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

CASE NO: AR 402/2019

In the matter between:

T[...] P[...] M[...]

Appellant

and

THE STATE

Respondent

ORDER

On appeal from: the Regional Court for the Regional Division of KwaZulu-Natal, held at Inkanyezi, Magistrate Ms H J Meyer presiding, it is ordered:

1. The appellant's appeal against the convictions of two counts of rape is upheld.
2. The appellant's convictions by the regional court of two counts of rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 is set aside and replaced with the following convictions:
 - “(a) In respect of count 1 the accused is found guilty of contravening section 15(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007; and

- (b) In respect of count 2 the accused is found guilty of contravening section 15(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.”
3. The appeal against the sentences imposed by the regional court are upheld.
4. The sentences of 15 years’ imprisonment in respect of count 1 and life imprisonment in respect of count 2 imposed by the regional court are set aside and replaced with the following sentences:
- “(a) In respect of count 1, the contravention of section 15(1) of SORMA the accused is sentenced to five years’ imprisonment.
- (b) In respect of count 2, the conviction of contravention of section 15(1) of SORMA the accused is sentenced to five years’ imprisonment.
- (c) Three years of the sentence imposed on count 2 will run concurrently with the sentence imposed on count 1.
- (d) The appellant is therefore sentenced to an effective term of seven years’ imprisonment.”
5. In terms of section 282 of the Criminal Procedure Act 51 of 1977, the substituted sentences are ante-dated to 11 September 2018, being the date on which the appellant was sentenced in the court *a quo*.

JUDGMENT

The Court

Introduction

[1] The appellant was charged in the Inkanyezi Regional Court with two counts of rape:

1.1 Count one, the offence of rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA) in that it was

alleged that on 1 July 2016 at Melmoth he unlawfully and intentionally committed an act of sexual penetration with a 15 year old complainant O[...] L[...] C[...] by inserting his penis into his mouth without consent of the complainant. The provisions of s 51 of the Criminal Law Amendment Act 105 of 1997 (the CLAA) was applicable in that the complainant was under the age of 16 years at the time;

1.2 Count 2, the crime of rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 read with provisions of s 51 of the CLAA in that the respondent alleged the appellant on 2 July 2016 at Melmoth unlawfully and intentionally committed an act of sexual penetration with a 15 year old complainant O[...] L[...] C[...] by inserting his penis into his anus and into his mouth without the complainant's consent.

[2] The appellant who was legally represented at the time, pleaded not guilty to both counts on 8 February 2017. He was subsequently convicted on both counts on 6 February 2018 and on 11 September 2018 sentenced to 15 years' imprisonment on count 1, and to life imprisonment on count 2. Ancillary orders were issued in relation to the entry of appellant's name for inclusion in the National Register of Sexual Offenders in compliance with s 50 of the SORMA.

[3] In terms of the Criminal Procedure Act 51 of 1977 (CPA) the appellant enjoys an automatic right of appeal in respect of count 2, the court having granted leave to appeal the conviction and sentence on count 1 pursuant to an application for leave to appeal on 11 September 2018. Apart from the judgments delivered in support of the conviction and sentences imposed, the court additionally provided reasons in response to the grounds of appeal. Such additional reasons were filed on 1 August 2019. It is this appeal against the convictions and sentences which serve before us.

Proceedings in the court *a quo*

The appellant's guilty plea

[4] Pursuant to the provisions of s 115 of the CPA, the appellant filed a written statement encapsulating his plea of not guilty. In essence, the plea read as follows:

- “1. I, T[...] P[...] M[...], plead not guilty to both counts of contravening Section 3 read with Sections 1, 50, 55, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act NO 32 of 2007 read with the provisions of Section 51(1) and part I of schedule 2 of the Criminal Law Amendment Act NO 105 of 1997 and further read with Sections 256 and 261 of Act 51 of 1977.
2. I admit that on 1 July 2016 and 2 July 2016 at Melmoth, I inserted my penis into the mouth of O[...] L[...] C[...], but deny that this act of sexual penetration was unlawful as O[...] L[...] C[...] consented to me doing so on both occasions.
3. I deny having inserted my penis into the anus of O[...] L[...] C[...].
4. I deny that the complainant was a child younger than 16 years of age on 1 July 2016, alternatively, if it is proven that he indeed was below the age of 16 years, I was not aware of that and truly believed that he was older than 16 years of age at the time.”

[5] The s 115 plea explanation was signed on 7 February 2017 and dated at Eshowe.

Grounds of appeal

[6] The appellant when setting out the grounds of appeal requests that the written heads of argument submitted during the trial in the court *a quo* be incorporated. The grounds of appeal upon which he relies are the following:

6.1 that the court *a quo* erred in arriving at the conclusion that he knew the complainant's age, he being younger than 16 years. He submits that he did not know the exact age of the complainant and thought the complainant was 17 years of age. The complainant portrayed himself to be older than 16 and this was supported by the Facebook posts referred to by the appellant's daughter during the course of her

evidence. The appellant's version that he thought the complainant was older than 16 at the time was reasonably possibly true, as the complainant and appellant did not have regular contact with each other;

6.2 the court *a quo* erred in rejecting the evidence of the appellant's daughter relating to the complainant's Facebook profile, in which he provided a different date of birth, earlier than the one in his birth certificate, which made him older than 16 years of age;

6.3 the court *a quo* erred in accepting the evidence of the complainant given the material contradictions between his evidence in court and his statement provided to the police and failed to have regard to the fact that during the course of his evidence through an intermediary, the complainant avoided answering material questions by crying, storming out of the intermediary room and informed the court that he would not answer questions. Allied to this is the submission that the court *a quo* erred in accepting that the reason for this was as the complainant was a child testifying and giving evidence of a traumatic and intimate nature;

6.4 the court *a quo* attached insufficient weight to the material contradictions and omissions in the complainant's statement to Constable Zungu;

6.5. the court *a quo* erred in finding that the respondent had proved its case beyond a reasonable doubt;

6.6. the court *a quo* erred in accepting that the complainant was an honest and reliable witness and in rejecting the evidence of the appellant.

Issues

[7] The issues on appeal are whether the *court a quo* correctly found that the appellant had unlawful and intentional sexual intercourse with the complainant as alleged in the two counts without the consent of the complainant and whether the appellant was unaware of the age of the complainant.

[8] An assessment of the evidence presented in the court *a quo* is necessary for a determination of the issues.

[9] The complainant L[...] C[...] O[...], hereinafter referred to as LO, testified that he is the appellant's wife, R[...]s stepbrother. He has over time resided at several homes and places of safety and at the time of testifying he resided at Boys Town, Durban. On 1 July 2016 he had gone to spend the holidays with his stepsister R[...]1 and her family in Melmoth. He could not recollect that last school holiday that he had spent there prior to the July school holiday or the exact reason why he did so but something had occurred in Richards Bay with S[...] and she did not want him to stay there for the holidays and he was then sent to Melmoth. He confirmed that he knew the appellant and referred to him as 'Pops'. This was a nickname all the family members used when referring to the appellant.

[10] On the evening of 1 July 2016 between 22h00 and 23h00 he was in the lounge with Pops. His sister R[...]1 was in her room and so was her daughter R[...]2. He and Pops were sitting and watching television and Pops was drinking beer. It was dark despite the light from the television and the kitchen. At the time they were both seated on the couch he was seated in the corner of the couch and the appellant was seated on the left of the couch. There was a movie they were watching on television and he recollected that at one stage in the movie he observed one of the characters raping a girl in the movie.

[11] The appellant at some stage during the course of watching television went to the kitchen to fetch a can of beer and returned and questioned the complainant as to whether or not he was feeling cold. He answered and said yes and as he got up to fetch a blanket, the appellant said that he could share his blanket with him and so he moved closer to the appellant on the couch. The appellant then opened the can of beer and took two sips from it and whilst he did this the movie reflected a person raping a slave.

[12] Afterward sipping the beer, the appellant then placed the can down, moved his legs and covered the left leg of the complainant. The appellant was facing toward the television. The complainant was slouching on the couch and was dressed in a short sleeve top and short pants. After the appellant placed his leg over the complainant's leg,

the appellant then took his hand and started rubbing the complainant's legs with his right hand and touching his private parts.

[13] LO testified he looked at the appellant and said "hawu Pops." The complainant described his private part as being "my dick". The appellant then went onto his knees in front of the complainant and pulled down his pants and boxers. The complainant who had been slouching, sat upright. The appellant then started playing with the complainant's penis and sucking it. The complainant then pushed on the appellant's shoulders and the appellant then grabbed his hands saying "sshh". After touching the complainant's penis, the appellant then started sucking the complainant's penis in his mouth. He carried on sucking his penis and then the appellant stood up and returned to sit in his place on the couch. (It emerged during the course of cross-examination that the complainant ejaculated.) When the appellant stood up and returned to his place on the couch, the complainant stood up and pulled up his pants and boxers.

[14] The appellant then unbuttoned the button on his pants, pulled down the zip, pulled down his pants and then grabbed the complainant by his head and put his head toward his penis and made him suck it. This occurred for approximately two minutes, whereafter the appellant ejaculated in the complainant's mouth. After that the appellant then grabbed the complainant by his shoulder, pushed up his head and pulled his pants up. The appellant then took another sip of his beer and sat there for a few minutes.

[15] After a short while, R[...]2, the appellant's daughter came into the lounge and told LO that it was past his bedtime. The appellant responded to R[...]2 saying "leave him" they are still watching the movie. After a short while the appellant fell asleep on the couch. The complainant when he noticed this, got up, brushed his teeth, washed his face and then went into the room and slept.

[16] The second incident occurred at around 17h30 / 18h00 the following day. He was returning from his cousin DW's house and the appellant was in the kitchen cooking soup. R[...]1 was in her room reading a book and R[...]2 was in her bedroom watching

movies on her laptop. He greeted the appellant and then went to the bathroom. Afterwards he then went to sit on the couch and R[...]1 came to check on the food.

[17] The appellant then came to him and asked him if he wanted to accompany him for a ride to the dam. The appellant told him that they were going fishing. The complainant thought about it and agreed because he thought the appellant wanted to talk to him about what had happened the day before and possibly wanted to apologise so he agreed. The appellant told him to fetch a jacket and told his wife R[...]1 that they were going fishing. They then drove to the dam and on the way, the appellant asked him whether he enjoyed last night. He said to the appellant “not really”. The appellant questioned him as to the reason why. He questioned the complainant as to whether or not whilst living in Boys Town he had sex with other boys. He responded to the appellant saying no, they all had girlfriends.

[18] According to LO, the appellant then said “so you had never sucked cock before” and he responded saying no. The appellant’s response was then “why do you do it so well” and he responded saying he did not know why. The appellant started grabbing his legs and rubbing the complainant’s penis whilst he drove the vehicle. When the appellant noticed that the complainant was not having an erection, he questioned the complainant about this and the complainant’s response was that he did not know and that it was sore from yesterday. It was at that point in time the appellant said to him “oh when I am done with you it’s going to be more sore”.

