IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: A 51/2016

In the matter between:

ANWAR FISHER Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED ON FRIDAY 9 FEBRUARY 2018

GAMBLE, J:

INTRODUCTION

[1] The appellant was convicted in the Regional Court, Mitchell's Plain 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 ("the CPA"). The appeal before us is against the convictions only.

[2] The background circumstances tell a story as old as time itself: the illicit, lustful exploitation by an older man of the blind infatuation of a teenager, much like Lolita in the celebrated novel by Vladimir Nabokov. But this case has a twist unlike so many of the others.

[3] The complainant in all of the charges is a young woman who was 14 years old at the time that the offences were committed. For the sake of anonymity I shall refer to her only as "M". The evidence establishes that the 43 year old appellant, a sometime captain in the S.A.Police's reserve force and a deputy sheriff by occupation, and M's family were social acquaintances: the appellant was a regular visitor to M's home in Rylands, as were certain of his daughters, while M and her mother (to whom I shall refer only as "L") often visited the appellant's home in Mitchell's Plain.

[4] The appellant's daughters attended schools in the Athlone area and he customarily ferried them to and from school every day. In light of the fact that M attended high school with one of his daughters, the appellant regularly picked her up at home in the morning, dropped her off at school with his daughters, and in the afternoon dropped her off at home again. On the face of it, these were two happy families who enjoyed one another's company.

[5] But here is the twist in the tale. Unbeknown to the rest of their respective families, the appellant and L had been involved in an adulterous relationship since approximately 2007. This relationship was conducted clandestinely, intensely and intimately. The evidence presented by the State in this matter demonstrates that around mid-2011, at a time when L was pregnant with her 6th child, the appellant

commenced directing his attention towards M and soon became intimate with her. The appellant denies any sexual contact with M and says that the case against him is the devious work of L, who behaved as a woman scorned when the appellant eventually elected to put a stop to their relationship early in 2012.

THE CHARGES PREFERRED AGAINST THE APPELLANT

[6] Initially the appellant faced nine charges –

- three charges of exposing a child to pornographic images in contravention of s19(a) of SORMA in that on 26 and 27 January 2012 he sent to M, via the cellphone service known as "WhatsApp", 3 images of his penis;

- two charges of sexual assault in contravention of s 5(1) of SORMA arising from separate incidents committed on the same day in July 2011 when he firstly placed M's hand on his erect penis without her consent and, secondly, when he rubbed M's vagina with his hand, also without her consent;

- four charges of statutory rape in contravention of s15(1) of SORMA in that he committed the following acts of sexual penetration of M with her consent at a time when she was aged between 12 and 16 years (to wit, 14 years) –

    - in August 2011 and at Lansdowne, by penetrating her mouth with his penis;

- in August 2011 and also at Lansdowne, by penetrating her vagina with his penis;

- in December 2011 and at Sybrand Park, by penetrating her vagina with his penis; and

- Also in December 2011 and at Sybrand Park, by penetrating her vagina with his penis on another occasion.

[7] The appellant was acquitted on the three pornography charges when the Regional Magistrate found that it was possible that the images may have been intended by the appellant to have been sent to a cellphone in the possession of L (rather than M), as he subsequently claimed. It is accordingly not necessary to deal with those charges in any particular detail in this judgment save to say that there will be referral to the pornography in relation to issues of credibility, probability and the like.

THE CELLPHONE EVIDENCE

[8] At the outset the State adduced the evidence of two police officers in relation to the use of cellphone communication in this matter. Firstly the investigating officer, D/Sgt Chiteshe, testified that after receiving the docket on 2 February 2012 for purposes of investigation, she approached the accused the following day and seized two cell phones in his possession: a Blackberry “Curve” model and the other a “Chat 2” model. On 6 February 2012 D/Sgt Chiteshe seized a further two cellphones, this

time in the possession of M, namely a Blackberry (model not disclosed) and a red Nokia “Xpress Music” model.

[9] The following witness who was called by the State was D/Lt Col. Linen, a forensic investigator specializing in cell phone analysis. He examined the accused’s Blackberry and M’s Nokia looking for any instances of communication between the 2. On the Blackberry the witness found several photographs of the appellant’s penis stored on the phone’s memory but nothing similar on the Nokia.

