



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NO: A359/12

DPP REF NO: 9/2/5/1-216/12

BELLVILLE CRT APPEAL NO: 14/2012 (GSH 2/17/10)

In the matter between:

CHRIS BINDEMAN

Appellant

And

THE STATE

Respondent

JUDGMENT DELIVERED ON 21 SEPTEMBER 2012

BUIKMAN, AJ

1. The Appellant in this case was convicted of two counts of contravening the Criminal (Sexual Offences and Related Matters) Amendment Act 32 of 2007 in the Belville Regional Court namely:

- 1.1. section 5(1) read with sections 1, 56(1), 57 – 61 thereof in that on or about 1 January 2010 and at or near Elsie's Rivier he unlawfully and intentionally

sexually violated the complainant by rubbing his penis, buttocks and testicles with hair relaxer; and

- 1.2. section 3 read together with sections 1, 55, 56(1), 57 – 61 thereof in that on 1 January 2010 and at or near Elsie's Rivier the appellant sexually penetrated the complainant by inserting his finger in the complainant's anus without the complainant's permission.
2. The complainant was 13 years of age at the time of the incident.
3. Both counts were taken together for the purpose of sentencing and the Appellant was sentenced to 15 years imprisonment. Section 51 of Act 105 of 1997 and relevant provision of the Act 32 of 2007 are applicable. The Appellant was also declared unfit to possess a firearm in terms of section 103(1) of Act 60 of 2000.
4. The Appellant appeals against the conviction and sentence.
5. The Appellant, who was represented during the proceedings, pleaded not guilty to the charges and chose to make no admissions in terms of section 115 of the Criminal Procedure Act 51 of 1977.
6. The following facts are common cause:

- 6.1. the appellant, at the time of the incident, was the boyfriend of Ms Opperman, the complainant's mother;
- 6.2. the appellant, the complainant, Ms Opperman and another woman all spent the night in one room at the appellant's home in Elsie's River;
- 6.3. there was hair relaxer in the appellant's room;
- 6.4. the complainant sustained injuries to his penis, buttocks and his testicles.

7. The State called four witnesses:

- 7.1. Ms Handemark, a clinical psychologist, who had assessed The complainant's level of mental functioning and his ability to testify;
- 7.2. The complainant, who testified as to the events of the night in question;
- 7.3. Wilhelmina Opperman, the mother of the complainant and to whom the complainant had made the first report;
- 7.4. Dr Collison, who medically examined the complainant on the day of the incident.

8. Ms Handermark testified that although the complainant's mental ability was not much more than that of an 8 year old, he was nevertheless able to testify in court proceedings. He understood the correct anatomical names for the male genitalia. She found the complainant to be legally unable to consent to sexual intercourse on the basis of his mental age, intellectual disability and lack of knowledge of sexual matters. He was found to have a good understanding of truth, falsehood and perjury and hence was able to take the oath. Ms Handermark found the complainant to be a competent witness in court although she felt that he ought to be assisted with the help of an intermediary. Her evidence was, in the main, unchallenged;
9. The complainant testified with the help of an intermediary, Ms Harrison. There was no opposition to her appointment in terms of section 170A of the Criminal Procedure Act 51 of 1977 and the complainant did not give his evidence in open court. The proceedings were held *in camera*.
10. The complainant testified that he was visiting his mother's house on the night in question. There were also other visitors present that evening. He, the Appellant, Ms Opperman and the visitors watched a movie. The adults consumed alcohol.
11. One of the visitors was unable to leave as she had consumed too much alcohol. They all went to sleep in one room in the house. The complainant lay against the wall next to Ms Opperman and the Appellant lay on the other side of Ms Opperman. The drunk visitor lay at the footend of the bed.

12. According to the complainant, the Appellant asked him to come and sleep next to him. When he refused the Appellant pulled him over Ms Opperman whereafter the Appellant told him to pull down his pants. The Appellant started to play with his penis, his testicles and his buttocks. The complainant asked him to stop. He was told by the Appellant to fetch the hair relaxer, which the Appellant then used to rub on the complainant's penis, testicles and buttocks. The hair relaxer caused his genitals to burn and he against asked the Appellant to stop. He tried to wake Ms Opperman but was unable to do so.
13. The complainant testified that the Appellant then put hair relaxer on his finger and which he then inserted into the complainant's anus. It hurt and he went to visit the toilet. The Appellant went to fetch him from the outside toilet and grabbed him and took him back to the bed. The complainant was asked to suck the Appellant's penis but he refused. The Appellant also wanted to insert his penis in the complainant's anus but did not do so. He asked the complainant not to tell his mother. The complainant tried to wipe the hair relaxer from his genitals because it was burning. The Appellant then again inserted his finger in his anus. It was very painful and he left to watch television until the morning.
14. The complainant stated that the next morning his mother's friend, Mr Parker, noticed that he was "walking funny". When his mother asked him what was wrong he didn't tell her. He went to wash himself where he noticed blood on his testicles. He was shocked and told his mother about the events that had

