NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Appeal Case No: AR361/2021

In the matter between:

SABELO WISEMAN BUTHELEZI **APPELLANT**

and

THE STATE **RESPONDENT**

ORDER

The following order is made:

1. The appeal against the appellant's conviction on two counts of rape on 27 June 2018 and against the sentence of life imprisonment imposed on 29 June 2018 is upheld.

2. The said convictions and sentence are set aside.

J U D G M E N T
Delivered on: Friday, 10 June 2022

OLSEN J (DUMISA AJ concurring)

[1] The appellant in this matter appeals against his conviction on two counts of rape and the sentence of life imprisonment imposed on him in respect of those two counts, taken as one for the purpose of sentence. The trial commenced on 15 November 2015. It proceeded in fits and starts. He was convicted on 27 June 2018 and sentenced on 29 June 2018.

[2] On count 1 the appellant was charged with having raped the complainant once in 2008 when she was 12 years of age. On count 2 the appellant was charged with having raped the complainant "more than once on diverse occasions" during 2012. Having convicted the appellant on both counts the magistrate misdirected herself with regard to sentence in a number of respects.

(a) It is difficult to see that there was any justification for treating the two counts as one for the purpose of sentence.

(b) She sentenced the appellant on count 2 on the footing that life imprisonment was justified because the complainant was under 16 years of age at the time. The magistrate ignored the evidence that the complainant was 16 years of age at the time.

(c) To the extent that the magistrate may be taken to have endorsed the State's claim that a minimum sentence of life imprisonment was justified as a result of the appellant having raped the complainant more than once, albeit on different occasions, the learned magistrate misinterpreted paragraph (a) (i) under the heading "rape" in Part 1 of Schedule 2 to Act 105 of 1997. (See *S v Ngcobo* 2016 JDR 0401 (KZP))

Given the view we take concerning the convictions there is no need to say anything more about the sentence imposed.

[3] The complainant and the appellant are first cousins. The appellant is 7 years older than the complainant. The complainant's late mother was the sister of the appellant's mother.

[4] Prior to the death of the complainant's mother, the complainant and her siblings who lived in Johannesburg were accustomed to visiting the appellant's family home in Osizweni during June and December school holidays. The custom was followed in December 2008. The complainant and three of her older sisters were visiting at Osizweni. According to the complainant, on what appears to be the night before her family were to return to Johannesburg, the four girls were sleeping on the floor under a shared blanket in a small room, whilst the appellant slept on the single bed in that room. She was awoken during the night to find the appellant removing her panties, whereupon he proceeded to penetrate her. She tried to resist, fighting him off, but he threatened her saying that he would report to her family that she was conducting some sort of a relationship with a boy next door. None of this, according to her, disturbed her sisters. When he was done the appellant returned to his bed and the two of them slept through the night. The next day the girls returned to Johannesburg. When pressed she claimed to have made a report to one of the appellant's sisters that this event had occurred, who responded by advising the complainant to return to Johannesburg. She reported it to no one else. Thereafter the family visits during school holidays continued to take place and nothing untoward happened. Upon her mother's death in early 2012, and because her father was working away from the Johannesburg home, the complainant went to live with her aunt, the appellant's mother in the same household already referred to.

[5] These alleged events of 2008 gave rise to the charge of rape which is count 1. Besides the complainant, the prosecution called the complainant's paternal aunt and the complainant's father as witnesses, but, as the magistrate correctly recorded in her judgment, their evidence did not advance the State case on either of the counts. On count 1, therefore the State relied exclusively on the evidence of the complainant.

[6] In her judgment the learned magistrate dealt with the evidence relating to count 1, and the events of four years later which generated the charge on count 2, by concentrating on credibility. I think it fair to say with regard to count 1 that the magistrate responded positively to the complainant's evidence for these reasons given in her judgment.

(a) Throughout her evidence the complainant was calm and confident.

(b) The complainant did not contradict herself and her evidence was quite clear and satisfactory in all material aspects.

