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

REPORTABLE
Case No: AR 764/2014

In the matter between:

ZF **Appellant**

And

THE STATE **Respondent**

JUDGMENT **Delivered on: 22 October 2015**

Gorven J:

[1] The appellant was charged with five offences in the Regional Court, Durban. These were:

Count 1: Indecent assault;

Count 2: Rape;

Count 3: Rape;

Count 4: Assault with intent to do grievous bodily harm;

Count 5: Rape by way of a contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act[1] read with s 51 of the Criminal Law Amendment Act[2] (the CLA Act) and further read with s 94 of the Criminal Procedure Act 51 of 1977[3] (the Act).

[2] It was alleged that all the crimes were committed against P, his biological daughter. The first two counts were alleged to have taken place in 2006, the third 2007 and the fourth and fifth in 2008. In the fifth two rapes were alleged. Before the appellant pleaded, the reliance of the State on the provisions of the CLA Act as regards count 5 was drawn to his attention.[4]

[3] The appellant was legally represented throughout. He pleaded not guilty to all the counts and gave no plea explanation. He denied all of the allegations in the charges. He admitted that P was his biological daughter. On 26 November 2010, he was convicted as charged on all five counts. The following sentences were imposed. For count 1, five years' imprisonment. For counts 2 and 3, twelve years' imprisonment each. For count 4, three years' imprisonment and for count 5, life imprisonment. The sentences on counts 1 and 4 were made to run concurrently as were those on counts 2 and 3. Apart from the sentence of life imprisonment, therefore, the effective sentence was one of 17 years' imprisonment. The sentences were imposed on 2 December 2010. This appeal is against the convictions and sentences, with the leave of the court a quo.

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[1] Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
[2] Criminal Law Amendment Act 105 of 1997.
[3] On 16 December 2007 the Criminal Law (Sexual Offences and Related Matters) Amendment Act abolished the common law crimes of rape and *crimen injuria* and replaced them with statutory offences. Counts 1, 2 and 3 predated this but the Act applies to count 5.
[4] There is no indication why the State did not rely on the CLA Act for counts 2 and 3.

[4] At the outset of the trial, the State brought an application in terms of s 170A of the Act for the use of an intermediary whilst P gave evidence. At the time, P was 20 years old. The magistrate asked the legal representative of the appellant whether there was any objection to the application. There was none. The magistrate then granted the application. The services of the intermediary were utilised during P's evidence. There is no issue that the intermediary was a person qualified to act as such under s 170A or that she did so appropriately and competently. On appeal, however, the appellant took the point that s 170A(1) did not entitle the magistrate to grant such an application because P was over the biological and mental age of 18 years. This was said to amount to an irregularity which vitiated the proceedings.

[5] The relevant part of s 170A(1) reads as follows:

'Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological or mental age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may . . . appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.'

[6] The first question to determine is whether the use of the intermediary amounted to an irregularity. For this purpose, s 170A(1) must be construed. This subsection was amended in 2007. Before it was amended, it simply referred to the age of 18 years. In *S v Dayimani*,[5] Plaskett J held that this excluded mental age and meant only a biological age of less than 18 years. The amendment makes it clear that a biological and a mental age of less than 18 years both qualify for the use of an intermediary if the other requirements of the section are met. In *Director of Public Prosecutions, Transvaal v Minister of*

[5] *S v Dayimani* 2006 (2) SACR 594 (E).

Justice and Constitutional Development & others,[6] (*DPP, Transvaal*) the section was subjected to a constitutional challenge but was found to pass muster.

[7] It is significant that the rationale underlying the decision of the Constitutional Court in *DPP, Transvaal* was that the section was designed to protect children. Ngcobo J dealt with this aspect by saying, of the enquiry to be conducted by judicial officers to determine whether an intermediary should be appointed:

'The overriding consideration at that enquiry is to prevent the child from exposure to undue stress that may arise from testifying in court. What is required of the judicial officer is to consider whether, on the evidence presented to him or her, viewed in the light of the objectives of the Constitution and the subsection, it is in the best interests of the child that an intermediary be appointed.

[116] Following the approach outlined here not only protects child complainants from unnecessary trauma, it helps to ensure that the trial court receives evidence that is more freely presented, more likely to be true and better understood by the court. Given the special vulnerability of the child witness, the fairness of the trial accordingly stands to be enhanced rather than impeded by the use of these procedures. In my view, these special procedures should not be seen as justifiable limitations on the right to a fair trial, but as measures conducive to a trial that is fair to all.'[7]

And later:

'To conclude, therefore, s 170A(1) is designed to ensure the paramountcy of the best interests of the child complainant in criminal proceedings in which the child testifies. Properly interpreted and applied in the light of s 28(2) of the Constitution and its objective, as it must be, the subsection achieves that end. It does not exclude the protection that s 28(2) requires to be afforded to children.'[8]

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[6] *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & others* 2009 (4) SA 222 (CC).
[7] Paragraphs 115 and 116.
[8] Paragraph 130.

