THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

No precedential significance

Case no: 349/10

In the matter between

A S **Appellant**

and

THE STATE **Respondent**

Neutral citation: A *S v S* (349/10) [2011] ZASCA 52 (30 March 2011)

Coram: Lewis and Bosielo JJA and Petse AJA

Heard: 25 February 2011

Delivered: 30 March 2011

Summary: Conviction of indecent assault based on evidence of single, child witness: evidence reliable and consistent: appeal dismissed.

ORDER

On appeal from: Western Cape High Court (Cape Town) ((Binns-Ward J and Williams AJ acting as a court of appeal)

The appeal is dismissed.

JUDGMENT

LEWIS JA (PETSE AJA concurring)

[1] I have read the judgment of my colleague Bosielo JA. I agree that the appeal must be dismissed but approach the matter somewhat differently.

[2] The appellant, Mr A S, was charged with the indecent assault, on 30 March 2005, of J A who was 16 years old at the time. He was convicted by the regional court at Paarl in November 2007, and sentenced to 12 months' imprisonment, wholly suspended on the usual conditions, and to correctional supervision for a period of 18 months in terms of s 276(1)(h) of the Criminal Procedure Act 51 of 1977. He appealed against his conviction to the Western Cape High Court (Binns-Ward J and Williams AJ, both of whom wrote judgments) which dismissed the appeal. The further appeal is with the leave of the high court.

[3] The regional court found that A S had fondled and sucked J A's penis (thus committing indecent assault) in his office at a Seven Eleven convenience store in Cloetesville run by A S. That court, as well as the high court, dealt with the evidence of J as to what had transpired in great detail. It is not necessary to consider it all again. I shall therefore set out only briefly the facts on which the conviction was based.

[4] The basis of the appeal before us is that the regional court, and the high court (in the first appeal) should not have accepted the evidence of J A, who was not only a child, but also the only witness to the indecent assault (a single witness). In essence, therefore, as a second court of appeal, we are asked to re-evaluate the evidence of both J A and A S, despite full analysis and assessment by both courts a quo.

[5] The trial court accepted J A's evidence that on the day in question he had gone to A S's store to assist his father, who was employed as a security officer by A S. J A, who testified through an intermediary, said that he had not wanted to help his father that day as he felt ill, and was going to tell him that. On arriving, he had chatted to a cashier, B, and had then been beckoned to go into the office by A S. He was familiar with A S, who had often given him small items such as ice creams or chips from the store.

[6] A S asked him to sit down, which he did, and then enquired why J A was at the store. J A responded that he had come to tell his father that he was not feeling

well and did not want to help him. A S then asked what size shoe J A wore, and suggested that men with big feet had big penises. J A did not respond. They were interrupted by an employee who came into the office to discuss a matter with Strauss. The door was not shut. When she left J A decided to leave too as he felt uncomfortable. But A S looked at him in such a way that he felt compelled to remain there.

[7] A S then asked if he could feel J A's penis. J A refused. A S asked if he was shy. J A said no and that he was not scared of him either. A S touched J A's penis through his tracksuit pants and then put his hand inside the pants and started massaging J A's penis. J A did not react: 'ek het net blank geslaan'. He looked out the window, and also played with his cell phone. When told to stand up he did so. A S then sucked J A's penis. When A S was finished he asked if J A had enjoyed what had been done. J A replied that he had not: A Shad not had the right to do this to him.

[8] A S asked what J A wanted, to which he replied 'niks'. A S nonetheless gave him R100, a starter pack for a cell phone and R10 to get it started. He told J A to say nothing about the gift of money or the starter pack to his father and to return the following day.

[9] J A left the office and paid B, the cashier, for the starter pack. He then went to find his father, who was supervising the unpacking of wine. He said to his father that

he wanted to talk to him, but the latter was ‘moody’ so J A said he would talk to him later in the day. He left to go home, crying as he walked.

[10] When he arrived home he realized that he did not have the keys to the house. He thought he might have dropped them on the road and phoned his sister to ask her to look for them. (The keys were later found in A S’s office.) He encountered his sister and a friend on the road and told his sister that he had been raped. She accompanied him to their grandmother’s house where he told his grandmother what had happened. She phoned the police and Mr A.