[19] The complainant testified he became scared and when they arrived at the dam, he could smell alcohol on the appellant’s breath and knew that he was drunk. When they went to the dam, the appellant parked the car but turned it around facing the exit, switched off the lights and put the inside light of the vehicle on. The appellant then opened the driver’s door and came to the passenger’s side of the vehicle, opened the door, put the passenger seat back and pulled down the complainant’s pants. He grabbed the complainant and started playing with the complainant’s penis again. He

questioned the complainant as to why he was not getting an erection and once again the complainant said probably because it was sore from yesterday.

[20] LO testified that he was scared as he had heard stories of men getting raped, especially in prison, but was taken aback in shock about what was happening to him. He was experiencing a number of emotions and feelings and was "horrificed". He testified that he was also concerned that if he shouted no one would hear him and that the appellant may hit him or kill him. When the appellant pushed the seat back and jumped into the vehicle, facing the front, he was still seated in the passenger seat. The appellant then pulled his pants down and grabbed the complainant's penis and was trying to put it in his anus and trying to 'ride him'. Once again, the appellant questioned the complainant as to why he was not getting an erection.

[21] The appellant alighted from the vehicle and instructed LO to masturbate him. He then instructed him to alight from the vehicle and the appellant moved the passenger seat forward. The appellant then opened the back door and instructed him to lie down. The appellant then removed the complainant's pants which were at the bottom of his legs and placed them on the floor of the car. He instructed the complainant to lie back on the back seat and the appellant then climbed into the back of the vehicle and started rubbing the complainant's chest with his hand.

[22] He opened the complainant's legs, he started to finger his anus with his left hand. Whilst doing this the appellant was rubbing LO's chest and started sucking his nipple. The appellant then started sucking on the complainant's neck whilst trying to insert his finger into his anus. The appellant then instructed the complainant to turn around and inserted his penis into his anus. When the appellant started penetrating him, he kept on telling the complainant to 'stop squeezing'. Whilst the appellant was doing this, LO repeatedly said to the appellant it is 'sore'. According to LO the appellant responded saying 'it will be sore now but next time it's just going to slip in'.

[23] The complainant then told the appellant that it was getting late and he wanted to go home. The appellant then said they would leave and ejaculated into the complainant's anus. The appellant then stood up and instructed the complainant to turn around. The appellant then opened the complainant's legs so that the one was over the passenger seat and started sucking the complainant's penis. When the complainant did not have an erection, he questioned the complainant and the complainant said that it was still sore from yesterday. The appellant then once again tried inserting his finger into the complainant's anus and ejaculated again. The appellant ejaculated for the second time into the complainant's mouth and he then said they were leaving for home.

[24] The appellant then put his pants on and went around the car to the driver's seat and took out a bottle of old brown sherry and started drinking it. All the while the complainant put his pants on and the appellant closed the back door and instructed the complainant to get into the passenger seat, which he did. The appellant started the car and they drove home and on the drive home the appellant drank the bottle of old brown sherry and instructed the complainant to tell no one about what had happened. He also instructed him to inform R[...]1 if she asked that they went fishing by the dam. LO testified he agreed to do so.

[25] On their arrival at home, the appellant dished up food for both of them and they sat in the dining room eating. The appellant fell asleep on the couch as he was drunk. LO then got a pen and a piece of paper and wrote a note to R[...]1 saying that he did not feel safe in their house anymore and that he was leaving. He left the note on the bed, packed his clothes in a bag and left.

[26] He testified that he then left the appellant's home and went to D[...] W[...]s (DW), his cousin's house. On his arrival there he did not immediately see DW and after a while DW arrived and asked him what he was doing there at that time of the night. The complainant testified that he started crying as he was scared about what they would say if he told them what happened and said about what had occurred. His friends and cousin consoled him and he eventually told them that the appellant had touched him in

'funny places' with the added proviso that they would not say anything to anyone. They were shocked and suggested that they take a walk and smoke.

[27] Whilst walking they observed the appellant driving in his vehicle and the complainant hid from him, behind a bin. The appellant stopped the vehicle and approached them and asked DW and his friends where the complainant was. They responded and said they did not know where he was. The appellant accused them of lying saying "who is that behind the bin?". DW and his friends called out to him and said the appellant had seen him. The appellant then asked him what was wrong and he responded saying that the appellant knew. When the appellant requested him to accompany him home he refused and ran away.

[28] The appellant then returned to his vehicle and drove away. He then joined DW and his friends and after they had purchased a quart of beer sat drinking it in a nearby alley and discussed what they ought to do. DW mentioned that they should tell an adult and he responded and indicated it would destroy his stepsister R[...]1's relationship with the appellant and their family as they had children. During the discussion DW indicated that he had to tell his mother C[...] and LO agreed.

[29] They returned to DW's home and he waited outside while DW went inside to call his mother, C[...] . When C[...] came outside, she questioned him as to what had happened and said that R[...]1 was worried sick about him. DW explained to her what had happened to him as he was crying and he requested to sleep over at their home that night and she agreed. She also mentioned that as this was serious, she had to tell R[...]1 what had happened.

[30] C[...] telephoned his sister and informed her what had transpired and R[...]1 indicated that she would come and see him the following day. The following day R[...]1 came to see him and he told her what had happened. He was crying a lot and she said that they should pray. She then left and said she would sort it out. She then returned

saying he would go back to Boys town but later said he would stay another night at C[...] 's as there was no one at Boys town.

[31] A short while later R[...]1 and R[...]2 arrived and said they were taking him to Richards Bay to S[...] 's house. On their arrival there G[...] and other family members were present and they were crying and upset as by that time all of them had heard what had transpired. He was subsequently taken for a physical examination at hospital and to the police station to make a statement, with S[...] being present.

[32] During cross-examination the complainant acknowledged that everyone in the family referred to the appellant as "Pops" and that he had a closer relationship with R[...]1 his sister than with the appellant. He classified his relationship with the appellant as 'Not that close'. He agreed that he had stayed with the appellant and R[...]1 when he was very young for two years only and did not live with them again apart from visiting during the school holidays now and again.

[33] He confirmed that whilst he lived away from them, the appellant had not visited him nor phoned him and he only visited them in the December 2015 holidays and again in July 2016. Apart from living at various children's homes he stayed with family members other than the appellant and R[...]. He agreed that he came to visit R[...]1 and the appellant for the July 2016 holidays only because he had a fallout with his niece S[...] and she did not want him to stay there.

[34] He confirmed that he had a Facebook profile and had entered the incorrect date on such profile to make his age older than what he actually was. The incorrect date reflecting him being older was still posted the year he testified being 2017 and was still up as at July 2016. He also agreed with the proposition that he looked older than his age and that people often thought he was older than what he was. He also confirmed that he had stopped trying to make people think he was older than what he was, approximately one to two years prior to testifying. He had done so to enable him to drink alcohol and smoke.

[35] During cross-examination he indicated that although he did not have a close relationship with the appellant and had last stayed with them when he was young, it was impossible that the appellant did not know his age, as the appellant attended his baptism and was 'like a guardian' to him. He also relied on the fact that he had contact with his sister often over time.

[36] He acknowledged that he did have an erection on the Friday night but omitted to mention this in his evidence and that he had ejaculated although he did mention this to S[...] and G[...]. He disputed the appellant's version that he assisted him in removing his pants on the Friday night and had an erection whilst the appellant rubbed his thigh. He denied that he did not resist the appellant in anyway on both occasions and that he lay back on the couch and was relaxed on the first occasion with his hands behind his head giving the impression he enjoyed what occurred. He also denied saying to the appellant 'it was nice'.

[37] He denied not telling the appellant to stop what he was doing at any stage. LO agreed that he could have resisted the appellant's advances and shouted for help on the Friday night as both R[...]1 and R[...]2 were close by in their respective bedrooms.

[38] D[...] W[...] (DW), was 17 years old at the time he testified during the trial, in 2017, with the assistance of an intermediary. It is common cause that the complainant was his cousin and he would see the complainant in Melmoth during the holidays. On the morning of 2 July 2016, a Saturday, the complainant came to their home in the morning and they played soccer together, told jokes and laughed. D[...] and his friends left his home, leaving the complainant behind with other friends. When D[...] and his friends were returning home, he saw the complainant near their home at approximately 18h00 / 19h00. When he observed the complainant, he was walking with his head down and there appeared to be something wrong. When he questioned the complainant as to what was wrong, the complainant answered that he has a problem which he does not want to talk about.

[39] D[...] pleaded with the complainant to tell him what the problem was and the complainant reported to him that uncle Pops (the complainant's reference to the appellant) had asked him to accompany him to the dam. This was at approximately 17h00 and the appellant had informed him to advise sister R[...]1 that they were going to the dam to fish. The complaint agreed, and he and uncle Pops, travelled to the dam. On their arrival at the dam, the complainant informed him that the appellant locked the doors to the vehicle and told the complainant to "suck his penis". The complainant informed him that he was scared and because uncle Pops was "bigger than him so he had to do it". After narrating this to him, the complainant cried. On his return to sister's home, the complainant informed him that he told her that they had returned from fishing.

[40] He indicated that when the complainant was narrating this to him, he was crying. They then went into the yard to the outbuilding where the complainant also narrated to him what had happened on the Friday. The complainant had informed him that he and uncle Pops were sitting on the couch watching television and he, the complainant had no blanket. The complainant started feeling cold and got up to go and fetch a blanket. Uncle Pops said "no don't worry, come and sit next to him" because he had a blanket which he then shared with him. The complainant then went to sit next to uncle Pops and uncle Pops moved closer to him and started touching the complainant's penis. The complainant asked D[...] not to tell anyone about what he informed him.

[41] D[...] went inside the house and left the complainant with their friends. Their friends indicated that they were going to take the complainant for a walk to calm him down. When he went into the house as he did not accompany them, his mother questioned him as to the complainant's whereabouts. She informed him that she had received a telephone call from the complainant's sister saying that the complainant had gone missing and that uncle Pops was looking for the complainant. When his mother informed him of this, he then requested David to accompany him to look for the complainant and their friends.

[42] They left the house and informed his mother that they were going to look for his

friends. Whilst walking on the road looking for the complainant and their friends, the appellant approached and stopped them and questioned them as to the complainant's whereabouts. They denied having seen the complainant. However, the appellant saw the complainant and a friend a distance away and then drove toward them. They also proceeded in the same direction and observed the complainant run and hide when he saw the appellant's vehicle. They observed the appellant stop next to the complainant and drive off again.

[43] This was after the appellant had approached the complainant, asking him to go home with him and the complainant refused, him saying "you know what you have done" and the complainant ran away. The appellant, according to D[...] , drove off in the direction returning to his home. Whilst they were walking with the complainant, he pleaded with the complainant to tell his mother what had transpired. The complainant indicated that he was reluctant to do so, but had no difficulty if D[...] informed his mother what he had told him. On their arrival at D[...] 's home, he made a report to his mother of what the complainant had told them. The complainant was crying by this stage.

[44] D[...] 's mother then informed him that she was going to call the complainant's sister, R[...]. He saw her take her phone outside and telephone the complainant's sister and when she returned, she said the complainant was to sleep at their home for the night. The complainant stayed over during that night and the following day, his sister R[...]1 arrived spoke to the complainant and started praying with the complainant in the room whilst they were outside. She left and informed him to tell his mother that she had come. She returned later on that afternoon and took the complainant and that was the last time he saw the complainant.

