Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: A158/2019

In the matter between:

M G **APPELLANT**

v

THE STATE **RESPONDENT**

Court: Justice E D Baartman *et* Justice J Cloete

Heard: 22 May 2020

Delivered electronically: 25 May 2020

JUDGMENT

CLOETE J (BAARTMAN J CONCURRING):

[1] On 27 July 2017 the appellant, who had pleaded not guilty, was convicted as charged in the Paarl Regional Court on 6 counts of contravening the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. On 7 September 2018 he was sentenced to an effective 5 years imprisonment. He appeals against conviction only, leave having been granted on petition on 4 February 2019.

[2] The grounds of appeal are essentially that the trial court failed to properly consider material discrepancies in the evidence of the complainant (a single witness) as well as improbabilities in his version; erred in finding that it was corroborated by the other two State witnesses; and failed to properly consider the evidence of the appellant and his two witnesses. It is also submitted that in any event counts 2, 3 and 4 amount to a splitting of charges; the conviction on count 1 was not competent because the State failed to prove all the elements of that offence; and counts 5 and 6 were not borne out by the complainant's testimony as to when they were alleged to have occurred (there having been no amendments made to these counts before judgment).

[3] The charges faced by the appellant were not exactly a model of clarity. I summarise them briefly:

3.1 Count 1: rape committed *'on or about February 2011'* at Muscadel Street, Wellington, by coercing the 16-year-old complainant to penetrate the

appellant's mouth with his penis and inserting his tongue into the complainant's anus;

3.2 Count 2: masturbating in the complainant's presence *'on or about July 2010 at or near Wellington Secondary School'*;

3.3 Count 3: compelled sexual assault by inducing the complainant to masturbate with the appellant also *'on or about July 2010 at or near'* the school, although the complainant was alleged to be a year older than in February 2011;

3.4 Count 4: causing the complainant to watch the appellant self-masturbate *'on or about July 2010 at or near Wellington'* when the complainant was 16 years old;

3.5 Count 5: sexual exploitation of the complainant *'on or about July 2010 at or near Muscadel Street'* by forcing him to put his penis into the appellant's mouth as reward for assisting him with schoolwork; and

3.6 Count 6: exposing the complainant to pornographic material *'on or about February 2011 at or near Muscadel Street'*.

[4] From the evidence adduced during the trial it became clear that the State's case was based, firstly, on one incident in a classroom at the school in the second half of July 2010 and secondly, a series of incidents at the appellant's home in Muscadel Street spanning the period August 2010 until July 2011.

[5] The facts which became common cause, or were not seriously disputed by either the State or defence, are as follows. The appellant was appointed as a teacher at the school with effect from 13 July 2010. His father passed away two days later on 15 July 2010 and he left the school early that morning, only returning to resume his duties on 26 July 2010. The complainant's 16th birthday was on 19 July 2010.

[6] The complainant and the appellant first met in the latter's classroom, a partitioned section of a cellar usually used as a gym, which the appellant was only allocated some time after he returned to the school on 26 July 2010. During their first encounter, the appellant told the complainant and his two friends that he offered extra lessons to assist pupils with their studies.

[7] The complainant approached the appellant thereafter during a second school break, and the appellant arranged to meet him after school in the classroom of another teacher, Ms H, which was a more suitable venue. According to the complainant this occurred within a day or two after his birthday. This could not have been correct since the appellant was not even at the school at the time. According to the appellant it was only later in the year, around October 2010. However, that the first "lesson" took place in that classroom was not in dispute.

[8] Subsequently the complainant, at the appellant's invitation, attended regular extra lessons at the appellant's home which he shared with his closest friend, another teacher, Mr J R. Although the complainant denied this, it was established on the evidence that when these lessons took place it was not only the complainant, the appellant and R who were present. There were about 4 to 7 other children who

regularly also attended these lessons, and their tasks were divided between the appellant and R. Some of the children were tutored in the open plan living cum kitchen area and others on the outside stoep; only those children who required access to a computer did their tasks in the bedrooms of the appellant and R.

