**Mm Vs. the State**

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**SooperKanoon Citation** : sooperkanoon.com/1151190

**Court** : South Africa Supreme Court of Appeal

**Decided On :** Mar-08-2012

**Judge** : The Honorable Mthiyane Dp, the Honorable Heher, the Honorable Majiedt, the Honorable Wallis Jja &Amp; the Honorable Ndita Aja

**Appeal No.** : 542 of 2011

**Appellant** : Mm

**Respondent** : The State

**Judgement** :

On appeal from: Limpopo High Court, Thohoyandou (Makgoba AJ sitting as court of first instance) it is ordered that:

The appeal is upheld to the extent that the appellants conviction for rape is replaced by a conviction of indecent assault and his sentence of life imprisonment is altered to one of ten years imprisonment.

## JUDGMENT

WALLIS JA (MTHIYANE DP and MAJIEDT JA concurring)

[1] This appeal is against the appellants conviction of the rape of a seven year old girl and the sentence of life imprisonment imposed upon him for that offence. The alleged rape occurred on Wednesday, 31March 2004. The appellant was arrested

on 7April 2004 and remained in custody pending his trial. The trial was conducted before Makgoba AJ on 11 and 12 October 2004, on which latter date the appellant was convicted and sentenced. The appeal is before us with leave granted by Mann AJ on 11May 2009.

[2] Two disturbing features emerge from that brief recital of events. The first is that it took four and a half years for the appellant to have his application for leave to appeal heard and the second that it has taken nearly three more years after being given leave to appeal for his appeal to come before this court. That is entirely unacceptable. In terms of s35(3)(o) of the Constitution the appellant had a right to an appeal to, or review of his conviction and sentence by, a higher court. Delays of this duration negate that right either wholly or in part. That this is largely what has occurred in this case is apparent from the following sorry litany of facts.

[3] The appellant sought leave to appeal within one month of the conclusion of the trial. A request to process that application on his behalf made in December 2004 to the Justice Centre in Thohoyandou, which had provided him with legal representation during his trial, appears to have gone unanswered. In February 2005 the appellant submitted a request to the high court to be furnished with the complete court record. There was no response. Further enquiries by the appellant in July and September 2005 went unheeded. He resorted to a complaint to the Minister of Justice, who caused her administrative secretary to write to the registrar of the high court in Thohoyandou in October 2005 to remind him that in terms of s34 of the Constitution everyone has a right of access to court and that a public officer should not prejudice that right. The lack of response prompted a reminder on 14 November 2005. Eventually on 12December 2005 the registrar wrote to the appellant to tell him that in 2004 he (the registrar) had asked the Justice Centre to assist him with his appeal. There was no apparent attempt by the registrar to ascertain why the Justice Centre had not done so. The letter went on to add:

Should you wish to proceed with the matter without a legal representative, feel free to confirm such intention with my office.

[4] In December 2005 the appellant invoked the assistance of the Public Protector, who wrote to the registrar. No response was received and the Public Protector wrote again in February 2006. That prompted the registrar to send a copy of the December letter addressed to the appellant. Meantime apparently a representative of the Justice Centre visited the appellant in January 2006 and in February he was told that he would have to pay for the court to prepare the record of proceedings. In March 2006 money was deducted from his account at the prison for this service but no record was forthcoming. In May, after a further communication from the Public Protector, the registrar wrote to the appellant saying that transcribed records are obtainable from Sneller Verbatim (Pty) Ltd and that payments must be forwarded to their offices prior to quotation. His cheque was returned. The appellant then sought a quotation from Sneller for the preparation of the record and in October 2006 was told R3500 was required. He did not have this, but made unsuccessful attempts to raise the money with the assistance of his family. In February 2007 he wrote to the Judge President of the high court in Thohoyandou and in May 2007 he again wrote to the registrar asking that the State pay for the transcription of the record as he was in jail and his parents were pensioners. That finally attracted an affirmative answer in July 2007, while in June 2007 the Justice Centre was again asked to assist him with his appeal. The record was finally produced on 10August 2007 but nothing happened thereafter. It appears from subsequent correspondence that he was told that it had been sent to the trial judge for him to correct. Whether this is correct is unclear because in dealing with the application for leave to appeal Mann AJ noted that the record was a simple one, with no inaudible passages, and the judges notes were in the file.

