

**FREE STATE HIGH COURT, BLOEMFONTEIN**  
**REPUBLIC OF SOUTH AFRICA**

Appeal No.: A231/2012

In the appeal between:

**ALBERTO A DE SOUSA**

Appellant

and

**THE STATE**

Respondent

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**CORAM:**

LEKALE, J *et* THAMAGE, AJ

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**JUDGMENT:**

LEKALE, J

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**HEARD ON:**

22 OCTOBER 2012

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**DELIVERED ON:**

13 DECEMBER 2012

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[1] On the 11<sup>th</sup> June 2010 the appellant was convicted by the regional court sitting at Welkom on 2 counts of indecent assault and 1 count of rape as defined by the Criminal Law (Sexual Offences and Related Matters), Amendment Act 32 of 2007 (“the Sexual Offences Act”). He was, thereafter, sentenced to 5 years, 10 years and 15 years respectively on the counts in question on the 27<sup>th</sup> September 2010. It was directed that the sentences should run concurrently with the result that the

appellant currently serves an effective term of imprisonment of 15 years.

[2] The appellant feels aggrieved by the convictions and sentences and now approaches this court on appeal against the same following the decision of the Supreme Court of Appeal effectively granting him leave to appeal to this court. On convicting the appellant the trial court accepted the evidence tendered in support of the charges and rejected the appellant's version as not reasonably possibly true. The court below generally found that the complainant, who was 12 years of age when she testified, could not have had the imaginative capacity to describe ejaculation or the spitting out of semen because of her tender age at the time of the sexual abuse.

[4] The trial court further accepted the opinion of the forensic social worker to the effect that the complainant could not reasonably possibly have fabricated the incidents of sexual abuse in question.

[5] In respect of the rape charge the parties are *ad idem* that there

is no *prima facie* evidence that the incidents relied upon in support of the same occurred after the coming into operation of the Sexual Offences Act on the 16<sup>th</sup> December 2007. We are in respectful agreement with the parties in this regard in so far as the complainant was not sure of the dates and, in particular, testified that she was not certain if any such incidents of sexual abuse happened in 2008. She, however, testified that such incidents happened in 2009 when she was in Grade 5 at school which is not likely because she had already reported the incidents to her mother and the police on the 13<sup>th</sup> December 2008. Her evidence in the main was effectively that the last incidents occurred before the verbal altercation and stand-off her parents had with the appellant's household which, according to her mother, lasted for about 9 months. After the stand-off in question she resumed her visits to the appellant's house and nothing in the nature of sexual abuse occurred then.

- [6] When sentencing the appellant the trial magistrate found that there was a certain amount of planning that took place on the part of the appellant as well as the grooming of the child concerned. The trial court, further, found that the seriousness

of the offences aggravated as time went by and held that the gravity of the offences justified imprisonment.

[7] Both in the heads of argument and submissions before us Mr Nel, for the appellant, points out contradictions in the complainant's evidence as well as between her evidence and that of her mother and the forensic social worker. He, further, concludes that the trial court did not approach the relevant evidence with caution and that such evidence was not satisfactory in material respects.

[8] On behalf of the state, as the respondent, Mr Harrington supports the convictions on indecent assault charges but concedes that 15 years imprisonment is not appropriate and proposes 8 years as being more appropriate.

[9] Mr Harrington contends that the court *a quo* was steeped in the atmosphere of the trial and applied cautionary rules correctly. He submits that contradictions *per se* should not result in the rejection of the relevant evidence and that the weight to be attached to such contradictions depends on the nature, number

and importance of the same as well as their impact on the other parts of the witness' evidence.