(c) A conflict between her evidence and that of her father, concerning whether her father had expelled her from the house in Johannesburg when he came to hear of her pregnancy, was not material.

(d) The complainant reported the events of 2008 to the appellant's sister.

As to the last of these observations, the magistrate appears to have misdirected herself. The evidence of the first report is normally led to establish consistency, upon the basis that such consistency advances the prosecution's argument that a complainant's evidence is credible and reliable. Here the only evidence of such a report having been made is that of the complainant herself. In those circumstances the evidence hardly advanced the cause for which it is ordinarily presented to the court, given that its value is dependant upon the very credibility and reliability finding to which it is supposed to contribute. It cannot serve that purpose if the person normally called the "first report" is not called.

[7] However the State's case on count 1 flounders on an unrelated basis. Concerning count 1 the magistrate had this to say in her judgment.

'It is also important to note that there is a great amount of cross-examination of the complainant about the accused's version regarding the events of the night in question in 2008. Surprisingly, the accused's evidence is silent in that regard. One wanders as to whether he perhaps forgot completely about it or was it a fabrication?'

The magistrate misdirected herself in that regard. The appellant dealt with count 1 in his evidence in chief. He denied the complainant's allegation. A little later in his evidence in chief, when the subject came up again, he pointed out that what she had said could not have happened because the rule in that house was that the boys and girls did not sleep in the same room.

[8] The appellant's denial of the events giving rise to count 1, and his statement concerning sleeping arrangements, were not challenged by the prosecution. Indeed, whilst the appellant was cross-examined at length, there was not a single question which went to the allegation that he had raped the complainant in 2008. Whether the prosecution adopted that approach purposely or not is neither here nor there. As the appellant's denial went unchallenged he was entitled to his acquittal. In applying that principle it should not be overlooked that, given that this charge was raised many years after the alleged event, there was little the appellant could do, assuming his innocence, but deny that the event in question ever occurred. In such a case it is for the prosecution to show that the denial is false – ie that the version is not reasonably possibly true. The first and most elementary step in achieving that outcome is challenging the denial. (See *S v Manicum* 1998 (2) SACR 400 at 404e to 405i.)

[9] As it turns out the argument delivered in the court *a quo* has been transcribed and appears in the appeal record. It is noteworthy that the prosecutor's argument did not canvas count 1 at all.

[10] Turning to count 2, as already mentioned, after the death of her mother in early 2012 the complainant went to live with her aunt, the appellant's mother. As I understand the evidence this was because the complainant's father was not living in the family home in Johannesburg as he had to obtain work elsewhere. On the complainant's version, on three occasions, the details of which she provided in evidence, in about July or August 2012 the appellant informed her that he wished to have sexual intercourse with her, she refused, but he insisted and had his way with her. This all happened in the family household. Strangely enough the question as to whether these three separate events could have been discovered by anyone else in the household walking in was not fully canvassed. The complainant's descriptions of these three events were somewhat cursory (a few lines in the record covered each of them). On the second occasion when he said he wanted to have sexual intercourse with her and she said she did not like what he was doing, the appellant said that even if she were to tell his mother she would not be believed. On the third occasion the appellant said to her that if she refused intercourse he would tell his mother and his older brothers that she was not studying and was instead busying

herself with whatsapp. That appears to be the background against which, according to the complainant's evidence, these three sexual encounters took place without the application of any form of physical force, despite her expressed discontentment with what the appellant was about; and without any report following them. The complainant said more than once in evidence that she felt that she could not speak to her aunt, the appellant's mother, because she would not be believed.

[11] With regard to the events of 2012 (ie count 2) the appellant's evidence was that he had consensual sexual intercourse with the complainant on one occasion. He gave a clear and detailed account of what happened on that occasion. The gravamen of it is that the complainant told him that she had feelings for him and wished to have sex with him, and that following her caresses he weakened, as a result which sexual intercourse took place.

