IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

(Coram: Henney, J et Martin, AJ)

[*Reportable*]

Case No: A354/19

In the matter between:

LUKAS ABRAHAM WENTZEL Appellant

and

THE STATE Respondent

Heard: 9 October 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representative and to counsel for the state by email and released to SAFLII. The date and time for hand-down is deemed to be at 14h00 on 19 October 2020.

JUDGMENT

HENNEY, J

Introduction

[1] The appellant was convicted on 3 counts of contravening section 3 (rape) and one count of contravening section 16(1) (statutory sexual assault) of the Criminal Law (Sexual

Offences and Related Matters) Amendment Act, 32 of 2007 ("SORMA") in the Regional Court sitting at Paarl. He was sentenced to 10 years' imprisonment on each of counts 1, 2 and 4, and 12 months' imprisonment on count 3. The Regional Magistrate ordered the sentences on counts 2 and 3 run concurrently with the sentence imposed on count 1.

[2] The appellant was further declared unfit to possess a firearm and his name was entered onto the National Register for Sexual Offenders. With the leave of the Court a quo, the appellant now appeals his conviction. Mr. Klopper appears for the appellant, while Ms. Galloway appears for the respondent.

The Evidence

[3] It is common cause between the parties that the most important evidence presented during the trial in the Regional Court, was that of the complainant and the appellant. For the purposes of this appeal, based on the grounds of appeal regarding the conviction, it would therefore only be necessary to deal with the evidence of these two witnesses. The complainant testified that the appellant had been his music teacher from 2001 to 2010. During the period 2001 and 2007 the music lessons took place at Noord – Eind Primary School ("Noord – Eind"), and from 2008 until 2010 at the appellant's house. Appellant was always a friendly teacher who liked physical touching, and gave him lots of hugs and always held him.

[4] He testified that towards the end of 2008, during July to August, the manner in which the appellant touched him had changed. At that time, he was 13 years old. It started with the appellant putting his hand on the complainant's knee and then moving it further up. This led to touching of the complainant's penis, playing with it, appellant masturbating, the appellant having oral sex with the complainant, and, eventually, the complainant started having anal sex with the appellant, from 2009.

[5] During the initial stages the appellant asked the complainant 'if [he] knew what we were busy with.' According to the complainant, in the beginning he 'froze' but his 'adrenaline rose' and he felt 'excited', 'awake', 'alive' and did not think anything strange about it. He furthermore stated that he 'did not it want to end it because [he] wanted to know what the feeling was' as he had 'never experienced such a feeling in [his] life.'

Although this was a pattern that unfolded over a long period of time, it did not occur during each lesson. He furthermore testified that once it had progressed to anal sex, it occurred 'about every second lesson'. During the interactions when sexual penetration took place, there was no talking. They would get up, the appellant would bend over and the complainant would penetrate him. The complainant testified that he knew, without the appellant saying anything, what appellant wanted him to do when the anal sex started. Even though both the appellant and the complainant would undress, partial or full undressing did not take place during each incident. The sexual interaction between the two of them took place until he stopped his lessons in 2010.

[6] He furthermore stated that he told his parents he wanted to stop the lessons by saying he is too busy with other stuff, and it was during his matric year. He thus decided that he would carry on as if nothing was wrong, so that the appellant would be under the impression that he had not told someone about what had happened between them. He did not want the appellant to be afraid that he would tell someone; he just wanted to carry on with his life and he wanted to get away. He testified that during July 2011 he 'missed the feeling' and made contact with the appellant, via SMS, under the guise that he had a piece of music that he wanted to play for the appellant. They agreed to meet at the appellant's house and the same pattern started all over again.

