IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: A320/2014

Date: 10 October 2014

Not reportable

Not of interest to other judges

In the matter between:

R[...] S[...] M[...] **APPELLANT**

and

THE STATE **RESPONDENT**

***Coram*: Louw J *et* Hughes J**

JUDGMENT

Delivered on: 10 October 2014

Heard on: 6 October 2014

HUGHES J

[1] On 11 April 2012, the appellant was charged with one count of rape in the regional court Schweizer Reneke. He pleaded not guilty to the charge and was convicted and sentenced to sixteen years imprisonment on 11 May 2012. He applied for leave to appeal and this was refused. The appellant petitioned the Judge President of this court. On 11 February 2013, the Judge President granted leave to appeal in respect of conviction and sentence.

[2] Throughout the trial, the appellant had legal representation.

[3] Briefly, the alleged rape took place on 23 January 2009. The complainant was thirteen years of age at the time whilst the appellant was twenty-three years. The crucial issue in this case is whether the appellant was aware that he was having sexual intercourse with a thirteen year old and whether she consented.

[4] From the outset I must point out that at the close of the state's case the appellant closed his case without adducing evidence.

[5] I now turn to deal with the evidence of the state. On the night in question, the complainant was in the company of her friend, K[...]. They were searching for their friend N[...]. They looked for her at her home and she was not present. They then proceeded to Senewe's tavern, My Chicken tavern and September's taverns. They found her standing outside the September's tavern drinking. The minor joined N[...] who was drinking storm, an alcoholic beverage. She testified that before she embarked on her search for N[...] she had consumed two quarts of black label beer at Marula's tavern. She cannot recall how many drink of storm she drank outside September's Tavern with N[...]. Her last recollection of that night is that she sat on the pavement of the tar road with her head hanging toward the ground. The next day she woke up in hospital in the company of her mother.

[6] Her evidence is that she was in a sexual love relationship with the appellant, which she kept a secret from her family, as he was a friend of her brother. She said they would meet at night and she had had sexual intercourse with the appellant more than twice. She does not recall seeing the appellant on the night in question. However, she testified that if she did see him that night and he wanted to have sexual intercourse with her she would have consented.

[7] Of interest is the fact that she had not told the appellant her age. When she went to the four taverns she did not have a problem to enter even though she was under the age of eighteen. She conceded that the appellant had a relationship with her because he thought, "She was the right size and perfect fit for him".

[8] The complainant's evidence is that she did not report the rape to the police neither did she lay the charges against the appellant. This was all her mother's doing.

[9] It was put to her, in the court below that she had met the appellant at September's tavern and proceeded with him to her uncle's shack where they had consensual sexual intercourse. She responded: "*I do not remember that specifically because I had a black out from September's Tavern."* She was adamant that she could not say what transpired after September's Tavern.

[10] Dr Djolo Nganda examined the complainant on 24 January 2009 at 12h04. The good doctor established that she was still under the influence of alcohol and confirmed that sexual penetration had taken place with the minor. Dr Nganda testified that due to her medical background she was able to classify the development stage of the complainant as Tanner stage 3 and affirmed that a member of the public would not have been able to do so without medical knowledge and expertise.

[11] Her mother, R[...] M[...], took the stand and confirmed that her date of birth was [...] 1995. She testified

that on 24 January 2009 she found her daughter in the shack that belonged to complainant's uncle. She was lying on the floor with her pants down and her panties drawn down to her knees. She reported the matter to the police and informed them that she was of the view that N[...] would have knowledge of how her daughter got to the shack and was in the state that she in.

[12] The appellant opted to remain silent and closed his case.

[13] The counsel for the appellant, Adv. Van Wyk, submitted in her heads of argument, that the case of the prosecution remains undisturbed. Even though this was the case, the merits of the state's case still needed examination. Refer to S *v Hlongwa 2002 (2) SACR 37 (T)*

[14] Adv. Van Wyk argued that the two essential aspects for consideration in this case are the age of the complainant and whether she consented to sexual intercourse with the appellant.

