

**CRIMINAL PROCEDURE**

Indecent assault: Elements of indecent assault - accused touched complainant's buttocks and embarked on the lowering down of her panties but move frustrated by complaint's holding on to the panties - *R V Abrahams* 1918 CPD 590 considered but not followed - *S v F e n 'n Ander* 1982(2) SA 580(T) followed.

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**IN THE HIGH COURT OF NAMIBIA**

In the matter between

**THE STATE**

versus

**NICOLAAS RUKERO**

**CORAM:** SILUNGWE, J

Heard on: 2000.02.14-16; 2000.04.03-04

Delivered on: 2000.05.02

**JUDGMENT:**

**SILUNGWE. J:** The accused, who is now aged about 25 years, has pleaded not guilty to an indictment which charges him with the crimes of rape and attempted rape. It is alleged, firstly, that on March 12, 1999, at Karasburg, he unlawfully and intentionally had sexual intercourse with Priscilla Skeyer, a 3 year old girl who was under the age of consent; and secondly, that he unlawfully and intentionally attempted to have sexual intercourse with Rebina Skeyer, a 13 year old girl. The second count has, however, been reduced to indecent assault (at the close of the case for the State).

The State is represented by Mrs Schultz while Miss Hamutenya appears for the accused,  
instructed by the Directorate of Legal Aid.

A total of 10 witnesses have testified, nine of whom on behalf of the State and one - the accused himself - on his own behalf. The following facts are not in dispute.

1. The accused and Imelda, the mother of Rebina and Priscilla (the complainants), are opposite door neighbours in Westerkim Location, Karasburg. Besides the complainants, Imelda lives with Elsa, her eldest daughter (aged 18 years) and Selma, her niece. Imelda's house is depicted in a photo plan (exhibit A) compiled by Detective Sergeant Blaauw.
2. The accused is Selma's boyfriend and often spends nights with her at Imelda's house.
3. The accused resides (as seemingly does his mother too) at the house of Stefanus which the complainants usually visit to play and to watch television.
4. In the evening of March 12, 1999, Imelda was with the complainants at Prilmoep's shebeen where she was having a nice time taking alcohol. As time ticked on, she permitted the accused, who happened to be there too, and whom she trusted, to take the complainants to her home.
5. There was a street light near Imelda's residence.
6. Rebina is a competent witness.

It is what allegedly transpired after their arrival at the complainants' home that is at issue.

According to Rebina, upon their entry into the house, they all lay down on a big bed to sleep: the accused was first, next in the middle was Rebina and then Priscilla, in ..... that order. Presently, the accused touched Rebina's upper part of her buttocks and then attempted to pull down her panties. Rebina screamed and frustrated him by holding on to the panties. When the accused put his hand over her mouth in an apparent move to prevent her from screaming, she bit the hand and thereby forced him to let go of her. The accused told her that she must not try to be funny. She then seized the opportunity and run out of the house.

Since Rebina was apprehensive as to what might befall Priscilla, she took a position at a window to watch the accused. With the aid of the street light, she saw the accused pull down his trousers, put his penis into Priscilla's vagina, lie on top of her and make upward and downward movements as Priscilla cried. When Rebina opened the door, obviously to intervene, the accused got up, pulled up his trousers and went out of the room without saying a word. Priscilla continued crying. Rebina observed blood stains on a blanket -exhibit 1- on which Priscilla was lying; as well as on her (Priscilla's) body suit. Rebina "washed" Priscilla using a face towel. Thereafter both fell asleep.

On the following day, Rebina narrated the previous night's incidents to her sister, Elsa, as well as to her mother and to the accused's girl friend. She subsequently reported the matter to her aunt, Carolyne Skeyer, who saw the visible blood spots on the blanket (exhibit 1) and kept the blanket under her custody. Somehow, Priscilla's body suit has not been accounted for as it could not be traced. Later on, Rebina made a statement to the police.