[12] Wherever the truth lies, the consequence of what happened was that the complainant fell pregnant. The child was born in May 2013. According to the complainant she would never have reported what she said took place between her and the appellant if she had not fallen pregnant as a result of it.

[13] According to the complainant's evidence when she discovered she was pregnant in September 2012 (one would think it was late September, given that the short school holiday was due) she told the appellant's mother of that fact and identified the appellant as father of the child. The complainant's evidence is that the appellant was called by his mother and admitted paternity. That version was put to the appellant's mother when she gave evidence in chief and she said that it did not happen. Her version is that the child went off to Johannesburg for the short holiday and then returned to carry on with the last term of the school year. In December (presumably early December) when the term had ended the appellant's mother rose one morning to find the complainant ready to leave with her bags packed, and announcing to the appellant's mother that she (the complainant) was pregnant, and was going to Johannesburg to inform the father of the child. When she was cross-examined, the appellant's mother was not confronted in any way at all with the proposition presumably supported by the prosecution, that the pregnancy had been disclosed as the complainant had said. Instead she was confronted with a series of

questions designed to show that on her own version she had failed in her duty as putative mother to the complainant, and that she had not taken the complainant to a doctor or established who the father of the child was. Her response to this line of questioning is exemplified by this short passage of evidence.

'I admit that I failed her, I did not do what was expected of me as a mother. But hence I am saying that the reason for that is because when she approached me, she already had her bags with her telling me that she was leaving.'

And the position is that the complainant did then leave that household and did not subsequently return.

[14] The learned magistrate dismissed and disregarded the evidence of the appellant's mother in these words.

'When it comes to the accused's mother, her evidence did not take the defence case any further. Regarding her credibility, she was biased in favour of the accused. It became clear from her evidence that she was not concerned about the complainant's child at all. She disputed the complainant's version that when she discovered that she was pregnant by her son, the accused, she tried to cover-up for him by telling the complainant to go to Johannesburg so that it would seem to be that she got pregnant in Johannesburg.'

It is probably fair to say that mothers are naturally biased in favour of their children. That does not disqualify mothers as witnesses. The magistrate did not explain why she concluded (as by implication she did) that the rejection of the appellant's mother's evidence about the circumstances in which the pregnancy was disclosed, in favour of the complainant's version, was justified. The transcript of the evidence reveals no basis upon which to argue that material bias justified rejection of the evidence. She did not try to excuse her son's behaviouir. Her answers to questions put to her were to the point and straight forward; and as far as can be judged from a transcript, they were unblemished by what must have been her maternal affection for the appellant. Furthermore, it strikes me that the complainant's version of the circumstances in which her pregnancy was disclosed to the appellant's mother is

improbable. It implies that the complainant's mother entertained a belief that the paternity of the child could be hidden forever. Given the evidence of how the complainant's family reacted when they came to know of her pregnancy, which appears perfectly predictable, it is improbable that the appellant's mother could have expected the complainant to hide the truth indefinitely.

[15] DNA tests identified the appellant as the father of the complainant's child. The results were admitted into evidence by consent.

[16] The magistrate disposed of the appellant's evidence as an obstacle to conviction with this short passage in her judgment.

'During cross-examination of the accused it became clear that the accused has misgivings about the DNA results despite the fact that it was admitted by consent. Considering the accused's version, especially during cross-examination it is clear that had he not been linked by the DNA, he would have denied the sexual intercourse. His defence in my view was created in order to explain the DNA. The accused was very poor in the witness box especially during cross-examination. He purported to dispute that he is the father of the complainant's child yet he is linked by the DNA. He admitted that the DNA was not challenged.'

[17] The magistrate's assertion that it is clear that but for the DNA evidence the appellant would have denied sexual intercourse with the complainant is a gross misdirection. Nothing in the overall account of events given by all the witnesses, and especially nothing in the appellant's evidence, justifies that conclusion. It was merely speculative and, if anything, evidences a biased approach to the factual enquiry.