[10] Mr. Linen explained the various forms of social media platforms in operation at the time. Firstly he mentioned the “BBM” message system which allowed owners of Blackberry phones to communicate directly with each other. Then he referred to “MXit” which was described as a “chat program” which allowed the users of cell phones to send text messages directly to each other while using a secure service which could only be accessed via a PIN number which had to be entered into the phone by the user. The witness also referred to the “WhatsApp” service which allowed 2 (or more) cell phone users to send messages, photographs and video material to one another. He pointed out that if WhatsApp was used to send a photograph that image would automatically be saved to the memory of the receiving instrument and would be required to be manually deleted if no longer wanted by the recipient.

[11] Given that no data had been subpoenaed from the relevant cellphone service providers in terms of s205 of the CPA, the witness was unable to assist the court in establishing whether there had been any direct cell phone communication between the accused’s Blackberry and M’s Nokia. The witness could not say either whether M’s Nokia was used by L at any time and was therefore unable to dispute the

appellant's version that he believed that the pornographic images on his phone had been sent to L and not M. I pause to point out that it was the appellant's case that L too had sent pornographic images of herself to him but that these had been immediately deleted from his Blackberry to avoid detection by his wife.

THE COMPLAINANT'S EVIDENCE

[12] The complainant testified that in 2011 she was a Grade 9 pupil at a high school in Athlone and 14 years old at the time. M told the court that her family and the appellant's family regularly visited one another and that on occasion she would stay over at the appellant's house in Mitchell's Plain where she would normally share a bed with the appellant's daughter, K, who was a school friend of hers.

[13] M described the first incident of sexual contact between the appellant and herself on a morning in July 2011 after she had overnighted at his house. She said that the appellant was in bed watching TV and that some of his daughters were lying on the bed next to him also watching TV. M said that she sat on a stool[1] next to the bed on the appellant's left while his daughters were lying on his right. While she was so seated, said M, the appellant touched her breast and thereafter surreptitiously took her hand and placed it under the blanket on his erect penis. M said that she was surprised by what happened but maintained her silence. When asked why it was that the appellant's daughters could not see what had happened, M said that the appellant had drawn his feet up towards his body and in so doing the blanket had created a natural obstruction which interfered with the girls' line of sight.

[1] Referred to by the witnesses as a *'bankie'*

[14] M testified that later the same day the appellant drove her back to her parents' home. She said that just the two of them were in the car and that along the way the appellant reached over and placed his hand inside her jeans and under her underwear, thereby making direct contact with her vagina which he rubbed for *"a short while"*. This she said was for about 10 minutes and she described her reaction as *"confused and scared*". Nevertheless, M did not tell anyone about the incident.

[15] The next contact allegedly occurred after dark during August 2011 when the appellant again drove M back home from his house. The route which he followed took them through the industrial area of Lansdowne and M said that after he had pulled over in a quiet area the appellant requested her to perform oral sex on him[2]. This evidently lasted approximately 15 minutes before the appellant ejaculated on his lap. Thereafter, said M, the appellant asked her to remove her jeans and underwear and sit on his lap facing the steering wheel of the car. She complied with his request whereupon the appellant penetrated her vagina with his penis. This evidently went on for a further 20 minutes and M described it as painful but she did not suggest that the intercourse did not take place without her consent.

[16] M told the Regional Magistrate that the appellant told her that she should not tell anybody about what had happened and she said that when she arrived home she behaved quite normally. M did not disclose anything about that incident to her parents (who were home) but rather just had a shower and went to bed.

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[2] The complainant used the vernacular term *"blow job"* (and later she spoke of a *"BJ"*) to describe the act of fellatio.

[17] M testified that later that month a second incident occurred when the appellant picked her up after school one afternoon and drove her to a quiet spot in the residential suburb of Sybrand Park (near Athlone) where he stopped at an open plot near the suburban railway station. Once again M voluntarily performed oral sex on the appellant who thereafter penetrated her vaginally with his penis. She described how the appellant wiped himself clean after he had ejaculated. Once again, M described how, when she arrived home, she nonchalantly walked into the house, greeted her parents and went to do her homework.

