NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR169/15

In the matter between:

SIKHOSIPHI MLUNGU SHANGE **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

Delivered on: Friday, 29 January 2016

OLSEN J (MOODLEY J concurring)

[1] The appellant in this matter was tried in the Regional Court at Empangeni on a charge of rape, it being alleged that on divers occasions between July 2012 and March 2013 he raped the complainant, a child who was 12 to 13 years of age at the time and 14 years of age when she gave her evidence at the trial which commenced in April 2014. The appellant pleaded not guilty and explained that he denied having had any sexual relations with the complainant. The appellant, a 52 year old man, was convicted and sentenced to 20 years imprisonment. The appeal is against his conviction only, with the leave of the court *a quo*.

[2] Unravelling the evidence in this case is no easy task, even with the benefit of the record. (The task would no doubt have been just as, if not more difficult for the learned magistrate who presided at the trial.) There are a number of reasons for this. The first and primary one is that the evidence of the complainant was by no means coherent. She is unfortunately a retarded child. (I will return to this subject.) Despite some efforts by the magistrate to stop it, some hearsay evidence was adduced. On occasions this was done with a promise to call the appropriate witnesses to give direct evidence, and not all these promises were fulfilled. The evidence of peripheral witnesses was inconsistent in some respects, certainly with regard to the reports which led to a report to the police and the arrest of the appellant. It was mere rumour which led to the complainant's aunt (with whom the complainant lives, because her parents are deceased) calling her into her room and confronting her with a question as to what was going on between the appellant and the complainant. I will revert in due course to the question as to how matters unfolded from there. For the time being the point to be made is that there was no direct evidence from anyone who claimed to have personal knowledge of any fact or circumstance (whether it be a report from the complainant or anything else that was observed) which suggested that the appellant had taken, or was persistently taking, the complainant into the bush to rape her or, for that matter, to have consensual sex with her.

[3] It is not disputed by the defence that, after a report had been made to the police, the complainant was medically examined and that it was found that the complainant was a sexually active person, probably having had sexual relations on numerous occasions.

[4] There were three reasons why caution had to be exercised in considering an evaluation of the complainant's evidence. Firstly insofar as the conduct of sexual relations between her and the appellant is concerned, she was a single witness. Secondly, she was a child. Thirdly the complainant was mentally retarded, the topic to which I must turn immediately.

[5] It has not been suggested, and no part of the record of the evidence before us, and no observation of the magistrate, leads to the conclusion that the complainant was not a competent witness by reason of the provisions of s194 of the Criminal Procedure Act, 1977, which deals with persons afflicted with mental illness or labouring under any imbecility of mind. (See, in this regard *S v Katoo* 2005 (1) SACR 522 (SCA).) The question is as to the effect the complainant's condition may have when considering the issue as to whether her evidence is credible and reliable.

[6] The complainant was the first State witness. She gave evidence through an intermediary. She was questioned by the magistrate in order to establish whether she understood what it meant to tell the truth and in order to establish whether it was appropriate for the oath to be administered, as it was. Counsel for the appellant argued that these enquiries were insufficient. There is no merit in counsel's argument and I do no propose to consider it any further. The magistrate was satisfied, and there is no reason to question that conclusion. Some five months prior to the commencement of the trial a confidential psychological report concerning the complainant was written and produced by Mr S S Mthembu, the Head Clinical Psychologist at the Lower Umfolozi District War Memorial Hospital. The report was the product of two interviews conducted by Mr Mthembu in order to make an assessment of the complainant's mental condition. Mr Mthembu gave evidence. The evidence coincided with his report. His conclusion was that the complainant suffers from mild mental retardation and learning disorders. She had turned 14 at the time of the interview, and Mr Mthembu expressed the opinion that she had a mental age falling between 9 and 11 years. She was still in Grade 4 at the time. The material part of his report reads as follows.

