



REPUBLIC OF SOUTH AFRICA

Bib 7/98

CASE NO 634/96

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JOSIA PETRUS BEETS

APPELLANT

and

THE STATE

RESPONDENT

CORAM : ***NIENABER, SCOTT et PLEWMAN JJA***

HEARD : ***3 MARCH 1998***

DELIVERED : ***12 MARCH 1998***

JUDGMENT

SCOTT JA/...

SCOTT JA:

The appellant, a 61 year-old father of 5 children, was charged in the Regional Court with two counts of indecent assault and one of rape. He was convicted on one of the counts of indecent assault and sentenced to correctional supervision for a period of 30 months. A period of direct imprisonment was also imposed but this was conditionally suspended for 4 years. The appellant was acquitted on the remaining counts. His appeal against the conviction to the Natal Provincial Division (McLaren J and Wilson J) was unsuccessful. The present appeal is with the leave of that court.

The charges against the appellant arose out of two separate incidents which allegedly occurred one night in 1986 at the complainant's home. She was then 8 years of age. I shall refer to her as 'D'. Her parents were old friends of the appellant. He was then 53 years of age. At the time he was experiencing marital

problems and for this reason was spending the occasional night with D's parents.

A feature of the case was that charges were laid only in 1993 and by the time the trial commenced in 1994 a period of approximately 8 years had elapsed since the commission of the alleged offences. The reason for the delay will become apparent.

D's father (to whom I shall refer as 'Mr P') testified that shortly after 8 pm on the evening in question in 1986 he walked from the kitchen of his house to the garage outside where he had been working on his car. As he walked past his bedroom window he looked in and observed the appellant lying on the bed with D under a blanket. He said D was on her back with the appellant moving his hand between her legs, as he put it, 'masturbating her'. Although the appellant's hand was under the blanket it was clear from the movement what he was doing. Mr P testified that he proceeded to the garage in a state of disbelief and then went

back to have another look. The appellant was still at it. He then turned to the garage and slammed the door shut, as he explained, to let the appellant know that he, Mr P, would be passing by the window. When he got back to the window the appellant was standing up adjusting the front of his trousers. Mr P went into the lounge and called D and told her not to go back into the bedroom. Mr P did nothing further that night in response to what he had seen. He simply had a bath and went to bed.

The next morning he told his wife what had happened. She testified that when D came home from school that afternoon she sat her down, shut the door and asked her if there was something she would like to tell her mother about 'uncle G' (the appellant). D's response was to cry and when asked what had happened, said: 'he touched me between my legs' and 'he hurt me'. Later that day when the appellant returned, Mrs P confronted him with having molested D. She

threatened to take him to court and ordered him to leave. It is common cause that the appellant offered no explanation but simply climbed into his motor car and left.

The next day the appellant sent a note. It is somewhat disjointed and refers to events which are not in point. It does, however, contain a reference to D and court proceedings. Again, he offered no explanation for his alleged conduct but instead threatened suicide should a summons be served on him. The note concludes with a request that Mr and Mrs P forgive him. The P's reported the matter to the police but decided not to lay a charge against the appellant. Mrs P explained that she and her husband were reluctant to 'drag [D] through the courts'; they simply wanted to put the incident behind them and get on with their lives. They were also influenced by the appellant's threat of suicide.

The matter, however, did not end there. As D grew older she exhibited signs of psychological instability. In 1992 when she was in standard 6 she consulted the school psychologist. Subsequently she began suffering from what she herself described in evidence as 'anxiety attacks' and consulted other psychologists and a psychiatrist. She also began writing down some of her experiences, thoughts and concerns. In October 1993 she gave her mother something she had written headed '[D's] Story'. In it she gave an account of what the appellant had done to her in her parent's bedroom in 1986 and then went on to describe how later the same night the appellant had come into her own bedroom, raped her and forced his penis into her mouth. Mrs P sought the assistance of an organisation called Childline and on 27 November 1993 D made a full statement to the police. Criminal charges were preferred against the appellant who ultimately faced the 3 counts referred to above. The first, being one

of indecent assault, related to the incident observed by Mr P. The second and third , being respectively counts of rape and indecent assault, related to the events which had allegedly occurred later the same night. D's parents considered that her psychological problems were attributed to the appellant's conduct and they accordingly instituted civil proceedings against him for damages.

