

Reportable: YES / NO Circulate to Judges: YES / NO Circulate to Magistrates: YES / NO Circulate to Regional Magistrates: YES / NO
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**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division)**

Case Nr: 103/2005

Case Heard: 27/10/2008
Date delivered: 07/11/2008
In the matter between:

TTUELO GABOATLHOLE

APPELLANT

and

THE STATE

RESPONDENT

Coram: Bosielo AJP et Olivier J et Steyn AJ

JUDGMENT

Olivier J:

1. The appellant appeared in the Regional Court on a charge of the rape of a 13 year old girl, and an alternative charge of having had intercourse with a girl younger than 16 years in contravention of section 14(1)(a) of Act 23 of 1957. He pleaded not guilty. He admitted having had intercourse with the complainant, but stated that she had consented and that he had been unaware of the fact that she was younger than 16 years old.
2. The appellant was convicted on the main charge of rape and the matter was

referred to the High Court where he was sentenced to imprisonment for a period of 10 years. With the leave of the Court *a quo* he now appeals against both his conviction and sentence.

3. It was common cause:

- 3.1. that the complainant had been 13 years old at the time;
- 3.2. that intercourse had taken place; and
- 3.3. that the complainant and the appellant had come to know each other through the visits of the appellant to the complainant's brother Thebogo in the period of 2 to 3 months prior to the incident.

4. It is trite that a Court of appeal will not interfere with findings of fact unless they are clearly wrong (see **R v Dhlumayo and Another** 1948 (2) SA 677 (A) at 705, **S v Hadebe and Others** 1997 (2) SACR 642 (A) at 654f and **S v Monyane and Others** 2008 (1) SACR 543 (SCA) at 547j-548a).

5. The complainant's version, very briefly, was as follows:

- 5.1. She had on a previous occasion told the appellant that she was in grade 8 at school and 13 years old.
- 5.2. The appellant arrived on the particular day, Sunday 20 March 2005, again looking for her brother, who was not there at the time.
- 5.3. The appellant asked for water. At some stage one Thabo arrived, and a discussion took place between the appellant and Thabo about photographs which the appellant had to enlarge.

5.4. The complainant went to a room to apply lotion to her hands.

5.5. The appellant came to the room, touched her breasts, forced her onto a bed and raped her. Her screams and struggle had been in vain.

6. The appellant's version, again very briefly, was the following:

6.1. The complainant had earlier in the same month told him that she was in grade 8 at school and that she was 18 years old.

6.2. The complainant had resented him for having recruited Thebogo as a member of the church he attended, apparently alleging that it was a satanic church and religion. She had regarded him as evil and had verbally abused him.

6.3. On Saturday 19 March 2005 he again went to the particular house to look for Thebogo. The complainant once again verbally abused him, but as he was leaving she called him back, apologised, hugged him and invited him to return on the Sunday, when she would be alone at home, and told him that she had a surprise for him.

6.4. He found the complainant alone on the Sunday. He asked for water. Thabo arrived and they had a discussion about photographs.

6.5. At one stage, apparently after Thabo had left, he asked

the complainant if she had been sincere in her apology, which she confirmed. They started kissing, she closed the door of the house and intercourse took place in the living room.

6.6. After a visit to the toilet the complainant asked him if he had ejaculated inside her. When he confirmed this, she was worried about falling pregnant and disappointing her family. He suggested that she used a so-called “*twenty four hour emergency prevention pregnancy pill*”. The complainant asked him to leave and in fact “*chased (him) out*”, stating that she was going to lay a charge of rape against him.

7. As a single witness and child the complainant’s evidence had to be considered and approached with caution. The regional magistrate came to the conclusion:

7.1. that the complainant had made a good impression as a witness;

7.2. that she had not had a motive to falsely implicate the appellant;

7.3. that the report she had made to her grandmother indicated consistency in her version that she had not consented to intercourse; and

7.4. that her version was corroborated by the evidence of her grandmother that she was crying when she arrived and made the report.

8. In my view there are, in the first place strong indications of a reasonable possibility of such a motive, and the regional magistrate appears to have

overlooked material evidence in this regard.

9. The complainant admitted that she had disapproved of the appellant's religion and beliefs, that she had told him that she regarded him as evil, that she thought his eyes looked evil and that she had verbally abused him.
10. The question that could immediately be asked is why she would then not only have consented to intercourse with him, but in fact have initiated it.
11. The appellant's version, as already mentioned, was that the complainant had had a change of heart, had apologised to him for her behaviour and had then invited him to come over the next day. It may be argued that such a sudden change of heart was unlikely, even for such a young child, but the question is really whether it is, when considered as part of all the available evidence, necessarily not reasonably possible.
12. Then there was the discussion concerning the possibility that the complainant might fall pregnant. According to the complainant she had asked the appellant *"what if I become pregnant ... and he said that is your responsibility"*.
13. It is quite clear, again on the complainant's own version, that she was quite anxious for the appellant to agree to accept responsibility should she fall pregnant, to such an extent that she followed him outside even after he had according to her made it clear that it was her own responsibility to prevent that.
14. It appears, from the evidence of Dr Berlyn who had examined the complainant later the same afternoon, that the complainant had been using an oral contraceptive and had stopped using it five days prior to the incident. It is strange that a 13 year old girl, who had according to herself been a *"girl that is (not) into boys"*, would have used a contraceptive.
15. The fact that she stopped using the contraceptive only five days prior to this incident could be very significant if it was true that she had invited the appellant

over, knowing that they would be alone, and had blatantly seduced him into having intercourse with her.