> "She appears to have severe learning problems. She was reported by the relative as an individual who requires extensive supervision in almost all her daily activities. Clinical observations suggest that she possesses a below-average intellectual functioning and she has significant limitation in adaptive functioning skills, such as self-care, interpersonal relationships, family planning, etc."

The complainant smiles inappropriately at times. (This occurred during the trial and during Mr Mthembu's interviews with her.) Mr Mthembu explained that when he speaks of a learning disorder he speaks of the product of an inquiry into a patient's numerical skills, reading, capacity to write full sentences and so on. There he found the complainant "severely lacking". It strikes me that the most important aspect of Mr Mthembu's evidence, from the perspective of understanding and appreciating the complainant's deficits when considering her evidence, was his answer to the question as to whether she would be able to relate incidents which have happened to her. According to Mr Mthembu she can remember most things but it may not be detailed. He said

> Your Worship, there won't be a lot of details, but you can try and make sense of what she may be talking".

[7] This last-mentioned observation of Mr Mthembu is borne out by something said by the complainant's aunt. I have already mentioned that this case got reported to the police as a result of enquiries made of the complainant by her aunt. According to the complainant's aunt, when the complainant made the report she said that when they had gone into the bush the appellant had "slept with her". No further detail emerged immediately. When the aunt was cross-examined on the question of how many times this might have occurred her evidence was that the child simply said that he would call her and say they must go (into the bush). When pressed as to whether any more details emerged the aunt said "I did not persist in questioning her, because I know her mental status." It strikes me that, concerning the complainant's ability to furnish an account of something which happened, the experience of the person possibly most intimately concerned with her upbringing coincides with the outcome of the clinical evaluation made by Mr Mthembu. In the ordinary course a child's evidence must be evaluated as that of a child. In this case special regard must be had for the fact that the complainant is a child who, by reason of mild retardation of her mind, is unable ordinarily to furnish a detailed account of events which she has experienced. If that is not done the likely outcome will be that the exercise of

caution in evaluating the complainant's evidence, within the matrix of all the evidence in the case, may very well "displace the exercise of common sense". (*S v Sauls and Others* 1981 (3) SA 172 (A).)

[8] It was not in dispute at the trial that a place known as the Mahlangu homestead is a close neighbour of the household in which the complainant resides. (The appellant stays at a place called KwaHlaza which is at some distance from the Mahlangu homestead.) The Mahlangu homestead appears to enjoy some prominence in the community life of that area. Liquor is sold there and children go there to play. The complainant was accustomed to going there to play after school. She knew the appellant because he was a person who went there to drink liquor. He knew her too, but it is obvious from a reading of his evidence that he was inclined to downplay the notion that she was a person who featured prominently in his visits to the Mahlangu homestead. The appellant sometimes sold fish at the Mahlangu homestead. He was a bricklayer-cum-builder, and he was accustomed to go fishing and sell the fish when he did not have other work.

[9] According to the complainant, one early evening in 2012 (at round about 6pm) the complainant was playing at the Mahlangu homestead. (Her evidence is that children were accustomed to continue playing there after dark.) Her evidence is that the appellant sent her to the shop asking her to buy some bread. But whilst she was on the way he came up behind her and grabbed her from behind and took her into the bush. He lay his jacket on the ground and made her lie down, and after undressing her and himself he raped her. (Her evidence incorporated the description of the sexual act.) She felt pain in her vagina. When he was done she dressed herself (as did he) and they left. The appellant gave her R10,00. When she got home she saw a liquid on her which she described as sperm. Prior to going home she continued to play for a while at the Mahlangu homestead.

[10] Although the record is not perfectly clear on this it does seem that the complainant was describing the first instance of what she later said were repeated sexual encounters with the appellant.

[11] She described another event in some detail, which also took place after dark. In both of these instances the appellant, she said, used a torch; on the first occasion his cell phone torch and on the other occasion a large torch.