[8] It is clear that the Constitutional Court related s 170A to the imperative in s 28(2) of the Constitution[9] that the interests of the child are paramount in any matter relating to the child. This section is therefore properly understood as having been designed for the benefit of children, who, under our law, become adults at age 18. In argument before us, the State submitted that no irregularity occurred in this matter. In support of this submission, we were referred to an unreported judgment in the matter of *S v Hewitt*.[10] That judgment was given in an application for leave to appeal against the certification, on special review, that proceedings in the magistrates' court in a trial for rape were in accordance with justice. Leaving aside the fact that no appeal lies from such certification, D Pillay J considered a similar situation to that facing us. The complainant, when testifying, was just over the age of 18 and an intermediary had been appointed, ostensibly in terms of s 170A. The learned judge construed the section and, having considered *DPP, Transvaal*, held that no irregularity had occurred. Her reasoning was as follows:

'By setting 18 years as the age limit for protection, the legislature impliedly accepted that complainants up to that age are vulnerable. Circumstances may be that a child witness under 18 is not vulnerable or an adult witness is vulnerable. Therefore, I interpret s 170A(1) to mean that age limit of 18 years to be a guideline (*sic*). It is but one indication of the capability of a witness to testify, namely her biological level of maturity. Emotional and psychological maturity must also be factored into the discretion. By treating the section as a guideline assures its constitutional validity (*sic*). Treating the age of 18 years as a jurisdictional prerequisite, injects an inflexibility that defeats the purpose of the section.'

[9] I respectfully disagree with this conclusion and with the reasoning employed by the learned judge. In the first place, whilst it seeks support from *DPP, Transvaal*, no such support is to be found there. Secondly, the finding that the legislature did not mean to limit the application of s 170A to those under the

[9] Constitution of the Republic of South Africa, 1996.
[10] *S v Hewitt* Review case no. DR349/11, KwaZulu-Natal Local Division, Durban.

age of 18 is contrary to the principles of interpretation of documents. The correct approach has been set out in *Cool Ideas 1186 CC v Hubbard & another*,[11] as follows:

'A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).'[12]

[10] The ordinary grammatical meaning is that the section applies only to those under the biological or mental age of 18. This leads to no absurdity. Special considerations apply to child witnesses. I see no reason why including only children and those with a mental age of less than 18 is absurd. In addition, after it was held that only those under the biological age of 18 qualified, the section was amended to include those under the mental age of 18. No further categories were included. This is an indication that the legislature intended to exclude all adults who also have a mental age of 18 or over. There are other protections given to adult and other witnesses who don't qualify under s 170A to reduce potential trauma. One example is s 158(2) of the Act which allows for evidence to be given by means of closed circuit television or similar electronic media. In addition to the interpretation not leading to an absurdity, the three interrelated riders favour this construction. The purpose of s 170A was held to be 'to ensure the paramountcy of the best interests of the child complainant in

[11] *Cool Ideas 1186 CC v Hubbard & Another* 2014 (4) SA 474 (CC) para 28.
[12] References omitted.

criminal proceedings in which the child testifies.'[13] That is also the context of the provision. Constitutional validity is not threatened by this approach. In my view, accordingly, *Hewitt* is wrongly decided and should not be followed.

[11] I conclude that the use of the intermediary in this matter gave rise to an irregularity. What, then, is the effect of this? The law in this regard is clearly stated in *S v Naidoo*,[14] as follows:

'But irregularities vary in nature and degree. Broadly speaking they fall into two categories. There are irregularities (fortunately rare) which are of so gross a nature as *per se* to vitiate the trial. In such a case the Court of Appeal sets aside the conviction without reference to the merits. There remains thus neither a conviction nor an acquittal on the merits, and the accused can be re-tried in terms of sec. 370 *(c)* of the Criminal Code. That was the position in *Moodie's* case, in which the irregularity of the deputy sheriff remaining closeted with the jury throughout their two hour deliberation was regarded as so gross as to vitiate the whole trial.

On the other hand there are irregularities of a lesser nature (and happily even these are not frequent) in which the Court of Appeal is able to separate the bad from the good, and to consider the merits of the case, including any findings as to the credibility of witnesses. If in the result it comes to the conclusion that a reasonable trial Court, properly directing itself, would inevitably have convicted, it dismisses the appeal, and the conviction stands as one on the merits. But if, on the merits, it cannot come to that conclusion, it sets aside the conviction, and this amounts to an acquittal on the merits. In such a case sec. 370 *(c)* of the Code does not permit of a re-trial. That was the position in *Naidoo's* case, in which the failure to swear an interpreter at one stage, resulted in certain evidence being regarded as inadmissible.'

