REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR 377/2014

In the matter between:

RAVI CHETTY **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

Delivered on: Friday, 21 August 2015

OLSEN J (HENRIQUES J et NAIDOO AJ concurring):

[1] The appellant is a teacher at a school known as the New Hope Christian Academy. After a trial which commenced in October 2012 and ended in April 2013, the appellant was convicted and sentenced on two counts under the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 (the "Amendment Act"). The appellant was sentenced to three years imprisonment, wholly suspended, on count 1; and a fine of R1000 was imposed in respect of count 2. The complainant in each instance was a girl who was a pupil at the school, 13 years of age at the time of the incidents. The appellant appeals against his convictions and sentences

with the leave of the court *a quo*; but no submissions have been made on his behalf to the effect that either of the sentences was inappropriate.

[2] Section 18 of the Amendment Act is headed "Sexual Grooming of Children". The first count put to the appellant was that he contravened s 18 (2) (b) of the Amendment Act in that during 2010 he described various forms of oral sex to the complainant with the intention thereby to encourage or persuade the complainant to perform, or to diminish or reduce resistance on her part to the performance of, a sexual act with the appellant. In its relevant part s 18(2)(b) reads as follows.

> "(2) A person ("A") who –
>
> (b) … describes the commission of any act to or in the presence of B with the intention to encourage or persuade B or to diminish or reduce any resistance or unwillingness on the part of B to –
>
> (i) perform a sexual act with A …
>
> is guilty of the offence of sexual grooming of a child."

[3] It is not clear to me whether there is an omission in the section where it speaks of the description of the commission of "any act", the true intention being that it should be any "sexual" act. But that issue does not arise in this case. As will be seen, it is common cause that the appellant described sexual acts to the complainant. The question at trial, and now, is whether the State established that this was done with the intention to encourage or persuade the complainant to perform a sexual act with the appellant, or to diminish or reduce any resistance or unwillingness in that regard on her part. As will be seen, the answer to that question depends on whether the State proved beyond a reasonable doubt that the complainant's account of events was true.

[4] Count 2 was a charge of sexual assault under s 5(1) of the Amendment Act. According to the charge sheet (as amended) the appellant intentionally sexually violated the complainant by placing his knee between her thighs, and by rubbing her thighs with his hands. I propose to say no more about count 2

until count 1 has been disposed of. The charge of sexual grooming is the predominant feature of this case, and its outcome has a bearing on the fate of the appellant's conviction of common assault on count 2.

[5] The learned Magistrate in the court *a quo* accepted the complainant's evidence and rejected that of the appellant. She did so after giving a full account of the evidence of the witnesses which she regarded as the most important ones. She dealt in less detail with those she regarded as less important. She concluded that the State had proved its case on count 1 (sexual grooming) beyond a reasonable doubt, and found that the State had proved common assault, said to be a competent verdict, on count 2.

[6] Counsel who represented the appellant before us delivered a set of heads of argument largely dedicated to an attack upon the credibility of the complainant. Many of the references to the record in counsel's heads of argument do not support the submissions with respect to which they were made; and in other cases appear to me to have been misread. The heads of argument were expressed in strident terms. The pinnacle of this was a contention that it is evident that the complainant had "fabricated her entire evidence".

[7] In oral argument the submissions for the appellant were more measured. Whilst the submissions continued to support a conclusion that the complainant was an untruthful witness, the principal argument was that the magistrate had reached her conclusions without an evaluation of all the evidence, and especially without an evaluation of the complainant's evidence and that of the appellant. In my view the submission goes too far. The magistrate did evaluate the evidence. Whether all of it which was actually relevant was sufficiently considered may be a matter of opinion; a decision on the facts cannot be expected to be supported by an analysis of every nuance of evidence, accompanied by judicial commentary. Having said that, in my view it is in this case quite difficult to deal with the appellant's argument that the evidence was insufficiently evaluated without attempting the exercise oneself. I propose to do so without thereby implying a predilection to a

conclusion that there was any misdirection on the part of the trial court which posed an obstacle to a just outcome in the case. An evaluation of the evidence based solely on the appeal record cannot substitute for the advantages that a trial court has, especially when it comes to the evidence of a child on a subject such as the one with which this case is concerned. I am mindful of the duties and role of an appeal court when no particular misdirection on the part of the trial court has been identified. In particular findings of fact will only be disregarded on appeal if the recorded evidence shows them to be clearly wrong; and whatever its own evaluation of the recorded testimony may be, the appeal court must bear in mind the "advantage that a trial court has of seeing, hearing and appraising a witness". (*S v Monyane and Others* 2008 (1) SACR 543 (SCA) para [15].)

