

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION : MAKHANDA

CASE NO.: 92/2021

In the matter between:

SINDILE HABANA

Appellant

and

THE STATE

Respondent

APPEAL JUDGMENT

GRIFFITHS, J.:

[1] The appellant in this matter was convicted of rape as defined in the Criminal Law (Sexual Offences and Related Matters) Amendment Act¹ by the Regional Court sitting at Somerset East and was sentenced to life imprisonment. He has appealed against both his conviction and sentence.

[2] He was charged with unlawfully and intentionally committing acts of sexual penetration with the complainant on diverse occasions between February and June, 2016. Despite initially pleading guilty to the charge, the appellant, on the advice of his lawyer, changed that to one of not guilty.

[3] The state relied in the evidence of three witnesses, these being the complainant, one J[...], his mother, and a nursing sister. The complainant was at the

¹ Act 32 of 2007

time of the commission of the offences 12 years of age. He testified that he, and his younger brothers, lived in a farm in the vicinity of where the appellant lived. The appellant was a domestic worker on the farm. During or about February 2016, he and his younger brothers were visiting the appellant as they apparently did on occasion. Although it is unclear on his evidence, it appears that they did this every so often and at some stages would sleep over with him. It was common cause that the appellant was at that time 19 years of age.

[4] Although it is not clear on the complainant's evidence, it seems that on one of these occasions he was sleeping on the bed with the appellant when the appellant indicated that they should have sex with one another. They apparently undressed each other and kissed after which the appellant asked him to insert his penis into the appellant's anus. The complainant added that the appellant had also indicated that he would give the complainant biscuits and some money for doing this. They apparently carried out this act without the use of a condom. Over a period of time, they repeated this sequence of events and the appellant would give him biscuits and, at the end of the month, some money. It also appears from his evidence that he came to enjoy having intercourse with the appellant which it seems, on every occasion, involved the complainant inserting his penis into the anus of the appellant. The complainant also testified that, prior to these events, he had not indulged in sexual intercourse of any kind, but that he was attracted to women, not men. Ultimately, it was ascertained as confirmed by his mother and the nursing sister, that he had contracted HIV. Shortly before the complainant was tested positive, the appellant also underwent a test for HIV but tested negative. The nursing sister however testified that there was a window period and that he ought to have come back three months later for a second test to ascertain whether he was indeed clear. The appellant did not return for the second test. However, it was later ascertained that the appellant indeed suffered from HIV.

[5] The appellant on the other hand, whilst agreeing that indeed they had had sex in the manner described on several occasions, maintained that the initial approach had come from the complainant himself. They had been sleeping together on the bed, had started kissing each other, and the complainant had thereafter voluntarily inserted his penis into the appellant's anus. The appellant maintained that this was

not fully sexually satisfying for him because the complainant's penis was small and not what he was used to. He did concede that he had supplied the complainant with biscuits, had given him money and had allowed him to use his cell phone to watch movies. He also conceded that they had not used a condom when indulging in sexual intercourse and that when he had had sex with his partner over the weekends, he had not used a condom. However, he maintained that during the period that he and the complainant indulged in sexual intercourse he had not been aware of his HIV status.

[6] An aspect of the case which was not pursued at all during the evidence of the complainant, or the evidence of the appellant, related to the fact that the appellant was apparently gay. During the evidence there was reference from both witnesses to the fact that the appellant wore dresses, and women's panties. The only reasonable inference from all this evidence was that he was not only gay, but that he acted in many respects as though he were a female, and not a male, which, it was common cause, he was. In my view, this was a significant aspect of the evidence which ought to have been explored more fully both with the complainant and with the appellant.

[7] In convicting the appellant, the magistrate, in relying on the case of *S v SM*², concluded in effect that this case was similar in that, as I understand the reasoning, the appellant was in a position of *loco parentis* to the complainant and thus subject to the same reasoning as set out in that case which involved an extended period of grooming by a stepfather of his stepdaughter, ultimately leading to sexual acts and finally sexual intercourse on a number of occasions. The court in *SM*'s case relied on an earlier case³ in which Satchwell J described the concept of grooming within a close family unit.

