Editorial note: Certain information has been redacted from this judgment in compliance with the law.

THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NUMBER 75/98

In the matter between:

M V H VIVEIROS **Appellant**

and

THE STATE **Respondent**

CORAM: HEFER, ZULMAN JJA et MTHIYANE AJA

DATE OF HEARING: **21 FEBRUARY 2000**

DATE OF JUDGMENT: **9 MARCH 2000**

JUDGMENT

ZULMAN JA:

[1] The appellant was formerly the principal of the G.C. Williams House ("the home"), a facility in Bridgetown on the Cape Flats which cares for homeless, abandoned or abused children. He was charged in the Regional Magistrate's Court, Wynberg, with six counts of indecent assault and one of sodomy. All the complainants were minors at the time of the alleged offences. Some were very young children whilst others were more or less of the age of puberty. They were all being cared for at the home. The appellant was acquitted on two of the counts of indecent assault but found guilty on the remaining counts. On appeal to the Cape High Court the conviction on the sodomy charge was set aside but the convictions on the four indecent assault charges were confirmed. He now appeals against these convictions.

[2] In view of the nature of the charges and the age of the complainants it is well to remind oneself at the outset that, whilst there is no statutory requirement that a child's evidence must be corroborated, it has long been accepted that the evidence of young children should be treated with caution *(R v Manda* 1951(3) SA 158 (A) at 163 C; *Woji v Santam Insurance Co Limited* 1981(1) SA 1020 (A) at 1028 B- D); and that the evidence in a particular case involving sexual misconduct may call for a cautionary approach (*S v J* 1998(2) SA 984 (SCA) at 1009B). For reasons which will presently emerge the present case is plainly one which calls for caution. **[3]** Before I deal with each count in turn I wish to make the following general

observations:

(i) The magistrate failed to properly appreciate the significance of the onus which rested upon the State. In his reasons he stated :

> "The accused's failure to convince the court is a further guarantee of the veracity of the evidence tendered by the State."

It is trite that there is no obligation upon an accused person, where the State bears the onus, "to convince the court". If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true but whether one subjectively believes him is not the test. As pointed out in many judgments of this Court and other courts the test is whether there is a reasonable possibility that the accused's evidence may be true.

(ii) I do not find it improbable (as the magistrate did) that the complainants would conspire to fabricate charges against the appellant. The magistrate is incorrect when he states in his judgment that "no evidence was forthcoming to this effect". On the contrary, the appellant has suggested reasonable grounds for suspecting that at

least some of the witnesses for the State may have had a grudge against him and the evidence of Andrews (a child care worker of the Home) indicates that Andrews may well have had a motive to wish to implicate him falsely. I find nothing "inherently improbable" in the evidence of the appellant to the effect that Andrews and Miss Terry (a social worker employed at the Home) would fabricate evidence against him. The appellant has suggested reasons for this which are not so far fetched as to be summarily rejected.

(iii) It is of little value to judge an accused on his demeanour in the witness box and to convict on this ground. In this regard the magistrate states that "the accused was ill at ease when testifying". Such conduct is not unusual nor surprising amongst accused persons or indeed witnesses generally who may be afraid or even overwhelmed at the experience of giving evidence in a court, possibly for the first time. (See the remarks of Diemont JA in *S v Kelly* 1980(3) SA 301(A) at 308 B-G and H C Nicholas "Credibility of Witnesses" 32 1985 SALJ at 36-37 which are particularly apposite in a case like the present where the appellant became emotional even while some of the state witnesses were testifying.)

(iv) I find the magistrate's findings concerning the witnesses

Osmond and Beukes somewhat inconsistent. On the one hand he uses their evidence to discredit the appellant and on the other hand states that their evidence "must be regarded as of no value". Plainly the magistrate cannot have it both ways. Either their evidence is of value or it is not.

(v) It is important to bear in mind that there was a long delay before the charges were tried in court. Most of the incidents occurred 3 years before the trial. Whilst this may afford some excuse for discrepancies it nevertheless requires one to be cautious when evaluating the evidence.

[4] The first count concerns the complainant C.E. who was six years old at the time of the alleged offence and 9 years of age at the time that he gave evidence. His evidence is to the effect that the appellant masturbated him at the latter's house in Strandfontein. He demonstrated this to the witness Andrews and again in court. But Andrews described the action demonstrated to him as a "twisting movement" which is not how it was demonstrated in court. I cannot accept the magistrate's statement that the difference is "purely a semantic difference". It is important to note that the complainant acknowledges that, after he had run away from and had eventually been returned to the home, the appellant had given him a hiding and that he was cross with the appellant. Moreover, the incident

allegedly occurred shortly after Terry had joined the staff of the home as a social worker. It is common cause that the appellant asked Terry to investigate E.'s allegations and that she reported to the appellant and to a full staff meeting that she could find no basis for them. The complainant was referred to a psychologist for further investigation. The psychologist was not called to give evidence as to what he found. It is most extraordinary that suddenly, almost a year later, the same allegations came to the surface. Terry was not able to explain satisfactorily why she then believed the complainant having previously not believed him. Her attempted explanation seems to be highly suspect putting it at its lowest. Weighed against the appellant's denial that anything improper occurred and the improbability that the appellant would (as E. claimed) have switched on the light in the dining room while other boys were in the small house and while allegedly openly masturbating the complainant, there is considerable doubt as to the veracity of the complainant's account.

