the complainant's house with his girlfriend. The appellant approached her and demanded sex. He started to fondle her. Thereafter he carried her to her brother's room (Nevone) and put her on the bed whereupon he pulled down her pyjama pants and panty. He thereafter started licking her vagina and inserting his finger into it while she lay on the bed. The appellant stopped the sexual assault on her when he heard some movement in the passage which he thought was his girlfriend. She did

not report this incident to her mother but told Nicole of it.

[15] During cross examination she testified that while sleeping with her grandmother on the double bed the appellant had tried to insert his penis into her vagina but did not succeed because she held her legs together and he ended up penetrating her anally.

[16] She denied that the appellant returned to her granny's house at about 04H00am and that would not have sexually assaulted her.

[17] Nicole Hurling (first report) testified that the complainant phoned her from Oudtshoorn where she had gone to attend a funeral to report that her uncle (the appellant) had raped her. She sounded frightened. She also testified about another incident when the appellant came to the complainant's house in Eersterivier to teach her how to dance. He "muffed" her vagina and raped her. Those were the only incidents of sexual assaults which she reported to her.

[18] The complainant's mother testified amongst others about the complainant's date of birth and the report of sexual assault she made to her on 25 July 2008. She testified about the incident which occurred when the family was in Oudtshoorn for a funeral. She reported to her that, "Sy het gevoel sy penis was agter by haar".

[19] She also reported the sexual assault which occurred at her home during the holidays when the appellant had come to visit her house with his girlfriend. This assault according to her took place at the TV room while the witness and the appellant's girlfriend were sitting in the dinning room and her father was busy with a braai.

[20] Regarding the Oudtshoorn incident she corroborated the complainant's evidence about what she was doing when the appellant arrived that night. She was busy ironing when the appellant came back and that she had asked him to go sleep with one of her boys on a double bunk bed and not at the foot side of the bed. He refused saying that he was going to sleep with his mother on her bed.

[21] During cross examination she denied that the appellant only arrived at the grandmother's house at 04H00 in the morning. She stated that he came back before she went to bed.

[22] The appellant testified in his defence. He stated that he arrived at her mother's place at about 04H00 in the morning having spent almost the entire evening with his friends. His mother opened the door for him. The complainant's parents were sleeping in the sitting room when he arrived. The complainant was sleeping on the same bed as his mother and her young sister. He took off his clothes and slept at the foot end of his mother's bed as there was no other space for him to sleep. He slept across the bed with his feet to the wall. He confirmed that while sleeping as aforesaid the complainant's mother walked past him and asked him why he did not go and sleep with one of her boys because it was not comfortable where he slept. He said he was happy where he slept.

[23] He denied that when he woke up the next morning the complainant and the other children were already up and playing outside. He said they were still in bed. He denied that he sexually assaulted the complainant at Oudtshoorn. With regard to the sexual assaults which took place at the complainant's home the appellant denied to have committed them

because there was never a time when he was alone with the complainant while visiting her parents.

[24] The appellant's mother testified for the appellant. She confirmed that the appellant after arriving home from the Cape left shortly thereafter to drop off his two friends in Deysselsdorp. He returned after 04H00 in the morning. She was busy reading the Bible when she heard his car arriving. She opened the door for him. She denied that when the appellant returned home she asked him to bring her tablets and water. She said at that time it was too late for her to take her medication. She takes it twice per day once in the morning and once in the evening before 19H00. She further denied that the appellant changed sleeping positions while on her bed. He remained at the foot end of the bed until the next morning. She further denied that the door was open when the appellant returned home. She said it was locked. She had to get up to open it for him.

[25] Elroy Titus travelled with the appellant to Oudtshoorn on 1 June 2007. They arrived in Oudtshoorn between 23H00 and 24H00 and from there they drove to Dysselsdorp to drop off Willem. They thereafter went to see his girlfriend, Maudine. It must have been after 01H00 when they returned to Oudtshoorn.

