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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA**

CASE NO: A634/2017

DATE OF HEARING: 23 MAY 2019

- 1) REPORTABLE: YES
- 2) OF INTEREST TO OTHER JUDGES: YES
- 3) REVISED.

.....
SIGNATURE

.....
DATE

In the matter of:

ALBERT MOHALE

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

Bam AJ

1. Appellant was tried and convicted on 14 May 2015 on a charge of statutory rape as contained in section 15 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007), (the Act) in the Regional Court for Gauteng, held at Klerksdorp. He was sentenced on 29 June 2015 to six years imprisonment and further declared unfit to possess a firearm in terms of section 103 (1) of the Firearms Control Act 60 of 2000. His application for leave to appeal both conviction and sentence were refused, leading to the petition to the Judge President of this court which petition was granted on 8 November 2017. The appeal is now before this court with the appellant attacking both conviction and sentence on the basis that the court a quo misdirected itself in rejecting his version. His version, according to appellant's counsel, was reasonably possibly true and appellant was entitled to an acquittal. It is prudent to first tease out the facts which laid the basis for the conviction. Save for one or two areas, the facts are largely agreed by both complainant and appellant.
2. It is common cause that the State's case rested on the version of one witness, the complainant, whom the court had found to have testified honestly. The evidence as accepted by the trial court goes thus: Complainant, a girl of 13 years¹ at the time of the commission of the offence², testifying through an intermediary, avowed that she had been involved in a relationship with the 29 year old appellant. They had decided to terminate the relationship following the charge against the appellant.
3. Complainant testified that on the day of their first meeting, a date which neither she nor the appellant could remember but were comfortable to estimate to be round December 2013, the appellant told her that he loved her and she replied back stating, 'I love you too'. Without mentioning the dates and frequency, complainant indicated that their relationship involved intimacy (sexual intercourse) and that they kept the

¹ Complainant's birth certificate, Exhibit A, was submitted to court by consent

² 14 years during the trial

relationship secret because of complainant's mother. They had slept, for example, in complainant's brother's (P[...]'s) home and had sexual intercourse. They had also slept at the appellant's place of residence and had sexual intercourse.

4. Asked by the prosecutor how she came to meet appellant, she replied that it was at a tavern. She confirmed as much during cross examination that their meetings were held only at the tavern. I will return to this point later. On the particular day that appellant proposed love to her, complainant had been sitting with a friend called N[....] on a stoep at the tavern. N[....] had briefly gone to the ladies when appellant came and set next to her. During their chat, appellant asked about her age, to which complainant replied she was 13. Appellant proceeded to profess his love for her, and complainant responded as aforementioned. Whilst testifying in chief, the prosecutor had occasion to seek complainant's comment on the version of the appellant that he had thought she was older than sixteen. Complainant said she had no comment. During her cross examination, the same question was again raised and complainant conceded that she would accept if the appellant had thought she was older than sixteen because of her physic.

Medical Report

5. I propose to consider the medical report before I deal with the appellant's version. The completed J88 form was submitted to court by consent. The examination was carried out by a Dr Shisange who saw the complainant on 1 February 2014. He noted the following in the report:
 - (i) The patient was stable; she was menstruating hence the presence of blood in her genitalia.
 - (ii) There was evidence of penetration, not necessarily recent.
 - (iii) There were no tears or lacerations and the Hymen had bumps.
 - (iv) There was no evidence of violence.
 - (v) Everything was intact ; and
 - (vi) Complainant was in Tanner stage five.
6. I will revert to the doctor's reference to Tanner stage 5 and the State's failure to call the doctor to testify on this issue, in light of appellant's defence.

7. Appellant testified in his own defence and called no witnesses. His evidence was in line with that of the complainant save for two respects. He confirmed the existence of the relationship (before they terminated it, that is) and the consensual sex. He had met complainant at the tavern and their meetings occurred at the tavern. The broad thrust of his defence was he had labored under the mistaken belief that complainant was 18. He denied that:

(i) Complainant had told him she was 13.

(ii) They met outside the tavern.

How the appellant came to be arrested

8. During the closing address, the magistrate asked the question and the defence explained that appellant was arrested following a report by his former girlfriend and mother of his young child. It was said that upon learning about the relationship, she went to report to complainant's mother. It is then that the charge was laid and appellant was arrested the next day.