[7] He said that at that time he wanted to see what he was feeling and thinking, and whether his decision to stop the music lessons had been correct. He stated that he decided to break the pattern, and suggested that they go to the bedroom. Although they went to the bedroom they were there only for a short period, because the appellant wanted to go back to the music room. This was usually where the penetration took place. He knew the appellant did not feel anything and that it was just sex. It was just a pattern that they repeated. Later in 2011, he missed the appellant and the relationship he thought they had, and he wanted to see if he himself could break the pattern. At this time, he really did have a piece of music he wanted to play for the appellant.

[8] He contacted the appellant, they got together and while he was playing the piece of music he became aroused, and the whole pattern started all over again. Later that evening he became very depressed, and 'realised that each and every step was so well

practiced'. Despite this realisation, in July 2011, after he was selected to visit NASA in America, he did not know who to share this news with, and he contacted the appellant, whereafter they met at Noord – Eind. During this encounter, while he was telling the appellant about his visit to NASA, the appellant touched his leg and this built up to the appellant inserting his finger into his anus.

[9] The complainant testified that this conduct of appellant (inserting of his finger into his anus) shocking him, and he promised himself never again to contact the appellant. This was the last contact that took place between the two of them. He always felt comfortable around the appellant, and saw him as a friend and someone he looked up to. He trusted him and thought the appellant knew what he was doing. He saw what happened between the two of them as a 'new manner of playing' and as the next development in their relationship. It was after this last incident that he realised that for the appellant it was just about sex, which he found scary. It was the first time that the appellant had acted unexpectedly without giving him a chance to take his time, in the way the events had taken place on that specific day. This made him realise that he could no longer trust the appellant. It was also after this incident that he realised for the first time that his feelings, including his negative feelings towards the appellant, were because of the things they were doing.

[10] He further testified that he later developed psychological problems and he considered himself to be addicted to sex. He did mention what happened between himself and the appellant to a friend of his, Espe Mostert, but he did not elaborate on it, because this person was not very keen to hear the details. He furthermore did not mention it to his parents, because he did not have a very good relationship with them.

[11] In cross-examination he stated that a lot of music lessons took place at the appellant's house, but also at Noord - Eind. The appellant never forced him to do anything, and he would always give him time, he would always proceed slowly. He does not remember a lot of specific details and does not have a good recollection of what took place. He remembers it 'in pieces'. He further stated that at times when he played his music well, the music would not matter and then they would have sex, and when his music was not that good they would stop and focus on the music. Also that during anal

sex, at the beginning stages, the appellant would only take off his pants and not his shirt, but later on he also took off his shirt. He himself would be standing in the music room, either with his pants totally removed, or later with his pants and shirt removed. Eventually as they progressed he would be standing in the music room totally naked. Similarly, at the beginning stages, he would also only have a shirt on with his pants removed, which later progressed to him being totally naked.

[12] He further testified that without there being any communication between the two of them beforehand, the appellant would bend over and he would proceed to penetrate him from behind. He felt safe with the appellant when he started touching him and he felt 'horny' when he did this. When he was asked how he would know when to place his penis in appellant's anus, he said that at that stage he was about 14-15 years old, had started to watch pornographic videos and he knew how it worked. He perfectly understood what would happen next, which is that if someone in front of you pulls their pants down it is not difficult to know what should happen next. During the music lessons at the appellant's house, when they had anal sex, it was in the afternoon and they were either partially or totally naked, which happened frequently. All of this would happen between a period of 15 to 20 minutes at a time. After he had stopped the music lessons with the appellant he wanted to have contact with him again, because he missed the physical intimacy with the appellant and he sent him an SMS.