The reference in the quote to '*Naidoo's* case' is to a different matter.[15] There the reasoning was that an interpreter is a witness who gives evidence as to what the person testifying is saying in a different language. If the interpreter is not sworn in, his or her evidence is inadmissible. The evidence given through an unsworn interpreter was thus excluded from consideration. The court held that, after

[13] *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & others* 2009 (4) SA 222 (CC) para 130.
[14] *S v Naidoo* 1962 (4) SA 348 (A) at 354D-H.
[15] *S v Naidoo* 1962 (2) SA 625 (A).

'separating the bad from the good', there was not sufficient admissible evidence to support a conviction.

[12] It was submitted that the irregularity in the present matter was so severe as to *per se* vitiate the proceedings at the trial. No motivation was given for this submission other than that the use of the intermediary was not provided for in s 170A. There is a two stage enquiry as to the effect of this irregularity.

[13] The first stage is to determine whether, as was the case in *Naidoo*, the irregularity resulted in the evidence of P being inadmissible. If so, the balance of the evidence cannot sustain any of the convictions. This is because P was the sole witness to each of the counts. In *Dayimani*,[16] Plasket J found, by analogy with the position of an interpreter, that the evidence thus adduced was inadmissible:

'This being so the magistrate erred fundamentally in allowing the evidence of the complainant to be given with the assistance of an intermediary. Section 170A of the Criminal Procedure Act simply had no application in this matter and could not have been invoked. It follows, in my view, that this defect renders the evidence of the complainant inadmissible. See in this regard the analogous case of *S v Sydow* 2003 (2) SACR 302 (C) at 308*e* in which it was held that evidence given by a complainant through an interpreter who had not taken the oath in terms of Rule 68 of the Magistrates' Courts Rules was inadmissible. See, too, *S v Booi and Another (supra* at para [29]) in which Mogoeng JP held that, where intermediaries had been improperly appointed because they were not qualified and the magistrate had not complied with the requirements of s 170A, the accused had not been given a fair trial and their convictions had to be set aside.'[17]

[14] It can be seen that Plasket J relied on the approach in *S v Sydow*[18] and *S v Booi & another*[19] for his finding. He did not analyse the respective roles of an

[16] *S v Dayimani* 2006 (2) SACR 594 (E).
[17] Paragraph 10.
[18] *S v Sydow* 2003 (2) SACR 302 (C) at 308*e*.
[19] *S v Booi & another* 2005 (1) SACR 599 (B).

interpreter and an intermediary. In *S v QN*,[20] I had occasion to conduct this analysis. In that matter, the issue was whether the failure of an intermediary to take an oath amounted to an irregularity. It was held that it did not, disagreeing with the finding in *Booi* in this regard. In arriving at that conclusion, the following was said:

'The analogy between an interpreter and an intermediary breaks down when one considers the situation where a case is conducted in English, with an English-speaking accused, a child witness whose home language is likewise English, and an English-speaking presiding officer and lawyers. There is then no question of interpretation. A question is posed and where appropriate the intermediary reformulates it for the child in non-threatening language. The child then answers. All of this is done in a language common to all the participants in the process. On what basis in that case can it be said that the intermediary must be sworn? Clearly there is no reason for that to be done. The "requirement" that this be done cannot therefore flow from anything inherent in the role of the intermediary. Once it is recognised that the witness must give her own answers to questions, however and by whom they have been formulated, the intermediary is not conveying the evidence to the court as does an interpreter. These examples illustrate the point that the analogy between the two is a false one.'[21]

[15] I see no reason why the use of an intermediary in the present matter resulted in the evidence given by P being rendered inadmissible. To that extent, I respectfully disagree with *Dayimani*. The answers given were hers. In that regard, her evidence complied with s 161 of the Act.[22] The use of the intermediary in reframing questions put to her was not said to have affected her evidence in any way. There was no indication from the record or submission by the appellant that he had been prejudiced or that cross-examination of P had been curtailed. In this regard, in *K v The Regional Court Magistrate NO &*

[20] *S v QN* 2012 (1) SACR 380 (KZP).
[21] Paragraph 22.
[22] Section 161 of the Act reads:
'A witness at criminal proceedings shall, except where this Act or any other law expressly provides otherwise, give his [or her] evidence *viva voce*.'

others,[23] an early challenge was mounted to the constitutionality of s 170A. In dismissing the challenge, the following was said:

'[T]he Judge or magistrate who presides at the trial controls the proceedings and is able to see to it that the intermediary carries out his function properly and without prejudice to the accused.'[24]

There is no indication that this did not take place in the present matter, despite the fact that the intermediary should not have been appointed.

