IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO: AR 139/06

In the matter between:

HERBERT SIPHO NKOSI **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

Date: 08 February 2012

PLOOS VAN AMSTEL J

[1] The appellant in this matter was convicted by a regional magistrate on 27 August 2003 on a charge of rape. The charge against him was that during September 1998 and at Esikhaweni he unlawfully had sexual intercourse with a 12 year old girl without her consent. The magistrate referred the matter to the High Court, where Combrink J confirmed, in terms of s 52 (which has since been repealed) of the Criminal Law Amendment Act 105 of 1997 that the conviction appeared to be in accordance with justice. After hearing argument on sentence the learned judge sentenced the appellant to life imprisonment. The appeal before us is against the conviction and sentence.

[2] The case for the State was as follows. At the time of the incident, in

September 1998, the complainant, her brother and her parents lived in the appellant's home with him and his family. She was 12 years old at the time. One evening, after the others had gone to bed, the complainant was busy collecting her books in the kitchen, where she had been studying. The appellant entered the kitchen and asked her to give him some cake. She asked him what he was talking about, whereupon he pulled her towards the cupboard, made her lean against it, took her panties off and had sexual intercourse with her. When a door banged somewhere in the house he stopped, warned her not to tell anybody, and walked away. A few days later, early in the morning, she was sweeping the sitting room when the appellant again approached her, removed her panties and had sexual intercourse with her. He again warned her not to tell anyone.

[3] The complainant and her family moved out of the appellant's home on 1 December 1998, some three months after the incidents. Some ten months later, in October 1999, the complainant wrote a letter to her mother in which she told her what the appellant had done to her. Both her parents read the letter and discussed the contents with her. Her father asked her if she would be willing to repeat her allegations in front of the appellant, and she agreed. Her parents took her to the appellant's house, where she related her story in the presence of the appellant and his wife. Her father asked the appellant if the allegations were true and he said "Well, that indeed did happen". His wife burst into tears and the complainant and her parents left shortly after that.

[4] In his evidence the appellant denied that he had had sexual intercourse with the complainant, and he denied that he had admitted to it. He confirmed however that the complainant and her parents had come to see him and that she alleged that he had raped her. He said he was hurt and surprised by the complainant's allegations against him and that the subsequent meetings were designed to restore the relationship between the two families.

[5] There are strong indications in the evidence that the appellant had raped the complainant. It seems unlikely that such a young girl would have had the courage to confront the wrongdoer in the presence of his wife and her parents if nothing of the sort had happened. The medical evidence also confirmed the presence of a healed

tear on the hymen, which was stated to be in keeping with a forceful penetration.

[6] There are however other considerations which concern me. The magistrate reminded himself that the cautionary rule should be applied with regard to the complainant's evidence as she was a single witness and a child. There are several reasons in my view why it cannot be said that her evidence was satisfactory in all material respects.

[7] The most important of these is that she stated in her statement to the police that the appellant had raped her on three separate incidents, whereas she said in her evidence that there had been only two incidents. She must also have told her mother that there had been three incidents because this is what was recorded in the mother's statement to the police. This is not merely a case of writing three instead of two. The third incident is described as follows in the mother's statement:' The third incident occurred while my daughter was washing utensils after supper she then told me that Sipho came again and took off her panty and inserted his panty (sic) inside my vagina (sic) but she further said she did not report because she could see that Sipho was going to hit her and that we would be running shot (sic) of accommodation.' Inspector Ngqulungu, who took the complainant's statement, confirmed that the complainant had told her of three separate incidents. This is a very material contradiction which causes grave concern. The third incident referred to in the statements seems to have been a complete fabrication.

[8] Another concern relates to the fact that the complainant first reported the alleged rape to her mother some ten months after they had left the appellant's home. In that time she also did not mention the incidents to any of her friends or her brother. One can understand why the complainant would have been reluctant while they still lived in the appellant's house to report to her parents what had happened. But they moved out in December 1998 and she only informed her mother of the rape in October 1999. The matter was only reported to the police in November 1999. There is no satisfactory explanation on the record for the delay.

[9] Further difficulties relate to her evidence that the second incident took place in the dining room, whereas she later said that it had happened in the sitting room;

her denial that she watched the television program ‘Generations’ with the rest of the family in the evening, whereas her mother said she did; the improbability that the appellant would have raped the complainant in the kitchen at approximately 9pm when anybody could have come into the kitchen as the inter-leading door did not lock; her mother’s evidence that according to the complainant the appellant had followed her to the toilet and locked the bathroom door, which was not her evidence; her evidence that the appellant had threatened to hit her, whereas she had told her mother that he had threatened to kill her; the complainant told her parents that the appellant had given her money to keep quiet, which she said she did not remember; coupled with the fact that by the time the complaint’s family left the appellant’s home the relationship between the two families had broken down.

[10] Unfortunately the record of the proceedings before the magistrate does not enable one to evaluate these difficulties properly. Attempts were made on a previous occasion to reconstruct the record. The appellant thereafter contended that the record remained inadequate. We were informed by counsel that this court, as it was constituted then, rejected that contention and directed that the appeal should proceed. It seems fair to assume that the court directed that the appeal should proceed on the record as it stood because it was not possible to improve the record by further attempts at reconstructing it, which counsel informed us is the case.

[11] The evidence of the complainant’s mother as to what transpired at the appellant’s home when he was confronted was apparently not audible on the recording and was not transcribed. The answers to questions in cross-examination as to why she took so long to report the matter to the police and what eventually caused her to report the matter were also not transcribed. The same applies to questions relating to her police statement, in which she mentioned three incidents, the television programs which the complainant watched and the fact that the other members of the two families were also up early so that the complainant could not have been alone with the appellant. These were material questions and we don’t know what the answers to them were.

[12] A further matter which is puzzling is that the complainant’s father was not called to testify. His evidence would have been very material with regard to the

alleged admission by the appellant and the subsequent meeting between members of the two families.

[13] I do not believe that in the light of all these difficulties it can be said that the appellant's guilt was established beyond a reasonable doubt.

[14] In those circumstances I propose that the appeal should succeed and that the conviction and sentence be set aside.

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PLOOS VAN AMSTEL J

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MOKGOHLOA J

I Agree:

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KOEN J

I agree and it is so ordered.

Appearances:

For the Plaintiff	**:**	Mr. H. K Gunase
Instructed by	**:**	Ravin Singh Asheena Singh & CO c/o Govindasamy & Pillay Pietermaritzburg
For the Defendant	**:**	Mr. R. du Preez
Instructed by	**:**	The Director of Public Prosecutions Pietermaritzburg
Date of Hearing	**:**	01 February 2012
Date of Judgment	**:**	08 February 2012