[5] The continued inaction prompted the appellant once more to approach the office of the Minster of Justice. Nothing came of this and in February 2008 the appellant again wrote to the registrar asking how long it takes for the Judge to complete his honourable corrections of the record. His next letter in March 2008 starts somewhat plaintively:

I suppose you would be wondering what happened to me;

and goes on to complain that six months have elapsed with no progress or response concerning the judges processing his honourable corrections. It ends by asking, For how long should I continue to wait? There was apparently a further letter in May because on 2 July 2008 the registrar wrote saying that:

The records of your case has been asked for. You will receive same as soon as it is received.

That was not a helpful response and it is no surprise to find that the appellant then wrote an angry letter describing these letters as accumulated empty promises and complaining that between the registrar and the Legal Aid Board they were playing hide and seek with him.

[6] There were then further delays that are undocumented in the record but resulted in the application only being heard on 4May 2009 and judgment granting leave to appeal being given on 11May 2009. At least Mann AJ had a proper appreciation of the need for swift action. However once he had granted leave to appeal the delays set in once again. In August 2009 the Thohoyandou Justice Centre wrote to the registrar expressing surprise that the records regarding argument had not been transcribed. The fact that this was entirely unnecessary and contrary to the rules of this court governing the preparation of records appears to have escaped them. By September 2009, however, they had been prepared and sent to the Justice Centre with a letter saying that they now owe our office a fully prepared record for this court. It was only in November 2009 that the registrar of the high court sent the record to the registrar of this court. That record commences with an indictment in an entirely different case and is followed by a statement of substantial facts and list of witnesses in that other case.[1]No notice of appeal was delivered, but in January 2010 an application to condone the late filing of the appeal record and reinstating the appeal was lodged together with affidavits by the representative of the Justice Centre and the appellant in which there is no explanation at all for the failure to lodge a notice of appeal.

[7] This sorry mess is attributable to all concerned having no regard to the appellants rights and the difficulties confronting him, as a prisoner serving a life sentence, in pursuing his appeal properly. No-one seems to have had any regard

for the need to deal with applications of this sort expeditiously. Nor was any regard paid to the provisions of the Criminal Procedure Act[2] and the provisions of the rules of this court in regard to the preparation and lodging of records and the preparation of cases for consideration by this court. In the result some seven and a half years have elapsed since the appellants conviction, during which he has been incarcerated,[3] whilst he has tried steadfastly to pursue the appeal that is his right. The one person who has not been at fault in all this is the appellant, most of whose letters have been couched with studied courtesy and patience. To the extent that his appeal has not been pursued in accordance with the letter of the law that non-compliance should be condoned. As to the rest the registrar of this court will be directed to send a copy of this judgment to the Director-General of the Department of Justice for consideration of appropriate action against the registrar of the High Court in Thohoyandou and to the head of the Justice Centre for consideration of the conduct of the officials employed in the Justice Centre in Thohoyandou.

[8] I turn then to the merits of the appeal. The appellant is alleged to have raped a seven year old girl in her own home on the afternoon of 31March 2004. According to the complainant she and two other girls, her cousin and a friend, were looking for locusts in a field when the appellant, who is her uncle, called them. She was given a bag to carry and take inside the homestead, which she did. She said that the appellant followed her into the home and shut the door. She then asked him for money to go and buy chips and he gave her 80 cents. She said that he then undressed her, placed her on the sofa and put his penis on my private part. She explained that he had removed the clothes that he was wearing before doing this. As far as the other two girls were concerned she says that the appellant had ordered them to leave before this incident occurred.

[9] The complainants evidence was very brief and in some respects cryptic. She was not asked to explain what she meant when she said that the appellant placed his penis on her private part. It is clear that this is the expression she used, because the trial judge asked her, at the conclusion of her evidence in chief, what did he put on your private parts? Then, after the judge had asked her several leading questions, she said that the appellant did evil things to her and when

asked to explain what type of things said: He was raping me. Unfortunately there was no attempt to explore with her what she understood by this, nor is it clear, she having given evidence through an interpreter, whether this accurately reflected her description of the incident. She was after all a child and children do not usually use technical language such as rape to describe sexual acts or vagina and penis to describe their private parts.[4]Euphemisms of some or other sort are more usual. However, an interpreter might well in the formal arena of a courtroom use the more technical expression as an equivalent. It would have greatly assisted in considering this appeal if some care had been taken to ascertain whether the statement that the appellant was raping her was compatible with her earlier description of the appellants penis being placed on her private part.