9. In his judgement and in summing up the evidence, the magistrate noted:

*'The complainant did testify in the view of the Court honestly. She admitted that we had an affair with the accused person. I consented to sexual intercourse. How we met and that on the day when we met before we had sexual intercourse, I told him that I was 13 years old. She went further that when she was asked about this issue of whether if the accused believed that you were above the age of 16, said yes, it could be because I have got a big body, could be that he believe that I am over 16.'*³

'Now the question is, was she lying because the accused disputes that she did tell him that she was 13 years of age. She has mentioned this several times and mentioned that I told him because he is the one who asked me how old I was and then I told him. And that the affair was kept a secret because she was afraid

³ Page 32, line 17-25

of her mother. Now, I have been addressed by the defence person that the complainant has a reason to perhaps false incriminate or deny such an affair because she was caught up. But to the contrary, the complainant throughout it would appear did not want to make things worse for the accused person. Because even after she was caught up that he had an affair, one perhaps should say she could have said yes, this man had been raping me all along. Was not consenting. She came out clear. I love this person. I consented to sexual intercourse, even today I , I love him. She....., was prepared to reveal something which should be favorable to the accused person. That if the accused thought I was 16, could be in his opinion that is the position because of my body. But she insisted I did inform him I was 13 years old⁴. ' (copied as is from the record)

10. Following this summary the magistrate rejected the appellant's evidence followed by the conviction.

Appellant's case on appeal regarding conviction

11. At the heart of the grounds, lies the contention that appellant should not have been convicted. The court misdirected itself in other words.
12. It is submitted that:
- (i) The court had failed to treat the evidence of the complainant - as a single witness - with caution.
 - (ii) The court misdirected itself when it rejected the appellant's version as not being reasonably possibly true.
 - (iii) Overall, appellant's submissions convey that the State had failed to prove its case beyond reasonable doubt.

13. I now deal with the appellant's grounds.

(i) The court a quo failed to treat the evidence of the complainant - as a single witness- with caution.

⁴ Page 33 para 2 to 25

14. It is submitted on behalf of the appellant that the complainant was a single witness and a child witness. This point is expanded by submitting that the complainant had not on her own accord reported the incident to her mother, therefore, she may have felt the pressure to mention the point that she had informed the appellant about her age, it is submitted. Following on this submission, the point is made that the court failed to carefully weigh and consider the weaknesses, probabilities and improbabilities in both versions in order to exclude any doubt on the appellant's guilt. I deal with the first submission and save the second for later. Section 208 of the Criminal Procedure Act⁵ provides that an accused may be convicted of any offence on the single evidence of any competent witness. The position regarding how courts should generally approach the evidence of a single witness has been espoused from time to time by many an SCA decision. It will suffice therefore to refer to the below extract from *Zamokwakhe Madondo & 2 Others v The State*⁶ which succinctly sets the position:

'Central to a resolution of this appeal, is a consideration of the approach to be adopted by a trier of fact, when faced with the task of assessing the evidence of a single witness.

In an oft repeated dictum, it is said that the evidence of such a witness must be "clear and satisfactory in every material respect", and that where the witness "has an interest or bias adverse to the accused"⁷ the evidence must be approached with caution. In other words, the evidence "must not only be credible but also reliable"⁸, but it is clear that, "There is no rule of thumb, test or formula to apply when it comes to a consideration of the credibility of the single witness"⁹, and "The trial Judge will weigh his evidence, will consider its merits and demerits and,

⁵ 51 of 1977

⁶ 512/11 ZAKZPHC/2012/43 para 3.

⁷ R v Mokoena 1956 (3) SA 81 (A) at 85 H

⁸ S v Janse van Rensburg & Another 2009 (2) SACR 216 (C) at 220 G

⁹ S v Webber 1971 (3) SA 754 (A) at 758

having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told¹⁰”.

