

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable/Not Reportable

Case no: 631/2025

In the matter between:

ZIMISELE COLLEN VUMANI MAGWENYANE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation:	*Magwenyane v The State* (631/2025) [2026] ZASCA 149 (2 November 2026)
Coram:	ZONDI DP and MBATHA and MATOJANE JJA
Heard:	20 August 2026
Delivered:	2 November 2026.

Summary: Criminal law and procedure – sentence – applicant convicted of the rape and sexual assault of two young children – applicant 17 years old when the offences were committed and 18 years old when arrested – age never determined by the regional court – s 51(6) of the Criminal Law Amendment Act 105 of 1997 excludes the minimum sentencing regime where the offender was under the age of 18 years at the time of the commission of the offence – s 4 of the Child Justice Act 75 of 2008 determines the application of that Act by reference to the age of the person when the criminal process is initiated– the two enquiries are independent of one another – misdirections in the judgment on sentence – cumulative sentence of 70 years' imprisonment imposed after a finding that imprisonment for life would be disproportionate – sentence set aside and substituted – applicant having served the

substituted sentence in full, order made at the hearing for his release confirmed.

ORDER

On application for reconsideration referred in terms of s 17(2)(*f*) of the Superior Courts Act 10 of 2013:

1 The application for reconsideration in terms of s 17(2)(*f*) of the Superior Courts Act 10 of 2013 is refused in respect of the convictions and granted in respect of sentence.

2 The decision of two judges of this Court refusing the applicant special leave to appeal against sentence is set aside and substituted with the following:

'Special leave to appeal against sentence is granted'

3 The appeal against sentence is upheld

4 The order of the high court is set aside and replaced with the following order:

'(a) The appeal against the convictions is dismissed.

(b) The appeal against sentence succeeds. The sentences imposed by the regional court on 30 April 2015, and the orders made in terms of s 50(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and s 120(4) of the Children's Act 38 of 2005, are set aside and replaced with the following:

(i) Count 1: 11 years' imprisonment.

(ii) Count 2: five years' imprisonment.

(iii) Count 3: five years' imprisonment.

(iv) Count 6: 11 years' imprisonment.

(v) The sentences on counts 2, 3 and 6 are to run concurrently with the sentence on count 1, so that the effective sentence is one of 11 years' imprisonment.

(vi) The sentence is antedated to 30 April 2015.

5 The order made on 20 August 2026 that the applicant be released from custody forthwith is confirmed.

JUDGMENT

Matojane JA (Zondi AP and Mbatha JA concurring):

Introduction

[1] The applicant, Mr Magwenyane, was charged in the Pietermaritzburg Regional Court (the regional court) of eight counts: count 1 rape of a seven-year-old girl; counts 2 and 3 sexual assault upon the same child; count 4 rape of a five-year-old girl; count 5 sexual assault upon that child; count 6 rape of a three-year-old girl; count 7 sexual assault on that child and count 8 compelling or causing a child to witness a sexual act. The applicant was convicted of the rape of a seven-year-old (count 1), of two counts of sexual assault upon her child (counts 2 and 3), and of the rape of her three-year-old cousin (count 6). He was acquitted on the remaining counts, including both counts relating to the five-year-old.

[2] The offences were committed at Himeville in August and September 2009. On 30 April 2015 the regional magistrate sentenced the applicant to 25 years' imprisonment on each of counts 1 and 6 and to 10 years' imprisonment on each of counts 2 and 3. In June 2016, she granted leave to appeal against both conviction and sentence. The KwaZulu-Natal Division of the high court, Pietermaritzburg (the high court) dismissed the appeal against the convictions and against sentence. On sentence, it ordered that parts of the sentences run concurrently, which reduced the effective sentence to 40 years' imprisonment. Two judges of this Court refused special leave to appeal on 22 February 2024, and the President of this Court referred that decision to the Court for reconsideration and, if necessary, variation, in terms of s 17(2)(*f*) of the Superior Courts Act 10 of 2013 (the Superior Courts Act).

[3] The appeal turns upon a fact which the regional court never determined. It is the applicant's age. The record before that court contained nothing on the subject beyond a 2011 charge sheet that recorded his age as 18 years. On the strength of that single entry, the regional court proceeded as though he had been an adult when

the offences were committed and sentenced him under the minimum sentencing regime in terms of s 51 of the Criminal Law Amendment Act 105 of 1997 (the Act). If he was a child when the offences were committed, that regime did not apply. If he was a child when he was arrested, the Child Justice Act 75 of 2008 (the Child Justice Act) governed the proceedings against him from that moment. His age was therefore not one of the many considerations to be weighed in sentencing. It determined which law applied.