Imelda, Carolyne and Elsa all corroborate Rebina. Imelda trusted the accused with her children. When she returned home on March 12, 1999, at midnight, she found the children asleep. The following day, she was extremely shocked to receive a report from Rebina about what the accused had allegedly done to her and to Priscilla. Imelda summoned the accused's mother to whom she recounted the alleged incidents and then showed her Priscilla's vagina which was red and surrounded with abrasions. When Imelda cleaned Priscilla's private parts with a wet cloth, the latter felt pain and exclaimed. Priscilla equally felt pain when she passed water. This prompted Imelda to administer to the infant some painkillers.

As there was no food at home on the following Monday (the 15<sup>th</sup>), Imelda went to work. It wasn't until Tuesday March 16 that she reported the matter to the police and took Priscilla to a medical doctor for attention.

She explains that the matter was only reported to the police on March 16, 1999, because of the shock she experienced when she received the report. She testifies that when the accused came to the shebeen, he was drunk and so was she.

My observation of Priscilla is that she looks much younger than her age and that she is being carried in arms.

Carolyne's testimony is that after Church Service on Sunday (the 14<sup>th</sup>), she received a report from Rebina. She then visited the scene of crime with her husband and there saw a blood stained blanket (exhibit 1) which she took into her custody and decided that this was a police case. She later handed over the blanket to Constable Bock. She was apparently present when the complainants were taken to the police on the following Tuesday.

Elsa's account is that when she returned home (from elsewhere) at about 23h00, Rebina told her what the accused had allegedly done to her and to Priscilla. Elsa was present when Rebina made the report to their mother on the following day. Rebina showed Priscilla's vagina to the mother and Elsa observed that it was red. The blanket (exhibit 1) is usually on the big bed on which all three sisters sleep. Their aunt took away the blanket and kept it under her custody.

On March 16, 1999, Dr Thelma Britz examined Priscilla and noticed that the patient was very emotional. She observed that Priscilla's introitus was very red which led her to conclude that for such inflammation to have taken place, there must have been considerable amount of force applied. She further observed that Priscilla's hymen was torn and that because of that condition, there must have been penetration. In her opinion, blood could only have come from the torn hymen.

The Doctor examined Priscilla four days after the alleged incident and found no blood on her. She testifies that vaginal tissue heals very fast and, therefore, bruising of the vaginal tissue can disappear within 4 days; it takes 24 - 48 hours to disappear. In

contrast, however, bruising of the muscle may take 5 - 7 days to disappear.

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She examined the accused as well and found that his penis was normal. She asserts in cross-examination that it is definitely possible for the accused at 23 years of age to have had sexual intercourse with a 3 year old girl.

Mr Elmo Enrico Thomas is an expert forensic analyst at the National Forensic Science Institute of Namibia. On March 23, 1999, he received from Detective Inspector Eiman a rape kit (in respect of Priscilla); and a rape case kit (in respect of the accused). Also received on March 30, 1999, was a blanket (exhibit 1). His analysis of the exhibits yielded the following results:

6. no spermatozoa were microscopically observed on the vaginal smears;
7. no semen was chemically detected on the vaginal swabs;
8. blood detected on the blanket was immunologically characterized as being of human origin, and originated from an ABO blood group "O" person;
9. the blood sample from the complainant was found to be an ABO blood group "O", and her saliva characterized her as a non-secretor (that is, a person who has ABO substances in his/her body fluids, such as semen, saliva, *et cetra*; a non-secretor is the opposite of a secretor);
10. the blood sample from the accused was found to be an ABO blood group "B", and his saliva characterized him as a non-secretor;
11. this means that the blood chemically detected on the blanket could have come from the complainant.

Mr Thomas testifies that samples were taken about 72 hours after the alleged incident and that no spermatozoa can be detected after 48 hours.