[8] In my view, this case differs substantially from both *SM*'s case and that of *M*. Those cases clearly involved sexual grooming over some time within a relatively close family unit. This was described more fully by Satchwell J when she said:

² 2013 (2) SACR 111 (SCA)

³ *S v M* 2007 (2) SACR 60 (W) at paragraphs 35 – 40.

“[36] However, writings on research into the 'grooming process' assist in understanding how repeated physical or even sexual contact between the accused and one of his stepdaughters could culminate in rape. South African courts have interpreted the absence of evidence of undue influence, threats or promises to persuade the child to allow physical interaction as mitigating. Our courts have not always had the benefit of information on this grooming process and tend to look for violence in the normal sense of the word or undue influence on the part of the perpetrator to persuade victims to 'allow' him to start touching or fondling them.

[37] It has been explained that the sex offender tends to rely on befriending a child and gaining a hold over him or her, thus allowing the offender to control the victim. Grooming is difficult to define, but it is explained as an ongoing process aimed at the child accepting sexual activities. 'Grooming is a transient feature that is difficult to capture and virtually impossible to decide when it begins and ends. What is more certain is that grooming is neither new, nor restricted to online behaviour. It is generally seen as a cycle of abuse, and can include for example befriending a potential victim to allow the child to acquiesce to sexual activity.' The grooming aspect involves an aspect of deceptive trust created by the offender and manipulation of the child by the adult. It is the fact that one of the parties to the relationship is in such a position of power over the other that renders such sexual activity morally wrong and punishable within the realms of the criminal law.”

[9] And later:

“[39] The accused occupied a position of power in relation to his stepdaughter. She was vulnerable to his seniority in age and familial standing, his affinity with her mother who was the only other adult in the home, his role as *paterfamilias* in the home and family. This was appreciated in *S v Jansen* 1999 (2) SACR 368 (C) where it was said at C 378g *h* that '(r)ape of a child is an appalling and perverse abuse of male power'; in *S v Swart* 2000 (2) SACR 566 (SCA) where reference is made to how the rapist 'exploited to the full the position of power which he held over them'; in *S v G*

2004 (2) SACR 296 (W) where the Court commented at 301c d, 'She was raped in the safety of her own home by a person towards whom she was affectionate, and from whom she was entitled to expect protection. The accused has violated the trust which the complainant and her mother placed in him'; in *S v P* 2000 (2) SA 656 (SCA) at 660G where the Court commented how a grandfather had 'violated that love and abused that position of trust'."

[10] Turning to the facts of this matter, it seems clear from the record that the complainant was under some stress in giving evidence, which was exemplified by the fact that at one stage he began crying. He seemed hesitant to give much detail and had to be pressed by the prosecutor to provide anything akin to a full exposition of what had happened. This is by no means to blame the complainant, who was only 12 years old when this occurred and 16 when he testified. However, the distinct impression one gains on a reading of his evidence is that he suffered from a degree of guilt for having indulged in what he referred to as these "*dirty*" things, but more so because he realized that these actions had resulted in his contracting HIV. It must also be remembered that he was a single child witness to these events. As against this background, the evidence that the appellant was both gay, and apparently a transgender of sorts who regarded himself more as a woman than a man, a person who wore dresses over women's panties, becomes of importance. A reading of the evidence of both the complainant and that of the appellant, reveals that there was in all likelihood a degree of attraction by the complainant to the "womanly" or feminine appellant. In this regard the magistrate held that the fact that the complainant testified to being more interested in women than men was proof that he was unlikely to have consented to sex with a man. However, the question arises (which was never properly dealt with in evidence) as to whether the appellant was indeed a "man" in the sense which the magistrate spoke of.

[11] In the circumstances, was it correct for the magistrate to have simply found that the complainant's version, whatever it indeed was, was entirely correct and that the appellant's version was to be rejected? Whilst it may well have been that the appellant was overstating the facts when he said that the complainant had in effect seduced him, in my view there was no real evidence to gainsay the appellant's

testimony to the effect that what occurred on the first occasion, and indeed subsequently, was consensual. The net effect of the complainant's evidence was that they began kissing one another, undressed each other, and the appellant had asked him to insert his penis into the appellant's anus. It seems to me that the offer of biscuits and money to some extent followed these events and were consequent thereupon, not the inducement thereto. Certainly, in my view, on all the evidence this is reasonably possible.

