



SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case No: 236/2015

In the matter between:

CORNELIUS MARTHINUS JANSEN

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Jansen v The State* (236/2015) [2016] ZASCA (133)
(29 September 2016).

Coram: Tshiqi, Seriti, Saldulker and Mathopo JJA and Fourie AJA

Heard: 24 August 2016

Delivered: 29 September 2016

Summary: Criminal appeal: appellant convicted on two counts of contravening certain sections of Criminal Law Amendment (Sexual Offences and Related Matters) Act 32 of 2007: Trial Court relied on evidence of single witness: proper judicial approach to such evidence: Evidence of single witness not satisfactory and therefore unreliable:

convictions and sentences set aside.

ORDER

On appeal from: Gauteng Local Division Johannesburg (Tshabalala J and Siwendu AJ sitting as court of appeal):

The appeal succeeds, and the appellant's convictions on both counts 7 and 8 and the sentences imposed pursuant thereto are set aside.

JUDGMENT

Seriti JA (Tshiqi, Saldulker, Mathopo JJA and Fourie AJA concurring):

[1] The appellant, Mr Cornelius Marthinus Jansen, appeared in the Regional Court, Kempton Park facing nine counts of contravening various sections of the Criminal Law Amendment (Sexual Offences and Related Matters) Act 32 of 2007 read with the provisions of section 51 (1)(a) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 as amended.

[2] On 21 November 2012 he was acquitted on seven counts and was convicted on two counts namely counts 7 and 8. After his conviction he was sentenced to ten years' imprisonment on count 7 and life imprisonment on count 8.

[3] The allegations pertaining to count 7 are that during the period of May 2008 to July 2008 the accused unlawfully and intentionally exposed or displayed his genital organs to his minor child who will be referred to as CJ who was then three years old, by ‘being completely naked in front of her on numerous occasions, by bathing with her and afterwards rubbing his body and his genitals with cream while she was made to watch him’.

[4] The allegations pertaining to count 8 are that during July 2010 the accused unlawfully and intentionally sexually violated CJ (then five years old) by penetrating her vagina with his finger, alternatively by ‘touching, rubbing and pinching her vagina with his hands and fingers’.

[5] The appellant applied for leave to appeal against both convictions and sentences. On 7 December 2012 the appellant was granted leave to appeal to the court below against both his convictions and sentences. On 27 November 2014 the Gauteng Local Division, Johannesburg dismissed his appeal. The appellant with special leave of this court now appeals against both his convictions and sentences.

[6] The main issues in this appeal are whether the State has proved beyond reasonable doubt that:

- (a) the appellant exposed or caused exposure of his genitals to CJ during May 2008 to July 2008;
- (b) the appellant raped CJ during July 2010 or sexually assaulted her by touching, rubbing and pinching her vagina with his hands and fingers;
- (c) whether the evidence of CJ was satisfactory, reliable and truthful;
- (d) whether the appellant’s version could be rejected as false and not reasonably possibly true.

[7] The State relied on the evidence of seven witnesses, namely CJ, Ms Butterworth, Dr Bellingan, Ms Lillian Fikizolo, Ms Leona Swart, Ms Lizzie Khumalo and Ms Letitia van den Berg. The defence relied on the evidence of inter alia the appellant, Prof Spies, Dr SC Blunden, Dr C Opperman and Ms Lorraine Jansen (Lorraine).

[8] CJ was three years and five years old respectively at the time of the alleged offences and was six years old at the time she testified. Her evidence in respect of count 7 was as follows: that at the time when she stayed with her parents (during 2008) her father injured her. In short she testified that her father injured her and she said ‘Ja hy het daar gevryf by my blommetjie’, that her ‘blommetjie’ is between her legs, and she used to bath alone, but when her father puts cream on her body ‘dan vat hy weer aan my blommetjie elke keer’.

[9] Regarding count 8 she testified that at some stage she left their home and went to stay at Huis Impak Children’s Home. During school holidays and weekends she used to visit Ms Swart, her foster parent. At the time when she was staying with Ms Swart she visited her father. She was asked if her father injured her when she visited him and she said ‘Ja toe ons Soccer World Cup toe was nê toe gaan eet ons en toe vryf hy weer by my blommetjie’, while they were at his house.