[18] A further incident of consensual intercourse allegedly occurred in December 2011 when the appellant picked up M early from school one day and took her back to the same place in Sybrand Park. Once again an act of oral sex was followed by vaginal penetration, only on that occasion the appellant is alleged to have ejaculated inside M's vagina and thereafter to have cleaned her with what she described as "*a wipe".*

[19] On the way home the appellant stopped off and bought M a cold drink and enquired of her how she felt. M said she replied that she was okay. Upon arriving home, L asked M why she was so late. The latter informed her mother that she had been *"working"* with the appellant. M acknowledged that she knew that the appellant's work involved him driving around and dropping off documents at people's houses. The evidence suggests, too, that the appellant went into M's house on that occasion.

[20] M then described how she and the appellant had cellphone communication with each other during January 2012. She said that she did not have her own phone at the time and that between December 2011 and February 2012 she

used her mother's Blackberry cell phone to communicate with the appellant using the WhatsApp and MXit platforms. M described the subject of their communications as *"sexual stuff"*[3]*.*

[21] M said that in addition to these text messages, the appellant sent her three photographs of his erect penis which she saved to the phone and she went on to describe in detail what was depicted on the photographs. When shown copies of the photographs which Linen had downloaded off the appellant's Blackberry, M confirmed that these were the images that had been sent to her. Linen had earlier handed copies of the photographs to the court. The supporting data handed in confirm that they were created between 26 January and 1 February 2012

[22] M testified that in January 2012 L had gone to Mossel Bay one weekend to visit her own mother. On that occasion, said M, she asked the appellant (who was busy with his rounds as sheriff) via sms to buy her R5 worth of airtime as the shop near her house where she usually bought airtime was closed while the owner was at mosque. M said that the appellant replied that he would do so in exchange for oral sex.[4] M explained that the appellant complied with her request but that she did not offer any *quid pro quo.* For the sake of convenience I shall hereinafter refer to this communication as *"the airtime sms".*

[23] M further testified that when L returned from Mossel Bay her mother went through the Blackberry phone and came across the airtime sms. This led to L discovering about the relationship between the appellant and M who thereupon

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[3] "*He would keep on asking me if I would do it again and then I just said yes."*

[4] *"And then he sent me an sms saying if you give me a blow job I'll buy you another R5 airtime."*

confessed everything to her mother. L assured M that there was nothing to be scared of and subsequently took her to the Mitchell's Plain police station for purposes of making a statement.

[24] Perusing the transcript of the proceedings in the lower court, it is apparent that M (who was by then 17 years old) gave her evidence in a clear and coherent manner and the Regional Magistrate's assessment in her supplementary reasons of 15 January 2016 regarding M's demeanour and credibility is, in my view, entirely justified.[5] Further, M withstood her cross-examination fairly well: the defence was unable to make any significant inroads into her evidence-in-chief other than to expose the sort of limited inconsistencies that one would expect from a young witness in a matter such as this. In addition, it appeared that when she was initially cross-examined M was fasting during the Muslim holy month of Ramadan (June 2014) and that this had affected her ability to concentrate properly. Accordingly, when she complained about this the Regional Magistrate postponed the case until November 2014: the cross-examination was therefore spread over several months.

[25] The thrust of the defence case, as it was put in the cross-examination of M, was to the effect that the appellant had not been intimate with M in any way on any of the occasions described by her. It was further contended that the appellant had never travelled alone with M in his car and that on each occasion that he gave her a lift from school one or more of his daughters was present in the car.

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[5] *"1. The court found her to be an honest and reliable witness who gave a coherent recollection of her sexual encounters with the appellant, had (sic) she wanted to falsely implicate the appellant as a result of her mother's influence suggested (sic) by the defence, she would have easily cried rape instead of consensual sexual encounters with an elderly man."*

[26] It was initially suggested to M during the second phase of cross-examination in November 2104 by his counsel in the court *a quo*[6] that L was the driving force behind the laying of charges against him[7]. However, no real substance was given to this assertion in cross examination. Then just a little while later in cross examination it was put to M that she herself had been instrumental in exposing the relationship with the appellant.[8] Once again no detail was given regarding the facts underpinning this suggestion, but, in any event, the assertion is senseless in the absence of a relationship of sorts between the appellant and M. I shall deal with this point later when I discuss the defence case.

