IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO. AR 167/12

In the matter between:

SOOBRAMAN MUNDHREE **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT Delivered on 28 September 2012

SWAIN J

[1] The appellant, with the leave of the Regional Court at Durban, appeals against his conviction on a charge of sexual assault for which he was sentenced to five years' imprisonment totally suspended on conditions, it having been alleged that on 23 November 2010 and at the Durban Magistrates' Court, the appellant unlawfully and intentionally sexually violated the complainant Shaista Gaffoor by kissing her on the mouth, inserting his tongue into her mouth and fondling her breast.

[2] The answer of the appellant to this charge, was to aver that it was the complainant who had in fact initiated intimacy between them on the date and the place alleged, by hugging the appellant and kissing him on the mouth.

[3] That this incident took place at the Durban Magistrates' Court is dictated by the fact that at the relevant time, the appellant was acting as a Regional Court Magistrate and the complainant was employed as a stenographer in the court in which the appellant presided.

[4] What transpired between the appellant and the complainant took place in the privacy of the appellant's chambers and consequently direct evidence of what happened consists entirely of the protagonists competing versions of events.

[5] It is accordingly appropriate to consider at the outset, the correct approach in an appeal in a criminal case on fact, where there is a conflict of fact between the evidence of the State witnesses and that of the accused, as stated in

S v Singh 1975 (1) SA 227 (N) at 228 F – H

"It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of the State witnesses that, therefore, the defence witnesses, including the accused, must be rejected. The proper approach in a case such as this is for the court to apply its mind not only to the merits and the demerits of the State and the defence witnesses but also to the

probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt. The best indication that a court has applied its mind in the proper manner in the abovementioned example is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses".

[6] In addition, it is necessary in assessing the probabilities of a case such as the present, that regard be had to events which preceded, as well as those that followed the incident, as well as the nature of the relationship between the parties.

[7] The appellant and the complainant are agreed that before the incident they had a "working relationship". The complainant described it in these terms adding "and nothing else" whereas the appellant described it as a "good" working relationship. The complainant had started working in the appellant's court four weeks before the incident and the appellant agreed that the complainant was simply a member of the court and was not a friend of his. The complainant said the appellant was much older than her and she respected him "as being fit to be my father" but had no interest in him. The appellant agreed that compared to him the complainant was a very attractive young lady. The complainant and the appellant were, at the time of the trial, respectively twenty-four years and sixty-seven years of age.

[8] The appellant agreed that as a judicial officer it was important at all times to behave in a professional manner towards members of his staff, and it was important to ensure that there was no complaint of

being partisan, or overly friendly, with any particular individual. The appellant agreed that this extended to all members of staff including the interpreter, stenographer and court orderlies. He agreed that it was important to maintain some sort of distance from his staff, because he was in charge of his court and it was important to ensure that he was always respected and held in high esteem by them. In accordance with this approach, he said that the complainant referred to him as Mr. Mundhree and he addressed the complainant as Ms Gaffoor.

[9] In this context the only interaction between the complainant and the appellant on a personal level, and outside the workplace, occurred on Thursday 17 November 2010 when the complainant who is a Muslim, had taken the day off work to celebrate Eid, received an sms on her cell phone reading "Hi, how are you? Happy Eid. From Steve" The complainant stated that she did not know who Steve was. On the following day, 18 November 2010 a Friday, when the court was about to start, the appellant walked into court and wished the complainant good morning, to which the complainant responded by wishing the appellant a good morning. The appellant then said "How are you?" to which the complainant replied that she was fine. The appellant then asked "Did you receive my message?" to which the complainant replied "Yes, thank you". That was the end of their conversation. The appellant admitted having sent the complainant an sms wishing her a happy Eid and signing off the sms as Steve. He said he was not sure whether the complainant knew him as Steve but said "Everyone knows me that I am called Steve". He said the message was one of a number that he had sent to other Muslim friends wishing them well. His explanation for signing the sms as "Steve" was that his smss always ended off "Steve"

and he did not end with Mr. Mundhree because "never do I abuse my title by saying that I am Mr. Mundhree the Presiding Officer or something, I just play low keyed". The appellant stated that after he had sent the message, and in the days that followed, prior to the incident in question, he had not communicated with the complainant in any way which was of a personal nature and any conversation was of a professional nature. With regard to the complainant's evidence that the appellant had asked her on the following day, whether she had received his message when cross-examined he was asked the following question:

