NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR619/2014

In the matter between:

S[…] S[…] N[…] **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

Delivered on: Thursday, 30 April 2015

OLSEN J (MOODLEY J concurring)

[1] The appellant in this matter was convicted of rape and sentenced to life imprisonment by the Regional Court sitting at Pietermaritzburg. At the time of the events which gave rise to his conviction the appellant was 35 years of age and the complainant was a 12 year old girl. The appeal is against both conviction and sentence.

[2] The charge put to the appellant in the court *a quo* was that he raped the complainant on a number of occasions between May 2011 and July 2011. The evidence revealed that in fact the period of the alleged rapes was defined by the witnesses not with respect to dates, but with respect to the absence of the complainant's mother from home over the period concerned. The charge sheet ought to have been amended during the course of the trial because the

period did not coincide with the stated dates; but that did not happen. Counsel appearing for the State before us asked for the amendment and counsel for the appellant agreed to it on the basis that the amendment did not prejudice his client in any way. We indicated to counsel that the amendment would be granted in this judgment, and we do grant an amendment to the charge sheet by the deletion of the words "May 2011 to July 2011" where they appear in the charge sheet, and the substitution therefor of the words "July 2011 to September 2011"; and by the deletion of the words "between May 2011 and July 2011" where they appear in the charge sheet and the substitution therefor of the words "from July 2011 to September 2011".

[3] The complainant's mother has two children by the appellant, with whom she lived as husband and wife at the material time. The complainant is older than these two children, having been born of an earlier relationship between her mother and another man. They all lived in the same household. Although the complainant described the appellant as her "stepfather" during the course of her evidence she confirmed that, prior to the events in question in this case, her relationship with the appellant was good and that he treated her as his own child and did everything for her. In ordinary discourse she called him "father".

[4] In mid-2011 the complainant's younger half-brother became ill and the complainant's mother left with the sick child for Swayimane where the child was to be treated. She was away for about six weeks. According to the complainant four days after her mother had left for Swayimane the appellant had sexual intercourse with her. This was repeated on a nightly basis until her mother's return after a period which the complainant called "a whole month". That gave rise to the charge that during the period in question the appellant had raped the complainant on what the charge sheet calls "diverse occasions".

[5] The first issue raised on appeal by the appellant is that the complainant (who was 14 years of age when she gave evidence) took the oath to tell the truth (as provided by s 162 of the Criminal Procedure Act, 1977); whereas the

record reveals that the complainant was a witness who ought to have been admonished to speak the truth (as contemplated by s 164 of the Criminal Procedure Act).

[6] The complainant gave evidence through an intermediary. When she was called the court asked the complainant her age and received the reply, 14 years. The court then asked the complainant what grade she was in and was told that it was Grade 9. It is necessary to record what followed.

> "COURT Do you know what it means to take the oath, to speak the truth?
> WITNESS No.
> COURT Well, do you know what the difference is between the truth and a lie?
> WITNESS Yes.
> COURT What is the difference?
> WITNESS When you are telling a lie, it is something that not happens, but when you tell the truth, you are telling something that happens.
> COURT Are you prepared to swear before God that you will tell only the truth in Court today?
> WITNESS Yes, Your Worship."

[7] The comma inserted by the transcriber in the court's first question (i.e. the first question in the passage quoted above) conveys that the question was what the court in *S v Raghubar* 2013 (1) SACR 398 (SCA) called a "compound question". There were two questions. The complainant was being asked whether she knew what it meant to take an oath. The complainant was being asked, secondly, whether she knew what it was to speak the truth. The court's response to the negative answer supports this; the learned Magistrate immediately tried to deal with one question at a time, starting with the question of the difference between the truth and a lie.

[8] The complainant's affirmative answer to the question posed, and her explanation of the difference between truth and falsity, established that she

knew and understood the difference between the two. In the context in which she was asked to answer that essentially abstract question her answer is one of the more convincing ones that a court is likely to come across when the witness is a child.