[8] It would be convenient, before giving an account of the material evidence in this case, to say something about the environment within which the events canvassed in the evidence took place. The New Hope Christian Academy was established by a Pastor Isaac who is the head of the church to which presumably most if not all the pupils belong. Pastor Isaac described himself as the pastor and spiritual administrator of the school. His wife, Mrs Isaac, is the principal. The management of the school is accountable to him and he is in particular responsible for the staff (including the engagement and dismissal of them). Teachers are accountable to Pastor Isaac. He is the overseer. He is from time to time called upon to attend at school when there is some personal difficulty with an individual child or with staff, and also visits the school to "give life skills" (as he put it when he gave evidence).

[9] The appellant was employed as a teacher when the school was founded. Given his age that suggests that he commenced work as a teacher at the age of 18 years. He teaches maths and science. The appellant is not married. He was either 33 or 34 years of age when the events giving rise to this prosecution took place. He was also a youth leader in Pastor Isaac's church.

[10] The mode of teaching employed at the school is different to that followed in an ordinary school. There are no classrooms. Teaching takes place in a large room which Pastor Isaac described as a church hall. The younger children (children who would be regarded as being in lower grades) are accommodated to one side of the teaching room and the older ones in another. Each child works at her or his own pace. They are not formally in "grades" although each child has a "form teacher". The appellant was the complainant's form teacher at the material time.

[11] The children have cubicles within which each student sits and does his or her own work under the guidance of a supervising teacher and a monitor. When a child experiences difficulty with work, she or he puts up a flag and a supervising teacher comes to assist. Each teacher has a desk or table within the room. Pupils may go up to the teacher's desk for assistance. Extra lessons, when the school is not in its ordinary session, would take place at the teacher's desk.

[12] The school is a small one. It appears that the teachers get to know the pupils rather well for that reason. In the appellant's case these closer than usual relationships may have been fostered as well by his role as a youth leader at the church. The complainant, 13 years old at the time of the material events, had been at the school throughout her scholastic career, commencing with pre-school. The appellant had been there throughout. She had an apparently good and close relationship with the appellant. He appears to have been popular. Two other pupils who gave evidence (called by the defence) confirmed the appellant's popularity and the happy and comfortable relationship they (and the complainant) had with the appellant. Judging by the appellant's evidence he was not as close to all his pupils as he was to the complainant.

[13] Before the events which gave rise to this case occurred the complainant had acquired a boyfriend. She had met him at a swimming club, which may be the only place where they saw each other. He was not a pupil at the school. All the evidence (such as it is on this issue) points to the fact

that the complainant and her boyfriend were mere childhood sweethearts. As she put it, they had not even kissed or hugged.

[14] The complainant was the first witness called for the State. Despite her age (15 years at the time of giving evidence), and despite the subject matter of the trial, she gave evidence without the assistance of an intermediary.

[15] The material events commenced in October 2010. The complainant and the appellant were talking together. The appellant does not dispute that during this conversation he told the complainant that she should break off her relationship with her boyfriend. The complainant and the appellant agree that in the course of that conversation some level of drop-off in the complainant's grades was discussed as a reason for doing so. However, the complainant asserts that it went further than that. According to her the appellant said that if she wanted to be part of his life she should break up with her boyfriend. The appellant disputed that, but under cross-examination the complainant did not waiver on the point. (It should be mentioned that the complainant was cross-examined on a statement she had made to the police which was not produced in evidence. There is nothing on the record to show why the appellant's attorney did not hand in the statement as an exhibit. As an appeal court we are accordingly left in the position where the record draws our attention to the alleged inconsistencies without being able to consider them in context; and where we are deprived of the benefit of observing for ourselves where the statement was consistent with the evidence.)

[16] About two days after this event the complainant called off her relationship with her boyfriend. She was sad about this, but not angry. This evidence (upon which her friends were able to comment) was not contradicted.

[17] Some weeks later the complainant sought out the appellant for some assistance with her school work, after which the conversation between them which is most material to this case took place. Either version of the conversation reveals that there was a disturbingly inappropriate relationship

between the appellant (an apparently trusted male teacher over 30 years of age) and the complainant (a trusting 13 year old female pupil). The subject of the relationship between the appellant and a former female teacher at the school came up. In her evidence in chief the complainant said that she could not remember how the subject arose. When cross-examined it was put to her that it arose because she asked about it. Her response was that it could be so, but she could not recall. The complainant's evidence is that the appellant said that he and the teacher did not have a sexual relationship "but that they saw each other naked and that he fingered her". It was put to the complainant in cross-examination that she had been curious about the former teacher and that the appellant had told her that he and the former teacher had not had sexual relations. The appellant contradicted that when he gave evidence. According to his evidence what he said was that he and the former teacher were "going out". He said that he would not have told her about his sexual life. He offered no explanation as to why his attorney would have put something different to the complainant.

[18] According to the complainant the conversation developed from there. The appellant volunteered that there was a former pupil of the school who was "hot". The appellant denied that he had said that. That dispute aside, it is common cause that the conversation went further.