16. The question also arises what she would have done if the appellant had reacted by saying that he would accept responsibility if she fell pregnant. Would she still have laid a charge?
17. It is quite clear that the appellant's reaction angered the complainant. That is why she followed him when he left, this despite having according to her just been forcibly raped. She "*wanted him to face his responsibilities*" and, when he was not prepared to do so, felt that "*men like him are not real men*".
18. Her answer, when asked whether the appellant's reaction had made her angry, was patently false and in conflict with her own version:

"I was not angry, because I knew that the Accused person was not able to maintain a child and I also knew that I was going to lay a charge against him.

19. Why did she so anxiously demand such an undertaking from the appellant if she knew that he could in any event not maintain a child and that she was in any event going to press charges against him? It is also not clear on what basis she could have regarded the appellant as unable to maintain a child.
20. I must also remark that I find this sort of discussion, and the behaviour and reaction on the part of the complainant, extremely difficult to reconcile with the scenario of a sexually inexperienced 13 year old girl who had just been forcibly raped by somebody she regards as evil.
21. It also appears that the regional magistrate, in his findings regarding the report and the complainant's emotional state at that stage, overlooked certain inconsistencies in the evidence in this regard.
22. According to the complainant she lived with her grandmother and brothers at M. (M2.) Street in G., Kimberley, and that was where the incident took place at

approximately 14:00 in the afternoon. Yet she had to run to M3. Street in Newtown to report the incident to her grandmother, where she arrived (according to the grandmother) at about 15:00.

23. On the grandmother's version it would have been completely impossible for the intercourse to have taken place in a different neighbourhood, about an hour's run away. According to her the complainant had been plaiting her (the grandmother's) hair, presumably at the house in M3. Street. The complainant at some stage left and she (the grandmother) got up and went to a mirror to see what her hair looked like. When she turned away from the mirror the complainant came back in, crying, and reported the rape.
24. This is simply irreconcilable with the complainant's version. According to her she had been sitting outside a house in a different neighbourhood, listening to music played by the neighbours (not plaiting hair), when she was approached by the appellant and some time later, after having given the appellant water and after the discussion between the appellant and Thabo, raped.
25. It is also difficult to accept that the complainant could one moment be cool, calm and collected enough to want the appellant to be prepared to accept responsibility if she became pregnant, and the next moment arrive at her grandmother, crying to such an extent that she struggled to report the incident.
26. According to the doctor who examined her a few hours later, her "*Mental health and emotional status*" at that stage was "*good, calm and understanding*".
27. The regional magistrate concluded that the appellant's version left unanswered the question why the complainant, who "*disliked the accused for his religious beliefs and referred to him as evil*", would have chosen to have intercourse with him.
28. This brings me back to the appellant's evidence about his encounter with the complainant on the Saturday and about how she had apparently had a change of

heart and had invited him to come over the Sunday when she would be alone.

29. The complainant's reaction when this version was put to her in cross-examination was completely unsatisfactory, but was not discussed by the regional magistrate in his judgment.
30. At first the complainant's reaction was that she could not remember having talked to the appellant on the Saturday. Upon further questioning she said: "*Gaan aan, miskien kan ek onthou*".
31. When it was thereafter put to her that she had called back the appellant who was leaving and was already at the gate, and that he then returned to her, she did not deny this and simply said: "*Carry on*".
32. When it was then put to her that, after she had hugged the appellant he asked if she was interested in him, her answer was "*Ek kan nie van die Saterdag onthou nie, geen kommentaar*".
33. When it was put to her that she had then invited the appellant over for the Sunday when she would be alone, her answer was: "*Okay, I do not remember the Saturday, so no comment*".
34. In passing it may be noted that the record reflects that it was put to the complainant that she had said that her "*mother*" would not be at home on the Sunday, while the appellant's evidence was that she had said that her "*brother*" would not be home. Nothing turns around this. The problem probably arose in the transcription, because it also reflects a statement, in the cross-examination of the complainant, that the reason for the visit was that the appellant was looking for the complainant's "*mother*". This would quite clearly not be correct, because the evidence was that the appellant always went there to visit the complainant's "*brother*", who was his friend.
35. In view of the complainant's answers to these statements regarding the events of

the Saturday, and the fact that the appellant's evidence in this regard could not be shaken in cross-examination, it is reasonably possible that the complainant had changed her mind about him and had invited him over for the Sunday, knowing that she would be alone. Once this is accepted as a reasonable possibility it is no longer improbable that she would have agreed to have a relationship and intercourse with the appellant on the Sunday.

