THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no**:** 859/10

In the matter between:

BONGI BIYELA **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Bongi Biyela v The State* (859/10) [2011] ZASCA 43 (29 March 2011)

Coram: CLOETE JA, SHONGWE JA AND TSHIQI JA

Heard: **14 February 2011**

Delivered: **29 March 2011**

Summary: Rape – Sexual intercourse with a girl under the age of 16 – Apparent age pleaded – Actual age not proven by the state – Injuries also not conclusive – Court faced with two mutually destructive versions – No basis to reject accused's version.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Bertelsman and Matojane JJ sitting as court of appeal):

The appeal succeeds. The conviction and sentence are set aside.

JUDGMENT

TSHIQI JA (CLOETE AND SHONGWE JJA concurring)

[1] This appeal concerns two issues. The first issue is whether the sexual intercourse between the appellant and the complainant was consensual. The second issue is whether the appellant had the requisite mens rea when he engaged in sexual intercourse with the complainant, a girl under the age of 16 years.[1]

[2] The appellant was charged in the Regional Court, Pretoria, for having raped the complainant, alleged to have been a 15 year old girl. He pleaded not guilty. He admitted in terms of s 220 of the Criminal Procedure Act 51 of 1977, that he did have sexual intercourse with the complainant but pleaded that it was consensual and further that he was under the impression that she was between 18 and 20 years old.

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[1]The age of consent is 16 years. *The Sexual Offences Act* 23 of 1957 regulated the position at the time of the offence.

[3] The appellant was convicted and sentenced to 15 years' imprisonment. He appealed to the North Gauteng High Court against both the conviction and sentence. His appeal (per Bertelsman and Matojane JJ) was dismissed. In dismissing the appeal, the court below tabulated five factors that in its view, cumulatively dispelled any doubt on the reliability of the evidence of the complainant. These will be considered at length herein below. The present appeal is brought with leave of this court. Because the appellant was in custody and because there appeared to have been a miscarriage of justice, the President ordered that the record of the proceedings and the heads of argument in the court below should be lodged with this court immediately and could be supplemented in due course if necessary. The appeal was argued on 14 February 2011. This court upheld the appeal, set his conviction and sentence aside and stated that the reasons would follow. The order was issued urgently because it became apparent that the continued detention of the appellant, as a result of the present conviction and sentence, was not in the interests of justice.[2] This judgment contains the reasons for the order.

[4] The sexual intercourse between the appellant and the complainant took place in an outside room at the appellant's home in Mamelodi West, Pretoria, in the early hours of the morning, on 29 June 1997 around five am. The previous evening both the appellant and the complainant had gone to two night clubs together with four other friends, in the appellant's motor vehicle. The four friends were: two females, the complainant's cousins and two men,

[2]In certain instances it becomes necessary to grant an order prior to giving judgment when the outcome of the appeal is not in doubt and the interests of the litigant demand an immediate resolution. See: AD & another v DW & others (Centre for Child Law as amicus curiae; Department for Social Development as intervening party) 2008 (3) SA 183 (CC); Arwah Abdi & another v Minister of Home Affairs & others (734/2010) [2011] ZASCA 2 (15 February 2011).

their respective boyfriends. There was no existing intimate relationship between the appellant and the complainant when they left their respective homes in Mamelodi. The complainant had joined the group with the blessing of her aunt, her mother's sister, Sharon who had asked the two cousins to take care of her. She was allowed entrance into both clubs and was not questioned about her age.

[5] In communicating what had occurred from the time the group arrived at the second club until the sexual intercourse took place, the complainant was at pains to paint a picture suggesting that she was not acquainted with the appellant and had no desire to do so. She stated that at the second club she simply sat and talked to her cousins. According to her nothing happened between her and the appellant. According to the appellant, on the other hand, a close relationship started developing between him and the complainant at this club. He stated that they talked and danced and that he even professed his love for her. His version was corroborated by one of the state witnesses Given Makhanya, the boyfriend of one of the cousins and was further corroborated by Tony Letswalo, the other cousin's boyfriend, who testified as a defence witness. Her version was not corroborated.

[6] Makhanya's version of what happened at the club was as follows:

'We then entered into the said nightclub and then we started to jive and then we were seated at that time two by two.

