Fe 7-01-06

THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Date: 18 October, 2 December 2005
4 Janu ary 2006

Case number: CC 49/05
Date: 4/1/06

NOT REPORTABLE

In the matter between:

THE STATE — RESPONDENT

And

NORlSTON MANGOKOANE — FIRST ACCUSED
NTHATO MAKONE — SECOND ACCUSED
MICHIGAN MARlVATE — THIRD ACCUSED

Rape - circumstantial evidence of rape not sufficient in the circumstances accused 3 *might have been under the impression that the complainant had consented in the light of her participation in passionate kissing before the alleged incident. There was not proof beyond a reasonable doubt that the complainant was still unconscious when she allegedly had sex with accused* 3. *Sexual Offences Act* - s 14(1) *and* (2). *Although competent verdicts conveyed to accused, prosecution and defense not focused on the question of a contravention of* s *14(1)(a) and the relevant defense of deceit (widely interpreted) in* s 14(2). *Too late to refer this back for evidence. Dolus, which includes knowledge of unlawfulness, a requisite for a contravention of* s 14(1) *(a)*
Sexual Offences Act - evidential onus on accused as to defences in terms of s 14(2) - *reverse onus not compatible with Constitution*

Van Rooyen AJ

[1] The three accused were charged with three rapes of the complainant.

Accused 2 absconded and the trial was proceeded with against accused 1 and

3. The *three* alleged rapes had to do with the charge that each of them also

assisted each of the others in the rape. The two accused were found guilty of one rape each of the complainant during the afternoon of 12 November 2001. It was admitted that the complainant was almost exactly fifteen years old at the time. The learned regional magistrate referred the two accused to the High Court for sentencing, since the complainant was under the age of 16 years. I requested the learned regional magistrate to provide me with further reasons pertaining to the question whether the accused might not have believed that the complainant had consented to sex and that *dolus* was, accordingly, not proved.!

The Evidence

[2] The State called the following witnesses: a doctor, the complainant, Ms Valentine Sibanyoni and Ms Somisa Magorie - both friends of the complainant. They were part of a group who went to an apartment of a sister of one of them at midday, after some of them (including the complainant and the two witnesses for the State) had completed their school exams. The sister would return from work only later that afternoon.

[1] I should mention that I granted bail to both accused on the 8th June 2005, pending the report of the learned regional magistrate. In October the report had not reached me yet as a result of the fact that my request had not, for an unknown reason, reached the learned regional magistrate. When the report reached me shortly before 2 December 2005, I had to read the four hundred page record again in the light of the thorough report which I received from the learned regional magistrate. I postponed the matter for judgment to 4 January, when everyone would be available.

[3] The complainant testified that she and accused 3 went to buy liquor. Later on accused 3 went and bought more liquor. She had consumed liquor and the liquor had its effect on her. Accused 2 wanted to take her to bed. After having pushed away accused 2, she hung onto accused 3 and they started kissing. She was so drunk that she fell onto the sofa. He then picked her up and took her to the bedroom and accused 3 closed the door behind them. She did not remember what happened then. She thought that she passed out. She recalled that when for a short while she regained consciousness, accused 3 was on top of her holding her one leg in the air, while she felt pain in her vagina. She thought that he was "helping himself" with her. Then she had a blackout again and later she found herself sitting on her haunches at the side of the bed, crying. She then noticed that she was only wearing her bra and her shirt. She collapsed. The next thing was that she found herself at the taxi rank. She had no recollection that accused 1 had sex with her. In cross-examination it appeared that this was the first time that she had consumed alcohol. She also testified that she could not recall how she left the apartment and how she walked through the people. All she knew was that she saw accused 2 and 3 and Ms Magorie at the bus stop. Ms Magorie called her home and she was picked up, where she alighted from the taxi, by her brother and a friend. She spoke to Ms Sibanyoni about the

fact that she had been drunk and that accused 3 was on top of her. She thought that his pants were off, but she was not sure. Her leg was blocking the view. She would have seen more if she had not been drunk. At home her father told her that she was drunk. She did not comment when her father spoke to her because she was being shouted at. At school, according to her, people were talking. She could not remember when she went to the Doctor and Ms Sibanyoni accompanied her; it was after a week or two. She could not remember what she told the doctor. She also said that she did not know whether to blame herself. She could not remember whether Ms Sibanyoni went to a clinic with her the next day to get the day-after pill. She was too scared to go to the Police. Later on she did go to the Police, after she was told that three people had sexual intercourse with her. She was hurt and ashamed at what happened. She was getting psychological assistance.