[4] That question is now answered. In its heads of argument, the State placed before us the date of birth reflected in the signed special power of attorney and his identity number, namely, 04 June 1992. Neither party disputed that date. The state accepts, as counsel confirmed at the hearing, that the applicant was 17 years old when the offences were committed and 18 years old when he was arrested on 8 September 2010. That concession was properly made, and it is decisive of much that follows.

Factual background

[5] The evidence on the merits needs to be summarised insofar as it bears upon sentence. The two complainants are cousins. They lived near the applicant's homestead at Himeville. The families were on good terms, and the children regularly visited. On an afternoon during the charged period, the elder complainant, then seven years old, stopped at the applicant's home on her way from school to drink water. The applicant's niece accompanied her. The applicant called her to his room, saying that there was a letter for her family. Inside, he told her to undress. When she hesitated, he drew her attention to a knife on the table. He made her lie on the bed and raped her. He then made her take his penis into her mouth and put his own mouth to her genitals. He told her that he would stab her if she told anyone. She told no one.

[6] On another day in the same period, the younger complainant, then three years old, was sent with other children to the applicant's homestead to borrow a cellphone charger. The applicant made her take his penis into her mouth. Later, when she was taken to visit her mother in Pietermaritzburg, she arrived in tears and could not be

consoled. Eventually she told her mother what had happened. Her mother went home to make enquiries. During those enquiries, the elder complainant disclosed what the applicant had done to her. A social worker interviewed the children, and the police were informed.

[7] The applicant was arrested on 8 September 2010. He pleaded not guilty on 22 October 2014 and testified in his own defence. His defence was a bare denial coupled with a suggestion, never put to the State witnesses, that the complainants' family bore him a grudge over grazing cattle. The regional magistrate rejected it. On 23 April 2015 she convicted him on counts 1, 2, 3 and 6 and acquitted him on the remaining counts. The State proved no previous convictions.

[8] Sentence followed a week later. The applicant's attorney addressed the court from the bar. No evidence was led in mitigation. No pre-sentence report or probation officer's report was obtained. The State handed up victim impact statements for both complainants. The regional magistrate declined to read them into the record, saying that 'on the previous occasions when these were read, the emotions broke', but she relied upon their contents in her judgment. The applicant's personal circumstances, as they emerge from the address in mitigation, were that he was a first offender, was 'relatively young', had left school in Grade 11 'because of this offence', and had since found employment.

[9] The only reference to the applicant's age in the proceedings before the regional court is the opening sentence of the judgment on conviction: 'According to the charge sheet before me, he is 18 years old'. The case number, RC320/2011, indicates that the matter was enrolled in the regional court in 2011. The offences were committed in 2009.

[10] The judgment on sentence addressed the applicant's age in four passages which do not cohere. The regional magistrate first recorded that 'at the time of the commission of the crimes, he was at least 18 years old'. She then said that 'the accused was very young at the time of commission of the offence' and that it was 'trite

law that youthfulness of an offender will be a mitigating factor'. She later held:

'At the age of 18 years old, the accused cannot be described by this Court as a youth. His age is a neutral factor. Nothing about his age reduces his moral blameworthiness. He chose not to testify and give evidence and put the Court into his confidence about the level of his youthfulness or immaturity or any factor that may have caused him to act in the manner in which he did.'

[11] Later still, after quoting from the judgment of this Court in *S v Mabuza*(*Mabuza*),[1] she found that 'the age of the accused suggests to me that it will be disproportionate for this Court to sentence the accused to the maximum sentence permitted by the law', and concluded that the fact that the applicant was a first offender and 'was young at the time of commission of the offence' constituted substantial and compelling circumstances justifying a departure from the prescribed sentence of life imprisonment.

[12] Having so found, the regional magistrate imposed the sentences I have described and added that 'the provisions of section 280 of the Criminal Procedure Act are applicable'. The combined sentences translated to a period of 70 years' imprisonment. She made no direction that any of the sentences should run concurrently. She ordered that the applicant's particulars be entered in the National Register for Sex Offenders under s 50(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Sexual Offences Act). She purported to order under s 120(4) of the Children's Act 38 of 2005 that 'prospective employers are informed of the unsuitability of the accused to work with children'. She declared him unfit to possess a firearm under s 103(1) of the Firearms Control Act 60 of 2000.

[13] When the application for leave to appeal was argued in June 2016, the regional magistrate said this: 'The court is of the view that perhaps there ought to have been a pre-sentence report compiled on the accused as the accused was 18 at the time of the commission of the offence. The Court is of the view that perhaps a higher court

[1] *S v Mabuza and Others* [2007] ZASCA 110; 2009 (2) SACR 435 (SCA) para 23.

will come to a different opinion about sentence.' She granted leave on both conviction and sentence.