[13] He further testified that he made a mistake when he said in his evidence in chief that after he had decided to discontinue the music lessons, that he had met the appellant at his house, as it was at Noord – Eind. He remembers the incident where they had gone to the appellant's bedroom, but it happened in 2010, not in 2011. He made a mistake earlier when he testified that it happened in 2011. It happened when they went into the music room and, just when the sex started, he requested that they go to the appellant's bedroom. It was after they had had oral sex and the appellant had taken off his clothes. He could not remember whether he took the appellant by his hand and lead him out, but he just wanted to go to the bedroom. He wanted to have sex with the appellant in the normal manner on a bed. Both of them were naked and they walked from the music room to the bedroom. He furthermore explained where the bedroom is situated in relation to the music room, which was just on the left-hand side of the music room. On that

particular day he and the appellant were on the bed naked. They were on top of each other, they were touching each other and he could not remember if they were kissing. He could see that the appellant was uncomfortable; he then decided to go back to the music room, where they continued to have sexual intercourse. It was his decision to go to the bedroom and it was also his decision to return to the music room.

[14] The appellant was comfortable when they went back to the music room. The same story played out, both of them were naked and he penetrated the appellant from behind. In evidence it further emerged that he only reported the crimes almost 7 years after November 2010, which was on 16 February 2017. It is further common cause that the appellant's wife ran a crèche from the premises where the music lessons had taken place, with an extensive staff component, and that the house was quite busy, with people coming and going. There were also about 60 minor children on the premises during daytime.

[15] The appellant, in his testimony, denied that he committed any of the incidents that the complainant says the two of them were involved in. He furthermore stated that it was simply impossible for the events to have occurred in the manner that the complainant said it had occurred. And it was highly improbable that it could have taken place either at the house, in the music room or at Noord - Eind. This was because of the presence of other people, and them moving in close proximity to the music room where he and the complainant would have been. There were always other people present in the vicinity of the music room. His wife was also there on a daily basis. His bedroom was right next to the music room and there was nobody in his bedroom during the day, but sometimes in the afternoon, when his wife had finished with her work, she would rest on the bed for about half an hour or so. Opposite the music room there was another bedroom, that had been occupied by his elderly mother at that stage.

[16] He testified that the toilet opposite the music room was about 2 paces away from it and that there would have been constant movement of people in that vicinity: his wife, the staff of the day school, and the childminder who had been busy potty-training his granddaughter at that time. He would then see people moving around outside from the bathroom and the bedrooms. His bedroom was about one pace away from the music

room. The door of the music room was always open, because they stored two-way radios there. The staff of the day school had to have access thereto, because they would use it when they would go to the park next to the house. One person would be on the premises with a radio and another person would be in the park with a radio.

[17] During this time his granddaughter would often run into the music room, with the childminder running after her to remove her from the room. The windows of his bedroom, as well as those of the music room, were open and it would have been easy for people to look into both of these rooms. It would have been impossible for himself and the complainant to go lie on his bed in the main bedroom, with people being able to see from the outside through the window into his bedroom. It would also have been impossible to engage in sexual activity, with his wife possibly being able to see them when she went outside. It would further also have been impossible to have sex in the music room whilst being totally naked, with all the people moving around his house.

[18] He furthermore denied that any sexual activity could have taken place at Noord – Eind, because during the afternoon at the school there were a lot of extramural activities, such as hockey, netball and rugby in the winter, and during summer time tennis, swimming and athletics. It would also not have been possible to have any sexual relations in his class in the afternoon at school, as his classroom did not have a bath or basin in it.

[19] He says that the complainant came unprepared for his lessons and, after he spoke to him about it, the complainant told him that he is not into music anymore. It was then that he decided to discontinue the music lessons. He says that the reason, they discontinued with the music lessons was because the complainant said he was not interested in it anymore and it was very difficult for him to continue with his lessons and deal with his school work.