[4] Ms Sibanyoni testified that the complainant joined the persons who went to buy liquor the first time. Ms Sibanyoni did not consume any alcohol. The complainant had been drinking and she seemed drunk. She had seen the complainant and accused 3 kissing and fall onto a couch. She went off to watch television. When she returned she found the complainant on a bed in the other bedroom between accused 2 and 3. She was told that they must leave the room. She saw complainant kissing accused 3. Accused 2 pushed

everyone out of the room and closed the door. The other boys were peeping through the glass pane at the top of the door. When the door was opened she went in with Ms Magorie. She found (some) of the complainant's clothes on the floor and complainant, who had on only her shirt, was crying. They took her to the bathroom. The complainant was still drunk. They helped her to put her clothes on, including her panties. She begged the complainant to leave, but she could not because she was drunk. Ms Sibanyoni confirmed that complainant did not remember most of what happened, as she had a blackout. The complainant only became aware of what happened after she told her what happened. She also did not remember that she slept with accused 3. She did, however, remember that she kissed him and that he was on top of her at one stage.

[5] Ms Magorie testified that she saw accused 3 and complainant kissing and falling on the sofa. Thereafter they walked backwards towards one of the bedrooms. He did not push her. The kissing was described as "hard kissing", which meant that tongues were used. She found the bedroom door locked and some of the men were peeping through the glass pane at the top of the door. She was not tall enough to look through the door pane. When the door opened, she found accused 3 and the complainant inside. The complainant was crying and sat on the floor. Accused 3 left. He, however,

came back and kissed the complainant before leaving. She and Ms Sibanyoni then assisted the complainant and took her to another bedroom to sleep it off. The owner of the apartment then asked them to leave since his sister would be returning. The complainant stayed behind in the flat since she had passed out. They went and sat outside. At some stage accused 3 went inside. When he came back, he called her. She went to look and she found accused 1 with his pants and boxers down on top of the complainant. Both accused 1 and the complainant's bottom sections were naked and accused l' s buttocks were going up and down. She could not see his penis. She asked him what he was doing, but he told her to leave. He then got dressed and they both went outside. In her view the complainant was unconscious when she saw accused 1 on top of her. She knew that, since she had put her to bed earlier, when she automatically went to sleep. She could not say whether she was unconscious then, but she did not open her eyes. She also testified that at the time when accused 3 was alone with complainant in the bedroom, accused 1 was one of the men looking through the glass pane. She went back into the apartment to help the complainant get dressed. Accused 3 helped her to get the complainant out. They then took her to the taxi rank.

[6] A Dr Malan examined the complainant on the 25th November. She was told by the complainant that she had been raped on the l2th November. Since she was not sexually active and there were signs that the hymen was penetrated, it could fit in with rape at that time. She also identified a fungal infection, which was very common in women and was not a sexually transmitted disease. It could, however, occur after sexual intercourse. She could not definitely say what was used to penetrate, but it was a big object, most probably an erect penis. The allegation that the complainant was raped by three persons, did not mean that there were greater injuries than with one rape; after the first rape there was more lubrication and semen (which made thy penetration easier). As to when the penetration took place, she answered that since the tears took a maximum of 48 hours to heal, it was not possible to say exactly how long before the healing of the tears the penetration took place. She could not say if the hymen had been penetrated before. No specimen of semen could be taken, since the penetration had already taken place 11 or 12 days before. In answering a question whether the absence of a hymen necessarily meant that someone had intercourse, she answered: "Yes, I think, in this sense especially with my conclusion, there were still trails of the hymen left. ...It sometimes can happen that the hymen can be absent even without penetration in some people that are very active." It was not

possible to say exactly how many days before the examination the penetration took place.

