

S v AF 2018 (1) SACR 377 (WCC)

KEY CONCEPTS	
Rape & sexual offences of 14-year-old female	Rape by family friend
Cross-examination of accused	Single witnesses
Contradictions in evidence	Cautionary rule

Introduction

The appellant was convicted in the regional court on 6 charges under the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA) and sentenced to 5 years' imprisonment in terms of s276 (1)(i) of the Criminal Procedure Act 51 of 1977 (CPA). The appeal is against the convictions only.

Facts of the case

The complainant was a 14-year-old female. The appellant was a 43-year-old man, who was a captain in the South African Police reserve force and a deputy sheriff by occupation and also social acquaintances of the complainant's family. The appellant was a regular visitor to the complainant's home as were his daughters, while the complainant and her mother(L) often visited the appellant's home. The complainant attended the same school as one of the appellant's daughters and he regularly ferried the children to and from school so he would regularly pick her up at home in the morning and drop her off at home again in the afternoon. Unbeknown to the rest of the family, the appellant and L had been involved in an adulterous relationship since 2007 which was conducted in secret. In about mid-2011, when L was pregnant with her 6th child, the appellant turned his attention to the complainant and soon became intimate with her. The appellant was alleged to have had sexual intercourse with the complainant on a number of occasions and asked her to perform oral sex on him. He also sent the complainant pornographic photos of his penis. The appellant denies having had sexual contact with the complainant and says that L has fabricated the case against him because he ended their relationship in 2012.

Findings of the trial court

The appellant was charged with:

- 3 charges of exposing a child to pornographic images in contravention of s19(a) of SORMA in that he sent three images of his penis to the complainant;
- 2 charges of sexual assault in contravention of s5(1) of SORMA arising from separate incidents committed when he placed the complainant's hand on his erect penis without her permission, and when he rubbed the complainant's vagina with his hand without her consent;
- 4 charges of statutory rape in contravention of s15(1) of SORMA in that the committed acts of sexual penetration of the complainant with her consent when she was aged between 12 and 16, to wit 14.

The appellant was acquitted on the pornography charges because it was possible (as alleged by the appellant) that the photos had been sent to L, the complainant's mother, instead of the complainant as they shared the same cell phone. The appellant was convicted on the remaining 6 charges.

Issue before appeal court

In the appeal on conviction, the appellant's counsel took issue with the cross-examination of the accused. It was suggested that the extensive questioning by the prosecutor in the court a quo about the basis for a fabricated claim by the complainant required him to express an opinion about the subjective state of mind of another person, and that questions directed at eliciting this type of evidence were impermissible.

The prosecutor extensively questioned the accused about the basis for a fabricated claim by the complainant. In his evidence-in-chief to express a view as to why the complainant and her mother had made damaging claims against him, the appellant had initially offered a garbled explanation to the effect that the complainant's mother had probably wanted to save face amongst their friends and family when , liaison was ultimately exposed in 2012. That assertion rendered cross-examination on the point permissible.

In the result, once questioned on his suspicions, the appellant furnished various explanations, none of which hold water in the view of the appeal court, because of the following:

- the appellant's affair with the complainant's mother, L, did not end in 2012 but continued right up to the day before his arrest, when the parties were intimate with each other;
- L admitted that she felt ambivalent about proceeding with the charges once laid, and only felt compelled to do so when the investigating officer threatened her with perjury;
- L continued to express affection for the appellant after his arrest; and
- she helped the appellant by driving his car home from the police station after his arrest and delivering his personal effects to his wife.

The appellant's suggestion required a high degree of complicity and connivance between the complainant and her mother to create a version that would be compelling and believable. Fabricating a story between witnesses is fraught with the danger of contradiction, yet this was not found in the present case. The complainant's evidence in court accords largely with her statement to the police.

Single witnesses

The complainant in this case was 14 years old at the time and a single witness in relation to all the charges which meant that the court had to take into account s208 of the CPA to consider her evidence cautiously and seek corroboration where necessary. The complainant testified 3 years after the events and the contradictions that exist in her evidence are not material and do not require the court to reject the witness's evidence. Contradictions may

sometimes be indicative of error, but not all errors affect the credibility of witness, and the court will evaluate the evidence taking into account the nature of such contradictions, the extent thereof and their bearing on other aspects of the witness's evidence. The court must have regard to the fact that, particularly in the case of younger witnesses, contradiction may be indicative of "imperfect recollection, observation and reconstruction of an honest witness."

The High Court made the following findings on the complainant's credibility:

- the regional magistrate made positive credibility findings;
- the complainant's relative maturity for her age is readily apparent from the record;
- her version is corroborated in a number respects;
- there is a medical evidence which suggests that consensual vaginal penetration was probable;
- there is the evidence regarding the airtime SMS
- the existence of the photographs which was positively confirmed by her mother;
- there is evidence regarding the soiled handkerchief and the complainant's flighty behaviour when she got home as well as her wanting to know whether the appellant had been sterilised;
- there is the unchallenged evidence of the mother (L) that the appellant was contrite after the event and his concern for the plight of his wife and children;
- there was no suggestion by the defence that, at the time, the appellant immediately denied his involvement with the complainant.

The High Court had little doubt that the complainant was correctly found to be an honest witness and her and that her evidence met the requirements of s208 of the CPA. The state's case was overwhelming and persuasive. The appellant's bare denial did not measure up, and the High Court was satisfied that the appellant's version was rejected as not being reasonably possibly true in the circumstances. The appeal, therefore, must fail and the conviction of the appellant is confirmed.