[27] It was further suggested by defence counsel to M that any pornographic photographs which had been sent to her were erroneously transmitted: that they were actually intended for her mother because the appellant had assumed that L was using the Blackberry to which he had sent the photographs at the time. M disputed this, saying that there was no room for mistaken belief on the part of the appellant as to the recipient of the photographs because the two of them were *"chatting"* via cell phone at the time.

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[6] The appellant was represented by different counsel on appeal.

[7] *"Now the accused will say that your mother was the main instigator to lay this charge because she was under the impression that the accused had a relationship with you…"*

[8] *"…(H)e never did anything alleged in this charge sheet, he disputes it. He never had sex with you, you never gave him any blow jobs, maybe something happened that you got scared that your mother is going to find out and then you complained. Because you did say that if your mother didn't find out about the sms or the messages on the phone you would not have complained about anything. What do you say about that?"*

[28] Regarding the airtime sms, the appellant's case ultimately was that he admitted that the text had been sent to M, but that it was intended to be an oblique, teasing reference to a young man called Tashriq, who was apparently known to M. The suggestion was that M had been intimate with that person[9]. M pertinently took issue with this suggestion and said that there was no room for any misunderstanding[10]. Given that the airtime sms plays a key role in this case, I shall revert to it too when I evaluate the appellant's evidence.

[29] M was questioned at length by the Regional Magistrate in an attempt to clarify some of her answers. Firstly, the witness said that when she communicated with the appellant by cellphone she would use MXit on the one handset and WhatsApp on the other. When doing so, said M, she would always tell the appellant that it was she who was calling[11]. She also pointed out that while each of them had their own accounts, L was unable to access her MXit communications (and vice versa) as they were password-protected.

[30] Then M explained to the court the events that led to her mother reporting the matter to the police. She said that they were out driving somewhere, that L found her phone in the car and that she went through it. Later that evening L confronted M at home regarding what she had seen and it was evident from that

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[9] *"You see the message wasn't that the accused asked you for a blow job or that he gave you (sic) a blow job but it was more about the person Tashriq that gave you (sic) a blow job."*

[10] *"No, on the message, he sent me the message (sic) Tashriq's name wasn't mentioned in the message. I asked him to go buy me R5 airtime because it was Friday and all the shops was (sic) closed and he was on the road. Then he sent me a message (sic) I'll buy you another R5 if you give me a blow job."*

[11] *"I would say its [M] chatting".*

interaction that L had seen both the photographs which the appellant had sent her daughter, as well as the airtime sms. M told the court that her mother still had the airtime sms on her phone and that it was available for production to the court. She also said that she had received the photographs via WhatsApp and had deleted them off the WhatsApp platform but not off the phone's photograph library where they were automatically stored.

THE EVIDENCE OF THE COMPLAINANT'S MOTHER

[31] The last witness for the State was the complainant's mother, L. She told the court that she had known the appellant socially for 8 -10 years, having met him through a relative. L said that she had 2 cell phones at the time of this incident – a late model Blackberry and a red Nokia "Music Express"- to which both she and her daughter M had access. Generally, she would leave the Nokia for M's use when she went out with the Blackberry.

[32] L said that she gave birth to her 6th child, a baby boy, on 6th June 2011. She said that when she returned home from hospital after a painful confinement she saw M literally hanging onto the appellant. She let things go because she did not wish to provoke an argument at that stage but later that evening L said that she confronted M and scolded her regarding what she considered to be inappropriate behaviour with the appellant. L said that M was tearful and told her that while her mother was in hospital the appellant had approached her while she was still in bed and, as he lay on top of the child, told her that he wanted to have intercourse with her.

[33] This evidence is inadmissible hearsay and was not dealt with by M in the witness box. In any event, L said that she decided not pursue the matter further with the appellant at that stage, firstly because he had unexpectedly taken himself off to hospital with chest pains (which she assumed may have been indicative of a heart complaint) and secondly, because she did not want to jeopardise the children's' transport arrangements to school.

