IN THE HIGH COURT OF NAMIBIA

CASE NO: CA 110/2000

In the matter between:

JOHAN SMIT **APPELLANT**

and

THE STATE **RESPONDENT**

Coram:	Mtambanengwe, J *et* Shivute, J
Heard On:	29 April 2002
Delivered On:	**16 May 2012**

APPEAL JUDGMENT

SHIVUTE, J:

[1] This is an appeal against conviction and sentence. The appellant was convicted on 5 counts of indecent assault in the Windhoek Magistrate's Court and

sentenced to a fine of N$10 000, 00 or two (2) years imprisonment, plus an additional 1 year imprisonment wholly suspended for 5 years on the usual conditions. The appellant pleaded not guilty to the charges and as he was entitled to do, disclosed no basis of his defence.

[2] The facts of the case may be summarised as follows:

> The complainant was a 16 year old girl who lived with her family in the appellant's mother's house. The complainant's family lived under very difficult social conditions. They had no home of their own and were evicted from the house they had previously occupied owing to arrear rentals. The appellant's mother who was living alone, allowed the family to rent a room in her house. The appellant was married to one LS. The marriage between the parties was at the time disintegrating and when the wife moved out of their common home, the appellant started visiting his mother to dine or collect his laundry. The evidence also reveals that the complainant's mother was addicted to drugs and barely gave attention to the complainant and her brother. The complainant's father did not have time for the family either. The appellant became a father figure to the complainant and her brother and would assist with their homework and school projects as well as with their basic needs. This relationship had developed to a point where the complainant and her brother as well as the appellant's son would visit the appellant at his residence from time to time. It is at this residence that the complainant testified that she was indecently

assaulted. The complainant testified that on the first occasion in July 1997, she and her father went to a birdcage to attend to a bird and that the appellant followed them and placed his arm around her back. On the second occasion, while doing her school project, she needed a map and the appellant informed her that he had one at his house. The appellant volunteered to drive the complainant to his house to collect the map. On their way there, while driving, the appellant touched the complainant on her upper leg. When they arrived at the house, the appellant touched her again on her leg. While in the house, the appellant closed and/or locked the door, pressed the complainant against the door, unzipped her trousers and touched her pubic hair. Thereupon the appellant forced the complainant to touch his private parts. On the third occasion, the complainant was looking for a video cassette at the appellant's house. The appellant took her to his bedroom, locked the door and made her watch a video different from the one she was looking for. That day the appellant fondled her breasts. On the fourth occasion, again at the appellant's house, when the appellant's son went to the bathroom, the appellant once again forced the complainant's hand to his private parts, unzipped her trousers and then touched her private parts. On the fifth occasion when the complainant was looking for her brother who had gone playing, the appellant gave her a lift in his car and while in the car once again touched her legs. All this, the complainant testified, happened without her consent and that on each occasion she had requested the appellant to stop.

After some time the complainant had gained the confidence of the appellant's estranged wife, LS, and told her of the incidents of alleged indecent assault. LS in turn told her brother, LL, a former police officer. LL devised a plan to obtain independent evidence, and as he put it, to test the complaint's credibility in relation to the allegations she had made against the appellant. With the help of DJB, an owner of a private investigations company and a security expert, as well as JJK who had worked for DJB, they set up a private operation in terms of which a remote radio microphone listening device was concealed in the complainant's shoe. The microphone was supposed to feed another device attached to a tape recorder which was in turn supposed to record the appellant and the complainant's voices while the acts of alleged indecent assault were being perpetrated on the complainant. The audio cassette used in the operation was given to Dr Ludik, the Director of the National Forensic Science Institute, with the request to analyse the auditory input that had been captured on the cassette and to provide the court with the content of the audio data. Dr Ludik testified that he had determined that the recording involved a teenage girl and an adult male; that the recording was poorly done, and the only portion thereof that was audible was the voice of a girl repeatedly saying in Afrikaans "Nee, nee Johan" or "No, no Johan". He refuted the suggestion by counsel for the appellant at the trial that the recording on the tape could have been inserted by third parties. Dr Ludik gave a satisfactory explanation for his opinion that it was impossible for the recording to have been inserted by third parties.