[26] Belinda Fernando testified for the appellant regarding the occasion when he had visited the complainant's house. She denied that while she was with the appellant at the complainant's house the appellant raped or indecently assaulted her. The appellant could not have done so because he did not have an opportunity to do so.

[27] One of the grounds on which the appellant challenges the conviction is that the court *a quo* erred in finding that the state had proved its case beyond reasonable doubt in light of contradictions and inconsistencies in the state witnesses' evidence, which the appellant submits must have affected the reliability and trustworthiness of their evidence.

[28] A thrust of Mr Klopper's argument, who appeared for the appellant, was that the trial court failed to evaluate the complainant's evidence properly - that had it done so it would have found her evidence totally unacceptable.

[29] In analyzing the complainant's evidence the court *a quo* was alive to the fact that it was dealing with the evidence of a single witness in sexual related offences and that it might be necessary to approach such evidence with caution. After evaluating the entire evidence which was before it, the court *a quo* was satisfied with the complainant's merits as a single witness, that is, she testified in a clear and satisfactory manner and that therefore her evidence was reliable and truthful. It found her behaviour in immediately reporting the incident to her close friend to have been consistent with the absence of consent. It rejected as false and not reasonably possibly true the appellant's denial of the charges against him.

[30] This court's powers to interfere on appeal with the findings of fact of a trial court are limited (**R v Dhlumayo and Another** 1948 (2) SA 677 (A). It is not suggested that the trial court misdirected itself in any respect in accepting the complainant's evidence. In the absence of any misdirection the trial court's conclusion, including its acceptance of the

complainant's evidence is presumed to be correct.

[31] In an attempt to persuade us to find that the court *a quo* was wrong in accepting the complainant's evidence, Mr Klopper analyzed her evidence in considerable detail. In doing so he pointed out what he submitted were contradictions, discrepancies, inconsistencies and improbabilities in the complainant's evidence. He also referred to other features in the complainant's evidence which he relied upon as reflecting adversely on her credibility and the effect thereof, so he argued, rendered her evidence unreliable and unacceptable.

[32] In this regard it was pointed out by Mr Klopper that there are contradictions in the complainant's evidence regarding what the appellant did to her in Oudtshoorn. He argued that initially the complainant stated that the appellant penetrated her vaginally and anally but later she changed and stated that she was only anally penetrated.

[33] When the complainant testified regarding the occurrence forming the subject of counts 1 and 2 she stated that the appellant "pulled her" to lie on her back and he got on top of her. He then tried to put his penis into her vagina but she "crossed her legs tighter and the appellant's penis was in between." And he took it out and he got off and lay again on the side of the bed. He thereafter put his penis behind into her anus and he pushed it into her vagina.

[34] The appellant does not deny that on the day in question he slept on the same bed as the complainant. His defence is that he could not have raped and indecently assaulted her because he and the complainant were not alone on the bed and secondly he slept by the foot

side of the bed. Sleeping with them were the appellant's mother and the complainant's younger sister.

[35] The question is whether the appellant could have had an opportunity to sexually assault the complainant in close proximity of other people.

[36] The complainant said he had an opportunity to rape and indecently assault her and that he used that opportunity. Immediately after the Oudtshoorn incident, when she had an opportunity to do so, she telephoned her friend Nicole and told her what the appellant had just done to her. There is no suggestion that there was evidence of bad blood between the appellant and the complainant prior to this incident. Nicole confirmed that while out in Oudtshoorn the complainant telephoned her to inform her that the appellant raped her. Nicole's evidence shows that the complainant was consistent and is a factor which supports her credibility. It does not, however, corroborate her evidence (**S v Hammond** 2004 (2) SACR 303 (SCA).

[37] The question is whether the complainant's evidence regarding the Oudtshoorn incident establishes the offences of rape and indecent assault with which the appellant is charged. It is clear from the complainant's evidence concerning the Oudtshoorn incident that there were two occasions on which the appellant tried to penetrate her. On her version she frustrated the appellant's attempt by crossing her legs tightly together and the appellant got off her and lay on the side of the bed. It is therefore clear that vaginal penetration or anal penetration did not take place on the first occasion. The appellant's conduct amounts to an attempt to commit rape. It does not constitute an offence of rape.