[9] Nevertheless, as pointed out by counsel for the appellant, the complainant's answer to the first question was in the negative. Given that it was established that she knew what it means to speak the truth, the negative answer must have been directed at the question as to whether she knew what it means to take the oath. The word "oath" is not one which would be expected to be found naturally in the vocabulary of a 14 year old child, in whatever language. The issue is whether she did not understand the word "oath", or whether the complainant did not understand the significance of taking an oath. In the latter case, an admonition would have been required. The Magistrate's question in my view cleared the way to the taking of the oath. He asked the complainant whether she would be prepared to "swear before God" that she would "tell only the truth in court today". She answered in the affirmative. Given her age, her schooling, the clarity with which she could express the difference between truth and lies, and the fact that she was assisted by an intermediary, in my view the Magistrate was correct in concluding that the complainant did understand the nature and import of the oath, as a result of which she was duly sworn. In addition one can take comfort from the fact that there was an admonition built into the question as to whether she was prepared to swear before God that she would only tell the truth in court, especially considering the clarity with which the complainant expressed her understanding of the difference between the truth and lies. I conclude that there was no irregularity involved in the fact that the complainant took the oath. (Counsel for the appellant did not argue that the complainant was not a competent witness.)

[10] The appellant's argument in support of the appeal on the merits of the conviction was somewhat narrowly confined. (No criticism is intended in making that observation.) It is accordingly not necessary in this judgment to furnish a detailed account of all of the evidence.

[11] As has already been said above, the complainant's evidence described an act of sexual intercourse between her and the appellant against her will on the first occasion, four days after her mother had left. It then occurred on a daily basis until her mother returned. The prosecution considered it necessary to ask the complainant to deal with one of the other occasions when, according to the complainant, the appellant was drunk and tore her pyjamas (which he subsequently destroyed). On that occasion the complainant says that she cried out and that one Vusi Dlamini heard this and looked through a gap into the room where she and the appellant lay. On the following day Mr Dlamini asked the complainant why she had been crying. She gave the answer that it was not her, but her younger sibling who had been crying. According to the complainant she did not tell Mr Dlamini the truth because the appellant had told her that if she revealed what was going on he would kill her.

[12] It is necessary to explain the accommodation arrangements in place at the time. Mr Dlamini's parents owned the building. A room in the building was occupied by the complainant's family as tenants. There is a doorway between the room rented by the complainant's family and that occupied by Mr Dlamini, apparently on his own. The door which fits into that doorway is not high enough to fill the frame. Mr Dlamini looked through the gap between the top of the door and the frame in order to see what he did.

[13] Mr Dlamini was called to give evidence. He said that he had heard crying and decided that he had better see what was going on. He saw the appellant lying on top of the complainant with his (the appellant's) trousers down. He was not able to say whether the complainant was in a state of undress. He did not claim to have seen any movements which suggested that sexual intercourse was underway at that time.

[14] Mr Dlamini was at the time a young man still studying. He reported what he had seen to his parents expecting that something would be done. But nothing was done. In the end he had to wait upon the return of the

complainant's mother in order to make the report which he regarded as necessary.

[15] The complainant's mother returned home at the beginning of September. By then rumours were circulating that something untoward had been going on in her absence. She questioned the complainant who denied that anything had happened. She also questioned the appellant who denied it. The complainant's aunt became involved. She telephoned the complainant's mother and one gets the impression that she insisted that the complainant's mother should establish what had been going on. Eventually, according to the evidence of the complainant's mother, the appellant confessed to her that he had had sexual relations with the complainant on one occasion when he had been drunk. At that stage the complainant herself admitted to her mother that her denials had been false, and informed her mother of the full extent of what had taken place in her absence. It was reported to the police and an examination by a doctor followed the next day.