[34] L went on to describe an incident when she and her family had visited the appellant's home for a braai. When they set off back home, L said, they left M with the appellant as he was going to the shops to buy chocolate and undertook to bring her home later. When the appellant dropped her off, L described M's behaviour as unusual. She said the child was very playful and rather flighty, running around with a handkerchief in hand. M told her mother that she had vomited into the handkerchief. After the appellant had driven off, L said that M unexpectedly enquired of her whether it was true that the appellant had gone for "*male sterilisation*"[12]. This, too, is inadmissible hearsay in light of the fact that M did not confirm it under oath.

[35] L also said that M was very protective of her cellphone that day and deleted all the messages on it: L said that she was concerned because she was unable to view any of the messages which M seemed to want to keep away from her. L described how M went to shower and how she later found the handkerchief neatly

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[12] *"She asked me…. is it true that he can't have kids and all this and I'm wondering why is this child having this conversation with me because it's just like so out of the blue…."*

hanging there to dry. This made her suspicious that something untoward had happened between M and the appellant[13].

[36] With reference to the airtime sms, L said that she was at the beach with a friend when the *"red phone"* fell onto the sand. Her friend handed the phone to her and L said that she then scrolled through it and came across the sms in question. She immediately confronted the appellant about this over the phone but he was somewhat flippant and said it was all just a joke. L became alarmed that the appellant might be pursuing her daughter and said that she decided to urgently seek counsel from her mother in Mossel Bay. It had clearly dawned upon L that she and her daughter were possibly involved with the same man.

[37] As fate would have it, L's husband was unable to take her to the bus station to travel to Mossel Bay and he asked the appellant to help out because the appellant was evidently the friend the family turned to when they needed such a favour. En route to the bus station L said that she confronted the appellant regarding his potential involvement with M, told him she knew of the airtime sms and admonished him to stay away from her daughter. She described the appellant's response as strange.[14] That evidence was not challenged by the cross-examiner.

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[13] "… *And then when I went to shower later in the evening the handkerchief was nicely washed and hung up and all that and I'm thinking to myself… what 13 year-old throws up in a handkerchief and washes it out, she's going to leave it there for me to wash out, why would she be washing it out. So that night I was very suspicious that something happened in the car.."*

[14] *"I'm having a conversation with him and he just looks at me like he's half dead or something and he doesn't say yes, no, maybe, sorry, anything like that and that is it and we drive on."*

[38] L said that she was simply unable to broach her concerns with her mother because she did not know where to start. Upon her return to Cape Town L said she went through M's phone (evidently the red Nokia) and came across other text messages in which M told friends that she had lost her virginity. This distressed L no end and when M came home from school that day L said that she confronted her daughter who readily admitted everything to her. L then reported the matter to the police.

[39] L confirmed to the court that she had seen the three photographs of the appellant's genitals on her daughter's phone. She also testified that there were messages between the appellant and M on that phone (presumably the Nokia) which accordingly dispelled any notion that the pictures had been erroneously sent to the daughter rather than the mother.

[40] After the matter had been reported to the police, but before the arrest of the appellant, L said that she received a telephone call from the appellant during which he initially denied any involvement with M. L said that she persisted with the accusation against him and eventually the appellant acknowledged his culpability but pleaded for understanding for the plight of his family saying that he would never do such a thing again. That evidence was not challenged either by the appellant.

[41] L was obviously conflicted between her affections for her daughter and her lover and candidly admitted to the Regional Magistrate that she had considered not proceeding with the complaint[15]. However, her ambivalence did not find favour

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[15] *" I was like 50/50 whether to withdraw or not…"*

with the investigating officer who refused to consider withdrawal of the charges and threatened her with a charge of perjury. In the result the prosecution went ahead.

[42] The cross-examination of L was fairly peripheral and inconsequential and very little of what she said was placed in issue. During her evidence it transpired that the appellant's wife had learnt about their affair during October 2011 and that she had demanded an apology from the appellant and L. Mutual undertakings of trust were thereafter given that the affair had been terminated. That notwithstanding, the affair continued apace until about a week before the arrest of the appellant.