[7]Accused 1 testified that he did not. have sexual intercourse with the complainant. He denied that he went back into the flat after they were asked to leave. He did not see anyone peep through the glass door. When they left, the complainant was able to walk on her own; he did not see accused 3 kissing the complainant. He fell asleep on the sofa at a stage. His witness, Mr. Marule, confirmed that the complainant was drunk, that she vomited and was taken to the bathroom by her friends. It was possible that accused 3 rnight have been in the bedroom with complainant. He confirmed that he saw accused 1 sleep on the sofa for about thirty to forty minutes. He did not see anyone peep through the door- pane.

[8] Accused 3 testified that after they met the girls and went to the flat, they bought cane, cider and lemonade. Ms Magorie and the complainant were drinking continuously. Later on they went to buy a half-jack brandy and Spice Gold. At a stage the complainant pushed accused 2 away and kissed accused 3. As they had been drinking and the complainant was drunk, they happened to fall on the sofa. They then started talking and she told him that she wished to sleep to get well. He would not, as testified, have had sex with a drunken girl. He left her and went to sit outside with some of the other

men. He was looking for a cigarette, but since they did not have one, he left for a shop. When he returned he did not sit for long before they were informed that they had to leave since the sister would return soon. Ms Magorie asked him to help to carry the complainant, since she was unable to stand. They accompanied the ladies to the taxi rank. The complainant, who was walking next to him, kissed and hugged him and they were laughing. He recalled that she told him that she loved him. He disputed that he had sex with the complainant. They were never alone in a *room.* He did not see anyone peeping through a door-pane. He denied calling Ms Magorie to come and see what accused 1 was doing. He did not see either accused 1 or 2 having sex with the complainant that day.

The Reasons of the Learned Regional Magistrate

[9] The learned regional magistrate found that the complainant's testimony was corroborated in certain respects by that of Ms Sibanyoni and Ms Magorie in that complainant was alone in the bedroom with accused 3 and that when they entered accused 3 left the room. Both attested to the fact that she only had on her bra and shirt and was crying when they entered. Both testified that boys were looking through the glass pane at the top of the door while the door was locked and that they *took* complainant to the bathroom in a half-dressed state.

[10] As to accused 1 there was only the testimony of Ms Magorie. She testified that while they were sitting outside the apartment and had left complainant in the apartment to "sleep it off", accused 3 called her to come and have a look what accused 1 was up to in the apartment. She saw accused 1 on top of the complainant with their clothes pulled down.

[11] The discrepancies in the testimony of the first three state witnesses could be ascribed to imperfect recollection, observation and reconstruction. They were, however, not material and not sufficient for the court to reject the testimonies of the witnesses. In evaluating the complainant's testimony, the court took into consideration that she was a single witness in respect of the fact that accused 3 was on top of her. She could not remember much as a result of her state of intoxication. She did not exaggerate or fabricate evidence and was a credible and reliable witness. She conceded that she was drunk at the time. Since she did not know what had happened to her, she could, ironically, not report anything to anyone. In fact she only took steps to report the matter to the Police when friends told her that it was rumoured that she had been raped.

[12] The evidence was that Ms Sibanyoni had not consumed liquor. The court could not speculate about the state of intoxication of Ms Magorie. There was no evidence that she was not able to speak or walk properly.

Therefore the court could not find her to have been an unreliable witness. Part of Ms Magorie's evidence was corroborated by Ms Sibanyoni as to the state in which they found the complainant. Ms Magorie's evidence was accepted as trustworthy and reliable. There was also no reason to doubt the expert evidence of the doctor.

[13] In so far as the accused were concerned, what amounted to an alibi was never put to the witnesses. The Constitutional Court has accentuated the need for raising disputes with the witnesses. However, it was also true that there might have been some communication gap between accused 3 and his three different attorneys, who conducted his defense consecutively. There were, however, unsatisfactory aspects in regard to the accuseds' testimony. In so far as accused 3 was concerned, complainant testified that accused 3 was on top of her, her leg was in the air and she was feeling pain in her vagina. If this was coupled with the circumstantial evidence as to the state in which Ms Sibanyoni and Ms Magorie found her, it justified "a reasonable inference" that sexual intercourse had taken place.