"Did you tell her that you had sent the sms to her, ask if she had received the sms"

to which he replied

"I am not certain whether I've told her I sms'd to her or not"

[10] Related to the appellant's professed desire to wish the complainant well at Eid, was the purchase of a box of chocolates as a gift to the complainant, which according to the appellant was given with the same objective. The appellant maintains that this was his sole objective in summoning the complainant to his chambers on Tuesday 23 November 2011, when the disputed incident occurred. Why he did not present the chocolates to the complainant on the day following Eid, being Friday 18 November 2010, when he asked the complainant whether she had received his message, is explained by the appellant on the basis that

"No, this was something during the weekend, my wife and I went and bought some chocolates and I told her that the stenographer had Eid. And she also suggested

don't buy for one person, what about the others. I said yes I have a court interpreter and I also had one for the court interpreter".

He was then asked

"So you had bought two boxes of chocolates?" to which he replied "That is correct".

However, under cross-examination when asked why he bought the complainant a box of chocolates for Eid he replied

"It was actually – it's my wife's idea when I went home I told her the stenographer was not there".

The appellant then re-iterated that

"It was my wife's idea, it is during the Eid festival we normally give out gifts which I have done to others and I told her that my stenographer is also Muslim she did not come to work. She said lets buy her a chocolate and also asked me who else works with you, I said the court interpreter. So she bought these two chocolates in her presence on the weekend".

According to the appellant he did not give the chocolates to the complainant on the following Monday, being 22 November 2012 because they were "not in my lunch packet" and he had not remembered to bring them. However on Tuesday 23 November 2012 his wife had placed the chocolates in his lunch container and "I managed to remember that on that morning". On the Tuesday when Mr. Sibiya, the legal aid attorney asked for a short adjournment, which he granted, he went to his chambers "when I noticed these chocolates then I phoned Mr. Mngadi the prosecutor to see where the stenographer is to ask her to come down".

[11] It is therefore clear that on the appellant's version, he possessed a noble and altruistic object, in inviting the complainant to his chambers. However, there are a number of aspects of the appellant's evidence which cause concern and which may be regarded as inconsistent with the appellant's professed objective;

[11.1] Signing the Eid sms message as "Steve" was not in keeping with the formal professional relationship between the complainant and appellant, where they respectively addressed one another as Mr. Mundhree and Ms Gaffoor. The appellant's attempt to explain the use of his name "Steve" on the basis that he did not wish to abuse his title and refer to himself as "Mr. Mundhree", rings hollow in the light of the evidence that this was how the complainant always addressed him. To sign himself as "Steve", in this context, was quite clearly a subtle invitation to the complainant of a more personal and less formal relationship.

[11.2] That the appellant was anxious to receive an acknowledgment from the complainant, that she had received his sms, is indicated by the fact that at the first available opportunity, namely when he walked into court and was about to commence proceedings, he directly sought such an affirmation from her. This conduct is inconsistent with the sms message simply being one of a number sent by the appellant to friends as a matter of routine, and illustrates the improbability inherent in the appellant's assertion that he was not certain whether he had told the complainant he had sent the sms.

[11.3] In evidence in chief, the appellant quite clearly indicated that it was his idea to purchase chocolates for the complainant and this

occurred to him on the weekend. In this regard the only suggestion from his wife was that he should also buy chocolates for the interpreter. However, in cross-examination, he was adamant that the idea was his wife's and was suggested by her, when he returned home from work on the Thursday. In evidence in chief, he stated quite clearly that he had bought both boxes of chocolates, whereas when cross-examined he stated they were bought by his wife. The only reasonable inference to be drawn from these contradictions is that the appellant did not wish there to be any suspicion that he had a personal interest in purchasing the chocolates for the complainant, other than as a formal gift to celebrate Eid.

[11.4] The purchase of chocolates on the weekend, two days after Eid, as a gift to celebrate Eid, the appellant knowing that at the earliest, he would only be able to hand the chocolates to the complainant on the following Monday, which would then be four days after Eid, indicates the tenuous nature of the link between the gift and the appellant's professed reason for giving it.