[10] The contradictions relied upon by the appellant in his contentions should, in our view, be seen in the light of the totality of the evidence regard being had to the child complainant's evidence to the effect that the acts complained about took place over a period of time and at two different places with each class of activities taking place more than once. The indecent assault in charge number 1 took place at her paternal grandmother's house on a number of occasions with the appellant at times exposing his private parts and inviting her to kiss his stomach. The second class of incidents took place at the appellant's house in the TV room on the couch and sometimes in the bedroom on the bed when the appellant would, sometimes, put his private part in her mouth. On certain occasions the appellant would ejaculate in the process. The appellant and his wife used to buy her clothes and, further, used to give her presents.

[11] The evidence of the forensic social worker should, in our view,

also be seen in its proper context in that it was not tendered as the evidence of a report witness. Its relevance and value lie in the multi-dimensional forensic framework employed to test the veracity of the child's claims of sexual abuse. The forensic social worker testified as an expert and expressed an opinion to the effect that it was highly unlikely that the child was fabricating the story about sexual abuse because she, *inter alia*, gave reliable sensory information without being aware thereof and without making a conscious effort to relay the same.

[12] Any discrepancies between the evidence of the child and that of her mother, in our view, deserve to be looked at in the light of the fact that the mother's testimony was to the effect that the child did not tell her everything at once. The complainant told her about additional incidents in between the sessions the former had with the forensic social worker. The appellant's defence, on the other hand, was effectively a bare denial.

[13] As correctly submitted for the respondent, the trial court's acceptance and evaluation of oral evidence can only be interfered with in exceptional circumstances and only if the

court of appeal is convinced, on adequate grounds, that the trial court was wrong in accepting the same (see S v FRANCIS 1991 (1) SACR 198 (A) at 204C and S v ROBINSON AND OTHERS 1968 (1) SA 666 (A) at 675G-H).

[14] We are not convinced that the trial court erred in her appraisal and acceptance of the child's evidence. We are, in fact, persuaded that she applied the applicable cautionary rules properly. We can, as such, not fault the convictions on the indecent assault charges and are of the view that the trial court was correct in rejecting the appellant's defence.

[15] Initially the parties were apparently under the impression that the setting aside of the conviction in respect of the rape charge meant, as a matter of course, that same fell to be replaced with a conviction on indecent assault. The court, however, held a different *prima facie* view in the light of the fact that the appellant was not at risk of being convicted of indecent assault when the matter was heard and the competent verdicts on the rape charge do not include indecent assault and could only be applicable if the acts complained about were committed on or

after the 16<sup>th</sup> December 2007. The parties, therefore, requested and were afforded an opportunity to consider the issue and, eventually, submitted additional arguments on the same not later than the 16<sup>th</sup> November 2012 as agreed.

[16] The parties hold different views on the issue with Mr Harrington maintaining that it would be competent and fair for the court to convict the appellant of indecent assault in respect of charge 3 because the court of appeal is entitled to amend the charge and to issue orders that the trial court ought to have made in terms of the provisions of section 86 read with sections 309(3) and 304(2)(c) and (iv) of the Criminal Procedure Act, no 51 of 1977 (the “CPA”). Mr Harrington, further, points out that all the essential elements of indecent assault are included in the said charge as it stood at the trial.

[17] Mr Nel, on the other hand, contends that to convict the appellant of indecent assault would amount to a substitution as opposed to an amendment of the relevant charge and the court does not have the power to substitute one charge for another under the guise of an amendment. In his view the state has to

live with the consequences of its decision when it preferred a charge of rape as opposed to indecent assault during the trial.

[18] It is correct, as the parties submit, that the court is competent on appeal to amend the charge sheet in terms of section 86(1), read with the provisions of section 309(3) of the CPA (see **S v KRUGER EN ANDERE** 1989 (1) SA 785 (A) at 795B).

[19] In an application for an amendment of the charge sheet the question is whether the proposed amendment is indeed an amendment as opposed to a substitution and, if the answer is in the affirmative, the next enquiry is whether or not there is no prejudice to the appellant (see **S v BARKETT'S TRANSPORT (EDMS) BEPERK EN ANDERE** 1988 (1) SA 157 (A)).