[14] Only the testimony of Ms Magorie implicated accused 1: she saw him on top of the complainant with his pants down and his buttocks going up and down. It would be a reasonable assumption to draw that he was having sexual intercourse. Accused 1 and 2' s version that they did not have sex with

complainant was not reasonably possibly true. She could not have consented to sex with accused 1 in the light of everybody's testimony that at the time she had passed out and it was, accordingly, impossible for her to have consented.

[15] In the case of accused 3 she was, according to complainant's testimony, unconscious for most of the time. Although she had been seen kissing him and had moved in her intoxicated state towards the bedroom, she was not in a position to give informed consent to any sexual act. Her earlier kissing of accused 3 could not be regarded as consent to sexual intercourse.

[16] Lastly it was held that the two accused were not accomplices to each other's rape of the complainant. Mere presence is not sufficient to satisfy the requirements of complicity. Each one was, accordingly, guilty of one rape.

High Court Approach

[17] My main problem with the approach of the learned regional magistrate is, with respect, that the final question was left unanswered: whether the accused, if they did have sexual intercourse with the complainant as inferred by the court, were proved beyond a reasonable doubt to have at least foreseen the possibility that the complainant was not consenting. Of course,

such an intention would have to be based on inferential reasoning.[2] The learned regional magistrate answered my request for further reasons on this point in a thorough report, for which I am indebted to her. She reasoned that given the fact that the complainant was clearly drunk, everyone could reasonably be inferred to have known or have foreseen the possibility that consent was absent. This approach was eloquently supported by Mr *Davhana*, for the State.

[18] To have a full picture of what happened in the case of accused 3, the record needs to be quoted where Ms Magorie testifies:

PROSECUTOR: Just hold on there. --- And then I left to go into the dining room where I found Mitch (accused 3) and Norma (complainant) kissing and then they fell on top of the sofa. After that they stood up, walking backwards into one of the other bedrooms. I decided to leave and go back to where I was sitting. Then everybody left....
So they left the room? --- Yes, and I followed where I found that the door was locked.
What door?--- The bedroom door and a couple of the guys were peeping over one of the glasses....

[2] As to how *dolus eventualis* is established by way of inferential reasoning, see S v *Beukes* 1988(I) SA 511(A) where Van Heerden JA said: "'n Hof maak dus 'n afleiding aangaande 'n beskuldigde se gemoed uit die feite wat daarop dui dat dit, objektief gesien, *redelik moontlik* was dat die gevolg sou intree. Indien so 'n moontIikheid nie bestaan nie,word eenvoudig aanvaar dat die dader nie die gevolg in sy bewussyn opgeneem het nie. Indien wel, word in die reël uit die blote feit dat hy handelend opgetree het, afgelei dat hy die gevolg op die koop toe geneem het." (emphasis added); in S v *Lungile and Another* 1999(2) SACR 597(SCA) at par [17] Olivier JA said:"In the present case, the crucial question therefore is whether the State proved beyond a reasonable doubt that the first appellant in fact did foresee.. .that the death of a person could result from the armed robbery in which he participated, In this case, as in many others, the question whether an accused in fact foresaw a particular consequence of his acts can only be answered by way of deductive reasoning. Because such reasoning can be misleading, one must be cautious. *Generally speaking, the fact that the first appellant had prior to the robbery made common cause with his co-robbers to execute the crime, well-knowing that at least two of them were armed, would set in motion a logical inferential process leading up to a finding that he did in fact foresee the possibility of a killing during the robbery and that he was reckless as regards that result."* (emphasis added)

What happened then? --- We decided to wait
What were you waiting for? --- For the door to open because I tried to open it and it was locked. And then it opened. We stepped in.
Who stepped in? ---All of us basically.
Ja? ---All the guys left including Mitch.
Where was Mitch? ---In the bedroom with Norma.
When the door opened, who was inside that room? --- We found (Norma) sitting at the foot of the bed.
On the bed or not? --- No, at the foot of the bed.
But where was she sitting? --- On the floor.
Ja? --- Mitch left. He came back and he kissed Norma. Norma said she would need to go to the bathroom. So me and Valentine (Sibanyoni) took her to the bathroom.
Just before you continue. When you came into the room, what was Norma wearing? --- She was only wearing her school shirt.
Do you know about how long they were inside that room? --- No.
You indicated that they walked backwards into the room? --- Yes.

