



REPORTABLE

CASE NO: SA 30/2008

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

TA

Appellant

and

THE STATE

Respondent

Coram: MAINGA JA, HOFF JA and FRANK AJA

Heard: 03 October 2017

Delivered: 26 October 2017

Summary: The appellant was convicted in the High Court on five counts of rape involving five minor children. He was sentenced to five years on each of counts 1 – 4 and seven years on count 5. The High Court granted appellant leave to appeal against conviction. Appellant had admitted to having had sexual intercourse with the complainants in counts 1 – 4 and denied to having had sexual intercourse with the complainant in count 5. All offences took place at the farm where the appellant

resided. All five complainants failed to report the offences at the times they were committed, but did so much later on when the complainant in count 4 reported to her uncle. During the investigation of that complaint, the other offences on the other complainants came to the surface. In fact, count 5 was added on at the commencement of the trial, after the Public Prosecutor had consulted with the complainant in that count, who was subpoenaed as a witness in the other complainants' cases. Appellant relies on the conducts of the complainants to allege consensual intercourse or deny intercourse in count 5.

The questions that arose for determination was whether: (1) the minor complainants consented to the sexual intercourse in counts 1 – 4, (2) the appellant had sexual intercourse with the complainant in count 5 and (3) the disclosure by the defence counsel to the court on the enquiry by the trial judge of the appellant not informing defence counsel of the photographs which the appellant intended to produce in evidence was an irregularity, which resulted in a failure of justice.

The court remarked that the failure of the complainants to report the offences at the times they were committed, but much later on, when they had the opportunity to report the same, when viewed in isolation, no grounds would exist for the rejection of the appellant's evidence. The approach should not to take the fact in isolation, but rather to examine the fact in the context of the whole case, in order to determine whether it could stand. Viewed in the context of the whole case, the appellant's version rings hollow and leave to appeal should have failed. Appellant's version that BE, GK and LA elicited sexual intercourse from him and that they were prostitutes who slept around with men and that the three agreed between themselves to go to

the farm and have sexual intercourse with him and he would pay for their services, is not possibly true as he collected BE, his sister's daughter, from her grandmother under the pretext of removing her, in his own words, from prostitution and yet once on the farm he turned her into a sex slave, which was accompanied by assaults when she resisted his sexual advances. LA went to the farm with appellant and BE, LH was collected by appellant from her mother. GK arrived on the farm, with EH and her parents but the one night she spent on the farm, appellant forced himself onto her. All five complainants told one version that he assaulted them or threatened to do so when or if they resisted his sexual advances and threatened to assault them if they reported the offences. The complainants' ages at the time the offences were committed militates strongly against the likelihood of them accepting of love proposals, let alone, to seduce or initiate sexual intercourse with the person they regarded as an uncle or their care taker. In as much as the complainants testified on a subject too complicated for a child to understand, their evidence reads well and is trustworthy.

On counts 1 and 5 Hoff JA *et* Frank AJA hold the view that BE resided on the farm for at least six months without reporting the alleged rape on her and EH only reported the rape during December 1998 two years later at the trial when she consulted with the Public Prosecutor as a witness in the other offences against the appellant. Therefore appellant's defence of consent raised in relation to BE and appellant's denial of sexual intercourse with EH cannot be said to be false beyond any reasonable doubt.

Held (per Mainga JA, Hoff JA and Frank AJA concurring) that the sexual intercourse in counts 2, 3 and 4 was not consensual.

Held (per Frank AJA, Hoff JA concurring) that the sexual intercourse in count 1 was consensual and appellant did not have sexual intercourse with the complainant in count 5. The appeal in respect of counts 1 and 5 succeeds and the convictions (and sentences) on the said counts are set aside. The appeal in respect of counts 2, 3 and 4 is dismissed.

Mainga JA dissenting holding that the sexual intercourse in count 1 was not consensual and appellant had sexual intercourse with the complainant in count 5 as the alleged offence in December 1998 is corroborated by a separate incident in April 1999, when the complainant in that count returned to the same farm with GK and her parents. That evening, that complainant shared a room with appellant, BE and GK. Appellant called her to his bed in the presence of the other two complainants, while her parents were in the adjacent room. Probably because of her experience with the appellant in December 1998, she refused and left that room and went to the room where her parents were accommodated.

As regards the disclosure in that the trial judge on various occasions posed questions to appellant's counsel, requiring counsel to disclose appellant's instructions regarding the photographs, which counsel disclosed contrary to what the appellant testified about the photographs, which communication discrepancy between client and legal adviser, the trial court among other things, relied on to discredit appellant's evidence, the court held that, it was indeed an irregularity, but it was not the sole fact the trial court disbelieved the appellant. It was one of the many lies appellant told the trial court and therefore a failure of justice did not result from the irregularity. Appeal dismissed.