It is apparent from the record that the identity of the person who had allegedly indecently assaulted the complainant was not in issue at the trial. What was in issue was whether the alleged assaults occurred at all. The appellant had to a certain extent corroborated the evidence of the complainant with regard to the occasions on which the complainant says the indecent acts were perpetrated on her. For example, the appellant does not deny that he had driven with the complainant in his car, suggesting that he might have innocently touched her leg in the process of changing gears; that he had once or twice helped the complainant with her school projects; that he had helped her find the map; that the complainant was once looking for a specific video at his house, and that on the day of the recording the complainant uttered the words “No Johan”. The appellant’s take on this aspect of the complainant’s evidence was that the complainant started, for no apparent reason, to repeatedly shout “No, no Johan”. The central issues for decision in the court below were whether the appellant had perpetrated the alleged indecent acts on the complainant and whether all the elements of the crime had been proved. The appellant denied having touched the complainant’s breasts, leg or having assaulted her indecently in any manner.

The thrust of the appellant’s defence was that the complainant was influenced by LS, the appellant’s estranged wife, to ruin his reputation so that custody and

control of their minor children in the then pending divorce matter would instead be awarded to LS.

Submissions on appeal

[3] It was submitted on behalf of the appellant that the State had not proved all the elements of the crime of indecent assault. In the premise, the appellant relies on the case of *R v M* 1946 AD 1023 at 1027 where the Court pointed out that the version of an accused on an incident should stand and a court may not convict unless it was convinced that the explanation was improbable and that beyond any reasonable doubt was false. Reliance on circumstantial evidence should be consistent with the proven facts which should exclude every reasonable inference otherwise. It was further argued on behalf of the appellant that the evidence of the complainant, who was a minor and a single witness, should be treated with caution and that the trial court had failed to take into consideration the fact that in sexual offences, minors who are single witnesses should be treated with special caution.

[4] The appellant pointed out inconsistencies in the complainant's evidence which he says cast doubt on her credibility as a single witness. The complainant allegedly contradicted herself with regard to the number of events during which she was allegedly indecently assaulted. The complainant additionally contradicted herself, so the argument went, with regard to what she testified in court in comparison with what was contained in the statements given to the police, as to the aspect of how the information was communicated to LS. The appellant submitted that no other

evidence apart from the statement “No Johan” was presented before court to prove that the complainant was indeed indecently assaulted and that it had not been established that the words “No Johan, no Johan” were uttered by the complainant and in response to being indecently assaulted by the appellant. It was furthermore submitted that the complainant was influenced by LS to lay false charges against the appellant for reasons related to a pending divorce action, as previously mentioned.

[5] Counsel for the respondent submitted on the other hand that the appellant was correctly convicted. The respondent submitted further that an appeal court should not interfere with the decision of a trial court which had the opportunity to observe witnesses and make credibility findings based on the evidence presented before it and which opportunity the court on appeal lacks. The respondent relied on *S v Sligger* 1994 NR 9 (HC) wherein this Court stated that where no irregularities or misdirections were proved or apparent from the record, the court on appeal will normally not reject findings of credibility by the trial court and will usually proceed on the factual basis as found by the trial court. It was furthermore counsel for the respondent’s contention that the State had proved the five counts of indecent assault beyond reasonable doubt. That it had been established that there had been an intentional and unjustified touching on the complainant which had the effect of outraging the normal sense of what is decent and proper. It was submitted further on behalf of the respondent that the statements by the appellant that he did not touch the complainant’s upper leg when he was driving and that he may have bumped against

her knee when he was changing gears are mere fabrications intended to mislead the court.

[6] As already mentioned, the State had led the evidence of LS who testified that she was told by the complainant of the indecent acts allegedly perpetrated upon her by the appellant and the court *a quo* rejected the appellant's defence that his estranged wife unduly influenced the complainant to make false allegations so as to enable LS to obtain an unfair advantage during the pending divorce action. The magistrate accepted the version of the complainant on the basis that although she was subjected to a rigorous cross-examination, she proved to be a reliable, credible and trustworthy witness; that she could clearly remember how, when and where the indecent acts were perpetrated on her, and concluded that the complainant did not fabricate the evidence.