D was a poor witness. Her evidence was contradictory and in material aspects differed from her earlier statements. In fairness to her she was of course required to give evidence regarding events which occurred some 8 years previously and when she was only 8 years of age. The fact that she had experienced psychological problems in the interim may also have made her task as a witness more difficult. Nonetheless, the Regional Magistrate came to the conclusion that little weight could be attached to her evidence and in view of the appellant's denial of the charges he was entitled to an acquittal on counts 2 and 3.

As far as count 1 is concerned (which is the only count relevant to this appeal), D's evidence was to the effect that the appellant fondled her 'private area' and 'stuck his finger up me'. Her evidence in this regard was largely corroborated by that of Mr P. However, D went further and said that when her father called her, the appellant put his head under the blanket and actually licked her 'private area'. This evidence was, of course, inconsistent with Mr P's version. He testified that by the time he called D the appellant had already got up from the bed. In view of the discrepancy the magistrate disregarded this aspect of D's evidence when convicting the appellant on count 1. In these circumstances the criticisms levelled at D as a witness are of little relevance. The magistrate was fully aware of those criticisms and ultimately accepted her evidence only to the extent that it was corroborated by that of Mr P.

The appellant testified that on the evening in question he did indeed

lie on the bed in the main bedroom of the house together with D under a blanket but said that nothing untoward took place and that they were merely watching television together. Both in this Court and in the court below it was contended that in all the circumstances this version of what happened was at the least reasonably possibly true. In support of this contention counsel for the appellant argued that the opportunity which Mr P had to make a reliable observation of what was happening in the bedroom was limited; that Mr P could have misinterpreted the situation and that if he is to be believed, it would be inexplicable that he should not have taken immediate steps to confront the appellant.

As I have said, the appellant was an old family friend. It was common cause that it was not unusual for him to play games with D and for her to sit on his lap and generally to display towards him the affection a child of her age ordinarily displays towards its own father. In these circumstances, had the

two of them been innocently lying on the bed watching television together, it is unlikely that Mr P would have given the matter another thought. According to Mr P, what he saw so shocked him that he went back for a second look. He could hardly believe his eyes the first time. To suggest in such circumstances that he might not have looked properly or that he might have misconstrued what he saw is in my view untenable. It was because the appellant and D were not innocently watching television together that Mr P was so upset. It is no doubt true, as observed by the magistrate, that many if not most parents in such a situation would have acted differently. But the evidence suggests that Mr P is a mild mannered person of a non-confrontational nature. This also accords with the magistrate's assessment of his demeanour. The criticism is in any event, in my view, misplaced. Regardless of what anyone else might have done in a similar situation, it is not in dispute that Mr P called D away from the bedroom, that he told his wife

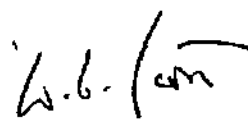
the next morning what had happened and that he caused the appellant, a trusted friend of long standing, to be confronted with having molested D and to be sent away.

Mr P's evidence must, furthermore, not be viewed in isolation. As a consequence of what he observed D was questioned by her mother about what had happened. The immediate response of the 8 year-old was to cry and to say that the appellant had touched her between her legs and hurt her. When Mrs P confronted the appellant with what her husband had seen he offered no explanation. He simply left. If there was an innocent explanation, or if the allegation was simply untrue, one would have expected the appellant to offer it or deny the charge, if not immediately, then shortly afterwards. Instead, he sent a note to Mr and Mrs P in which he threatened suicide if a summons were served on him and requested forgiveness. The appellant's explanation that he requested

forgiveness merely on the assumption that even on his own version he had done something wrong, was to my mind wholly unpersuasive.

It follows that in my view the appellant was correctly convicted on count one, viz indecent assault.

The appeal is dismissed.


D.G. SCOTT

NIENABER JA

- Concur

PLEWMAN JA