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

CASE NO: AR 358/16

In the matter between:

**T E B**

Appellant

and

**THE STATE**

Respondent

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Coram: Koen J (Henriques J concurring)

Heard: 23 March 2018

Delivered: 29 March 2018

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**ORDER**

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The appeal against conviction and sentence is dismissed and the conviction of rape and the sentence of life imprisonment are confirmed.

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**JUDGMENT**

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**KOEN J**

[1] The Appellant, a 55 year old male, was convicted of having during the period from April 2012 to 2014 and on diverse occasions raped BSB,<sup>1</sup> his daughter who at the time was 7 years of age. On 28 August 2015 he was sentenced to life imprisonment. The present appeal lies against his conviction and sentence pursuant to his automatic right of appeal.

[2] As regards his conviction it was submitted on behalf of the Appellant that he was wrongly convicted for one or more of the following reasons:

- (a) He was convicted on the single evidence of BSB whom the learned magistrate wrongly accepted as a 'good witness';
- (b) That the complainant and her mother, N S, gave contradictory evidence whether one B stayed with the mother;
- (c) That the complainant had conceded that she would do what her mother tells her to do including tell the court that her father had raped her;
- (d) That the complainant was mendacious having advised the Appellant's girlfriend, that her father had not raped her, which she subsequently sought to explain away as 'joking or fooling, I was deceiving her';
- (e) That the complainant had failed to tell her mother that three unknown males had also raped her;
- (f) That the complainant failed to identify her father as the rapist in court; and
- (g) That the medical evidence was neutral since the injuries observed in her vaginal area could have also been caused by these three unknown males.

[3] I do not intend summarising the evidence of the various witnesses in this judgment in detail, as their evidence is a matter of record. I shall only refer to some of the salient features thereof.

[4] The complainant had testified that it was first her father who had raped her and 'then', i.e. subsequently, three boys on another occasion who had raped her. Dr

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<sup>1</sup> As the complainant is a minor, her identity is not disclosed but her initials used to refer to her.

Kunene who had examined the complainant but only during 2014 when she was nine, testified that she had told him that she had been sexually assaulted by her father plus three unknown guys on unknown dates. He had found evidence of an old sexual assault and tears on her hymen. The findings on the gynaecological examination were concluded to be 'suggestive of sexual penetration.' The medical evidence is however largely neutral in deciding the issue as to whether the Appellant had penetrated the complainant. The present was not an instance of a child who complains of only one act of penetration by a particular offender where the nature and extent of the injuries may assume much more significance. The injuries suggestive of sexual penetration could equally have been inflicted by the three unknown men who subsequently raped her.

[5] Whether the Appellant is guilty of having raped his daughter must be assessed in the light of the evidence viewed chronologically from the time that the rape was first reported and against the background of the circumstances prevailing at the home of the complainant.

[6] As regards the home environment, the Appellant and his wife, the mother of the complainant namely N S had lived together until they parted ways in 2011. When they parted ways the Appellant did not want her to leave with the complainant, stating that the complainant belonged to that home. The complainant was thereafter living with the Appellant in his home whilst her mother was living elsewhere.

[7] Ms Jiyane, the head of department at Sizakela Primary School where she is also responsible for the wellbeing of her students, which is the school attended by the complainant, testified that she had received a report from the Grade 1 class teacher of the complainant, Ms Ngwenya regarding a certain sketch or drawing which the complainant had made. The complainant was sent to her office with this drawing which depicted two people with their lips attached and their private parts touching. She asked the complainant what these people were doing to which the complainant responded that they were 'having sexual intercourse.' She thereafter asked the complainant where she had learned this and the complainant then spontaneously reported that 'her father is having sexual intercourse with her.' Ms Jiyane confirmed that the complainant had told her specifically that her biological

father was the one who had raped her. Further she confirmed that the complainant never said anything about anyone else or any other persons except her father. This latter response was in reply to a suggestion that it was her mother's boyfriend B, who was referred to as her "stepfather" who had raped her and that she was confused between her father and "stepfather". Ms Jiyane *inter alia* confirmed that the complainant would be aware of the distinction as they are taught at school about the family.