Just a minute. At what time did you leave Jamini? --- We did not in fact stay at Jamini because the girls said that the place was boring.

Yes, and then? --- And then we grooved, enjoy ourselves and Bongi was busy then speaking to this Refilwe and she had all the time she was just enjoying herself dancing, Bongi embraced her'.

[7] Letswalo's version was as follows:

'Bongi and Refilwe enjoyed themselves. They were talking and dancing with each other. They even hugged each other'.

[8] After leaving the club, according to Makhanya and Letswalo, the complainant requested to drive the appellant's motor vehicle. They did not accede to her request and Makhanya drove the vehicle. This in itself is unusual if her version is true. It is unusual that she would request to drive a vehicle belonging to someone she met on that day for the first time and with whom she was not acquainted. Her behaviour in that regard is rather consistent with the version by Makhanya and Letswalo which suggests that on the contrary, she was close and comfortable with the appellant at the club.

[9] It is not in dispute that after the group arrived back in Mamelodi, the two cousins and their boyfriends alighted and both the appellant and the complainant remained in the vehicle. They are the only witnesses who could testify as to what occurred thereafter.

[10] According to the complainant, she was asleep in the car when they travelled back to Mamelodi. She did not see the appellant dropping off her cousin Sharon and her boyfriend but only woke up when the appellant was dropping off the second couple in Mamelodi West. She asked them not to leave her in the car with the appellant and asked the appellant to drop her at

her home in Mamelodi East. The appellant refused and said that he would not be coming back to Mamelodi West to drop off the couple but that he intended to drop the complainant at her home in Mamelodi East at a later stage.

[11] The appellant's home was in Mamelodi West. If he had indeed intended to drop the complainant at her home in Mamelodi East, and then go back to his own home, he would have had to go back to Mamelodi West. It is incomprehensible how he would have said that he would not return to Mamelodi West after dropping off the complainant. It is also strange that both her older cousins, who had been asked to take care of her, left her in the car alone with the appellant and did not question the fact that the appellant dropped them off first in Mamelodi West. The probable inference, I dare to venture, is that already that stage, it was clear to everyone in the group that the complainant chose to remain with the appellant in his motor vehicle.

[12] After the appellant had dropped off the second cousin and her boyfriend, the complainant was left alone in the vehicle with the appellant. They proceeded to a petrol filling station. According to her it was at the filling station that he told her that he could not take her home because he had to go to work. She stated that there were petrol attendants at this filling station and also agreed in response to the prosecutor that she did not inform them that the appellant did not want to take her home. Apart from the fact that she did not raise the appellant's change of heart with any of the petrol attendants, she also did not ask the appellant to leave her there or simply get out of the car. It does not seem that she made an issue at all about the appellant's sudden

change of heart. Her behaviour is inexplicable. She had the perfect opportunity to either leave his car and seek assistance or shelter. Strangely, she did neither.

[13] After they left the filling station they proceeded to the appellant's home. She stated that at the gate she again asked the appellant to take her home. He refused and told her he would take her home in the morning. Her account of what occurred at the gate, and why she did not escape whilst the appellant was busy opening the gate, leaves one with a distinct impression that she did not intend to do so. At best her evidence in that regard is vague.

[14] Initially, she stated that the appellant stopped her whilst she was trying to get out of the car by holding her and took out a knife and stated his intention to use it if she did not co-operate. When questioned whether they were in or outside the car at this stage she stated that they were inside the car and she was trying to get out. It is not clear what she meant when she said she was trying to get out of the car. She stated that he turned around and grabbed her hand. She then stated that she then got in the car and the appellant locked it. It is not clear at what stage she got out of the car, because earlier on she had stated that they were not outside but inside when he restrained her from trying to get out of the car.

[15] Her further evidence is that the appellant left the car and went to open the gate. Her evidence on why she did not open the door and run or scream for help is again confusing and vague. She initially stated that after he left the

car to open the gate he did not lock the doors again. When asked what she did when the appellant was opening the gate she again stated that she was trying to get out of the car. Later on she suggested that the car was locked. She was clearly undecided whether to state that the door was locked or unlocked.

[16] Even if one accepts in the complainant's favour that the doors were locked while she remained in the car, there is no explanation why she failed to simply open the doors and get out. There was no evidence that it was not possible to open the locked doors from inside. The only inference is that she simply sat in the car and failed to utilise yet another opportunity she had to escape from the car, or alert neighbours or the occupants inside the appellant's home that she was being held against her will. Her evidence does not explain this failure.

