



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: A38/2017

In the appeal between:

DEWALD PRINSLOO

Appellant

and

THE STATE

Respondent

CORAM: MBHELE, J et MTHEMBU, AJ

JUDGMENT BY: MTHEMBU, AJ

DELIVERED ON: 29 MARCH 2018

JUDGMENT:

- [1] The Appellant was originally charged in the Regional Court in Welkom with 7 counts as listed below, but was convicted on the 29th April 2015 on six counts. He was acquitted on the 7th count. Counts 1 to 5 are offences contemplated in the Criminal Law (Sexual Offences and Related Matters Amendment) Act 32 of

2007, while counts 6 and 7 were offences contemplated in the Forms and Publications Act 3 of 2009. The said offences were:

- 1.1 A contravention of Section 18(2) of the Criminal Law Amendment Act, Act 32 of 2007 (the Act) - Sexual Grooming of Children (Count 1);
 - 1.2 A contravention of section 5(1) of the Act – Sexual assault (Count 2);
 - 1.3 A contravention of section 22 of the Act “Flashing” (Count 3);
 - 1.4 A contravention of section 55 of the Act – Attempted Rape (count 4);
 - 1.5 A contravention of section 3 of the Act – Rape (Count 5);
 - 1.6 A contravention of section 24B (1)(a)(b) and (c) of Act 3 of 2009 – Importation or Procuring of Child Pornography (Count 6).
- [2] He was sentenced to various terms of imprisonment and the court ordered that the sentences should run concurrently. He was effectively sentenced to fifteen years imprisonment.
- [3] He felt aggrieved of the convictions and he appeals with leave of the trial court against the said convictions only.

AD THE CONVICTIONS:

- [4] The State's case is largely based on the evidence of the complainant, a 10 year old boy at the material time in respect of all the charges, who was a single witness. State also led the evidence of six other witnesses in support of its case.
- [5] The Complainant with the assistance of an intermediary testified as follows about five incidents that occurred during the period when appellant was staying with them at his parental home.
- [6] The complainant testified to the effect that during February to April 2010 he lived with his parents in Riebeeckstad, Welkom. The appellant, complainant's cousin, went to live with them.
- [7] Complainant had a good relationship with the appellant until one day the appellant called him to his bedroom saying he had something to show him. Upon his arrival he was shown photos of naked women on appellant's computer.
- [8] On another day the appellant called him to his bedroom to watch a movie that he had never seen before. Appellant undressed and asked him to do likewise. While watching the movie they held each other's private parts at appellant's instruction.
- [9] On another occasion appellant called him to his bedroom where they watched a movie while holding each other's private parts. This

time they stroke each other doing up and down movements until a substance came out of his penis. The appellant showed him how to touch his penis. He later learnt that the substance that came out of his penis was a semen.

- [10] In another occasion the appellant called him to his bedroom and told him to put his penis between his buttocks. Thereafter appellant placed his penis between complainant's buttocks. He did not feel any pain.
- [11] On one incident he was playing games on appellant's computer and ended up sleeping on a single bed in appellant's bedroom. The appellant came to his bed, pulled out his penis and played with his private parts. Thereafter he returned to his bed.
- [12] Appellant showed him a video depicting naked women wherein he observed them having sex. His description of what he observed was anal, normal and oral sex.
- [13] He said he did not report these incidents because he was threatened by the appellant and that he was ashamed of the things that happened to him. He did not know if it was his fault.
- [14] He admitted under cross examination that he did something similar to one Jody, his cousin, a year after appellant left his home but denied that the reason he reported the appellant was because he was confronted for his conduct on Jody.

- [15] He denied that the bulge on the carpet at the door of Appellant's bedroom would have made it impossible for the appellant to molest him in his room because he would be easily caught once his parents drive into the premises.
- [16] Cecil Louw, a forensic social worker from Teddy Bear Clinic, testified to the effect that the complainant did not disclose everything on their first day of consultation. He told her of other incidents in her follow up meetings. She was of the opinion that the manner in which the complainant disclosed details of his encounters with the appellant is consistent with behaviour of a child who was sexually abused. His behaviour was consistent with how a person who blames themselves and is ashamed of what happened to him.
- [17] Count 6 is based on the evidence of a Forensic Cyber Analyst, attached to the Cybercrime Unit of the SAPS, Free State, namely Colonel Isaac Pretorius ("Pretorius").
- [18] Pretorius thoroughly analysed the hard drive and memory of the laptop which had been seized in the possession of the appellant. He testified that although no actual child pornography was found on the laptop, his investigations revealed that appellant's computer was used to access child pornography websites on the internet. An app was used to clean child pornography from appellant's computer just hours before his arrest.
- [19] The Appellant's grounds of appeal are set out broadly in his Notice of Appeal. There are about 31 grounds of appeal noted by the

Appellant. The said grounds essentially deal with the credibility, reliability and contradictions in the evidence of the complainant. They also deal with whether the version of the appellant is reasonably possibly true.