[11.5] The reason advanced by the appellant for not giving the chocolates to the complainant immediately after the weekend on Monday 22 November 2010 was that the chocolates "were not in my lunch packet". When he was asked "so you didn't have the opportunity for the whole day to give her the chocolates?" he replied "I didn't have it, it was my wife who had placed the chocolates on the Tuesday morning" and agreed that he had consequently forgotten to bring the chocolates on the Tuesday and by logical inference, also the Monday. That the presence of the chocolates in the appellant's "lunch bag" on the Tuesday was, according to the appellant, something of a surprise to him as indicated by his

evidence "so when I went to the lunch tin I found that my wife had also placed in the bag chocolates". He said that "when I noticed these chocolates" that was when he phoned Mr. Mngadi the prosecutor to ask the complainant to come to his chambers. I find it improbable on the appellant's evidence, that having taken the trouble to send the sms to the complainant on Eid, and then having followed this with an enquiry in court the next day as to whether the complainant had received the sms and then followed this with a purchase of chocolates for the complainant on the weekend, the appellant would then inexplicably have lost interest in giving the chocolates to the complainant, and had forgotten to bring the chocolates to work on both the Monday and the Tuesday. A reasonable inference to be drawn from this is that the appellant sought thereby to diminish the extent to which he could have been perceived as having a personal interest in giving the chocolates to the complainant.

[11.6] As regards the chocolates that were destined for the interpreter, the appellant said he had not given them to her on the same day, because she was absent on that day. He had however given them to the interpreter in court on another day. He said he had not called the interpreter into his chambers to give them to her and when asked whether there was any reason for that he said

"No specific reason, because I met her in the passage and said look I've got you a gift and that's it".

I regard it as not without significance, that although the appellant met and told the interpreter in the passage that he had a gift for her, he did not find it necessary to call her to his chambers, but chose rather to give his gift to her, in court.

[12] In my view, what the above evidence reveals, is a concerted effort by the appellant to link the ostensible reason why he called the complainant to his chambers, namely to give her chocolates, to a legitimate motive, namely to celebrate Eid, despite the fact that in doing so, a number of glaring contradictions and improbabilities are revealed in his evidence, as outlined above. What this also reveals is that his motive in buying and giving the chocolates to the complainant, must have been of a more personal nature, which he sought to conceal by such a subterfuge.

[13] It is against this background that the appellant's evidence has to be assessed that as far as his recollection went, the complainant had come alone to his office on previous occasions, for the reason that

"You know for instance every clerk does that when you want to sign a warrant of arrest or some correction in the court book, we have to correct that".

In this regard it was put to the complainant when giving evidence

"So if the accused had to come and testify to the effect that you had come to his office on many different occasions with the prosecutor in this matter"

to which the complainant replied

"That's not true".

When giving evidence the complainant said the visit to the appellant's office in issue in the present case was her second visit to his office. She explained that

"The first visit was when I had taken over from the previous clerk, she had taken me to his office to introduce him to me, that was the first".

The appellant's legal representative then put to her, by reference to her answer that she had not been to the office of the appellant with the prosecutor, the following:

"But Ma'am, you just said you had never been to his office before the 23rd"

to which she replied

"Been to his office alone before. On 23 November was my first visit alone in his office".

Of significance however in this regard is that the prosecutor put to the appellant, that although it had been put to the complainant by the appellant's legal representative, that the complainant had on many occasions come to his office with the prosecutor, which the complainant had denied

"It was never put to her that she came alone to your office?"

to which the appellant replied

"That's the duty of the Counsel to have done that. You cannot think of everything".

That the appellant sought to blame his legal representative for not putting what he maintained were his instructions to his legal representative, must be assessed in the context that the appellant is legally trained, and must have appreciated the need, to put to the complainant such a vital piece of evidence. What was put by his legal

representative was quite clear, namely that the complainant had come to the appellant's office on many occasions with the prosecutor, not that she had come alone on previous occasions, for the reasons advanced by the appellant. If what the appellant's legal representative put to the complainant was not in accordance with the appellant's instructions, the appellant would quite clearly have appreciated the need to rectify what was put. The only reasonable inference to be drawn is that the appellant never gave such an instruction to his legal representative and that his evidence in this regard was a later fabrication, given with the express purpose of diminishing the unique nature of the complainant visiting his chambers on her own.