[11] The sister and P A gave evidence as to their part in what had happened that day. They largely corroborated what J A had said, although there were discrepancies in their versions. As the courts below found none was material. J A was of course not raped, but, as he explained to the trial court, he had not heard of the term ‘indecent assault’ before the incident. He did not know what had happened to him.

[12] J A was cross-examined at great length. When questioned about his reaction to A S’s conduct he stated that he had said ‘los my’ when A S first touched him. This was at variance with his testimony in chief when he had said that he had said nothing to A S. He had been silent because he was shocked. When the contradiction was put to him, however, he admitted that he had lied when cross-examined. He had become weary of answering questions and had said something to stop the questioning. He apologized for misleading the court, but said he had felt nervous and pressured.

[13] A S denied the indecent assault. He admitted that J A had spent time in his office and that he had given him money and a starter pack – but that, he said, was because he often gave children things and he knew J A's family were not well-off.

[14] The version of J A, argued A Son appeal, was inconsistent and inherently improbable. The only inconsistency, however, lies in J A's versions as to his reaction when A S touched his penis. As I have said, there was a plausible explanation for his lie in this regard. The trial court found that, apart from this one inconsistency, he was a truthful, consistent and reliable witness. An examination of the record of the trial bears that out.

[15] As Binns-Ward J said in his judgment in the court below, J A's evidence was unaffected by the cross-examination, despite its length. And J A's version was plainly not fabricated – an inference supported by some of the improbabilities in his account. Foremost of these was that the door to the office was not locked (in fact it was open) and anyone might have entered while the assault took place. J A's surprise at the brazenness of this conduct was patent. Moreover, it could hardly have been in the interests of J A falsely to incriminate his father's employer, who had previously shown kindness to him.

[16] A S countered a detailed and angry account by J A of what had happened with a bland denial of the indecent assault. He relied on the improbability of the assault taking place when the office door was open and any employee could have seen in,

or indeed entered. But that improbability in my view emphasises the truth of J A's account, as the high court found. In any event the evidence showed that it was not easy to see into the office and only two employees – one of whom had come in when J A was in the office – had access.

[17] It is true that J A's evidence had to be assessed with caution. But the trial court was fully aware of this, and as I have said, analysed the evidence of all the witnesses with great care, as did Williams AJ in her judgment in the high court. Both courts found that J A's evidence was consistent and honest, apart from the one blemish which he explained satisfactorily. His conduct after the assault was also consistent with his complaint that he had been indecently assaulted. He immediately reported what had happened to him to members of his family and he handed the money and starter pack given to him by A S to the police.

[18] The trial court correctly applied the approach to the evidence of a single witness enunciated in *S v Sauls* 1981 (3) SA 172 (A) at 180E-H where Diemont JA said:

'There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in *S v Webber* 1971 (3) SA 754 (A) at 758). The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 may be a guide to a right decision but it does not mean

"that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded"

(*Per* Schreiner JA in *R v Nhlapo* (AD 10 November 1952) quoted in *R v Bellingham* 1955 (2) SA 566 (A) at 569). It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.'

[19] In my view, the State proved the acts of indecent assault beyond reasonable doubt. But in the alternative, A S argued that even if the State did prove the indecent assault it had not proved that A S had acted without J A's consent. However, he did not provide any evidential basis for his alternative defence. While the defence of consent may be raised if the State proves the act, and while the State must prove absence of consent, there must at least be some evidence on which it is based. In this matter there was none. See *S v York* 2002 (1) SACR 111 (SCA) para 19 and *S v M* 2006 (1) SACR 135 para 284.

