

S v ML 2016 (2) SACR 160 (SCA)

KEY CONCEPTS	
Rape of 9-year-old female	Rape by mother's boyfriend
Age of child proved for minimum sentence	Doctor required to explain J88
Cautionary rule	

Introduction

The appellant, who was 28 years old at the time of the trial, was convicted of the rape of a 9-year-old girl by the regional court and sentenced to 20 years' imprisonment. He applied for leave to appeal to the Eastern Cape Local Division but this was refused by the trial court. A subsequent petition in terms of s309C of the Criminal Procedure Act 51 of 1977 (CPA) to the Eastern Cape Local Division was also unsuccessful. A further petition to the SCA for special leave to appeal in terms of s16(1)(b) of the Superior Courts Act 10 of 2013 was granted.

Facts of the case

The appellant's mother stated that she was in a relationship with the appellant, who had shared her bed on the day in question, together with the complainant and another young child, who slept on the bed in the opposite direction. In the morning she had gone outside to start a fire to boil water so that she could bath the complainant before she went to school. It was during this time that the complainant alleged that the appellant had raped her. The mother said that on her return there was nothing about the complainant's behaviour that indicated she had been raped. The complainant seemed happy, did not complain of any pain when she was bathed and left for school walking normally. There was no evidence of blood when she bathed the complainant. It was only after school on the following day that she noticed a discharge from the complainant's private parts. When she asked her what had happened, the complainant replied that she did not know. The following day she took the complainant to the clinic where they were informed that the complainant had been raped. The mother was not present when the complainant was examined by the doctor.

Issue before the SCA

The sole issue to be determined is whether leave to appeal should be granted to the appellant to appeal to the court a quo against his conviction and the sentence imposed by the trial court. This requires a determination of whether the appellant possesses reasonable prospects of success in prosecuting an appeal. The appellant's conviction was based in large measure upon the trial court's findings that the testimony of the complainant that the appellant had raped her was corroborated by the findings of the doctor contained in the J88 form. This form, which set out the findings and conclusions of the doctor, who examined the complainant, was handed in by the state without any objection by the defence in terms of s212(4) of the CPA.

The doctor recorded in the J88 under clinical findings as follows: “No hymen ... 20 x 20 mm. Redness around vaginal entrance, oozing yellow offensive pus, no abrasion/bruise.” The dimensions ‘20 x 20 mm’ refers to the dimensions of the complainant’s vaginal opening as explained under the section ‘gynaecological examination.’ It was also noted that there were no fresh tears and that the complainant’s vagina only admitted the examining doctor’s little finger. The remainder of the gynaecological examination was noted as ‘normal,’ except for the discharge and the presence of bruising. The doctor’s conclusion was that penetration had occurred.

The complainant’s evidence was that she had never had sexual intercourse before this incident. The doctor’s conclusion that penetration had occurred, therefore meant that he needed to be called to give evidence to explain his conclusion in the light of his findings that there were no fresh tears or scarring, that the vagina only admitted the passage of his little finger but that the hymen was absent.

“This court has in the past expressed its dissatisfaction with the growing trend on the part of the prosecution, particularly in cases of sexual assault of young children, not to call the medical expert who examined the complainant and compiled the medical report. The routine approach by prosecutors seems to be to obtain the admission from the accused of the findings in the report, or simply to rely upon the affidavit by the examining doctor as prima facie proof of the contents of the report.”

In the present case, the complainant is a very young child and the only witness implicating the appellant. Her evidence must, therefore, be treated with caution, and a degree of corroboration is required to reduce the danger of relying solely upon her evidence to convict the appellant. It is unjustified to rely upon the cryptic findings and bald conclusions by the doctor. If the doctor had been called, their evidence could have had a decisive effect upon the outcome of the trial. Without that evidence, the court is left with the doctor’s conclusion that penetration occurred, which appears to be inconsistent with the objective findings revealed during the gynaecological examination. The need for medical corroboration is increased by the evidence of the complainant’s mother.

A further concern relates to the interview that took place between the complainant and the doctor. the entry in the J88 reads as follows: “Brought in by mom that suspects rape. Child: admits having sexual acts with mom’s boyfriend.” The doctor’s evidence of how this was raised and discussed with the complainant was of vital importance. There is the danger that the child could have been prompted by leading questions and there could have been suggestion. Another question that requires explanation is that the J88 records that the examination took place on the 2 June 2011 whereas the complainant’s mother said she took the complainant to be examined 2 days after the incident, namely 27 May 2011. An

explanation of this disparity would be vitally significant in assessing the apparent absence of serious injuries to the complainant.

For the reasons set out above, the appellant has reasonable prospects of success in an appeal to the court a quo.

Insofar as the sentencing is concerned, the appellant was sentenced to 20 years' imprisonment in terms of part 1 of schedule 2 to the Criminal Law Amendment Act 105 of 1997, which provides for this as a minimum sentence in the case of the rape of a person under the age of 16 years in the absence of substantial and compelling circumstances. A concern is that the state never proved the age of complainant. This could have been proved by a birth certificate or evidence of the mother. The age of complainant had to be proved beyond a reasonable doubt because it is a vital element in the determination of whether a prescribed minimum sentence had to be imposed.

For these reasons the appellant possesses reasonable prospects of success in relation to the sentence imposed in an appeal to the court a quo.

The appeal was thus upheld and the appellant was granted leave to appeal to the Eastern Cape Local Division against his conviction of rape and the sentence imposed.