[17] Another opportunity for the complainant to escape or seek assistance presented itself when according to the complainant the appellant left her alone in the room and went to an outside toilet. Again her evidence is vague. She initially stated that she tried to scream. When asked how she tried to scream she stated that she did so by shouting 'Help.' This she did whilst standing somewhere in the room. She could not explain why she did not go to open a window and scream. Her response was that she did not think of doing so. She was confronted with a version she had given in another court where she had stated that she did not scream because she had flu (it seems that the proceedings had commenced before a different magistrate and had started de

novo before the one who convicted the appellant). She could not explain this contradiction but simply responded that she did scream.

[18] What is uncontroverted is that the lights in the main house were on when the appellant parked the car inside the yard. The question why the complainant did not regard this as a possible sign that there were people in the main house, who could possibly come to her assistance, remained unresolved.

[19] Then there is the layout of the appellant's home. The uncontroverted evidence of the appellant suggests that the yard was small and that his room was close to the main house. His room was also close to another room occupied by his cousin. These rooms were separated by a toilet which was built in between the two rooms and the doors of these rooms faced each other. At such a close proximity, either the cousin or the mother would have heard the complainant had she attempted to seek their attention.

[20] The complainant left the appellant's home that same morning. The appellant gave her money for transport and she left for home. After she reported that she had been raped by the appellant, she was accompanied to the police station and was referred to Dr Rubeira, a district surgeon. The appellant was later arrested at his home.

[21] Dr Rubeira testified during the trial and was cross-examined at length on her clinical findings. Her completed medical report (J88) reflected 'age or

apparent age' as '15 years' and noted the complainant's general health, physical and mental state as follows:

'Build was consistent with age. Mental state-depressed. General health-good'.

[22] It further stated that the following was noted on examination:

'Urethral area red. Hymen torn & bulging. Post fourchette with abrasion. Digital exam-painful. Patient bleeding. The above injuries are consistent with those caused by forced entry'.

In his judgment the magistrate relied on the contents of the J88 and the evidence of Dr Rubeira to support his conclusion that the complainant was indeed raped. In doing so the magistrate misconstrued the evidence of the doctor in two respects. The first area of misdirection pertains to the age of the complainant. The age of the complainant was crucial because the appellant was faced with a competent verdict of having had sexual intercourse with a girl under the age of sixteen years ie 'statutory rape'.[3] From the onset the appellant disputed the age of the complainant. His legal representative informed the court that he would testify that her apparent age was 18 to 20 years. He confirmed this to the court.

[23] In his summation of this evidence, the magistrate states that 'she indicated that she observed that this youngster was 15 years of age, and not only that, she indicated further that the 15 years she observed, or which was revealed to her was [consistent] with the build of the complainant'. With respect to the magistrate, this was not the evidence of the doctor. What

[3]Section 261 (1) of the Criminal Procedure Act 51 of 1977.

occurred was that the J88 was introduced into evidence. The doctor was taken through what she had recorded in the J88. No attempt was made to ask her to explain what she meant pertaining to the age vis-a-vis the bodily frame of the complainant. She was also not specifically asked to express her opinion on her age. No other expert evidence was led to verify her age. Instead the learned magistrate persisted with his view, based on his observation that the complainant was 'small' and 'frail'. In this regard he erred.

[24] Where proof of age is essential to the guilt of an accused, the court has to be satisfied beyond a reasonable doubt on this score.[4] In terms of s 337 of the *Criminal Procedure Act*[5] the court can estimate the age of a person in criminal proceedings only if no or insufficient evidence is available at the proceedings. In this matter s 337 was not applicable because the district surgeon was available.[6]

[25] What posed a further complication in this matter was the fact that the complainant was close to attaining the age of 16. She was born on 8 August 1981 and was thus 15 years and two months old on 29 June 1997. She was clearly a border-line case.