APPEAL JUDGMENT

MAINGA JA (HOFF JA and FRANK AJA concurring):

[1] This is the second time this appeal is heard in this court. The first time this appeal was heard by a full bench of this court on 26 October 2010 (Maritz JA presiding). Maritz JA designated the writing of the judgment to Mtambanengwe AJA. Brother Mtambanengwe AJA prepared a draft for the court in the third week of January 2011, which draft was circulated to the other members of the court. The outcome of the draft judgment did not reflect what was agreed on after the appeal was argued. The presiding judge indicated that he would prepare another draft or make his comments on the existing draft, which he would make available to the other members of the court. Regrettably that draft, or comments never came. Late last year (2016) I and Mtambanengwe AJA who sat on this matter and the other judges of the Supreme Court were informed that for medical reasons, Maritz JA has become unavailable to make his comments on the existing draft judgment or perform any related work. Given the deliberations the court had after the hearing of the matter and the discussion I had with Mtambanengwe AJA, I took it upon myself to recast the draft judgment Mtambanengwe AJA had produced along the lines of the court's deliberations in chambers, provided Mtambanengwe AJA signified his agreement to the new draft and the judgment. In that event the two of us would have constituted the majority judgment of the appeal. The morning of 10 May 2017 the draft judgment I had prepared was ready to be delivered to brother Mtambanengwe, who was admitted in hospital at the time, for his consideration. Sadly that morning I was informed that the brother had passed on. I being the only judge available lacked

the necessary majority required in terms of s 13(4) of the Supreme Court Act 15 of 1990 (See also *Wirtz v Orford* 2005 NR 175 (SC)). Consequently the matter had to be re-heard.

[2] This is an appeal with leave of the High Court, against conviction on five counts of rape. The appellant had pleaded not guilty to all five counts of rape. His plea explanation was that he had sexual intercourse with the complainants in counts 1 to 4 with their consent and denied to having had sexual intercourse with the complainant in count 5. After evidence was led appellant was convicted on 22 November 2000 by Teek, JP on all five counts. He was sentenced on 23 November 2000 to five year's imprisonment on each of the first four counts and seven years on the fifth count.

[3] The indictment shows that all five offences were committed on the farm Dobbelsberg, where the appellant resided. It was common cause that the complainants were young girls, but their ages were not properly proven. The evidence placed on record about their ages is hearsay. On the allegations of the State, count 1 is repeated rape of BE, a 14 year old girl, between February and July 1999, count 2 was rape of GK, a 13 year old, on 2 April 1999, count 3 is rape of LA, a 14 year old, on an unknown date during April 1999, count 4 is rape on more than one occasion of LH, a 14 year old girl, between 29 April and May 1999. In count 5, it was alleged that appellant raped EH, an 11 year old girl, on an unknown date in December 1998.

[4] It is common cause that none of the complainants reported the rape immediately at the time they took place. Constable Brunzel testified that a complaint was laid by LH's parents during June 1999. During the police investigation it was discovered that the appellant had also had sexual intercourse with other young girls, who turned out to be the other complainants in this case, who subsequently made statements accusing the appellant for having raped them.

[5] The evidence in the case is fully set out in the judgment of the trial judge and the court below that granted leave to appeal. For the purposes of this judgment I will only summarise the salient features of the evidence.

[6] BE, the complainant, in count 1 testified that she was 15 years old, but she did not know her date of birth. Appellant is her uncle. Appellant and BE's grandmother (appellant's mother as well) agreed that BE would go stay on the farm, with him. For approximately a week on the farm they lived in peace. Thereafter, he started assaulting her and telling her to lie down, and he would have sexual intercourse with her. This occurred many times for the period she was on the farm. She testified that she stayed there for about six weeks, but it appears from the rest of the evidence given by other witnesses, including the investigating officer, Constable Brunzel, that this must have been six months, as alleged in the indictment. She testified that she did not consent and when she refused, she was assaulted. It is not clear how she was assaulted, but in cross-examination it emerged that he kicked her off a chair.

[7] Constable Brunzel testified that she visited farm Dobbelsberg with LH and her mother during the investigation of the complaint made by them. LH pointed out the appellant. Constable Brunzel found appellant staying with BE at the farm. Brunzel already knew that BE was a witness to the rape on LH. LH also allegedly informed Brunzel that the appellant did the same thing to BE. In this regard Brunzel testified:

‘I asked [BE]¹ about the allegations whereby she informed me that she was sleeping with him since January month that year and the suspect in regard also slept with her since January month. Okay I interrogated her about that incident whereby she was first ashamed to inform me that but later on when I call her aside she informed me that it is true that he slept with her and that he also did it the previous night.’

[8] GK testified that she was born on 11 October 1986 and was 14 years at the trial and in Grade 8. On 2 April 1999 she went to farm Dobbelsberg with EH and EH’s parents. EH’s parents were offered an adjacent room to the room where she, EH, Martha who appears to be BE and appellant slept. Appellant called EH to go into his bed, but she refused. When appellant approached EH, she stood up and ran out of the room to her parent’s room. Thereafter the appellant called GK and told her to lie down, but she refused. GK asked appellant as to why he doesn’t sleep with his sister, who should be BE. He called BE and made her sleep in his bed. Thereafter, BE got out of the bed and appellant made GK sleep in his bed and asked her to remove her panty. He had sexual intercourse with her. GK got out of appellant’s bed and went to sleep in the other bed. Appellant asked her to return to his bed later, but she refused. In the early hours of the morning, appellant

¹ Identity withheld.

approached again, wanting to have intercourse with her but she refused. In the process of that conversation, EH's father woke up and woke them up and they left the farm.