Grounds of appeal

[20] Mr. Klopper, in his heads of argument on behalf of the appellant, broadly submits that the evidence upon which the conviction of the appellant followed did not satisfy the threshold of proof beyond reasonable doubt. More particularly, that the evidence of the

complainant, on which the case for the prosecution rests, has to be questioned for the following reasons: he was an unsatisfactory witness; had not overcome the scrutiny required for the evidence of a single witness who makes uncorroborated allegations of sexual misconduct against an accused; that in the light of the inherent dangers that existed, after a consideration of the profile of the complainant and his personal circumstances, the court should not have accepted his evidence; that there was a reasonable possibility, in the light of the totality of the evidence of the complainant, that there was a motive for making the allegations, or that there was a reasonable possibility that other psychological factors played a role; that in the light of the obvious and inherent improbabilities in the complainant's version, his evidence as a single witness should not be accepted; that, based on the evidence of Dr. Panieri-Peter, the complainant had relevant and serious problems, but that she was not objective in her assessment; and that given the nature and onus and the evidence presented by the appellant, this evidence could not be rejected as false and as not being reasonably possibly true.

[21] Mr. Klopper further submitted that the state did not prove the crime of rape or a contravention of sec 15 of the SORMA, and that the court a quo had erred in its findings based on the evidence presented. Further that the state clearly failed to prove what it averred in the charge sheet in respect of count 2, as there was no evidence of the appellant ever ordering the complainant to do anything in relation to any sexual activity.

Discussion

[22] This was not an easy case for the Regional Magistrate to have dealt with; it was not an 'ordinary' rape case, where the complainant did not consent, whereafter he or she would immediately have gone to report the matter, where the possibility of a first report may have assisted in proving the consistency of an allegation of rape against an accused person, and permitted the possibility of collecting and procuring evidence to assist the complainant, which would have made it easy for a judicial officer to make a finding that the allegations made by the complainant are to believed. It was difficult in the sense that the complainant wanted to have sexual intercourse with the appellant, and only realised afterwards that what may have happened between himself and the appellant was wrong. It would have been difficult, after the fact, to reconstruct a version that the appellant did

something wrong. This, in my view, is one of the difficulties the Regional Magistrate had to deal with in coming to a conclusion as to whether the state had proven its case against the appellant beyond reasonable doubt.

[23] An assessment of guilt will depend on the quality of the evidence that the state presents to prove its case against an accused person. The amount of evidence, or the number of witnesses that testify in a criminal trial, does not determine whether the state has a strong enough case; it depends on the quality and probative value of the evidence. I agree with the submission of Ms. Galloway, that the trial court was correct in stating 'that the only question that needed to be answered is whom to believe given the evidence.' It is clear that, besides the other evidence that was presented, the only important evidence upon which the conviction could be based was that of the complainant.

[24] The complainant is clearly a single witness and there is no evidence to corroborate his version. The court is then obliged to view his evidence with the necessary caution. I agree with Mr. Klopper that the trial court did not consider the evidence that was presented to it as a whole, and that the burden of proof rests on the state. The trial court merely compared the two versions, accepted the version of the state and rejected the version of the appellant. I also agree with Mr. Klopper that the trial court did not follow the correct approach when the Regional Magistrate said: 'And *ultimately I need to consider whether the complainant's version is plausible in the circumstances. Whether it is so as the accused says, that it was impossible to have had happened, and that none of these incidents had taken place. And how much weight are ultimately attached to each of these versions. In short, when does the court believe given the evidence look (sic) I did holistically.'*

[25] In my view that was the wrong approach, because the main question to consider, as stated above, was whether, despite the version of the appellant, the version of the state can withstand scrutiny so as to elevate it to proof beyond reasonable doubt. It seems to me that the Regional Magistrate, after having been satisfied that she believed the version of the complainant, a single witness, without proper scrutiny rejected the version of the appellant as not reasonably possibly true. In the oft quoted *S v Van der*

Meyden 1999 (1) SACR 447 (W), at 449C-450B, Nugent J said the following in this regard:

'Purely as a matter of logic, the prosecution evidence does not need to be rejected in order to conclude that there is a reasonable possibility that the accused might be innocent. But what is required in order to reach that conclusion is at least the equivalent possibility that the incriminating evidence might not be true. Evidence which incriminates the accused, and evidence which exculpates him, cannot both be true – there is not even a possibility that both might be true – the one is possibly true only if there is an equivalent possibility that the other is untrue . . . The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it.'