[19] According to the complainant the appellant proceeded to ask her whether she understood the meaning of certain sexual terms which are part of the vernacular. These were raised one at a time. She answered in the negative and he proceeded to describe each term in clear vivid terms, one by one. The terms covered and explained were female on male oral sex, male on female oral sex, mutual simultaneous oral sex and the subject already mentioned, "fingering". The appellant in his evidence admitted the graphic account of these exchanges given by the complainant, but contended that these subjects arose and were canvassed as a result of an enquiry in each instance by the complainant. When cross-examined along those lines the complainant was adamant that it was at the instance of the appellant that these topics were discussed as they were.

[20] When asked to explain how, on his version, this exchange about sexual terms arose, the appellant stated that he wanted to explain the dangers of "pop-ups" on the internet. What exactly these pop-ups were, and why and how frequently they might affect any internet use by a child, were subjects which were not canvassed in evidence. The implication was that "pop-ups" are or lead to pornography, and that implication is one which appears to have been understood by all involved in the trial. Accepting that, the appellant offered no acceptable explanation as to why he saw it as his duty or role to enter into the subject of internet pornography in a private discussion at school with a 13 year old female pupil. He accepted that he was not qualified and that others were responsible for dealing with such life issues (assuming it to be appropriate at all to lead a 13 year old child beyond a normal discussion of the "birds and the bees" into the realm of sexual practices designed to achieve sexual pleasure otherwise than through sexual intercourse.)

[21] It is obvious that if the appellant was innocent of the charge put to him on count 1, then his extraordinary foray into graphic sexual terms and adult sexual behaviour must have taken place merely in his capacity as an educator. His difficulty is not only that others were responsible, especially when it came to the girls, for whatever life skills training the school provided, but also that he himself could not claim to be qualified in that regard at all; again, certainly when it came to girls. It was argued on his behalf that these exchanges amounted to nothing more than an error of judgment. Even if one accepts the appellant's version that the conversation was generated by enquiries from the complainant, and not at his instance (ignoring, for the moment, that on his own version it was he who raised the subject of internet pornography), the first enquiry from the complainant ought properly to have generated a referral to a female teacher qualified to deal with such enquiries. In my view the appellant had to know that. He was a teacher with 16 or more years experience. He himself said that there were rules about intimacy with pupils. For example, the "30cm" rule, mentioned by him, was apparently

designed to warn teachers to keep an adequate physical distance between themselves and pupils.

[22] In her evidence the complainant denied that the discussion about sexual terms arose out of a conversation about the internet. She could not remember precisely how it happened. She said that she thought he had asked her if she wanted to know what certain things were and that she had replied in the affirmative. Under cross-examination she agreed that she was curious. She said she was immature. She ascribed no intention to the appellant, motivating the conversation. She accepted that when she replied in the affirmative to the question as to whether she would like to know what each successive term meant, she was curious and in effect encouraged the appellant to carry on. In cross-examination she said she was uncomfortable but not disgusted. She accepted that she did not think about any repercussions, or where the questions were leading. She did not feel that the appellant had overstepped the mark. It strikes me that these reactions may perhaps be put down to what has been called the "precocious sexuality" of children newly entered into or during puberty. In her evidence the complainant herself said that "I was maybe physically mature, but emotionally and mentally, you are not all there – you learn – and that's what I was in." She said that she did not know that his conduct may constitute an offence.

[23] Later on in her cross-examination the issue that arises in respect of count 1 (that the conduct should be with the intention to encourage or persuade a child to indulge in sexual activity, or to reduce resistance or unwillingness in that regard) was put to the complainant with a view to getting her to express her opinion on what the appellant's intention was. She made no attempt to make of the case more than she could say it was. Her answer was "I don't know the intentions, I don't think I can comment". But when later on she was pressed and it was put to her that the exchange over sexual terminology was merely an "informative chat" her response was "I don't think his intentions were pure".

[24] Two other matters came to light and were dealt with somewhat crisply in the course of evidence of both the complainant and the appellant. In her evidence in chief it came out that a week or so before the discussion about sexual terminology the appellant had asked the complainant whether she wanted him to kiss her, and she said that her response was in the negative. Under cross-examination she was pressed on the subject as to whether there were any suggestions made in any form after he had described the sexual terminology, and that elicited the answer that the appellant had said that if she ever wanted someone to teach her or show her, he would do so. Both of these allegations were denied by the appellant; but strangely enough, despite the fact that some rather innocuous "contradictions" between her statement to the police and her evidence were raised in cross-examination of the complainant, these two allegations were not tackled in that fashion.

[25] The complainant was pressed on her curiosity. She was asked whether she remained curious after these terms had been explained to her. Her response was that the appellant had said to her that if she ever wanted to ask him anything she must come to him. She did so. About a week after the conversation about sexual terminology she asked him what a "scrotum" was. He gave her the answer. The appellant confirms this. These facts, about which there is no dispute, are not consistent with the proposition that the earlier exchange about sexual terms was a mere error of judgment on the appellant's part. They suggest an intention on the appellant's part to cultivate a facet of his relationship with the complainant which had been established during the earlier exchange.