[16] Because the evidence of P was not rendered inadmissible, the final question to determine is whether the irregularity resulted in a failure of justice.[25] Although no special entry was made concerning the irregularity, the principles remain the same. The basic principle is that an accused must be fairly tried[26] and be afforded an opportunity to adduce and challenge evidence.[27] Despite being offered the opportunity to point to any failure of justice, the appellant could point to none. Neither can I find any. In the event, the evidence of P was properly taken into consideration by the magistrate and must be taken into consideration in the appeal.

[17] The appellant, however, raised a further irregularity. This relates to the circumstances under which an affidavit under s 212(4) of the Act was admitted into evidence in the face of an objection on the part of the appellant's legal representative at the trial. The affidavit dealt with form J88, the medical report of the doctor who examined P on 14 June 2008. The prosecutrix claimed to be handing in the J88 by consent. At that stage, there was no s 212(4) affidavit covering it. The appellant objected and made it clear that he did not consent. The prosecutrix then attempted to motivate its acceptance into evidence on the

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[23] *K v The Regional Court Magistrate NO & others* 1996 (1) SACR 434 (E).
[24] At 448*e-f*.
[25] *S v Felthun* 1999 (1) SACR 481 (SCA) at 485I–486A.
[26] S v Xaba 1983 (3) SA 717 (A) at 728D.
[27] S35(3)(i) of the Constitution of the Republic of South Africa, 1996.

basis that the doctor in question was deceased. The matter stood down. On resumption, the prosecutrix informed the Court that she had established that the doctor was not deceased. There were two doctors with the same surname, one of whom had died. The doctor who compiled the J88 had not been subpoenaed as a result of the incorrect belief of the prosecutrix that it was he who was deceased. She requested an adjournment so as to subpoena the doctor to testify.

[18] On resumption, the prosecutrix indicated that the doctor had deposed to an affidavit in terms of Section 212(4) covering the J88 and sought to hand it in. The appellant objected, saying that certain of the facts, let alone opinions, contained in the J88 would be challenged and that certain matters required an explanation from the doctor. The magistrate then made a ruling accepting the J88 in terms of s 212(4) and saying that the appellant could not oppose this but must indicate what it is that he objects to and that it is his duty to lead evidence to rebut that aspect.

[19] Section 212(4) allows for the use of an affidavit relating to a fact which is established by an examination or process requiring a skill. The mere production is '*prima facie* proof of such fact'. The effect of this was spelt out in *Ex parte Minister of Justice: In re R v Jacobson & Levy*,[28] as follows:

'"*Prima facie*" evidence in its more usual sense, is used to mean *prima facie* proof of an issue the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the *prima facie* proof becomes conclusive proof and the party giving it discharges his *onus*.'

In a case, such as the present one, where only the doctor was present at the examination and no evidence could be led in rebuttal of his observations, the use of s 212(4) places an accused person in an invidious position. The *prima*

[28] *Ex parte Minister of Justice: In re R v Jacobson & Levy* 1931 AD 466 at 478.

facie proof will lead ineluctably to conclusive proof. It is presumably for that reason that s 212(12) was enacted. The material parts say:

'The court before which an affidavit or certificate is under any of the preceding provisions of this section produced as *prima facie* proof of the relevant contents thereof, may in its discretion cause the person who made the affidavit or issued the certificate to be subpoenaed to give oral evidence in the proceedings in question . . .'.

[20] In view of the approach I take to this matter, it is not necessary to consider whether, and if so under what circumstances, a court can refuse to accept an affidavit which complies with s 212(4) into evidence. This may well implicate a constitutional issue and was not debated before us.[29] The situation which unfolded before the magistrate in this matter is one which *par excellence* called for the exercise of her discretion to require the doctor to give oral evidence. This is so even if the approach was couched in the form of an objection to the handing in of the s 212(4) affidavit. It was clear that the appellant wanted to challenge the doctor on aspects of his report. There is no indication that the doctor was not available or could not be subpoenaed; on the contrary, he had deposed to the s 212(4) affidavit that very day. I can only conclude that the magistrate did not exercise any discretion at all to have the doctor testify. Her failure to exercise a discretion clearly amounts to an irregularity. The admission of the J88 without the appellant being afforded the opportunity to cross-examine the doctor would have led to a failure of justice. In the circumstances, the J88 should have been excluded from consideration when evaluating the evidence.