[14] The high court delivered its judgment on 2 March 2017. It dismissed the appeal against convictions. On sentence, it held that, because the cumulative effect of a 70-year sentence was worse than imprisonment for life and the applicant would not be considered for parole until 35 years had elapsed, the sentence should be corrected. It ordered that ten years of the sentence on count 3 and 20 years of the sentence on count 6 run concurrently with the sentence on count 1, producing a cumulative sentence of 40 years. The application for special leave to appeal was filed on 7 December 2023, almost seven years later, and was refused on 22 February 2024. The referral was made on 15 July 2024. The State did not oppose condonation for the late filing of the application for special leave, and the Court granted it at the hearing.

Issues for determination

[15] Four issues arise. The first is whether exceptional circumstances exist to reconsider the refusal of special leave, separately for the convictions and the sentence. The second is whether the regional court erred in law by sentencing the applicant without determining his age, and what follows from that error now that the age is known. The third is whether, independently of the question of age, the judgment on sentence is vitiated by misdirection. The fourth is whether this Court should sentence the applicant afresh or remit the matter, and what is to become of the ancillary orders.

Reconsideration in terms of s 17(2)(*f*)

[16] Section 17(2)(*f*) of the Superior Courts Act permits the President of this Court, in exceptional circumstances, to refer a decision refusing leave to the Court for reconsideration and, if necessary, variation. Reconsideration is an extraordinary remedy and not a second chance upon the merits. It is a safeguard against manifest injustice, and the circumstances relied upon must be markedly unusual; prospects of

success alone do not suffice.[2]

[17] Regarding the convictions, the applicant advances arguments that the regional court, the high court, and the two judges of this Court who refused special leave have already considered and rejected. He says that the complainants were not credible, that the caution required in the evaluation of the evidence of single witnesses and of children was not applied, that the evidence of the elder complainant stood uncorroborated, that the medical examination disclosed no injuries, and that the evidence of the social worker as to what the children told her was not corroboration.

[18] That last submission is sound in principle. Corroboration must come from a source independent of the witness whose evidence is to be confirmed. The regional magistrate did not rest her findings upon the social worker alone. She conducted a competency enquiry for each child, heard them with the assistance of an intermediary, and made credibility findings which she explained at length. The trustworthiness of a child's evidence depends on the child's powers of observation, recollection, and narration, and measured against that test, her findings cannot be faulted. The caution she professed appears genuine, as shown by the acquittals on the remaining counts. The absence of injury recorded on the J88 does not exclude penetration.

[19] There is no rule that the evidence of a young single witness must be corroborated. The court must approach it with caution and look for features which confirm it. It must ask itself whether the evidence is trustworthy[3]. Each complainant made a spontaneous report to a member of her family. The elder complainant's disclosure was made in the course of enquiries prompted by the younger complainant's report, and a court must be alert to the risk that a child questioned in those circumstances may repeat what she has heard. But the elder complainant's account contains detail, the knife and the threat to stab her, which forms no part of the younger child's account. The two accounts describe the same distinctive conduct by

[2] *Nel v S* [2025] ZASCA 89 (12 June 2025) para 6; *Minister of Police and Another v Ramabanta* [2025] ZASCA 95; 2026 (1) SA 100 (SCA); 2026 (1) SACR 250 (SCA) para 22.
[3] *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A) at 1028B-D.

the same man in the same house.

[20] The convictions rest on findings of fact which have twice been considered on appeal. No exceptional circumstance appears which would warrant this Court revisiting the refusal of special leave in respect of them, and reconsideration is refused to that extent. The position in respect of sentence is different, for the reasons which follow. It is convenient to address the legal framework before returning to the merits.

[21] This limb of the application raises no substantial point of law, is not of general public importance, and discloses no grave injustice. The court refuses reconsideration in respect of the convictions. The position in respect of sentence is the reverse, for the reasons which follow. It is convenient to address the legal framework before returning to the merits.

Legal framework

The minimum sentencing regime

[22] Rape of a person under the age of 16 years falls within Part I of Schedule 2 to the Act. Section 51(1) obliges a regional court which has convicted a person of such an offence to sentence him to imprisonment for life unless, in terms of s 51(3)(*a*), it is satisfied that substantial and compelling circumstances exist which justify a lesser sentence. The approach to that enquiry was settled in *S v Malgas*.[4] The prescribed sentence is the starting point and should not be departed from lightly or for flimsy reasons. But all the factors traditionally relevant to sentence remain relevant. Where the prescribed sentence would be disproportionate to the crime, the criminal and the needs of society, the court is entitled to impose a lesser sentence. The proviso to s 51(3)(*a*) confines a regional court which imposes a lesser sentence in respect of an offence referred to in Part I of Schedule 2 to 'a term of imprisonment for a period not exceeding 30 years'.