[43] L's cross-examination was interrupted due to a lack of court time and it continued about a month later. When L returned to testify on 10 December 2014 she informed the Presiding Magistrate that she had brought along with her the phone in question with the airtime sms still intact. While there was much discussion about the sms, no copy thereof was actually handed in as an exhibit. In any event, the defence persisted in cross-examination of L with the suggestion that the airtime sms was intended to be a light-hearted allusion to sexual contact with Tashriq, but L was adamant that *"there's no third party involved with this SMS."*

[44] During the re-examination of L, the contents of the sms were read into the record by the court[16]. Counsel for the defence responded to this by suggesting to L that the appellant's cell phone then must have been used by someone else to send

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[16] *"Your airtime for BJ, I will give you another R5".* The message was preceded by a reference number from the cell phone service provider to enable M to download the airtime which the appellant had purchased for her. The sms was sent at 11h22 on 6 January 2012 – a Friday.

that message. This allegation was inconsistent with the earlier allegation that an sms had indeed been sent relating to a message in which Tashriq was mentioned by name

[45] Finally, L told the court that she had viewed both the Blackberry and red Nokia phones and found nude photographs of the appellant on both handsets. Those that were on the Nokia were password protected because they were filed under the MXit program but the witness said she was able to view them after her daughter had opened the program for her. That evidence was not challenged under cross examination by the defence.

MEDICAL EVIDENCE

[46] At the close of the State case the defence made application for the discharge of the appellant in terms of s174 of the CPA which was correctly refused by the Regional Magistrate. During his address in that application counsel for the defence drew the court's attention to the fact that the State had presented no medical evidence in support of the complainant's allegations. This remark seems to have jolted the prosecutor into action because upon refusal of the application for discharge, he immediately requested the court's leave to hand in the so-called "Form J 88" relating to a medical examination of the complainant. The prosecutor explained that with the protraction of the case he had lost track of things and forgotten to hand up the report, which had been in the possession of the defence all along. With the consent of the defence, the J88 was then placed before the court by agreement.

[47] The medical report revealed an examination conducted at 11h30 on 2 February 2012 at the GF Jooste Hospital in Manenberg by a Dr Narula. She

described M as a 14 year old female of normal build, who was 1,54m tall and weighed 45kg. There were no complaints of any particular concern other than chronic constipation. The examination of M's genitalia revealed a whitish discharge from the vagina and an annular and irregular hymen with a series of clefts therein. The doctor concluded that her findings were *"compatible with (forcible) vaginal penetration with a penis/object"* and that *"definitive hymenal changes"* had been noted. In addition, the doctor speculated that the scarring of M's rectum was *"most likely the result of severe constipation, however the possibility of anal penetration with a penis object"* could not be excluded.

[48] In light of the absence of any allegations by M of anal penetration, this possibility was correctly excluded by the Regional Magistrate. In the circumstances, it is apparent that the allegations by M of consensual vaginal penetration are supported by the medical evidence.

THE DEFENCE CASE

[49] The appellant testified in his own defence and called as witnesses his daughter (to whom I shall refer as "K") and another young woman (whom I shall call "T"), who appears to have been in foster care at the appellant's home in 2011/12 when she would have been around 18 years of age.

[50] As already indicated the appellant's version of events was a bare denial of any intimacy with M but he acknowledged a long-standing adulterous relationship with L. The appellant was at pains to attempt to demonstrate that there had been no opportunity for him to have travelled alone with M at any stage, saying that one or

more of his children was always around when M was in his car. To this end he adduced the evidence of K and T in an attempt to provide corroboration for his version.

[51] Much of the argument on the appeal before us turned on the import of the airtime sms. While the appellant originally sought to make light of it, his attempt to ultimately persuade the court *a quo* that it was about the goings-on of Tashriq are difficult to accept. It is important to bear in mind that this allegation was the appellant's fall-back position when the message was eventually produced, his original version having been a denial of the communication and a later version having sought to attribute it to an anonymous unauthorized user of his phone. This important piece of evidence accordingly elicited various explanations from the appellant demonstrating his mendacity.

[52] Furthermore, under cross examination by the prosecutor the appellant was shown to have been an inherently dishonest person: not only did he admittedly conceal his long-standing affair with L from his wife, when his adultery was eventually exposed he promised to terminate it forthwith. Yet, this undertaking was breached almost immediately as he and L continued to see one another for several more months until L, somewhat reluctantly it must be said, terminated the affair upon discovering the allegations regarding her lover's involvement with M.