[21] With those two issues out of the way, it can be considered whether, excluding the J88, the evidence supports the convictions. The State called P and four other witnesses. P testified to two incidents which took place in 2006, one

[29] See *S v Sithole* 2013 (1) SACR 298 (GNP); *Director of Public Prosecutions v Modise & another* 2012 (1) SACR 553 (GSJ); Du Toit et al *Commentary on the Criminal Procedure Act* p24-36B - 24-36C.

which took place in 2007 and three which took place in 2008. She lived with her aunt [N…….], the wife of her maternal uncle, and her cousin [M…..] at South Beach, Durban from at least 1993 until January 1999, when she was ten years old. She then went to live with the appellant and a person to whom the appellant was married in the customary sense after her husband, a cousin of the appellant, had died. P regarded this person as her stepmother. I shall refer to her as P's stepmother or the appellant's wife. The three of them lived at Avoca. P's biological mother died in March 1999.

[22] In the first incident in 2006, the appellant came to P's bed in the early hours of the morning. Her stepmother was away, visiting her mentally ill father. The appellant woke P and told her to remove her panties. When she asked why she should do so, he threatened to kill her. She then complied. He told her to open her legs and she again asked why she should do so. He told her not to keep asking questions otherwise he would kill her. When she opened her legs, the appellant inserted his finger into her vagina and said he was testing to see if she was a virgin. He asked where her hymen was but she did not know what he was referring to. He then told her to put on her clothes and left.

[23] About a week later, when her stepmother had not yet returned, the appellant again came to her in the early hours and told her to take off her panties. She again enquired why she should do so and he again told her not to keep asking questions. She did so and, at his instruction, opened her legs. He got on top of her and inserted his penis into her vagina and had sexual intercourse with her. Afterwards he left and told her not to tell anyone. The next day he took her to visit her paternal grandmother at KwaMashu. She did not tell anyone then because, she said, she was scared of the appellant because he was always hitting her and threatening to kill her if she did so. She could not remember the date in 2006 when these incidents took place.

[24] She first reported these two incidents in 2007 to one [N…….], on their way to the local shop. On her return from the shop, her cousin [M…….] noticed that she was crying and P then told her of these incidents. She asked [N……] and [M…….] not to tell anyone because she was scared.

[25] In November 2007, also while her stepmother was away, the appellant again came to P's bed and woke her. When she asked why she should wake, he told her just to wake up, take off her panties and open her legs. She kept on crying and asking why she should do so and he threatened to kill her if she continued to refuse. She complied and he inserted his penis into her vagina. He finished, told her to dress and said he was sorry and that he did not know what was going on with him. He asked her to forgive him and she agreed to do so. Later that morning he could see that P was still angry and he kept asking for her forgiveness. He told her to bath. The appellant and P then went to KwaMashu and found [N……] and others there. She told [N…….] that her father had raped her again. She again asked [N……] not to report it to the elders.

[26] One day, while visiting her grandmother at KwaMashu, she decided to go to South Beach to stay with [N……] because there were no children at KwaMashu. The appellant never allowed her to visit [N……] or to stay there. Whilst there and after her cousin [M…..] took a bath, P asked her if [M…..] was ever inspected for virginity by her father. [M……] asked what she meant and P kept quiet. [M……] then asked if P had been inspected by the appellant and P said that she had. P made [M……] promise not to tell [N……] but [M…..] nevertheless did so. P was scared because she knew that the appellant would hit her for having 'escaped' and going to stay there. When [M…….] told [N……], [N……] started crying and asked P whether the appellant had inspected her. She replied in the affirmative and [N……] then asked if the appellant had had

sexual intercourse with her. In her frightened state, P denied this, despite persistent questioning by [N……]. Her stepmother and then the appellant phoned and asked where she was. She told them she was going with [M…..] and [N…..] to her grandmother's house at KwaMashu. [M…..] and others accompanied her.

[27] When she got there, she was leaning at the front door and another cousin, [N…….], emerged and asked if she had ever been raped by the appellant. [N……] had been inside when [N…..], P's paternal grandmother and other family members were talking about P. She initially denied that the appellant had raped her but [N……] persisted and P eventually admitted it. [N……] then entered the house. Her uncles were returning from the appellant's house and [N…..]'s husband suggested that they meet the next day. The planned meeting took place but the appellant, despite having undertaken to attend, was absent. P was asked to tell her story whereupon [N…….] and her husband said that she should stay with them at South Beach. This took place in April 2008 just before the schools reopened.

[28] On 9 June 2008, P was to write an examination. The appellant was waiting for her by the school and said that her stepmother was sick. P said that he should approach the school authorities for permission for her to leave early that day. They went into the school and she told one Mr Sullivan about this. Mr Sullivan sent the appellant to fetch his identity book. The appellant left her at school. She left early and went to Avoca. She saw that her stepmother was not well but her stepmother said that she was going to visit P's grandmother who was also unwell and left. When P told the appellant that she was going to leave, he closed the door and tied her hands and feet with rope. He then struck her with his fist, causing a cut below the left eye and a cut to her leg. She did not count the number of blows he delivered but estimated that it was about five

blows. Her stepmother saw blood coming from her eye and asked what was happening. The appellant claimed that nothing had happened and that he had struck P because she was falsely accusing him.