[23] Section 51(6) provides that the section does not apply in respect of an accused person who was under the age of 18 years at the time of the commission of an offence contemplated in subsec (1) or (2). The provision has a history. As amended by the

[4] *S v Malgas* [2001] ZASCA 30; 2001 (1) SACR 469 (SCA); 2001 (2) SA 1222 (SCA) para 25.

Criminal Law (Sentencing) Amendment Act 38 of 2007, s 51 applied to offenders who were 16 or 17 years old when they committed the offence, subject to a discretion to depart from the prescribed sentence. The Constitutional Court held that extension inconsistent with the constitution in *Centre for Child Law v Minister for Justice and Constitutional Development and Others*,[5] and ordered that, to remedy the defect, the subsection is to be read as though it referred to the age of 18 years. As a result, the minimum sentencing regime does not apply to a person who was under 18 when the offence was committed, whatever his age when he is arrested, tried or sentenced. The enquiry under s 51(6) is directed at age on the date of the offence.

The Child Justice Act

[24] The Child Justice Act came into operation on 1 April 2010. Section 4(1)(*b*), in the form in which it stood at the time of the proceedings in the regional court, provided that the Act applies to any person who is alleged to have committed an offence and who was ten years or older but under the age of 18 years when he was handed a written notice, served with a summons or arrested for that offence.[6] Section 4(2) provides that where a person is alleged to have committed an offence when he was under the age of 18 years, but is 18 years or older and under the age of 21 years when the process against him commences, the Director of Public Prosecutions having jurisdiction may, in accordance with directives issued by the National Director of Public Prosecutions, direct that the matter be dealt with in terms of s 5(2) to (4) of that Act. Section 4(3)(*a*) provides that the Criminal Procedure Act 51 of 1977 (the Criminal Procedure Act) applies to a person referred to in s 4, save in so far as the Child Justice Act provides for amended, additional or different provisions or procedures.

[25] The trigger for the application of the Child Justice Act is the person's age when the criminal process against him commences, not his age when the offence was committed.[7] The two enquiries, the one under s 51(6) of the Act and the other under

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[5]*Centre for Child Law v Minister for Justice and Constitutional Development and Others* [2009] ZACC 18; 2009 (2) SACR 477 (CC); 2009 (6) SA 632 (CC); 2009 (11) BCLR 1105 (CC).

[6]The lower limit in s 4(1) was raised from ten to 12 years by s 2 of the Child Justice Amendment Act 28 of 2019 with effect from 19 August 2022. Nothing turns on the amendment for present purposes.

[7] **4 Application of Act**

s 4 of the Child Justice Act, ask different questions and may yield different answers. A person who was 17 when he committed an offence and 19 when he was arrested falls outside the Child Justice Act unless the Director of Public Prosecutions (the Director) directs otherwise. He nonetheless falls outside the minimum sentencing regime, regardless of what the Director does.

[26] Where the Child Justice Act applies, its provisions are peremptory. A probation officer must assess the child before his first appearance. He must be brought before a preliminary inquiry. If the matter is not diverted, he must be tried in a child justice court. Before sentencing, the court must obtain a pre-sentence report prepared by a probation officer, and it may not impose a sentence of imprisonment without such a report. Sentence must be imposed in accordance with the objectives set out in s 69 of the Child Justice Act.[8] Imprisonment may be imposed upon a child of 14 years or older only as a measure of last resort and for the shortest appropriate period of time, and may not exceed 25 years.[9]

[27] The Child Justice Act also makes provision for determining age. Where the age of a person is uncertain, and it is material to whether the Act applies, the presiding officer is obliged to estimate the age of the person upon the material available and, if

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(1) Subject to subsection (2), this Act applies to any person in the Republic who is alleged to have committed an offence and-

(a) was under the age of 12 years at the time of the commission of the alleged offence; or

(b) was 12 years or older but under the age of 18 years when he or she was-

(i) handed a written notice in terms of section 18 or 22;

(ii) served with a summons in terms of section 19; or

(iii) arrested in terms of section 20,

for that offence.

