



Reportable:	YES / <u>NO</u>
Circulate to Judges:	<u>YES</u> / NO
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

CASE NO: **CA&R43/2016**
DATE HEARD: **01/08/2016**
SIGNED: **04/08/2016**

In the matter between:

EDWARD SMIT

Appellant

and

THE STATE

Respondent

Coram: Olivier J et Erasmus AJ

REASONS

Olivier J

[1.] The appellant appeared in the Regional Court, Postmasburg, on a charge of having committed an act of sexual penetration with the 15 year old complainant, in contravention of the provisions of section 15(1) of the **Criminal Law (Sexual Offences and Related Matters) Amendment Act**¹ (“*the Act*”). The appellant, according to the charge sheet a 40 year old male, pleaded not guilty to the charge and in explanation of his plea stated that his defence was a denial of all allegations and that everything was placed in dispute. The appellant was convicted as charged and was sentenced to 5 years imprisonment, conditionally suspended for a period of 5 years. Leave to appeal against the conviction was granted on petition and after the hearing of the appeal the following orders were made:

- “1. The appeal succeeds and the conviction and sentence are set aside.*
- 2. The Clerk of the Regional Court, Postmasburg and the Registrar of this Court are directed to ensure that the name of the appellant is removed from the National Register for Sexual Offenders in terms of Act 32 of 2007.”*

What follows are the reasons for those orders.

¹ 32 of 2007

- [2.] On the day of the alleged incident, 31 January 2014, a sport day was held at the school at which the appellant was a teacher and the complainant a learner. The appellant had been tasked with photographing the events. The complainant was on her way to the school when the appellant picked her up in his vehicle and took her with him to his home. This much was common cause. It was what happened at that house, and how long the appellant and the complainant had been there before returning to the school, that were the issues in dispute.
- [3.] In cross-examination it was put to the complainant that the appellant had been on his way home in his vehicle to fetch a camera when he came across the complainant and picked her up. It was put to the complainant that they merely had a cool drink at the appellant's house before leaving and that they were back at the school by 09:00.
- [4.] The complainant's version was that the fact that she was picked up by the appellant had not been a mere coincidence. According to her it had been arranged between the two of them by means of text messages. In cross-examination she testified that it was "*Past 08:00*" when the appellant picked her up. She admitted having been given a cool drink at the house of the appellant, but she denied that that was all that had happened there. According to her she and the appellant in fact had sexual intercourse in various ways,

and over a prolonged period of time and in different rooms of the house, until they eventually arrived back at the school at about 11:30.

- [5.] The appellant did not himself testify, but the evidence of two witnesses was presented on his behalf. Mr. G. R., also a learner at the particular school, testified that he had seen the appellant standing at the tuck shop at the school at 09:04 that morning. He remembered the time, because he had gone to fetch a cell phone and had noticed the time on the cell phone.
- [6.] Ms Erika Beukes apparently operated a mobile tuck shop at the sport day. According to her she saw the appellant standing there at 08:50. She explained that she was sure about the time, because she had been waiting for her husband to deliver something there at the time.
- [7.] The evidence of Mr Roman and Ms Beukes was not discredited, or even seriously challenged. On their evidence the appellant could clearly not have been at his house from "*Past 08:00*" until approximately 11:30, as testified by the complainant.
- [8.] The complainant, on the other hand, was clearly not a good witness and in her evidence she deviated from the contents of her police statement in several respects.

[9.] It is, with respect, difficult to discern from the judgment exactly why the appellant was convicted despite the evidence of Mr Roman and Ms Beukes. When regard is, however, had to the subsequent proceedings in the application for leave to appeal, and to the questions put to the appellant's attorney, it would appear that the attitude of the Regional Magistrate to their evidence was that it did not exclude the possibility that the appellant may have been with the complainant at his house before being seen by Mr Roman and Ms Beukes, or thereafter. If this had indeed been the approach adopted by the Regional Magistrate it would, with respect, have been fundamentally wrong.

9.1 In the first place it was, as already mentioned, in any event common cause that the appellant and the complainant had been at his house at some stage that morning.

9.2 The Regional Magistrate seems to have lost sight of the fact that, on the complainant's version, it would not have been possible for the appellant to have been seen at the school at either 08:50 or 09:04.

9.3 It would in any event not have been good enough if, on the evidence of Mr Roman and Ms Beukes, there was "*a possibility*" that the appellant may have been with the complainant at his house after 09:00. What the prosecution needed to prove, not as a mere possibility but indeed

beyond a reasonable doubt, was that the appellant and the complainant had indeed been at his house not only around 09:00 that morning, but indeed for a long time thereafter.