[9] Also present in the house were the appellant's mother, who came to live with them after his father's death and who would usually be sitting in the open plan area (she could not drive and hardly knew anyone in Wellington); the domestic assistant, Ms M M who worked from 08h00 to 17h00 at least 3 days per week; and for a period of about a month (in October 2010) the appellant's sister, Marina, together with her baby.

[10] The evidence also established that as time progressed the complainant's behaviour deteriorated substantially. Whereas initially he was quiet and respectful, he became demanding, impertinent and aggressive. Although his school marks improved by the end of 2010, in the first quarter of 2011 he abandoned school, was involved in a stabbing incident, and had to be persuaded by another teacher, a Mr A (with whom he was particularly close) to return.

[11] On 25 August 2011 the complainant reported to his class teacher, Ms B, her husband and Mr A that he had been coerced by the appellant during the lessons at his home to masturbate with him, view pornography and ejaculate into his mouth. This was in turn confirmed by the complainant to the headmaster, a Mr C, and Ms Feroza Thompson, a social worker employed by the Western Cape Education Department who was notified by the headmaster after the report was made. This resulted in the

appellant's arrest, his suspension and his dismissal after a departmental disciplinary hearing in which the complainant testified in September 2011.

[12] Before turning to the substance of this appeal, it must be stated that there was no evidence adduced by the State that the appellant had inserted his tongue into the complainant's anus, and no more need be said about it.

[13] As previously stated the first incident is alleged to have occurred in Ms H' classroom. The appellant's evidence, which was not challenged by the State, was that this classroom was one of the most visible in the block. It had large windows facing onto an open quad and sports field, affording passers by a clear and unobstructed view into the classroom. The appellant did not have a key to the classroom (because the classroom was not allocated to him) and relied on one of two caretakers/cleaners to unlock it for him. The door to the classroom opened onto a corridor used by pupils, staff and others.

[14] The complainant himself accepted that teachers, some pupils and non-professional staff would usually be on the premises for about an hour after the end of a school day. He had arrived at the classroom immediately after school ended. He did not suggest that none of these people were on the premises when the incident is alleged to have occurred. The appellant's testimony that sport was being played on the field adjoining the classroom and quad similarly went unchallenged.

[15] In his evidence in chief it was the complainant's version that upon entering the classroom he sat on one of the benches. The appellant told him that in order to help

him he needed to trust him, which required them to masturbate in the presence of each other. The complainant was to undo his trouser zip, take out his penis and masturbate. The complainant refused, but the appellant told him it was the manly thing to do and that every man did this. Because the complainant felt that he did not have much of a choice, since he needed the appellant's help, he did as instructed while the appellant did the same as they faced each other.

[16] When they finished the appellant told him that they would not do the homework task (a history project) at the school after all, but rather at the appellant's home where there was a computer, so that the work could be downloaded onto a compact disk and the complainant would achieve a higher mark. This would happen in a few days and the appellant would tell him when. The complainant then took his school bag and left the classroom.

[17] During his cross-examination material omissions and contradictions emerged, which boiled down to five different versions of the circumstances in which the incident in the classroom was alleged to have taken place. First, the complainant testified that the classroom door was open when he arrived, and made no mention of the door being closed or locked at any stage during the incident. Second, he stated that after the appellant coerced him to masturbate with him, the latter closed and locked the door before the masturbation took place.

[18] Third, the complainant stated that the appellant closed and locked the door immediately after the complainant entered and before any discussion took place. Fourth, the complainant stated that the appellant only closed and locked the door

after one of the caretakers/cleaners, a Mr W, was seen twice in the corridor across the quad from the classroom onto which its windows faced, because W was able to see into the classroom from that vantage point. No mention was however made of the stage at which this occurred, and no explanation was given by the complainant for why locking the door on the opposite side of the classroom would, in these circumstances, have obscured W' visibility.