[18] The magistrate misdirected herself in asserting in her judgment that the appellant disputed that he was the father of the child. The cross-examination on this issue had a different flavour. The cross-examiner sought to explore the question as to whether the appellant now accepted that he was the father of the child. In my view a fair summary of his response to this line of questioning is that he could not bring himself to accept that, despite the DNA evidence. The overwhelming majority of lay people, in this country and elsewhere, do not understand the scientific basis for the

assertion that in some circumstances DNA evidence is irrefutable. The appellant undoubtedly fell into that category of persons. He explained that his first attorney (who subsequently withdrew from the case for want of funds) had told him that there was something wrong with the DNA results. In addition, his evidence was that he had believed from the outset (ie that would be from about December 2012 when his mother told him that the complainant was pregnant) that the father of the child was in Johannesburg. It is plain from the record that the appellant did not then want to be the father of the child. It is a natural human response not to accept outcomes which you do not want. But he did accept that for the purposes of the case he had to be regarded as the father of the child.

[19] In her judgment the magistrate did not explain why it is that the appellant's reluctance to accept paternity, despite the fact that he acknowledges sexual intercourse with the complainant, justifies a conclusion that his evidence must be rejected.

[20] The fact that sexual intercourse had taken place between the complainant and the appellant was "publicly" known well before the trial. The community regards such conduct as incest. As a result, and with a cow and a goat supplied by and at the expense of the appellant's family, a cleansing ceremony was held at the home of the complainant's family. The complainant's father complained in evidence that, despite the cleansing ceremony, damages were not subsequently paid. It seems that neither he nor the complainant's aunt (that is the one who was a State witness) were able to say whether the cleansing ceremony post-dated the delivery of the DNA results. There was certainly no positive evidence before the magistrate supporting the proposition that the appellant denied having had sexual intercourse with the complainant until the arrival of the DNA results.

[21] Besides

(a) a brief criticism of the appellant's approach to the DNA evidence and to an acknowledgment of paternity, and

(b) the magistrate's erroneous belief that the accused did not deny the 2008 event which was the subject of count 1 (dealt with above)

the magistrate offered no explanation in her judgment for her finding that the appellant was “very poor in the witness box especially during cross-examination”. A careful examination of the record of the appellant’s evidence reveals no basis for a finding that the appellant was a poor witness, and no justification for it simply to be rejected out of hand, as was done by the magistrate. Insofar as the magistrate’s assessment of the evidence of the complainant is concerned, I have already mentioned the improbability of the complainant’s version of the circumstances in which she disclosed to her putative mother that she was pregnant and that the appellant was the father of the child. To what I have already said on this score may be added the fact that the State made no effort to explain or explore how it is that the household overseen by the appellant’s mother functioned during the last school term of the year, allegedly with knowledge of the complainant’s pregnancy and the appellant’s responsibility for her condition. Furthermore, with regard to both this and a general assessment of the evidence given by the complainant, the magistrate simply ignored the consideration that from the point of view of both families and the community, what had happened was incest; with the result that the complainant had every reason to avoid the suggestion that she was a willing participant.

[22] Because of the magistrate’s misdirections we are in the position of an appeal court which is obliged to re-examine the factual issues without the benefit of having heard the witnesses. Despite my criticisms of the complainant’s evidence I am not able to find on the record that one can say with certainty that her testimony on count 2 was false. But of course that is no basis upon which to decide the case. There is equally, in my view, no basis on the record for a finding that the appellant’s version is false. It is certainly reasonably possibly true, with the result that, for the reasons given, the appeal in this matter must be upheld.

The following order is made.

1. The appeal against the appellant’s conviction on two counts of rape on 27 June 2018 and against the sentence of life imprisonment imposed on 29 June 2018 is upheld.

2. The said convictions and sentence are set aside.

OLSEN J

I agree

DUMISA AJ

Date of Hearing:	Friday, 20 May 2022
Date of Judgment:	Friday, 10 June 2022
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