[26] According to the complainant, a few weeks after the discussion on sexual terms, during November, and apparently quite close to the end of the school year, the events which gave rise to count 2 took place. The witnesses who dealt with it directly were the complainant, the appellant, and two of the complainant's friends whom I shall call "A" and "B". As will be seen Pastor Isaac dealt with this subject indirectly.

[27] A group of four friends were accustomed to take extra maths lessons from the appellant. It seems that this was normally done three at a time and that the usual composition of the group was A, B and the complainant. These lessons were given at the appellant's desk.

[28] The appellant's desk is one and a half metres long and only one metre wide. At the one end the desktop is supported by a pedestal which houses drawers. At the other end it is supported by a board which blocks a view underneath the table from that side, but otherwise performs no function other than to support the desktop. Being only 1,5 metres long the desk can only accommodate three students sitting opposite the appellant for a lesson. There is no dispute about the fact that B customarily sat in the middle with the complainant to her right and A to her left. The complainant and B were able to sit with their legs under the table. In the case of A the pedestal obstructed this comfortable straight-ahead seating arrangement.

[29] According to B these extra lessons took place about three times per month. A's estimate was once per week. During the course of such a lesson the girls sat with their work in front of them, writing in their books, and getting help from the appellant when it was required.

[30] The complainant dealt with the relevant events in her statement to the police (which was referred to on the subject, but, it will be recalled, not handed in); in her evidence in chief; under the cross-examination which followed her evidence in chief in the ordinary course; and finally when recalled after the close of the defence case, and after an inspection-in-loco had been held. The inspection-in-loco was presumably designed to allow the magistrate to acquaint herself with the place where the events the complainant spoke to were played out, and in particular with the appellant's desk and chairs, and the seating arrangements. Unfortunately there was no formal recording of the observations made during that inspection. Obviously, given the magistrate's verdict and judgment, the inspection satisfied the magistrate that the complainant's account of events could not be dismissed upon the basis that what she said happened could not possibly have occurred. The absence of a

formal record of the inspection-in-loco does not hinder us as an appeal court from accepting this finding.

[31] During the course of the extra lesson on this occasion the complainant says that the appellant placed his knee between her slightly parted legs under the table. He moved his knee from side to side between her thighs. She was wearing her school skirt. After a while he mouthed words at her, telling her to open her legs a little wider. He mouthed words to the complainant again, asking her if it felt nice; and she replied in the affirmative. He then removed his knee, moved himself forward so that his chest touched the edge of the table top, and placed his hands (or a hand) under the desk and under her skirt, and commenced caressing the complainant's inner mid thigh. This lasted some minutes before he stopped. The lesson ended and A and B left, leaving the complainant behind with the appellant, apparently not for long. In the absence of the other two the appellant asked the complainant what colour panties she was wearing. She replied that she did not know.

[32] On the appellant's version the complainant's account of the events on that day are a complete fabrication. During his evidence in chief, when he denied the occurrence, he claimed that he would have had to "crouch or go underneath the table" in order to touch the complainant's legs. In cross-examination he said that he would have to "go underneath, bend down and go underneath the table to touch her". He asserted that it was not possible to reach her from where he was sitting. That evidence may safely be rejected, but that does not mean that the appellant's denial should be rejected. All it means is that the events described by the complainant could have occurred.

[33] The complainant was subjected to extensive detailed cross-examination on two occasions concerning these events. Few stones were left unturned in the effort to discredit her. I would make the general observation that during the course of much of this questioning it seems to have been overlooked both by the appellant's attorney and by the magistrate that the person being cross-examined was only 15 years old. I give an example. The complainant had been asked earlier to estimate the gap between her knees at

a certain stage. Her knees were under the desk. It is not clear to me how in the circumstances she was supposed to make an estimate. Furthermore, the events had taken place two years before when she was 13 years of age. Nevertheless her answer was 15cm. She was cross-examined on this when recalled after the close of the appellant's case. A ruler was produced which resulted in the complainant having this proposition put to her. "So your knees were now 12cm, not 15cm apart." Observations like that do not advance the search for the truth at all, and only serve to harass. An adult witness may recognise an observation like that as a piece of foolishness. But directed at a 15 year old child there is a risk that the tactic becomes unfairly intimidatory. Before us counsel for the appellant argued that the extensive cross examination of the complainant on the subject of how the appellant moved his chair or his large frame in order to reach her thigh revealed inconsistencies which render the complainant's evidence unreliable. In my view no such inconsistencies were revealed, and counsel's submissions did not bring to account that one could hardly expect the complaint's memory for this aspect of the event to be anywhere near perfect given the distraction (to put it at its lowest) of what she says was going on under the desk.