[38] On the second occasion the appellant penetrated her anally from behind. She said he pushed his penis further into her vagina and she felt there was penetration at this time. She removed the appellant's penis, got up and went to the bathroom. This aspect of evidence was not taken any further by the state. It was not clarified how the anal penetration became vaginal penetration as the complainant's evidence seems to suggest.

[39] The complainant was cross examined on this aspect of evidence and her cross examination revealed the following evidence:

> "Toe sy penis in jou anus in was, het hy enige bewegings gemaak? Yes.
>
> So, nadat hy nou die bewegings gemaak het, is dit nou bewegings soos uit en in, in die anus in – Yes
>
> Toe het jy toe nou self sy penis uitgehaal, is dit reg so? Jy het jou hand gebruik en self sy penis uitgehaal uit jou anus uit – Yes".

[40] It becomes clear from this extract that the evidence which emerged during cross examination was that vaginal penetration, which at the time was a necessary element of the offence of rape, did not take place. The evidence does not therefore disclose an offence of rape. It only establishes the offence of indecent assault which is the second count. In the circumstances the court *a quo's* finding that the state had proved beyond reasonable doubt that the appellant was guilty of the first count of rape, was clearly wrong. The appellant should have been given a benefit of doubt on the first count of rape and should have been acquitted but should have been found guilty of attempted rape. Its finding regarding the offence of indecent assault was however, correct

as the evidence presented succeeded in establishing this offence.

[41] I turn to consider evidence regarding the third count of rape which allegedly occurred at the complainant's house in Eersterivier. This incident is alleged to have taken place on a week day in June 2007 during the school teachers' industrial action. On this particular occasion the complainant had returned earlier from school. She was with her two brothers when the appellant made an unannounced visit at her home.

[42] According to the complainant the appellant took her into her room which he then locked. He thereafter asked her to suck his penis. She refused. He then undressed her and thereafter raped her. The appellant does not dispute that he was at the complainant's house on the day in question. He, however, says the complainant asked him to teach her how to dance. He agreed. She then took him to her room for that purpose and she locked the door because she did not want her brothers to laugh at her as she danced seeing that her dance moves are clumsy.

[43] In my view, the court *a quo* correctly accepted the evidence of the complainant regarding this incident. The suggestion by the appellant that it is the complainant who locked the room is rejected. There would be no reason for her to so do as her brothers were busy watching movies in another room. It does not seem they would have been interested in what the complainant was doing in her room.

[44] I proceed to consider the evidence regarding the fourth count. This occurred during January 2008 and March 2008 according to the charge sheet. It is framed in terms of Sexual Offences and Related Matters Amendment Act 32 of 2007 ("the New Act"). This Act *inter alia,* enlarges

the definition of rape to include the insertion of any part of the body of one person into or beyond genital organs or anus of another person. According to the complainant the appellant arrived at her home on a Saturday. Her parents were present and they decided to have a braai. The appellant's girlfriend was not with the appellant when he arrived; the complainant's father drove to fetch her. There was no arrangement that the appellant and his girlfriend would sleep over at the complainant's house on that day. It became necessary for them to do so because her father, who was to take them back to their place after the braai, became unfit to do so. The appellant and his girlfriend were allocated complainant's room to use for that purpose.

[45] According to the complainant she was sitting in the lounge room watching a movie when the appellant approached her and demanded sex. He started touching her. He carried her and put her on a bed in her brother's, Nevone, room. He pulled down her pyjama pants and panty and started licking her vagina and inserting his finger into it while she lay on the bed. When he heard movement sounding like footsteps he stood up and went to the room where his girlfriend was. The complainant got up and went to sleep in a spare room. It is not clear from the evidence whether at that stage the appellant had inserted his penis into her vagina. But in view of the fact that the fourth count is framed under the new Act, nothing turns on it as there is evidence that he had put his finger into the complainant's vagina which in terms of the new Act constitutes an offence of rape. The court *a quo* was correct in accepting the complainant's evidence on this charge and dismissing the appellant's denial as being not reasonably possibly true.