[45] During cross-examination, the witness confirmed that when the complainant came to his home that morning, they played soccer, laughed and told jokes. When the complainant returned in the afternoon and they spoke to him, although he could not recollect the exact words that the complainant used to describe what had occurred between him and uncle Pops, he disputed that the complainant informed him that Pops

asked him but rather said that the complainant informed him that "Pops said he must do it". He was adamant that the complainant had informed them that Pops had asked him to suck his penis.

[46] He indicated and appeared to dispute the complainant's evidence that the first person he told about sucking the appellant's penis was S[...] . He confirmed that during his evidence in chief he did not mention that he and the complainant and their friends had consumed alcohol as they are not allowed to drink alcohol.

[47] C[...] W[...] , DW's mum confirmed that the appellant's wife is her cousin and that their children are friends and have been so from a very young age when the complainant used to visit their home. On Saturday evening, 2 July 2016, she received a message from the appellant's wife, R[...] , asking if the complainant was there at their home. She questioned her son DW who said no, he was not present. When she asked R[...]1 why she was looking for the complainant, R[...]1 informed her that the complainant has taken his clothes and written a note saying that he did not feel safe staying at their house anymore.

[48] A short while later, DW walked into the house and she questioned him as to the whereabouts of their friends. They then left. A short while later she received a message from DW saying that they had found the complainant in town. This was, as R[...]1 had informed her that the appellant had gone to look for the complainant but when he saw the appellant's car, the complainant had run away. A short while later, DW came home and said he had something to tell her. When she went outside, she saw the complainant with him, and that is when the complainant told her that Pops had sexually molested him.

[49] She went back into the house as she was shocked and then went back outside a few minutes later and asked the complainant to explain to her what had happened. The complainant informed her that on the Friday night, 1 July, he and the appellant were sitting in the lounge watching television and when the complainant stood up to fetch a

blanket as it was cold, the appellant said to him “no, come and sit next to me because I have a blanket”. He sat next to the appellant on the couch and covered himself with the blanket. That is when the appellant proceeded to touch his private parts.

[50] On the following day, 2 July 2016, the complainant informed her that the appellant took him to the dam and made him perform oral sex on him. The complainant requested her not to tell anyone, but she said she could not keep quiet about it and then took her phone and telephoned R[...]1 and told her what had happened. R[...]1 said she would get to the bottom of it. The complainant slept at her home that night.

[51] The following day she went to church and when she returned, her children informed her that R[...]1 had been there and that she had been speaking to the complainant. R[...]1 returned to the house on the Sunday and asked her if the complainant could sleep there again that night because she wanted to get hold of his counsellor. The complainant agreed and R[...]1 then left. Shortly after R[...]1 returned and informed the complainant that he must pack his bags as she was taking him to Richards Bay to S[...]’s house.

[52] During cross-examination she indicated that she could not remember correctly, whether DW first told her what had transpired, and then complainant, but she could confirm that the complainant confirmed everything that DW had told her that. When it was suggested to her that DW, with the help of his friend David informed her what had happened and that the complainant did not explain to her what happened, she was adamant that the complainant did tell her what had transpired.

[53] S[...] P[...] confirmed that both the appellant and the complainant were her uncles. On Sunday, 3 July 2016 whilst in town with her mother G[...] P[...] at the Richards Bay Mall, her mother received a call from her aunt, R[...]. The phone was on speakerphone at the time, and R[...]1 told her mother that she had a problem and did not know what to do. Her mother then asked her to explain what had transpired and her aunt informed her mum that the appellant had molested the complainant. She then told

her mother G[...] to inform R[...]1 to bring the complainant to Richards Bay.

[54] Approximately two hours later, R[...]1 and the complainant arrived at her home in Richards Bay. R[...]1 and her mother G[...] sat inside the home talking and R[...]1 was crying. They spent a couple of hours talking when R[...]1 then left to return to her home in Melmoth. On Monday, 4 July her mother G[...] left for Pietermaritzburg and that is when she sat down with the complainant and asked him to tell her what had happened. The complainant then explained to her what transpired on 1 and 2 July 2016.

[55] The complainant informed her that on the Friday night, 1 July whilst in the lounge with the appellant, he was feeling cold and the appellant offered to share a blanket with him, which he agreed to. The appellant then started touching him on his thighs and private parts and they then sucked each other's penises.

[56] The following day the appellant requested the complainant to come with him for a drive. When she asked the complainant why he agreed to do so, the complainant thought that the appellant wanted to speak about what had transpired the night before and possibly apologise and warn him not to say anything to R[...]. The complainant informed her that en route to the dam, the appellant started rubbing the complainant's thigh and private parts and asked him why he, the complainant was not getting excited or getting hard.

[57] The complainant responded to the appellant and told him that he was still in pain from the night before and the appellant responded and said that the complainant would 'be even more sore after today'.

[58] On their arrival at the dam, the complainant told her that that is when the appellant raped him. The complainant informed her that whilst he was seated in the passenger seat, the appellant put his seat down faced him, held his legs up and penetrated him by inserting his penis into the complainant's anus. The complainant also told her that the appellant made the complainant 'give him a blow job after this'. After the

complainant had performed oral sex on him, the appellant sent the complainant to the back of the car to fetch the appellant's alcohol. The complainant told her that he was scared and they then drove home and he waited for the appellant to sleep. Once the appellant had fallen asleep, he wrote a letter to R[...]1 telling her he did not feel safe, packed his bags and left and went to C[...] W[...] and his cousin D[...] 's home.

[59] The complainant informed her that he had made a report to D[...] and two of D[...] 's friends as to what had transpired and they then took a walk. Whilst out walking with his friends and DW, the appellant was driving around looking for the complainant and he hid in the bushes. When the complainant made the report to her, he was very emotional and he was crying.

[60] After the complainant had told her everything, she then made an appointment with her general practitioner, Dr Balata and took the complainant for an examination. The doctor prescribed medication for the complainant as he was extremely emotional and she then spoke to a friend of hers who was a captain in Richards Bay, SAPS. The matter was then referred to Richards Bay lifeline and the complainant and her were referred to the Ngwelezane hospital where a physical examination was done and the police were called to take a statement.

[61] She confirmed during cross-examination, that she was present with the complainant when he narrated to the policeman the events for purposes of his statement. She confirmed that once the statement had been read by the complainant, he signed it and in all probability, she did the same. She confirmed that what was contained in the statement was properly taken down as the complainant explained it. She also confirmed that the statement which the complainant provided to the police officer contained more details on what he had reported to her as the police had wanted more detail.

[62] She confirmed that when they attended at the Ngwelezane hospital, a nurse was present to asked for the details of what occurred and took notes as the complainant

explained to her what had transpired. She was present in the room at the time. She confirmed that she was not present when the complainant was examined by the doctor nor present when he reported to the doctor what transpired.

[63] G[...] E[...] P[...] confirmed that the appellant was her brother-in-law and that the complainant, was her stepbrother. She confirmed that the complainant was the youngest of her siblings and they shared a father. She was present when the complainant was born on [...] M[...] 2001 at St Mary's hospital in Melmoth. A birth certificate was issued for the complainant, a copy of which was then handed in as an exhibit. She confirmed that when the complainant was born, he resided with his mother and their father and they also lived with her as well.

[64] She testified that the complainant resided with the appellant's family until he was approximately five years old. He resided with her in Pietermaritzburg when he was baptised on 8 July 2012. She was present at his baptism, which was performed by Father Xulu. The appellant was present and stood in as the sponsor being the godfather to the complainant. The duties of a sponsor is to provide spiritual guidance and assist parents when they are not there. She testified that the certificate was issued at the time of the complainant's baptism.

[65] During cross-examination she confirmed that the baptism took place on 8 July even though it also reflects 4 July 2012. She could not provide an explanation for it. She was adamant that the appellant was the godfather. She indicated that she could not dispute if R[...]1 indicated that she was going to be the sponsor and godmother and said that it was traditional to have both a godfather and a godmother. She indicated that if the appellant says that it was never the intention for him to be godfather, it would be strange as he was present and they all spent the weekend together at the appellant's home in Melmoth thereafter. She confirmed however that the baptism certificate does not have the appellant's signature on it.

[66] Father Bongani Xulu confirmed that during 2012 he was the parish priest at St

Pius Catholic Church in Melmoth. He was shown the baptism certificate and he confirmed that it contains his signature and reflects the details of the complainant and when he was baptised. He confirmed that the name of the appellant appears as being the sponsor.

[67] During cross-examination he confirmed that he does not have any independent recollection of the actual baptism of the complainant. He indicated that they usually do give instructions to the sponsors in preparation of the baptism. He indicated that it is normal for males to sponsor males being baptised, and for females to sponsor females being baptised. He could not disagree however, if R[...]1 M[...] testified that she was one to prepare the complainant for his baptism and was going to stand in as the sponsor.

[68] He also had no recollection of having asked the appellant on the day of the baptism to step in as sponsor for the complainant. He also confirmed that he would not disagree with the supposition that on the day of the complainant's baptism, he insisted that a male sponsor be called up and did not want to allow R[...]1 to sponsor her stepbrother.

[69] The appellant testified that he had been married to R[...]1 M[...], the complainant's stepsister for approximately 30 years and was self-employed as a motor mechanic in Melmoth, which business he operated for approximately 20 years. The complainant is his wife's stepbrother. At the time of his arrest, he was informed that the complainant was 15 years old at the time of the incident and prior to this he thought he was much older than his age. He was unaware of the exact age of the complainant as he did not have a close relationship with the complainant. He guesstimated the complainant's age to be 17.

[70] He initially had contact with the complainant when the complainant was young and stayed with them for approximately 2 ½ years whilst he attended preschool and primary school. Because the complainant was a problem child, he was placed in a home. Since that time period he had no contact with the complainant, but his wife used

to contact her stepbrother telephonically. The last visit which the complainant made to their home was in December 2015 and July 2016. Prior to July 2016 when the complainant visited, he did not have a close relationship with him. He used to attend at work in the morning, after work attend at the Centenary Club to have a few beers and return home at approximately 7 o'clock in the evening.

[71] Whilst the complainant was at his home during the holidays, he would go onto the internet with his wife's computer or watch TV or the complainant would play with his friends. He indicated that there was an occasion that he had to discipline the complainant by smacking him on his bottom as they went shopping to Makro and when they returned home, he found a toy with sweets in the complainant's underpants, which he had stolen from Makro.

[72] When questioned regarding the complainant's evidence that he would have known his age as his wife R[...]1 would phone her stepbrother every year for his birthday and as he was at the complainant's baptism, he indicated that when his wife phoned her stepbrother for his birthday, he was never around and did not overhear anything on the phone when she spoke to him. Although he did not recollect being at the complainant's baptism, he accepted that his name was on the certificate so that he must have been there.