[26] I also align myself with the judgment referred to by Mr. Klopper in his heads of argument, of *S v Dyira*[1], where once again the warning was sounded against the uncritical acceptance of the evidence of a single witness, and what the court should do in the ordinary course with reference to the guidelines as set out in the judgment, which are the following:

'a) a court will articulate the warning in the judgment, and also the reasons for the need for caution in general, and with reference to the particular circumstances of the case;
b) a court will examine the evidence in order to satisfy itself that the evidence given by the witness is clear and substantially satisfactory in all material respects. Here the delay of 17 weeks in making a complaint must be regarded as a material defect in the evidence;
c) although corroboration is not a prerequisite for a conviction, a court was sometimes, in appropriate circumstances, seek corroboration which implicates the accused before it will convict beyond reasonable doubt. Here there was no corroboration;
d) failing corroboration, a court will look for some feature in the evidence which gives the implication by a single child witness enough of a hallmark of trustworthiness to reduce substantially the risk of a wrong reliance upon her evidence (*S v Artman* 1968 (3) SA 339 (A) at 340H). This is the route which the state must take to support this conviction.'

[1] 2010 (1) SACR 78 (ECG) para 10.

[27] In my view, the Regional Magistrate did not follow any of the well established guidelines as set out in the above mentioned judgment, and although she referred to some of the worrying aspects of the complainant's evidence, she did not sufficiently pay attention thereto and in particular to the appellant's version.

[28] During the initial stages of his testimony the complainant created the impression that he could very clearly remember exactly what happened; in cross-examination he was not so confident anymore and said that he could not remember a lot of specific details, and he remembered 'pieces' of what happened between himself and the appellant. The complainant's evidence about the manner in which he and the appellant interacted before sexual intercourse took place, was rather bizarre. He created the impression that it was as if both of them were acting automatically, without any communication about what was to happen between the two of them. In further elaboration of this, he said that at that stage he was between 14 and 15 years of age, that he had watched some pornographic videos, and that that was why he knew what was expected of him and what he had to do.

[29] What was further very disturbing about the complainant's evidence, and which Ms. Galloway was constrained to concede, correctly in my view, was whether it was plausible that he and the appellant would have had sexual relations in a busy house, during the day, with lots of people around them, whilst they were partially or completely naked. And while both of them, being in such a state, and in the music room with an open door, would have had anal sex, considering the music room was situated next to the appellant's bedroom, and opposite the bathroom that was frequented by the appellant's wife and other staff members of the day school. And which was also situated opposite the bedroom that had been occupied by the appellant's elderly mother during that time.

[30] The complainant further testified that at some stage he did not want to have sexual relations with the appellant in the music room, but rather in the appellant's bedroom, situated right next to the music room. When this happened he took the appellant by his hand, whilst both of them were completely naked, and they walked into the passage from the music room to the bedroom. In the bedroom they were lying on top of each other. This happened, once again, during broad daylight with other people in the house and with the windows not covered. The probability of this happening should have been a clear

indicator to the Regional Magistrate that she should have exercised an abundance of caution. Notwithstanding that the appellant in his version referred to this and other difficulties, the Regional Magistrate still believed the version of the complainant, beyond reasonable doubt, and held that of the appellant as not being reasonably possibly true.

[31] A further grave concern about the evidence and the version of the of the prosecution, was that in the charge sheet in respect of count 2, the state alleges that the appellant 'had ordered' the complainant to insert his penis into the appellant's anus and have sexual intercourse with him, on more than one occasion without his consent. In order for the state to have made such an allegation in the charge sheet, the only witness who could testify about the events being the complainant, it could only have been him who could have said in his statement that he was ordered by the appellant to place his penis in (appellant's) anus.