[16] The learned Magistrate carefully considered the evidence tendered by the State and found it satisfactory in all material respects. The learned Magistrate was not satisfied with the evidence of the appellant. The appellant offered contradictory speculative suggestions as to why Mr Dlamini would have invented an account of sexual abuse by the appellant of the complainant. Neither of the appellant's suggestions would have been convincing had it stood alone; but both lost any value they had because they were mutually contradictory. The evidence revealed no reason why the complainant would first deny and then confess falsely to sexual activity with the appellant, save for the appellant's suggestion that it may have had something to do with the fact that he was not the complainant's biological father.

[17] The Magistrate considered all the evidence and the probabilities, and concluded that the appellant's version could not reasonably possibly be true. The Magistrate came to this conclusion acknowledging that there was no duty

or onus on the appellant to establish why false evidence would have been fabricated by the complainant and Mr Dlamini.

[18] Counsel for the appellant does not offer any general criticism of the manner in which the learned Magistrate approached the evidence. In my view a consideration of the record reveals that counsel's approach is the correct one. Instead counsel focuses upon a particular apparent contradiction between the evidence of the complainant and that of Mr Dlamini, and argues that it throws sufficient doubt on the State's case to justify an acquittal.

[19] Mr Dlamini said that the observation he had made of what was going on occurred at 6am in the morning. The question as to when precisely this event occurred was not pursued with the complainant although she did say in response to a general question concerning all the events, that they occurred at night. The apparent contradiction was not pursued in evidence and the learned Magistrate found it of little significance. In my view he cannot be faulted in that regard.

[20] However counsel for the appellant took the matter further before us. He pointed out that according to the record the complainant's evidence is that Mr Dlamini observed the second incident of sexual intercourse between the complainant and the appellant, whereas according to Mr Dlamini's evidence his observation was made on the Sunday immediately preceding the return of the complainant's mother on a Monday. This apparent contradiction was not highlighted or dealt with at the trial. It did not feature in the Magistrate's judgment.

[21] In my view it is too narrow a consideration of the record which generates a conclusion that there was such a contradiction. Dealing first with the evidence of Mr Dlamini, he said that he had reported what he had observed to his mother and father. The evidence of the complainant's mother (and indeed the complainant) reveals that rumours had started circulating before the return of the complainant's mother and that they were well

established when she returned to the household on a Monday. After describing what he had observed, Mr Dlamini said the following.

> "I then left and told my mother and my father about this, but they did not take any action after I had made this report. So I then decided to wait for the mother of the complainant to return so that I could report this to her. The mother of the complainant returned back eventually and I made this report to her, that is all."

The record reveals that the court then intervened as follows.

> "Was that the same day, weeks, months? --- she came back on a Monday, the following day, because this incident took place on Sunday."

Reading that question and answer literally generates a conflict with the other evidence which suggests that Mr Dlamini's report to his parents took place somewhat earlier than the day before the return of the complainant's mother. It was not argued before us that there was any other source of the rumours which had circulated besides Mr Dlamini's report of his observations. It seems to me that something got lost in the interpretation of the exchange between the Magistrate and Mr Dlamini, or that Mr Dlamini misunderstood the question.

[22] Be that as it may, and accepting counsel's proposition that Mr Dlamini's evidence is that his observation was made the day before the complainant's mother returned, the next question is whether there is in fact a real contradiction between that and the evidence of the complainant. It is quite apparent from the manner in which the complainant was led that it was the prosecutor's intention to ask her to describe only two events with full particularity. The one was the first occasion of sexual intercourse and the other the occasion when the appellant was drunk and the complainant's pyjamas were torn. It is in that context that the complainant said:

> "On the second day I was wearing pyjamas, he even tore my pyjamas on the side".

And then further:

> "Then on the second day he came and on that day he was drunk. I cried on the second day and brother Vusi heard me and he peeped through a hole to see what was going on."