[10] She further testified that she reported to Ms Fikizolo, who worked for Ms Swart, that her father ‘het by my blommetjie gevat en by my tieties’. At the time that she stayed with Ms Swart, she visited her father only once. She remembers Ms Lizzie Khumalo, who was working for her mother and father. She told Ms Khumalo that her father ‘het my blommetjie gevat’.

[11] Further details came out during her cross examination. Amongst others she testified that she reported to Ms Swart and her husband that the appellant 'het in my blommetjie gevat'. She testified further that her father pushed something into her vagina. When asked what did her father push into her vagina, she said 'dit is amper soos 'n spyker maar dit is nie soos 'n spyker nie dit is n ding wat eintlik vir grootmens is maar hy het dit in my blommetjie gedruk'. She was unequivocal that no other person touched her vagina, nor injured her except the appellant. In re-examination she said that 'pappa se tottie was geel gewees en dit het gebloei'.

[12] Ms Butterworth, a social worker, who was tasked with the forensic assessment of CJ during 2008 testified that she first saw CJ on 27 May 2008, when she was around three and a half years old. The purpose of the consultation was to provide therapy and counselling. At that time, CJ had been placed in a place of safety with her cousin, Ms Smith. She again had several sessions with CJ in August and September 2008. In 2009 she had therapeutic interventions with CJ and thereafter prepared a number of reports. In one of the reports she stated that over the assessment period she witnessed several disturbing behaviour patterns displayed by CJ. This raised a concern that she had been exposed to either inappropriate sexual conduct or inappropriate sexual behaviour but that she could not state that she experienced them herself. According to her CJ could have obtained the information from both her parents. Mrs Butterworth specifically stated that during their sessions CJ never accused or implicated the appellant. She was however concerned with the fact that during one of the sessions she drew a father with a penis and appeared to be pre-occupied with her relationship with her father. Mrs Butterworth was also concerned with the fact that in one of the sessions CJ placed her mouth over the

penis of an anatomically correct doll and told her that she was biting his “tottie.” As a result of those concerns and observations Mrs Butterworth stated she formed an opinion that the appellant was most likely the abuser.

[13] In May 2008 Ms Lizzie Khumalo was working as a domestic worker for the Jansen family. She made a written statement to the police. At the time of the trial, the investigating officer could not trace her. The State made an application that her statement be admitted in evidence and the application was granted. In the statement Ms Khumalo states that she was a domestic worker for Ms Linda Jansen. During May 2008 when she was busy cleaning the house CJ who was three years old at the time told her that the appellant had fondled her private parts. The child showed her what her father did to her.

[14] Dr DC Bellingan, who was the East Rand District Surgeon for 20 years testified. He examined CJ on 23 July 2010 when she was five years old. After the examination he prepared a report. Amongst others he testified that the posterior fourchette was intact. The hymen had a very small opening and consisted of the rim only with a small tear at 6 o’clock. In CJ the posterior fourchette was still present which indicated that the penetration of the child came from either directly in front or from above which is usually someone lying next to a child and putting a finger in her vagina. If it was a penis it would have come from the bottom and run across the posterior fourchette and in the process it would tear the posterior fourchette. The tear that he saw was an old injury which was almost completely healed. Dr Bellingan further testified that had the child put her finger in her vagina she would have had a similar appearance. Based on his clinical examination he concluded that digital penetration

had taken place.

[15] Ms Fikizolo also testified. She testified that during 2010 she was employed as a domestic worker and stayed at Ms Swart's house. She knows CJ as she used to visit Ms Swart's house. On a certain Monday at the beginning of July 2010, whilst she was cleaning the passage, CJ came to her and told her that, the previous day, which was a Sunday her father touched her on her private parts and also put her on top of the bed and undressed her. She told Ms Swart what CJ told her and Ms Swart requested her to write a report which she wrote the following day, Tuesday the 6 July 2010.