The accused's version is that on the date in question, he shared with a friend of his two bottles of dry wine each of which was 350 milligrams; he expressly states that he consumed one bottle of wine only that evening and that although he was drunk, he was not that drunk. In other words, he was not so drunk as not to know what was taking place.

The accused claims that he took the complainants to their mother's home between 23h00 and 24h00 and that although there was a street light, there was no light inside the house. Rebina placed Priscilla on one of two beds in their room and walked out. He lay down on the other bed and cannot say when Rebina returned to the room. When Rebina awakened him, he could not tell where Priscilla was lying as it was dark; he was so drunk he could not remember. Rebina then told him that he must go to his home and, as he did so, he still could not see Priscilla. All that he can remember is that he played with the complainants. He did not try to pull down Rebina's panties and can't remember whether she screamed. He denies that she bit his hand. He further denies that he ever lay on top of Priscilla neither did he open his trousers. He denies that he had sexual intercourse with Priscilla. He maintains that when he got up, Priscilla was not in the room and he could not tell where she was. He did not see any blanket with blood spots thereon.

The accused states that when he returned to the room on the second occasion, he neither found Rebina nor Priscilla whereupon he thought that they might have gone to his home which was opposite theirs. He denies that he touched Rebina's panties or that he told her not to be funny.

In the afternoon of the following day, the accused's girl friend allegedly told him that he had been rude/ungodly to Priscilla. Thereafter, the mother of the complainants fetched him from his friend's house. On the following Tuesday, the police arrested him for rape. Dr Britz

examined him on the upper part of the body up to the waist; she examined his legs too but not his private parts.

Under cross-examination, the accused avers, *inter alia*, that he decided to remain with the children until their mother's return home. He did not sleep with the children in their room but rather he went and slept in a spare room depicted in photo 1, point "A" of the photo plan (exhibit A). That spare room was in the middle of the house, it was in fact a kitchen with one small bed. Even when the street light is on, that room remains dark inside. But the street light illuminates other rooms of the house. Although he has briefed his legal representative about what happened during the night in question, he has not told her about the middle/kitchen room!

The accused's demeanour during cross-examination has betrayed him a great deal. He has sweated, been jittery and exhibited much discomfort when asked what he allegedly did to the complainants in their room as well as about his story concerning the middle room. He maintains that he did nothing to the children and that he is not a liar. \_.

He, however, concedes in re-examination that some of the things he has told the Court are not true, for instance, the story about the middle/kitchen room is untrue. He admits that he lay down on bed in the same room with the complainants.

It is obvious that the only direct evidence for the State comes from Rebina who implicates the accused in respect of both crimes of rape and indecent assault. I find her to be an impressive, forthright and credible witness. I accept her evidence that although the street light at her residence automatically switches on and off at certain intervals, it was on throughout the period that the accused remained on the premises, and that with the aid of that light, she was able to see what the accused did to Priscilla at the material time. The accused himself testifies that the street light illuminates all other rooms with the exception of the middle/kitchen room, which confirms Rebina's evidence in so far as this relates to what is



clearly the children's bedroom. I believe her testimony that she witnessed the accused having sexual intercourse with Priscilla and that the latter was crying in agony, even after her intervention which led the accused to flee the room. Rebina, Elsa and Imelda, their mother, all observed redness in Priscilla's vagina which is confirmed by the medical evidence of Dr Britz who found Priscilla's introitus very red. In the doctor's opinion, considerable force must have been applied to cause such inflammation. Priscilla's torn hymen is evidence that penetration must have occurred. On the evidence of Mr Thomas, which I believe, I find that the blood stains on the exhibited blanket came from Priscilla which, according to Dr Britz, could only have come from her ruptured hymen.

I am satisfied that all State witnesses are fundamentally credible and reliable.