[9] In respect of count 3, LA testified that she went to the farm one weekend in April 1999. She was staying in the hostel and BE asked her to come and visit. That night the appellant said the two beds in his room should be put together. When she asked why, BE allegedly said that they would be beaten if they do not do what he says. She testified that appellant subsequently took out a kierie and said she should go and sleep on his bed, which she then did. Thereafter he undressed and raped her. She went back to the hostel the next day, but did not report the incident to anyone. Appellant allegedly said that he would beat her if she informed anyone. When asked how the police came to know about the rape. She said:

‘When [LH]² went to report, women or the officers working with the Women and Child Abuse Centre said obviously all the girls who visited that farm must have been raped. So all the girls who visited that farm were then called.’

[10] LH, the complainant in count 4 testified that she was 15 years, born on 12 February 1985 and in Grade 7. She visited farm Dobbelsberg between 29 April and 21 May 1999. Appellant came to collect her from her parent's home at her request. The first night he picked her up from her bed while she was sleeping, forcefully took off her panty and had intercourse with her. She stayed there for three weeks and the appellant had intercourse with her about twice every day during the said period. They returned to Karibib before school started. While they were still on the farm,

² Identity withheld.

appellant gave her some oranges and later bought her two pairs of shoes, earrings, deodorant and underwear. She denied consenting to the intercourse and said he used force and also beat her.

[11] She reported the rapes to her uncle, who told her aunt. The matter was then reported to the police. It is not clear when she reported the matter to her uncle. The uncle did not testify, but her aunt, Martha Gases, did. The report made to her was not one of rape, but that the appellant ill-treated her by having sexual intercourse with her. A family meeting was held during which the complainant told them that appellant had sexual intercourse with her at all times of the day without using a condom. LH's mother was also called as a witness. She denied having reached an agreement with the appellant to have given LH in a sexual relationship. She testified that she let her daughter go to the farm in order to be with BE. She added that, she released her daughter into his care, because he said that he had a wife and that LH would return home with no complaints. Under cross-examination she said the following:

'When your daughter returned did she report anything to you? --- When she returned she didn't tell me anything. And when I also questioned her she also didn't tell me anything.

How did you learn about the problem that was there? --- Well My Lord in actual fact the girl was getting fat or she was getting bigger. And I know her. So on that basis I was trying to find out from her but she kept everything away from me. And as I know her My Lord I tried, she didn't tell me anything. She even hides it from my in-law and she went and tell my brother about it.'

But [MH],³ isn't it because you had these discussions with the accused that [LH]⁴ was afraid to tell you but rather she is telling your brother? --- No My Lord, Perere (accused) had intercourse with the girl, my daughter but she never wanted to talk this to me. And only later when my brother confronted her is that she told him that Perere had intercourse with her.'

[12] As for count 5, EH testified that she visited farm Dobbelsberg for about five days over Christmas in December 1998. She testified that she was 12 years old and born on 26 September 1988. Which means that she would have been 10 years old at the time of the alleged offence and not 11 as alleged in the indictment. Her age or birth date was not properly proven, a point taken by the appellant in general in respect of all the complainants. EH shared a room with the accused and her 17 year old brother. She slept on the floor. During the first night, the appellant called her to go to him but she refused. He then pulled her up onto the bed, took off her panty and started 'making her'. During the remainder of the period at the farm, the appellant continued to have sexual intercourse with her. She screamed the first time, but her brother did not hear. She did not report the incidents to anyone because appellant threatened to beat her if she did.

[13] The next time she visited the farm she was with her mother. This was for one day in April 1999. That night there were three girls in the room. Appellant called her again, but she got up, opened the door and went to her mother. Early the next morning they returned to Karibib. She said she informed her mother, but she did not say anything.

³ Identity withheld.

⁴ Identity withheld.

[14] According to Constable Brunzel, EH told her about the rape when she investigated the matter after LH's relatives reported the case. She informed the complainant's mother, who did not want to lay a charge. From the record it is clear that count 5 was added to the indictment at the trial when EH mentioned the rape that occurred in December 1998, during the consultations with the State advocate. Up to that stage she had been considered as a State witness in the events relating to count 2.

[15] The trial judge ordered that EH be medically examined, which was done on 21 November 2000. The medical report showed that the hymen had been broken and that she had lost her virginity, but there is no evidence when this occurred.

[16] The appellant was employed at farm Dobbelsberg. On 13 February 1999 he went to farm Poort where his mother resided. He asked his mother, who is also the grandmother of BE to take BE with him to farm Dobbelsberg. BE, is his sister's daughter, ie, his own niece. According to appellant he felt sorry for BE as she had been in various prostitution relationships around farm Poort, including sleeping with her stepfather. He then took BE to farm Dobbelsberg. At the farm or in his room he offered BE a bed, but she declined to sleep in that bed as she was not used to sleeping alone. She slept in appellant's bed. She started relating to appellant how she slept around with men at farm Poort. In the process of that conversation they ended up having sexual intercourse. BE would leave farm Dobbelsberg to go to Karibib, but she would return to farm Dobbelsberg. She remained on the farm until 7 July 1999. He testified that he did not know her age.