[16] Ms Swart testified that she is the foster parent of CJ. She met CJ when she was 4 years old in 2009 at Jakaranda Academy and CJ was in her class. It was a kindergarten school. On 25 July 2009 she took her out for the weekend. At that stage they were foster parents, and they could take her over weekends and during school holidays. In July 2010 CJ stayed at their place for the entire duration of the holidays. It was the long school holidays at the time of the Soccer World Cup. She was instructed not to have any contact with CJ's parents. CJ's parents were each allowed to see CJ on alternative Sundays at Huis Impak. Her father was later allowed to take her away for about five hours on a Sunday. The arrangement was that she would drive with CJ to Huis Impak, and her father would come and collect CJ and bring her back later to the same place.

[17] On or about 4 or 5 July Ms Swart went with CJ to Huis Impak where the appellant came and collected CJ. She does not know whether the appellant was alone when he came to collect CJ. However he was

alone when he returned her. In the evening whilst asleep CJ cried out ‘no daddy, no daddy’. She went to CJ and comforted her and she slept. The following day, Ms Fikizolo came to her and told her what CJ told her. She requested Ms Fikizolo to reduce to writing what she was told by CJ. She was shocked when she heard the report by Ms Fikizolo.

[18] The following Sunday she took CJ to the place where the appellant collected her. When the appellant brought back the child he was alone. The Saturday prior to the visit to the appellant, CJ when told that her father will see her again the following day, was not happy. Ms Swart said that CJ told her that she does not want to see the appellant because he injures her. In the evening, like the previous occasion, whilst asleep CJ had nightmares and said ‘no daddy no daddy’. After the second visit by the appellant, around 11 or 12 July 2010, CJ told her that her father touched her private parts again. She again wrote a report and sent it to Huis Impak. After the school holidays she took CJ back to Huis Impak. She detailed incidents where CJ behaved abnormally for a child of her age.

[19] Under cross-examination she referred to the two reports she wrote which were dated 6 July 2010 and 14 July 2010 respectively. In both reports she wrote what CJ told her. After every weekend and holiday they were required to write a report about the activities of the child and any problems that the child has encountered. She was referred to a portion of the report she wrote which reads as follows:

‘[CJ] is gereeld baie bang. Sy wil dan net naby my wees of op my skoot sit. Ek het haar al gevra hoekom is sy bang, haar antwoord was ek is bang vir pappa en vir daardie vrou . . . Ek het haar gevra waarom is sy vir hulle bang, sy het gesé want pappa het sy tottie in my privaat gedruk.’

She confirmed that the portion quoted correctly reflects what CJ told her. CJ, without any question from her (Ms Swart) told her what her father did to her. She stated that she saw CJ masturbating on several occasions. CJ, on one occasion “het haar handjie in haar broekie ingesit en sy sou haar vingertjie diep indruk en masturbeer . . .” and that “in die bad het sy tot haar waslappie binne in haar genitaliee gedruk . . . die bad het mos so propietjie; so silwer dingetjie bo-op, en sy sal gaan sit en sy sal op die ding rondskuif...met haar privaatdeel; . . . sy doen dit vele kere.” She stated that when the appellant brought back CJ to Huis Impak, he was always alone. If Ms Lorraine Jansen was with appellant when the appellant came to collect CJ at Huis Impak, she did not see her. Under re-examination she said CJ on several occasions mentioned that ‘pappa my blommetjie gevat en gevryf het’ and that ‘pappa sy tottjie in my privaat gedruk het’.

[20] Ms Letitia van der Berg, a social worker, also testified. She saw CJ for the first time on 5 August 2010. She was requested by the South African Police Services to do a blind forensic assessment of CJ. She prepared a report after she consulted with CJ on 5 August, 2 September, 7 September and 16 September. In her report she states, amongst others, that CJ informed her that Barend, a child at the Children’s Home and another person, who she would not name, had touched her private parts.