[73] On the evening of 1 July 2016, he and the complainant were sitting on the couch watching TV. The complainant was lying slouched on the couch, swinging his legs from side to side. His daughter and wife were in their respective rooms. He questioned the complainant as to whether he was feeling cold and when the complainant indicated he was, he asked the complainant whether he would mind sharing a blanket with him. The complainant shifted closer to him on the couch and covered himself with the blanket which he had. He had gone out drinking earlier on with his friends as he had attended to a breakdown and had consumed approximately four beers. After the breakdown, they went to the club and he consumed another two beers. On his arrival at home, he sat down and watched a bit of television and fell asleep. When he woke up at approximately

20h00, he had supper and watched television. He had consumed another can of beer.

[74] Whilst they were covered with the blanket, he started rubbing the inside of the complainant's thigh until the complainant got an erection. This was as he was aroused by the complainant swinging his legs on the sofa from side to side. He then knelt down in between the complainant's legs, removed his pants and then sucked on his penis until the complainant ejaculated in his mouth. He indicated that whilst he did this, the complainant had put his head back with both his hands behind his neck in a relaxed mode. The complainant did not say anything to him at the time. In addition, the complainant had lifted his buttocks to assist him in removing his pants. After the complainant ejaculated, he helped him to put his pants back on and they sat next to each other, watching television. After the complainant had ejaculated, he asked the complainant if it was nice and the complainant responded by saying yes.

[75] Approximately five minutes later, the complainant took his hand, put it inside his pants and started stroking his penis until it was semi-erect. The complainant then pulled down the appellant's pants and proceeded to suck his penis. After he had ejaculated in the complainant's mouth, the complainant moved to his side of the couch and the appellant pulled up his pants and watched television. The complainant also remained seated next to him watching television.

[76] After a short while his daughter R[...]2 came into the kitchen and noticed the complainant sitting on the sofa. This was after 11 o'clock and she asked the complainant why he was not sleeping. The complainant responded saying he was watching television. She asked him a further two times why he was not sleeping and on the third occasion when she asked him why he was not sleeping, the appellant told her the movie was going to finish in approximately 10 or 15 minutes time and to leave the complainant as he can go to sleep thereafter. The complainant watched the movie until the end and then went to his room to sleep. The appellant remained watching television. After a while he switched off the television and went to his bedroom to sleep.

[77] On the following morning, 2 July 2016, after getting up and bathing, he went to the kitchen and made breakfast. The complainant woke at about 8h45 or 9h00, had breakfast and by that stage his wife was awake and the complainant asked her what he could do. She gave the complainant some chores in the yard. Later on in the morning, the complainant returned and said that he had finished his chores and requested permission to see his friend D[...] . The appellant agreed on the proviso that the complainant would return before 5 o'clock. He estimated that the complainant left at approximately 11h00. The complainant was acting normal and cheerful.

[78] Whilst the complainant was away, he was watching television. The complainant returned home well before the 5 o'clock deadline. The complainant came to him to ask him what he could do, and he told him to rake the leaves off the grass. At approximately 16h30, the appellant decided to take a ride to the dam and as he was reversing the car, the complainant walked towards the car and he asked him whether the complainant would like to accompany him to the dam. The complainant responded yes and walked around the car and jumped into the passenger seat and he drove toward the dam. He did not inform his wife or his daughter that he and the complainant were going to the dam. On the way to the dam nothing transpired between him and the complainant but he had half a bottle of old brown sherry. He had drunk approximately three glasses of the bottle and this was the remainder. He was not feeling the effects of the alcohol.

[79] On their arrival at the dam, he parked the car with it facing the exit of the dam and switched off the ignition. He placed the old brown sherry on the floor of the car and requested the complainant to put down the backrest of the passenger seat. He alighted from the driver side and went over to the passenger side and requested the complainant to open the passenger door which the complainant then did. In order to make more space, he slid the passenger seat back, and whilst he was in between the complainant's legs asked the complainant if he had sex with a male. The complainant said no. He then asked LO if he had had sex with a girl and the complainant responded by saying yes.

[80] When he tried to find out the name of the girl whom he had had sex with the

complainant refused to give him a name. He then grabbed the complainant's pants on the sides and the complainant lifted himself up. The complainant had not said anything at this stage. Whilst stroking the complainant's penis, the complainant said it was sore. When he asked the complainant why it was sore, the complainant said it was sore from yesterday. He then proceeded to suck the penis of the complainant but noticed that the complainant did not get an erection. He then stopped and questioned the complainant as to why he could not get an erection and the complainant indicated that he did not know.

[81] He then stood up, lowered his pants to his knees and proceeded to rub his bum on the complainant's penis. When the complainant could still not get an erection, the appellant told the complainant to put up the seat and for them to go to the back seat. At that stage, the appellant indicated that he did not have an erection. Both he and the complainant alighted from the vehicle and the complainant opened the left side door and jumped in the back seat. The appellant moved the passenger seat forward and whilst the complainant was lying on his back, he asked the complainant to put his leg on the headrest, one on the back headrest and the other on the front passenger headrest. Whilst the complainant was lying on his back, he then got into the back of the vehicle and lay on top of the complainant.

[82] He rubbed his penis against the complainant's penis in the hope that the complainant would get an erection. Neither he nor the complainant had an erection. That is when the appellant started rubbing the outside of the complainant's anus with his fingers in a roundabout motion. When the complainant could still not get an erection he lay on top of him and they fell asleep.

[83] The complainant woke him up and told him that they should go home. He told him that they could leave just now he then fell asleep again on top of the complainant. The complainant then woke him up and said "Pops can we please go home. We can carry on with this tomorrow". He then got up, alighted from the right-hand side passenger door and the complainant sat up on the seat. He requested the complainant

to suck him one more time, which the complainant did but he still could not get an erection. He described the complainant's conduct as normal and they did not have any discussion on the way home.

[84] On their arrival at home, he parked the car, they both alighted from the vehicle and proceeded inside the house. The complainant went to his room and he remained in the lounge watching television and he fell asleep. After a while, his wife woke him up and asked him where the complainant was. When he responded and said that the complainant was in his room, she informed him that the complainant was not there. His wife told him that she found a note in which the complainant said he had run away. He then requested her to phone C[...] and C[...] informed them that the complainant was not there and one of her nephews was also missing. He then told his wife is going to ride around town to try and look for them.

[85] Whilst driving around town, he met up with D[...] and questioned him as to the whereabouts of the complainant and Jordan. D[...] told him that they had not seen the complainant or Jordan. He continued driving around town and as he reached the stop street of the Melmoth courthouse, he saw two shadows in the headlights of the motor vehicle. One of the shadows ran to hide behind a dirt bin and he drove the car in that direction. He alighted from the vehicle and walked to the dirt bin and noticed that it was the complainant. He asked complainant to get in the vehicle as he was taking him home. The complainant refused and said he was not returning home with him. He then returned home and left the complainant in the city centre but told his wife where the complainant was and that he was with D[...] and J[...]. He did not tell his wife what had happened.

[86] After his wife had spoken to C[...] , C[...] informed his wife that the complainant was making allegations against him. After his wife had finished speaking to C[...] , he told his wife exactly what had happened. The explanation which he gave his wife was that on the Friday he and the complainant "gave each other blow jobs" and on the Saturday afternoon at the dam performed oral sex on each other again. His wife was

very upset, and they have since sought professional help from the psychiatrist to deal with these problems.

[87] He confirmed that he was at work on the morning of his arrest, and the detective arrived with a warrant of arrest approximately a month after the incident. He wanted to clear his name. He did not think that he had committed a crime, as whatever he and the complainant had done was consensual and he did not force the complainant into doing anything. In addition, he thought that LO was older than what he actually was.

[88] During cross-examination, he confirmed that after the complainant had left them, he had completed grade 9. The reason for him leaving was that he was causing lots of problems at school, fighting with the children, defecating in the corridors and stealing. Even though his wife tried to intervene and assist the complainant, the complainant's conduct just got worse. They thereafter put him in a Children's Home in Newlands East. They hardly saw him whilst the complainant lived in the homes and he last saw him in 2015 when his wife went to fetch him from S[...] 's House in Richards Bay. He had caused problems at S[...] 's house and they did not want him to stay there anymore.

[89] As a consequence, his wife then fetched him and allowed him to come to their home. At that point the complainant had nowhere else to go. He confirmed that from the time the complainant left home when he was in grade 9 until 2015, he had little to no communication or interaction with the complainant. He confirmed that he had no recollection of being present at the complainant's baptism, but because he is reflected as being present on the baptism certificate, he agreed that he must have been at the baptism. He confirmed that when his wife fetched the complainant from S[...] 's house in July 2016 he did not question her about what had transpired, but it is only after she had picked up the complainant and he arrived at their home that his wife told him that she had fetched the complainant from S[...] 's house because he had caused problems there but she did not elaborate on them, and neither did he ask.

[90] Constable Thamsanqa Zulu confirmed having taken a statement from the

complainant. At the time the complainant was in the presence of his guardian and he did warn him to tell the truth as there is no provision for a minor to take an oath. The complainant narrated the events to him in the presence of his guardian and he wrote down what the complainant was saying. Once he had finished taking down the statement, he handed it to the complainant and the guardian who then read and confirmed the contents, and he signed as commissioner of oaths.

[91] During cross-examination, he confirmed that he had not received training in taking down statements from victims of sexual offences. He had no recollection of the complainant crying when he took his statement and if the complainant had been crying, he would have stopped and given him time to compose himself. He also indicated that he did not use the exact words that the complainant used or jot down exactly what the complainant said to him verbatim. The statement was a summary of the complainant's evidence in his own words not that of LO.

[92] They communicated well in English and were able to communicate and converse satisfactorily with each other. He indicated that he understood the suggestion by the prosecutor that he had no authority to change the words which the complainant used in describing the incident to him. He confirmed that the guardian was present at the time he took the statement although he did not record her name. The purpose of calling him to testify was for him to confirm the statement that he took and that LO and his guardian read the statement and confirmed its contents before signing it.

[93] The next witness for the appellant was R[...]2 M[...], his daughter. She confirmed that the complainant is her mother's stepbrother and used to reside with them when he was much younger in pre-primary school. They would only see him briefly during the school holidays for maybe a day or two as the complainant would live with his aunt in Ulundi. She did not have telephonic contact with the complainant when he did not visit them. Apart from the December 2015 and July 2016 school holidays, he did not visit their house. She confirmed that she did not have a relationship with the complainant and neither did the complainant have a relationship with her father.

[94] R[...]2 confirmed that the three screenshots from the complainant's Facebook profile she took those in August 2016 and sent them to her mother over WhatsApp. She confirmed that the complainant had a public Facebook profile so she was able to merely search for his name on Facebook and view the details. She was not listed as a friend of his on Facebook. The reason why she went to look at his Facebook profile was as she was unsure of his age.

[95] She confirmed on Friday 1 July 2016, the complainant was there for the school holidays. She was in her room and her mother had gone to sleep. She was on the phone until approximately 22h30 and could hear the television and then got up to switch it off. When she entered the lounge, she noticed the complainant awake and her father was there as well. She and the complainant had argued because she wanted to switch the television off and the complainant wanted to finish watching the movie. Her father, the appellant got up and said that the complainant could finish watching the movie. She confirmed that in July 2016 she did not know how old complainant was.

[96] During cross-examination, when asked to explain what she meant when she indicated she had no relationship with the complainant, she said he was just there and she did not speak to him. She confirmed that on the night when she and the complainant argued over him going to bed, her father was asleep on the couch.