[10.] We were of the view that, on this basis alone, the appeal against the conviction should succeed. There was, however, another and even more fundamental problem in the evidence upon which the Regional Magistrate convicted the appellant.

[11.] The relevant provisions of section 15(1) of the Act read 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,”

[12.] The age of the complainant was therefore an essential element of the crime with which the appellant had been charged. Despite the fact that it appears from the record that at least the father of the complainant had been present at court at the time that her evidence was presented, the only evidence presented by the prosecution as regards the age of the complainant was her own. She testified that her date of birth was 10 February 1998, which

would have meant that the incident had taken place less than 2 weeks before her 16th birthday.

[13.] The problem is, however, that “*a statement by a person as to the date when he was born is hearsay*”². No explanation was proffered by the prosecutor for not presenting better evidence than this regard the complainant’s age. As I have already mentioned, the appellant had placed everything in dispute in his plea-explanation, which would obviously include this element of the crime.

[14.] The fact that this evidence had not been objected to or challenged did not render it admissible³. Even if it could, evidence like this would obviously not have had any evidential value⁴.

[15.] The facts of this matter are easily distinguishable from those in **S v Waldeck**⁵. In that matter the source of the hearsay evidence had been the deceased, and therefore unavailable to testify. In the present case at least one of the parents of the complainant was available as a witness. Unlike in the **Waldeck** case, the defence was not in the present matter warned beforehand that the prosecution intended relying on hearsay evidence. Lastly, it appears that the court in the **Waldeck** matter was, on the rest of the evidence presented by the prosecution, satisfied that the deceased would

² **R v C** 1955 (1) SA 380 (K) at 381 G; Compare also **Rex v Lakhoo** 1943 GWLD 10 at 11 – 12; **Rex v Corris** 1931 TPD 471 at 474 – 475; **S v Mbelo** [2001] JOL 8225 (NC) para 8

³ Compare **R v C** [1955] 1 All SA 297 (C) at 300; **S v Koralev and Another** 2006 (2) SACR 298 (N) at 304a-d; **Kaputuaza and Another v Executive Committee of the Administration for the Hereros and Others** 1984 (4) SA 295 (SWA) at 312F; **Rex v Chabane** 1948 (1) SA 272 (O) at 276

⁴ Compare **Mapule v S** [2012] JOL 29242 (SCA) para [6]

⁵ 2006 (2) SACR 120 (NC)

have been a credible source of the information. In the present case there is simply no other evidence than that of the complainant.

[16.] There had therefore quite simply been no admissible evidence that the complainant had at the time of the incident been under the age of 16 years old. That the appellant, as a teacher at the school attended by the complainant, may have been aware of the age of the complainant, is not the point. What was concerned here was what the age of the complainant had indeed at the particular time been; not what the appellant had thought it to be.

[17.] Even in cases like these, where the interests of young complainants in sexual matters are concerned, the rules of evidence should be complied with –

“Courts in civil or criminal cases faced with the legitimate complaints of persons who are victims of sexually inappropriate behaviour are obliged in terms of the Constitution to respond in a matter that affords the appropriate redress and protection. Vulnerable sections of the community, who often fall prey to such behaviour, are entitled to expect no less from the judiciary. However, in considering whether or not claims are justified, care should be taken to ensure that evidentiary rules and procedural

safeguards are properly applied and adhered to.”⁶

[18.] Here the prosecution failed the complainant. It could, on the face of it, quite easily have presented better, and indeed admissible, evidence of the complainant’s age. It failed to do so, or to explain why it could not be done.

[19.] Also in other respects the manner in which the prosecution of the case was conducted left much to be desired. The evidence of a number of other witnesses, whose evidence could possibly have assisted, was not presented. This included the family member to whom the complainant had made a report⁷ and people who had according to the complainant apparently been in possession of incriminating pictures. We trust that Ms Ilanga, counsel for the respondent, and her office will take appropriate steps in this regard.

C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

⁶ **S v Stevens** [2005] 1 All SA 1 (SCA) para [1]

⁷ Although not spontaneously, and only about two weeks after the events.

I concur.

**S L ERASMUS
ACTING JUDGE
NORTHERN CAPE DIVISION**

**For the Appellant: Mr R R Bode
(Engelsman Magabane Inc.)**

**For the Respondent: Adv K F Ilanga
(Office of the Director of Public Prosecutions)**