

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: A.108/2020

29/3/2021

In the matter between:

S[...] D[...]

Appellant

and

THE STATE

Respondent

JUDGMENT

D S FOURIE, J:

[1] During November 2019 the appellant, a 23 year old male, was convicted on a charge of raping a female of 14 years old (contravening section 3 of the Criminal Law Amendment Act, No 32 of 2007, read with the provisions of section 51(1) of the Criminal Law Amendment Act, No 105 of 1997). On 27 November 2019 the appellant was sentenced to 20 years imprisonment after the Trial Court had come to the conclusion that there were substantial and compelling circumstances justifying the imposition of a lesser sentence than the prescribed minimum sentence of life imprisonment. The appeal is against conviction only.

[2] It is common cause that the appellant and the complainant had sexual intercourse on 27 August 2016. According to the appellant he was informed by the complainant that on the day in question she was already 19 years old and that she had consented to sexual intercourse. This defence was denied

by the complainant who testified that the appellant had forcefully undressed her whereafter she was raped.

THE EVIDENCE

[3] The complainant testified that during August 2016 she was still at school in Grade 7. She only knew the appellant *"by sight "* as she had seen him at a shop, known as Mike's Place. She later explained that she also knew his name as she could hear other people calling him by that name.

[4] She testified in great detail how she was raped. The appellant had first strangled her, whereafter he was *"biting my ears"*. After she had been raped, the appellant offered to pay her R200.00 *"to go to the doctor"*.

[5] In cross-examination she conceded that on the night in question at approximately 21h00, before the alleged rape, she was sitting with a group of men around a fire in the vicinity of Mike's Shop waiting for a friend by the name of N[...]. It was put to her that according to her statement made to the police, the appellant had during the rape, *"hit me with fists on my face for several times and I did not count how many times"*. In court she denied that she was ever hit with fists in her face.

[6] It was also put to her that according to paragraph 6 of her statement the appellant had told her *"that he loves me"*. When questioned about this statement, she gave the following explanation:

"... he did say that he loves me on our way as he was taking me to Collin's house and I asked him how do you say you love me whereas you have a wife and kids".

[7] The complainant's friend, D[...] also testified. She was also 14 years old on the night in question. She testified that the appellant was known to her as he *"used to stay with Z[...]'s (complainant) sister; he was in a love relationship with*

Z[...]'s sister ". Later during the night she came across the complainant who was crying and said that she had been raped by the appellant. She also testified to scratch marks which she had seen on the side of the complainant's neck and that these scratch marks were still visible when the police arrived on the day after the incident.

[8] A medico-legal examination report (J88) was handed in by agreement as an exhibit. According to this document the complainant was examined the day after she had allegedly been raped. It appears that she was examined by a medical nurse with a diploma qualification in general nursing. The following information appears on this document:

- (a) According to the general examination, no obvious injuries were noted;
- (b) According to the gynaecological examination, no injuries were noted, save for multiple clefts, but no fresh tears;
- (c) In the "*history section* " it is indicated that the complainant had already been using contraceptives and that the date of "*last intercourse with consent*" was 21 August 2016, a few days before she was allegedly raped;
- (d) Her general body built was described as "*average*" with a height of 1,61 metres and a mass of 47.7 kg.

[9] The appellant also testified. According to him he saw the complainant for the first time on the Friday preceding the incident. The complainant, the appellant and his friends were seated together and drinking on the Friday. They agreed to meet each other at Mike's Shop the following day. After they met as agreed, they proceeded to Collin's place where they slept together. He denied that he had raped her or that he had applied force as was alleged by the complainant. After they had slept together, the complainant demanded R300.00 from him. He was unable to pay her.

[10] In cross-examination he conceded that on the day in question he and the complainant were not involved in a relationship. According to him the complainant told him that she was 19 years of age. It was then put to him by the Prosecutor that the complainant *"still looked young even today ... I can imagine in 2016 when she was 14 years ... how did she look "*. The appellant replied by saying: *"No comments "*.