[32] Furthermore, the state alleged that there was no consent; once again it could only have been the complainant who could have alleged this in his statement, that the sexual intercourse that had taken place with the appellant had been without his consent. The evidence clearly shows, firstly, that he was not 'ordered' by the appellant to do anything and, secondly, that consent had not been absent. The complainant clearly must have misled, or must have been dishonest with, the state for it to have made such allegations against the appellant in the charge sheet.

[33] In this particular case there was no corroboration, and there was also no other feature in evidence which presented or illustrated a hallmark of trustworthiness to reduce the risk of a wrong conviction, as pointed out earlier. It was only the evidence of the complainant, as a single witness. This evidence was, in my view, not sufficiently trustworthy for the court to conclude that it should be accepted, after having regard to the version of the appellant, as proof beyond reasonable doubt upon which the court would have been able to convict the appellant.

[34] Even if the evidence is to be accepted, I am not convinced that the prosecution has shown that the appellant has committed any offence of rape in contravention of section 3 or the alternative charge of statutory rape in contravention of section 15 of SORMA. I

then requested both Mr. Klopper as well as Ms. Galloway to provide this court with an additional note regarding this issue, which they promptly did, and for which we are grateful. Before dealing with this issue, it would be the appropriate to have regard to the purpose of the SORMA.

[35] The SORMA has as its purpose, inter alia, 'repealing the common law offence of rape and replacing it with an expanded statutory offence of rape, applicable to all forms of sexual penetration without consent, irrespective of gender; repealing the common law offence of indecent assault and replacing it with a new statutory offence of sexual assault, applicable to all forms of sexual violation without consent; creating new statutory offences relating to certain compelled acts of penetration or violation; . . . enacting comprehensive provisions dealing with the creation of certain new, expanded or amended sexual offences against children and persons who are mentally disabled, including offences relating to sexual exploitation or grooming, exposure to or display of pornography and the creation of child pornography, despite some of offences being similar to offences created in respect of adults as the creation of these offences aims to address the particular vulnerability of children and persons who are mentally disabled in respect of sexual abuse or exploitation; criminalising any attempt, conspiracy or incitement to commit a sexual offence; . . .' (Own emphasis.)

[36] Section 3 of the Act, which defines the crime of rape, states: 'Any person ("A") who unlawfully and intentionally commits an act of sexual penetration with a complainant ("B"), without the consent of B, is guilty of the offence of rape.' Section 15 states: '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. . .'

It further more gives a detailed definition of sexual penetration in section 1(1), as that it:
'includes any act which causes penetration to any extent whatsoever by-
(a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;
(b) any other part of the body of one person or, any object, including any part of the body of an

animal, into or beyond the genital organs or anus of another person; or
(c) the genital organs of an animal, into or beyond the mouth of another person.'

[37] I agree with Ms. Galloway, in her persuasive and illuminating submission, that when read with the intention of the Act as detailed in the header thereto, the intent of the legislature was to include penetration by any person. And that had it been the legislature's intention to exclude penetration by the victim, penetration of the mouth of a person by another, i.e. in instances where the perpetrator stimulates the male victim with his mouth, would have been excluded as possible contraventions of the relevant section. Similarly, in instances where a female perpetrator rapes a male victim. In this regard, she referred to an unreported decision of S v Magxeke[2], which I will discuss later on in the judgment. She further submits that in view of not only the wide definition of sexual penetration, but also the use of gender neutral terminology, that had it been the intent to exclude penetration by male victims, it would have been expressly excluded in the definition of penetration.

[38] And I also agree with her that, upon a consideration of the provisions, the lack of consent is still the key to the determination as to whether an act of rape or statutory rape has occurred. In this regard she submits that for the purposes of sections 3 and 15 of the Act, consent is defined in subsection 1(2) of the Act as: 'voluntary or un-coerced agreement'. That section 1 (3) of the Act provides for circumstances when consent can be seen as not complying with the definition thereof, in that determined that:

'Circumstances in subsection (2) in respect of which a person ("B") (the complainant) does not voluntarily or without coercion agree to an act of sexual penetration, as contemplated in sections 3 . . . include, but are not limited to, the following;

(a) Where B (the complainant) submits or is subjected to such a sexual act as a result of-
    (i) the use of force or intimidation by A (the accused person) against B, C (a third person) or D (another person) or against the property of B, C or D; or
    (ii) a threat of harm by A against B, C or D or against any property of B, C or D; . . .'