[17] Regarding GK, he testified that she arrived at farm Dobbelsberg on 2 April 1999 with her uncle, wife and two other children, one appears to be EH, the complainant in count 5. He offered GK's uncle and wife a room. GK, EH and BE who resided with the appellant, slept in BE's bed. As they were chatting, EH left the room and went to her parent's room. BE and GK who remained with the appellant undressed and they were showing their private parts. GK jumped in the appellant's bed, under the blankets, naked. They had sexual intercourse. When he made love to the one, the other would ask him to suck her breasts. In the room, GK and BE had what appellant called a 'sex book' with pictures of naked women. GK and BE imagined themselves to be those naked women. He kept three of the photos, which fell from that book and wanted to hand them up in court. They were on the farm the Friday, Saturday and Sunday, but before sunset on Sunday, he took them (GK and BE) to Karibib. The Public Prosecutor indicated that he had not seen the photos. The court asked counsel for the appellant whether he saw the photos. His reply was that he just looked at the photos, but it was not his intention to hand them up, especially that he did not confront GK and BE about the photos. The court repeated the question whether the pictures were not shown to counsel for the appellant. Counsel said they were not. The court asked counsel whether the pictures came as a surprise to him to which counsel answered in the affirmative and said he did not see them.

[18] I mention the exchange between the court and counsel for the appellant about the photos for the reason that, the court below granting leave to appeal, amongst other things relied on that conversation between the court and counsel to

grant leave to appeal. The court below regarded that conversation as an irregularity both on the side of the court and counsel.

[19] Appellant denied knowing the age of GK. He however knew her from farm Poort. He further said GK and BE undressed (naked) and they looked at naked women's pictures to draw his attention.

[20] Regarding LA, appellant testified that on 19 March 1999, he and BE went to Karibib to do shopping. While in the hostel, LA saw appellant and BE and she enquired from appellant as to where the two were going. Appellant replied to say they were going back to the farm. LA indicated that she wanted to go with them. She went and collected her clothes and left with appellant and BE. At the farm after dinner they retired to bed. The two, LA and BE stripped naked and suggested that the three should sleep together in one bed. Appellant said they could not sleep together in one bed, but both said they would just lay in one bed together while they were still chatting. They ended up in one bed and they ended up having sexual intercourse. After the intercourse, the two went in BE's bed and slept. At this point, appellant added, 'so they also didn't want to understand. LA didn't want to understand as to why after having sex with the other one or intercourse with the other one I didn't do it with her. So eventually then I also end up having intercourse with her. I was well to an extent tired but then as she wanted to, I end up having intercourse with her as well.' The Saturday he showed LA around the farm. On Sunday they went to Karibib to attend Independence celebrations. In Karibib they went to LA's sister's house. Appellant saw LA's father at a bottle store and he asked LA that they should go to him, but LA refused and said he is drunk, he will say a lot

of things. They then proceeded to the soccer field where the Independence celebrations were taking place. He denied knowing the age of LA.

[21] In regard to LH, appellant's version was that, on 17 January 1999, LH was sent by her mother to go and call appellant. When he arrived at LH's mother's place, LH's mother enquired from appellant as to where he was working, to which appellant said he was working at farm Dobbelsberg. She asked him again whether he had a wife, to which he replied in the negative. She then said to appellant that she was unemployed, nor did she have a husband and she has three children. She further said she has difficulties to rear the children. She then offered LH to the appellant so that he could assist her in feeding and clothe the children. Appellant enquired as to the age of LH, to which she said she was 18 years old. Appellant enquired again whether LH had a man or a relationship, to which she said LH was involved in a relationship, but she was not seeing somebody who was maintaining her. Appellant said he would see what he would do in that regard. LH's mother said he should not be afraid, LH was her daughter, he can come and take her during school holidays. After that conversation, he returned to the farm. He came on 6 May 1999 to fetch LH. When he arrived at LH's mother's place, he told her that he was going back to the farm. LH's mother told her daughter to collect her things and go with appellant to the farm, which LH did. They then left for the farm. On their way to the farm appellant enquired from LH whether her mother told her why she was going to the farm. She replied to say she was going to stay with the appellant, because he doesn't have a wife. At the time they were going to retire to bed, the other girl, I assume was BE, undressed and got into appellant's bed. LH also undressed and got into appellant's bed. Appellant also undressed and got into bed and they chatted

about how LH was sleeping around in Karibib and thereafter they had intercourse. LH remained on the farm until 21 May 1999. Appellant conceded that LH was short and thus could not estimate her age, but accepted her mother's word that she was 18 years old.