[5] The magistrate relies heavily upon the evidence of Andrews as corroborating that of the complainant. Andrews was found to be untruthful regarding certain evidence that he gave in cross-examination concerning his qualifications. His untruthfulness in this regard cannot simply be brushed aside upon the basis that it is not directly relevant to the matters in issue. It is plain that Andrews may well have had grounds for bias against the appellant who had reported him for being late,

absent and an inefficient child care worker. All this led to Andrews losing his bonus. Admittedly, the fact that he lied about his qualifications does not necessarily bring about that the rest of his evidence is suspect; but there is an obvious need for caution and there is no indication in the magistrate's reasons that he realized this.

[6] The complainant in count 3 was C.N.N.. The appellant is alleged to have indecently assaulted him by kissing him on one occasion at the appellant's house in Strandfontein "in a ladylike fashion". N. was 17 years of age at the time of the alleged offence and 19 years when he gave evidence. He testified that the kiss was "over affectionate". The appellant's evidence was that he kissed N. in a fatherly and not indecent way. According to N. he first made a report about the kiss to one Wallace. Wallace was not called to give evidence. As there is no indication that he was not available one is entitled to draw an adverse inference against the State. Moreover, there are contradictions in Nel's evidence as to whether or not he went to the appellant's residence after the alleged incident. I find his statement that he could not remember whether or not he had done so to be evasive. This is certainly not another "semantic discrepancy" as the magistrate found. The appellant contends in his heads of argument that the necessary intention to assault was not proved in relation to this count nor was it been proved that the assault was of an indecent nature. There may be some substance in this contention and also in the

contention that even if one accepts Nel's evidence the assault was not of any significance and that the maxim *de minimis non curat lex* applies. In the light of my view of the other unsatisfactory aspects of the appellant's conviction on this count it is not necessary to come to a firm decision.

[7] The complainant in count 4 was V.H. who was 16 years old at the time of the alleged offence. He alleges that one night the appellant crept into the room which he was sharing with one Beukes where he pushed his hand into the complainant's trousers, played with his penis and tried to kiss him on his lips and put his tongue into his mouth. He was unable to say when the incident occurred save to state that it took place on a Saturday or Sunday night in the appellant's cottage at the home. The complainant alleges that he told

P.L.L. (the complainant in count 6) about the incident. Initially L. did not corroborate the complainant in this regard and when it was put to him what H. had said, he changed his evidence and said that he knew that H. had said something to him but could not recall if he had given him the full story. The evidence reveals that the appellant and the complainant had clashed on a number of occasions. The first related to an incident when the complainant had seriously damaged a vehicle belonging to the home which he had taken without consent. The appellant' evidence to the effect that the complainant had been in a police cell because of this for nearly a week and had been punished was not challenged. There were other incidents

relating to the disappearance of money from the home's safe which involved the complainant. There is accordingly at least a reasonable basis for believing that the complainant must have harboured some ill feelings towards the appellant. One cannot safely rely upon his evidence and conclude that he is telling the truth. The appellant denies that he had ever done anything improper to H.. What he did on occasion was to check whether the complainant had wet his bed (which, it is common cause, the complainant often did). I cannot accept the magistrate's finding that it is inherently improbable that an adult would place his hands under the bedding to determine whether the bed was wet without first waking its occupant and that, for this reason, the appellant's evidence fell to be rejected.

[8] The complainant in count 6 was, as previously stated, P.L.L. who was 18 years old at the time of the alleged offence. He testified about two incidents. The first was when the appellant allegedly touched his private parts through his trousers while he was in bed. The other occurred about two weeks later when the appellant allegedly again put his hands into the complainant's trousers and touched his private parts. The appellant denies that he behaved in the manner stated. There is no corroboration of the complainant's evidence. His evidence is unsatisfactory and unreliable in several respects. There is considerable substance in the argument advanced in the appellant's heads of argument to the effect that the complainant has a problem in separating reality from unreality. Indeed the

complainant stated in cross-examination that the first incident might well have been a dream on his part. The appellant's evidence that the complainant was referred to a hospital for psychiatric care was not denied by the complainant nor challenged by the State. Any abuse of the complainant would undoubtedly have come out in the psychiatric evaluation. There is no evidence that it did. It is also unlikely that the appellant would have referred the complainant for such evaluation if he had been guilty of abusing him.

[9] In all of the circumstances I believe that the magistrate was incorrect in convicting the appellant on the four counts in question.

In the result the appeal is allowed and the convictions and sentences in question are set aside.

_____

R H ZULMAN JA

HEFER JA)
MTHIYANE AJA) CONCUR