IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: A250/10

In the matter between:

GODFREY NELSON — Appellant

and

THE STATE — Respondent

Court: MEER J
Heard: **28 January** 2011
Delivered: 8 February 2011

JUDGMENT

MEER J:

[1] Appellant appeals against his conviction on 18 November 2005 in the Regional Court Somerset West for rape, and his sentence thereafter on 5 December 2007 to 17 years imprisonment, in this Court, after the matter was referred for sentencing in terms of Act 105 of 1997.

The Appellant who was legally represented had pleaded not guilty in the court *a quo*.

[2] Leave to appeal was granted on 8 December 2008 after Veldhuizen J heard further evidence from the Complainant to the effect that she had lied in her testimony in the Magistrate's Court that she had been raped. She testified that she had consented to sexual intercourse with the Appellant. On the basis of the further evidence it was concluded there to be a reasonable possibility that another court might come to a different finding and leave to appeal was accordingly granted.

[3] The Appellant appeals both the conviction and sentence on the following grounds:

3.1 Appeal against conviction:

In the light of the Complainant's further evidence of consensual sex, there is a reasonable possibility that another court could come to a different finding regarding conviction. Complainant's further evidence was plausible and consistent with her earlier evidence. Her evidence of how the intercourse came to light was consistent with her evidence in the court *a quo* that her Aunt Ms Williams had surprised her in the bathroom. Her explanation for her inconsistent prior evidence that she was afraid of her mother and was told what to say by her, could not be ruled out. Her further evidence was borne out by her actions after the incident.

3.2 Appeal against sentence:

The Appellant submits that the sentence is shockingly inappropriate, given his personal circumstances, *inter alia* his youth, the fact that he was a first offender and the absence of trauma, emotional shock and serious injury associated with the incident.

Evidence in the Regional Court

[4] The evidence of Lusiana Booysen, the Complainant, was in summary as follows: She was born on 1 November 1991 and would have been twelve and a half at the time of the incident. On the evening of 8 May 2004, the Appellant visited the Complainant's family home. He left the house together with the Complainant's mother and a number of other persons who were also visiting, but returned shortly thereafter to tell the Complainant that her mother was looking for her. The Complainant walked out of the house but could not find her mother. On her return the Appellant grabbed her by the arm and dragged her to a cement slab near the house where he asked her to have sex with him. She refused and threatened to tell her mother. He then forced her to have sexual intercourse with him. Immediately thereafter she returned to the house.

[5] She went to the bathroom to pass urine. Her aunt, Bonita Williams entered the room, saw a white stain on her panties, and asked her what it was. She answered that it was nothing. Williams then asked her if the appellant had sexual intercourse with her. She answered in the affirmative, and Williams asked her what she was going to tell her mother. She said that she did not know. Ms Williams advised her to tell her mother what had happened.

[6] The Complaint's mother, Sabina Booysen, returned the next morning and was informed of the incident by Ms Williams. Complainant's mother testified that she woke the Complainant, inspected her and concluded that she had had sex with the Appellant. She proceeded to confront the Appellant but he denied that he had raped her. A charge of rape was reported against the Appellant after the Complainant had been examined by a doctor who found injuries to her vagina and hymen, consistent with sexual penetration.

[7] The Appellant testified that there had been sexual intercourse which was consensual and initiated by the Complainant, entirely. More particularly, on the evening of the incident, he was visiting when Complainant asked him to accompany her to fetch the washing. Once outside she made sexual overtures to him, resulting in sexual intercourse. At the time he was under the impression that the Complainant was 16 years old. His evidence was found by the court *a quo* to be so implausible that it was rejected.

Complainant's evidence in the High Court

[8] The Complainant's further evidence before this Court on 8 December 2008 was that she had been in a sexual relationship with the Appellant at the time of the incident, that she was in love with him, and that she had consented to sexual intercourse with the Appellant on the 8 May 2004. She explained that she had testified that she had been raped on the instructions of her mother, who had found out about their relationship and did not like the Appellant. Her mother had brought the charge of rape and instructed her to testify that she had been raped, even

though she had told her mother that she had not been raped. She was afraid of her mother who was inclined to hit her, and thus did as she was told. She explained that she lived with her mother, and if the latter put her out of the house, she would have had nowhere else to stay.