[53] When pressed under cross-examination to offer an explanation as to why he considered that M should be disbelieved in relation to her allegations against him the appellant suggested that her evidence was the product of a devious plot by L to get back at him for terminating their relationship. That explanation poses a number

of incongruities. Why, if the tryst had been successfully resumed after mutual assurances had been furnished to the appellant's wife regarding its termination in October 2011, did the appellant suddenly decide to call it off at the end of January 2012? There was no obvious need to do so. And, why if L wished to falsely implicate the appellant, did she go to such extraordinary ends to do so? Surely, an allegation of a single incident of non-consensual, vaginal penetration would have been much more effective?

[54] In argument before us, counsel for the appellant, Mr. Liddell, submitted that this approach was impermissible. Relying on *Maseti* [17], a rape case in which the parties' families were also known to each other and in which the prosecutor extensively questioned the accused about the basis for a fabricated claim by the complainant, Mr. Liddell submitted that the following *dictum* was applicable to the present matter:

> *"The question requires the witness to express an opinion about the subjective state of mind of another person. It follows that questions directed at eliciting this type of evidence are impermissible and should be disallowed."*

[55] That *dictum* is in my view not applicable in the instant case. Here the appellant had been asked in his evidence-in-chief to express a view as to why L and

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[17] Maseti v S [2013] ZASCA 160 (25 November 2013) at [22]

M had made the damaging claims against him[18] and had initially offered a garbled explanation to the effect that L had probably wanted to save face amongst their friends and family when their liaison was ultimately exposed in January 2012. That assertion rendered cross-examination on the point permissible as the following *dictum* in *Maseti* demonstrates.

> *"[23] This was not a case where the accused had, in evidence in chief, expressed a belief that the case against him had been fabricated for a particular reason, the validity of which might have been the proper subject of cross-examination."*

[56] In the result, once questioned on his suspicions, the appellant furnished various explanations, none of which in my view held water. Of particular relevance in this regard are the following facts -

- their affair had continued right up to the day before his arrest, when the parties were intimate with each other;

- L had admittedly expressed ambivalence 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

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[18] *Do you know why the complainant or her mother would encourage her daughter to make these charges against you, this (sic) false charges?.....Why would you think that the daughter would lay these charges against you?"*

- She helped the appellant by driving his car home from the police station after his arrest and delivering his personal effects to his wife.

[57] Finally, the suggestion ultimately put up by the appellant required a high degree of complicity and connivance between mother and daughter to create a version that would be compelling and believable throughout. Such a scheme is invariably fraught with the danger of contradiction as the person required to falsely implicate an accused *"loses the plot*", as it were. And yet in this case we see anything but that: the evidence of M accords largely with her statement to the police and, as I have said, the contradictions are not material in the circumstances.

[58] Of course, the appellant does not have to persuade the court that his version is the unequivocal truth, just that it is reasonably possibly true in the circumstances[19]. It is trite that the onus remains on the State to prove an accused's guilt beyond any reasonable doubt, and when the court is asked to make such a finding, it must step back and consider the appellant's version in the context of the entire factual matrix before it[20]. In the present case that requires consideration of the evidence of the defence witnesses as also the application of caution towards the evidence of M in light of her age, immaturity, the fact that she was a single witness as also consideration of the general probabilities of the matter.

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[19] R v Difford 1937 AD 370 at 373; R v M 1946 AD 1023 at 1027; S v Kubeka 1982 (1) SA 534 (A) at 537.

[20] S v Hadebe 1997 (2) SACR 641 (SCA); S v Trainor 2003 (1) SACR 35 (SCA) at 40f.

> *"The proper approach in a case such as this is for the court to apply its mind not only to the merits and demerits of the State and defence witnesses but also to the probabilities of the case."*[21]

[59] Turning to the defence witnesses, it must be said that they add little to the piece. The assertion by K that her father only ever gave M a lift when she and her sisters were also in the car does not exclude the fact that the 2 lovers may have secretly travelled together to partake in sexual activity. The very fact that their tryst was secretive (notwithstanding some suspicion on her part, it was successfully concealed from L for quite some time) implies that, by design, it was not intended that she should have known about it. In the result it seems to me that K's evidence does not take the defence case any further.