Whether all the elements of the crime were proved beyond reasonable doubt

[7] The crime of indecent assault consists in an assault which by nature or design is of an indecent character. The State must therefore prove that such indecent assault was unlawful in that no consent was given.[1] The complainant testified that on the first occasion in July when the appellant touched her back near the birdcage, she gave no permission thereto. The complainant also did not give permission for the appellant to touch her upper part of the leg when they were driving on the way to the appellant's house. The complainant repeatedly testified that she gave no permission for the indecent acts perpetrated. The second element of the crime requires that there

[1]Burchell J & Milton J .1997. *General Principles of Criminal Law.* Western Cape: Juta & Co, p 502-505.

should be an assault which usually involves the touching of the part of the body that becomes sexually aroused – sometimes euphemistically referred to as “private parts”. The complainant testified in this regard as follows:

> *”When I then took the book, he then pushed me against his son’s bedroom door. He then zipped my trouser’s zip off. He then zip his zip off and then **forced** my hand on to his penis…”*
> (Added emphasis)

[8] There is clear evidence that there had been touching of private parts without the complainant’s consent. Such act is clearly indecent in nature in that it involves some sort of sexual activity falling short of sexual intercourse, thus satisfying the third element of the crime. The intentional aspect can be drawn from the fact that the appellant knew that there will not be anybody at home and upon arrival, closed and or locked the door of the house to keep any third party out. The repeated indecent assaults on the complainant over a period of time also indicate such intention. The appellant was the only witness for the defence case and testified that the first occasion when he touched the complainant near the birdcage was to comfort her as she was crying after being scolded by her father. With regard to the second occasion, the appellant testified as follows:

> “Sometimes I sort of when she stands up when we sit and watch TV, then I sort of pinched her on the side, and say: ‘A cup of coffee would be nice.’”

The appellant denied ever touching the complainant's upper part of the leg or pushing her against the door or unzipping his or her trousers. As to the allegation that he had forced her to touch his penis, the appellant's evidence was simply that he was not aware of the incident.

[9] The magistrate relied on the case *of S v D and Another* (NmHC) 1992 (1) SA 513 at 514F which recites the well-known principle that the burden of proof is on the State and no onus rests on the accused to convince the Court of the truth of any explanation he or she gives. If he or she gives an explanation, even if that explanation be improbable, the 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.[2] The learned magistrate rejected the appellant's version as not being reasonably possibly true and, as previously mentioned, accepted the version of the complainant. It is also apparent from the appellant's evidence-in-chief that he merely gave answers to his counsel's questions and in many instances his response to the allegations made in the complainant's evidence were bare denials. It is not therefore surprising that the trial Court preferred the respondent's version to that of the appellant.

Cautionary rule in sexual offences

[10] The appellant further contends that the magistrate erred in law in not considering the inconsistencies within the complainant's evidence and that the

[2] See also *R v Difford* 1937 AD 370 at 373.

cautionary rule was not correctly applied. The cautionary rule relating to sexual cases as espoused in the case law can briefly be stated as follows:

> **"***In rape cases for instance, the established and proper practice is not to require that the complainant's evidence be corroborated before a conviction is competent. But what is required is that the trier of fact should have clearly in mind that those cases of sexual assault require special treatment, that charges of this kind are generally difficult to disprove, and that various considerations may lead to their being falsely laid…"*[3]

[11] The respondent submitted that the learned magistrate was fully aware of the cautionary rule regarding minors and this is evident from the judgment when it pointed out that the evidence of the child was reliable and based on the reasons advanced for accepting the complainant's version. It is further evident from the complainant's evidence-in-chief that she was able to know what is right and wrong and had testified that she thought the touching of her leg and breasts by the appellant was wrong. The complainant could clearly remember what had happened and where and although she was uncertain about the precise dates, she could give a reasonable and acceptable estimate of the time period. The learned magistrate pointed out that if the complainant was a person of bad morals, as the appellant's mother had testified, she would not have laid charges against the appellant or against another person (reference to a previous case wherein someone else was convicted of indecently assaulting the same complainant).

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[3] *R v W* 1949 (3) SA 772 (A) at 780 and 783G.