[22] Appellant's evidence about the allegations of rape on EH, partly corroborated EH's evidence, to the extent that she and her brother visited the farm during December 1998. He also testified that EH remained on the farm during Christmas and returned to Karibib at the New Year, but denied having had intercourse with her. He also corroborated EH's evidence about the second visit, during April 1999. He testified that on 2 April 1999, EH, her parents a younger sister and GK arrived on the farm. At some point in the evening the appellant, EH, BE and GK entered appellant's bedroom and were chatting. As they were chatting, EH stood up and went to the room where her parents were accommodated. The next morning all of them were together but none had ill-feelings. He was asked why his accusers testified that he assaulted or threatened them. He denied assaulting EH, or any of the other complainants. In reply to his counsel he stated:

'BE, GK and LA were friends They were sleeping around already with men in Karibib and so on. So to them it was an agreement they had amongst the three of them that they will come, have intercourse with them and then I will pay the money for that. Yes and in that respect my Lord they came as prostitutes or practice prostitution on me. And since I do not smoke, I do not drink they consider and they were also talking that I am keeping a lot of money. So my Lord in that regard I did not have that intention with them. They were the ones who, they were the cause for me to have sexual intercourse with them.'

[23] Appellant was asked about the photos which he wanted to produce in court. He said they were in the possession of BE. When he confronted BE about the photos, the book where the photos were disappeared and he never saw it again. The ones he had fell out of the book and he got hold of them before the matter was reported and they were among his documents all the time, even after he was arrested. He finally said he never threatened or forced anyone to have sexual intercourse with him. BE, GK and LA exposed themselves to appellant 'and then sort of inviting me to have intercourse with them . . . They sort of break me down and cause me to do it or weaken me to have intercourse with them.'

[24] Accused admitted to having had sexual intercourse with the complainants in counts 1 to 4 allegedly with their consents. The question which arises is whether the complainants in counts 1 to 4 granted their consent to sexual intercourse with the appellant. In count 5, appellant denied having had sexual intercourse with the complainant. The question which arises in that count is whether appellant raped or had sexual intercourse with the complainant.

[25] The court below granting leave to appeal relied on the fact that BE failed to report the rape for over a period of 6 months or the failure to report the rapes was not satisfactorily explained. In the case of GK, that court granted leave for the reason that appellant took issue with the fact that GK was a single witness on the issue of consent and gave no details of how she was forced to have sex and she made no report, although she had the opportunity to report the alleged rape. In the case of LA the court was not impressed with appellant's version that it was LA who initiated the sexual intercourse, but that there may be merit in appellant's contention that she

was not corroborated as a single witness and that she made no report of the rape when she was far away from appellant safely in the hostel. Regarding LH, the court granting leave did so for the reason that LH did not voluntarily make the report of rape. In count 5, the court below granting leave to appeal accepted appellant's contention that the trial court did not approach the evidence of EH with caution, she being a single witness and that the adverse findings regarding the appellant's credibility by the trial court is tainted by an irregularity, which occurred during the trial when the trial judge on various occasions enquired from appellant's counsel to disclose what the appellant's instructions were regarding the photographs, which instructions counsel disclosed violating attorney-client privilege, which disclosure was used by the trial court to reject appellant's evidence wholly.

[26] It is so that, viewed in isolation, the failure of the complainants to have reported the rapes for a considerable period of time, when they had had the opportunities to do so, no grounds would exist for the rejection of the appellant's evidence. That approach created doubt in the mind of the learned judge granting leave and that was the point heavily relied on by counsel for the appellant in this appeal. The approach was not to take that fact in isolation, but rather to examine the fact in the context of the whole case in order to determine whether it could stand. (*S v M* 2003 (1) SA 341 SCA at 365A). Viewed in that light, appellant's version rings hollow and leave to appeal should have failed. The ages of the complainants were not proven but both the State and counsel for the appellant agreed that the complainants were young children. In fact as regards counts 1 to 4, except for LH, whose age appellant says he was told by LH's mother, which was denied, appellant in cross-examination testified that he enquired about the ages of the other three

complainants (BE, GK and LA). That is indicative that by their appearances he must have thought that they were young. BE is the child of his own sister, even if he did not know her exact age, he should have known that she was a young girl at the time. In fact appellant's version about BE exposes him as a deliberate liar. He testified that he went to farm Poort and requested for BE from her grandmother (appellant's mother too) to come and live with him. He further said that he felt sorry for her and wanted to remove her from the life of prostitution she was embroiled in. He testified further that the day they arrived on the farm, after dinner, they retired to bed. He offered her a bed, but she declined to sleep in that bed as she was not used to sleeping alone. She jumped in appellant's bed and as a result they ended up having intercourse. Appellant is silent on whether he proposed and she agreed to intercourse or a long standing relationship of sexual intercourse. Even if I were to accept that she indeed refused to sleep alone, jumped in the appellant's bed, the probability is that even though she did not protest, she did not have an understanding of what was happening. Take for example the version of LH. She did not report that she was raped, but reported that appellant ill-treated her by having sexual intercourse with her. It is clear that she did not have an understanding of what happened to her. She regarded the sexual intercourse as ill-treatment. Appellant testified that he was offered LH, by LH's mother, in return for assistance. This evidence was disputed by LH's mother, in fact she is the parent who laid charges against the appellant. Her version, *inter alia*, was that she indeed asked appellant whether he had a wife on the farm, to which appellant replied in the affirmative and he further added that LH would be returned without any complaints. LH's mother testified that she released LH to go with the appellant for LH to be with BE. Consistent with his version he gave LH oranges, two pairs of shoes, earrings