[20] As I have said, the high court gave leave to A S to appeal against its order to this court on the basis that there was a reasonable prospect that we would take a different view. I question the propriety of that approach. Both members of the high court were persuaded beyond reasonable doubt that A S was guilty of indecently assaulting J A. The State case was said to be strong, and the evidence of J A in particular was regarded as credible and reliable. The only criticism by the high court of the trial court was that it had been unduly critical of A S's evidence. And the only basis for allowing a second appeal was that there were some inconsistencies between the evidence of J A, his sister and his father on what had happened after

the assault. These were of a minor nature. They were not material to the conviction. There is nothing that this court can add to the reasoning or the findings of the high court. In the circumstances, leave to pursue a second appeal, based solely on the credibility of witnesses, should not have been granted.

[21] The appeal is dismissed.

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C H Lewis

Judge of Appeal

BOSIELO JA

[22] The resolution of this appeal involves the vexed issue of the proper approach to the evidence of a single and child witness. The appellant was charged and convicted of indecent assault of the complainant in the Regional Court, Paarl. He was sentenced to imprisonment for 12 month wholly suspended on the usual conditions as well as correctional supervision for 12 months in terms of s 276(1)(h) of the Criminal Procedure Act 51 of 1977. Aggrieved by his conviction, the appellant appealed unsuccessfully to the Western Cape High Court (Binns-Ward J and Williams AJ). His appeal having failed, the appellant sought and was granted leave to appeal to this court against his conviction.

[23] The facts of this case have been admirably captured in the judgment of the court below. No useful purpose will be served by rehashing them in great detail. I will confine my judgment to only those salient facts that elucidate this judgment.

[24] The complainant herein is the son of P A, who worked for the appellant at his store called 7 Eleven at Cloetesville. On 30 March 2005, the complainant was present at the appellant's store as he had gone to assist his father who worked as a security officer for the appellant. The complainant testified that, whilst chatting with B, a cashier at the appellant's store, the appellant called him into his office where they both sat on some chairs. According to the complainant whilst seated on a chair in the appellant's office, the appellant, rather unexpectedly started to ask him about the size of his shoes. The appellant remarked that men with big shoes have big penises. This made him uncomfortable. This discussion was interrupted by one P, an employee who entered the office. As she left the office the complainant wanted to leave but the appellant gave him a look which propelled him to stay.

[25] After P left the office, the appellant asked the complainant if he could feel how big his penis was. The complainant told him not to touch him. The appellant then stood up, went to where the complainant was seated and felt his penis through his track-suit trousers. He then proceeded to put his hand into the complainant's trousers and started to massage his penis. The appellant told him to stand up and he obliged. Before he knew what was happening, the appellant took his penis into his mouth and sucked it. According to the appellant, he did not resist or object as his mind went blank and instead he played on his cellular phone whilst peeping through

out the window. He testified that he did this as he was trying to distract the appellant. After this the appellant put his penis back into his trousers and enquired from him if he enjoyed it. The complainant responded by asking how he could enjoy it, as he did not give the appellant permission to do what he did.

[26] It is not in dispute that after the incident the appellant gave the complainant R100, a starter-pack and R10 to use as payment for the starter-pack. According to the complainant he then left and went to pay for the starter-pack. He later went to where his father was working. However, his father appeared to be so moody that he did not want to listen. He then left for home. Soon hereafter he reported this incident to his sister D A (D A) who was so shocked that she did not want to listen further. Instead, she recommended that they go and report the incident to their grandmother, which they did. Upon being told what had happened to the complainant, the grandmother telephoned the police and the complainant's father.

[27] D A confirmed that the complainant complained to her that he had been 'raped' by the appellant. She furthermore confirmed that she was present when the complainant told to their grandmother what the appellant did to him. She also confirmed that her grandmother telephoned the police and their father soon after the complainant had told her what had happened.

[28] The complainant's father, P A (P A) confirmed that on this day the complainant came to see him at his place of employment. He had arranged with the complainant to come and assist him as one of his employees was absent. He was busy

supervising people who were packing bottles of wine, when the complainant arrived. When the complainant tried to tell him that he was sick, he ignored him and continued working. He later received a telephone call that the complainant was sick at home. He then went home. Whilst en route home he met the complainant and his mother-in-law inside a police vehicle. He was then told about the incident. He then accompanied the grandmother and the complainant to the police station where this matter was duly reported.