[34] Other so-called contradictions with regard to the complainant's account of this event were raised in argument. For example the complainant was criticised upon the basis that her account of the events when she gave evidence in chief did not include the fact that the appellant moved or swung his knee between her thighs. It was put to her that she had said this in her statement to the police. She confirmed that and said that she had forgotten to mention that when giving her evidence in chief. In her evidence in chief, dealing with the appellant's request that she should open her legs wider, and his question as to whether she liked what was being done, she said that these words were "whispered". The magistrate herself saw something of a contradiction between this and the word the complainant finally used to described these communications, that is to say that the words were "mouthed". The criticism is not warranted. The complainant's evidence was clear. Her two friends heard nothing, despite the fact that the children were sitting very close to each other and very close to the teacher. It had to be that

at the material times A and B were leaning forward to their work on the table in front of them. It was clearly never the complainant's evidence that the appellant uttered the words in a manner capable of being heard by A and B. She may be criticised for struggling to find the correct word to describe the manner in which the appellant communicated with her, but not for having contradicted herself as to the facts of which she was attempting to give an account.

[35] B was the first of the complainant's two friends called by the defence. She described how she sat in the middle with A on her left and the complainant on her right. This was always the order in which they sat.

[36] This leading question was put to B during her evidence in chief, and the answer is reproduced as well.

> "And where would Mr Chetty's hands be throughout this session? --- On the table".

Exactly the same question and exactly the same answer, word for word, occurs in the transcript of the evidence in chief of A, who followed B as a witness. There was no reason why either girl should remember whether the appellant's hands disappeared from the table at any time during any of the frequent sessions. They did not know which extra lesson was the one during which the events they were commenting on allegedly occurred. They would have had no reason to be aware of whether the appellant removed a hand, or his hands, from the desktop at any time during any of the extra lessons.

[37] Both B and then A were asked to comment upon the proposition that the appellant had placed his knee between the complainant's thighs. The answer in each case was that it could not have happened because the witness would have noticed it, either by seeing or feeling it. One understands B's statement that she might have felt it, as she was sitting next to the complainant in a relatively confined space. But A was not. Neither of them could have seen what happened, if it happened, without drawing her upper

body backwards, away from the table, deliberately to peer under the table. They would not have done so unless something had caught their attention. In my view the complainant's evidence that her two friends could have seen what happened but did not see what happened coincides with that assessment. (The complainant says that if they had seen what had happened they would have raised it with her. That was the nature of their relationship. But they did not raise it with her.)

[38] The last witness called for the defence was Pastor Isaac. According to him, when during 2011 the State's witness statements were provided to the defence, the appellant decided to reveal to Pastor Isaac that there was, in addition to the allegation regarding the discussion of sexual terms, an allegation that the appellant had touched the complainant inappropriately in the manner presently under discussion. Pastor Isaac made his own investigation. He involved A and B in that investigation. The magistrate was criticised in argument on behalf of the appellant because in a few lines she concluded that the evidence of A and B did not take the matter much further. In my view her decision in that regard was correct. Her attitude may very well have been that the less said, the better. But perhaps, given the criticism of the magistrate, I should mention that, reading the record, one sees that there is a real possibility that, concerning the evidence of what could or could not have happened at the appellant's desk, A and B had either deliberately or inadvertently been coached, presumably by Pastor Isaac. The thrust of the evidence of A and B was that what the complainant said had happened was impossible. The appellant's attorney thought that Pastor Isaac was going to say the same thing, but was presumably disappointed, as this exchange during his evidence in chief on the subject of his investigation reveals.

> "And your finding was that it was impossible for the accused to have done something like this, or something like the allegations that were brought against him. --- I said unlikely, improbable."

[39] Two other features of the appellant's evidence concerning these events should be mentioned. Firstly, it was put to the complainant under cross-

examination that the appellant would say that he may inadvertently have touched her leg with his, but not deliberately. He did not confirm this when he gave evidence. Secondly, in his evidence in chief, dealing with the events of "touching", he spoke mostly in general terms about what would happen when the teaching sessions with the three girls were taking place. But sometimes he used language which conveyed that he knew which occasion of extra tuition the complainant had been speaking about in her evidence. It may be, however, that this merely reflected a deficiency in the appellant's language skills.

[40] According to the complainant the next day she sought the appellant out in a room where the teachers would go to work, and where books and the like were stored. The purpose of the visit was to tell him that he must not again do what he had done the day before. She found him sitting on a couch in that room. She approached him, standing on one side of the couch. He put his hand under her skirt just over her knee. He asked her if she had told anyone what had happened the day before. She told him that he must not do that to her again. The appellant was asked to comment on this evidence under cross-examination. The only answer he offered was "well, I didn't touch her on her legs". He did not deny meeting with the complainant in the room, where they were alone; nor that any discussion at all had taken place regarding his conduct and his relationship with the complainant. This was notwithstanding the fact that the complainant's evidence concerning this meeting was repeated to him before he was asked to comment, and notwithstanding his acknowledgment that he had heard what the complainant had to say about it. On the other hand, the cross-examiner did not press the point, and insist that the appellant deal with the issue in more detail. Nevertheless when the complainant was cross-examined concerning this meeting, it was not put to her that no such meeting took place. The appellant's attorney took the opportunity of extracting concessions from the complainant that she felt confident and comfortable telling the appellant not to do it again, and that she had expected him to comply.