What was Norma's state? --- She was crying.
Could she stand on her own to feet? --- No
Do you know why she could not? ---No
Do you know if she had been drinking? --- Yes
Do you know whether the alcohol had an influence on her? --- I would not know.
When she walked to the toilet.. .did she walk on her own or did you have to help her? --- We helped her
Why did you help her? ---Because she was tipsy.
What do you mean by tipsy? ---Sort of like drunk. She could not walk properly.
... We decided that she should sleep the liquor off.
Yes?--- We left her since the owner of the flat said that her sister would return.
We were too many in the flat We went and sat outside.
And Norma?--- She stayed behind.
What was she doing when you left? --- She had basically passed out
And what happened then? --- We sat outside. Then Mitch (accused 3) went inside. After Mitch came back from inside, he called me and said come and look what Nori is doing. Then I went where I found Nori (accused 1) with his pants down and boxers.
Yes? --- On top of Norma.
And what clothing did Norma have on? --- Her shirt was up and her school dress. Then I confronted him.. ..She was not wearing underwear.

And underneath his boxers, was he wearing anything --- No.
Was he doing anything when he was on top of her? --- I could see movement."
She confirmed that the complainant was "passed out"

In cross-examination Ms Magorie gave more details about the kissing with accused 3.

"How were they kissing?--- They were kissing passionately.

When you say they were kissing passionately, what do you mean? ---They were kissing like heavy kissing. If two people are involved, they will kiss like that.

. . . You said that at some stage when you went inside that particular bedroom the complainant kissed accused 3? --- Yes, I did say that.
Could you say she did that voluntarily? ---Yes, she could.
. . .And what you are telling this court is that the complainant is the one who turned around and kissed accused 3? --- Yes
And how were they kissing? ---The same way that they were kissing before.
Passionately? --- Yes, passionately.
I see. So can you today tell this court that you saw accused 3 having sexual intercourse with her? ---No I did not see that.

[19] Both accused denied that they had sex with the complainant. In so far as accused 3 is concerned, he conceded that he had kissed the complainant but he denied that he had taken her to the bedroom and had sex with her. Neither Ms Sibanyoni nor Ms Magorie saw the intercourse take place. Complainant had a "flashback" recollection of having sex with accused 3 and then, according to her, became unconscious again. A negative inference must be drawn from the fact that the State did not call the boys who were said, by the state witnesses, to have been watching through the top door-pane what was

going on in the room. If it is accepted, without deciding the point, that accused 3 did have sex with complainant as the only reasonable inference from the proved facts, then the next question is whether he knew or foresaw the possibility that she did not consent, but nevertheless continued.

Smalberger JA summed up the position in S v *J*[3] :

"Ek kom nou by die crux van die appèl, naamlik of die appellant die vereiste *mens rea* gehad het. Die blote feit dat die appellant met die klaagster gemeenskap gehad het regtens sonder haar toestemming maak hom nie noodwendig aan verkragting skuldig nie. lndien die klaagster oënskynlik tot gemeenskap ingestem het, en die appellant *bona fide* geglo het dat sy regtens in staat was om toestemming te verleen, sou die vereiste opset by hom ontbreek het. Anders gestel, in die omstandighede van die onderhawige geval, tensy die Staat bewys óf dat die appellant subjektief besef het dat die klaagster nie in staat was om tot gemeenskap toe te stem nie, óf dat hy die moontlikheid daarvan besef het maar desondanks voortgegaan het met die pleging van die daad, is die vereiste opset nie bewys nie (kyk *R* v *K* 1958 (3) SA 420 (A) op 425H; *R* v *Z* 1960 (I) SA 739 (A) op 743A; S v S 1971 (2) SA 591 (A) op 597B - D).

[20] Ms Magorie testified that there was passionate kissing before the couple went to the bedroom. She also added that she saw them kissing passionately in the bedroom. Accused 3 even came back and kissed her after the intercourse had taken place. The mere fact that she was crying cannot be regarded as supporting the only reasonable inference that complainant had been raped. Given her drunken state, it is not unlikely that that contributed to her crying. In fact the Regional Court drew "a reasonable inference" that she had been raped. The question should have been whether it was the only

[3] 1989(1) SA 525(A) at 530.

reasonable inference based on the proved facts. Watermeyer JA said the following in R v *Blom:*[4]

"(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.