[97] R[...]1 M[...] confirmed that she is married to the appellant and they have two children. The complainant is her stepbrother as her father had him out of wedlock. After her father passed away, the complainant came to stay with them until they made a decision as to what would happen to him. It was convenient at the time as there was a pre-school which had full day care facilities and either she or the appellant would take him to school. He lived with them for approximately 2 ½ years and when the complainant began experiencing behavioral problems, no one in the family wanted to take him in.

[98] The social worker intervened and the complainant was placed in a home. He never returned to stay permanently with them and after he had stayed at Lake Haven Home, he stayed with her sister when he was also expelled from school. There was not a stage when the complainant would live with them again at their home in Melmoth. During the school holidays he would visit with her sister who resides in Ulundi. Whilst the complainant was in the home, she would often have telephonic contact with him and would phone him on his birthday. Once a year they would visit him at her sister's home. The appellant did not accompany her on these visits to the complainant nor did her husband ever phone him. After the complainant once again began experiencing trouble at school, they then placed them in another home in Pietermaritzburg where she did not have any contact with him.

[99] After he left G[...] 's home, he was put in a shelter and went to a place of safety as he got involved in gang activity. He then was transferred to Bechet High School in Durban whilst he was in the place of safety and thereafter transferred to Girls and Boys Town in Durban. In December 2015, he came to stay with them for a few days in the school holiday prior to going to her sister S[...] . He did not really live with them as one of the farm managers asked if he could stay there for a week as he had a son who was of the same age to the complainant. The complainant would only come and stay for a few days at a time. In July 2016, when no family member wanted to take him in for the holidays, the social worker telephoned her and she agreed to have him for a few days, which is when the incident occurred. Most of the time during the holidays, the complainant would accompany her to work but thereafter because he said it was boring would stay on the farm or go to his friends once he had done his chores. During these visits, and prior to the incident in July, there was hardly any contact with the complainant. The appellant also did not have much contact with the complainant.

[100] She explained that when the complainant was residing in Pietermaritzburg with G[...] on a Sunday, she spoke to their priest about having the complainant baptized even though he was much older. Prior to a service, the priest spoke to the complainant and he then baptized him. She had explained to the priest that she would volunteer to

be his sponsor but the priest, when he was baptizing the complainant, said that her husband, the appellant must come up and sponsor him. The appellant had not been asked nor did he plan to be the complainant's sponsor, and she did not even speak to him about it as she had already reconciled herself to the fact that she was going to be his sponsor and she had a better relationship with him.

[101] She indicated that after the appellant had been arrested, during one of the court appearances, when they arrived home, the appellant asked her if she perhaps had a birth certificate for the complainant. She checked amongst her papers and did not have a birth certificate, but found the baptism certificate and handed it to the appellant's attorneys. She confirmed that the appellant would not be present when she made phone calls to the complainant and interacted with him. The only reason why she knew how old he was, was that in May of that year when she telephoned him for his birthday, she questioned him as to how old he was. If she had not asked him that question, she would not have known and would have had to go through her records. She confirmed that her daughter R[...]2 had printed and sent her the Facebook profiles, which R[...]2 had printed off the complainant's Facebook profile.

[102] She confirmed that on 1 July 2016, she had left the appellant watching TV and went to bed around 22h00 and was lying in bed reading. She assumed that the complainant had also gone into his room like he did every other night and she fell asleep in her room. She also indicated that the bedroom door was open that night.

[103] On Saturday 2 July 2016, after the complainant had helped her clean inside the kitchen and did his chores sweeping the yard she did not see him again as she assumed he went to visit his friends. He did not tell her that he was doing so. During the morning of 2 July 2016, the complainant was fine and was normal and she did not notice anything unusual about him. She saw him later on that afternoon at around 17h00. The appellant had cooked and she told the complainant to help himself to something to eat and she then went back into her room to read. She was not certain of the time but noticed that the appellant left the premises as she saw the brake lights of the car as he

left.

[104] The appellant did not tell her where he was going. After a short while, when it became very quiet, she then got up to see what the complainant was doing but she could not find him anywhere and that is when she assumed that the complainant had gone out with the appellant. It was later on that evening after she had finished reading, and got up to check on everyone that she could not find the complainant. She then woke up the appellant and asked him where the complainant was and he indicated he did not know where he was. She then proceeded to the complainant's room and saw a note in which he said he did not feel safe.

[105] She tried to contact C[...] but she did not answer her telephone, so she sent her a message asking her if the complainant was there with her. C[...] responded to say that the complainant was not there but neither were two of her children. In the interim, the appellant also took a drive around town to see if he could find the complainant and he saw the complainant with Jordan and the complainant said he did not want to return home as he was with his friends. She did not think anything of it and waited to see what would transpire. After a while C[...] sent her a message saying the complainant was making an allegation that the appellant molested him.

[106] She told her that she would come and see her in the morning after church. When C[...] informed her of the allegations which the complainant was making, she spoke to the appellant about it and informed him that the complainant was making the allegation that he had molested him. The appellant at the time was half asleep in a daze and said he did not know. She tried to sleep but she could not sleep because she was concerned.

[107] The following morning, she went to church and did not have any further discussion with the appellant about these allegations that night. She went to church and then thereafter went to C[...] 's home. On her arrival at C[...] 's home, she found the complainant and spoke to him. That is when the complainant said that her husband had

molested him. The complainant told her that the appellant had asked him to perform oral sex, which he did and they then performed oral sex on each other. The same thing happened at the dam on the following day.

[108] When she asked the complainant as to why he did not say anything to her, the complainant informed her that he did not want to destroy her marriage and her relationship with the appellant. She was devastated at the time and asked the complainant what he wanted to do, and suggested that he return to Girls and Boys Town and the complainant agreed. When she returned home, she informed her daughter R[...]2 the complainant was making allegations that the appellant had molested him and wanted to return to Girls and Boys Town.

[109] She did not have any recollection of speaking to the appellant on Sunday evening but did discuss the complainant's allegations on Monday. When she contacted Girls and Boys Town she was told that there was no one there on the holidays and she could not bring the complainant back so she and her daughter ended up taking him to Richards Bay to r S[...] 's house. She did not have a discussion with the appellant on the night that she returned but did so the following morning. They agreed to speak about this that evening when he returned from work.

[110] When she questioned the appellant about what had transpired, he apologized to her and said that it was the most stupidest thing that he had done and tried to explain to her what had happened whilst he and the complainant were watching television on 1 July 2016. She was not certain whether she blocked out the details but she then contacted a social worker and went to the doctor who booked her off for a couple of days. She confirmed that she had forgiven her husband and that her husband, the appellant was not aware of the complainant's age at the time of the incident.

[111] During cross-examination, it was suggested to her that Father Xulu had testified that when a male is baptized there is no sponsor that is a female. She disagreed with this and indicated that when her son was baptized her sister Venita was his godmother

and he did not have a godfather. She confirmed that during the course of the complainant's baptism, when the priest called the sponsor up, she went up alone and the priest then called the appellant up, which he did. She confirmed that she had planned to be the sponsor of the complainant but during the course of the baptism, she stood there as the godmother and then the priest called the appellant up. The priest wanted a male figure. The appellant did not volunteer nor did she ask him to be a sponsor. Both her and the appellant stood up at the time when the complainant was baptized.

[112] She confirmed that when the priest made out the baptism certificate, he put the appellant's name as the sponsor. She was also not certain as who provided the priest with the complainant's date of birth at the time the priest completed the baptismal certificate. She confirmed that although she did not go to the police when incident was reported, she tried contacting the social worker but was unable to contact her. She confirmed that when the complainant narrated what had transpired to her, he was a bit emotional and speaking in a high-pitched voice. She was also emotional at the time. Upon questioning from the court, she confirmed that she was the one who would provide the complainant with permission if he needed to go anywhere and give him chores. The appellant did not really have much to do with the complainant and she would be the one who would interact with him more.

The medical evidence

[113] The respondent led the evidence of Dr. Emeka Edwards Orisakwe (Orisakwe) who completed the J88 of the complainant at 15h06 on 5 July 2016. She confirmed that the complainant was accompanied by a guardian. At the time of the examination, the medical history provided by the complainant was that there was penis-anus penetration by the complainant's brother-in-law on 1 and 2 July 2016. On 2 July 2016, the appellant is alleged to have requested the complainant to suck his penis, which he did.

[114] There was no abnormality detected and the anal examination reflected hard faeces in the rectum and winking and reflex dilatation and redness. The findings were in

keeping with likely penetrative sexual activity. The conclusion based on the history provided by the complainant was of penis-anus penetration and fellatio. The doctor confirmed that some of the findings were subjective. The only objective findings were in paragraph 7 where the redness was recorded in other places, but it was non specific in terms of the conclusion. Based on the redness, the doctor concluded that the findings were in keeping with likely penetrative sexual activity.

[115] The doctor indicated that it was not normal for a child of 15 years old to have redness on the skin surrounding the orifice of the anus. It is an objective finding if there was any activity around the anus that requires any form of penetration, it would leave the area with erythema or what they describe as being redness. If a penis was inserted into the anus of the victim, it would cause redness to the skin surrounding the orifice. The redness disappears on the first day and one would not be able to notice it, but the redness is more likely to stay longer in white skinned people compared to darker pigmented person. The incident was reported three days after it had occurred. Twitching is a normal reflex dilation when one examines complainant's in the area of the anus. It is a non-specific finding.

[116] The hard faeces can occur for a number of reasons and the reason why this one is marked objective is because during the process of anal penetration, most victims have difficulty to use the toilet because of the pain and irritation around the anus and some are likely to retain faeces for some days after the incident, and it therefore becomes hard. This is why the doctor concluded the finding was an objective one in keeping with the history.

[117] In answer to questions from the court, the doctor confirmed that the winking was within the realms of a normal examination and was non-specific. During cross-examination, Dr Orisakwe confirmed that he had his own independent recollection of examining the complainant. It also emanated during cross-examination that the report made by the complainant was that on Friday and Saturday, being 1 and 2 July, the complainant complained of sexual penetration penis-anus on the Friday, and on the

Saturday was also requested to suck the appellant's penis. The notes were taken by the professional nurse and herself. Both the doctor's notes as well as that of the professional nurse reflected that the complainant verbalized that the perpetrator had inserted the penis in the anal area.

[118] The doctor also acknowledged that if the complainant had informed her that the appellant had forced him to suck his penis, she would have framed it that way, hence the reason why they used the word "requested". During cross-examination Dr Orisakwe indicated that the redness was as a consequence of some form of penetration, not necessarily penis-anus, it could be a finger, a stone or a stick. When pressed to answer as to whether or not the redness on the skin around the anus could be as a consequence of other reasons, the doctor indicated that it was not just the redness that begs the question why it was red and the doctor would have had to find a reason for the redness.

[119] If a finger was used, it is simply not rubbing a finger but one would have to make some effort to apply pressure against the skin and the surrounding area, so one would have to be rubbing and penetrating the skin around the orifice area to result in the redness. The doctor eventually conceded that it would not only be penetration which would result in the redness around the orifice but skin infections would also cause redness and other skin conditions, although there was no sign of infection.

