SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 245/2015

In the matter between:

DANIËL JOHANNES STEPHANUS VAN DER BANK **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Van der Bank v The State* (245/15) [2015] ZASCA 10 (09 March 2016).

Coram: Majiedt and Pillay JJA and Fourie, Victor and Baartman AJJA

Heard: 17 February 2016

Delivered: 09 March 2016

Summary: Appellant convicted of rape and indecent assault - sexual intercourse with sixteen year-old girl who has a mental capacity well below her age - consent alleged - consent can only be given by person capable of consenting - expert evidence proving complainant incapable of consenting - appeal dismissed.

ORDER

On appeal from: Gauteng Division, Pretoria (Raulinga and Webster JJ and Thlapi AJ sitting as court of appeal):

The appeal is dismissed.

JUDGMENT

Pillay JA (Majiedt JA and Fourie, Victor and Baartman AJJA concurring)

[1] The appellant was arraigned on one charge of rape and one charge of indecent assault in the Regional Court, Pretoria. It was alleged that he committed these offences during 1999 at Waverley and Rietfontein, Pretoria, on a 16 year-old girl by having sexual intercourse with the complainant and by inserting his finger into her vagina respectively. He was represented throughout the trial and pleaded not guilty to each count. He tendered a written explanation of the pleas in terms of s 115 of the Criminal Procedure Act 51 of 1977 (the Act) through his representative and subsequently confirmed the contents. It was then read into the record. It is necessary to quote this statement and it reads as follows:

'Ek, die ondergetekende, Daniël Johannes Stephanus van der Bank verklaar hiermee:

1. Ek is die beskuldigde.

2. Ek ontken dat ek [the complainant] verkrag of onsedelik aangerand het.

3. Ek erken dat ek op drie geleenthede volle gemeenskap met [the complainant] gehad het naamlik:

"3.1 gedurende September 1999 te 21ste Laan 829, Rietfontein, en

3.2 gedurende Oktober 1999 te Dunwoodeelaan 1301, Waverley, en

3.3 gedurende November 1999 te 21ste Laan 829, Rietfontein.

4. Ek bevestig dat die voormelde gemeenskap met haar toestemming en aktiewe deelname geskied het.

5. Gedurende die tydperk September 1999 tot November 1999 het ek op verskeie geleenthede aan haar privaatsdele gevat met haar toestemming en inderdaad 'n vinger in haar privaatdeel gedruk. Dit het plaasgevind voordat ons gemeenskap gehad het asook op ander geleenthede waar ons nie gemeenskap gehad het nie."

[2] Immediately before the complainant was called to testify, the prosecutor indicated that she wished to call a Ms Schoeman to testify and to apply for her to be appointed as intermediary to assist in the testimony of the complainant on the basis that the complainant was mentally challenged. The record reflects that the defence had no objection thereto. Unfortunately what happened immediately thereafter escaped recording for some reason or another. However, it appears from the record that the intermediary was duly appointed and did assist the complainant in testifying.[1] At the conclusion of the evidence the appellant was convicted on both counts and the matter was transferred to the High Court for sentencing. On 27 March 2007, the convictions were confirmed in the High Court and were taken together for sentence. On 23 July 2007 he was sentenced to 12 years' imprisonment, of which four years were conditionally suspended for five years.

[3] The appellant was then granted leave to appeal to the full court, Pretoria. This appeal was heard on 3 November 2010 and dismissed on 19 December 2014. Leave to appeal was refused by it. It bears mentioning that the full court did not have the power to consider an application for leave to appeal - only this court is empowered to do so in terms of s 16(1)(b) of the Superior Courts Act 10 of 2013.

[1] A certificate of appointment as an intermediary at S 318 of the record suggests that she is nonetheless a member of a class of persons proclaimed by the Minister of Justice and Constitutional Development in the *Government Gazette* as being competent to be appointed as intermediary in terms of s 170A(4)(a) of the Act.