[14] Logically, the next aspect of the evidence to be assessed, is the complainant's evidence that when she was told by Mr. Mngadi, the prosecutor, that the appellant had called and wanted to see her in his chambers

"I just didn't want to go alone. I just felt in some way that I was afraid to go alone".

For this reason, the appellant said she asked Mr. Mngadi, the prosecutor, to accompany her. According to the complainant, Mr. Mngadi refused, because he was preparing his roll. Mr. Mngadi however stated he did not remember the complainant asking him to accompany her. The complainant also said that after she left Mr. Mngadi's office, she entered the court and met Mr. Sibiya, the legal aid attorney, who asked where she was going. She told him that the Magistrate had called and asked to see her. According to the complainant, Mr.Sibiya then asked her to ask the appellant whether they could work through lunch, because he was tired and wanted to

finish court early. The complainant then said

"I thereafter told him could you come with me so you can tell him that, and we both can go together".

According to the complainant, Mr. Sibiya however said he could not come with her, because he had to consult with his clients. Mr. Sibiya confirmed when giving evidence as a defence witness, that the complainant asked him to accompany her to the appellant's chambers, but she did not give him any reason for her request. He confirmed that he had told her he was still busy with a client and she must go alone.

[15] In this regard Mr. Prior, who appeared on behalf of the appellant, submitted that on the complainant's evidence, the reason why she wanted Mr. Sibiya to accompany her, was not because she was afraid to go alone, but because she wanted Mr. Sibiya to convey his request to the appellant himself. However if this was obviously the case, Mr. Sibiya would have said so, and not replied that he did not know why the complainant wanted him to accompany her.

[16] When the complainant was asked why she was afraid to go alone to the appellant's chambers, she replied

"Prior to this incident there were – what can I say, I've heard that the Magistrate, the accused liked me and he had told Mr. Sibiya to hook him up with me".

Mr. Sibiya, when giving evidence for the appellant, said he had never had such a conversation with the complainant and the appellant had

never asked him to "hook me up with the complainant". However, when cross-examined he said that he had a conversation with the appellant before 23 November 2010, where the appellant had said to him that the complainant "is a nice lady", with which he agreed. He said he understood the remark in "a professional way" by way of comparison with the previous clerk of court, referring to the way she conducted her work and how neat her work was. He said he might have passed this compliment on to the complainant.

[17] In assessing this conflict between the evidence of the complainant and that of Mr. Sibiya, it must be borne in mind that Mr. Sibiya at the time of giving evidence, was still the legal aid attorney, in the court presided over by the appellant. The appellant was presiding in that court at the time of the appellant's trial and would be presiding in that court again on the following day. The appellant had presided in that court, save and except for the months of January and February preceding his trial, when it was presided over by Mr. Govender, who was the appellant's legal representative at his trial. It is therefore clear that Mr. Sibiya cannot be regarded as a totally independent witness, subject as he was to the constraints placed upon him by virtue of his position as the resident legal aid attorney, in the court presided over by the appellant, before and after his trial.

[18] That the complainant did not wish to go on her own to the appellant's office is supported by Sibiya, although he is unable to say why this was so. It is difficult to imagine why the complainant as a stenographer, would wish to be accompanied, when summoned to the

chambers of the Magistrate presiding over her court. Whether this belief was founded upon her allegation that the appellant had asked Sibiya to "hook him up" with her,or not, when cross-examined whether she was still afraid of the appellant, when she entered his office and closed the door, she said

"At that time I had mixed emotions going through my mind as to what his reason to see me".

[19] Turning now to a detailed consideration of the evidence of the complainant and the appellant as to what transpired in the appellant's chambers. It is necessary to do so, because as will become apparent, it is often in the detail, that the truth is revealed.

