

S v Haupt 2018 (1) SACR 12 (GP)

KEY CONCEPTS	
Sexual assault of 12-year-old	Sexual assault by mother's boyfriend
Cautionary rule child witness	Cautionary rule single witness
Child witness	Credibility of child

Introduction

The appellant was convicted in the regional court on 2 counts of attempted rape and sexual assault and sentenced to 12 years' imprisonment on the charge of attempted rape and 6 years' imprisonment on the charge of sexual assault. The sentences were ordered to run concurrently, the appellant was declared unfit to possess a firearm and his name was entered into the register of sex offenders. The application for leave to appeal was refused, but he was subsequently granted leave to appeal by the High Court.

Facts of the case

The complainant was 12 years old at the time of the alleged incident, but 15 when she testified. The appellant was the boyfriend of the complainant's mother. He lived with the complainant, her younger siblings and her mother in the same house. On certain occasions the family of 5 would lie on the bed and watch DVD movies on the television in their mother's bedroom. On those occasions she would lie next to the appellant while her siblings would lie next to the mother. The appellant would then touch her with his finger between her thighs on her vagina while she had her panty on. All of the touching incidents occurred in the mother's bedroom, except for one occasion which took place in her sister's bedroom. The appellant also on another occasion touched her breasts under her t-shirt. She did not tell anyone about what the appellant was doing to her as she was afraid that the appellant would leave her family and, as he was the apparent breadwinner, they would be destitute. The appellant denied the allegations and stated that he had had a quarrel with the complainant's mother about finances and that it was subsequent to the quarrel that charges were falsely laid against him.

Medical evidence was also presented by the doctor who conducted a gynaecological examination on the complainant and recorded his findings on the J88 form. The complainant's external genitalia were red, swollen and tender but the hymen was intact.

Appeal to the High Court

The appellant argued that the state had failed to prove its case beyond reasonable doubt. The complainant was not only a single witness, but she was a minor whose evidence ought to be treated with caution and her evidence was neither clear nor reliable on material aspects due to contradictions. In approaching the evidence, the High Court reiterated that the proper approach to evidence was to look at the evidence holistically in order to determine whether the guilt of the accused has been proved beyond a reasonable doubt. In *Hadebe and Others* 1998 (1) SACR 422 (SCA) at 426f-h the court stated:

“But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set aside at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.”

In examining the evidence in the present case, the court noted the following:

- the complainant was 12 at the time of the alleged incidents and 15 when she testified;
- she had to testify about incidents that had taken place 3 years earlier;
- this resulted in her inability to respond to some questions under cross-examination or replies to the effect that she would prefer not to respond to a particular question i.e. she was asked why she continued to lie next to the appellant if he behaved inappropriately and he could not respond adequately to the question which was very pertinent to the appellant's guilt or innocence;
- the trial court did not seem to attach any weight the inadequate complaints of the complainant and this was a misdirection;
- the complainant was a minor child testifying in a case of a sexual nature in which she was the only witness;
- the state relied on her evidence and it was therefore imperative that she answer all questions put to her;
- in light of the inadequate responses it cannot be said that her evidence was clear and reliable in all material aspects;
- the trial court did not apply the cautionary rule adequately in evaluating her evidence, constituting another misdirection;
- while the complainant was quite clearly an intelligent child, her powers of recollection, narration and capacity to frame and express appropriate answers were found wanting in some instances – this manifested in periods of silence or sheer inability to respond to some questions i.e. when asked what the appellant did after putting a hand in her pants, she said she did not want to answer the question;
- in view of this charges, her testimony was inadequate and creates more questions than answers;
- the evidence is at variance with the charges put in material respects i.e. putting a hand to breasts is totally not reconcilable with `sucking breasts and private parts of the complainant' in the charge sheet;
- how is it possible to determine whether the appellant attempted to rape the complainant without an explanation as to what the appellant did with his finger;
- even the state conceded in their address that there were certain contradictions in the complainant's evidence and there were several times when she chose not to answer the questions posed to her;
- the complainant admitted that she told nobody what had happened, and only disclosed when her mother asked if the appellant had touched her, which raises the issue of suggestibility, and no basis was laid for why the mother asked about the touching.

The court, having evaluated the strength, weaknesses, probabilities and improbabilities on both sides, was not persuaded that the state had proved its case beyond a reasonable doubt. Both the conviction and sentence were set aside.