happened. She escorted him to the Police station and he was examined by the doctor.

15. Ms Opperman confirmed that they had all retired on the night in question and that the complainant was lying on her one side against the wall whereas the Appellant lay on the other. The drunk visitor was also asleep in the room. Ms Opperman did not wake in the night. The next day her friend Mr Parker had told her to ask the complainant why he was walking peculiarly. The complainant then told her that the Appellant had smeared hair relaxer on his penis and his anus and attempted to insert his finger in the complainant's anus. According to her, the complainant had also told her that the appellant had asked him to suck his penis. When she confronted the appellant he denied that he was responsible and told her that it was a story. She reported the incident to the police station

16. Dr Collison, gave evidence to the effect that he had observed that the skin around the opening of the anus had a lot of redness, erythema and there were signs of abrasions around the area. No digital examination of the complainant's anus had been carried out. He also saw erosions on the right testis and both testis had abrasions. According to Dr Collison, the injuries were consistent with peroxide, which is contained in hair relaxer, having been applied to the area. It could not have been caused by newspaper when wiping the area. He did not notice any abnormalities to the anal opening. One would expect to see injuries to the anus if one had forcefully tried to penetrate the anus with a penis but not if somebody uses something of minimal diameter.

17. According to the Appellant, he went to bed earlier than the others who had been watching a movie on the night in question. He was tired as he had worked hard that day. He was not drunk although he had consumed a few drinks. The visitors were still present in the house when he went to sleep. When he woke the next morning he saw one of the guests asleep in the room. Ms Opperman wanted money for alcohol but he did not want to give her money. She later told him that she wanted him to go with her to the police station. He did not know why she wanted to go. He stayed in his bed. It was only after he was arrested that he found out what it was all about. He denied that he in any manner raped or sexually assaulted the complainant.
18. The Appellant admitted that there was hair relaxer in the room. According to him, the complainant had fabricated the story because he did not have a vehicle and wanted Ms Opperman to go back to her former boyfriend who did own a motor vehicle.
19. The Magistrate found the complainant to be a good witness. Although he was a child, he was held to have given a meaningful, chronological account of the events. Despite having been subjected to cross-examination, he did not contradict himself. His evidence was also corroborated by the doctor who found that his injuries are consistent with hair relaxer having been used the complainant's genitals. The complainant's mother verified what the complainant had told her the day after the incident had taken place.

20. On the other hand the magistrate found that the appellant did not make a good impression. His version was a bald denial of what had happened. Given the strong evidence adduced by the State, the magistrate dismissed the appellant's version as untrue.
21. I agree that the explanation given by the appellant was unsatisfactory. When he was cross-examined about the nature of the injuries that the complainant had sustained he sought to suggest that the complainant had inflicted these himself. The appellant's evidence as to why the complainant would want to incriminate him was never put to any of the State witnesses. Similarly, when he sought to implicate Ms Opperman in as much as he suggested that she was angry with him because he did not give her money for alcohol, this too was never put to Ms Opperman.
22. It is so that there are inaccuracies in the findings of the Magistrate when she gave her judgment. It is not correct that Ms Opperman testified that the complainant confirmed to her that the appellant had inserted his finger in his anus. Her evidence was that the complainant told her that the appellant had tried to insert his finger. The Magistrate also, incorrectly, found that, according to the complainant, his anus bled the day after the incident. He gave no such evidence but stated rather that there was blood on his testicles.