15. It appears to us that this is exactly what the magistrate did. The record shows that as he considered the evidence of the complainant, the magistrate was alive to the fact that he was dealing with the evidence of a single witness and a child for that matter¹¹. Aside from the above, credibility findings, once made by a trial court, should not be easily interfered by an appellate court unless the trial court was patently wrong¹². Consequently, we cannot find fault with judgement of the magistrate in this regard.
16. What is apparent from reading the record which was not taken up by either party but which we are compelled to raise in the interests of justice is the unabashed disregard of material evidence placed before the trial court. The first such evidence is the note made by the doctor in the medical report that the complainant was on tanner stage 5. At the time of submitting the medical report, the prosecutor had read its details into the record noting that the doctor had noted the tanner stage as five¹³, thereafter, nothing more was said about that evidence. The State also failed to call Dr Shisange to explain what he meant by tanner stage 5. It is to be noted that the doctor had examined the complainant within 3 months from the time the two began their relationship¹⁴. In light of the appellant's defence which had been stated upfront to the court through his defence attorney, such information was critical. At the risk of repetition, appellant's defence was that he had labored under the mistaken belief that complainant was 18. During his testimony, he laid the basis for his mistaken belief, which I will soon come to. For the purposes of informing ourselves what is

¹⁰ S v Sauls & others 1981 (3) SA 172 (A) at 180 E – F

¹¹ Pages 30 para 20 to 33 para 20 (typed page numbers)

¹² S[...] & another v The State (126/2014) [2014] ZASCA 215 (01 December 2014)21] This Court held as follows in S v Pistorius 2014 (2) SACR 314 (SCA) para 30: 'It is a time-honoured principle that once a trial court has made credibility findings an appeal court should be deferential and slow to interfere therewith unless it is convinced on a conspectus of the evidence that the trial was clearly wrong (R v Dhlumayo & Another 1948 (2) SA 677 (A) at 706; S v Kebana [2010] 1 All SA 310 (SCA) para 12.'

¹³ Page 5 of the record, line 19

¹⁴ It was accepted by the court that the relationship started in December 2013

meant by Tanner stages (otherwise known as Sexual Maturity Rating), I referred to the NCBI Bookshelf, a service of the National Library of Medicine, National Institutes of Health online¹⁵. This is what I found:

Tanner stage 4

17. Girls

In girls, stage 4 usually starts around age 13. Changes include:

Breasts take on a fuller shape, passing the bud stage; Many girls get their first period typically between ages of 12 and 14, but it can happen earlier; Height growth will slow down to about 2 to 3 inches per year; and Pubic hair gets thicker.

Tanner stage 5

This final phase marks the end of your child's physical maturation.

Girls

In girls, stage 5 usually happens around age 15. Changes include: Breasts reach approximate adult size and shape, though breasts can continue to change through age 18; Periods become regular after six months to two years; Girls reach adult height one to two years after their first period; Pubic hair fills out to reach the inner thighs; Reproductive organs and genitals are fully developed; Hips, thighs, and buttocks fill out in shape.

In citing this information, we do not profess to provide a medical opinion on tanner stages relevant to girls for the purposes of their apparent age nor do we suggest that referencing to one source suffices for the purpose of formulating a medical opinion. However, properly sourced and made available to the court, the information would have been invaluable. It was not enough then for the magistrate to merely engage in an exchange with the defence attorney regarding the apparent age of the complainant, with the magistrate insisting in his opinion that complainant's face indicated that she is a child, especially in light of the evidence exhibited by the medical form, which came unsolicited from the doctor. This in our view was the first misdirection.

¹⁵ <https://www.ncbi.nlm.nih.gov/home/about/>; accessed on 2019/06/23

18. The second piece of evidence made available to the court which was also disregarded was complainant's testimony that they had slept with the appellant in her brother's home with her brother present on the night in question. Viewed against the statement that she and the appellant had kept their relationship a secret because they were afraid of complainant's mother, it becomes a matter of logic that one of the statements is not true. In weighing which version to uphold between complainant's, that she had told appellant that she was 13 years against that of the appellant, that he had never asked the complainant about her age, the magistrate referred to the secret nature of the relationship as if to say that if indeed the appellant had not been aware of complainant's real age, there would have been no need to keep the relationship secret. Yet complaint had testified that on 29 January 2014, she, her friend N[...] and the appellant met at her brother's house. The occasion that had brought the four parties together was not probed. Right there in her brother's house she had sexual intercourse with the appellant. This extract from the record might be helpful¹⁶:

'Ok on 29 January 2014 you were at the house of your brother is that correct? - Yes we were there, myself, N[...] and then my brother.

Okay, it is common cause that you and Borata (the nickname of the appellant) had sexual intercourse that night at your brother's house? - Yes, we had sexual intercourse.

Did you consent to having sexual intercourse with Borata? - Yes we had consented sexual intercourse.

Was it the first time that you had sexual intercourse? - Not it was not the first time.'