[29] As against the version stated above, the appellant testified that whilst he was busy on his computer in his office he saw the complainant in the store. He denied that he invited the complainant into his office. The complainant complained to him that he was not feeling well and that his father forced him to come and work. Furthermore, the complainant complained about his clothes and the fact that his father misused his starter-pack. He then gave the complainant a starter-pack, R10 and R100 to go and buy himself a shirt and trousers. The complainant then left the office to go and pay for the starter-pack which he had given him. He denied that he indecently assaulted the complainant as alleged. The appellant testified that he gave the complainant the starter-pack, R10 and R100 as he appeared to him to be neglected (‘verwaarloos’). The appellant stated that in any case it was not the first time that he had shown some generosity to the complainant and his family.

[30] The regional magistrate gave a detailed and comprehensive judgment. It is clear from the judgment that the learned magistrate was aware of the caution that she had to exercise whilst evaluating the evidence of the complainant who was both

a single and child witness regarding what had happened inside the appellant's office. Furthermore, the regional magistrate acknowledged and evaluated the discrepancies and inconsistencies apparent in the complainant's version. She also took into account the discrepancies between the evidence of D and that of the complainant concerning the report. However, the regional magistrate found that whatever inconsistencies or discrepancies existed in the state's version, they were not so material as to adversely affect the witnesses' credibility and the probative value of their evidence.

[31] On the other hand the appellant did not make a favourable impression on the regional magistrate as a witness. The regional magistrate found that the appellant was evasive and failed to answer relevant and pertinent questions. In fact the regional magistrate was of the view that the appellant was arrogant and felt offended when certain questions were put to him. Having read the transcript I can find no fault with this finding.

[32] In this appeal a spirited attack was launched against the favourable findings made by the regional magistrate on the complainant's reliability and credibility. It was submitted that the regional magistrate did not apply the necessary caution to the complainant's evidence which is required in the case of a single and child witness. I disagree. It is clear from the transcript that the regional magistrate was not only aware of the caution to be applied to the complainant's evidence but she in fact applied it. The same is true of the judgment of the court below. In any event, it is

clear that the regional magistrate duly applied the salutary approach enunciated in *S v Sauls & others* 1981 (3) SA 172 (A) at 180E-H where it is stated:

'There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness… The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 may be a guide to a right decision but it does not mean

"that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded."… It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.

The question then is not whether there were flaws in Lennox's evidence – it would be remarkable if there were not in a witness of this kind. The question is what weight, if any, must be given to the many criticisms that were voiced by counsel in argument.'

See also *S v Artman & another* 1968 (3) SA 339 (A) at 341B-D; *S v Webber* 1971 (3) SA 754 (A) at 758G-H.

[33] The appellant's counsel submitted that the regional magistrate should have found the complainant not to be reliable as he was exposed, during cross-examination, to have lied when he testified that as the appellant fondled his penis, he told him to stop or leave him alone. Counsel for the appellant contended that this lie shows that the complainant, aware of the inherent improbability of his version, tried falsely to explain away the improbability inherent in his conduct during the alleged indecent assault. It is noteworthy that the complainant openly and frankly admitted that he had lied to the court. He explained that because the cross-examination was protracted, repetitive and tedious, he had become exhausted and answered without

thinking or reflecting on his replies. He did this as he thought that by providing any answer, he would put a stop to the lengthy and tedious cross-examination. To his credit he openly apologised to the court. Relying on *S v Oosthuizen* 1982 (3) SA 571 (T), the regional magistrate found that the mere fact that the complainant was shown to have lied on one aspect of the case does not necessarily justify his entire evidence being rejected as false and unreliable. Having read all the evidence, I can find no fault with this finding.

[34] The appellant's counsel submitted further that the complainant's behaviour during and after the alleged sexual molestation was so bizarre as to render it inherently improbable. It was contended that it is improbable that the complainant could have remained still and offering no resistance whilst the appellant put his hand into his pants and massaged his penis and even proceeding to suck it. He contended further that the fact that the complainant went to chat with B (the cashier) soon after this incident rather than going directly to report to his father, is incongruous and detracts from the plausibility of his version.

