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

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 769/2013

Not reportable

In the matter between:

A[…] A[…] D[…] S[…] Appellant

and

THE STATE Respondent

Neutral citation: *D[…] S[…] v The State* (769/13) [2014] ZASCA 142 (26 September 2014)

Coram: Mpati P, Bosielo and Willis JJA

Heard: **12 September 2014**

Delivered: **26 September 2014**

Summary: **Indecent assault – the evidence of forensic social worker assisting the court in finding that an indecent assault had occurred – appeal upheld in respect of first count – appeal dismissed in respect of second count.**

ORDER

On appeal from: The Free State High Court, Bloemfontein (Lekale J and Thamage AJ sitting as the court of appeal):

1 The appeal is upheld in respect of the first count of indecent assault;

2 The conviction and sentence on the first count are set aside;

3 The appeal is dismissed in respect of the second count of indecent assault.

JUDGMENT

Willis JA (Mpati P and Bosielo JA concurring):

[1] This appeal is concerned only with the correctness of the convictions of the appellant on two counts of indecent assault. The appellant was arraigned in the regional court, Welkom on two counts of indecent assault and a count of rape. Section 3 of the Sexual Offences Act 32 of 2007 (the Sexual Offences Act) was applicable to the count of rape. He was convicted as charged and sentenced to five years' imprisonment on the first count of indecent assault and ten on the second. In respect of the rape conviction, the appellant was sentenced to 15 years' imprisonment. The magistrate ordered these sentences to run concurrently. The effective sentence was therefore 15 years' imprisonment. It was also ordered that his name be included in the Register for Sexual Offences in terms of s 50(2)*(a)* of the Sexual Offences Act and that he de declared unfit to possess a firearm in terms of the Firearms Control Act 60 of 2000.

[2] Both the appellant's application to the magistrate for leave to appeal and his subsequent petition to the Free State High Court were dismissed. He then appealed against the dismissal of the petition. The high court then, somewhat anomalously, on hearing the petition granted leave to appeal to this court. This court then found that what was properly before it was not an appeal in respect of the convictions and sentences but an appeal against the dismissal of the petition. It upheld the appeal against the dismissal of the petition and granted leave to appeal against his convictions and sentences, directing the appeal to the Free State High Court.

[3] The high court (Lekale J, with whom Thamage AJ concurred) upheld the appeal against conviction and sentence in respect of the count of rape but confirmed the convictions on the two counts of indecent assault. The high court confirmed the sentence of five years for the first count but reduced the sentence on the second count to seven years' imprisonment, directing that the sentence on the first count should run concurrently with the sentence on the second count. On appeal, the high court therefore reduced the sentence to an effective term of seven years' imprisonment. The high court granted leave to appeal to this court against conviction only.

[4] The first count relates to incidents in 2005 and/or 2006 at the home of the complainant's paternal grandmother in Loop Street in Welkom, during which, on several occasions, the appellant allegedly summoned the complainant to kiss his lower naked stomach and also exposed his penis to her.

[5] The second count relates to incidents which allegedly occurred between September and December 2007 at the appellant's then home in Romeo Street in Welkom during which he allegedly inserted his penis into the complainant's mouth and, from time to time, ejaculated therein.

[6] The complainant had been very close to her aunt, the wife of the appellant and had loved her cousins, the children of the appellant. The trigger which led to the disclosure of the incidents by the complainant to her mother seems to have arisen from the gift of an item of jewellery which had been given to her by her aunt. This gesture led the complainant to believe that her aunt had learned of the incidents and was trying to 'buy' her silence.

[7] The appellant denied having committed the offence. He said that: he had 'no idea' why the complainant would falsely have implicated him. He had no previous convictions. The appellant is the uncle, by marriage, of the complainant.

[8] The conundrum which has exercised the mind of every court that has considered the matter is that the case against the appellant is critically dependent on the evidence of the complainant who was a single witness, 12 years old when she testified and six years old when the alleged acts of indecent assault occurred.

[9] A careful analysis of the evidence is that it is safe to conclude that in Loop Street he may merely have had the complainant kiss the lower part of his naked stomach and did not, in fact, deliberately expose his penis to her. Distasteful though this incident may have been, it does not constitute indecent

assault. The high court was therefore wrong to have confirmed the conviction on the first count.

[10] Insofar as the second count is concerned, the complainant described how the appellant put his penis into her mouth and how thick liquid came out of his penis into her mouth, which she spat out She described how she did not see the liquid but could taste it. This evidence as to the taste and texture of ejaculate was, with exquisite delicateness, described by Lekale J as 'sensory information'. When the appellant's counsel was asked how, if the complainant had not experienced the sensation of ejaculate in her mouth, she could describe it in this way, it was submitted that she could have seen pornographic films. Seeing does not extend to the vivid descriptions of ejaculate used by the complainant.

[11] There is a discrepancy in the complainant's evidence inasmuch as she said twice that the appellant, while he had his penis in her mouth, shook her head 'back and forwards'. Later she changed this to 'left and right'.

[12] The State called a forensic social worker, employed by the South African Police Service, Charmaine De Waal. She is vastly well qualified and experienced in the field of child sexual abuse. She undertook extensive consultations and evaluations with the complainant. She had about seven sessions with the complainant, each lasting for approximately one and a half hours.

[13] It is intrinsic to the nature of the forensic social worker's task that not only would she hold consultations with the complainant but also that the complainant would make reports to her. These reports are clearly hearsay. The evaluation of the allegations, however, went way beyond the relaying of reports. The social worker conducted extensive scientifically respectable tests with regard to the complainant's version of events. It was described by Lekale J as a 'multi-dimensional framework'. The social worker's conclusion was unequivocal: the complainant had experienced sexual abuse of the kind described. Lekale J dealt with her evidence well. By considering the evidence

of the forensic social worker, the court was assisted in making a correct finding that an indecent assault had, indeed, occurred.

[14] If regard is had to the totality of the evidence, in which the following are the key factors:

(a) the appellant was an unconvincing witness;

(b) despite discrepancies in her evidence, the complainant came across well;

(c) the evaluation by the forensic social worker;

(d) the sensory information relating to ejaculate given by the complainant,

it is clear, beyond reasonable doubt, that the appellant is guilty on the second count. Although he enjoys the benefit of the doubt in respect of count one, it has no practical effect on sentence as the sentence on count one was ordered to run concurrently with the sentence on count two.

[15] The following is the order of the court:

1 The appeal is upheld in respect of the first count of indecent assault;

2 The conviction and sentence on the first count are set aside;

3 The appeal is dismissed in respect of the second count of indecent assault.

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N P WILLIS

JUDGE OF APPEAL

APPEARANCES:

For the Appellant:	J Nel Instructed by: R Oosthuizen Muller & Partners, Welkom c/o E G Cooper Majiedt Inc, Bloemfontein
For the Respondent:	W J Harrington