¹⁶ Page 12, line 9 to 21

19. As to whether the sexual intercourse occurred at a secluded place within the brother's home and whether the brother could in any way have noticed that the two had sexual intercourse was not probed. Respectfully, if indeed the relationship was meant to be kept secret, then there is no way the two would have engaged in sexual intercourse in complainant's brother's house as there was always a risk of being caught and then the information would reach complainant's mother, especially if the brother disapproved of the relationship due to complainant's age. There was also the complainant's friend present who could potentially leak that information, wittingly or unwittingly. By all accounts, this piece of evidence, coupled with the evidence tendered by the complainant of how she used to meet with the appellant, suggests an open relationship. Had the magistrate reconciled these statements, the ineluctable conclusion would have been that the relationship was simply open. Instead, the magistrate failed to do so and referenced only the fact that the relationship was kept secret, a further misdirection in our reckoning.
20. The third piece of evidence relates to complainant's testimony regarding where she used to meet appellant. The record shows¹⁷:

Examination in chief

Prosecutor: 'How did it come about that you met him [referring to the appellant]?

' We were at Midwest Tavern.

Were you inside the tavern? - No, I was standing outside the tavern.

What were you doing there? - Just, just standing there together with my friend N[...].'

Cross Examination of the complainant: Page 15 line 5:

Defence Attorney: 'Madam, you said you met the accused at a tavern, Midwest? - Yes.

¹⁷ Page 13 line 23

And did you ever go to taverns with the accused while you were having a relationship? - 'We only met when he went to the the tavern and I would also be at the tavern.'

21. This last answer prompted the court to interject as demonstrated below:

Court: 'I did not understand. What was the question.....?'

Defence Attorney: [Repeats the question as]: 'If she had ever frequented taverns with the accused? If she ever went to taverns?'

Court: 'In the company of the accused?'

Defence attorney: 'With the accused, yes —And then the answer is that Your worship whenever the accused is at the tavern and I will be at the tavern we will meet there.'

Court: 'I am wondering about this meet. They would meet at taverns.'

Interpreter: 'That is what she said.'

Court: 'Proceed.'

22. At the start of the trial the complainant was asked what grade she was studying and she replied, grade 7. At the beginning of her testimony, upon being asked where she first met the appellant, she replied that it was at Midwest Tavern. It was only when the prosecutor had raised the question, 'Were you inside the tavern?' that she responded, 'No, I was outside.' During cross examination, she reverted to her original position and further highlighted that she met the appellant only at the tavern. Respectfully, if she meant in the streets, somewhere around the tavern, or a shop in the vicinity of the tavern, she would have definitely made a statement to that effect. In her answer during cross examination, she made it plain that her meetings with the appellant occurred at the tavern which lends credence to appellant's version that he frequently met the complainant at the tavern.

23. I have gone through the trouble of isolating all these critical pieces of evidence, which, although placed before court, were simply disregarded. They were disregard-

ed even though they are relevant to the appellant's version that because of complainant's physic and her frequent presence at the tavern, where no children under 18 are allowed, by law, he accepted that complainant was 18.

The law

24. Section 56 of the Act deals with defences and it states:

'(1)

(2) Whenever an accused person is charged with an offence under-

(a) section 15 or 16, it is, subject to subsection (3), a valid defence to such a charge to contend that the child deceived the accused person into believing that he or she was 16 years or older at the time of the alleged commission of the offence and the accused person reasonably believed that the child was 16 years or older;'

Sub section (3) is not relevant as there is no evidence of a blood or adoptive relationship between the two as expressed in the section. *In Biyela v The State*¹⁸, it was held that:

'An accused may escape liability for engaging in sexual intercourse with a girl under the age of 16 years if he can prove that he was deceived as to the age of the girl; either by the girl or by a person in whose charge she was. The deception may be by words, conduct or appearance (R v T¹⁹). The accused must prove on a balance of probabilities that he was deceived, whether inadvertently or fortuitously²⁰.' (own underline)

25. The State submitted that because the appellant testified that he had never asked the complainant about her age, the defence that he was misled was not open to the appellant.