[21] The appellant testified in his defence and called a psychologist, Dr Carole Anne Opperman, Dr C Blunden a social worker and Ms Lorraine Jansen, his then partner as defence witnesses. He testified that he got married to Linda, the biological mother of CJ on 30 August 2003 and CJ was born on 8 November 2004. Linda had a severe bipolar mood disorder and she was misusing alcohol. When they got married Linda was working

but a few months after their marriage she was retrenched and she never worked again. Linda would take care of CJ during the day but he would take over upon his return from work as Linda would be drunk. He would bath CJ, put cream on her and dress her. CJ had a rash around her genitals and he applied Fissan Paste around her genitals. From 29 September 2007 up to 13 October 2007 Linda was hospitalised at Linksfield Park Clinic. Prior to that in 2006 Linda was admitted at a rehabilitation centre at Boksburg for a month. During Linda's hospitalisation Linda's friends used to look after CJ during the day until he came back from work. In July 2008, Linda went to lay criminal charges against him and never returned home. She accused him of sexually molesting CJ.

[22] The appellant further testified that between 6 March 2009 and 23 July 2010 CJ stayed at Huis Impak. He used to visit her every second Sunday of the month from 11h00 till 13h00 at Huis Impak. Later it was decided that he could take her from Huis Impak for three hours. The first Sunday he picked her up they were supposed to see Prof Spies, a social worker. When they were on the way, Prof Spies phoned him and cancelled the appointment. He then went to Rooihuiskraal where he met Lorraine at the Spur where they had lunch.

[23] He picked up CJ on four other occasions and Ms Lorraine Jansen came with him. On one occasion they finished having lunch early and he went to his house with CJ. His son, who stayed in London, was home for the Soccer World Cup. At his home they played Lego on the carpet for about half an hour till the time was up and together with Lorraine they took CJ to Huis Impak. He took CJ to his house only on that one occasion. He denied all allegations levelled against him.

[24] Under cross-examination he said that he and Linda separated in July 2008. He told Professor Spies that he used to care for CJ when Linda was drunk and unable to take care of CJ. On one occasion CJ burst into the bathroom whilst he was putting cream on his body. When CJ opened the door he was naked, so she did see him naked. On another day CJ burst into their bedroom when he and Linda were engaged in sexual intercourse. On noticing her they stopped and he took CJ to her bedroom. When CJ was under a year old she used to bath with him.

[25] He told Professor Spies and Dr Carol-Anne Opperman that Linda coached CJ to accuse him of sexual abuse. He confirmed that he told Dr Carol-Anne Opperman that CJ was sexually acting out and behaving in an inappropriate manner because CJ saw him putting cream on his body and also walked into their bedroom when Linda and him were having sexual intercourse. When CJ saw him in the bathroom, he was putting cream on his legs, arms, between his legs and on his penis. When asked why CJ was masturbating, he said she could have been coached by her mother. He further said that the inappropriate behaviour of CJ noted by various people could be as a result of Linda telling CJ that if anybody touched her genitalia she should tell her. Linda said this to CJ several times. He had five visits to CJ without any supervision. He had more than four people with him when he was with CJ, except for one occasion when he picked up CJ to take her to Professor Spies, but when he took her back he was not alone.

[26] The next defence witness to testify was Dr C Blunden, a social worker. She had various sessions with CJ. CJ made allegations of sexual molestations. Her involvement with CJ was therapeutic. During one of the sessions, CJ told her that a monster hurt her on her vagina. She further

testified that CJ informed her that ‘The monster hurt me by my tinky winky. He hit me with a stone. It was sore. He smacked me with a stone on my tinky winky. I was sore. She had her clothes on. He took it off. Then I asked what the stone looked like. She said a baby one. The monster like daddy. It was not daddy . . . It was one of daddy’s friends . . . It was a big uncle . . . His hair was black. He did it three times...He said he is going to klap me on my face if I tell daddy.’

[27] Dr Carol-Anne Opperman also testified. She consulted with CJ on four occasions. Her first consultation with CJ was on 16 March 2009 and she compiled reports. In one of the reports she said that an inappropriate relationship exists between the appellant and CJ. From information she received it indicates sexual abuse and sexualised behaviour. In one of her reports she said that:

‘However it is difficult to determine who the perpetrator is as Cassidy accuses both her mother and her father of sexually abusing her plus as far as I know eight other people’.