[12] This Court in *S v Engelbrecht* 1993 NR 154 HC at 163G-H laid down the principle that in evaluating evidence given by children, the court must be aware of the risk inherent in such evidence. If the court does not take cognisance of these risks, a court of appeal would be at liberty to alter a conviction. The cautionary rules concerning the evidence of children must be even more carefully applied where such witness is a single witness. In *S v Monday* 2002 NR 167 (SC), the Supreme Court at 192F observed that although the Supreme Court in *S v Katamba* 1999 NR 348 (SC) held that the cautionary rules relating to complainants in sexual offences was outdated and should no longer be applied, the cautionary rule with regard to the evidence of single witnesses and evidence of very young children still applied. It should be observed in this regard that although the complainant in this matter was evidently a single witness, at the age of 16 she could obviously not be said to be a very young child. In *S v Monday* (*supra*) the children whose evidence was in issue were aged between 7 and 9.

[13] In *S v Esterhuizen* 1990 NR 283G-H (HC), Frank J applied the well-known *dictum* in *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E-G with regard to the approach to evidence of a single witness where it was stated as follows:

> "There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a 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. … [I]t 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."

[14] Although a summary of the evidence has already been given, it is necessary to refer to specific evidence of some of the witnesses to make it clear that it is not only on the basis of the statement "No Johan" that the appellant was convicted and that even though the complainant was a single witness, the trial court was entirely justified in accepting her evidence. State witness LL confirmed that he had initiated the idea to set up the device that was used to listen in and record the conversation between the appellant and the complainant. After the operation, the device was given back to him and having listened to the recording on the tape, he came to the conclusion that the complainant was in an uncomfortable position with the appellant when she uttered the words "No, no, Johan" The security expert, DJB, told the court that the recording was poor due to the fact that the listening device was placed in a shoe. The ideal place for optimum recording output would have been the area around the complainant's chest. This area was, however, ruled out for fear that the device would have been detected since the appellant was allegedly in the habit of touching the complainant "all over the body". Both DJB and Dr Ludick corroborated LL's evidence that the complainant sounded anxious when she uttered the words "No Johan". LS testified that the complainant had informed her that her estranged husband was molesting her and that she felt scared every time she drove with the appellant; hence she always took her brother along. All these aspects have been confirmed by the complainant. Although the appellant's mother testified that the complainant was allegedly a child of bad character, the trial court found the complainant, as already

stated, to be an honest and credible witness. The trial court rejected the appellant's defence of a plot between his wife on the one hand and the complainant on the other.

[15] The complainant was a single witness with regard to the aspects of indecent assault but the learned magistrate accepted her evidence and relied on circumstantial evidence presented in court, such as the recording wherein the words "No Johan" were uttered, the report she had made to LS and the appellant's evidence corroborating the evidence of the complainant with regard to occasions she said she was assaulted. The advantage and benefit enjoyed by the trial court to come to these findings based on the evidence is one not available to the appeal court and in the absence of an irregularity or a misdirection, there can be no basis for interfering with credibility findings made by the trial court. The findings of fact and the reasoning of the court below as well as the conclusion it had arrived at are sound and cannot be faulted. I am satisfied that the appellant was properly convicted.

[16] As regards the sentence, considering the fact that the appellant was a first time offender and that he had lost his job in the wake of the serious allegations against him and furthermore because the complainant did not sustain injuries as a consequence of the assault, the learned magistrate sentenced the appellant as mentioned already. In aggravation, the nature of the offences, the minority of the complainant, the fatherly figure and the trust misused by the appellant are all the factors that had invited the sentences imposed. The respondent therefore submitted that the learned magistrate

did not err in law and/or in fact and that the appeal court should not interfere with the sentences imposed.

[17] It seems to me that the sentences imposed are appropriate. The appellant misused the trust and his position to take advantage of the complainant's vulnerability. The complainant testified that although she felt violated by the appellant's shenanigans, she could not tell anyone immediately at the first incident because she was afraid that if the appellant's mother had heard about the allegations, she could have chased the complainant's family from her house, thus leaving the family homeless. It is my considered opinion that there can be no basis for interfering with either the conviction or sentence. The appeal against conviction and sentence should therefore be dismissed. In the result, the following order is made:

The appeal against conviction and sentenced is dismissed.

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SHIVUTE, J

I agree.

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MTAMBANENGWE, J

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