[12] Furthermore, on the evidence as presented it can never be said that there had been a grooming process for a period of time prior to the first act of intercourse. The evidence from both sides was that the complainant and the appellant were simply friends. There was no evidence of a series of inducements over time from a person in a position of power over the complainant.

[13] I am accordingly of the view that the magistrate misdirected herself in the manner in which she assessed the evidence of both the complainant and the appellant. This being so, I am of the view that the appeal against the rape conviction should succeed⁴. However, it is quite clear as conceded by the appellant in evidence that he is guilty of the alternative of what used to be known as "Statutory Rape" pursuant to the provisions of section 15 of Act 32 of 2007 and that a conviction under this section as a competent verdict, would be appropriate. In this regard counsel for the appellant sought to argue that should this court conclude "*that the appellant did not cause the act of penetration, then no act of sexual penetration was committed...*" In pursuing this argument, he contended that once this conclusion was reached, the appellant cannot be convicted of the competent verdict under section 15. In my view, this argument is misplaced. Section 15 of the Act reads follows:

**"15 Acts of consensual sexual penetration with certain children
(statutory rape)"**

⁴ During argument the question was raised as to whether or not, on the facts of this matter, the acts of penetration constituted rape as defined in the Act. I am satisfied, having received further heads of argument from counsel in this regard, that such acts did indeed constitute rape as defined. See in this regard: *S v Wentzel* 2020 JDR 2254 (WCC) at paragraphs 37 – 40; Snyman: Criminal Law, sixth edition at pages 349 – 351.

(1) A person ('A') who commits an act of sexual penetration with a child ('B') who is 12 years of age or older but under the age of 16 years is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child, unless A, at the time of the alleged commission of such an act, was

(a) 12 years of age or older but under the age of 16 years; ...”

“*Sexual penetration*” is defined as follows:

“**sexual penetration**’ includes any act which causes penetration to any extent whatsoever by

the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;

(a)

(b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or

(c) the genital organs of an animal, into or beyond the mouth of another person and **sexually penetrates**’ has a corresponding meaning;”

[14] Should counsel’s argument in this regard be accepted, then the definition of sexual penetration would have to be interpreted to be a complete and definitive definition of sexual penetration for the purposes of the Act. It was clearly never intended to be. The words “*includes any act*” and logic dictate that the purpose of this section is to include certain further acts of penetration which might not have, in the ordinary course, been seen to have been regarded as sexual penetration⁵. It was never intended to exclude other forms of sexual penetration, consensual or not.

⁵ See *Wentzel* (supra) at paragraphs 42 – 44.

[15] As regards sentence, it is so that the appellant was a first offender and was in custody awaiting trial for about a year and 9 months. He was also relatively youthful, being 19 at the time of the commission of the offence. He was unmarried with no children and was employed as a farm worker earning R800 every fortnight. He is also HIV positive. On the other hand, whilst it was common cause that during the period that he and the complainant indulged in such sexual encounters he was unaware that he had contracted HIV, the simple fact is that he must have been aware of the possibility that he may have contracted it because he was gay and during that period he had been sleeping with other men without the use of condoms. Despite his lack of education (having only achieved standard 5) it is simply untenable in this day and age that any person would not be aware of the dangers of unprotected sex. He must have foreseen the distinct possibility that he may have contracted the disease, and the possibility that he might infect the complainant. This, to my mind, is a clear aggravating factor as is the fact that he persistently carried out these acts of intercourse with a 12-year-old over an extended period. This is compounded by the fact that he was the older and more mature party to these acts and had a responsibility to prevent this happening in the first place, or, at the very least, after it had occurred on the first occasion, to discourage its repetition. In the circumstances, I am of the view that a sentence of 12 years imprisonment would be apposite.

[16] Accordingly, the following order will issue:

1. The appeal against both the conviction and sentence is upheld.

2. The order of the court *a quo* is substituted with the following:

“(a) The accused is found not guilty of rape but is convicted of contravening section 15(1)(a) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act (Act 32 of 2007);

(b) The accused is sentenced to twelve (12) years imprisonment.”

R E GRIFFITHS
JUDGE OF THE HIGH COURT

MAJIKI, J. : I agree

JUDGE OF THE HIGH COURT

HEARD ON : 04 MAY 2022
DELIVERED ON ; 16 AUGUST 2022

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