[20] The complainant said she knocked on the door, the appellant said come in, she entered and closed the door behind her. She closed the door even though she had mixed emotions going through her mind as to why the appellant wished to see her, but because he was a Magistrate she did not feel it was in order to leave the door open. The appellant was still robed and she asked

"Did you ask to see me"

to which the appellant replied

"Yes, come and have a seat"

She pulled out the chair across from the appellant and sat down opposite to him, with the table between them. The appellant asked

"So how are you?"

to which she replied

"I am fine thanks".

The appellant then said

"Why don't you come and visit me at my office?"

and then said

"You must come and we can get to know each other and we can have a good chat".

The complainant replied that she didn't have time to do so, as she was the clerk and had many duties that she needed to perform and that she had no time to come into his chambers to sit and chat. The appellant then said that they were approaching December, when the court would be closing and they needed to finalise more matters and asked if she did not mind working late. She replied that it was fine to work late in order to finalise matters, as she took it to be in the best interests of the court. She agreed to this because being the machine operator, it was essential for her to be there. She said she did not know why he had spoken to her about the court roll and its effectiveness, and he had not specified a time, when he had asked about working late. The appellant then asked her

"I heard that you are going through a divorce or you might be divorced".

At the time the complainant was going through a divorce and she was not sure how the appellant knew about it, because she had never

discussed it with him. She had however discussed it with other court staff. The appellant asked her what the reason was for the divorce and she told him that her husband had an affair and had somebody else. She denied, when it was put to her, that she had told the appellant that her husband had alleged that she was having an affair. The appellant did not mention Eid and did not give her any other reason why he had called her to his office. The appellant began asking her personal questions relating to her life, such as where she was living now and how many years she had been married. The appellant said to her

"You are a very attractive lady. Your husband is making a mistake by leaving you".

She did not respond to this because she did not know how to answer him. She wasn't sure if he was comforting her by his statement, but felt that by telling her she was an attractive lady, he was flirting with her or leading her on in a way, so she did not answer him. She was quite surprised as to how the appellant somehow knew about her personal life and because he was a Magistrate, she felt that she needed to answer him. The appellant thereafter reached to the bottom of his table and took out a green box of chocolates which read "Occasions" on it. He handed it to her and said

"This is for you".

He handed it to her, but she did not accept it from his hand and left it on the table. He did not indicate why he was giving the gift to her. The phone then rang so she stood up and said that she had to go and would see him in court. She was not rude and said it in a pleasant way because she was not traumatised, but felt uncomfortable being asked personal questions by him, which she felt it was not appropriate to

explain to him. The appellant said to her "No wait" and she heard him say to the person on the phone "I'll be there just now". She was facing the door, the appellant put the phone down, came around the table and said

"Come here and let me give you a hug".

The complainant said she just stood there and did not move a step forward. She thought that he was probably wanting to comfort her after she had told him about her personal life. She thought of it as a "comfort hug". She felt awkward about it "coming from him being a Magistrate" and not something she had expected from him. The appellant approached her and gave her a hug. The appellant's face was on her left hand side and the hug became tighter. The appellant started kissing her on her neck, then to her cheek and then into her mouth because she felt his tongue in her mouth. She said the appellant used "a lot of force" in kissing her. While he was kissing her his left hand was fondling her right breast over her clothing. The complainant said she stood there frozen and was shaken and that "it all happened so fast". She just stood there shocked and her "entire body's reaction was I just froze at that moment". She did not kiss him or react to anything that he was doing. She did not respond to his hug and her arms remained at her sides. The appellant said to her

"I love you I can't stop thinking about you. I stare at you all day from the bench and I want to be more than friends".

When the appellant realised she was not kissing him back, he stopped and gave her another tight hug. After that he let go of the complainant and was waiting for a response from her when she said "I have got to go"

moved away from him, opened the door and left his office, leaving the chocolates behind. The complainant said she was completely traumatised and wanted to cry.