[20] The case for the state in counts one to five rests largely on the evidence of a single witness. This witness was at the material times 10 years of age. The appellant, an adult male, is his cousin and he stayed with the complainant at the complainant's parental home together with the complainant's parents. The evidence of the complainant was attacked by the defence on the basis that it was not trustworthy and that it was not credible. This submission is made on the basis that the complainant contradicted himself and changed his version.

[21] In view of the fact that the accused is a single witness and a child, the evaluation of his evidence must be approached with caution. Not only should such evidence be credible but it must also be reliable. (See **R v Mokwena** 1956(3) SA 81 at 85. The court in **S v Sauls and others** 1981(3) SA 172 at 180 E-G said the following: "There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness (see the remarks of Rumpff JA in **S v Webber** 1971(3) SA 754(A) at 758). The trial judge will weigh his evidence, will consider its merits and demerits and, 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 told. The cautionary rule referred to by De Villiers JP in 1932 may be a guide to a right decision but it does not mean 'that the appeal must succeed if any criticism, however, slender, of the witnesses' evidence were well founded'"

(Per Schreiner JA in R v Nhlapo (AD 10 November 1952) quoted in R v Bellingham 1955(2) SA 566(A) at 569). It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.'

- [22] Having regard to the Complainant's age, both when he testified and when the incident happened, coupled with the time spent being cross examined by the defence, certainly affords some explanation for the discrepancies in his evidence.

- [23] I am of the view that the court *a quo* was alive to the fact that the evidence of the Complainant had to be approached with caution as he was a single witness. This approach by the court cannot be faulted.

- [24] In this regard the court *a quo* held that:
 "... hence the cautionary rule of practice is called for in the evaluation process of V....us' evidence, both as a single witness and as a child witness".

- [25] The Court *a quo* went further and stated that "In the evaluation of a child's evidence, judicial officers have to, therefore, consider factors such as reliability of the memory of the child, susceptibility to suggestion, the truthfulness and the meaning of what was said and the court must take into account the motivation for saying what was said" The court referred to the article of Ziff in the **South African Journal of Criminal Justice** 1991 (4) 24, titled "*The Child Victim as a Witness in Sexual Abuse Cases*".

- [26] The court *a quo* found that even though the complainant was only 10 at the time of the incidents he did appear to have a reliable

memory. He displayed sufficient intelligence and hence passed the basic test of caution in respect of a child witness.

- [27] The court *a quo* also tested the truthfulness and reliability of complainant's evidence. It found that his evidence remained consistent in material aspects, had no reason to falsely implicate the Appellant. He simply said what was done to him.
- [28] The defence too conceded at some stage that the complainant was sexually abused when the appellant testified after hearing the evidence of the forensic Social Worker. So was there a motive by the complainant to conceal the truth of who really sexually abused him? His evidence does not indicate so, that there was a motive to conceal the truth. His memory the court *a quo* found to be reliable. His evidence did not suggest fantasizing about it. It was tested at great length.
- [29] The Magistrate found that the complainant indeed contradicted himself at times. However, the court had to bear in mind that this child was cross examined for a lengthy period (for 7 days during a period covering 06 June 2013 to 23 January 2014) and he was exhausted. The defence also constantly told the court that the complainant was tired.
- [30] The testimony and report of the Social Worker supported the Complainant's testimony in that she gave a detailed explanation to the contradictions and discrepancies in the Complainant's testimony.

[31] It is true that with regard to count 5 on a charge of rape that the complainant made no reference to the rape in his testimony in chief as well as in his consultations with the forensic Social Worker. His testimony in this regard should, however, be evaluated against this backdrop.

- Section 227(2) of the Criminal Procedure Act provides as follows:

“No evidence as to any previous sexual experience or conduct of any person or in connection with whom a sexual offence is alleged to have been committed, other than evidence relating to sexual experience or conduct in respect of the offence which is being tried, shall be adduced, and no evidence or question in cross examination regarding such sexual experience or conduct, shall be put to such person, the accused or any party to the proceedings pending before the court unless-

- (a) the court has, on application by any party to the proceedings, granted leave to adduce such evidence or to put such question:
- (b) such evidence has been introduced by the prosecution.