[9] Complainant's mother died in 2006. Complainant had felt uneasy about her testimony implicating Appellant and had approached a pastor in this regard. Early in 2008 Complainant decided to give evidence to the effect that she had consented to the intercourse and had approached the Appellant's mother about her willingness to do so.

[10] Unlike in her earlier testimony she testified that she had no idea what her actual age was. She had relied on what her aunt had told her about her age in her earlier testimony during the trial. She however denied telling the Appellant that she was sixteen years old at the time of their relationship.

On Appeal

[11] On behalf of Appellant it was submitted that Complainant's recent evidence was consistent with her evidence in the Magistrate's court in a number of material respects. Before the Magistrate she had never suggested that she was threatened. The fact that she did not call for help was consistent with a version that she had not been raped, as also was her conduct after the incident. No evidence was led that she was emotional after the incident. When her aunt asked about the white stain on her panties she underplayed it. It could not be outruled, it was submitted, that her mother had forced her to incriminate the Appellant.

The contradictions between Complainant's and Appellant's versions could be attributed to the latter giving a different version to hers as he was scared to incriminate himself. The medical report, it was submitted, did not outrule consent.

[12] On behalf of Respondent it was submitted that although Complainant had detracted from her testimony during the trial, there were a number of inconsistencies which questioned the veracity of her coming forward later and saying she had lied. Her explanation for not coming forward was implausible in that her mother had died two years before she decided to testify again. She had had the opportunity to tell the truth to a social worker, who found her to have been traumatised, when the latter's report was done. She had also had a further opportunity to state this evidence when the Appellant was sentenced in 2007, by which time her mother had passed away. This suggests the possibility of influence and bias. Her decision to testify happened to coincide with the sentencing of Appellant to 17 years imprisonment which suggested she did so because she felt sorry for him. It was submitted that even on the new evidence a conviction for statutory rape was competent, given that the evidence pointed to Complainant being under the age of 16 at the time of the incident.

[13] The aforementioned submissions, in particular those for and against a version of consensual sex and the veracity of the Complainant given her respective versions, highlight the complexities inherent in this matter. I am alive to these aspects, all of which are exacerbated in assessing complainant's evidence once again, by the fact that she is a single child witness to the event, to whom the cautionary rule must be

applied extremely cautiously, given the curious circumstances of this case. I am however also mindful that whatever difficulties may attach to Complainant's testimony, and whatever her motive for changing her testimony a few years later, before this Court, a version that there was consensual sex is now before us on appeal. It is a version which cannot be excluded as being reasonably possibly true in the light of all the evidence. Appellant must be given the benefit of this version which is consistent with his testimony, that of the Complainant and the evidence as a whole.

[14] I accordingly conclude that the Complainant consented to the act of sexual intercourse with the Appellant in 2004. I now turn to the consideration of the age of the Complainant at the time which has a bearing on the all important aspect whether Appellant can be found guilty of consensual sexual penetration with a child in terms of Section 14 of the Sexual Offences Act 23 of 1957, an offence, commonly known as statutory rape. A guilty verdict on this latter offence is a competent verdict on a charge of rape, as is specified at Section 261 (1)(g) of the Criminal Procedure Act 51 of 1977.

[15] In evidence in chief the Complainant and her mother testified that she was born on 1/11/1991. The Appellant testified in the Magistrates court that the Complainant was sixteen years old at the time of the incident. However, during evidence in chief, when it was put to him that Complainant was 12 at the time and he was asked, "Is dit omtrent reg?" he replied, "Is seker so. Ek was 22 die tyd." In her further testimony as alluded to above, the Complainant said she did not know precisely in what year she was born and that she did not have a

birth certificate. She had been told by her aunts that it was in 1990. On this version she would have been thirteen and a half at the time of the incident.

[15] The medical report records Complainant's weight as 37 kg and her vaginal entrance as being so small that a finger could barely enter it. The doctor who examined her described her as being in the early stages of puberty and not having commenced menstruating. This would make her a wisp of a girl unlikely to have reached 16 years of age. As against this the Appellant's version that she was 16 cannot in my view be reasonably possibly true. It is moreover improbable that Appellant who had lived on the same farm as her and knew her for several years would not have known her age or could have thought she was 16. I accordingly conclude that the Appellant was guilty of committing an act of consensual sexual penetration with a child.