¹⁸ Bongi Biyela v The State (859/10) [2011] ZASCA 43 (29 March 2011), para 29

¹⁹ 8 1960 (4) SA 685 (T) at 687A

²⁰ 9 R v V 1957 (2) SA 10 (O)

26. There are, in our view, several factors in this case which were placed before the court and which should buttress the finding that appellant was indeed misled as to the real age of the complainant. They are:

Complainant's uncontroverted evidence

- (i) The complainant's version that when the appellant first proposed to her, she was seated at the stoop at a tavern. A tavern is hardly the place where a 13 year old -who is busy with grade seven- will likely hang out. One would go so far as to suggest it is inconceivable that a 13 year old would be sitting on a stoop at a tavern hanging out. Appellant's belief that he saw her as or accepted that she was 18 is fortified when viewed in light of complainant's conduct.
- (ii) Amplifying the aforementioned conclusion is the complainant's statement that she and the appellant met only at the tavern.
- (iii) Her statement that she slept with the appellant and had sexual intercourse in her brother's home. Even though no evidence had been led regarding the age of the brother, it must be accepted that the brother must be older than the complainant to have his own home. It is reasonable to assume that given the 'secret' nature of their relationship they both would have made every effort not to evidence any sign of a relationship between them, especially given complainant's age, in case the brother disapproves. The act of having consensual intercourse in the brother's house, to the contrary, must indeed have misled the appellant about her age.

Completed J88 form

- (iv) Despite the magistrate's insistence that complainant appeared to be a child to him, the medical evidence pointed otherwise. In this regard, tanner stage five would tend to suggest that complainant looked like a full-grown girl than her real age.
- (v) Complainant's own concession that due to her physic, (which) is supported by the medical report) may have misled the appellant as to her real age.

The brother's conduct

(vi) It is reasonable to expect that complainant's brother would disapprove of the relationship to protect the 13 year old. That complainant presented herself at her brother's home where the appellant was also present and made no attempt to immediately leave the place so as to avoid any chance that the brother may discover their relationship only lends credence to the appellant's claim that he was misled. Without generalizing, a 13 year old would not likely allow a situation where an older brother discovers that she is involved in a relationship at that age, much less, a relationship with a 29 year old.

27. As indicated, none of the evidence set out in the preceding paragraphs was taken into account by the trial court in reaching its findings. In *Nonyane v The State*²¹, where a similar occurrence of the trial magistrate disregarding evidence before him had been the raised, SCA admonished:

'The magistrate was not entitled to disregard Lekhotwe's evidence. As Nugent J said in S v Van der Meyden, in a passage subsequently approved by this court in S v Van Aswegen:

'What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.'

'Mahomed J said in S v Ipeleng:

'Even if the court believes the State witnesses, it does not automatically follow that the appellant must be convicted. What still needs to be examined is whether there is a reasonable possibility that the evidence of the appellant might be true. Even if the evidence of the State is not rejected, the accused is entitled to an acquittal if the version of the accused is not proved to be false beyond reasonable doubt. (See S v Kubeka 1982 (1) SA 534 (W) at 537E; R v M 1946 AD 1023 at 1027.)

²¹ [2006] SCA 23 (RSA) para 6 (4)

28. In our view, the court a quo was faced with two mutually destructive versions, one of the complainant and that of the appellant. In light of the factors already canvassed in this judgement which corroborated appellant's version, there was no reason for the magistrate to reject the appellant's version as not being reasonably possibly true.

Did the state discharge its onus?

29. I have already pointed to the critical elements of complainant's evidence and medical evidence which was disregarded by the magistrate. What we also found missing from the judgement is the weighing of intrinsic improbabilities, probabilities, weaknesses and strengths of the cases of both sides so as to reach a finding²². The one or two references in the judgement to the appellant's version are perfunctory. We say this respectfully. Accordingly there was no basis for the magistrate to reject appellant's version as not being reasonably possibly true. The facts of this case point otherwise. Our finding is that the State had failed to prove its case beyond reasonable doubt. In light thereof, there is no point in considering the case made by the parties on sentence.

30. The following order is made:

- (i) The appeal against conviction is upheld.
- (ii) The conviction and sentence are set aside.
- (iii) The appellant is to be released from custody with immediate effect.

**NN BAM
ACTING JUDGE OF THE HIGH COURT,
PRETORIA**

²² Maseti v S (353/13)[2013] ZASCA 160 (25 November 2013) para 21

I CONCUR

J. KOLLAPEN
JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES

DATE OF HEARING : **23 MAY 2019**

DATE OF JUDGMENT : **27 JUNE 2019**

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