[10] There are a number of problems with the interpretation of the evidence and this was complicated by the defence attorney apparently being oblivious to these nuances. Thus she put to the complainant that the appellant would deny that he had sexual intercourse with you, without explaining the implications of the expression. Hardly surprisingly that attracted the response:

He did have sexual intercourse with me.

What one cannot tell is whether this reflected the actual words used by the complainant or was the interpreters manner of conveying a denial of the basic proposition couched in the language of the cross-examiner. A perusal of the record demonstrates that the interpreters use of English was uncertain. On occasions the interpreter added explanations that clearly were not a reflection of what the witness had said. Once, having started to translate an answer, the interpreter corrected the translation halfway through from a literal word for word translation to one that was more grammatically correct in English. In the course of doing so the word originally used to translate what the witness said fell away.[5]On that occasion it did not in substance alter the meaning of the answer but it reveals that the interpretation may not have been precise in rendering what the witnesses actually said. All in all one is left with a measure of uncertainty as to the accuracy of the translation in relation to critical issues in this case.

[11] In cross-examination the focus largely fell on whether and to whom the complainant had reported this incident. She initially said that she had not spoken to anyone about it, but then said that she had told her grandmother who was looking after her at the time. When confronted with the discrepancy she reversed her position and said that she had not told her grandmother. From that point on she maintained that she had not told anyone about the incident. It was put to her that the appellant would say that she had gone into the house with him because she had asked him for money to go and buy chips and that he gave her 80cents, but she wanted two Rand from him. When she tried to take some more money he held her by her tummy and pushed her out of the house. When this happened she knocked against a chair.

[12] The complainants cousin, herself a 13 year old girl, gave evidence that largely corroborated that of the complainant. She confirmed that they were out looking for locusts; that the appellant approached them and gave the complainant a bag to take into the house for him; that he followed her into the house and closed the door and then, speaking through a window, he instructed her and the other girl to leave. Contrary to the complainants denial she said that on the following day the complainant had told her what had happened to her in the house. She denied the suggestion in cross-examination that she had been present whilst the complainant went into the house and left with her.

[13] The complainants grandmother said that she saw that the complainant had 80 cents with her when she returned from playing on the afternoon of 31 March 2004. She said that when she questioned the child on where she obtained the money she was told about this incident involving the appellant. Her description matched that of the complainant but a difficulty in translation emerged over precisely what the appellant was said to have done to the complainant. The grandmothers evidence, as translated, was that she was told that the appellant had slept over her. The interpreter explained that she used the Venda expression u lala. This was not explored further. It was plainly significant because it reflects the point already made that children are inclined to use euphemisms to describe sexual matters. The grandmother said that after learning of this she took the complainant to the clinic because she observed that she was not well.

[14] There were contradictions in the grandmothers evidence regarding the reports made to her. The impression she gave in chief was that she learned of the incident from questioning the complainant about the money in her possession. In cross-examination she said that she initially received a report from the children the complainant was playing with, and then further corrected that by saying that the report was made by the mother of one of these children. It was only after receiving this report on the Thursday (or possibly the Friday) after the incident that she interrogated the child and was told about what happened. What is certain, however, is that she learned of something that aroused sufficient concern for her to take the complainant to the local clinic on the Saturday morning, from where she was referred to the Donald Fraser hospital for examination by a doctor.

[15] As appears to be an increasing feature of cases such as these the doctors report was simply handed in by consent and the doctor was not called to give evidence. That practice is generally speaking to be deprecated. It means that there is no opportunity for the doctor to explain the frequently subtle complexities and nuances of the report; to clarify points of uncertainty and to amplify upon its implications and the reasons for any opinions expressed in the report. That may make the difference between a conviction and an acquittal or perhaps a conviction on a lesser charge. Depending on the areas where there is a lack of clarity, the lack of clarification may either benefit or prejudice an accused. Neither result is desirable. Magistrates and judges who are confronted with these reports without explanation do not have the requisite medical knowledge to flesh out their full implications. Unless therefore there can be no confusion, for example in a case where the fact of rape is admitted and the only issue is one of identification of the perpetrator, it will generally be desirable for the doctor to give evidence in support of his or her report. In this case it was undoubtedly necessary and the fact that the doctor was not called has rendered the consideration of this appeal far more complicated than it should have been.