[41] Over the school holiday between the 2010 and 2011 academic years the complainant says that she became sensitive to the fact that what had occurred in 2010 was wrong. This exchange between the magistrate and the complainant illustrates the complainant's evidence as to her state of mind.

> "Now, I need you to tell me and I need you to be clear now, if you are not happy that your dad can hear – listen to this – it may be uncomfortable to hear. We are all past that now. You know we are here already. There is a case we just need to hear you – alright. --- I let these things happen to me.
> I can't hear you. --- I let things like these happen to me.
> That you let it happen? --- Yes.
> What did you let happen to you? --- I let him talk to me like that and let him touch me."

[42] According to the complainant on the first day back at school in 2011 she went up to the appellant's table and he said to her that "all the funny things that happened last year weren't going to happen again". Her response was "you know what, I don't want to be close like how we were last year". According to the appellant the complainant informed him that she did not want to discuss "these terms, these terminologies and stuff like that, again". He said that he thought she said that on the first day of school in 2011.

[43] The complainant's mother's evidence explains how this case reached the courts. She had heard some rumours that the appellant was touching the girls at the school. She initially did not believe it. But she decided to ask the complainant whether she knew anything about this. The complainant replied in the negative. She told the complainant that if anything was going on she (the complainant) should tell her parents. The complainant's mother then decided that she should ask the question again. The story came out. A meeting with Pastor Isaac was one of the products of this. It was by all accounts unsatisfactory. The details of the meeting, and how it came about, as well as details concerning certain SMSs sent during the long holiday, do not contribute anything to the ultimate decision in this appeal. There are,

however, two matters of some importance arising from the meeting. According to Pastor Isaac he spent about half an hour questioning the appellant in advance of the arrival of the complainant's parents for the meeting. During that time the appellant did not disclose to him that he had discussed the sexual terms referred to earlier with the complainant. During the meeting the complainant's father challenged the appellant on this issue and the appellant denied the allegation that he had described sexual terms to the complainant. The complainant's father was justifiably upset at the time and appears to have behaved aggressively. The appellant explained that he made his denial because he was scared – "because the father woke up to hit me". However it appears that it took some months before the appellant confessed to Pastor Isaac that the discussion on sexual terms had in fact taken place. The other observation to be made is that according to the complainant's mother, at the meeting the appellant raised the question of the complainant's so-called boyfriend, saying that you couldn't believe what the complainant was saying. According to the complainant's mother the appellant said that the complainant was not a good girl – "she was a loose girl, a bad girl". This evidence was not contradicted by either the appellant or Pastor Isaac. It is not consistent with the appellant's contention that he denied the discussion of sexual terms because he was scared. One would have thought that such a slight on his daughter's character would have enraged the complainant's father even more than an admission that a discussion of sexual terms had taken place.

[44] The final witness called by the State was a R……. G……... She was 24 years of age when she gave evidence and she spoke of events that had occurred in 2004 when she was 15 years of age. Miss G……. on one occasion asked the appellant to draw a picture for her and he offered to draw the picture on her hand. She became uncomfortable because, she said, he held her hand in a seductive way. On another occasion she was at his table getting assistance. Her cousin was there as well. The appellant put his hand on her knee and she pushed it away. Her cousin saw this and reported it, as a result of which Miss G.....'s father challenged the principal and Pastor Isaac at a meeting, which resulted in an apology both to her and to her

parents. When she was cross-examined it was put to her by the appellant's attorney that the appellant told her that he had "possibly" fallen in love with her and that he wanted to marry her. Miss G..... confirmed this.

[45] Miss G……. was called despite an objection from the appellant's attorney (who had access to Miss G…….'s statement) that her evidence would be irrelevant. There was merit in this objection. There is a considerable distance between the events described by Miss G……. and those involving the complainant. There was nothing trivial about the inappropriate conduct of the appellant towards Miss G……... Her father was right to be angry about it. However what the complainant described was something far more crude and openly sexual in nature. It involved no protestations of love on the part of the appellant, which is unsurprising bearing in mind that he was seven years older by the time he behaved inappropriately (on anyone's version) with the complainant, and bearing in mind the fact that the complainant was two years younger than Miss G……. was when she was confronted with misconduct on the part of the appellant. Accordingly, upon the basis that Miss G…….'s evidence was tendered as similar fact evidence, it was disqualified at the first hurdle.

[46] In dealing with the evidence the magistrate observed that the appellant's interaction with Miss G……. did not go to prove that he was guilty of the current offence, and that it would be improper to reason in that fashion. However the magistrate found that it was permissible to accept Miss G…….'s evidence on the basis that it showed "that it is not impossible or improbable that the [appellant] behaved in an inappropriate or improper manner towards a student." In my view the magistrate in effect found that Miss G…….'s evidence went to the appellant's character. For that reason also the evidence ought to have been disregarded. There was no connection between the two sets of facts as regards their circumstances, or as regards proximity of time or method. (*R v Bond* 1906 2 KB 389 at 424.) What occurred in the case of Miss G..... could not generate an inference as to the existence of the facts in issue in the present case. (*S v Green* 1962 (3) SA 886 (A) at 894 D – E.)