deodorant and underwear. The gifts were possibly efforts to silence her as appellant had promised to return her without any complaints. Back home she refused to tell her mother about the sexual intercourse, but she eventually informed her uncle. When the uncle confronted her, she related that the very first night when they arrived on the farm he picked her up from her bed, while she was asleep, into his bed, forcefully took off her panty and had intercourse with her. The three weeks that she was on the farm he had intercourse with her twice a day. This evidence is consistent with the observation I made earlier on that nowhere in the testimony of appellant is he saying he proposed any of the complainants for sexual intercourse. Consent is assumed in that either the complainants did not protest to the sexual intercourse or they did not report the same. In my opinion, appellant took advantage of the complainants' ages. He would have sexual intercourse with one or more than one complainant in the presence of the other. EH testified that he called her to go and sleep with him, while BE and GK were in the same room and awake. That's when she stood up and went to her parent's room. Appellant does not offer any explanation why she exited the room, which is inconsistent with EH's conduct. Appellant himself testified that when EH left the room, BE and GK remained. They undressed (naked) and showed their private parts. GK jumped in his bed naked and they ended up having sexual intercourse. He further added that when he made love to the one, the other one would ask him to suck her breasts. BE and LA had the same version, appellant slept with them in each others presence. He added that LA did not want to understand why he did not want to sleep with her after he had sexual intercourse with BE.

[27] Appellant testified that BE, GK and LA were friends and were sleeping around with men already in Karibib and they agreed between the three of them to go to the farm and have sexual intercourse with appellant and he would pay for the services, or they exposed themselves to appellant, inviting him to have sexual intercourse with them or sort of broke him down or weaken him and it caused him to have sexual intercourse with them. On appellant's own version, the general allegation cannot be correct. On his own version, he testified that he collected BE from her grandmother and brought her to farm Dobbelsberg. GK arrived on the farm with EH's parents. They slept on the farm the one night and they left the next morning. It was only LA who came to the farm after she met appellant and BE in Karibib. There is no evidence that the three colluded to go to the farm to have sexual intercourse with the appellant, except for the say so of the appellant. Neither is there evidence that the complainants in counts 1 to 4 were prostitutes. Appellant collected BE and LH under false pretenses, but turned them into sex slaves once they were on the farm. It is improbable that children of complainants' ages as the court granting leave correctly found in the case of LH, would have elicited sexual intercourse from their uncle in return for payment, which fact was never put to the four complainants. The complainants' ages at the time the offences were committed militates strongly against the likelihood of them accepting of the love proposals, let alone to seduce or initiate sexual intercourse with the person they regarded as an uncle or their care taker.

[28] EH's circumstances are different from the other four complainants. Her case against the appellant is that he raped her on the farm during December 1998. Appellant confirms her presence on the farm with her brother during that period, but

denies the charges. She also did not report that incident until much later after the first four charges were registered. In fact count 5 was not part of the initial four indictments against the appellant. It was added on at the trial. It is appellant's word against that of EH. EH's brother who was with her during December 1998 was not called as a witness. In my view, from the facts, either EH spoke the truth or she deliberately and falsely implicated the appellant in the offence. The trial court had the benefit of observing the witnesses and concluded as follows:

'The complainants gave their evidence in an honest and frank manner and so did the other State witnesses. I could see no reason and none was pointed out to me why I should doubt the veracity of their versions or testimony. Because of the threats of violence made to them by the accused if they dared to report the incidents and most probably the shame and stigma that goes with what the accused did to them, the crimes were unveiled only when [LK]⁵ reported what the accused did to her. The conduct of the complainants is reasonable, understandable and acceptable having regard to their tender ages and unsophisticatedness. The complainants' versions have a ring of truth about them and are in all material sense similar in nature in that the accused followed more or less the same *modus operandi*.

I therefore accept the version of all the complainants as the truth in particular that they did not consent to having sexual intercourse with the accused. I reject the accused's defence.'

[29] It is not apparent from her testimony that EH was vindictive, indeed she is corroborated in a separate incident that occurred in April 1999, when she visited the farm with her parents. While she, BE, GK and appellant were in the room chatting, appellant called her to his bed but most probably because of her experience with

⁵ Identity withheld.

appellant in December 1998, she stood up and went to the room where her parents were accommodated. This evidence as I have already stated is corroborated by GK, and partly by the appellant. If appellant could invite her in his bed in the presence of the two other complainants and while her parents were in the adjacent room, there is no reason why he could not have done the same while she was with her brother during December 1998. When she had left the room, appellant made his advances to GK and succeeded in having sexual intercourse with her.