With regard to the accused's version, I find that his explanation can not reasonably possibly be true. In point of fact, he has lied through his teeth as is exemplified not only by his own admission but also by his demeanour when subjected to cross-examination. Further illustrations include the following: in examination-in-chief, he says that he was so drunk that he couldn't remember but in cross-examination he concedes that he was drunk but not so drunk, that is to say, he was able to appreciate what he was doing; in examination-in-chief, he denies having told Rebina that she shouldn't be funny but concedes under cross-examination that he said to her: "Don't be funny like that" or words to that effect; he testifies in examination-in-chief that the complainants' room was dark but admits in cross-examination that, with the exception of the middle room, all other rooms are illuminated by the nearby street light; and he denies that Dr Britz examined his private parts but the doctor's evidence is to the contrary, she testifies that she found that his penis was normal.

In so far as the rape charge is concerned, Rebina is not a single witness since her testimony is supported not only by her mother and her elder sister but also by Dr Britz and Mr Thomas. I

am satisfied that all the essential elements of the crime have been established and that the State has discharged its burden of proof beyond a reasonable doubt.

As regards the crime of indecent assault, Rebina is a single witness and, as such, her testimony needs to be approached with caution: *S v Webber* 1971(3) SA 754 H. As previously stated, Rebina is a competent and credible witness. Section 208 of the Criminal Procedure Act No. 51 of 1977 provides that an accused person may be convicted of any offence on the evidence of any single competent witness and, I would add that such witness must be credible. See *S v Sauls & others* 1981(3)SA 172 at 173 A-B; and *S v Kubeka* 1982(1) SA 534 (W) at 536 D-E.

I believe Rebina's testimony that the accused touched her on the buttocks and then tried to pull down her panties but that she prevented him from succeeding by holding on to the panties; and that when she screamed, he sealed her mouth with his hand which she bit before escaping to safety. I reject as false the accused's version that he slapped Rebina on the buttocks.

It is indisputable that the accused assaulted Rebina; the only issue for determination is whether the assault amounted to indecent assault. Ms Hamutenya contends that it did not as indecent assault involves touching erogenous parts of the victim's body and that such parts do not include buttocks. She relies, *inter alia*, on a passage contained in the Principles of Criminal Law, 2<sup>nd</sup> edition, by Jonathan Burchell and John Milton which reads (at page 505):

*"...it must follow that an act or gesture, not itself indecent but which creates the apprehension that an indecency is about to be perpetrated on the person of the victim, must amount to an assault. In other words, the test is not the nature of the act or gesture of the accused but the message that act or gesture conveyed to the victim. Of course, if the act of the accused does not convey this message to the victim, the crime is not committed, however indecent the intent of the accused.*

*...X must intend not only to assault Y, but to assault Y indecently. If X intends to assault Y by hitting him in the stomach but by mistake he handles Y's private parts, he is guilty of common - not indecent - assault."*

She also relies on *S v F en 'n Ander 1982(2) SA. 580(T)* which is therein cited and preferred by the learned authors. As I see it, neither the passage nor *S v F en 'n Ander* is supportive of the accused's case.

I would like to stress that the passage above relates to an intentional (as opposed to a mistaken or even an accidental) act or gesture which, by itself, is not indecent but which inspires the apprehension in the mind of the victim that an indecency is about to be committed. There is no gainsaying that there may be an act or gesture which is in itself indecent, such as touching or fondling the victim's private parts or any erogenous part of her body. It is trite that indecent assault is not restricted to female victims only, but it affects male victims as well.

Following the approach in *S v F en 'n Ander, supra*, the crime of indecent assault consists in an unlawful and intentional assault which is, or is intended to be, indecent. In that case, Akerman, J., remarked that a touching which is not indecent in itself may nevertheless found a conviction for indecent assault if the accused's intention was to touch the victim indecently, and such intention was conveyed to the victim. In this connection, he further observed, as is reported in the *South African Criminal Law and*

*Procedure Vol. II, Common Law Crimes, 3<sup>rd</sup> edition, by JRL Milton, at page 474 that;*

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*"regard can and must be had to the expressed intention of X ... as conveyed to the complainant (whether by words, conduct or by implication) to determine whether an assault constitutes an indecent assault.*