36. The regional magistrate conceded that the appellant had not made "*a bad impression*" as a witness, but rejected his version on the basis of what the regional magistrate perceived to have been improbabilities in the appellant's version. I have already dealt with some of them.
37. The regional magistrate found it improbable that the appellant would have left so soon after intercourse if he had been invited there and had just struck up a relationship with the complainant. The simple answer to this is that the appellant and the complainant had clearly had an argument about him not wanting to take responsibility and that she had then asked him to leave and had, in fact, chased him away.
38. The regional magistrate also could not understand why the complainant would (on the appellant's version) have decided to stay in the livingroom, rather than having intercourse in the comfort of her bedroom. The appellant testified that the complainant reasoned that her uncle might come there, that the time it would then take to come from the bedroom to open the door would look suspicious and that she would in any event in the livingroom be in a better position to detect any approach by the uncle. This evidence was not discussed by the regional magistrate, and apparently not considered.
39. In my view the evidence did not exclude the reasonable possibility that the complainant may have consented to intercourse. Although it may be said that there are also improbabilities in the appellant's version as regards the issue of consent, I am reminded "*that in the search for truth it is better that guilty men should go free than that an innocent man should be punished*" (see **S v Kubeka**

1982 (1) SA 534 (W) at 538H).

40. This means that the conviction on the charge of rape and the sentence will have to be set aside. I am, however, satisfied that it was proved beyond reasonable doubt that the appellant had realised that the complainant was younger than 16 years and that it would be wrong to have intercourse with such a person.
41. The rejection of the evidence of the appellant's witness, mr Gift Molefi, that he had overheard the complainant telling the appellant that she was 18 years old, was fully justified.
42. Even if she has in fact told the appellant that, it is quite clear that he would have known (or at the very least suspected) that she could in fact not be older than 16 years. The appellant's own legal representative agreed, after observing the complainant some six months after the incident, that "*one can not compare her with an eighteen year old*". Even Molefi, while persisting in his version that the complainant had said that she was 18 years old, conceded that he doubted this. The complainant's elder brother, Thabogo, was a friend of the appellant and he was only 15 years old at that stage.
43. Dr Berlyn testified that it was not reasonably possible that anybody could have been under the impression at that stage that the complainant was 18 years old. He testified that the complainant's physical development represented a girl between the ages of 10 and 15 years.
44. In my view the appellant should therefore have been convicted of a contravention of section 14(1)(a) of the Sexual Offences Act 23, of 1957. Although this section has since been repealed by the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007, this only happened long after the conclusion of the trial (see **s12** of the **Interpretation Act**, 22 of 1957).
45. There is no sense in remitting the matter for the purposes of sentence. The regional magistrate has in any event since retired. The appellant has no previous

convictions. His personal circumstances appear from the judgment on sentence and are favourable. He had an income of more than R8 000,00 per month. The complainant suffered no long term psychological effects.

46. For the purposes of sentence one will once again have to accept the appellant's version as reasonably possible, which would mean that the complainant had blatantly seduced him into having intercourse with her.
47. I am satisfied that a fully suspended sentence would in the circumstances have been appropriate. The reality is, however, that by the time the appellant was released on bail pending this appeal, he had already served more than 2 months imprisonment, which will have to be kept in mind in considering sentence on the alternative count. He had also spent 17 months in custody before he was sentenced.
48. In my view it would, under these circumstances, be unduly harsh to burden the appellant with an unsuspended sentence (see **S v O** 2003 (2) SACR 147 (C)). The time already spent in prison and in custody cannot be undone and the only practical approach is to substitute his sentence with a period of imprisonment more or less equal to the period already served (see **S v N** 2007 (2) SACR 398 (E) para [6]) and to antedate it in terms of section 282 of the Criminal Procedure Act, 51 of 1977.
49. The following orders are therefore made in this matter:
 1. **The appeal against the conviction on the charge of rape succeeds and the conviction and sentence are set aside.**
 2. **The appellant is convicted on the alternative charge of having had intercourse with a girl under the age of 16 years in contravention of section 14(1)(a) of the Sexual Offences Act, 23 of 1957.**
 3. **The appellant is sentenced to imprisonment for a period of 2 months**

and 2 weeks, backdated to 22 September 2006.

**C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION**

I agree:

**L O BOSIELO
ACTING JUDGE PRESIDENT
NORTHERN CAPE DIVISION**

I agree:

**E J S STEYN
ACTING JUDGE
NORTHERN CAPE DIVISION**

**For the Plaintiff: Adv P J Cloete
 Legal Aide Centre, KIMBERLEY**

**For the Respondent: Adv A H van Heerden
 Director of Public Prosecutions, KIMBERLEY**