[28] Ms Lorraine Jansen also testified on behalf of the defence. She is the ex-wife of the appellant but stayed with him again in July 2010 after the appellant divorced CJ’s mother. She accompanied the appellant on every occasion he went to collect CJ at the Children’s Home, except when the appellant had taken CJ to meet with Professor Spies in Pretoria. She was also present when they returned her, and he handed her to Ms Swart in the street in front of the Children’s Home.

[29] Section 208 of the Criminal Procedure Act states that an accused may be convicted of any offence on the single evidence of any competent witness. In *Stevens v S* [2004] ZASCA 70; [2005] 1 All SA 1 (SCA) para

17, Navsa and van Heerden JJA said:

‘As indicated above, each of the complainants was a single witness in respect of the alleged indecent assault upon her . . . It is, however a well established judicial practice that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility . . .’

In *S v Mahlangu* [2011] ZASCA 64; 2011 (2) SACR 164 (SCA) para 21 Shongwe JA said:

‘The court can base its findings on the evidence of a single witness, as long as such evidence is substantially satisfactory in every material respect, or if there is corroboration. The said corroboration need not necessarily link the accused to the crime.’

[30] In its judgment the trial court, regarding count 7 said ‘it is likely that the little girl must have seen her daddy’s tottie on more than one occasion’, and convicted the appellant on count 7. There is no credible evidence to support the conclusion of the trial court. During her evidence CJ did not adduce any evidence which can sustain a conviction of the appellant on count 7. The standard of proof in a criminal trial is proof beyond reasonable doubt. It is trite that an accused bears no onus to convince the court of the truthfulness of the explanation that he tenders.

[31] Concerning count 8 CJ is a single witness, and save for the contradictory reports she made to various people about alleged sexual violations there is no other evidence to corroborate her version. According to Ms Butterworth, the state’s own witness, CJ did not specifically implicate the appellant. Her conclusions are at best speculative and are based on her observations of the concerning behavior that CJ displayed during the therapy sessions. Ms Letitia van den Berg, a social worker who also testified for the state stated that CJ had implicated

Barend, a child at the Children's Home and another person, who she would not name, and she accused them of having touched her private parts. It was not disputed that during her sessions with two of the defence witnesses Dr Opperman and Dr Blunden, CJ also accused her mother and eight other people of molesting her sexually. Mrs Swart's evidence of how she observed CJ masturbating poses another problem for the state. During cross examination Dr Bellingan was constrained to agree that although it is rare for young girls to inflict the kind of injury that CJ suffered in her genitalia they could themselves cause such an injury. All this contradicts her evidence that only her father molested her. I am thus not able to conclude that the injuries observed by Dr Bellingham could only have been inflicted by the appellant. There is a real possibility that such injuries could have been inflicted by CJ herself whilst she was masturbating or could have been inflicted by anyone of the people CJ had implicated. Another problem for the state is that CJ informed Leona that her father pushed his penis into her vagina and this allegation that she was sexually penetrated through a penis was denied by Dr Bellingan.

[32] These are serious contradictions which go to the heart of her case. In my view, they have rendered her evidence untrustworthy, less credible and unreliable. It cannot be said that her evidence is satisfactory in all material respects.

[33] There is no reliable evidence that can sustain the conviction of the appellant on both counts. Furthermore, the explanation of the appellant in his defence is reasonably possibly true and he was entitled to an acquittal on both counts 7 and 8. The High Court erred in confirming the conviction of the appellant.

[34] The following order is made:

The appeal succeeds, and the appellant's convictions on both counts 7 and 8 and the sentences imposed pursuant thereto are set aside.

WL SERITI
JUDGE OF APPEAL

APPEARANCES:

For Appellant: JHL Scheepers

Instructed by: VFV Attorneys, Pretoria

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For Respondent: N Muller

Instructed by: Director of Public Prosecutions, Johannesburg

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