[29] The appellant then said that P should phone her paternal grandmother and tell her that she was fine. She did so as she was scared of the appellant. She was then told to phone her aunts for the same purpose. When she phoned [N……], P could tell that she was at the police station. [N……] asked where she was and P told her that she was at Avoca. [N……] said that she and others were coming with the police. P asked her not to come with the police because she was scared. [N……] terminated the call and she, her husband and [M…..] went to Avoca to fetch P, without the police. The appellant saw them coming and took P out of the house and hid. The front door was open but eventually they left. This was at about 19h00 and, after they left, the appellant made P and her stepmother sleep in the bushes with him in case they returned.

[30] After waking while it was still dark, the appellant took them to Ndwedwe, a rural area, where they stayed with the [N…..] family. P was still in her school uniform from the previous day and some children at Ndwedwe brought her clothes to change into. The following day the appellant told P that he wanted to take her to the place where he used to stay with his mother and grandmother. He took her to a derelict house and, brandishing a knife, told her to undress. It appeared to P that some herbal ointment had been sprayed onto the knife. The appellant laid his jacket on the floor and told her to lie on the jacket, whereupon he inserted his penis into her vagina. While raping her, he made noises as if he was enjoying himself. She kept crying when he finished and moved away. He then burnt incense and reported to the ancestors that P was from the lady [N……'s] house who had passed away. Again, she was scared and told no-one on her return.

[31] The following day her stepmother was to leave. P wrote a note saying that the appellant had done it again. She mouthed to her stepmother that the appellant had done it again and slipped the note into her bag. Her stepmother suggested that she ask the appellant about this and P told her not to do so because he would kill her. After her stepmother left, the appellant told her that they were going to see a grandmother but again took her to the derelict house. He told P that she was pregnant and that he would have sexual intercourse with her so that she had a miscarriage. He also told her that if her stepmother returned the next day, P must ask for coke because she was thirsty and the appellant would give her tablets. He then raped her. After this they went to visit the grandmother and then boarded a bus back to [N……'s] house. She slept with the other girls there and took out a book and wrote another letter.

[32] The next day, Friday, her stepmother returned. She told P to take a bath but P only washed her feet and face. The three of them returned to Avoca. That night P took the letter and tried to escape by climbing through the bathroom window but it was too small. She had wanted to give it to [N…….'s] father next door to give to [N…….]. The appellant saw the letter and read it. He would not tell her stepmother what it said. He took P outside and asked her who she wanted to give the letter to. The appellant tore it up and kept threatening to assault her. They went back into the house and to bed.

[33] On Saturday, the appellant told P's stepmother to go to KwaMashu to tell her paternal grandmother that they were back. P cried and begged her not to go but the appellant insisted that he would do nothing to P. When her stepmother left, the appellant closed the door and said to her 'This is what you've been always wanting'. He went to the toilet and while he was in the toilet she escaped through a window in another room. She found a child and asked her to call her mother. She asked the mother to call the police. The police arrived and she

asked them to take her to hospital. They wanted to take her to an adult family member and she directed them to where her stepmother was at KwaMashu. Her stepmother was not there so they took her to [N……]. They went to the police station and thereafter to Addington Hospital where she was examined by a doctor.

[34] The evidence of P concerning the incidents is that of a single witness. It is trite that such evidence must be viewed with circumspection. It is clear that the magistrate did so. However, caution must not be equated with the abandonment of common sense.[30] As regards a single witness:

'The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told.'[31]

With this in mind, the evidence of P must be evaluated.

[35] On appeal P was criticised for not reporting the incidents until after a considerable time had elapsed. When she was asked about this in cross-examination, her steadfast answer was that, living as she was with the appellant, she feared him due to his threats to harm or kill her if she reported them. Her fear of the appellant, and that of others in his family including his traditional wife, lends credence to the testimony of P in this regard. It is further borne out by the fact that, when the appellant became aware that P had in fact disclosed this to family members, he lured her from school so as to keep her under his control and assaulted her, thus forming the basis for count 4. It is further confirmed by his general behaviour in preventing her from having free social interaction with other family members and, in particular, with [N……] with

[30] *S v Sauls & others* 1981 (3) SA 172 (A) at 180G.
[31] *Ibid* at 180E-F.

whom she had lived from 1993 until 1999. In *Monageng v The State*,[32] insight into the old chestnut as to a delay in reporting the rape was given:

'It is further widely accepted that there are many factors which may inhibit a rape victim from disclosing the assault immediately. Children who have been sexually abused, especially by a family member, often do not disclose their abuse and those who ultimately do may wait for long periods and even until adulthood for fear of retribution, feelings of complicity, embarrassment, guilt, shame and other social and familial consequences of disclosure.11 Significantly, the newly passed Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 provides, in s 59, that 'in criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof'. Raising a hue and cry and collapsing in a trembling and sobbing heap is not the benchmark for determining whether or not a woman has been raped. There was thus nothing unusual about the complainant's behaviour and her explanation for not immediately reporting the appellant is plausible.'