[46] To sum up the court *a quo* erred in convicting the appellant on the

first count of rape. He should have been acquitted on the count of rape but convicted for attempted rape. The appellant's convictions on counts 2, 3 and 4 are, however, in order and his appeal against them should be dismissed.

[47] I proceed to consider the appellant's appeal against the sentences. In the light of the conclusion I have reached regarding the correctness of the conviction on count 1 it follows therefore that the sentence imposed in respect thereof must also be reconsidered.

[48] In the circumstances the sentence of ten (10) years imprisonment for the first count must be set aside. It remains to consider an appropriate sentence for attempted rape.

[49] It must be pointed out that the charge on count 1 was framed in terms of the common law and not the new Act. In my view, having regard to the seriousness of the offence and that it was committed by a person who is related to the complainant and which rendered the complainant extremely vulnerable, the sentence of five (5) years imprisonment will be appropriate.

[50] With regard to the sentence of ten (10) years imprisonment in respect of counts 3 and 4 respectively, it is not, in my view, when viewed individually, excessively harsh to justify this court's interference therewith. Section 51 of Act 105 of 1997 applied to both counts 3 and 4 which means that the court *a quo* could sentence the appellant to life imprisonment in the absence of there being substantial and compelling circumstances. The court *a quo* investigated this aspect and because of the appellant's personal circumstances found that there were substantial

and compelling circumstances justifying the imposition of a sentence less than life imprisonment. As I have said the sentences of ten (10) years imprisonment in respect of count 3 and count 4 each and five (5) years imprisonment in respect of count 2 when viewed individually, are not grossly excessive having regard to the fact that the offences were repeated and committed on various occasions by a person who was closely related to the complainant. They were committed at times and places where the complainant would be unsuspecting and more vulnerable. They were committed by her uncle who ironically should have been the one to protect her.

[51] It is the cumulative effect of the sentences which, in my view, is problematic. The effective term of sentence imposed by the court *a quo* is thirty (30) years imprisonment after ordering five (5) years imprisonment sentence in respect of indecent assault to run concurrently with a sentence of ten (10) years imprisonment for count 1.

[52] It is to this aspect of the sentences that the court *a quo* paid insufficient attention and which in my opinion amounted to an improper exercise of discretion justifying this court's interference with the sentence. (**S v COALES** 1995 (1) SACR 33 (A)). The total effective period of thirty (30) years imprisonment is unduly harsh in my opinion having regard to the fact that some of the offences are closely connected. I am of the view that this court should reduce the total effective period of sentences imposed by the court *a quo* by directing that certain sentences run concurrently with others.

[53] In the circumstances the sentence of five (5) years imprisonment on count 2 should be directed to run concurrently with a sentence of five

(5) years imprisonment in respect of count 1.

[54] As regards the sentences in respect of counts 3 and 4 a portion of the sentence on count 4 should be directed to run concurrently with a sentence of ten (10) years imprisonment in respect of count 3.

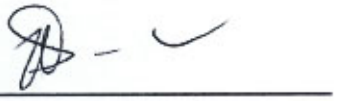
The order.

[55] In the result it is ordered as follows:

1. The appeal against conviction and sentence on count 1 succeeds. The conviction and sentence on count 1 are set aside.
2. The conviction of rape on count 1 is replaced with one of attempted rape and the appellant is sentenced to five (5) years imprisonment.
3. It is ordered that the sentence of five (5) years imprisonment on count 2 shall run concurrently with a sentence of five (5) years imprisonment on count 1.
4. The appeal against convictions on counts 2, 3 and 4 is dismissed.
5. The appeal against the sentences in respect of counts 3 and 4 succeeds.
6. It is directed that seven (7) years of the ten (10) years imprisonment sentence in respect of count 4 should run concurrently with a sentence of ten (10) years imprisonment on count 3. Effectively the sentence to be served by the appellant is eighteen (18) years.

ZONDI, J

I agree.



SABA, AJ