[30] The question which arises is whether the complainants' evidence is trustworthy. *Diemont JA* considered factors which may influence the court's assessment of the trustworthiness of young witness's evidence in *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A) at 1028B-E as follows:

'Trustworthiness, as is pointed out by Wigmore in his *Code of Evidence* para 568 at 128, depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears "intelligent enough to observe". Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion "to remember what occurs" while the capacity of narration or communication raises the question whether the child has "the capacity to understand the questions put, and to frame and express intelligent answers" (Wigmore on *Evidence* vol II para 506 at 596). There are other factors as well which the Court will take into account in assessing the child's trustworthiness in the witness-box. Does he appear to be honest – is there a consciousness of the duty to speak the truth? Then also

"the nature of the evidence given by the child may be of a simple kind and may relate to a subject-matter clearly within the field of its understanding and interest

and the circumstances may be such as practically to exclude the risks arising from suggestibility.”

(*per Schreiner JA in R v Manda*) [1951(3) SA 158(A) at 163 A-C.] See also *Minister of Basic Education Sport and Culture v Vivier No 2012(2) NR 613 (SC)* at 623F-624A-B.

[31] I must confess that the young witnesses testified on a subject too complicated for a child to understand. They had difficulties to describe insufficient details what the appellant had done to them and refer to private parts by name, but made demonstrations to illustrate or clarify what they referred to as ‘tsu-tsu’ and/or ‘pie pie’. Our law of evidence and decided cases requires that the courts should approach evidence in sexual offences involving minors and single witnesses with caution. In counts 1 - 4 the appellant admitted that he had sexual intercourse with the complainants but with their consent. The complainants in those counts were only required to confirm or deny consenting to sexual intercourse. All four denied and told one version. The appellant’s *modus operandi* as the trial court correctly pointed out, was the same. He would invite each of the complainants to his bed and resistance to his invitation would be met with assaults or threats of assault and post the event they would be threatened with assaults if they ever reported the sexual intercourse. LA, for example testified that the day she arrived on the farm, after they had had their dinner, she was ordered to put the beds where she and BE were going to sleep and that of the appellant together and that she must sleep in the middle. When she enquired why, BE warned her that if she does not comply with the order, she would be beaten up. She started crying but appellant took a kierie and ordered her to step into his bed and remove her panty. LH was picked up from the bed where she was sleeping to appellant’s bed, forcefully removed her panty and had

intercourse with her. EH was called and invited to appellant's bed, when she refused he pulled her to his bed. In April 1999, when EH returned to the same farm with her parents, and GK, that evening GK testified that appellant called and invited EH to his bed. When she refused appellant got up and assaulted her. EH did not testify that she was assaulted, but GK and the appellant testified that she stood up and went to the room where her parents were accommodated. Notwithstanding that EH was in the presence of her parents it did not deter the appellant to invite her for sexual episodes. EH did not report that evening's experience to her parents. GK who was also new to the environment succumbed to appellant's sexual advances. The next morning she returned with EH and EH's parents, without reporting what the appellant did to her. Appellant's version is not possibly true - the trial court was correct to find that he was a very poor witness, indeed he was and I would find no reason to depart from that finding of fact.

[32] The question arises why the complainants did not report their experiences with the appellant. The plausible answer is either they consented to the sexual intercourses or they believed in the threats of assaults by the appellant or as the trial court found, the shame, stigma that goes with the allegations of rape or as in the case of LH who was afraid to inform her mother for the reason that she might assault her. Fear of the assault by the appellant sounds attractive to me and that was the complainants' evidence and was the trial court's finding. The conduct of the complainants during and after the sexual intercourse episodes is not without criticism, particularly that of BE who lived with the appellant much longer than any of the other complainants and had every opportunity to have reported the alleged rape on her and EH whose allegations of rape during December 1998 only surfaced

at the time of the trial. I take note that Constable Brunzel testified that EH reported the rape to her during the investigation of the other four counts but that EH's mother declined to lay charges. In December 1998, EH was with her brother in the same room where she was allegedly raped and many other occasions thereafter until when they left the farm after Christmas. She did not report or wake up her brother who boded in the same room at all times when they were on the farm. She did not report to her parents when the appellant attempted to seduce her during April 1999.

[33] In the circumstances of this case, I am not persuaded and do not agree with the majority judgment on counts 1 and 5 that the failure by BE to report the appellant when she had the opportunity to do so she granted consent to sexual intercourse or that EH's case is weakened, because she failed to report the rape on time and so is the rest of the evidence. The record reveals that the minor complainants and the other witnesses testified as the trial court found, honestly and frankly, their evidence reads well, BE a grade 2 drop-out perhaps less articulate than others. Without EH's experience with the appellant in December 1998, a child of her age, was expected to go to the appellant when he invited or called her, but she instead walked out of the room. That conduct is, in my view, consistent with her version that appellant raped her during December 1998. I see no reason to find fault with their evidence.

[34] What remains is the irregularity as found by the court granting leave. No doubt it was an irregularity and it raises the question whether a failure of justice resulted from the irregularity. In terms of s 309 (3) of the Criminal Procedure Act 51 of 1977:

‘. . . [N]o conviction or sentence shall be reversed or altered by reason of any irregularity . . . in the record or proceedings, unless it appears . . . that a failure of justice has in fact resulted from such irregularity.’