[16] The doctor reported that he observed bruising and abrasions on the medial aspect of the childs labia minoris.[6]The hymen was disrupted wide and irregular and the posterior fornix[7]was visible, but the implications and causes of this were not explained. Nor were the fact that the complainant had a yellowish discharge

from the genital area and the doctor observed erosions ventrally.[8]The firm conclusion was expressed that the complainant had been the victim of sexual assault. The report does not, however, say that she was raped and judging by the difficulties the doctor encountered with a physical examination[9]actual penetration would have been difficult to achieve. Whether penetration occurred is fundamental to the correctness of the conviction of rape.[10]

[17] The appellants evidence was in accordance with the case put to the complainant by his counsel. He said that he encountered the complainant and her cousin on the road as he was making his way home from the fields. The complainant asked him for money to buy chips and he was happy to give it to her as he had done on previous occasions. When they came to the house he went in with the complainant following him and the cousin in the entrance. He said that he placed a chair against the door to prevent it from closing. He gave the complainant 80cents from some coins he kept on a shelf but she wanted more and tried to take it. He stopped her by holding her round the tummy and pushed her away out of the house. As he did so she bumped herself against the chair holding the door open and started to cry. However she rapidly composed herself and he watched her walk away with her cousin, showing her the money she had been given as they walked. He denied the allegations concerning the alleged rape.

[18] The appellants conviction can only be sustained if on a consideration of all the evidence his version of events cannot reasonably possibly be true. Whilst in many cases the fact that an accused person gives a false version of events is not decisive of the merits of a conviction, in this case where the falsity relates to events on a particular day at a particular place involving him and the complainant, if his version cannot reasonably possibly be true its falsity lends strong support to the truth of the complainants evidence.

[19] The objective and undisputed evidence shows that the complainant was subjected to a sexual assault. She had been in the house with the appellant on the Wednesday afternoon. Both she and he agree that she was tearful when she left the house because she had been hurt while inside. By Thursday, or at latest Friday, her grandmother realised something was wrong and took her to the clinic

on the Saturday morning. That is when the diagnosis of sexual assault was made. The appellant was arrested on the following Wednesday, which indicates that the complainant had identified him immediately as the perpetrator. If the appellants story is correct then another man sexually assaulted the complainant at another time and probably another place and for some inexplicable reason this seven year child has from the outset laid the blame on a close relative who has always been kind to her and chosen to conceal the identity of the true perpetrator (or if unknown to her to say that she was assaulted by an unknown man). The appellants description of grabbing the child by her tummy and her hurting herself by bumping against a chair does not explain the injuries in her vaginal area. His suggestion that her grandmother put the child up to telling a dishonest story in order to take revenge for a dispute over the boundaries of a field at a time when he was at best a youth in his teens is utterly incredible.

[20] When the evidence is weighed in its totality it amply supports the trial courts finding that the appellants version could not reasonably possibly be true and that the evidence of the complainant, when viewed with the appropriate caution called for because of her tender years and the fact that on the assault itself she was a single witness, could be accepted. Accordingly a conviction was appropriate. The only issue is whether that should be of rape or of indecent assault.[11]That depends on whether the evidence was sufficient to show beyond reasonable doubt that penetration occurred. In my opinion in the light of the lack of certainty about the purport of the complainants evidence and the absence of any explanation from the doctor of his clinical findings it was not.