THE CONVICTION

[11] When considering the evidence one should take into account that the complainant was a single witness and that she contradicted herself. Not all contradictions will lead to the rejection of a witness' evidence. However, in this case the complainant testified that she was never hit in the face with fists , whereas in her police statement she did give such an explanation. Furthermore , according to the evidence of the second State witness there were scratch marks on the neck of the complainant. However, no injuries were noted the following day when the complainant was medically examined. According to the medical report it also appears that at the age of 14 years the complainant was already sexually active , even before she was allegedly raped.

[12] These facts and circumstances should be taken into account when considering the appellant's defence. It is not necessary for a Court to believe the version of an accused. A Court is bound to acquit an accused if there exists a reasonable possibility that his evidence may be true (*S v Kubeka* 1982 (1) SA 534 (W) at 537G). However, it is also important to bear in mind that a decision to acquit or to convict should take into account all the evidence.

[13] Furthermore, bearing in mind the advantages which a Trial Court has of seeing, hearing and appraising a witness , the powers of a Court of Appeal to interfere with the findings of fact of a Trial Court are limited (*S v Francis* 1991 (1) SACR 198 (A) at 204c-e). In the absence of a demonstrable and material misdirection by the Trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows it to be clearly

wrong (*S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645). In order to succeed on appeal, the appellant must therefore convince the Court of Appeal on adequate grounds that the Trial Court was wrong in either accepting or rejecting the witness' evidence (*S v Latha and Another* 1994 (1) SACR 447 (A) at 453).

[14] In his judgment the Magistrate "*noted a few contradictions in the State's case*". He then concluded that these contradictions are not detrimental "*as the intercourse is not denied by the accused*". However, the issue is not intercourse, but whether or not such intercourse took place by consent. The Trial Court then pointed out that the witness D[...] corroborated the evidence of the complainant. Shortly after the incident D[...] met the complainant who was crying with her trouser on her knees and that the appellant offered to pay the complainant an amount of R200.00 after he had been confronted with the alleged rape. It was also emphasised that D[...] corroborated the evidence of the complainant that she had been strangled by the appellant, because D[...] saw visible scratch marks on the complainant's neck.

[15] The evidence of the complainant, as well as the evidence corroborating her version, should not be considered in isolation. When applying the test of reasonable doubt it should be borne in mind that a decision to acquit or to convict should take into account all the evidence, not only that of the state, but also that of the accused. In acquitting the accused, it is not necessary to first reject the State's case. Even where the accused's explanation is improbable, the Court is not entitled to convict, unless it is satisfied that the explanation of the accused is false beyond a reasonable doubt. (*R v Difford* 1937 AD 370 at 373).

[16] When considering the evidence corroborating that of the complainant, it seems that the Magistrate has failed to take the following into account:

(a) the appellant's offer to pay the complainant R200.00 was to enable her "*to go to the doctor*". If he had indeed raped her, he would not encourage her

to go and see a doctor, unless they had consensual intercourse and he knew that she had suffered no injuries;

(b) the medical examination of the complainant which took place the day after the alleged rape, indicated no injuries, neither according to- the general examination, nor the gynaecological examination;

(c) if she was hit several times with fists in the face and a scratch mark was visible on her neck, one would have expected the medical examiner to have noticed at least some kind of injuries during the examination.

[17] The absence of any injuries is an important factor to be taken into account. It does not corroborate the complainant's version, but it may support the appellant's defence. The appellant's version is that the complainant had consented to sexual intercourse. Applying the test in criminal cases properly, there is no reason as to why the appellant's version should be rejected as being false. According to the medico-legal report the complainant was already sexually active prior to this incident. There are various contradictions in the State's case to be taken into account. The objective evidence indicates that the complainant suffered no obvious injuries. The appellant was prepared to pay R200.00 for her to go and see a doctor after he was accused of raping the complainant.

[18] In my view the Magistrate failed, not only to take into account all the evidence, but also to apply the objective test in criminal cases properly. It also appears that the evidence of the appellant was rejected without taking into account that the accused bears no onus. Taking into account the evidence referred to above, I am of the view the Trial Court was wrong in rejecting the appellant's evidence as false. For the reasons as set out above, I am of the view that the Magistrate has misdirected himself by not taking into account that there is a reasonable possibility that the evidence of the appellant may be true. As a result the appellant's conviction and sentence should be set aside.