[35] It is true that the complainant's evidence is not without some blemishes. It is also true that on the critical issue of the indecent assault, the complainant is a single and a child witness. Both the regional magistrate and the court below were aware of this. They pertinently dealt with whatever discrepancies or inconsistencies existed in the complainant's version. Concerning the admission by the complainant about his lie, the regional magistrate found that the explanation given by the complainant was reasonable under the circumstances.

[36] It is clear from the transcript that the complainant was exposed to a protracted, tedious and repetitive cross-examination which literally wore him down. At some stage, the complainant appeared to be so tired that the regional magistrate offered him a break to recover. Crucially the court below found that the protracted and tedious cross-examination left the complainant's evidence unaffected.

[37] I do not find the complainant's behaviour bizarre or improbable. The complainant explained that he was shell-shocked. His mind went blank. Crucially, one should not ignore the fact that the complainant was only 16 years old at the time. Such a thing had never happened to him. He had no previous sexual experience. Again proper consideration should be accorded to the relationship between the complainant and the appellant. Not only was the appellant older than him, but he was also his father's employer. He trusted him. Undoubtedly, the appellant was in a position of authority over the complainant. This incident happened in the appellant's store and in his office. It is not surprising that the complainant froze with fright when he was unexpectedly exposed to such a grossly indecent assault.

[38] Counsel for the appellant submitted that as the complainant and D contradicted each other on the exact words used by the complainant when reporting to D and later to their grandmother, their evidence should have been rejected as untruthful and unreliable. I do not agree. It is common cause that the trial in this matter took place after a very long time. The incident occurred on 30 March 2005. The trial started 16 months later on 15 August 2006. Furthermore, at the time when

the appellant reported this incident to his sister D and later to his grandmother, he was still shocked and confused. Both D and the grandmother were equally shocked. It is therefore understandable why there are some discrepancies on this aspect. In any event, I am of the view that these discrepancies are not so material as to be destructive of their evidence. These are the sort of discrepancies that one can expect from witnesses who testify from memory after a long time. I am of the view that these are the sort of discrepancies to be expected from 'honest but imperfect recollection, observation and reconstruction'. Instead of sustaining a finding that the complainant and D deliberately lied, the difference in their evidence is, to my mind, indicative of the fact that they did not rehearse their story so that they could present the same version. See *S v Mkohle* 1990 (1) SACR 95 (A) at 98g-h.

[39] What remains undisputed is that the complainant reported, soon after he left the appellant's shop, to both D and their grandmother that he had been 'raped' by the appellant. D confirmed this. The complainant explained that he used the word 'rape' as the concept 'indecent assault' was not known to him at the time. I find this explanation by a 16 year old boy to be reasonable. It is also common cause that the matter was reported to the police immediately. It appears to me that the complainant's behaviour of reporting to D and their grandmother soon after the incident is consistent with his version that he was indecently assaulted by the appellant much against his will. After all why would he lay a serious and false charge against the proverbial good Samaritan who had been kind to him and who, on that day, generously gave him R100, a starter pack and R10 to pay for it. It is noteworthy that the complainant handed the starter-pack and R100 which he had received from

the appellant to the police on the same day. To my mind, the complainant's immediate reporting of the incident puts paid to any suggestions that he consented to what the appellant did to him. Having read the transcript I find myself unable to disturb the credibility findings made by the regional magistrate. See *R v Dhlumayo & another* 1948 (2) SA 677 (A).

[40] Although the appellant bore no onus to prove his defence or even convince the court of the truthfulness of his version, the version he proffered is so fanciful and grossly improbable that it cannot be reasonably possibly true. On the contrary the complainant's version is so clear and consistent with absence of consent that the appellant's version cannot be reasonably possibly true.

[41] In the result the following order is made:

The appeal is dismissed.

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L O Bosielo

Judge of Appeal

APPEARANCES:

For Appellant:	F van Zyl SC
	Instructed by
	Theron & Partners, Stellenbosch;
	Matsepes Incorporated, Bloemfontein;
For Respondent:	M Allie
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