[23] I am again concerned about the interpretation of evidence. What was the complainant talking about? On the second day after her mother had left the first incident of sexual intercourse had not taken place. When she said "on the second day" did she mean on the second day upon which sexual intercourse took place? Or was she intending to convey that this was the second of the occasions on which she was giving particular evidence? If this issue had been taken up in the course of the trial some clarity might have been achieved. But it was not. The address by the appellant's attorney in the court *a quo* is reproduced in the record. She did not raise the argument now put before us. In my view this apparent contradiction does not tarnish the decision made by the Magistrate. The weight of the evidence and the probabilities support his finding. In my view the conviction must stand.

[24] Turning to the question of sentence, the learned Magistrate recorded in his judgment on sentence that he is loath to impose life imprisonment and that he had searched for reasons not to impose the minimum sentence. However he found the aggravating features overwhelming.

[25] It was not argued that the learned Magistrate misdirected himself in any respect other than by imposing a sentence which was disproportionate.

[26] The personal particulars of the appellant were placed before the court *a quo*. He was 37 years of age at the time of his conviction and therefore some 35 years of age at the time of the events. He had reached standard 10 at school. He has two children born of his relationship with the complainant's

mother. He had been employed but had become retrenched. He had no previous convictions.

[27] A victim impact statement was produced but unfortunately was omitted from the record before this court. However in his judgment on sentence the Magistrate quoted from the first paragraph as follows.

> "Before the incident, my life was fine, I was all right and I was happy. After the incident of being raped, I felt like I was living in my own world because I was asking myself how can a person who I regard as my father, rape me. He used to do everything for me that I wanted and needed. I have known him for almost six years, calling him my father, but in his mind, he had other intentions about me. What really hurts me, is that he is sick with HIV and he never used condoms when he raped me. I felt like it was not me he was doing this to, but somebody else. I could not believe it."

[28] This passage from the victim impact statement highlights the most disturbing features of this case. From the complainant's perspective a proper relationship of father and daughter had developed between the appellant and the complainant. He used to assist her, even with washing her clothes. She came to call him "father". Her mother obviously thought nothing of leaving the complainant in the care of the appellant when she (the mother) went off for some six weeks to seek medical attention for one of the children born of the relationship between the appellant and her. One would have thought that in those circumstances paternal responsibilities and affection would have been to the fore of the appellant's mind. However what he did to the complainant reveals that from his perspective the relationship of father and daughter, and the trust it engenders (upon which both the complainant and her mother relied), was more cultivated than natural, and more apparent than real. On the complainant's evidence the appellant raped her on something like thirty occasions. He was not under the influence of alcohol on the first occasion. Her evidence discloses a deliberate grooming four nights after her mother had left. The appellant then had every opportunity, day after day, to reflect on

what he was doing. And yet he did not desist. No evidence was put before the court in support of the proposition that for some or other reason the appellant's moral blameworthiness should be regarded as less than what the facts suggest. In my view the learned Magistrate cannot be faulted for his finding that there were no substantial and compelling circumstances justifying the imposition of a lesser sentence than the life sentence prescribed for the present offence in terms of the Criminal Law Amendment Act, 105 of 1997.

The following order is made.

1. The appeal against both conviction and sentence is dismissed.

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OLSEN J

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MOODLEY J

Date of Hearing:	TUESDAY, 21 APRIL 2015
Date of Judgment: :	THURSDAY, 30 APRIL 2015
For the Appellant :	Mr E X Sindane
Instructed by:	LEGAL AID OF SOUTH AFRICA Appellant's Attorneys 20 OTTO STREET PIETERMARITZBURG (Ref.:) (Tel No.: 033 – 394 2190)
For the Respondent:	Ms S Mcanyana
Instructed by:	Director of Public Prosecutions Respondent's Attorneys 6th Floor, Southern Life Building 88 Joe Slovo Street Durban (Ref. (Tel.: 031 – 3345114 / 033 – 845 4400)