He was thereafter granted special leave to appeal against the convictions by this court in the following terms:

'1. Special leave to appeal is granted to the Supreme Court of Appeal.

2. The leave to appeal is limited to the following:

> Leave to appeal is limited to the issue whether the complainant's evidence was inadmissible on the basis that it was given through an intermediary in conflict with the provisions of s 170A of the Criminal Procedure Act as applicable at the time she gave evidence.'

[4] When the matter was initially set down for the appeal hearing the parties were requested to prepare further argument on the following:

"The parties are required to submit further written argument on whether the evidence, excluding the evidence of the complainant, is in any event sufficient to sustain a conviction. In addition the parties must address the question whether factually the recorded evidence of the complainant reflects her own words or the intermediary's expression of what she was told by the complainant."

This request led to the postponement of the appeal and the parties submitted supplementary heads of argument accordingly. At the time the complainant testified on 17 March 2003, s 170A(1) the Act read as follows:

'170A. Evidence through intermediaries.—
(1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.'

[5] It is common cause that the complainant was 19 years old when she testified. The appellant submitted that in terms of s 170A(1) as it then was, once the witness reached the age of eighteen, there was no power or discretion to invoke s 170A.

[6] The introduction of s 170A was brought about by the need to allow child witnesses to give evidence in conducive surroundings and to be at ease or as close thereto as circumstances allowed when testifying, in order to achieve a just verdict. It has been subjected to criticism in relation to the fundamental right an accused person has to confront his or her accusers. The balance between protecting child witnesses and an accused's right to a fair trial, sought to be achieved by invoking s 170A, has however been found to be constitutionally sound. (See: *K v The Regional Court Magistrate NO & others* 1996 (1) SACR 434 (E); *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & others* [2009] ZACC 8; 2009 (2) SACR 130 (CC).) The section was subsequently amended in 2007 by s 68 of Act 32 of 2007 to include not only witnesses who were biologically under the age of eighteen but also those who were regarded as mentally under the age of eighteen.

[7] Relying on *S v Dayimani* 2006 (2) SACR 594 (E), it was argued on behalf of the appellant that s 170A of the Act authorized the use of an intermediary only in instances where the witness was under the age of eighteen and that any evidence tendered through an intermediary by a person who is eighteen or over is inadmissible. It was further submitted that the court below was incorrect in ruling that the section must be interpreted to include the mental age of the witness. It was argued that if that were so, then the legislature would not have found it necessary to amend it to specifically include persons who were mentally below the age of eighteen.

[8] In *Dayimani*, the complainant was regarded as 'moderately mentally retarded' and s 170A was nonetheless invoked (wrongly so that court held) because the complainant was eighteen years old at the time of testifying. It is not necessary to consider whether *Dayimani* has been correctly decided. The proper approach, in my view, would be to consider the evidence other than that adduced by the complainant and assess it to establish whether the convictions should be sustained or set aside.

[9] As can be seen from the appellant's plea explanation, he admitted to engaging in sexual intercourse with the complainant and that he had touched and inserted his finger

into the complainant's vagina. The only issue therefore is whether all of this had been done with her consent.

[10] By definition, common law rape is the unlawful and intentional sexual intercourse by a person without the consent of the other. Consent has to be free, voluntary and consciously given in order to be valid. In our law, valid consent requires that the consent itself must be recognised by law; the consent must be real; and the consent must be given by someone capable of consenting.[2] The first two requirements do not need to be discussed since the issue is whether the complainant was capable of giving consent - related to the third requirement. Where a person in intellectually challenged, his or her condition must be expertly assessed and only then can a finding as to such capability be made. In order to prove that the complainant was incapable of giving consent, the State called a number of witnesses.