These remarks apply equally to the present matter. It is more than understandable that she delayed reporting the incidents.

[36] P's evidence further has a ring of truth. She was not prone to exaggeration. As regards the 2007 rape incident, her evidence was that, after he had committed the rape, the appellant said that he did not know what had come over him and asked her to forgive him. If she had set out to falsely implicate the appellant, she could easily have added further incidents. In addition, the two incidents in 2008 forming the basis for count 5 arose out of the appellant taking P to Ndwedwe, far from home, when he was aware that [N……] wished to report him to the police. The fact that, on their arrival the following day, she was still wearing her school uniform, lends support to her version of events. This evidence was not challenged. The appellant undertook to attend the family meeting when the allegations emerged but failed to do so. His explanation does not ring true. Finally, when P eventually reported matters to the police, the

[32] *Monageng v The State* (590/06) [2008] ZASCA 129 (01 OCTOBER 2008) para 24

appellant disappeared for approximately one month without telling anyone at the time or offering a credible explanation at the trial. That is not the conduct of an innocent person.

[37] P's evidence as to the events surrounding the incidents was corroborated by that of the other witnesses. The appellant submitted that there were contradictions between the witnesses. This is correct. It would be surprising if at least some contradictions did not emerge when a number of witnesses recall events which took place in the past. The magistrate carefully considered these and correctly found that, taken as a whole, the evidence of these witnesses was acceptable and corroborated that of P. In fact, had the evidence of all the witnesses perfectly coincided, this would appropriately have raised suspicions that the witnesses had collaborated to harmonise their evidence for the trial. Excluding the reference to the J88, the magistrate committed no misdirections in assessing the evidence of the State witnesses.

[38] As against this, it must be considered whether the evidence of the appellant was reasonable possibly true. Here, counsel for the appellant could make no submissions in favour of the appellant's evidence. Material contradictions emerged between what was put on his behalf to the State witnesses and what he testified to. Further, such contradictions emerged between his evidence in chief and what he said in cross-examination, especially when problems with what he had said in his evidence in chief were pointed out to him. One example of his evidence concerning [N……] will suffice to illustrate this. It was put on his behalf that the reason why he did not want P to visit [N…..] and [M….] was that [N….] was a drug dealer and [M…..] was a user of prohibited substances. When asked in his evidence in chief why his relationship with [N…..] was not good, he said that [N…..] would phone P, request her to go to [N…..] and that, when P returned, she would argue with

everyone at home. This was never put to P or [N…..]. When asked why his wife would lie in her testimony against him, he claimed that she was scared of [N…..] and that, when the appellant was arrested, [N…..] asked people to attack the homestead causing his wife (and P's stepmother) to flee to the rural areas. None of this was put to his wife or [N…..]. There were numerous other serious contradictions and extreme improbabilities in his evidence. It was utterly fanciful and correctly rejected as false by the magistrate.

[39] The approach after assessing the evidence on both sides was dealt with in *S v Chabalala*,[33] to the following effect:

'[W]eigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt'.

Applying this test, it is clear that, disregarding the J88, the evidence proved beyond a reasonable doubt that the appellant was guilty on all five counts.

[40] As regards the sentences, the appellant raised no quibble with those which were imposed for the first four counts. This was proper because, in those matters, no misdirections could be pointed to and neither do any of them induce any sense of shock. If anything, they appear to be on the light side. Making the whole of the two sentences for counts 2 and 3 run concurrently with each other was, in my view, overly lenient on the part of the magistrate. However, these sentences are not subject to interference by a court on appeal. I have no criticism of the sentences imposed for counts 1 and 4.

[33] *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15.

[41] The sentence of life imprisonment imposed for the fifth count was done pursuant to the provisions of Section 51(1) read with schedule 2 of the CLA Act. The only basis upon which a court may impose a lesser sentence than that prescribed is if substantial and compelling circumstances are found to exist in terms of Section 51 (3) of the CLA Act. The test which must be applied has been restated on many occasions. It was set out clearly in *S v Malgas*.[34] In essence, a sentencing court is obliged to take into consideration the normal principles of sentencing and consider what sentence would be imposed but for the provisions of the CLA Act. If there is disparity between the two, and an injustice would result from the imposition of the prescribed sentence, substantial and compelling circumstances exist. This exercise was not undertaken by the magistrate in considering the sentence on this count. Her failure to do so amounts to a misdirection. As a result, this court is at large to consider an appropriate sentence *de novo*.