[21] The appellant's version of what transpired was as follows. When he noticed the chocolates he phoned the prosecutor, Mr. Mngadi, to ask the complainant to come to his chambers. The complainant knocked at the door, which he unlocked and let her in. He greeted her, told the complainant "a belated Eid" and handed the chocolates to her, which were on the table. The complainant then gave him a hug and smiled and he patted her on the back, reciprocating. The complainant did not say thank you, but thanked him with a hug, by placing her right arm around him. He supposed she had hugged him because she was glad to have received the gift and he regarded it as a friendly gesture, which did not make him feel uncomfortable. After the hug, they were apart when the complainant came forwards and kissed him once on his lip. No tongue was involved in her kiss, but it was not a "peck" and he said "it was with a bit of force" and "you know she just came up on me". He said it was not "a lingering" kiss "because I managed to stop that". He said the kiss was not part of the thank you, because the hug was, and the complainant had moved forward from the left hand side, to kiss him. He did not kiss her back, stopped her there and asked her "Oh, what is this?" This was because this was not necessary "and I had to question that". He did not feel very uncomfortable about the kiss but "wanted to know what is this?". He felt that the manner in which she had approached him was not appropriate. The complainant then sat down in the chair which was nearby and apologised and said "I am sorry". The complainant then broke down and told him she was going through

marital problems with her husband. Her husband was accusing her of having another man and they were fighting for custody of the child. He said he accepted her apology and he tried to help her but the phone rang. It was Mr. Mngadi who was ready to proceed in court. He told her that they had to go up to court and the complainant left the office and he locked the door. He did not ask her whether she was alright, because it did not occur to him. He also did not say to her that she could talk to him later if she wanted to. When the complainant left she seemed normal to him, not at all embarrassed, happy with the chocolates and grateful to him.

[22] What is striking about the conflicting versions advanced by the complainant and the appellant, as to what happened in the appellant's chambers, is the great detail furnished by the complainant, as opposed to that furnished by the appellant. What is also significant is that despite such detail no contradictions or inconsistencies were revealed when she was cross-examined. In addition, the complainant's version is supported by the appellant's conduct before the incident, and more particularly his attempt to explain his conduct, by maintaining that his sms message to the complainant at Eid was not personal in nature, maintaining that he could not recollect whether he had raised this message with her, attempting to link the purchase of the chocolates to Eid, maintaining that it was his wife 's idea to buy chocolates for the complainant, maintaining that he had forgotten to bring the chocolates on both the following Monday and Tuesday and maintaining that the complainant had come to his office on her own on numerous prior occasions. The complainant's version of how events unfolded in the appellant's chambers, describing as it does the progressive levels of

intimacy demanded by the appellant and imposed upon the complainant, culminating in a degree of intimacy, which the complainant justifiably found to be unacceptable, I find entirely convincing. By contrast, the appellant's version postulates behaviour on the part of the complainant which is both irrational and inconsistent with the events that preceded their fateful meeting.

[23] Regard being had to the merits and demerits in the complainant's and the appellant's evidence and weighing their version of what happened in the appellant's chambers on 23 November 2010, against the probabilities of the case, I am satisfied that the complainant's version is the truth and that of the appellant, may be rejected as false.

[24] I am fortified in this conclusion by asking why the complainant would wish to falsely implicate the appellant with such scurrilous accusations, shortly after their meeting, when on the appellant' version, the appellant had shown the complainant nothing but kindness and it was the complainant, who had behaved inappropriately When I posed this enquiry to Mr. Prior, he suggested that the complainant may have feared that the appellant would report her behaviour to her superiors, with the consequence of disciplinary action. By fabricating a different version, in which the appellant was the guilty party and doing this before the appellant had the opportunity to report the complainant, would forestall such action. However, on the appellant's own evidence the complainant could not have harboured any such fears, because he said he had accepted her apology, she appeared normal to him, she was not embarrassed and was happy with her chocolates and grateful

to him. The appellant said he had no inkling the complainant would charge him with sexual assault, because she left his chambers in perfectly good spirits and they were on good terms. When asked why the complainant had falsely accused him he said he had no idea.