[12] According to the complainant the last occasion upon which she was taken into the bush by the appellant occurred during 2013 ("last year" when counted from April 2014 when the trial was underway). When asked about the frequency of these events she said that they happened every afternoon after school. But when one looks at the rest of her evidence one sees that this statement must have been a misinterpretation of what she said, or an accidental mis-statement by her. Fairly judged her evidence is that the encounters of the type of which she described took place frequently over the period 2012 and 2013. According to the complainant the appellant customarily gave her R10,00 or R20,00 on each occasion.

[13] The complainant has a sister, T, who was 21 years old at the time of the trial. At the time of the events giving rise to the trial she stayed in the same household (that of the complainant's aunt) with the complainant. By the time of the trial she no longer stayed there. She explained that she was "oppressed" by that family because they said "I sold the child out". The reason why that would have happened is not difficult to discern in T's evidence. The complainant seems to have been under the control or in the care of T whilst their aunt was away at work. T's evidence is that the complainant on many occasions returned home with money, or things she had bought with money, which amounted to R10,00 and sometimes R20,00. When T enquired of the complainant where she had got the money the answer was from the appellant. T made no further enquiry and did nothing

about it. T confirmed that sometimes the complainant would come home as late as 8 0'clock at night. What is clear from the evidence of both T and the complainant is that the complainant made no report to her older sister of what was going on between the complainant and the appellant. Equally clear is that T made no enquiry.

[14] According to the complainant there were three or four occasions when the appellant gave her fish. She would take it home and T would cook it. This is confirmed by T, as is the fact that the complainant's report was that she had received the fish from the appellant. The complainant was quite clear on the fact that the gifts of fish were not associated with any sexual encounters such as those she had described. According to the complainant when she first brought the fish home she and T had a nice meal and T said that she must get some more fish from the appellant.

[15] On two occasions the complainant was asked in evidence why the appellant gave her fish. The two answers she gave were consistent. On the first occasion she said that it was because "he wanted me to get used to him". On the second occasion she was asked her reply was that he said "I must'nt forget what this fish is for". The fish was obviously a fairly prominent feature of the case. The complainant's evidence on the subject was not challenged in cross-examination. However when the appellant gave evidence he contended that he had sold fish to the complainant. In his evidence in chief he put it this way.

> "As I have indicated, I was selling the fish, so she would also probably come and buy when people were buying, but I never had just given her fish."

The passage of evidence when this comes up in cross-examination illustrates also that the appellant was trying to give the impression that he had not taken any particular note of the complainant at all at the Mahlangu homestead.

> "So is it your evidence that you would just see her around there, you have never spoken to her? --- Yes.
>
> Not at all? --- Well, perhaps I would speak when selling.
>
> COURT : Why would you speak to her? --- Yes, I would say I spoke to her because I speak to the people when I sell to them, if they ask how much the fish is.
>
> PROSECUTOR : And that will be the only conversation that you would have with the … [indistinct]? I am just talking about the complainant now. --- Yes
>
> How many times had she bought fish from you? --- I will not be in a position to say, I do not really notice when selling to a person.
>
> COURT : But would you say its more than once, more than twice, or more than three times? --- It is possible that it is over four times."

[16] After the complainant's story had come out, and the matter had been reported to the police, the complainant and her aunt accompanied a Constable Xulu in a police vehicle to the appellant's home. When the vehicle and the appellant met up, according to the appellant he had been drinking. He said that he addressed the complainant's aunt asking "I am being arrested. Why?"; whereupon the policeman intervened saying "no, you will talk in front." (The appellant was then taken to the police station where, he says, he was informed that he was to be arrested for rape.) According to the complainant the appellant said "both of you have had me arrested".

[17] According to the complainant's aunt and Constable Xulu the appellant's exclamation when he saw that the complainant and her aunt were in the company of the police was somewhat more pointed. According to the aunt he exclaimed "you, child, have you arrested me for raping you?" and "are you pregnant now?" As Constable Xulu recalls the outburst the appellant said "oh, you have arrested me, you are pregnant". According to all four accounts

there was a spontaneous exclamation from the appellant; and it is according to the appellant's own account that it was Constable Xulu who immediately stopped the appellant from saying anything else.