[19] Sixth, the complainant had conceded in the disciplinary proceedings (held in September 2011, when the events were presumably still fresh in his mind) that W was in fact present in the corridor onto which the classroom door opened (and not across the quad). He also conceded in those proceedings that W twice stood at the open door to the classroom, asking how long they would be (because he wanted to clean and lock up), but had maintained this occurred before the appellant closed and locked the door and before he initiated the masturbation discussion. It was not suggested during the trial that the door locked with anything other than a key (i.e. that it had a yale lock or similar which would enable it to lock without one).

[20] There were other contradictions in the complainant's testimony as well. These included where and how he met R for the first time. The complainant also initially claimed that there was no discussion about the history project itself in the classroom on that day. After being confronted with his testimony in the earlier disciplinary hearing about W' presence at the open entrance to the classroom, he conceded that any passer by would easily have been able to see what was going on inside, but for the first time claimed that when W initially appeared, he and the appellant were seated at a desk discussing what he needed to do for his history project.

[21] Although the complainant was subjected to lengthy cross-examination over an unduly extended period (which was peppered by delays not of his own making) from 2013 to 2015, and it can reasonably be accepted that with the passage of time his recollection would not have been as clear, the material discrepancies on crucial aspects of his version cannot simply be wished away on that basis.

[22] I thus hold a different view to that of the trial court which found that, despite the passage of time, the complainant's version was consistent throughout in all material respects. Moreover, the testimony of the other two State witnesses, Mr B and Ms Thompson, did not in fact corroborate the complainant's version that the first incident occurred in a classroom at the school, because on their testimony the complainant did not report this to either of them. Both of these witnesses were patently honest, credible and reliable and there is no reason to disbelieve them.

[23] The record reflects that the State led the complainant's testimony in a "broad brush" manner. It became clear during the course of the trial that the prosecutor had made no attempt to either familiarise herself with the transcript of the disciplinary hearing, or consult with the complainant about it before handing him over for cross-examination. It seems that the complainant was ill-prepared, and one would have expected more of the prosecutor, who should at least have ensured that all material aspects of the complainant's version were covered during his evidence in chief. The result was that the State's case in respect of the first incident was ultimately so weakened that, in the face of the appellant's denial and his subsequent unchallenged testimony, it is not possible to find that the State discharged its onus of proof beyond a reasonable doubt. The appellant is thus entitled to an acquittal on counts 2, 3 and

4, and it is not necessary to consider whether these amounted to a splitting (or duplication) of charges.

[24] Turning now to the second series of incidents which allegedly occurred at the appellant's home, i.e. those pertaining to counts 1, 5 and 6. It is convenient to commence with count 5, in which it was alleged (as previously stated) that *'on or about'* July 2010 the appellant sexually exploited the complainant by forcing him to put his penis into the appellant's mouth as reward for assisting him with schoolwork.

[25] It was submitted on the appellant's behalf that there was no evidence by the complainant that such an event occurred in and during July 2010 and that, absent an amendment to this charge before judgment in the trial court, it mistakenly convicted him on this count.

[26] In my view the reference in the charge sheet to *'on or about July 2010 at or near Muscadel Street'* taken together with the complainant's testimony that he commenced with lessons at the appellant's home in August 2010, was sufficiently broadly worded for the appellant to be aware, by the time of conclusion of the evidence, what period the State relied upon.

[27] However the difficulty faced by the State is that it was never the complainant's version that in August 2010 he was forced to put his penis into the appellant's mouth. His testimony was rather, essentially, a repetition of what allegedly occurred previously in the classroom, with the addition that he was also shown pornographic material which the appellant downloaded on his computer in his bedroom in order to

assist the complainant to ejaculate. It was further the complainant's version that this pattern was repeated on each occasion he went to the appellant's home, which was three times per month, until he completed his school exams at the end of 2010.

[28] Accordingly there was no evidence before the trial court to prove count 5 and to the extent that the learned magistrate assumed otherwise in her judgment, she erred in this regard. It follows that the appellant must also be acquitted on count 5.

[29] That leaves counts 1 and 6 (excluding that portion of count 1 pertaining to the appellant having allegedly inserted his tongue into the complainant's anus). As previously mentioned the period specified was *'on or about February 2011'* and the acts complained of were the coercion of the complainant to penetrate the appellant's mouth with his penis and exposing him to pornographic material.