[8] Ms Jiyane thereafter reported the matter to the principal who gave the instruction to call the complainant's mother to come to school. Prior to this, no report had been made to the mother, and the complainant's mother in her evidence confirmed that the first time she heard about the rape was at school when she was summoned there. Ms Jiyane had also observed that the complainant was walking awkwardly, sort of limping. When she asked her about that, the complainant pointed at her 'private parts saying that it was painful.'

[9] The complainant's mother took the matter no further, apparently due to a lack of financial resources, and not withstanding pleas by Ms Jiyane to her that she please take the complainant for a medical examination. Eventually only in 2014 when the department of social welfare provided the school with youth care workers, was the matter handed to the latter. It was the evidence of the complainant that one B resided with her mother. The complainant's mother however testified that there was no man living with her. Although this is a contradiction, the mother's version, being one advanced for reasons best known to herself, the contradiction does not relate to material aspect of the case. There was no evidential foundation to suggest that B had raped the complainant, other than pure speculation on the part of counsel for the Appellant at the trial.

[10] The complainant was also asked as to whether she would do exactly what her mother tells her to do, which she confirmed. She was then asked whether 'if your mother can tell you now that tell the court that your father raped you would you be able to tell the court that' to which she said 'I would have done that.' The suggestion therefore was that because of the bad blood between the complainant's mother and

the Appellant, the charge of rape was one which had been falsely fabricated against him at the instigation of the complainant's mother.

[11] That proposition can in my view safely be discounted. The complainant's mother did not know about any suggestion of a rape by the Appellant until it had first been disclosed to the first report, Ms Jiyane. She could therefore not have fabricated the accusation and planted it as a seed in the mind of the complainant, otherwise the initiative for reporting the rape would probably have emanated from the complainant or her mother and to be discovered in a roundabout way by Ms Jiyane. The doctor's findings had been consistent with old injuries of a sexual assault. According to the complainant's mother's evidence the complainant had not told her about the rape by the three unknown boys. The complainant's mother would accordingly not have known that there would be medical evidence consistent with penetration affording her an opportunity to falsely fabricate charges that the complainant's father had raped his daughter. The statements elicited from the complainant under cross-examination, in my view, are also more consistent with the complainant confirming, after her mother had become aware of the allegations pursuant to a visit to the complainant's school that her father had raped her, admonishing the complainant to tell the court the truth. The truth she was required to tell was that it was her father who had raped her. This is what the complainant confirmed she would do. The evidence of the complainant in its totality, particularly the vehement subsequent denials that she was falsely implicating her father, are inconsistent with the notion that she was simply repeating a false version her mother had told her to repeat in court.

[12] It is also in that light that the statement by the complainant that she was joking or fooling with her 'stepmother' stating that her biological father had not raped her, must be understood. It could hardly be expected of a 7 or 9 year old child when confronted by the girlfriend of the person who had raped her, who was her father, to openly declare that he had in fact raped her. More likely is her version that in replying that her father had not raped her, she was 'fooling' her 'stepmother' and was 'deceiving her'. But that does not mean that she was now similarly deceiving the court.

[13] Finally, reliance was placed on the fact that when at the end of her evidence the complainant was called to come into the court from the adjoining room from where she had been testifying to identify the man who had raped her, she was unable to identify her father in the dock. It appears that he had shaved his hair and beard and looked different during his trial. There can, however, be no suggestion of confusion in the identity of the person who raped her, if it was indeed her father. She referred to him by his first name 'E', confirmed his surname as 'B', had told Ms Jiyane that her father had raped her, also repeated that as part of the historical explanation given to Dr Kunene, and repeated that evidence in court.