[47] It is not clear that the evidence of Miss G..... was taken into account by the magistrate when she found that the State had proved the complainant's version of events to be correct. (The credibility finding in favour of the complainant and against the appellant appears in the judgment before Miss G.....'s evidence is dealt with.) Proceeding upon the assumption that the magistrate did misdirect herself by allowing Miss G.....'s evidence to influence her decision, I am nevertheless of the view that the magistrate's assessment of and preference for the State case was well and properly founded.

[48] The magistrate did not find the appellant to be a satisfactory witness. He did not impress the court. To the extent that it can, a reading of the transcript suggests that the magistrate's assessment of his evidence was correct. It is clear that the appellant was an evasive witness. As already pointed out there were obvious contradictions between the appellant's evidence and the instructions he gave his attorney. Passages in his evidence where he attempted to explain how he came to be discussing crude sexual terms with a 13 year old girl are, to say the least, unconvincing. His dishonesty after the event, and his delay in confessing to his employer that he had discussed sexual terms with the complainant, is inconsistent with his contention that the crucial conversation between them was nothing more than an innocent "informative chat" or the product of an error of judgment.

[49] Of course, as the magistrate warned herself, there was no onus on the appellant to prove his innocence. Likewise, as the magistrate again warned herself, in relation to both the discussion of sexual terms and the touching of the complainant's thigh, the complainant was a single witness, and a child. The magistrate approached her assessment of the complainant's evidence, with reference to *R v Mokoena* 1932 OPD 79, upon the basis that it was required to be clear and satisfactory in every material respect.

[50] I explained at the outset that many of the criticisms of the complainant made in argument simply had no foundation in the record. With respect to a

number of instances counsel for the appellant offered the criticism that the complainant was tailoring her evidence. I can find no instance where the criticism was justified, and indeed in none of them can I see why it would have been necessary for the complainant to tailor her evidence. On the contrary, the complainant was remarkably candid about her own role in the events which took place. Another example would not be out of place. Under cross-examination she was challenged as to why she did not report what had happened. The complainant's answer was that she realised a bad thing had happened, that she was embarrassed and did not want anybody to know about it. The questioning continued.

> "Was this because you had consented to this whole thing happening, is that why you felt bad? --- When I rethought what happened, yes.
> Did you think it was your fault? --- What I do know is that I do have a part to blame but it is not the whole thing, I don't deserve all the blame. I do know what I did was wrong but I don't deserve all the blame."

[51] The magistrate found that the complainant testified in a convincing fashion and that, despite her age, she gave her evidence clearly and satisfactorily. Judging from the record that assessment was correct. The complainant's answers to questions were direct. When she could not remember a detail she said so. She spoke directly without any attempt to escape responsibility, or to downplay her own role. The record of her evidence is impressive. It was nevertheless not flawless, but in my view the magistrate cannot be faulted for having come to the conclusion that it was trustworthy, notwithstanding any shortcomings. (See *S v Sauls and Others* 1981 (3) SA 172 (A) at 180 C – H.) There were no faults in her evidence which would not be explained by the fact that she was a young child when testifying, and speaking on a difficult subject two years after the events had taken place.

[52] Insofar as the probabilities are concerned, if the appellant's version is the truth then the complainant's evidence was a remarkable fabrication.

Whilst it is correct that perhaps especially in sexual cases motives may remain well hidden, it should nevertheless be observed that the evidence in this case revealed no motive for the complainant to invent the story she told. On the contrary, her relationship with the appellant was a good one, and one gains a clear impression that but for the incident of touching the complainant would have regarded the discussion of sexual terms as water under the bridge. It is clear from both of the slightly different accounts of the verbal exchange between the complainant and the appellant on the first day of school in 2011, that the complainant had decided to leave well alone, and deal with what had happened on her own, despite the fact that she had come to realise the import of what had occurred whilst reflecting on it during the long school holiday. Insofar as the episode of touching is concerned, it is improbable that a 13 year old child, presumably unaware of the irrationality of human sexual urges (see *Kruger;* Hiemstra's Criminal Procedure, page 24–9), would invent an account of inappropriate touching taking place in the circumstances she described. She would anticipate that the presence and such close proximity of witnesses (her friends) would lead to her story being disbelieved. Placing a false account of inappropriate touching in, for instance, the room in which the complainant confronted the appellant the next day, would have been a more obvious course to follow.

[53] In the circumstances I am satisfied that the magistrate was correct in accepting the complainant's version of events. That of the appellant was rightly rejected as false beyond doubt.