[35] The irregularity was not raised in this court by both counsel, neither was it raised by the appellant in his application for leave to appeal, but the court *a quo* hearing the application, found that the trial judge’s findings on the credibility of the appellant are crucial in relation to the assessment of the adequacy of the evidence on count 5.

[36] The irregularity relates to the appellant’s evidence in chief of the photographs which GK and BE allegedly had depicting persons engaging in sex. This allegation was not put to GK and BE during cross-examination by appellant’s counsel. The trial judge on various occasions posed questions to appellant’s counsel, requiring counsel to disclose appellant’s instructions in that regard. Appellant testified that he informed his counsel about the photographs. Defence counsel made a disclosure that appellant did not inform him about the photographs. The trial court amongst other things used that disclosure in making adverse findings on appellant’s credibility as a witness, playing a role in rejecting appellant’s evidence as a whole. Counsel for the State in the application for leave to appeal in the court below made reference to *S v Moseli* (2) 1969(1) SA 650 (O) and submitted that the trial judge committed an irregularity by requiring defence counsel to disclose instructions to the prejudice of the appellant. The question is what effect did the irregularity have on the rest of the proceedings.

[37] It is manifestly desirable that the least possible inroad be made upon the principle that communications between client and legal adviser are confidential (*S v Alexander and others* (1) 1965 (2) SA 796 AD at 808C). The basic concept is that the accused must be fairly tried. Before an irregularity . . . can be said to have occurred, that which is complained of must be associated with the trial in a degree imperiling that basic concept (at 809D).

[38] The irregularity no doubt was associated with the trial, but only to the extent that the trial court found that the failure by the appellant to disclose the photos to his legal representative was, amongst other things, consistent with the other false evidence he presented to court. It was not the sole finding the trial court relied on to disbelieve him. In that regard, the irregularity did not result in a failure of justice, appellant was correctly convicted and I find no reason to disturb the conviction.

[39] As a result the appeal should fail.

[40] I propose the order as follows:

1. The appeal is dismissed.

MAINGA JA

FRANK AJA and HOFF JA (dissenting)

[41] I have read the judgment of my brother Mainga JA. I however, with respect, disagree with him in respect of counts 1 and 5. I am of the view, for the reasons

mentioned below, that the appeal should succeed on these two counts because the evidence raise sufficient doubt as to the guilt of the appellant so as to render these convictions unsafe.

[42] BE who is the eldest of the complainants lived on the farm with the appellant for about six months. During this period they had sexual relations on a continuous basis. The farm is not that isolated and within walking distance of a village. Furthermore, BE visited this village and other places such as the town of Karibib during this period. Other people came to visit and she invited LA (the complainant in count 3) in the presence of the appellant to visit them on the farm. She never reported her alleged rape(s) to any of the persons she visited nor did she warn or try to dissuade LA from visiting the farm. In fact when the police arrived on the farm she was still there living with the appellant. BE was present when the rapes in counts 2 to 4 occurred and would be a potential witness in this regard. There was thus a potential motive for her to also implicate the appellant and in so doing exculpate her behaviour and justify her inactivity in not reporting the appellant or protecting the other victims. In light of the foregoing the defence of consent raised in relation to BE cannot, in my view, be categorised as false beyond any reasonable doubt.

[43] EH (the complainant on count 5) was only added to the list of complainants shortly prior to the trial as she during consultations with the prosecutor (as a potential witness) indicated that she was also raped by the appellant. This was about two years after the event. Prior to this she did not inform anyone. She visited the farm on her own version twice. Once with her 17 year old brother and once with her parents. She thus lived with her family but failed to complain or to alert anyone of

them with regard to the alleged rape. In a police statement taken during November 1999, nearly a year after the alleged rape, as part of the investigation into the allegations of rape by the appellant she did not mention the fact that she was raped and hence also a victim of the appellant. As far as the alleged rape is concerned she testifies that she and her brother slept in the same room as the appellant who after calling her to his bed (which she refused to do) pulled her onto the bed, pulled off her panty and had sexual intercourse with her. When pulling her towards him and his bed she screamed and while the appellant was having intercourse with her she was crying. Despite this her brother did not wake up nor did she report the matter to him the following morning. She seemed to have suffered no serious injuries which are unusual taken her alleged age and there is even some suggestions that the appellant had intercourse with her thereafter. Her brother was not called as a witness but it is improbable in my view that had the events taken place as described by her that her brother would not have, at the least, attempted to interfere on her behalf. Once again the appellant's denial that he had sexual intercourse with EH cannot, in my view, be stated to be false beyond any reasonable doubt.

[44] In the result the appeal should be upheld to the extent indicated above and the following order be made:

- (a) The appeal in respect of counts 1 and 5 is successful and the convictions (and sentences) on these counts are set aside.
- (b) The appeal in respect of counts 2, 3 and 4 is dismissed.

- (c) The sentences of 5 years each on counts 2, 3 and 4 (total 15 years) are antedated to 23 November 2000.

FRANK AJA

HOFF JA

APPEARANCES

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