[30] It was the complainant's testimony that after he returned for extra lessons at the appellant's home in February 2011 the latter took matters a step further. He coerced the complainant to put his penis into the appellant's mouth as he ejaculated. This occurred, again three times a month, whenever the complainant attended these lessons at the appellant's home, and affected him so badly that he dropped out of school until Mr A persuaded him to return. It was only later that year, after the complainant had a spiritual dream, that he summoned up the courage to report the abuse to the fellow teachers.

[31] The timeline proffered by the complainant is supported by the common cause fact that around March or April 2011 Mr A, seemingly oblivious to the real reason why the

complainant was struggling, approached the appellant and R to request that they allow him to reside with them (they refused). It would appear that Mr A was under the impression, based on the excuse given to him by the complainant, that the latter's home environment had deteriorated to the point that he was not coping.

[32] What does not make sense is the complainant's testimony that he continued to be abused by the appellant until about the end of July 2011, because it was not in dispute that following the stabbing incident the complainant did not attend school during the second term. Again criticism must be levelled at the prosecutor who failed to canvas this properly with the complainant during his evidence in chief, and thus left him exposed to doubt later being cast on his credibility. Moreover the State failed to call Mr A who, given his close relationship with the complainant, would most likely have been able to shed light on whether he resumed his extra lessons after returning to school in the third term.

[33] That being said, in my view corroboration for the abuse itself can nonetheless be found in the complainant's reports to Mr and Mrs B, Mr A, the headmaster Mr C and Ms Thompson; in the undisputed substantial deterioration in the complainant's behaviour; in him leaving the school at the end of 2011 despite the appellant having already been suspended from teaching, if not dismissed (once the abuse was exposed); and the lasting effect of the abuse on the complainant some years later when he testified, which was pertinently noted by the trial court in its judgment. I agree with the learned magistrate that it is highly improbable that, were this all a figment of the complainant's imagination, he would have subjected himself to the ordeal of testifying in court. I also agree with the reasoning of the trial court that given

that the abuse commenced when the complainant was only 16 years old and taking into account his straitened personal circumstances at the time, he was easily susceptible to being groomed and abused.

[34] Against this must be weighed the version of the appellant together with the evidence of his witnesses. In a nutshell the appellant's defence was an alibi in the form of others who were present in the house on the occasions when the complainant attended his extra lessons. Both Mr R and Ms M were adamant that to the best of their knowledge the appellant would simply not have had the opportunity to abuse the complainant in the manner alleged, given not only the presence of others but also the layout of the house and the fact that there were no keys to the inside doors including the appellant's bedroom (however, as I understood the complainant's evidence, he did not testify that the door was locked but only that it was closed during these incidents).

[35] According to both the appellant and R the complainant turned on them when they attempted to cut ties with him at the end of 2010 as a result of his increasingly poor behaviour, and this in all probability was what motivated the complainant to falsely accuse the appellant. According to the appellant the tipping point came in July 2011 when he refused to buy the complainant a pair of rugby boots. During an argument on the school premises the complainant threatened to falsely accuse him of sexual molestation if he did not do so, and it was after the appellant again refused that the report was made by the complainant and charges were laid.

[36] There are certain troubling aspects about this version. While conceding that the complainant at times worked on the computer in his bedroom, there were various claims made by the appellant that were never put to the complainant when he testified. They were as follows.

[37] First, that when the complainant worked on the computer in the appellant's bedroom his sister (while she stayed there) as well as Ms M would enter to offer him refreshments (Ms M made no mention of this in her testimony either). Second, that it was R and not the appellant who set up the history project program for the complainant on the appellant's computer, and assisted the complainant on the first occasion when he was having difficulty with that program. Third, that by the time the complainant started his extra lessons at the house the appellant's mother had already moved into R's bedroom across the passage from the appellant's, while R shared the latter's bedroom (although he left his computer and personal effects in his own bedroom). Fourth, that upon completion of the history project it was no longer necessary for the complainant to use the computer in the appellant's bedroom (and thus for months on end all other lessons took place elsewhere on the premises).