[15] The complainant testified that she was in a love relationship with the appellant and that this relationship was a sexual relationship. Further, that if she had sexual intercourse with the appellant on the night in question it would have been with her consent. However, she could not remember as she had a black out.

[16] Adv. Van Wyk argued that the DNA evidence was a clear indicator that the appellant and the complainant had sexual intercourse. The question then is whether the sexual intercourse was with the consent of the complainant.

[17] On the day in question, the complainant who was thirteen years at the time had frequented four taverns that allowed her entry. She gained entry in all four taverns without any problems. She was well aware that entry would only be given to patrons whom were over the age of eighteen. She further stated that at no stage before the incident did she tell the appellant her age. The evidence above, together with that of the doctor ought to be considered, as it is evident that the public would not know how to assess the complainant's age without the medical expertise.

[18] Adv. Van Wyk submitted that there was a *lacuna* in the state's case. The state had failed to address this when they presented their case in the court below. No evidence had been led of the appellant's knowledge that the complaint was thirteen years. Further, no evidence was advanced that the complainant was so intoxicated that she could not have consented to sexual intercourse with the appellant. Lastly, the mother of the complainant had indicated to the police that the complainant's friend, N[...], might be able to shed some light on the whereabouts of the complainant on that night. However, N[...] was never called to testify at the trial and from the documents before me neither was she interviewed by the police.

[19] The essential requirements for the offence to constitute rape are set out in *Section 3 of Act 32 of 2007*

which provides as follows:

> "*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. "*

[20] The *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007* clearly defines in what circumstances consent could not have been granted. These are, if the complainant was a child below the age of twelve years; if she was asleep; if she was unconscious; if she was mentally disabled and lastly, if she was in an altered state of consciousness, including under the influence of medicine, drug, alcohol or other substance, to the extent that the complainant's consciousness or judgment is adversely affected.

[21] During argument, Adv. Chetty, for the state, conceded that indeed the state had failed to fill the lacuna. The state failed to prove that the appellant was aware that the complainant was thirteen years of age. The state failed to prove that the appellant had engaged in sexual intercourse with the complainant, who was a child as defined by *Section 1 of Act 32 of 2007.* This section defines a child as "*(b) with reference to section 15 and 16, a person 12 years or older but under the age of 16 years."* Further, that the sexual intercourse was non-consensual.

[22] In light of the above concession and that which appear at paragraphs 18 and 19 above, I agree that the state failed to prove a case of rape, as defined, of the complainant. A second failure, on the part of the state was that, they failed to prove that sexual intercourse with the complainant was without her consent.

[23] The court below misdirected itself when it did not consider that the appellant was not aware that he was having sexual intercourse with a child, more so a child under the age of sixteen. As appellant was unaware, the defence at his disposal lies in *Section 56(2) (a) of Act 32 of 2007,* which provides "*Whenever an accused person is charged with an offence under section 15 or 16, it is, subject to subsection (3), a valid defence to such a charge to contend that the child deceived the accused person into believing that he or she was 16 years or older at the time of the alleged commission of the offence and the accused person reasonably believed that the child* was *16 years or older"*

[24] It also misdirected itself in concluding that the sexual intercourse was non-consensual, having not filled the lacuna.

[25] In the circumstances, the appeal against the conviction must succeed. The appellant is in custody and as such, the registrar is to instruct the Correctional Service Department to release the appellant immediately.

[26] In the circumstances I make the following order:

[26.1] The appeal against the conviction is upheld.

[26.2] The conviction is set aside.

[26.3] The registrar is directed to request the Correctional Services Department to immediately release the appellant.

W. Hughes Judge of the High Court

I agree and it is so ordered.

J. W Louw Judge of the High Court

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Attorney for the Appellant:

LEGAL AID SOUTH AFRICA FNB Building

c/o Church and Paul Kruger street

Church Square

PRETORIA

Tel: 012 401 9200

Ref: Lilian van Wyk

Attorney for the Respondent:

THE DIRECTOR PUBLIC PROSECUTIONS

PRETORIA

Tel: 012 351 6700

Ref: PA 53/2014 (12/8/TVC)