[39] Ms. Galloway therefore submits the legislature, by providing the definitions as per subsections 1(2) and 1(3) of the Act, explicitly recognise a significant difference between

[2] 2012 JDR 0237 (ECP).

submission and consent. Furthermore, that mere submission as a result of actual violence, or fear of violence due to threats or intimidation, does not constitute valid consent. According to her, given the wide definition of sexual penetration in line with the common law crime of rape, it expressly defines the complainant or victim as the person that did not consent and not as a person that was penetrated. Therefore, according to her, the emphasis on who should be the complainant does not lie with the fact as to who committed the act of sexual penetration, but with the fact as to whether such person did or did not consent.

[40] I also agree with her that, in terms of the definition of sexual penetration, the complainant can be the person that penetrated or be the person that was penetrated. And that in essence the element of consent in the crime of rape, shifts the psychological nature of the crime away from what the victim did to what the accused did, and puts him/her on terms to justify his/her conduct. Also that an enquiry into consent or lack thereof, should begin by examining the conduct of the accused and the circumstances of the matter, in order to determine whether consent was given.

[41] She further submits that in matters such as the one at hand, where the victim is the one that penetrated the accused, the question a court needs to answer is: can it be said without reasonable doubt that the accused was aware of the complainant's non consent, or that he was, at least, reckless as to whether the complainant consented or not (dolus eventualis). Ms. Galloway finally submits that the meaning of the legislation is clear, i.e. that the complainant or victim is defined by the lack of consent and not the role he or she played in the act of sexual penetration. Whilst this might be true, it is trite[3] that one of the first elements of any crime that the prosecution has to prove, is that there must be conduct on the part of the perpetrator. And in the case of the crime of rape, in contravention of section 3 or section 15, such conduct would be the act of sexual penetration as defined in the Act.

[42] In terms of the definition it can either be: a) an act of direct sexual penetration, or; b) any act which causes penetration, which the prosecutor has to prove as a requirement for criminal liability. Where this is not proven no crime could have been committed. Such

[3] Snyman: Criminal Law - 6ed, Ch. II, page 51 states: 'The first general requirement for criminal liability is that there must be *conduct* on the part of X. By "conduct" is understood an *act* or an *omission.*'

an act is where the perpetrator directly penetrates the victim or the perpetrator uses part of an animal, another person or the victim him or herself to penetrate the victim. In the last instance, where the perpetrator uses the victim to penetrate him or her, the perpetrator must commit an act 'which causes' the victim to be sexually penetrated.

[43] In this regard the learned author Snyman[4] says: 'The use of the word "causes" in the first line of the definition means that the crime of rape created in the Act is no longer, as used to be the case in the old common law crime of rape, a formally defined crime, that is, a crime consisting merely in the commission of a certain type of act. It is now a materially defined crime, that is, a crime consisting in the causing of a certain situation, namely sexual penetration. The use of the word "causes" does not mean that "sexual penetration" is limited to cases where X uses another person to perform the act of penetration. The word "causes" should be read together with the word "includes" in the beginning of the definition. Read thus, and also considering the wide import of the word "causes", it is clear that **sexual penetration includes all the situations in which X performs the penetration of Y himself or herself, that is, with his or her own body or by himself or herself using some object perform the penetration**. The expression "which causes penetration" should be read as a *genus* of which the **actual penetration of Y by X is merely a species**.' (Footnotes omitted, own emphasis added.)