[20] As correctly submitted by Mr Nel an amendment of the charge sheet should be preceded, as a matter of fairness, by notice to the accused advising him of such an intention on the part of the court and affording him an opportunity to make an input on whether or not such a move would prejudice him in his defence (See **S v GELDERBLOEM AND ANOTHER** 1962 (3) SA 631

(C)).

[21] The issue in this regard is whether a conviction for indecent assault as apposed to rape would amount to a substitution as opposed to an amendment. The test for distinguishing between an amendment and a substitution is whether or not the proposed amended charge differs from the existing one to such an extent that it amounts to another charge (see **S v BARKETT'S TRANSPORT (EDMS) BEPERK EN ANDERE** *supra* and **S v MOTHA** 2012 (1) SACR 451 (KZP) at 455g - h).

[22] It is true, as submitted for the state, that charge number 3 as it presently stands contains all the elements of indecent assault.

[23] It is, further, correct as effectively contended by Mr Nel that indecent assault is a common law crime which existed until the 16<sup>th</sup> December 2007 as a distinct and substantive offence separate from the common law rape although it was a competent verdict on the charge of rape in terms of the CPA as it stood before that date.

- [24] An amendment entails the retention, to a great extent, of what is altered in the sense that the charge, as amended, can still be identified with the charge in its original form as the Appellate Division found in **S v KRUGER EN ANDERE** *supra* at 796I.

“Die begrip “wysiging” veronderstel ‘n mate van behoud van dit wat gewysig word. Indien ‘n voorgestelde ‘gewysigde’ aanklag glad nie meer met die oorspronklike aanklag identifiseerbaar is nie, is daar dus nie sprake van ‘n wysiging nie, maar wel van ‘n vervanging.’”

- [25] Where the proposed amended charge is in no way identifiable with the original charge there is no amendment but a substitution even if the new offence is of the same nature as the offence described in the original charge (see **S v KRUGER EN ANDERE** *supra* at 796C – J and **S v VAN WYK EN ANDERE** 1994 (1) SACR 183 (NC).

- [26] The issue, in my view, relates to the substance or essence of the charge before and after the proposed amendment has been put forward. If the alteration changes the charge so substantially that it constitutes a new charge then the process is

a substitution.

[27] The instant matter is distinguishable, in my view, from **S v MOTHA** *supra* where the court allowed, as an amendment, the insertion of words in the heading of the charge sheet relating to rape in order to read that the charge was “rape in terms of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, no 32 of 2007”. The essence of the charge remained the same in that it was still rape committed on the date and in the circumstances referred to in the charge sheet in its unamended form.

[28] In order to appreciate the differences between the two substantive crimes implicated in the present matter one may, in my judgment, look at the legal position prevailing before the 16<sup>th</sup> December 2007. The criminal conduct attributed to the appellant did not constitute rape and could only sustain a charge of indecent assault prior to that date. On that date such conduct got defined as rape by section 3 of the Sexual Offences Act and indecent assault, as a crime, was abolished.

- [29] For the court to be able to bring out a conviction on indecent assault under charge number 3 not only must the dates be changed from 2008 to dates prior to the 16<sup>th</sup> December 2007 but the nature of the crime should also be changed from rape to indecent assault.
- [30] In a case where the alleged conduct of an accused person constitutes more than one criminal offence the practice, which is legally permissible, sound and acceptable, is to charge him specifically in respect of each such crimes where appropriate or to frame the charges in the alternative to one another. (See section 83 of CPA.)
- [31] In my judgment the present matter is comparable to the facts in **S v BARKETT'S TRANSPORT** *supra*. In that matter the appellant had transported goods which his permit did not authorise him to convey. The applicable law proscribed two conducts viz the transportation of goods otherwise than with a permit and the conveyance of goods contrary to the provisions of the permit held by the accused. The appellant was convicted of transportation without a permit and, on appeal, the state

sought to amend the charge sheet in order to secure a conviction on the crime of transporting contrary to the provisions of existing permit. This attempt was resisted successfully on the basis that it amounted to a substitution of one charge for another.