Sentence

[16] As a competent verdict on a conviction for rape is a conviction for the offence of committing consensual sexual penetration with a child, Appellant must be sentenced afresh on the latter offence. As Appellant committed the offence in 2004, his sentence must be determined in terms of the applicable legislation as of that date, namely the Sexual Offences Act 23 of 1957 . Section 14 thereof, as aforementioned, makes it an offence for a male person to have sexual intercourse with a girl under the age of 16 years, even if she consents thereto. Section 22 prescribes a sentence of imprisonment for a period not exceeding six years with or without a fine not exceeding R12 000 in addition to such imprisonment.

[17] In *Fhetani v S* 2007 (2) SACR 590 the 23 year old Appellant's sentence of 15 years imprisonment for a conviction under the Sexual Offences Act 23 of 1957 for unlawful sexual intercourse with a girl below the age of 16 years, was reduced on appeal to 3 years imprisonment. On appeal it was noted that the trial court appeared to have been under the impression that that there were facts before it that established that the appellant was guilty of rape. There was no evidence that the complainant did not consent to the intercourse. Japhta JA in finding that the sentence imposed by the Court a quo was grossly disproportionate, stated at 593 f to 593 i

> [6] This does not mean that deterrence is no longer an object of sentencing. In this matter it is unlikely that the appellant would commit the same offence again. A severe sentence would only serve as a deterrence to other would-be offenders who might contemplate having sexual intercourse with girls below the age of 16 years. A sentence that is intended to serve this purpose must not, however, be grossly disproportionate to the offence of which an accused person was convicted. Because a grossly disproportionate sentence does not only violate the accused person's right to a fair trial but also his or her right not to be punished in a cruel, inhuman or degrading manner (*S v Dodo* 2001 (1) SACR 594 (CC) [also reported at 2001 (5) BCLR 423 (CC)–Ed] at paragraphs [35]–[39]).
>
> [7] Moreover, in sentencing the appellant the court below overlooked the provisions of the Sexual Offences Act 23 of 1957 in terms of which he was convicted. Section 14 thereof makes it an offence for a male person to have sexual intercourse with a girl under the age of 16 years, even if she consents to such intercourse. For this offence, section 22 prescribes a sentence of imprisonment for a period not exceeding six years with or without a fine not exceeding R12 000 in addition to such imprisonment.

[18] The case at hand pertains to an instance of consensual sex between a twenty two year old man and a girl of at least 13 years, an act which occurred in May 2004. Medical examination revealed minor

injuries. The Appellant has no previous convictions. He is a breadwinner, in fixed employment and supports two minor children. Appellant is currently out on bail of R1000. He has however spent just over ten months in prison from 5 December 2007 when he was sentenced, until 21 October 2008 when an order was granted for him to lead further evidence and bail was granted.

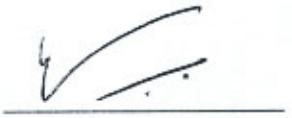
[19] As against the circumstances of the Appellant, must be weighed the seriousness of sexual offences and their prevalence in our society. The legislature, reflecting the social mores of society has enacted legislation in an attempt to curb sexual intercourse between adults and children and for good reason. The exploitation of emotionally immature children and the risks of pregnancy and sexually transmitted diseases is a cause for serious concern. In juxtaposing the interests of society against that of the Appellant and given the circumstances pertaining to the commission of the offence, I grant the following order on appeal:

The appeal against conviction and sentence is upheld. The conviction and sentence imposed by the court a quo is set aside and substituted as follows:

The Accused/Appellant is convicted of the offence of having committed an act of consensual sexual penetration with a child in terms of Section 14 of the Sexual Offences Act No 23 of 1957.

The Accused/ Appellant is sentenced to three years imprisonment of which two years and two months are suspended for a period of five years on condition that the Accused/ Appellant is not convicted of the crime of rape, sexual intercourse with a child or any other offence under the

Sexual Offences Act No 23 of 1957 as amended or under the Criminal Law Sexual Offences and Related Matters Act No 32 of 2007.



Y.S.MEER

Judge of the High Court

I agree and it is so ordered

E MOOSA

Judge of the High Court

I agree.

E.T. Steyn

Judge of the High Court