(2) The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

[21] I accordingly conclude that even if it is accepted, without deciding the point, that accused 3 did have intercourse with complainant, there is a reasonable doubt whether he was not at least under the impression in the light of the passionate kissing, that she was consenting. Although complainant could not walk without assistance after they found her sitting on the floor after the alleged intercourse, she said that she needed to go to the bathroom. Which could also very well indicate that she could have been talking or responding to the accused in such a manner that he could have thought that she was in fact consenting. The mere fact that she could only *recall* a snippet of what had happened does not, as argued eminently by Mr. *Scheepers,* mean that she was otherwise unconscious. In any case, accused 3 could very well have created the impression that she was consenting, given the passionate kissing in the lounge and the bedroom, shortly before the alleged act had taken place.

[4] 1939 AD 288 at 202,203.

[22] I have the same problem with the conviction of accused 1. It is true that Ms Magorie left the complainant in the apartment so that she could "sleep it off" and was under the impression that she had passed out. She, however, then joined the others who were sitting outside. It is not clear how long she spent there before accused 3, according to her, called her to go and look what accused 1 was doing. Accused 3 denied that he called her and accused 1 denied that he had sex with the complainant. Once again I will accept, without deciding, that accused 1 had sex with the complainant. But can one simply infer, as argued persuasively by Mr. *Mkhonto,* that she was still "passed out" when accused 1 had sex with her? The mere fact that complainant did not have a recollection of what happened, is not decisive. During her testimony she would, more than once, say that she could not remember. This makes it impossible to determine whether she simply did not remember at the trial *or* whether she was in fact unconscious at the time. She, for example, says with reference to accused 3 taking her to the bedroom and closing the door: "I do not quite remember that. I think I passed out because I was not okay." In so far as accused 1 is concerned, not only one reasonable inference can be drawn from the testimony of Ms Magorie: namely that accused 3 had sexual intercourse with the complainant whilst she did not agree. She might have recovered or created the impression that

she was consenting. Ultimately I am not satisfied that the testimony of Ms Magorie is sufficient to justify the only reasonable inference that rape had taken place. The State has, accordingly, not proved beyond a reasonable doubt that accused 1 knew or foresaw the possibility that the complainant was not consenting. The doctor could not even testify whether there had been more than one rape or even say that intercourse had not taken place before that date. The complainant had no recollection of this incident and could not corroborate what Ms Magorie had testified.

Section 14 *of the Sexual Offences Act* 1957

[23] The accused admitted that the complainant was born on the 9th November 1986. This made her almost exactly fifteen years old at the time of the alleged incident. The accused were informed of the competent verdicts at the commencement of the trial, which would have included s 14(1)(a) of the Sexual Offences Act 23 of 1957, as amended. S 14(1)(a) provides that any male person who (a) has or attempts to have unlawful carnal intercourse with a girl under the age of 16 years; or (b) commits or attempts to commit an immoral or indecent act with such a girl.. .commits an offence. Consent is no defence.

[24] S 14(2) provides for two defences on which an accused who is charged under s 14(1)(a) may rely: that the girl was a prostitute, that the accused was

at the said time under 21 years of age and that this was the first occasion on which he had been charged with contravention of the section. All three elements must be present. The second defence is that the girl or the person in whose charge she was deceived the accused into believing that she was older than sixteen at the time. I agree with Snyman *Criminal law* (4th Edition) 364 that the meaning of the term "deceive" is not clear. Does it, as Snyman argues, refer to active, express deception by the girl, or can it also include implied deception by her? Milton, *SA Criminal law and Procedure* Vol 3 (1997) E3 P 12, supports the approach in *R* v *T*[5] that if the accused is deceived in fact, it is immaterial whether the girl or the custodian intends to deceive him or knows that he has been deceived. This approach is also supported by Snyman *(op.cit.)* who argues that the term must be given a wide meaning because it appears in a "badly formulated defence in which the legislature presumably simply meant to acknowledge that (the accused) could rely on a mistaken belief about the girl's age." In S v *M*[6] Hattingh J approached s 14(2)(b) from the premise that it required knowledge of unlawfulness as part of *dolus,* before the accused could be convicted. I fully endorse this approach. It accords with the approach that when a statutory offence does not mention the form of *mens rea* required, it will normally be