[21] I accept for the purposes of this judgment that Professor Milton[12]is correct in saying that the slightest penetration is sufficient and that this includes any degree of penetration, however minor, into the labia, although neither Van Leeuwen, whom he cites in support of this proposition,[13]nor the cases he quotes, supports that proposition. It does, however, accord with the position in England[14]and in the United States of America.[15]If the doctors report had been unequivocal in saying that rape had occurred, that would have overcome the concerns about the complainants evidence and its interpretation, but it is not. Abrasions and bruising of the surface of the labia minoris are no certain indication of penetration. They are

consistent with being external injuries alone. The disruption of the hymen may be an indication of penetration, but it is not decisive unless directly linked to the sexual assault, which, in the absence of explanation by the doctor, it is not. In addition the complainants evidence is that while she felt pain during the assault there was no bleeding. The presence of erosions ventrally, the precise location of which the doctor did not indicate, takes the matter no further. Doctors conducting examinations of this type are usually aware of the requirement of penetration for rape and when they are satisfied that a sexual assault has involved penetration they record that the victim was raped. Had he been called as a witness and said that there was penetration he would no doubt have been cross-examined on his failure to say so expressly in his report. Counsel for the defence would have been foolhardy to insist on the doctor being called in the light of the inconclusive language of his report. In the absence of evidence from the doctor as to the precise nature of the sexual assault that he concluded from his examination of the complainant had been perpetrated upon her it would be unsafe to say on the basis of his evidence that penetration has been proved beyond reasonable doubt. This is not a case such as S v F,[16]referred to by my brother Heher JA, where the fact of penetration was accepted and the only issue was whether that was with the accuseds penis or his finger.

[22] The question then is whether the lack of clarity in the doctors report is overcome by the complainants evidence. I have already drawn attention to the limitations of her evidence. When using her own words she expressly said that the appellant placed his penis on not in her vagina. On the occasions when she used the words raping and sexual intercourse her understanding of these was not explored to see whether she was, in the expression used in the American cases, a person of understanding in regard to their meaning. The fact that the cross-examiner did not explore these terms with her does not in my view take the matter anywhere. It was for the prosecution to do so and to make it clear that she understood them and understood and intended their consequences. The difficulty facing the cross-examiner in doing so, when the version of her client was a denial of any sexual acts, is apparent. Any attempt to explore these questions could have remedied the deficiencies in the prosecution case and elicited detail that would be detrimental to her clients interests.

[23] The appeal must therefore succeed and the conviction of rape be altered to one of indecent assault. As the assault was perpetrated on a child under the age of 16 years it carries with it a statutory minimum sentence of ten years imprisonment and no substantial reason was advanced for departing from that sentence in the present case. This was a violation of a young child and involved both an abuse of authority and an abuse of trust.

[24] It is most unsatisfactory to have to reach a conclusion on the basis of uncertainty concerning the meaning of the medical report. Had the doctor been called as a witness and his evidence had revealed that penetration had occurred, then the conviction of rape would have been upheld and in the absence of substantial and compelling circumstances the sentence decreed by the legislature would have remained in place. That would have given satisfactory justice to his victim. On the other hand if the doctors evidence had made it clear that it could not be said with certainty that penetration had occurred the trial judge would no doubt not have convicted the appellant of rape, but of the lesser offence of indecent assault and a substantial but lesser sentence would have been imposed. Given current norms for the grant of parole the appellant would probably have been released from prison by this time. All of this demonstrates that the decision not to call the doctor was erroneous. Regrettably this is too frequently a feature of rape cases and judging by the experience of the members of this court it is increasingly rare for the doctor who examined the complainant in such cases to be called to explain the medical report. We were however informed from the Bar that there is no instruction in the office of the National Director of Public Prosecutions that doctors should not be called. That is a start to addressing the problem and it may be helpful to afford some guidance to prosecutors. In principle unless there is no issue about the fact of rape the doctor should be called as a witness. Certainly wherever the implications of the doctors observations are unclear the doctor should be called to explain those observations and to guide the court in the correct inference to be drawn from them.

[25] In the result the appeal succeeds to the extent that the conviction of rape is set aside and replaced by a conviction of indecent assault. The sentence of life imprisonment is set aside and replaced by one of ten years imprisonment.

HEHER JA (dissenting, NDITA AJA concurring):

[26] I have read the judgment of Wallis JA. I disagree only on the question of whether the State proved that the appellant penetrated the complainant (as is necessary to constitute the crime of rape). As there was no direct evidence establishing the fact, it was necessary that, on a conspectus of all the circumstances, the only reasonable inference was that penetration had occurred.

[27] What is required is penetration of the labia by the penis albeit to a slight extent: South African Criminal Law and Procedure 3 ed (by J R L Milton) Vol II 448, fn 122 and the authorities there cited.