[38] Fifth, and significantly, the appellant claimed that he recorded his July 2011 argument with the complainant (and thus by necessary implication the threat to falsely accuse him) on his cell phone. He also maintained that immediately after that argument he approached both C and R where they were standing smoking on the school premises and reported the argument to them. Although he made no mention of C having moved away, it was also the appellant's claim that he played this recording there and then to R. The fate of that recording (crucial evidence) was not

disclosed by the appellant. Inexplicably it was not explored by the State in cross-examination. R made no mention of it when he testified. Although the appellant maintained that he was deeply shaken by the argument, according to R the appellant only appeared mildly concerned when he reported this to him. C was not called by the appellant to corroborate what was allegedly conveyed to him; but in any event it is most unlikely that he would not have recalled this when the complainant made his first report about a month later in August 2011.

[39] In addition, other aspects of the appellant's version made no sense. According to him, by the time they testified, he and R had not been on speaking terms for the past two years due to a family fallout. According to R, they were still friends, although he implied that, given the pending criminal proceedings, they had not been able to communicate with each other as much as they had in the past. What is not in dispute is that prior to the appellant's arrest in August 2011 he and R were best friends who spent almost all of their time together. It was the version of both the appellant and R that his bedroom window faced onto the stoep of the house and that, if the curtains had been closed during these incidents as the complainant alleged, this would immediately have been noticed by those on the stoep. However, according to Ms M, the appellant's bedroom window was not visible from the stoep. In any event, and as a matter of logic, it is unlikely, as claimed by the appellant, R and Ms M, that the appellant was never out of their sight.

[40] He was in a position of trust and, if one accepts that neither R nor Ms M had any reason to suspect him of untoward behaviour, they would similarly have had no cause to monitor his movements. Further, and if the appellant and R are to be

believed, if the complainant had turned on them at the end of 2010, the unanswered question is why he waited for six months until a spat over a pair of rugby boots to falsely accuse the appellant, and the appellant only.

[41] Having regard to the aforegoing, and despite the manner in which the State presented its case, I am nonetheless persuaded that the appellant's guilt on counts 1 and 6 was proven beyond reasonable doubt. In this regard, there is no merit in the complaint that the State failed to prove the elements of the offence of rape (count 1) when regard is had to s 3 of the Act under which the appellant was charged, as read with the definition of *'sexual penetration'* in s 1 thereof. Moreover, there is no basis to interfere in the sentences imposed on counts 1 and 6 as a consequence of the State's failure to prove the other counts beyond reasonable doubt.

[42] **The following order is made:**

1. **The appeal against conviction succeeds to the extent set out below.**

2. **The appellant's convictions on counts 2, 3, 4 and 5 and the resultant sentences imposed are set aside.**

3. **The appellant's convictions in respect of counts 1 and 6 are upheld and the sentences imposed in respect of such counts are confirmed, namely:**

   <u>Count 1: Contravening s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007</u>

Ten (10) years imprisonment of which 5 years is suspended for 5 years on condition that the accused is not convicted of contravening s 3 or s 5(1) or s 55 of Act 32/07 committed during the period of suspension.

Count 6: Contravening s 19(a) of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

Three (3) years imprisonment wholly suspended for a period of 5 years on condition that the accused is not convicted of contravening s 19 of Act 32 of 2007 committed during the period of suspension.

In addition the accused's personal particulars be added both in the National Register for Sexual Offenders in terms of s 50(2) of Act 32 of 2007 and in terms of s 114(1)(b) read with s 120 of the Children's Act 38 of 2005 and s 103(1) of Act 60 of 2000. The accused is declared unfit to possess a firearm.

_____

J I CLOETE

_____

E D BAARTMAN

For the appellant: Adv Christo **Bisschoff** (4260949) (advg1@capebar.co.za)

Instructed by: M Van der Scholtz Attorneys, M Beukes, 5921930, vdscholtz@mweb.co.za;

For the respondent: Adv E **Kortje** (ekortje@npa.gov.za;) (4877261, 0848749137)

Instructed by: State Attorneys