[120] Dr. SJN Cele, a specialist forensic pathologist testified on behalf of the appellant and confirmed on 6 February 2017, he prepared a report. At the time of completion, he had the completed J88 form of a Dr Orisakwe. The information provided at the time was of an alleged sexual assault which occurred on 1 and 2 July 2016 reportedly to have been a peno-anal penetration. In addition, the adult male requested the complainant to lick his penis. When asked to comment on the anal examination, he indicated that as a consequence of faecal matter on the skin around the anal orifice, redness on the skin around the anal orifice and presence of hard faeces in the victim, Dr. Orisakwe concluded that such findings are in keeping with anal penetration.

[121] He indicated that anal dilatation can be associated with constipation or stool in the rectum. Peri-anal redness can be caused by specific foods, diarrhea, ringworms, Crohn's disease, skin infections and other skin conditions. The absence of overt anal features do not exclude the possibility of anal penetration to have taken place. There are no diagnostic signs of anal penetration and numerous features may be found in cases of anal penetration. The redness around the anal canal is a non-specific feature and could result from various causes.

[122] The medical literature indicated that the observations made by Dr. Orisakwe are variable and can be seen in both instances of anal penetration and those who are not penetrated. It would not be objective to rely solely on the clinical findings alone to confirm or conclude that anal penetration had taken place.

[123] He indicated that although he was not present when Dr. Orisakwe was testifying, he indicated that it was pointed out to him that Dr. Orisakwe agreed that the twitching or winking were normal findings and did not indicate or assist him coming to his finding of possible penetrative sexual activity. What led Dr Orisakwe to the conclusion was the redness around the anus and the history taken from the patient. When asked to comment on Dr. Orisakwe's evidence that from the type of redness he could see that the cause was penetrative activity, his comment was that the peri-anal redness was nonspecific and various possible factors can cause it.

[124] One is unable to make an objective finding having not eliminated the other possible causes in an objective way. One of the known causes of peri-anal itching and redness is a local infection around the anal canal caused by microorganisms, where a swab is used and a specimen collected and sent to a laboratory. There are also local skin infections and also it could be as a result of faecal impaction on the hard stools coming out which would cause friction around the area. Also, contact dermatitis after passing of stools, if one has not wiped oneself properly, there are remnants of residual stool on the outer anal area which could also include the redness and irritation.

[125] He indicated that because Dr. Orisakwe made a note of faecal matter and hygiene, if there was faecal matter in the area, it should be considered as among the causes for the redness. In order to exclude an infection, a peri-anal swab should have to have been taken and sent for microbiological analysis to confirm or disprove the presence of such an infection. In this instance the only way to have excluded infection as the cause for the redness was to take a swab. He indicated that if one considers the version of the complainant, he would agree with Dr. Orisakwe's conclusions that there would have been struggle and resistance, and one would then have seen possible injuries in the form of bruises around the area of interest or elsewhere as an attempt to restrain or overpower the complainant.

[126] When one considers the second scenario where the appellant indicated that he used his finger to rub around the anus of the complainant, it is possible to have resulted in what Dr. Orisakwe observed. In his view, one cannot say definitively from a simple anal examination whether redness around the anus was caused from penetration or contact around the anus. One would have to examine the inner lining of the anal canal and that could only be done by performing an examination using a scope that dilates the anal canal. One can simply not from looking at it make such a determination. He agreed with Dr. Orisakwe's conclusion that the presence of faeces or hard stools could follow sexual penetration and also that one must also consider the possibility of constipation or hard stools predating the incident of anal penetration.

[127] During the course of cross-examination, Dr Ntsele was questioned as to whether or not he had experience with working with victims of sexual assault given that he was a forensic pathologist. He indicated that as a pathologist, one does perform an investigation on victims who have been allegedly sexually violated and then killed. He has experience dealing with rape victims during his clinical years, but has not had experience with live victims of sexual assault. He has also dealt with victims of anal penetration during his practice as a doctor. In answer to a suggestion from the court that he was an expert witness being paid by the appellant, he indicated that he was objective

as he had to assist the court. That then was the evidence.

Judgment of the court *a quo*

[128] The court *a quo* was correct in concluding that the main issue for determination was whether or not there was consent. The court specifically had regard to s 1 of SORMA, which sets out the definition for consent and s 1(3) which sets out the circumstances where consent will be lacking with specific reference to an abuse of power or authority. In the judgment the court *a quo* made specific reference to written articles by Smythe and Pithey in Sexual Commentary, Sexual Offences. The court also had regard to several cases dealing with consent, specifically in the context of sexual relations involving children.

[129] It also dealt with the fact that the complainant was both a child and single witness and was mindful of the cautionary rules of practice which applies specifically to the evidence of a single witness and a child witness.

[130] Much of the judgment of the *court a quo* dealt in detail with the manner in which the complainant testified and how long it took to complete both his evidence in chief and cross-examination. It remarked on the occasions that it had to adjourn proceedings during the evidence of the complainant when he started crying or complained of a headache or needed a break. The court *a quo* was also alive to the fact that when testifying specifically during cross examination, the complainant ran out of the intermediary room. At one stage, the complainant stormed out of the room and threatened to assault the appellant and his attorney and came as close to the court door. In considering the criticisms levelled against the demeanour of the complainant as a witness, the court *a quo* remarked that the consideration of the demeanour of a witness can never be a substitute for an evaluation of the content of the evidence and that truthfulness of a witness can rarely be determined by demeanour alone without regard to the other factors, especially the probabilities. The court indicated that the complainant testified, and was subjected to lengthy cross-examination and such experience was traumatic which explained his behaviour.

[131] The court acknowledged that during cross examination on his statement, the complainant became reluctant to answer questions specifically in relation to the contradictions and refused to answer them. The court opined that it must have been traumatic for the complainant to relay “intimate detail continuously to different people” and as a consequence was “not willing to interpret the demeanour of LO and his behaviour during his testimony as indicative of a lack of respect or of untruthfulness”.

[132] In dealing with the differences between the complainant's written statement and the evidence given in court, the court *a quo* indicated that no adverse inference could be drawn against the contradictions and omissions in the evidence of the complainant given that Constable Zungu acknowledged that the statement had not been taken down in accordance with the National Instructions published in terms of s 66(1) of SORMA and that the statement was actually his summary of what the complainant related to him and further, that he substituted his language for that used by the complainant. The court *a quo* was of the view that given the concessions made by Constable Zungu, it was not convinced that the statement of the complainant was correctly recorded.

[133] In refusing to disregard the contradictions and therefore the contents of the statement, the court *a quo* indicated that the statement must be seen in the light of the concessions made by Constable Zungu and the manner in which the statement was recorded. In quoting an article by Karen Miller et al in Judicial Management in Child Abuse Cases Empowering Judicial Officers to be the Boss of the Court, 2005 SACJ 41, the court relied on a quote that children did not appreciate the legal weight attached to a police statement and did not understand the implication thereof. In identifying certain of the contradictions contained in the statement and the evidence, the court indicated that because the complainant acknowledged that he omitted details in the statement to Zungu and he indicated that he was ashamed, this was a satisfactory explanation for the differences.

[134] In accepting the evidence of the complainant, it concluded the following in

relation to the contradictions between his evidence in court and the written statement. "The reasons given by LO for the admissions in his statement, which he admitted to are valid reasons given his age and the sexual nature of the act. The only contradiction that remains between the statement and the evidence is a matter of how many times the accused ejaculated in him."

[135] The court *a quo* accepted the difference in his evidence in relation to the number of times the appellant ejaculated and the contradictions as not material, and not indicative of dishonesty. In relation to the differences as to where the incidents occurred, the court accepted that the appellant admitted the acts occurring at both the front and back seat of the car and therefore the contradictions were not material.

[136] In relation to the submission that the manner in which the complainant testified mainly by the use of slang words for sexual conduct and body parts was indicative that he had a good knowledge of sex and did not appear to be embarrassed and had previous sexual experience were not relevant and could not be utilised to assess the complainant's credibility and reliability.

[137] When dealing with the reliability of the first report the court *a quo* took the view that the differences in the nature of the reports given to different individuals could not adversely affect the complainant's evidence as he could not be expected to provide a full and detailed report to the first person given that they were a stranger.

[138] In relation to the delay in reporting the first incident, in comparison to when the second incident occurred, the court took the view that it cannot draw an inference from the length of delay, relying on s 59 of SORMA and also that the complainant's evidence that he did not want to destroy the marriage or relationship of his stepsister and that of the appellant was a reasonable one, bearing in mind that complainant wrote a letter to the appellant's wife after the second incident had occurred. His explanation for not mentioning certain important areas of evidence the court *a quo* accepted was as a consequence of him having to tell the story so many times.

[139] As regards the medical evidence the court *a quo* was of the view that although both experts testified in an objective and neutral manner, it preferred the evidence of Dr Orisakwe as she was the one who examined the complainant shortly after the incident. The court *a quo* attached less weight to Dr Nsele's opinion, as he did not observe the complainant himself and was giving an opinion of the observations made by Dr Orisakwe. It also accepted that the experience of Dr Orisakwe was more relevant and reasoned relating to sexual assault cases and that Dr Nsele because of his work as a forensic pathologist has had limited exposure to victims of sexual abuse unlike Dr Orisakwe.

[140] In dealing with LO's age and the baptism certificate of the complainant, the court *a quo* accepted the evidence that the appellant and his wife were his sponsors. In rejecting the evidence of the appellant, the court *a quo* took the view that the extracts of the Facebook profiles in relation to the complainant arose during the course of the defence case and that it strongly suggested that the complainant held himself out to be older than he was. This however is not as a consequence of the appellant raising it, but rather the appellant's daughter. The court rejected the appellant's evidence that he was unaware of the age of the complainant given the fact that he had grown up in front of him specifically in his early years and that whilst he was a young child who would discipline him by smacking him on bottom.

[141] Among the reasons which the court *a quo* considered in rejecting the appellant's evidence was that he, in his defence never referred to any steps that he had taken to ascertain the complainant's age or consent when performing or discussing the performance of any sexual acts with the complainant. The court *a quo* took the view that the appellant had difficulty in explaining why he performed the sexual acts on the complainant¹. In comparing the complainant's evidence with that of the appellant as to why the complainant had an erection, the court *a quo* drew an inference from the

¹ Page 592 of the judgment

evidence that "... because I will have an erection, the erection constituted consent."²

[142] The court *a quo* in referring to this aspect relied on a medical dictionary to reject the appellant's version, that of consent on the basis that the medical dictionary indicated that the mere fact that another person has an erection cannot on its own be an indication of consent. The fact that the appellant did not say anything to the complainant prior to performing any of the sexual acts, the court *a quo* rejected as informing the appellant's belief that the complainant had consented.

[143] It rejected the appellant's version that he thought the complainant had consented because he had done everything he had said to him. The court *a quo* also took the view that as the appellant indicated he did not seek permission to commit the acts on the complainant, there could not have been consent. In rejecting the evidence of the defence witnesses, the court *a quo* took the view that the appellant's daughter's actions and evidence were tailored to protect her father and also similarly rejected the evidence of the appellant's wife, specifically that in relation to the baptism. The court *a quo* was of the view that the evidence of the complainant was more probable as to what happened, as opposed to that of the appellant.