[19] However, this is not the end of this matter. It was submitted by the appellant's counsel that in the event that his defence of consensual sexual intercourse is upheld, the appellant would be guilty of contravening section 15(1) of Act 32 of 2007 which is a competent verdict on a charge of rape in terms of section 261(1)(a) of the Criminal Procedure Act, No 51 of 1977. Counsel for the State supported this submission.

[20] Section 15(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 provides as follows:

' 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".

[21] The Criminal Law Amendment Act No 105 of 1997 does not provide for any minimum sentence where a person is convicted of contravening section 15(1) of Act 32 of 2007. However, section 56A of the same Act provides that a Court shall, if a person has been convicted of an offence in terms of this Act and a penalty is not prescribed in respect of that offence, impose a sentence as provided for in section 276 of the Criminal Procedure Act, No 51 of 1977. Section 276 of the Criminal Procedure Act provides for a variety of sentences, including imprisonment.

[22] According to the appellant he was told by the complainant that she was already 19 years of age, whereas in fact she was only 14 years old. This is a difference of 5 years in age. According to the medico-legal report (J88) it appears that the examiner was aware that the complainant was only 14 years old. Her general body built is described as average, obviously for a 14 year old child. Furthermore, when it was put to the appellant by the Prosecutor that the complainant *"still looked young even today"* (three years later), he did not dispute that observation.

[23] Taking into account this objective evidence, I am of the view that the appellant should have realised that the complainant is not 19 years old, notwithstanding his evidence in this regard. Put differently, on the day in question he should have realised, and have foreseen the possibility, that the complainant was still a child under the age of 16 years. In the result I am of the view that the appellant should have been convicted of contravening section 15(1) of Act 32 of 2007 and not of rape. It follows that the sentence should then also be set aside.

SENTENCE

[24] Taking into account the evidence as well as the appellant's personal circumstances, counsel for the appellant suggested that a sentence of three years imprisonment, of which half should be suspended on certain conditions, would be a suitable sentence. Counsel for the respondent submitted that a sentence of five years imprisonment will be an appropriate sentence.

[25] The appellant is a first offender. He was 23 years old when he was convicted during November 2019. He completed Grade 10 at school and was single. He has two children with different biological mothers. By their very nature sexual crimes are regarded as serious, as these offences are prevalent in our society. The Legislature, reflecting the social morals of society, enacted legislation in an attempt to curb sexual intercourse between adults and children. Children should be protected, not abused.

[26] In S v Fhetani 2007 (2) SACR 590 (SCA) the appellant had been convicted in a regional court of contravening section 14(1)(a) of the Sexual Offences Act No 23 of 1957, i.e. having unlawful intercourse with a child under the age of 16 years. He was sentenced to 15 years imprisonment. His appeal was upheld and the sentence of 15 years imprisonment was substituted with a sentence of three years imprisonment.

[27] In *S v Sheldon-Lakey* 2016 (2) SACR 632 (NWM) the appellant, a 39 year old married educator had a sexual relationship with a boy under the age of 16 years who she was supposed to be counselling. The appellant in this matter was convicted in a regional court of having committed an act of consensual sexual penetration. On appeal the sentence of four years imprisonment was confirmed.

[28] Taking into account all the evidence , the relevant facts relating to the appellant's personal circumstances as well as the interests of society and that of the complainant, I am of the view that a sentence of four years imprisonment would be appropriate under the circumstances.

In the result I make the following order:

1. The appeal against conviction is upheld and the conviction of rape is set aside and substituted with the following:

"The accused is convicted, in terms of section 15(1) of Act 32 of 2007, of the offence of having committed an act of consensual sexual penetration with a child".

2. The sentence of 20 (twenty) years imprisonment is set aside and substituted with the following:

"The accused is sentenced to 4 (four) years imprisonment".

3. In terms of section 282 of the Criminal Procedure Act, No 51 of 1977, the sentence is ante-dated to 27 November 2019.

4 The order made by the Trial Court that the accused (appellant) is declared unfit to possess a licensed firearm and that his name be entered into the register of sexual offenders, remains unaffected.

D S FOURIE

JUDGE OF THE HIGH COURT
PRETORIA

I agree,

D PICK
ACTING JUDGE OF THE HIGH COURT
PRETORIA