[8] 69. (1) In addition to any other considerations relating to sentencing, the objectives of sentencing in terms of this Act are to-

(a) encourage the child to understand the implications of and be accountable for the harm caused;

(b) promote an individualised response which strikes a balance between the 40 circumstances of the child, the nature of the offence and the interests of society;

(c) (d) promote the reintegration of the child into the family and community; ensure that any necessary supervision, guidance, treatment or services which form part of the sentence assist the child in the process of reintegration; and 45

(e) use imprisonment only as a measure of last resort and only for the shortest **appropriate period of time.**

[9] Child Justice Act Chapter 5 (assessment), Chapter 7 (preliminary inquiry), Chapter 9 (trial in child justice court), s 69 (objectives of sentencing), s 71 (pre-sentence reports) and s 77 (imprisonment).

necessary, to direct that a probation officer or a medical practitioner determine his age. Independently of that Act, s 337 of the Criminal Procedure Act empowers a court, where a person's age is relevant to any matter, and there is insufficient evidence of it, to estimate that age, and the estimate is deemed his correct age, subject to the proviso to that section.[10] Neither provision permits a court to proceed upon an assumption where the question of age is live, and the means of resolving it are at hand.

Youth as a factor in sentencing

[28] Even where an offender was a young adult when he committed the offence, his youth remains a weighty consideration. In *Mabuza*, dealing with an applicant who was 18 years old when he participated in a gang rape, this Court said that a court 'cannot . . . lawfully discharge its sentencing function by disregarding the youthfulness of an offender in deciding on an appropriate sentence, especially when imposing a sentence of life imprisonment, for in doing so it would deny the youthful offender the human dignity to be considered capable of redemption'.[11] In *S v Matyityi,* the Court cautioned that youthfulness is not a talisman, and that a court should not depart from a prescribed sentence upon the ground of 'relative youthfulness' without evidence of the offender's immaturity.[12] It did not suggest that an 18-year-old's age is irrelevant. The two judgments must be read together. The younger the offender, the more readily immaturity may be inferred; but where reliance is placed upon it, the court should be placed in a position to assess it. That is a reason for a sentencing court to inform itself, not a reason for it to disregard the question.

[29] Where the offender was a child when he offended, the enquiry is different again. Section 28(1)(*g*) of the Constitution requires an individualised judicial response to sentencing, one that focuses on the particular child, rather than an approach encumbered by the rigid starting point that minimum sentencing entails.[13] As it was put in *S v M (Centre for Child Law as Amicus Curiae)*, '[a] truly principled child-centred

[10]Section 337 of the Criminal Procedure Act 51 of 1977; ss 13 to 16 of the Child Justice Act 75 of 2008.
[11]*Mabuza* above fn 1 para 23.
[12]*S v Matyityi* [2010] ZASCA 127; 2011 (1) SACR 40 (SCA); [2010] 2 All SA 424 (SCA) paras 13-14 and 23.
[13]*Centre for Child Law* above fn 6 paras 26-31.

approach requires a close and individualised examination of the precise real-life situation of the particular child involved'.[14] Once s 51 falls away, reduced moral culpability is not a fact the offender must establish to earn a departure. It is the premise from which the enquiry begins.

Cumulative sentences

[30] Section 280(2) of the Criminal Procedure Act provides that sentences of imprisonment imposed at the same time run consecutively unless the court directs that they run concurrently. A court which imposes more than one sentence must have regard to their cumulative effect. It must not impose an effective term which exceeds the ordinary life expectancy of the offender, or which in its practical operation is more severe than the sentence of life imprisonment which the law reserves for the most serious cases.[15] A prisoner serving life imprisonment becomes eligible for parole consideration after 25 years; a prisoner serving a determinate sentence becomes eligible after serving half of it.[16]

Analysis

The failure to determine the applicant's age

[31] The regional magistrate proceeded throughout on the basis that the applicant was 18 years old when he committed the offences. She had no evidence to that effect. The figure came from the charge sheet, which records the accused's age as at the date it was drawn. This one was drawn in 2011, at least two years after the offences. If the applicant was 18 in 2011, he was 16, or at most 17, in August or September 2009. Her own formulation, that he was 'at least 18 years old', betrays the uncertainty. So does the fact, recorded in her judgment, that he was in Grade 11 when the offences were committed and left school as a result. A learner in Grade 11 is ordinarily 16 or 17 years old.

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[14] *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) para 24.

[15] *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) at 519A-E; *S v Nkosi* 2003 (1) SACR 91 (SCA) para 9.

[16] Correctional Services Act 111 of 1998, s 73(6)(*b*).

[32] These were not obscure indications. They were upon the face of the record, and they called for enquiry. The regional magistrate had s 337 of the Criminal Procedure Act at her disposal and, if the applicant was a child, the age-determination provisions of the Child Justice Act. She could have called for a birth certificate or an identity document. She could have asked the applicant, his attorney, or his next of kin. She could have directed a probation officer to investigate and report. She did none of these things. Nor did the prosecutor draw the matter to her attention, although the State bears responsibility for ensuring that a person who may be a child is dealt with under the law that applies to children.