[32] The evidence of alleged sexual conduct of the complainant was elicited by the defence during the cross examination. This evidence relates to the alleged sexual encounter with Jody. Throughout his address the defence hammered on the alleged deviancy of the complainant. Mr Wyngaardt in his address went to the extent of saying: “....because remember now, it is not the first time that W.. us has been confronted with sexual deviancy. There has been the matter of the M family, there has been other matters and now once again with the a J matter, he is confronted.”

[33] The defence did not make an application to adduce evidence of sexual conduct of the complainant. This flies in the face of s227(2) of the CPA. Both the state and the defence seem not to have taken

cognisance of section 227 of the CPA. The court should also have played a proactive role and prevented questioning on the sexual conduct of the complainant in the absence of the necessary application. At the end of the day, it is my considered view that such evidence should have been ruled inadmissible.

- [34] The forensic Social Worker proffers a plausible explanation as to why the complainant failed to mention that the accused put his penis in his mouth during both the consultation with her and in the examination in chief. The social worker described this late disclosure of oral penetration as “accidental disclosure.” according to her expert opinion, children in the process of disclosure give bits to different people to test if adults are sensitive to their disclosure. I have no doubt in accepting this professional opinion. I am unable to find that the complainant was lying when he later disclosed the oral penetration only in cross examination.
- [35] I accordingly find that the court *a quo*’s findings with regard to counts 1 – 5 were not vitiated by any misdirection.
- [36] Count 6 is based on the evidence of a Forensic Cyber Analyst, attached to the Cyber Crime Unit of the SAPS, Colonel Pretorius (Pretorius). He thoroughly analysed the hard drive and memory of the laptop which had been seized in the possession of the Appellant. He testified that although no actual child pornography was found on the laptop, his investigations revealed that someone used the laptop to access such websites on the internet. Such photos etc. were found in these sites.

- [37] Cleaning mechanisms and anti-software viruses were running immediately when a Warrant Officer Jacobs contacted the appellant.
- [38] The laptop was not being used up until the time of contact of the appellant by warrant officer Jacobs. All that was done at the time is that an anti-virus software was used as a clean-up process. All of this was not disputed by the defence.
- [39] In fact the defence in the address on merits, admitted that it was not disputed that child pornography was accessed or possessed, the only aspect in dispute is who accessed it.
- [40] The appellant testified that when Warrant Officer Jacobs requested the laptop, he had only had it in his possession for about a week. His father had the laptop for about six months. Contrary to the Appellant's evidence, his father said that he had this laptop with him only for a period of two weeks. He said it never worked so he gave it back to the appellant.
- [41] During this short period that the Appellant had the laptop, it seems his friends', the manager of the shop he worked for, and customers all used his laptop. It seems that according to the appellant, he was just a generous and kind person. However, the undisputed investigation reveals that it was used at the time it became known that the police wanted the appellant's laptop and the cleaning device was running at the time the police were kept waiting for the appellant to hand over his laptop.

- [42] The Court *a quo*'s finding that the probability is that the Appellant knew what was on his laptop and immediately got the cleaning device to work cannot be faulted.
- [43] That anti-software virus was being run and the laptop was only shut down about 25 minutes before he arrived at the police is contrary to the Appellant's version that he just closed the laptop.
- [44] At the time when the investigation started, the appellant never mentioned the names of the people that he mentioned in court that had used his laptop. The question is why not? The probability is that the appellant used his laptop for himself for the purpose of accessing and watching child pornography.
- [45] I concur with the Court *a quo* that the Appellant's version pertaining to count 6 is also flawed with improbabilities and contradictions.
- [46] I further concur with the court *a quo* that having evaluated all the evidence, the contradictions, the probabilities, improbabilities, the defects in the complainant's evidence and the appellant's evidence and having considered the totality thereof, the balance weighs heavily in favour of the State.
- [47] The Court *a quo* was correct in finding that the Appellant's version in light of the totality of the evidence cannot be accepted as reasonably possibly true and must be rejected as false.
- [48] This court is satisfied that the State proved its case beyond reasonable doubt in respect of counts 1 – 6.

[49] None of the submissions and arguments raised by the defence indicated that the trial court acted irregularly or misdirected itself in any manner or material respect with regard to the convictions which would entitle this court to interfere with its decision. See **R v Dhlumayo** 1948 (2) SA 677 AD at 706 para 8 where at Greenberg JA said:

“Where there has been no misdirection on fact by the trial judge the presumption is that his (her) conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong”.

The conviction of the Appellant on counts 1 – 6 is in order.

[50] In the result I make the following order:

1. The appeal against the convictions on all six counts fails and is accordingly dismissed.

J MTHEMBU, AJ

I concur.

NM MBHELE, J

On behalf of the Applicant: Adv M Van Wyngaard
Instructed by:
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On behalf of the Respondent: Adv C Nameka
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