[54] The offence created by s 18 (2) (b) of the Amendment Act is a new one in our law. Before the Amendment Act came into operation Satchwell J in *S v M* 2007 (2) SACR 60 (W) para [37] said that grooming "involves an aspect of deceptive trust created by the offender and manipulation of the child by the adult". In *R v Legare* [2009] 3 SCR 551 Fish J, dealing with the offence created by the Canadian Criminal Code which prohibits the use of computers to communicate with underage persons for the purpose of "facilitating" the commission of a secondary (sexual) offence, said this concerning the concept of "facilitating".

> "In this context, "facilitating" includes helping to bring about and making easier or more probable – for example, by "luring" or "grooming" young persons to commit or participate in the prohibited conduct; by reducing their inhibitions; or by prurient discourse that exploits a young person's curiosity, immaturity or precocious sexuality".

[55] It seems to me that s 18 (2) (b) of the Amendment Act strikes at two forms of adult misconduct. There is a difference between, on the one hand, conduct with the intention to "encourage or persuade" a child to perform a sexual act; and, on the other, conduct with the intention to "diminish or reduce any resistance or unwillingness" on the part of the child to engage in a sexual act. It may be an answer to the first to say that "I would not have done it" and therefore lacked intention, but not to the second. In argument counsel for the appellant aptly described the second phenomenon as the "erosion of resistance". Manipulation of a child's sexual psyche by an adult for his or her own amusement or sexual diversion is harmful conduct which may have far reaching consequences for the child, even if the adult has no intention of ultimately performing any overt sexual act with the child.

[56] The conviction on count one was not challenged upon the basis that, if the complainant's evidence was accepted, it did not establish that the appellant had the intention required by s 18 (2) (b) of the Amendment Act. In my view the decision not to challenge this aspect of the case was correct. The appellant must have understood that, within the framework of the relationship that had developed between him and the complainant, a private and intimate explanation in full detail of the type of sexual activities he explained to her would have the effect of reducing her inhibitions and of diminishing a 13 year old girl's natural resistance or unwillingness to indulge in a sexual act with the person with whom such intimacies were shared. The episode of touching which followed a little later removes any residual reasonable doubt as to whether the appellant's intention fell within the section under which he was charged.

[57] In the circumstances the appeal against the conviction on count 1 cannot succeed.

[58] Turning to count 2, the conviction of common assault is based on the incident of inappropriate touching already dealt with extensively above. On appeal the State was not inclined to support the conviction, substantially because of the close connection between that incident and count 1.

[59] The following was said in *S v Maneli* 2009 (1) SACR 509 (SCA) para [8] on the subject of improper duplication of convictions.

> "To determine whether there has been an improper duplication of convictions the courts have formulated certain tests. However, these tests are not equally applicable in every case. One such test is to ask whether two or more acts were done with a single intent and constitute one continuous criminal transaction. Another is to ask whether the evidence necessary to establish one crime involves proving another crime."

[60] It seems to me that it is fair to conclude that the incident of inappropriate touching was a substantial element of the State's case in proving the requisite intention for a conviction on count 1.

[61] If that approach is perhaps technically deficient, it does seem that fairness calls for the appellant to be allowed the benefit of accepting that the conviction of common assault is in fact a duplicate conviction. Concerning the rules applicable in these cases the majority judgment in *S v Whitehead and Others* 2008 (1) SACR 431 (SCA) para [35] had this to say.

> "They are simply useful practical guides and in the ultimate instance, if these tests fail to provide a satisfactory answer, the matter is correctly left to the common sense, wisdom, experience and sense of fairness of the court."

[62] The appeal against the conviction on count 2 must accordingly succeed.

[63] It should be mentioned that it is not at all clear that the charge sheet relating to count 2 was one which qualifies under s 261 (2) of the Criminal Procedure Act as a charge of sexual assault "as contemplated in section 5" of the Amendment Act. If it was not, then common assault was not a competent verdict. There is no need to decide that issue.

In the result, the following orders are made.

1. **The appeal against the conviction and sentence on Count 1 (sexual grooming) is dismissed. The conviction and sentence are confirmed.**

2. **The appeal against the conviction of common assault on Count 2 is upheld, and that conviction is set aside, together with the sentence of a fine of R1000 imposed in respect of it.**

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OLSEN J

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HENRIQUES J

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V NAIDOO AJ

Dates of Hearing:	TUESDAY, 14 APRIL 2015 TUESDAY, 11 AUGUST 2015 (Full Court constituted in terms of s14(3) of the Superior Courts Act.)
Date of Judgment: :	FRIDAY, 21 AUGUST 2015
For the Appellant :	Mr R Mohamed
Instructed by:	PETER NAICKER ATTORNEYS Appellant's Attorneys Suite 911 Salmon Grove Chambers 407 Smith Street Durban (Ref.: Ms Choudree) (Tel No.: 031 – 3072651))
For the State:	Ms S Senekal & Ms Jacobs
Instructed by:	Director of Public Prosecutions Respondent's Attorneys 3rd Floor 301 Church Street Pietermaritzburg (Ref.: Ms S Senekal / Ms Jacobs) (Tel.: 031 – 3345114 / 033 – 845 4400)