[60] The evidence of T was presented by the defence in an attempt to give the lie to the incident regarding the television viewing. She evidently recalled an incident years before during which the appellant, his daughter K and the witness were together in his bedroom watching television. It must be said that the incident was relatively innocuous in the circumstances – a group of persons who were comfortable in the company of each other were watching television together in the comfort of the bedroom. Significantly, T places M in the room in close proximity to the appellant and corroborates M insofar as the latter said she was sitting next to the bed on a "*bankie".* Yet, the witness is certain that nothing untoward occurred. This, in and of itself, is curious given the passage of time and the relatively innocuous nature of the event described. Why, it must be asked, did she recollect the event at all?

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[21] S v Singh 1975(1) SA 227 (N) at 228G-H; S v Guess 1976(4) SA 715 (A) at 718H.

[61] But precisely because her vision of the appellant's hand was obscured by his raised knees under the sheet, which created a natural obstruction, she most probably did not see what she was not supposed to see. According to M this was the first incident of sexual contact with the appellant: it really was the commencement of his grooming of her for later penetration, and would thus have been conducted clandestinely. Little wonder then that M did not notice anything out of the ordinary.

[62] In the circumstances, I am not persuaded that the evidence of the defence witnesses took the case any further. At best for the appellant the import of their evidence can be described as neutral.

CAUTION AND CORROBORATION

[63] In light of the fact that M was a single witness in relation to all the charges, and given that she was a 14 year old teenager at the time, we are enjoined by s208 of the CPA to consider her testimony cautiously, and if possible to seek corroboration therefor in other admissible evidence.

[64] Given that M was required to testify some 3 years after the events which formed the basis of the charges, such contradictions as exist (and, as I have said, they are not particularly material) do not necessarily enjoin the court to reject the witness's evidence without more. While contradiction may sometimes be indicative of error, not all error affects the credibility of a 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.[22] In doing so a court will 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"*[23].

[65] I have already noted the positive credibility finding of the Regional Magistrate, which we are bound to respect. Moreover, the complainant's relative maturity for a young woman of her age is readily apparent from the record. Importantly, however, her version is corroborated in a number of respects. Firstly, there is the medical evidence which suggests that consensual vaginal penetration was probable. Further, there is the evidence regarding the airtime sms. This not only corroborates M's evidence directly but strengthens the probabilities in favour of the State's case and seriously dents the appellant's credibility. Also, the existence of the photographs to which M referred was positively confirmed by her mother.

[66] And then there is L's evidence regarding the soiled handkerchief and M's unusually flighty behavior when it was probably brought into the home, as also her inquisitiveness regarding the possibility that the appellant had been sterilized. Finally, there is the unchallenged evidence of L that the appellant was contrite after the event and his expression of concern for the plight of his wife and children. Importantly, there was no suggestion by the defence that, at the time, the appellant immediately denied his involvement with M. Rather, as L testified regarding their

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[22] S v Mkohle 1990 (1) SACR 95 (A) at 98 f-g.

[23] S v Oosthuizen 1982 (3) SA 571 (T) at 576 B-C.

exchange on the way to the bus station, the appellant appeared emotionless and detached when she confronted him with her daughter's claims.

[67] When all is said and done, I have little doubt that the complainant was correctly found to be an honest witness and that her evidence met the requirements of s208 of the CPA. The evidence in favour of the State's case was, at the end of the day, overwhelming and persuasive. Against that, the appellant's bare denial simply did not measure up. Accordingly, I am satisfied that the appellant's version was rejected as not being reasonably possibly true in the circumstances.

[68] In conclusion, I would like to express our appreciation to Mr. Liddell for his continued assistance in the matter. He was instructed to argue the appeal and was responsible for drawing the original heads of argument in 2016 but when his erstwhile instructing attorney died he was no longer on brief to argue the matter. His willingness to represent the appellant at the hearing on a *pro bono* basis is in the best traditions of the legal profession.

CONCLUSION

[69] In light of the aforegoing the appeal must fail. The conviction of the appellant on counts 1, 2, 3, 4, 5 and 6 is confirmed.

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GAMBLE, J

I Agree

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FORTUIN, J