[33] Counsel for the State submitted that the applicant was represented throughout, that his attorney never contended he was a child, and that it does not lie in his mouth to raise the point on appeal. I do not agree. The application of s 51(6) of the Act and of the Child Justice Act does not depend upon the point being taken. Both provisions define the class of persons to whom a statutory regime applies, and a court must satisfy itself that the accused falls within the class before it applies the regime. The failure of an attorney to raise the point does not relieve the court of that obligation, and the consequences of the omission fall upon the applicant and not upon his attorney.

[34] The error was one of law. The regional magistrate applied the minimum sentencing regime without establishing the fact on which it depended, and she sentenced the applicant as an adult without establishing that he was one when the process against him began. What follows from that error would ordinarily depend upon which of three positions was the true one. The State's concession has resolved that question. The applicant was under 18 when he committed the offences and 18 when he was arrested. The second of the three positions therefore obtains.

[35] Two consequences follow. First, s 51 of the Act did not apply to the applicant. The judgment on sentence, which took imprisonment for life as the prescribed sentence and searched for substantial and compelling circumstances to depart from it, was misconceived from the outset. The second is that the Child Justice Act did not apply of its own force, because s 4(1)(*b*) was not satisfied. It did not apply under s

4(2), because nothing on this record shows that the Director of Public Prosecutions gave a direction, refused one, or considered the question at all. Counsel for the State candidly conceded that he could not say that the Director knew that the Act was in issue. A functionary who is unaware that a power exists cannot be said to have exercised the discretion which that power confers. The complaints that no assessment took place, that no preliminary inquiry was held and that the regional court did not sit as a child justice court accordingly do not arise. The prosecuting authority's failure to consider the exercise of the discretion is nonetheless not indifferent, since the subsection exists to extend the Act's protective machinery to a young adult who offended as a child.

[36] What the regional magistrate was required to do, therefore, was to exercise an ordinary sentencing discretion, unconstrained by s 51, in the light of the fact that the applicant was a child when he offended and of what s 28 of the Constitution and *Centre for Child Law* require of a court sentencing such an offender. It is inconceivable that such a discretion would have produced sentences of 25 years' imprisonment on each of two counts.

The misdirections in the judgment on sentence

[37] The reasoning on the applicant's youth is irreconcilable. The regional magistrate held that his age was 'a neutral factor' and that there was 'nothing about his age that serves to reduce his moral blameworthiness'. She then held that imposing the prescribed sentence on him was disproportionate, and that his youth was a substantial and compelling circumstance. Both findings cannot be right. A sentence which rests upon findings which contradict one another is not the product of a properly exercised discretion, and an appellate court is at large to interfere with it.

[38] The passage in which the regional magistrate faulted the applicant for not testifying about 'the level of his youthfulness or immaturity' compounds the error. There is no onus upon an accused to establish substantial and compelling circumstances; the court is obliged to consider all the circumstances bearing upon

sentence, whether or not the accused places them before it.[17] Where a court regards the information before it as insufficient on a question as important as the maturity of a youthful first offender facing life imprisonment, it may call for evidence under s 274 of the Criminal Procedure Act, in particular a pre-sentence report. Sentencing is not a formality to be completed based on whatever is said from the bar.[18] The regional magistrate recognised as much a year later, when she granted leave to appeal. That recognition came too late.

[39] The regional magistrate also said that 'the seriousness of the offences that he has been convicted of justifies his circumstances being ignored over the interests of justice'. That is a misstatement of the law. The personal circumstances of an offender may be outweighed by the gravity of the offence and the interests of society. They may never be ignored.[19]

[40] The effective sentence is a further and independent ground of interference. Having found that imprisonment for life would be disproportionate, the regional magistrate imposed 25 years on count 1, ten years on each of counts 2 and 3, and 25 years on count 6, and said no more than that s 280 of the Criminal Procedure Act 'is applicable'. Section 280(2) provides that the sentences run consecutively unless the court directs otherwise. She gave no such direction. As written, the order commits the applicant to an effective term of 70 years' imprisonment, after which he would become eligible for parole consideration after 35 years. Had he been sentenced to imprisonment for life on counts 1 and 6, he would have become eligible after 25 years. The regional magistrate thus departed from the prescribed sentence upon the ground that it was too severe for this offender, and then imposed one which was, in every practical respect, more severe. No court could have intended that result, and it shows that the cumulative effect of the sentences was never considered.