[11] The mother of the complainant testified on behalf of the State. She testified that the complainant was born on 3 August 1983 after a complicated pregnancy. The complainant had suffered brain damage as a result of complications during the pregnancy and at birth. As a consequence, the complainant functioned at an intellectual level below her age from a very early age and this required special handling by her as a mother. This included regularly teaching her how to dress and also fundamental life skills before she was able to do it herself. She always had communication problems with other people. She explained that at the time of testifying, the complainant had been taken out of Sonnestraal School for moderately mentally challenged children at the school's request because she functioned at a level that the school could not improve on.

[12] The complainant's mother testified that she worked for the appellant and had established a good relationship with him. The arrangement would be that she would cook during lunch time and also fetch the complainant from school. Sometimes she would ask a fellow worker or neighbours to fetch the complainant when work commitments

[2] Jonathan Burchell South African Criminal Law and Procedure Volume 1: General Principles of Criminal Law 4th ed (2011) at 217. See also: *S v SM* [2013] ZASCA 43; 2013 (2) SACR 111 (SCA) para 37; *S v Notito* [2011] ZASCA 198 para 6.

prevented her from doing so. At times the appellant would offer to do so. This developed into a steady pattern. She also testified that she and the appellant had spoken about the complainant's mental condition and the reasons for her being at a special school.

[13] She testified that on one occasion when they were driving, the complainant indicated that she was experiencing discomfort in her genital area despite having taken a bath earlier that day. This the mother found strange since bathing during the day was not routine. When they got home, her mother applied ointment to the affected area of the complainant. The next day, when they were again in the motor, the complainant again complained about the condition in her genital area. Her mother then questioned the complainant who explained that it was the appellant who had inserted his finger into her vagina and, upon further probing, it emerged that he had engaged in sexual intercourse with her. The complainant's mother stated that when she confronted the appellant at the office he admitted guilt. It is, however, not clear from the record what he admitted guilt to.

[14] Thereafter she went to see an attorney and this culminated in charges being brought against the appellant. Much of her evidence entailed lengthy explanations about the complainant's abnormal mental condition and the unusual way she related to people. This was never disputed.

[15] The State also called a registered psychologist, Jakoba Petronella Barnard, who had drafted a report on her examination of the complainant and findings in December 1999, when the complainant was 16 years old. She sketched a brief history of the complainant's life. During the consultations she applied psychological tests, held conversations with the complainant and observed her behaviour. Her evaluation of the complainant was that she was intellectually seriously retarded and operated on a mental level of approximately eight and a half years old. This accorded with the results of the tests, consultations and observations of the complainant as well as with the information gained from her mother and her teacher.

[16] Barnard specifically stated that the complainant did not conduct herself as a 16 year-old in respect of her conversations and behaviour. Under cross-examination Barnard emphatically stated that any lay person would quickly detect that the complainant did not function at the level of an ordinary 15-16 year-old person. She conceded that a layman could place the complainant mentally between 12-14 years. When invited to extend the concession to 16 years, she did not and repeated that any lay person would realize that the complainant was functioning well below the level of a 16 year-old.

[17] Dr Paul Henry De Wet, a qualified and registered psychiatrist since 1991 and a specialist in forensic psychiatry was also called by the State. He heads the Forensic Psychiatry Unit at Weskoppies Hospital and runs a part-time private practice. He was called to testify about his findings after evaluating the complainant on the 11 January 2005, when she was 21 years old. His brief was to establish whether she could understand court proceedings and whether she could give informed consent. From reports he established that the complainant's birth was prefaced by a complicated pregnancy during which the foetus lost blood and that she had breathing complications resulting in convulsions immediately after birth. She consequently suffered brain damage. The developmental milestones like sitting, taking her first steps, speech and so forth were delayed and developed at a much later stage than would be expected in normal children.

[18] Because of her emotional and intellectual impairment, she had to receive primary school education in a special class. Her ability to socialize was therefore restricted and any normal person would immediately realize that the complainant suffered from an intellectual defect. In his assessment the complainant 'is not capable of understanding court proceedings and is unable to contribute meaningfully to the procedures.' Furthermore that the complainant 'is, secondary to her impaired intellectual functioning, not capable of giving informed consent'. Significantly these findings, in particular the latter, were never disputed.