[25] I am also fortified in my view by the complainant's conduct after the event. Mr. Mngadi confirmed that during the lunch adjournment the complainant told him that the appellant had asked her about her personal life, and that there was a phone call which she thought was Mr. Mngadi calling them to court. The appellant had then asked the complainant to hug and as he was hugging her, he had kissed her on the mouth. There was however a contradiction in the evidence in that Mr. Mngadi maintained that the complainant told him at the commencement of the lunch break, whereas the complainant said she had told him when he came back to his office and she had been crying and Mr. Mngadi asked her why she looked like this. Mr. Mngadi however said the complainant appeared normal and did not appear traumatised. Due regard being had to these contradictions, that she told Mr. Mngadi at lunch time, is confirmed by an incident later that afternoon. The complainant said that when the appellant adjourned court that afternoon he addressed her directly and asked her to come and see him in his chambers. The complainant did not reply but Mr. Mngadi indicated to her that she must not go. Mr. Mngadi confirmed this and that he had indicated to the complainant that she must not go by shaking his head. That the complainant had told Mr. Mngadi during the lunch adjournment is also confirmed by the evidence of Mr. Sibiya, who said that Mr. Mngadi told him as they were going into court at the end of the lunch adjournment that something had happened to the complainant. Because he was curious to know what had happened,

he wrote a note to the complainant asking her what had happened. The complainant replied in a note in court, saying this old man came over to me. After court he asked her about it and she said the Magistrate came over to her and he kissed her. Later that afternoon the complainant said she reported the incident to her friend Hemika in Verulam, who advised her to report it to her Supervisor. The next day she reported to the Verulam Court where she was based, was interviewed by the Court Manager and her Supervisor and a docket was opened.

[26] In coming to this conclusion I do not overlook the contradictions between the evidence of the complainant and other witnesses as to which adjournment had been taken during the morning when the incident occurred, how long the adjournment was, how long the meeting with the appellant lasted and whether anybody saw the complainant leave the court during the afternoon session. I regard these aspects as peripheral and not material to a determination of the main issue.

[27] A final issue that has to be dealt with is one raised in a set of supplementary heads of argument on behalf of the appellant, filed shortly before the hearing and drafted by Counsel, other than Mr. Prior. The argument advanced in these heads was that the Magistrate had failed to pay regard to whether the appellant knew, or subjectively foresaw, that the complainant did not consent to his conduct. The reason why the Magistrate did not deal with this issue, was quite obviously because the appellant's defence was that it was the

complainant who was the instigator of the intimacy to which the appellant did not consent. To simply analyse the evidence led by the State and submit that this failed to establish that the appellant knew or subjectively foresaw, that the complainant did not consent to his conduct and ignore the appellant's version of events, is both artificial and fallacious. Rejecting the appellant's version that the complainant was the instigator of the intimacy to which he did not consent, in itself carries with it a refutation that the appellant did not know, or did not subjectively foresee, that the complainant was not consenting to his conduct. Why would the appellant cast the complainant in the role of the instigator of the intimacy to which he did not consent, if all along the appellant believed that the complainant was consenting to his advances? A determination of whether the State has proved the requisite intention on the part of the appellant, is not to be determined divorced from some of the evidence, and based upon an acceptance of the correctness of the State's version and without regard to the appellant's version. From the outset when the appellant's version was put to the complainant, it was clear that the appellant alleged that the complainant was the instigator of the intimacy, to which he did not consent. The issue of whether on the State case, the conduct of the complainant, in response to the appellant's advances, could have caused the appellant to know, or foresee the possibility that the complainant was not consenting, was never canvassed with either the complainant, or the appellant, when giving evidence because of the nature of the defence raised by the appellant. It is impermissible to view the evidence of the complainant, that she froze and did not expressly object to the appellant's conduct, in isolation and then conclude that the appellant subjectively believed the complainant was consenting. In the context of all of the evidence, and in particular the

parties prior formal and professional relationship, as well as the wide disparity in their ages, the appellant could never have subjectively believed the complainant was consenting to his sudden, unexpected and crude advances. I am accordingly satisfied that there is no validity to these submissions and that the State proved the requisite intention on the part of the appellant, beyond a reasonable doubt.

[28] No argument was addressed to us on the issue of sentence. I regard the sentence imposed as being entirely appropriate, regard being had to all of the facts of the case.

I accordingly grant the following order:

The appeal is dismissed.

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SWAIN J

I agree

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KRUGER J

Appearances /…

Appearances

For the Applicant	:	Mr. P. Prior
Instructed by	:	Thandroyen & Partners Durban
For the Respondent	:	Ms. A. Watt
Instructed by	:	Director of Public Prosecutions Pietermaritzburg
Date of Hearing	:	23 August 2012
Date of Filing of Judgment	:	28 September 2012