[41] If, on the other hand, the regional magistrate intended the sentences to run

[17] *Malgas* above fn 5 para 25.
[18] *S v Siebert* 1998 (1) SACR 554 (SCA) at 558g-559b.
[19] *S v Zinn* 1969 (2) SA 537 (A) at 540G-H; *Malgas* above fn 5 para 25.

concurrently, she did not say so. A direction under s 280(2) must be express. A sentencing order from which the effective sentence cannot be read is defective in itself, because the accused, the correctional authorities and any court which later has to consider the matter must be able to tell from the order what sentence has been imposed. On either reading, the order cannot stand. The applicant reads it as producing 25 years and the State as producing 70 years; this difference itself measures the defect.

[42] Nor did the high court repair the position. Having recognised that a cumulative sentence of 70 years was worse than imprisonment for life, it did not ask itself whether the regional magistrate had intended that result. It treated the sentence as one of 70 years and reduced it to 40. If the applicant is right about what was intended, the effect was to increase his effective sentence from 25 years to 40 years, without a cross-appeal by the State and without notice to him. The high court also proceeded upon the basis that the complainants had each been raped more than once, which was never the State's case and does not accord with the convictions.

[43] Two further features of the judgment call for comment. The first is how the court treated the victim impact statements. The regional magistrate declined to place them on the record and then relied upon their contents, quoting from one of them, the complainant's wish that the applicant 'not be in a position where he will rape more children'. A victim impact statement is a legitimate and often valuable aid to sentencing. But it becomes evidence only when it is properly admitted, whether by consent, upon affidavit or through oral evidence, and only when the accused has had the opportunity to challenge or to answer it.[20] A document which the court declines to place upon the record is not evidence, and a court may not sentence upon its strength.

[44] The second is the catalogue of considerations which the regional magistrate treated as aggravating. She counted against the applicant that the court 'sat . . . in the newly refurbished Sexual Offences Court, which was brought about by the former

[20] *Matyityi* above fn 12 paras 16-17.

Minister of Justice Programme'. The venue of a trial has no bearing upon the sentence of the person tried in it. She relied on statistics that were not in evidence, on public demonstrations outside court buildings for which there was no evidence.

[45] She treated the applicant's failure to show remorse in the face of the three-year-old complainant's evidence as aggravating. An accused who maintains his innocence and puts the State to the proof of its case cannot be punished for not repenting of what he denies having done; the absence of remorse deprives him of a mitigating factor; it does not supply an aggravating one. The prevalence of sexual violence against children is a matter of which a court may take notice, and the regional magistrate was entitled to give it weight. But the passages I have described, read together, show a court sentencing with an eye to public sentiment rather than to the offender and the offences before it. This Court has repeatedly warned against that approach.[21]

[46] The misdirections are cumulative, and they are material. The sentencing discretion was not exercised properly, either at first instance or upon appeal, and this Court is at large. It follows also that exceptional circumstances within the meaning of s 17(2)(*f*) exist in respect of sentence. A person who was a child when he offended was sentenced upon the express basis that he was an adult whose age was irrelevant, under a regime from which the law excluded him, to terms of imprisonment which in the aggregate exceed a natural life; and the court which sought to correct that upon appeal arrived at an effective sentence higher than the one which the applicant says was intended. Were that to stand, the administration of justice would be brought into disrepute. Special leave to appeal against sentence is granted, and the appeal against sentence must succeed.

Whether to remit or to sentence afresh

[47] The ordinary rule is that an appellate court which sets aside a sentence for misdirection imposes the sentence which it considers appropriate, rather than remitting the matter. That course is open only where the record places the court in a

[21] *S v Rabie* 1975 (4) SA 855 (A) at 862G-H.

position to sentence. When these papers were first considered, the obstacle to sentencing afresh was that the applicant's age had never been established, so that it could not be said which sentencing regime applied to him. That obstacle has fallen away. Age is now common cause, and the applicable regime is known.

[48] What remains is the absence of a pre-sentence report, which, in the ordinary course, would call for a remittal. It does not do so here. The offences were committed 17 years ago. The applicant was sentenced 11 years ago and has been in custody since. A report obtained now would speak to a man in his thirties, not the youth who was sentenced in 2015, and it could not tell a sentencing court what it needed to know then. A remittal would add further delay to a matter that has already taken far too long, and it would do so while the applicant remains in prison under a sentence that ought never to have been imposed. This Court must do its best with the material available, including the evidence at trial, the victim impact statements, and the personal circumstances placed on record.

The appropriate sentence

[49] Both parties invited us to substitute an effective sentence of 25 years' imprisonment: the applicant on the basis that this is what the regional magistrate intended and the State on the basis that it is just and equitable. Their common position does not bind this Court, and I cannot accept it. The figure of 25 years is not the product of an independent assessment. It is the residue of an exercise in which the regional court began with imprisonment for life, applied an inapplicable regime, and treated the applicant's age as irrelevant. A sentence arrived at in that way cannot be reinstated merely because it is lower than the one which replaced it.