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*In my opinion that particular part of the complainant's body against which the assault is aimed or directed cannot be decisive for the determination of the 'indecent' of the assault. Clearly, where it is aimed at the 'victim's private parts or other 'erotic' parts of the body' the assault will be indecent... The opposite is not necessarily always true, viz that the assault will not be indecent merely because the assault is not directed at such parts..."*

Milton reasons that, on this approach, merely to touch a person on the hand or arm will constitute an indecent assault if the circumstances convey to the victim that the object of the accused is to achieve a touching of the erogenous parts and quotes *Ackermann, J's observations at 585G* which read:

*"Where, for instance, an appellant obtains sexual gratification or is sexually stimulated by fondling a part of the complainant's body which is not normally considered to be an 'erotic' area and during such fondling conveys to the complainant that he is obtaining sexual gratification or is enjoying the stimulation and that is the motive behind the fondling would in my opinion constitute indecent assault."*

In *S v Muvhaki* 1985(4) SA 317(Z) where the accused found the complainant seated, caught hold of her leg and lifted it high, thereby exposing her private parts, he was convicted of indecent assault in a magistrate's court and the conviction was confirmed on review by Reynolds, J. and Smith, J. In an earlier case of *R v M* 1947(4) SA 489(N), the accused had been charged with indecent assault in that he had attempted to lift up the complainant's dress and, as he lay on her, he was interrupted by the appearance on the scene of another woman, with the result that he fled but was apprehended shortly thereafter. He was convicted of indecent assault in a magistrate's court. When the case came up for automatic review, Milne, A.J. remarked, *inter alia*, (Harthorn J. P. concurring) at 493 (middle paragraph):

*"...an attempt by a man to lift a woman's clothing when it is not done with her consent, express or implied, or reasonably inferred or otherwise plainly with some non-sexual motive, seems to me to have all the elements of an indecent assault;..."*

It seems that the reference to "*motive*" in the preceding passages above should be understood as meaning "*intention*."

On the authorities, it is clear that indecent assault is committed (1) where the act is itself indecent, such as the accused's handling of the victim's private parts or other erogenous parts of the body; or (2) where the accused's act or gesture is not itself indecent but which creates the apprehension (or is deemed to do so in the case of an infant or imbecile victim)

that an indecency is about to be perpetrated on the victim; this constitutes an implied threat of indecent force.

It is trite that the crime of assault takes two forms: (1) the actual application of force and (2) the inspiring of application of immediate force. Although *R v Abrahams 1918 CPD 590* was followed for a long time, it no longer is good law for the simple reason that it overlooked the second form of assault but this shortcoming has since been redressed by *S v Fen 'n Ander, supra*.

In the instant case, it is significant to note that the accused did not only touch Rebina's buttocks but he also attempted to pull down her knickers - conduct that was obviously aimed at exposing her private parts for his own sexual gratification. In other words, touching of the complainant's buttocks and the attempt to pull down the knickers were directed towards satisfying the accused's sexual urges. Had the complainant not succeeded in fleeing to safety, she would in all probability have been raped, which was evidently the accused's dominant object. This is exemplified by the tragedy and trauma that at once befell Priscilla. As the accused's intention was quite obviously to attack Rebina in an indecent manner, I am satisfied that his conduct met all the elements of the offense of indecent assault.

In the result, I am satisfied that this count too has been proved by the State beyond a reasonable doubt.



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SILUNGWE, J.

In conclusion, the accused is found guilty of having raped Priscilla Skeyer and of having indecently assaulted Rebina Skeyer and he is accordingly convicted on both counts.

**ON BEHALF OF THE STATE**

**Instructed by:**

**ADV S SCHULTZ**

**Office of the Prosecutor-General**

**ON BEHALF OF THE DEFENSE**

**Instructed by:**

**MISS L HAMUTENYA**

**Director of Legal Aid**