[42] As I have said, it is my view that the effective sentence for counts 2 and 3 is too light. It would therefore not be appropriate to take the effective twelve years' imprisonment for those two rapes as the yardstick as to what should be imposed for the two rapes on count 5. The personal circumstances of the appellant must be taken into account. He was 48 years old at the time, had been married by customary rites for 15 years, had passed grade 7, had two biological daughters and supported three other dependants, had skills as a mechanic and tailor and earned some R3 000 from these two activities. For the purposes of sentence, he was a first offender.

[43] However, despite this, there are numerous aggravating circumstances when regard is had to the nature of the offences in count 5. The appellant abused the trust of his own biological daughter who should ordinarily have been

[34] *S v Malgas* 2001 (1) SACR 469 (SCA) para 25.

able to look to him for nurture and protection. In addition, not only did he abuse the trust but clearly attempted to protect himself by severely restricting the circumstances under which she could relate to friends and relatives. In other words, he curtailed her lifestyle and social development at a critical developmental stage of her life in his own interests. He thus interfered in the normal, healthy, social development of a young adolescent woman. He clearly treated her as his chattel and, on occasions when it became apparent that she might have disclosed his misdemeanours to others, gave effect to his threats to act with violence. She functioned for years in a climate of fear. The effect of this was to imprison her within the relationship to the extent that she was not even free to disclose his conduct to those whom she trusted. It took a massive action of the will and a clear sense of desperation on her part to do so.

[44] As concerns the interests of society, rape is a scourge on our society. It is characterised by violence and the effects on the victim are severe, long-lasting and difficult to overcome. This is all the more so when it is committed by a person in a position of trust such as the appellant. The very social fabric of human intercourse is negated by a father raping his daughter. If she cannot look to him for protection and support, it places doubt on the trustworthiness of all. Fortunately for P, she can look to [N…..] and her cousins for the nurture which was so clearly lacking in her relationship with the appellant. In *S v Baloyi (Minister of Justice & another Intervening)*,[35] Sachs J said:

'In my view, domestic violence compels constitutional concern in yet another important respect. To the extent that it is systemic, pervasive and overwhelmingly gender-specific, domestic violence both and reinforces patriarchal domination, and does so in a particularly brutal form.'

Although this was stated in the context of spousal violence, these words have equal application in the present matter.

[35] *S v Baloyi (Minister of Justice & another Intervening)* [1999] ZACC 195; 2000 (2) SA 425 (CC) para12.

[45] There is, however, another aspect to consider regarding the interests of society. It is that society benefits from productive members who use the opportunity to rehabilitate themselves. There are two pieces of evidence which suggest that the appellant may be a candidate for rehabilitation. First, he was convicted for robbery in 1988 and sentenced to seven years' imprisonment. On 4 July 1991 he was released on parole. He clearly learned from this experience and was not convicted of this offence or any other offence until the present one. In addition, he recognised the depravity of his behaviour when he told P that he did not know what was wrong with him and asked her forgiveness. This affords some hope of rehabilitation. In my view there are prospects for this and the appellant should be given this opportunity.

[46] Taking all of these factors into account, it is my view that a sentence of twenty-four years' imprisonment on count 5 would be appropriate. Since that is substantially less than life imprisonment, I find that substantial and compelling circumstances warrant a downward deviation from the prescribed sentence. It is also my view that, taking into account the cumulative effect of the sentences, this would be an appropriate effective period of imprisonment. The order made in terms of s 52 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, that the particulars of the appellant will be entered in the register of sexual offenders was not challenged. It will therefore stand.

[47] In the result, the following order is granted:

1. The appeal against the convictions of the appellant is dismissed.
2. The appeal against the sentences on counts 1 to 4 is dismissed.
3. The appeal against the sentence imposed on count 5 is upheld and the following sentence is substituted for that imposed by the magistrate:

"On count 5, the accused is sentenced to 24 years' imprisonment. The sentences imposed on Counts 1 to 4 are directed to run concurrently with this sentence."

4. In terms of s 52 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, the particulars of the appellant is to be entered in the register of sexual offenders.
5. The sentences will run with effect from 2 December 2010.

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GORVEN J

I agree, and it is so ordered.

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BALTON J

DATE OF HEARING:	6 October 2015
DATE OF JUDGMENT:	22 October 2015
FOR THE APPELLANT:	PM Mkumbuzi, instructed by the Durban Justice Centre.
FOR THE RESPONDENT:	S Singh, instructed by the Director of Public Prosecutions, Pietermaritzburg, KwaZulu-Natal.