5 1960(4) SA 685(A); also see Sv *F* 1967(4) SA 639 (W).
6 1997(2) SACR 340 (0).

accepted, in the absence of other *indicia,* that the form of *mens rea* required would be *dolus.*[7] Knowledge of unlawfulness is an integral part of *dolus* - see *S v Ntuli*[8] and S v *De Blom.*[9]

Although it was held in S v *Vio* that the onus rests on the accused to prove the defences on a preponderance of probabilities, this amounts to a reverse onus which, to my mind, cannot be justified constitutionally. [11] The accused would, however, bear an evidential onus once it has been proved that the girl was younger 16 and that sexual intercourse had taken place.

[25] The process before the regional magistrate was focused on the question of rape. The accused denied that they had intercourse with the complainant. Accused 3 admitted that he kissed the complainant and Ms Magorie's testimony shows that it was passionate kissing, which would be found between persons who are "involved". Although the record shows that the legal representatives, at the request of the regional magistrate, informed the accused of the competent verdicts on a charge of rape, which includes a

7 S *v Ngwenya* 1979(2) SA 96(A) where Jansen JA says at 100A : "Waar die teendeel nie blyk nie, sal skuld dus 'n vereiste wees. In die gewone geval sal die verskyningsvorm hiervan wat die Wetgewer in gedagte het, opset *(dolus)* wees en nie nalatigheid *(culpa)* nie. (As uitsondering kan die bedoeling egter wees dat selfs *culpa* tov sekere aspekte voldoende kan wees. Vgl, bv, S *v Oberholzer* 1971 (4) SA 602 (A) te 611 F - 612C.) Waar opset 'n vereiste is, moet die opset in die reël op al die elemente van die misdaad betrekking hê en, omdat opset in ons reg nie kleurloos is nie, moet daar ook wederregtelikheidsbewussyn wees (S *v De Blom* 1977 (3) SA 513 (A) te 529H ev). Aangesien die bewyslas in die algemeen op die Staat rus om al die elemente van die misdaad te bewys, moet die Staat dan ook hier die opset - met die komponent van wederregtelikheidsbewussyn - bewys *(De Blom-* saak *supra* te 532E - H)."

8 1975(\) SA 429(A).

91977(3) SA 513(A).

10 1967(4) SA 685(0).

II See S *v Baloyi* 2000(2) SA 425(CC) and S *v Singo* 2002 (4) SA 858 (CC).

conviction in terms of s 14(1)(a) of the Sexual Offences Act, the facts before the court did not, in any manner, address all the issues which would be relevant in terms of s 14(1)(a) and especially the question of the deception as to age (widely interpreted) in s 14(2). The bodily development of complainant is, for example, never addressed. All that emerged was that she was 15 years old at the time of the incident. The very closeness of this age to the 16 year limit in terms of s 14(1) already gives rise to the possibility that they did not realize that she was under 16. It is, of course, understandable that the accused would not have raised this issue, since they were denying intercourse. I could refer this aspect back to the learned regional magistrate for further evidence, but since four years have gone by since the date of the alleged offense, I believe that it will be impossible to come to a rational decision on this aspect. The mere fact that it was admitted at the trial that she was fifteen, does not necessarily mean that the admission also had a bearing on the knowledge of the accused of her age at the time. They could very well have been deceived in terms of s 14(2), if it is accepted that they did have sexual intercourse. Such deceit could even have satisfied a narrow interpretation of s 14(2)'s "deceived". That it is important that the elements

of competent verdicts must also be proved, is implicit in the judgment of Mpati JA in *Makaola* v S.[12]

[26] Since I do not agree with the convictions of the two accused, the matter of sentence has fallen away.

I order as follows:

The convictions of rape of accused 1 and 3 are set aside.

JCW van *Rooyen*

Acting Judge of the High Court - 4 January 2006

Advocate for the State: L Davhana (with advocates L Mahlangu and ER Mamabolo standing in for him at later dates)

Attorney for Accused I: S Mkhonto

Advocate for Accused 3: G Scheepers instructed by Muhayela Attorneys

[12] [2002] lOL 9573(SCA).