[44] Snyman cites a few examples[5] of the cases where the perpetrator uses the victim to commit an act which causes penetration, which finds application in this case. It is where a female places the penis of a male person into her vagina, anus or mouth, or where a male perpetrator places the penis of a male into his anus or mouth. Or where the perpetrator generally manipulates his or her body, or bodily movements, in such a way that his or her actions results in penetrating his or her victim's anus, vagina or mouth. In the case of *S v Magxeke* (infra) this point is illustrated from an extract of the judgment where Roberson J, in a case in which a 45-year-old female caregiver was convicted in terms of section 3 of SORMA, in relation to a 15-year-old physically disabled boy under her care, said the following:

[4] Ibid at page 346.
[5] Ibid at pages 347-351.

'The accused was aware of the complainant's physical and mental condition . . .The complainant was in his bed and was naked from the waist down. His penis was erect and the accused fetched a bottle in order for him to urinate. She brushed his genital area with her fingers, and asked him what he would give her if she gave him what she wanted. She then took off her pants and panties, climbed on top of him, inserted his penis into her vagina and had sexual intercourse with him. At first he enjoyed the feeling but then felt pain and asked her to stop but she continued.'

[45] In this particular case, the question is whether bending over and exposing one's buttocks, which the appellant did in this case, can be considered as an act which causes penetration. There was no other action on the part of the appellant apart from doing this. He did not physically take the penis of the complainant and place it in his anus, nor did he generally manipulate his or the complainant's body, so as to cause an act of penetration. What he did was merely to expose his buttocks, whereafter the complainant of his own accord penetrated the anus of the appellant. The complainant, if his evidence were to be believed, said that at all times since they began having anal sex, neither he nor the appellant said anything. He (the complainant) knew exactly what to do. He perfectly understood what would happen next, which was that if someone in front of you pulls their pants down it is not difficult to know what should happen next. There is furthermore no evidence upon which this court can make a finding that the complainant was groomed by the appellant, to such an extent that he knew exactly what to do. In fact, the complainant said that as a 14-15-year-old teenager he, after having watch pornographic videos, knew how to go about to penetrate the anus of the appellant.

[46] In my view, the conduct of the appellant, would have fallen short of an act which caused penetration by the appellant, that caused the complainant to sexually penetrate the appellant. Should the evidence have been acceptable and credible, at the very least the appellant could have been convicted of a contravention section 16(1) of SORMA, which states that any person who commits an act of sexual violation with a child, despite the consent of the child to the commission of such an act, is guilty of the offence of having committed an act of consensual sexual violation of a child. Clearly such conduct, if it had been proven, could have fallen within the definition of sexual violation[6], which includes

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[6] '**"sexual violation"** includes any act which causes-
(a) direct or indirect contact between the-

any act which causes direct or indirect contact between the genital organs or anus of one person, or the mouth of one person and the genital organs or anus of another person.

[47] In coming back to the facts of this case, the evidence upon which the appellant was convicted in this case was not strong enough. It was riddled with inherent improbabilities and inconsistencies, which should have created doubt in the mind of the Regional Magistrate. The Regional Magistrate did not have to believe his version and he should have been given the benefit of the doubt.

[48] In the result therefore, the appeal against conviction in respect of all 4 charges is upheld. I therefore make the following order:

"That the conviction and the sentences flowing from such convictions in respect of all 4 charges is set aside."

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R.C.A. HENNEY

Judge of the High Court

(i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;
(ii) mouth of one person and-
(aa) the genital organs or anus of another person or, in the case of a female, her breasts;
(bb) the mouth of another person;
(cc) any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could-
(aaa) be used in an act of sexual penetration;
(bbb) cause sexual arousal or stimulation; or
(ccc) be sexually aroused or stimulated thereby; or
(dd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or
(iii) mouth of the complainant and the genital organs or anus of an animal;
(b) the masturbation of one person by another person; or
(c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person,
but does not include an act of sexual penetration, and **"sexually violates"** has a corresponding meaning . . .'

I agree.

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B. MARTIN

Acting Judge of the High Court