[144] In rejecting the appellant's version of consent, the court *a quo* took the view and accepted the complainant's evidence that he was scared to stop the appellant on both occasions and was "confused and in freeze mode". The court *a quo* accepting that the complainant only performed certain sexual acts on the appellant because he was scared and he was fearful of appellant who was in a position of authority. In accepting that the submission or lack of resistance by the complainant implied consent, the court *a quo* was of the view that the only reasonable inference was that the relationship between the appellant and the complainant was unequal and that the appellant exercised authority and power over the complainant when he was in their house.

Analysis

² Page 592 of the judgment

[145] In the heads of argument filed in this matter by Advocate Mbokazi, he submitted that the judgment of the court *a quo* on conviction is unassailable. Mr MacDonald who appeared at the hearing of the appeal however was of a different view and acknowledged there were several misdirections committed by the court *a quo* when evaluating the evidence and when finding the appellant guilty of two counts of rape. In fact, he rightly conceded in our view that the evidence in the court *a quo* did not support the two convictions of rape in contravention of s 3 of SORMA.

[146] An appeal court must always be mindful not to interfere with the credibility findings of a trial court and its evaluation of the evidence, in the absence of a material misdirection. In a criminal trial, a court's approach to assessing the evidence

'is to weigh 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.'³

[147] In our view, the court *a quo* incorrectly applied the aforementioned test when evaluating the evidence holistically onus to prove the guilt of the appellant beyond reasonable doubt. When evaluating the evidence, it failed to consider whether the version of the appellant in relation to the rape counts was reasonably possibly true.

[148] It is trite that s 208 of the CPA makes provision for an accused person to be convicted on the evidence of a single competent witness, such as the complainant in this instance.⁴

[149] Section 3 of SORMA defines rape as the unlawful and intentional act of sexual penetration with a complainant without their consent. One of the issues in this appeal is whether there was consent. In terms of s 1(2) of SORMA, for purposes of *inter alia* s 3,

³ *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15.

⁴ *R v Mokoena* [1956] 3 All SA 208 (A) at 212-213; *S v Sauls and others* 1981 (3) SA 172 (A) at 180E-F.

consent means 'voluntary or uncoerced agreement'. Section 1(3) of SORMA goes on to deal with various circumstances where consent is not voluntary ie where there is a threat of assault, or an abuse of power or where the person is in a position of authority over the complainant.

[150] In our view the evidence did not support a finding of a contravention of s 3 on either count. The complainant conceded that his Facebook profile confirmed that he held himself out to be older than what he was. This was to enable him to drink and smoke. He also acknowledged that he had had prior sexual experiences. The language which he used to describe the manner in which the incident occurred and the words used to refer to the sexual appendages is not demonstrative of "an innocent naïve child".

[151] The court *a quo* failed to consider that his evidence was not satisfactory in all material respects. The medical evidence did not serve to corroborate his version as to what had transpired on the two occasions. In fact, Dr Orisakwe conceded that what influenced her finding was the report made by the complainant of penetrative anal intercourse. The objective medical evidence as testified to by Dr Nsele and confirmed by Dr Orisakwe was that there were other explanations for the redness around the anus.

[152] When one considers the contradictions in the complainant's account of how the two incidents occurred his reticence during cross-examination, his failure and refusal to answer questions in our view meant that one could not rely on his evidence. What also renders his evidence unreliable are the different accounts he gave of the incident to different family members and his reluctance to acknowledge that he became aroused on the first occasion.

[153] In our view, apart from the misdirections referred to above, there were several procedural aspects which warrant mentioning. The first of these is the fact that the court *a quo* heard the application for the appointment of an intermediary for the complainant and the other child witnesses prior to the appellant pleading to the charges. The

application for an intermediary it was common was opposed by the defence. The State lead the evidence of Captain Ncanana based at the SAPS Family Violence Child Protection and Sexual Offences Unit. Apart from reading her report into the record, this witness gave evidence of her interaction with the complainant and dealt to some extent with the nature of the evidence that the complainant would testify about and why it was undesirable for him to testify in an open court as opposed to through an intermediary. It is not certain why it was necessary for this to be done prior to the actual commencement of the trial and the appellant pleading to the charges.

[154] During a reading of the record in respect of the evidence and specifically the cross-examination of this witness of the defence, the court gained the impression that the Magistrate had already predetermined that an intermediary must be appointed and appeared to get frustrated with the questions posed by defence counsel. This is evident from the record where the court says the following:

“Because frankly I have other cases as well and we need to get on, please. I am not sure what – at this stage after everything, I am not sure the reasons why your client does not want this child to testify through an intermediary.”

[155] Secondly, in her judgment rather than relying on the evidence to determine whether there was consent, the court *a quo* relied extensively on the use of literature in the judgment instead of reference to the evidence. When this was raised as a ground of appeal, the court *a quo* in its additional reasons conceded that the appellant’s representative was not alerted to the fact that such literature would be used or given an opportunity to address aspects of the literature in argument.

[156] The proposed solution to this from the court *a quo* is that the remarks relating to these references in the judgment can be struck out. In our view, it is not as simple as striking the literature in the judgment as it affects the appellant’s fair trial rights but also the reference to the literature form an integral part of the reasoning of the court in deciding on the guilt of the appellant and rejecting his version and most importantly

when evaluating the evidence of the complainant.

[157] In relation to the sentencing aspect, the respondent wanted to rely on victim impact statements (VIS) of the complainant and that of his aunt. When it was pointed out by the legal representative of the appellant that these were not properly commissioned affidavits, and that there was an objection to the statements as the witnesses would not be called and be cross-examined on the contents of the report, the court *a quo* indicated that in the exercise of its discretion, it would allow the victim impact statements to be used despite the objection and that argument could be submitted on the weight to be attached to these statements. Once again, in our view, this constituted a serious misdirection where there was an objection to the use and introduction of these VIS statements as part of the evidence in aggravation of sentence.

[158] The most important misdirection and in our view, what constituted a serious misdirection in the evaluation of the evidence, related to the acceptance of the evidence of the complainant. Not only did this result in a breach of the appellant's fair trial rights, in our view this hampered the court in properly evaluating the evidence of the complainant and that presumably resulted in the rejection of the appellant's evidence and that of his witnesses. During the course of the complainant's evidence both in chief and in cross-examination, it was pointed out that there were several contradictions and inconsistencies in his statement.

[159] During the course of cross-examination, the appellant's legal representative attempted to point these out. There was a difficulty in relation to the complainant's statement in that it had not been properly commissioned or as the court *a quo* referred to it "authenticated". It allowed the statement to be provisionally admitted with the proviso that the investigating officer who took the statement could be called to come and authenticate the statement. What became evident during the course of questioning of Constable Zungu was that the statement was not a verbatim statement of what was narrated to him by the complainant but was a summary of what the complainant had told him which he then framed and recorded using his own words.

[160] A further difficulty in relation to the appellant's fair trial rights was that during the course of cross-examination, the complainant refused to answer questions, ran out of the intermediary room in anger and tried to enter the court threatening the appellant as well as his legal representative. This resulted in him not answering certain of the crucial aspects put to him by the appellant's legal representative. The court *a quo* relying on the literature concluded that because victims of sexual assault experience trauma, this was due to a traumatic event which the complainant had experienced rather than any other reason. In our view, the court *a quo* committed a misdirection and did not objectively evaluate the evidence.

[161] This also to a large extent influenced the court *a quo*'s finding that there was a lack of consent on the part of the complainant and also that the appellant was not aware of his exact age but also that the appellant considered that the complainant had acquiesced in performing the acts and did not put up any resistance.

[162] In our considered view there was no basis for the court *a quo* to rely on the evidence presented by the respondent to conclude that it had discharged the onus to prove the convictions of contraventions of s 3 of SORMA as the appellant's version was reasonably possibly true. The appeal against the convictions must consequently succeed.

[163] However, that is not the end of the matter as on the appellant's own version specifically his s 115 plea, he had consensual intercourse with a minor in contravention of s 15(1) of SORMA on two occasions.

The appeal on sentence

[164] This court now turns to deal with sentence as the appellant's conviction of two counts of rape has been overturned and substituted with a conviction of two counts for the contravention of s 15 of SORMA. The appellant was sentenced to 15 years' imprisonment in respect of count 1 and to life imprisonment in respect of count 2. In light

of the appellant's conviction on both counts having been overturned by this court it follows that the appeal against such sentences should be upheld and such sentences be set aside and this court determine afresh the appropriate sentences in respect of the substituted convictions.

[165] The imposition of a sentence is pre-eminently a matter that falls within the discretion of the trial court. An appeal court is at liberty to interfere with a sentence imposed if, in imposing a sentence, the trial court committed an error or misdirection or if the sentence is so disproportionate to the nature of the crime that it induces a sense of shock or outrage. However, 'a court of appeal can impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another.'⁵ The net result of this is that the usual test for interference with a sentence does not apply as when an appellant is successful on appeal and when one or all of the convictions have been set aside.⁶ Consequently, this court is entitled to consider the issue of the appellant's sentence for each conviction afresh.

[166] During the appeal hearing, this court invited counsel to submit supplementary heads of argument on an appropriate sentence if this court overturned the appellant's conviction from that of rape in terms of s 3 of SORMA to that of a contravention of s 15 of SORMA⁷. This court is indebted to counsel for their insightful submissions and the authorities to which they referred.

[167] There is no penalty prescribed for a contravention of s 15 of SORMA, however, s 56A(1) of SORMA provides that a court shall, if that court has convicted a person of an offence in terms of this Act and a penalty is not prescribed in respect of that offence in terms of this Act or by any other Act, impose a sentence as provided for in s 276 of the Criminal Procedure Act 51 of 1977 (the CPA), which that court considers appropriate and which is within that court's penal jurisdiction. This court is therefore at liberty to impose any sentence which it considers appropriate in the circumstances.

⁵ *S v Bogaards* 2013 (1) SACR 1 (CC) para 41.

⁶ *S v Horn* 2020 (2) SACR 280 (ECG) para 106.

⁷ The further supplementary heads were file on 21 February 2025

[168] In doing so, this court can have regard to other comparative cases where an accused was convicted of contravening s 15(1) of SORMA or its predecessor, namely s 14 of the Sexual Offences Act.⁸ These cases, we must emphasize, serve merely as a guide.

[169] In *Dube v S*⁹ the accused was found guilty of contravening s 14(1)(a) of the Sexual Offences Act. The accused was sentenced to 12 months' imprisonment. When imposing sentence, the court took into account that the accused was a first offender, pleaded guilty to the offence, at the time sentencing he had been in custody just shy of four years, and that at the time of his arrest the appellant was gainfully employed as a taxi driver and was responsible for several dependents including his wife and five minor children. In addition, the court considered that the complainant was a week away from the consenting age at the time of the incident.

[170] In *S v Fhetani*¹⁰ the appellant had been found guilty of an alternative count of unlawful sexual intercourse with a girl under the age of 16 years in terms of the Sexual Offences Act by the court *a quo*. However, he was thereafter sentenced as if he had been convicted of rape. On appeal the appellant's sentence of 15 years' imprisonment was set aside and substituted with a sentence of three years' imprisonment. At the time of the trial the appellant was a 23-year-old student doing matric. When the offence was committed the complainant was 15 years old. When imposing the sentence of three years' imprisonment, the court took into account the fact that the appellant had been in custody for five years.