[26] Proof of the complainant's date of birth was not the only problem. The other bone of contention was her apparent age. The appellant persisted in stating that the complainant appeared to him to be older than 16. Both Makhanya and Letswalo also persisted in this fashion. Makhanya insisted that

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[4] *R v Matipa* 1959 (2) SA 396 (T); *S v Matseletsele* 1976 (3) SA 821 (O); DT Zeffert, AP Paizes and A st Q Skeen: *The South African Law of Evidence*, p398

[5] Section 337 substituted by s 99(1) of Act 75 of 2008; see also ss 14 – 16 of the Child Justice Act of 2008; *S v Reynders* 1972 (1) SA 570 (C) at 572B; *S v Swartz* 1970 (2) SA 240 (NC)

[6] *S v Tsankobeb* 1981 (4) SA 614 (A) at 629B.

the complainant appeared to be 18 years old to him at the time. Even when the magistrate repeated his assertion and stated that in his observation ‘she is frail. She cannot be 18, 19. I saw her this year in 2001, not in 1997 when she was far much younger’. Makhanya responded to this assertion and stated that:

‘But according to my judgment as I saw her there she appeared to me to be 18’.

Letswalo, also testified that he estimated the complainant’s age to be 17 to 20 years. In addition to this he stated that she was wearing make-up ie mascara and red lipstick. His further evidence, apparently to support his view, was that his own girlfriend was 19 years old and the night club only allowed 18 year olds entrance.

[27] Both these witnesses found it necessary to mention that the complainant had asked to drive the car after they left the second night club to drive back to Mamelodi. Her request would have suggested to the appellant that she was old enough to have acquired a driver’s license or at least a learner’s license.

[28] The magistrate further criticised the fact that Letswalo’s evidence, stating that the complainant was wearing make-up, was not put to the complainant during her cross-examination. This criticism was unwarranted. The appellant’s legal representative did not anticipate that Letswalo would testify. He reserved the right to call him only if the State chose not to call him,

and that is how Letswalo ended up testifying as a defence witness. At the time he testified, the complainant had already testified.

[29] An accused may escape liability for engaging in sexual intercourse with a girl under the age of 16 years if he can prove that he was deceived as to the age of the girl; either by the girl or by a person in whose charge she was.[7] The deception may be by words, conduct or appearance (R v T).[8] The accused must prove on a balance of probabilities that he was deceived, whether inadvertently or fortuitously.[9]

[30] Several factors must, in my view, be taken in favour of a finding that the appellant was deceived about the complainant's age. The person in charge of the complainant on the day permitted her to go to a night club with older girls and their boyfriends. She wore make-up and she was allowed entry into both clubs. In the club she enjoyed herself, danced and kept the company of the appellant. She asked to drive the appellant's motor vehicle. Her appearance and behaviour, cumulatively, could quite easily have deceived the appellant. There is therefore no basis to reject his evidence that he was deceived.

[31] The other misdirection by the magistrate pertains to the nature of the injuries sustained by the complainant. In his further analysis of Dr Rubeira's evidence the magistrate states that 'but she affirmed her observation that the

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[7]Section 14(2)(c) of the Sexual Offences Act 23 of 1957 currently the Criminal Law (Sexual offences and Related matters) Amendment Act 32 of 2007, applies.
[8]1960 (4) SA 685 (T) at 687A.
[9]*R v V* 1957 (2) SA 10 (O)*; S v F & others* 1967 (4) SA 639 (W) at 641D*;* JRL Milton, MG Growling, S Hoctor: *South African Criminal Law and Procedure* vol III, statutory offences paras E3 – 6 and E3 – 12.

injury will only be caused by forceful penetration'. That is not what the doctor said. Her testimony was the following:

'Now doctor, assuming hypothetically of course that there was penetration which was not forceful, would you still have the same abrasions? --- You could. You could have'.

She confirmed this during cross-examination and stated:-

'You already indicated that one cannot make the only inference that there was forced entry in this specific instance. Is that correct? --- That is correct, ja'.

The finding by the magistrate that the injuries could only have been caused by forceful penetration was therefore a fundamental factual misdirection.

[32] Did the state discharge its onus? I have already dealt with the evidence of what occurred between the complainant and the appellant in the second night club. The complainant's evidence remained uncorroborated whilst the appellant's evidence was corroborated by Makhanya, the second state witness, and further by Letswalo. Their evidence is at odds with that of the complainant.