[18] I propose to deal only briefly with reports which the complainant made concerning the appellant's conduct. According to the complainant on one occasion she reported to the "granny" of the Mahlangu household that the appellant was repeatedly taking her into the bush and raping her. The response she got was that she had now become the appellant's girlfriend and that she should expect to be taken into the bush by him in the future. The last witness called by the State was a Constable Shandu who was the investigating officer. She was called solely to explain her failed efforts to secure the attendance of anyone from the Mahlangu homestead to give evidence.

[19] According to the complainant the first full report she made of what had been going on was to the nurse who apparently interviewed her when she went to the hospital to be examined by the doctor. The complainant said that when she had been questioned by her aunt (in advance of her aunt going to report the matter to the police) she had stopped short of saying what happened when the appellant took her into the bush.

[20] I mentioned at the outset that the aunt's enquiries of the complainant which generated the report to the police was itself generated by some rumour or other. The complainant's aunt had gone to the school to raise the question with the teachers as to whether the complainant should not be placed in a school for children with learning disabilities. There she was told that T had reported to the teachers that the appellant was conducting a sexual relationship with the complainant. T said that she had not conveyed this to the teachers. The teachers were not called. Whatever happened this encounter at the school led the aunt to confront the complainant. The only

material difference between the complainant's version of this discussion with her aunt, and that of her aunt, is that the latter says that she was told what happened in the bush; and that indeed the description of one of the events given to her by the complainant involved the wielding of a knife and threats from the appellant. The complainant stated more than once in her evidence that she was fearful of the consequences of her aunt learning about what had been going on. One can accept that such a child might embellish her account of the threat in order to avoid the ire of her aunt.

[21] Counsel for the appellant at the trial argued his case upon the basis that the events in question had taken place at night and that this was a case of mistaken identity. Confronted with that, the magistrate examined the defence case on that basis, and concluded that the complainant's identification of the appellant was good. In my view, given an overview of all the evidence, there was no room at all for the defence that the appellant had been incorrectly and erroneously identified. There was no mistake. The medical evidence supported the complainant's complaint that she had sexual intercourse on numerous occasions over a period. T's evidence that the complainant received money on many occasions supports that view – there is no suggestion that there was any other way in which the complainant would have come upon that money. The question in the case really was whether it was the appellant who did this, or whether the complainant was lying, and had accused the appellant in order to protect the true culprit or culprits.

[22] In her judgment the magistrate mentioned the difficulties in dealing with the evidence of the complainant both as a single witness and as a child suffering from some level of mental retardation. The magistrate listed certain contradictions in the evidence of the State witnesses, some of which were not contradictions at all (considered with the benefit of a typed record). She accepted the evidence of the complainant. In my view a reading of the record, bearing in mind the peculiar characteristics of the complainant as a witness, supports the conclusion that the magistrate was correct to do so.

Although the magistrate did not say so expressly, she obviously rejected the appellant's version. Judging from the record the appellant was a poor witness. If his version regarding the fish, that he had sold it to the complainant, had been put to the complainant in cross-examination, that would have raised questions as to where she would get the money to buy fish. (If the version had been put to T, that question could have been examined more realistically.) The version of the complainant that when she was given the fish, she was told to remember what it was for, was not challenged at all. In my view the magistrate was correct in reaching a conclusion on the evidence which involves rejecting the appellant's version as false beyond reasonable doubt.

[23] It is clear on the evidence that the association between the complainant and the appellant started with an incident of rape. In my view it does not matter that it could be argued that in the latter stages of the relationship between the two the law might have fixed the appellant's conduct with another label. In determining sentence the learned magistrate found that there were substantial and compelling circumstances, and there is no appeal against the sentence she imposed.

The following order is made.

1. The appeal against conviction is dismissed.

OLSEN J

MOODLEY J

Date of Hearing:	TUESDAY, 08 DECEMBER 2015
Date of Judgment: :	FRIDAY, 29 JANUARY 2016
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