[171] In *Nelson v S*¹¹ the appellant's conviction of rape was overturned on appeal and replaced with one of statutory rape in terms of the Sexual Offences Act. The appellant's sentence of 17 years' imprisonment was set aside and substituted with a sentence of

⁸ Sexual Offences Act 23 of 1957.

⁹ *Dube v S* [2004] JOL 13221 (W).

¹⁰ *S v Fhetani* 2007 (2) SACR 590 (SCA).

¹¹ *Nelson v S* [2011] ZAWCHC 132.

three years' imprisonment of which two years and two months were suspended for a period of five years on condition that the appellant was not convicted of the offence of rape or sexual intercourse with a minor or any other offence resorting under the Sexual Offences Act or under SORMA. In imposing this sentence, the court took into account that the appellant was 22 years old, and the complainant was 13 years old at the time of the commission of the offence, the medical examination revealed minor injuries, the appellant had no previous convictions; he was a breadwinner, in fixed employment; and supported two minor children. The appellant had spent in excess of 10 months in prison serving his sentence prior to being granted bail pending an appeal.

[172] In *S v Gwadi*¹² the appellant's conviction of rape was set aside on appeal and replaced with one of statutory rape in contravention of s 15(1) of SORMA. The sentence of 18 months' imprisonment was increased and replaced with a sentence of five years' imprisonment for contravening of s 15(1) of SORMA.

[173] In *S v Sheldon-Lakey*¹³ the appellant's sentence of four years' imprisonment for contravening s 15(1) of SORMA was confirmed on appeal. At the time of the commission of the offence the appellant was 39 years old, was married and employed as a temporary educator at the same school where the victim was a learner. The appellant was teaching Grades 9, 11 and 12 and the victim was in Grade 10. Apart from the fact that the appellant was an educator, she had also previously enrolled for a BProc degree and in addition also had a diploma in theology.

[174] In *S v April*¹⁴ the accused was convicted of one count of contravening s 15 of SORMA. The victim was the accused's 13-year-old child. The court sentenced the accused to five years' imprisonment. When imposing this sentence, the court took into account the following:

(a) the accused was 35 years old;

¹² *S v Gwadi* [2014] JOL 31687 (ECG).

¹³ *S v Sheldon-Lakey* 2016 (2) SACR 632 (NWM).

¹⁴ *S v April* [2018] ZAECPEHC 10.

- (b) he was not married but had two children who were 12 and five years old respectively;
- (c) he lived with the mother of his five-year-old child and both the child and her mother were his dependents;
- (d) the accused had dropped out of school due to financial constraints;
- (e) he had spent one month in custody before he was released on bail; and
- (f) the accused had three previous convictions: in 1999 he was convicted of escaping or attempting to escape from lawful custody and was sentenced to six months' imprisonment. In the same year he was convicted of two counts of robbery and one of house breaking with intent to rob, with both counts taken together as one for the purposes of sentence and he was sentenced to undergo ten years' imprisonment suspended for five years. In 2012 he was convicted of contravening s 4 of the Drugs and Drug Trafficking Act¹⁵ and sentenced to a fine of R1 000- or 150-days' imprisonment.

[175] What emerges from these comparative cases is that our courts have consistently considered five years' imprisonment as an appropriate sentence for statutory rape. This court is cognisant that each case must be determined on its own facts and that the Supreme Court of Appeal has cautioned that "decided cases on sentence only provide guidelines, not straight jackets",¹⁶ as well as what was stated in *Du Toit*:¹⁷

'Judicial fixation on past sentencing patterns as absolute precedents would be in conflict with the principle of individualisation and, ultimately, the right to a fair trial.'

[176] When considering an appropriate sentence, the court must have regard to the well-known *Zinn* triad as well as a fourth element in the victim. In addition, one must have regard to the recognised objectives on sentencing being prevention, deterrence, retribution and rehabilitation.

¹⁵ Drugs and Drug Trafficking Act 140 of 1992.

¹⁶ *S v D* 1995 (1) SACR 259 (A) at 260E. See also *S v PB* 2013 (2) SACR 533 (SCA) para 19.

¹⁷ *Du Toit Commentary on the Criminal Procedure Act* (Revision Service 73, 2024) ch28 at 10B-22.

[177] It is now apposite for this court to consider the appellant's personal circumstances. The personal circumstances of the appellant are the following:

- (a) At the time of his sentencing in the court *a quo* he was 56 years old, having been born 1[...] N[...] 1962.
- (b) At the time of the commission of the offence the appellant was 54 years old.
- (c) The appellant is married to the complainant's stepsister.
- (d) His wife was employed as an administrative clerk at Manzini Estate in Melmoth.
- (e) He has two adult children, a son and a daughter. At the time the appellant was sentenced his son was 30 years of age, his daughter was 23 years of age and a student at Varsity College in Durban.
- (f) The appellant was self-employed as a motor mechanic in a car mechanic workshop which he had operated since 1997 under the name and style T P Motors. He operated this workshop with his son.
- (g) The appellant and his wife divided their household expenses, the tuition fees in respect of their daughter and the other related expenses.
- (h) He had no previous convictions.
- (i) It is recorded in the probation officer's report that during the interview with the probation officer the appellant expressed regret for his conduct and a desire to apologise to the complainant.

[178] Mr *Wolmarans*, urged this court to have regard to two additional factors which he argued warranted consideration when imposing sentence, namely:

- (a) the complainant was born on 9 May 2001 and as such he was only two months shy of his 16th birthday at the time of the commissioning of the offences. Had the encounters taken place two months later then there would have been no offence to speak of; and
- (b) by the time the appeal was heard, the appellant had already been imprisoned and served a sentence of some six years and five months.

[179] While appropriate weight should be accorded to the appellant's personal circumstances the offences in respect of which the appellant was convicted are serious. What this court considers most aggravating is the fact that the appellant was in a position of trust over the complainant as Mr *MacDonald* correctly pointed out. The appellant pretended not to have known the complainant's age when by his own admission after the complainant's father died the complainant lived with the appellant and his wife in their house in Melmoth for two and a half years. This happened when the complainant was in preschool until he was in Grade 1 when he left to live with his aunt in Ulundi.

[180] The appellant knew that the complainant was a vulnerable child who had a troubled background and a history of instability. In order to ameliorate the trouble which residing with the appellant brought about, the complainant's accommodation rotated between his distant relatives in Melmoth, Pietermaritzburg, Ulundi and Richards Bay. The complainant had been accommodated in places of safety and various homes for vulnerable and neglected children around Durban. At the time of the offences being the school holidays in July 2016, the complainant was on a temporary sojourn at the appellant's home in Melmoth from Boys Town in Durban. The complainant was meant to reside with his aunt in Richards Bay for the remainder of the holidays.

[181] The appellant's own plea confirms the circumstances under which the offences were committed. On the night of 1 July 2016, the appellant waited until everybody went to bed before he took advantage of the complainant when they were both left watching TV in the lounge. When the appellant saw the complainant slouched on the couch swaying his legs from side to side he got aroused. In order to lure the complainant, he asked him if he was not feeling cold and would not mind sharing a blanket with him as he was seated on the couch. When the complainant moved and covered himself with the blanket the appellant started rubbing his thighs. This is when the first incident happened.

[182] On the following day, 2 July 2016 when the complainant had been raking leaves off the lawn the appellant asked the complainant when he was walking towards the car if he wanted to take a ride with him to the dam. When this happened the appellant's wife and daughter were in their rooms and the appellant did not tell them that he was going to the dam with the complainant.

[183] The complaint looked up to the appellant as a father figure in his life. However, instead of imparting some knowledge and life lessons on the complainant about manhood the appellant preyed on the complainant. The appellant's actions indicate those of a person who was clearly intent on exploiting the vulnerabilities of the complainant. The appellant demonstrably abused his position of trust.

[184] As far as the appellant's regret and desire to apologise to the complainant for his actions as expressed during his interview with the probation officer is concerned, it is well to remember what the Supreme Court of Appeal said in *S v Matyityi*:¹⁸

'...There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's errors.' (Footnotes omitted.)

[185] The appellant's desire to apologise to the complainant was a little too late and would not have meant anything to the complainant. When the opportunity had presented itself to the appellant to apologize to the complainant he failed to do so. The appellant did not apologise to the complainant on the very night of the second incident. The appellant could have done this when he found the complainant on the street when he went searching for him after the complainant had fled the appellant's house after the second incident. The appellant did not attempt to apologise at any time thereafter except for verbalising this desire for the first time during the interview with the probation officer. At that stage unfortunately the appellant had already been convicted.

¹⁸ *S v Matyityi* 2011 (1) SACR 40 (SCA) para 13.

[186] The appellant's desire to apologise was nothing more than self-pity for the predicament in which he had to put himself. Had the appellant genuinely wanted to apologise to the complainant he would have done so outrightly. The appellant's belated desire to apologise to the complainant was not genuine and of little mitigating value. The appellant's actions severely compromised the very structure of his own family according to the victim impact statement from the complainant's aunt.

[187] The complainant was a young and vulnerable young man. Society would also demand that any sentence imposed would have regard to the righteous indignation expressed in respect of the commission of sexual offences perpetrated on young offenders.

[188] After considering all the relevant factors, this court is of the view that a sentence of five years imprisonment in respect of each conviction for the contravention of s 15(1) of SORMA would not only satisfy the recognized objectives of punishment but also the interests of society, the complainant as well as give recognition to the appellant's personal circumstances. Given that the two incidents are closely related in time and space to each other it would also be appropriate to order a portion of the sentence on the second count to be served concurrently with the first.

Order

[189] In the result the following orders will issue:

1. The appellant's appeal against the convictions of two counts of rape is upheld.
2. The appellant's convictions by the regional court of two counts of rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 is set aside and replaced with the following convictions:

- “(a) In respect of count 1 the accused is found guilty of contravening section 15(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007; and
- (b) In respect of count 2 the accused is found guilty of contravening section 15(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.”
3. The appeal against the sentences imposed by the regional court are upheld.
4. The sentences of 15 years’ imprisonment in respect of count 1 and life imprisonment in respect of count 2 imposed by the regional court are set aside and replaced with the following sentences:
- “(a) In respect of count 1, the contravention of section 15(1) of SORMA the accused is sentenced to five years’ imprisonment.
- (b) In respect of count 2, the conviction of contravention of section 15(1) of SORMA the accused is sentenced to five years’ imprisonment.
- (c) Three years of the sentence imposed on count 2 will run concurrently with the sentence imposed on count 1.
- (d) The appellant is therefore sentenced to an effective term of seven years’ imprisonment.”
5. In terms of section 282 of the Criminal Procedure Act 51 of 1977, the substituted sentences are ante-dated to 11 September 2018, being the date on which the appellant was sentenced in the court *a quo*.

Henriques J

PP

Chithi J

APPEARANCES

Date of hearing : 31 January 2025
Date of further
written submissions : 21 February 2025
Date of judgment : 8 May 2025

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