

Sneller Verbatim/MvD

IN THE HIGH COURT OF SOUTH AFRICA

(LOCAL CIRCUIT DIVISION FOR THE DELMAS CIRCUIT)

DELMAS

CASE NO: CC 363\05

2005-10-27

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In the matter between

10 THE STATE

and

S S MOAKANE

Accused

J U D G M E N T

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HUSSAIN J. Mr Moakane, to whom I shall refer to as the accused, was found guilty of one count of rape before the Regional Court Magistrate and was referred to this court for purposes of sentencing in terms of Act 105 of 1997.

As is usually the case, I read the record of the proceedings before the
20 magistrate in order to satisfy myself that the proceedings, before the magistrate, were in accordance with justice. I also benefitted from the submissions of counsel for both the accused as well as the state.

The offence for which the accused was found guilty involves the rape of a victim who is under 16 years of age. This offence falls within part 1 of schedule
25 2 of Act 105 of 1997. Having considered the evidence very carefully, I came to the conclusion that the matter should not have been referred to this court in terms of the Act for purposes of sentencing. The reason being that it is not clear from the evidence exactly when the rape took place. There is a possibility that the rape took place in 1998. If the rape possibly took place in 1998, then it is equally
30 possible that the rape took place before the 1 May 1998.

Act 105 of 1997 came into operation on 1 May 1998. If that is the case, then the Act did not apply to the accused, in which event the accused had to be sentenced by the magistrate. The charge sheet in this case reads that the offence took place during 2000. This was not established by the evidence. The first
35 witness to testify was Mrs Motaung who is the aunt of the complainant. In her evidence she was asked to give an estimation as to how long ago the alleged rape happened. Her estimation was 1998.

The child's mother testified and according to the mother, it was in 1998 when she noticed something wrong with the child and that the child was walking
40 with some difficulty and she took the child to a clinic. She was quite certain that it was 1998.

The complainant testified and she was unable to remember when the rape took place. She was unable to say in what year the rape took place. What happened is that the prosecutor established in evidence that the child was 8 years
45 old when the rape took place. The trial took place in 2004 and accordingly this would mean that the rape happened in 1999. However neither the magistrate nor the prosecutor asked any questions of the child as to why she says she was 8 years old when the rape took place. The child may have been wrong and there is a possibility that the child was 7 years old when the rape took place.

The doctor was called to testify. This is the doctor who eventually examined the child. The doctor noted that the rape took place in the year 2000. This was the information that was given to the doctor. Again neither the prosecutor nor the presiding magistrate asked any questions about the date. The
5 doctor examined the child on 12 March 2004. It is clear that somebody told the doctor that the rape occurred in the year 2000. The doctor also testified that the suspect was approximately 20 years old. This too is clearly wrong because if the accused was 21 years old in 2004, he must have been 16 or 17 years old when the rape took place.

10 It is not unusual in cases of this nature involving young children that they cannot say when the incident took place. According to the evidence before the magistrate the child was threatened not to talk about the incident and for a number of years the child said nothing about the incident. When she eventually spoke about it she was unable to say when the rape took place. The magistrate did not
15 apply her mind to the question of the date of the rape.

In her judgment the magistrate says the following as far as the date is concerned.

"K Y M is 13 years old and attended school in Standerton and is in grade 7. She explained that during the period 1999 to 2000, a long time ago, she had
20 been raped."

There is no evidence to support this. It was important for the magistrate to have applied her mind to the question of the date as it is highly relevant due to the possible application of Act 105 of 1997. I noted that before the accused was asked to plead in the trial, the magistrate correctly warned the accused of the application
25 of the Act. Unfortunately the magistrate lost sight of the fact that possibly the Act did not apply in this case.

On the evidence before the magistrate, it cannot be said that the rape must have taken place after the 1 May 1998. At least there is a doubt that it happened after 1 May 1998. The consequences to the accused as to whether or not the Act
30 applies, are great indeed. If the Act applies, there is a possibility that he may be sentenced to life imprisonment. It is therefore important in cases of this nature for the trier of fact to establish whether or not the Act applies. If it is not possible to pin point the date, and there is a doubt as to whether or not the Act applies, then the benefit of the doubt must be given to the accused. If this was not the case,
35 there could possibly be a grave injustice.

Accordingly I find that the provisions of Act 105 of 1997 did not apply to the accused in this case. In the result the matter must be referred back to the trial magistrate for purposes of sentencing.

Accordingly I make the following order.

40 The accused is referred back to the magistrate who is to sentence the accused on the basis that the provisions of Act 105 of 1997 does not apply.