[33] I have also alluded to the inexplicable failure of the complainant to seize at least three opportunities to escape or ask for assistance if she wished to do so. The first opportunity was at the filling station, the second one at the gate at the appellant's home and the third one in the room when the appellant had gone outside leaving her alone. The evidence of Dr Rubeira pertaining to her age and her injuries does not assist the state either.

[34] This then leads me to the issue of the knife which she introduced into her evidence obviously to show coercion. The appellant denies that he was in possession of a knife. Both Makhanya and Letswalo deny seeing a knife and Makhanya said specifically that had the appellant produced a knife he would have seen it. Even on her own evidence, nothing much was done with the knife. It was only shown to her with a threat that it might be used if she did not co-operate. Again she is a single witness in this regard.

[35] I now turn to the issue that arose during Makhanya's cross-examination by the defence, that the complainant had falsely incriminated the appellant for fear of being reprimanded by her mother. Makhanya stated that he had been told by Letswalo that the complainant had not wished to lay a charge of rape against the appellant but did so because her mother was strict and also because it was the first time she went out until late. It should be recalled that Sharon, her aunt, had asked the two cousins to take care of the complainant. It should also be recalled that these very cousins saw her dancing with the appellant. They also left her in his car after they alighted. Letswalo was called by the defence and he confirmed that the complainant had made the statement to him. This evidence was not, as I have already stated, anticipated by the defence, hence it was not put to the complainant when she testified.

[36] The magistrate rejected this evidence. His reasoning for rejecting it boils down to this. If the complainant was indeed scared that her strict mother would scold her she would not have told Sharon, her aunt, that she had been raped. This implies that if indeed she had consented to the sexual intercourse, she would have kept quiet about it and her mother would not know. This

reasoning overlooks several important considerations. The obvious one is exactly what the complainant conveyed to Letswalo and it is that the complainant had to offer an explanation for coming back home the following morning. In addition, her older cousins had left her in the appellant's motor vehicle and she probably feared that they would talk about it. There are other countless reasons why a young virgin who, according to the evidence, had not used protection would rather lie to her parents. These range from fear of pregnancy to infection. In this matter it is not even necessary to speculate because the complainant had confided in Letswalo why she incriminated the appellant.

[37] The conclusion by the magistrate that the complainant had no reason to commit perjury and that her evidence must therefore be true, was yet another misdirection on his part. In *R v Mthembu*[10] this approach was held to be wrong. The court stated:

'The magistrate in his reasons for judgment obviously takes the view that if the evidence of the traffic inspector is accepted then the accused was guilty of driving to the danger of the public. In coming to the conclusion that that evidence is to be accepted he said that the inspector either saw the accused drive as he says or he has come to court to commit perjury. That is not the correct approach. The remarks of the late MILLIN, J., in *Schulles v Pretoria City Council* , a judgment delivered on the 8th June, 1950, but not reported, are very pertinent to this point; he says:

'It is a wrong approach in a criminal case to say 'Why should a witness for the prosecution come here to commit perjury?' It might equally be asked:

"Why does the accused come here to commit perjury?' True, an accused is interested in not being convicted, but it may be that an inspector has an interest in securing a

[10]1956 (4) SA 334 (T) at 335H–336B; Albert Kruger *Hiemstra's Criminal Procedure* p24 – 4.

conviction. It is, therefore, quite a wrong approach to say 'I ask myself whether this man has come here to commit perjury, and I can see no reason why he should have done that; therefore his evidence must be true and the accused must be convicted.' The question is whether the accused's evidence raises a doubt"'.

[38] The court was also faced with a further dilemma. Makhanya was a state witness. He contradicted the complainant's evidence in all material respects. The consequence of this was that the court was faced with two mutually destructive versions of the two state witnesses whilst the version of the defence, on the other hand, was corroborated by one of the state witnesses and by a defence witness. This left the court with no option but to accept the version of the appellant. In light of the above considerations there was no reason why the magistrate rejected it and also no basis for the finding by the court aquo that the appellant's version was not reasonably possibly true.

[39] It was in view of the above considerations that the appeal was upheld and the conviction and sentence were set aside.

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Z L L Tshiqi

Judge of Appeal

APPEARANCES

APPELLANT: B Booysens

Instructed by Schürmann Joubert,

Pretoria;

Honey Attorneys, Bloemfontein.

RESPONDENT:	P Vorster Instructed by the Director of Public Prosecutions, Pretoria.