[19] The State also called Ms Terblanche, the complainant's erstwhile teacher at Sonnestraal School, a school for moderately mentally challenged pupils with learning disabilities. She taught the complainant for two years at a level of standard two. The complainant was a weak pupil who would learn by way of becoming accustomed to what she was taught because it would have to be repeated many times. Ms Terblanche said that the complainant was not emotionally ready to indulge in sexual activity. Though the school did offer sex education, she could not say whether the complainant attended such lessons since it could only be attended with her mother's permission.

[20] The 63 year-old appellant testified in his own defence. In view of his admissions, it is not necessary to consider in detail the appellant's evidence, but only the material aspects thereof. The appellant has a short post matric qualification. He confirmed that the complainant and her mother had taken up residence in one of his houses in 1997. Later the complainant's mother started to work for him. Such work entailed her sometimes having to leave town and she would ask a neighbour in what appeared to be a complex where they lived to fetch the complainant from school. The appellant stated that he himself did so on many occasions. He explained that he had developed a reasonably comfortable relationship with the complainant and they used to converse in 'her way'. He did not think she was very bright.

[21] According to the appellant, the complainant would often playfully tickle him. This developed into a situation that he did the same to her, sometimes in front of her mother. He testified that on one occasion during September 1999, he had to go and attend to a problem in one of his houses. The complainant went with him. When they were in a bedroom in his house, she put her arm around his waist and a tickling episode between them occurred as a result of which, they landed on a bed. During this, he accidentally touched one of her breasts. He enquired from her if she minded and according to him, she said she did not, in fact liked it and that he could continue to do so. As he put it, one thing led to another and he then inserted his finger into her vagina and thereafter they engaged in sexual intercourse. He described the event as a mutual encounter and that she was an active participant. He described other similar incidents with her which occurred in the following months of October and November 1999. He emphasised that on

each occasion when he had sex with her, her vagina had become moist with natural bodily lubricant. He testified that he interpreted this and her conduct immediately prior to and during these episodes of sexual intercourse as consent.

[22] He further testified that as far as he was concerned, the complainant was not stupid but had an intelligence level from which he did not expect great intellectual achievement. Moreover he did have a conversation with her mother about her mental aptitude and why she went to a special school. He accepted that she needed special attention because she was not very bright. He however conceded that when he did bring her home, he had to dish up food for her and that he had handled her like a child. He also testified that during this period during which he had sexual intercourse with her, he was aware that she was 16 years old and that he saw her as a mere sex-object. In summary, his evidence regarding his defence to the charges is that she consented to his having intercourse with her and inserting his finger into her vagina.

[23] The trial court was correct in rejecting the appellant's contention that the complainant had consented to engage in these activities. He knew that she was backward with a mental age of far less than 16 years - her biological age in 1999. He knew that she was attending a special school for moderately mentally challenged children and had discussed this with her mother. He knew she had to be guided and he did so himself at times. Moreover the undisputed evidence of both Miss Barnard and Dr De Wet is that any ordinary person would soon realise that the complainant was mentally challenged. In particular Dr De Wet's undisputed finding that she was incapable of giving consent is overwhelming and proves that she was incapable of giving consent.

[24] In the circumstances the appellant's defence cannot be sustained since he must have known and therefore knew that she was incapable of giving the required consent. The State has proved his guilt on both counts beyond a reasonable doubt and the appeal falls to be dismissed.

[25] In the result:

The appeal is dismissed.

R Pillay

Judge of Appeal

Appearances:

For Appellant:	H F Klein (Heads of argument prepared by J J Strijdom SC) Instructed by: Rianie Strijdom Attorneys, Pretoria Symington & De Kok Attorneys, Bloemfontein
For Respondent:	J J Jacobs Instructed by: The Director of Public Prosecutions, Pretoria The Director of Public Prosecutions, Bloemfontein