[32] In my view, the trial court could not have returned the verdict of guilty on indecent assault because it was not a charge preferred against the appellant. The trial court could, further, not have amended the charge sheet by adding indecent assault as an alternative charge because that would not have been legally permissible in terms of the provisions of section 86 of the CPA. The court *a quo* would only have returned a competent verdict of guilty on indecent assault if the charge was common law rape. See generally **S v TUNGATA AND ANOTHER** 2004 (1) SACR 558 (Transkei) at 564H – J.

[33] There was no application for amendment of the charge sheet and we cannot *mero motu* amend the charge in order to return a verdict of guilty on indecent assault in the circumstances of the instant matter for that would amount to substitution as

opposed to amendment.

[34] The Court of Appeal may only interfere with the sentence imposed if the same is disturbingly inappropriate or the trial court did not exercise its sentencing discretion reasonably or properly. See **S v PIETERS** 1987 (3) at 717 (A) and **S v MALGAS** 2001 (1) SACR 469 (SCA).

[35] We can find no fault with the five years imprisonment imposed in respect of charge number 1 insofar as, in our view, the trial court struck a healthy balance between the appellant's personal circumstances, the nature of the offence and the interests of the society. In this regard it is clear that the appellant abused the trust reposed in him as the child's godfather and paternal uncle who stood *in loco parentis vis-à-vis* the girl at the time of the crime.

[36] We are, further, of the view that the court *a quo* correctly found that the sexual abuse involved increased in frequency and aggravated with the passing time with the girl being groomed by, *inter alia*, showering her with gifts which also appreciated in

value as and when the time went by. In our judgment the abuse would have, most probably, culminated in rape in the common law sense as the child gradually got accustomed to it and the number and value of gifts increased.

[37] We are satisfied that the 10 years imprisonment sentence imposed in respect of charge number 2 is disturbingly inappropriate and calls for an adjustment from this court in the light of, *inter alia*, the appellant's personal circumstances as a first offender, a family man with two minor children and his status in the community as a generally respectable figure as well as the fact that the complainant in this matter did not sustain any physical injuries. Ten years imprisonment is a prescribed minimum sentence for indecent assault in a case where the victim was under 16 years of age and sustained some bodily harm in the process (See Part III of Schedule 2 to Criminal Law Amendment Act, 105 of 1997 as it stood before the 16<sup>th</sup> December 2007).

[38] In our view the very fact that the appellant has been found guilty of indecent assault of his goddaughter is *per se* a

punishment insofar as it degrades him in the eyes of his peers. As Mr Nel correctly points out in argument, the inclusion of his name in the register of sexual offenders also serves as a punishment to a man of the appellant's social standing and effectively fulfils the objective of naming and shaming him.

### **ORDER**

[39] When all is said and done we are convinced that the following is an appropriate order:

39.1 The appeal succeeds in part in that the conviction and sentence in respect of charge number 3 are set aside;

39.2 The conviction and sentence in respect of charge number 1 are confirmed;

39.3 The conviction in respect of charge number 2 is confirmed but the sentence in respect of the same is set aside and in its place and stead is replaced the following:

**“Charge number 2: The accused is sentenced to 7 years imprisonment.**

**The sentence in charge number 1 shall run concurrently with the sentence herein with the result**

**that the accused shall serve an effective 7 years imprisonment.”**

39.4 The sentence is antedated to take effect from the 27 September 2010.

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**L. J. LEKALE, J**

I concur.

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**S. J. THAMAGE, AJ**

On behalf of the appellant: Adv. Nel  
Instructed by:  
E G Cooper Majiedt Inc  
BLOEMFONTEIN

On behalf of the respondent: Adv. W. J. Harrington  
Instructed by:  
Director of Public Prosecutions  
BLOEMFONTEIN

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