[14] The complainant was also criticised for having said that her father had raped her more than a 100 times. However, she immediately continued to state that '100' is 'a lot'. No doubt this was an exaggeration and all she simply sought to convey was that she had been raped by him many times. The uncontroverted evidence was that her father required her to sleep with him in his bed every night. It is so that she was unable to provide details of any other occasions. That is a criticism of her evidence which might in other contexts have suggested that she had been precognized in regard to one incident only, thus possibly suggesting false fabrication. Her evidence must however be weighed against the totality of all the evidence, notably that the only reason the rape(s) on the complainant was discovered was because of the diagram drawn at school, and the initial report to Ms Jiyane. The only alternative scenario would be that the complainant of her own volition, having been traumatised by the rape by the three boys, drew the diagram which led to her being referred to Ms Jiyane, where she then, because of her hatred for her father decided to blame him falsely as the rapist because it might result in her being removed from his care. That scenario however ascribes a considerable level of deviousness and craftiness to a 7 to 9 year old child. The complainant had confirmed that she did not love her father 'from a long time ago', later stated to be 'since 2013', but that was because he 'did something painful to me which I don't like'.

[15] On the evidence by the State witnesses there was evidence on which a court could find in favour of the State. The application for a discharge of the Appellant at the end of the State case was rightly refused. The Appellant thereafter failed to testify. There being evidence which called for an answer which the Appellant failed to

address, offering nothing to counter that evidence, the irresistible conclusion on a totality of all the evidence was that there was nothing to disturb or rebut the evidence of the complainant. Her evidence was complete and satisfactory in every material respect. That she on her own admission lied to her 'stepmother', in order to fool her, does not *per se* detract from her credibility in testifying that it was her father who had raped her. Likewise does her inability to recognise her father in court with his head and beard shaven detract from the fact that she must have known that the person who raped her was her father, whom she clearly identified by name and surname. Her evidence was also consistent with her spontaneous report to Ms Jiyane that it was her father who had raped her. Such further criticisms as there are relating to the conflict between her evidence and that of her mother regarding whether B resides with her mother, is not material to the present charge. Even as improbable as it might be that a girl of her age in her position would not have reported the rape by the three other men to her mother, this was a dysfunctional family where her contact with her mother was limited if not non-existent. The complainant did report the rape by the other three men to the social worker and to the doctor who examined her. Whether she had been raped by others is furthermore not material to the present charge which simply interrogates the question whether her father had also raped her.

[16] The trial court was furthermore steeped in the atmosphere of the trial. The learned magistrate observed the witnesses and accepted the evidence of the complainant. She repeatedly stated that it was her father, the Appellant who had raped her. Despite suggestions in cross-examination that the allegation had been fabricated and was being advanced by her at the insistence of her mother, and/or that she was mistaken and that B was the one who had raped her, she did not deviate from her version that it was the Appellant who had raped her. These suggestions, simply remain suggestions posed in cross-examination, and were never elevated to the level of evidence, due to the appellant's failure to testify to deny the allegations by the complainant, which would have required him being subjected to cross-examination to test the veracity of such evidence.

[17] I am not persuaded that the learned magistrate erred in convicting the appellant as charged.

[18] As regards the sentence, rape is a serious offence, and all the more so the rape of a 7 year old girl, particularly when raped by her father who has abused the position of trust he occupies in relation to his daughter. In the present instance the Appellant had furthermore isolated the complainant from her mother and was therefore all the more required to take particular good care of her. He failed to do so.

[19] I am unable to find that the learned trial magistrate in any way committed a misdirection in having regard to the nature of the offence and the personal circumstances and features relating to the Appellant, in concluding that there were no substantial and compelling circumstances present.

[20] The appropriate order is accordingly one dismissing the appeal and confirming the conviction and sentence.

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KOEN J

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HENRIQUES J



**Appearances**

For the Appellant:           ADV. Z ANASTASIOU

Instructed by:                JUSTICE CENTRE: PIETERMARITZBURG

For the Respondent:         ADV C KANDER

Instructed by:                DIRECTOR OF PUBLIC PROSECUTIONS,  
PIETERMARITZBURG