23. It is correct that there were inconsistencies in the first report to Ms Opperman, if one has regard to her evidence, and the evidence of the complainant. The Appellant's counsel, Ms Van der Westhuizen has argued that the doctor's evidence also did not corroborate the complainant's version that his anus was penetrated. She argues that one would have expected there to be injuries at the orifice of the anus and the anal canal if the appellant had used hair relaxer to penetrate the anus. According to the appellant, the State has therefore failed to prove that there was penetration.
24. I do not agree. Whilst it is true that the doctor did not carry out an examination of the anal canal, the injuries found by Doctor Collison are not inconsistent with those described by the complainant. The skin around the opening of the anus had a lot of redness and there were abrasions around the area. If somebody penetrates the anus using something of minimal diameter one would not expect any form of injury to be present according to Dr Collinson.
25. For one to find that there was no penetration, one would have to reject the evidence of the complainant. Although there are contradictions between the complainant's evidence and that of Ms Opperman, I do not believe that these are of such a nature to discredit the complainant.
26. I am satisfied that the State has proved its case against the appellant beyond a reasonable doubt and that the appellant is guilty of those charges of which he was convicted. I would therefore dismiss the appeal in respect of the convictions.

APPEAL AGAINST SENTENCE

27. The appellant was found guilty on two very serious crimes. The Appellant's counsel conceded that direct imprisonment is an appropriate sentence for a conviction of sexually assault and rape of a 13 year old. The complainant was the son of the Appellant's girlfriend and was well known to him. As a farther figure, the complainant trusted the appellant. The appellant also knew that the hair relaxer would cause pain to the complainant. He testified that Ms Opperman, who used hair relaxer for her hair, had previously complained to him that it caused her scalp to burn. He clearly caused the complainant great physical and emotional distress.
28. The magistrate correctly found that there were exceptional and compelling circumstances present not to impose the maximum sentence. The appellant, a 50 year old man, was clearly a model employee and had made a very good impression on his employer who testified in his mitigation of his sentence. Although he had previous convictions, none were relevant to the crimes of which he had been convicted. The Magistrate also took into account that alcohol had played a roll in the commission of the offences. It was also accepted that the appellant did not carry through with his desire to have sexual intercourse with the complainant and did not insist that the complaint suck his penis. The nature of the rape is undoubtedly not as serious as the many rapes that pass through these courts.

29. Counsel appearing for the Respondent conceded that the sentence of 15 years imprisonment was severe, given that the Magistrate had found that substantial and compelling circumstances existed, and the term of imprisonment should be reduced.
30. Considering all the aforementioned factors, I do believe that there is reason to interfere in the sentence imposed by the magistrate. The sentence imposed does not properly take into account the nature of the offence and also does not take into account the testimony of Mr De Jongh who told the court that the appellant had gone a long way to rehabilitate himself.
31. In the circumstances I believe that the term of imprisonment for both charges of which the appellant was found guilty should be reduced to a period of 10 years imprisonment of which 5 years shall be suspended for a period of 5 years provided that the appellant is not found guilty of the crime of sexual assault during the period of suspension.

Accordingly I would make the following order:

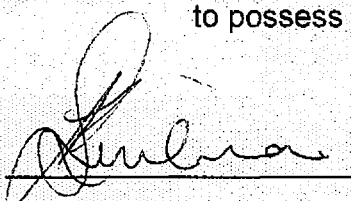
- 31.1. Count 1, that is the charge of rape as defined in Section 3 of the Criminal (Sexual Offences and Related Matters) Amendment Act 32 of 2007: the appeal regarding the conviction is dismissed;

31.2. Count 2, that is the charge of sexual assault as defined in Section 5 of the Criminal (Sexual Offences and Related Matters) Amendment Act 32 of 2007: the appeal regarding the conviction is dismissed;

31.3. The sentence in respect of Count 1 and Count 2 is however set aside and substituted with the following sentence:

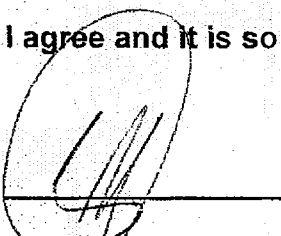
The appellant is sentenced to imprisonment for a period of 10 years (both counts having been taken together) of which 5 years shall be suspended for a period of 5 years provided that the appellant is not found guilty of contravening the provisions of sections 3 and 5 of the Criminal Law (Sexual Offences and Related Matter) Amendment Act, Act 32 of 2007 during the period of suspension.

In terms of section 103(1) of Act 60 of 2000 the appellant is declared unfit to possess a firearm.



L M BUIKMAN, AJ

I agree and it is so ordered.



N J YEKISO, J