[28] The complainant was a young child. Her evidence was uncomplicated. The interpretation from the Venda language shows signs of deriving from a speaker who was not thoroughly at home with English. Nevertheless there can in my view be no reasonable doubt about what happened to the victim.

[29] The appellant divested himself and the complainant of their clothes. He took her to a sofa and lay down on top of her. He placed his penis on (thus the interpretation) her vagina. She felt pain in her vaginal region. She screamed. Afterwards she did not bleed. She was able to walk home unassisted.

[30] In relation to what happened, the complainant used the words raping and sexual intercourse (thus also the interpretation). Neither expression was placed in issue by the cross-examiner and no investigation was conducted by the court to test the justification for their use.

[31] The complainant was medically examined, probably on the second day following the incident. The doctor recorded his findings:

1. The medical aspect of the labia minora was abraded and bruised.

2. The hymen was disrupted wide.

3. The posterior arch of the vagina was visible.

It was not suggested by counsel that the injuries derived from a non-traumatic cause (eg disease) or from the insertion of a foreign object (other than the appellants penis) such as a finger, or were self-inflicted. In the absence of facts such possibilities were no more than speculation: cf S v F 1990 (1) SACR 238 (A) at 247i-248a.

[32] Abraded means worn by friction; disrupted connotes disturbance by breaking or shattering. These are the unambiguous ordinary senses of the words used by the doctor (common to the Shorter Oxford, Websters and Encarta dictionaries). The findings are consistent only with penetration. If counsel for the appellant wished to test the appropriateness of the words chosen he should have asked for the evidence to be led and not simply admitted the report. But he did not do so. The doctors examination was painful for the complainant. Her vagina admitted only the doctors little finger. Neither of those considerations is, in my view, sufficient to militate against the clear inference that the appellant attempted, and, at least partially, succeeded in achieving penetration.

[33] The inference is consistent with the manifest intention of the appellant, an intention not interrupted or frustrated or resisted before he had carried out his purpose

[34] I would dismiss the appeal against the conviction. As this is a minority judgment it is unnecessary to consider whether the sentence should stand.

1. The correct documents were filed with counsels heads of argument.

2. Act 51 of 1977.

3. He has in all been in custody for almost exactly eight years.

4. When asked where she had been injured the complainant merely pointed to her private parts. The interpreter said She is pointing to her private part my lord, vagina. This suggests that the interpreter might have been concerned to use the formal English word. The complainant did not reply to this question by saying on my vagina yet elsewhere in her evidence she is reflected as freely and accurately using that expression.

5. The result was that instead of saying that the appellant undressed the interpreter rendered the answer as he took off the clothes he was wearing.

6. The inner folds of skin forming the margins of the vaginal orifice.

7. The rear of the arch shaped cavity in the interior of the vagina.

8. Ulceration in the abdominal area.

9. His note was originally that the vagina was shut but he deleted this and wrote little finger. Again there was no explanation.

10. Penetration was a common law requirement and it is continued in the present definition of the crime of rape in s3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, although that definition extends the scope of the crime to other penetrative acts.

11. As the offence was perpetrated before the enactment of the Criminal Law (Sexual Offences and Related Matters) Amendment Act the offences are those under the common law. Under s261(1) of the Criminal Procedure Act, as it read at that stage, indecent assault was a permissible verdict on a charge of rape.

12. J R L Milton South African Criminal law and Procedure, Vol II, Common Law Crimes (3 ed 1996) 448, footnote 122.

13. Simon Van Leeuwen Censura Forensis 1.5.23.12 (translated by Margaret Hewett, 2001). The reference to stuprum in this passage accords more nearly with the approach in Germany and some other jurisdictions than with the view of Professor Milton. See J M T Labuschagne Die Penetrasievereiste by Verkragting Heroorweeg (1991) 108 SALJ 148.

14. J C Smith Smith and Hogan Criminal Law (10 ed, 2002), 467.

15. James L Rigelhaupt Jr JD What constitutes penetration in prosecution for rape or statutory rape 76 ALR 3d 163 (Annotation). The author provides summaries of a vast number of cases from various courts in the USA that reveal how difficult it may sometimes be to establish that penetration has occurred when the medical

evidence is inconclusive.

16. S v F 1990 (1) SACR 238 (A) at 247i-248a.