[50] The offences are grave. The applicant raped a seven-year-old child at knifepoint and subjected her to two further acts of sexual violation, and he raped a three-year-old child. He was their neighbour, the families were on good terms, and the children had no reason to fear him. The victim impact statements show that the harm they suffered has not abated. Offences of this kind against very young children call for severe punishment. The interests of the complainants are not to be discounted

because the offender was himself young; a child's best interests are of paramount importance in every matter concerning that child, and that applies to a child complainant as much as to a child offender.

[51] Against that, the applicant's circumstances are as follows. He was 17 years old when he offended. He was a first offender. He left school in Grade 11 and was employed when he was arrested. The law distinguishes between an offender of 17 and an offender of 27 not out of sentiment, but because a child's culpability is not that of an adult who has done the same thing, and because a child retains a capacity for change that a sentencing court is bound to weigh.

[52] Weighing the gravity of the offences and the interests of the complainants and of society against the applicant's age when he offended, and his clean record, a sentence of imprisonment in line with the Child Justice Act would have been appropriate had the enquiry been conducted correctly in April 2015.

[53] In my view, a court applying the Child Justice Act would have imposed a custodial sentence at a youth centre, consistent with the Act's rehabilitative purpose. It would not have sentenced him to 14 years' imprisonment. Moreover, the regional court had a duty to refer the sentence for review to the high court, and he was denied that. Counts 1 to 3 concern a single course of conduct against one complainant; count 6 concerns a different child upon a different occasion and standing alone would attract a substantial term of its own, but the totality of the applicant's conduct must be measured as a whole, and the individual sentences will accordingly run concurrently.

Why the applicant is to be released forthwith

[54] Paragraph 4 of the order directs that the applicant be released from custody forthwith. Because an order of that kind is not lightly made, I set out the reasons. The first and decisive reason is that the sentence which this Court substitutes has been served in full. An effective term of 11 years, antedated to 30 April 2015, expired on 30 April 2026. Since then, no sentence has been in force authorising the applicant's detention, and no lawful warrant supports it. No one may be deprived of freedom

without cause.[22] Once this Court sets aside the sentence upon which his imprisonment rests and substitutes one which has expired, his continued detention becomes unlawful from the moment the order is made, and the order must say so.

[55] The second is the length of what he has already endured. The applicant was arrested on 8 September 2010 and sentenced on 30 April 2015, he has been in custody in an adult correctional centre contrary to the provisions of the Child Justice Act without interruption since that day. The record is unclear as to whether he was on bail or released on warning before the trial. On any view of this matter he has been in prison for longer than the law permitted, and the excess cannot be recovered.

[56] The third is that even the sentence which this Court considers would have been appropriate has been overtaken. Had a determinate sentence of 11 years been imposed on 30 April 2015, the applicant would have become eligible for consideration for parole after five and a half years, that is in about October 2020. He has therefore been detained for close to six years beyond the date upon which he became eligible even for consideration, and for more than four months beyond the expiry of the sentence itself. A term of imprisonment which has run its course cannot be extended by the time it takes a court to correct the error which produced it.

[57] The fourth is that the delay in this matter has been extraordinary and none of it is attributable to the applicant. Eleven years have passed since the sentence was imposed. He pursued an appeal to the high court, applied for special leave to this Court, and applied to the President for referral, and he has remained in custody throughout. A right which has been infringed for that long is not vindicated by an order which leaves its holder in prison. To set aside an unlawful sentence and then to postpone the consequence would be an empty vindication.

[58] The applicant was denied access to the rehabilitative opportunities available at Youth Centres, including formal schooling, vocational training, and other rehabilitation

[22]Section 12(1)(*a*) of the Constitution.

programmes. Without these interventions, he was deprived of the support needed to return to society as a reformed and rehabilitated person. This unlawful denial of such opportunities likely had a detrimental effect on his prospects for positive development.

[59] In the result, the following order is made:

1 The application for reconsideration in terms of s 17(2)(*f*) of the Superior Courts Act 10 of 2013 is refused in respect of the convictions and granted in respect of sentence.
2 The decision of two judges of this Court refusing the applicant special leave to appeal against sentence is set aside and substituted with the following:

'Special leave to appeal against sentence is granted'

3 The appeal against sentence is upheld
4 The order of the high court is set aside and replaced with the following order:
'(a) The appeal against the convictions is dismissed.
(b) The appeal against sentence succeeds. The sentences imposed by the regional court on 30 April 2015, and the orders made in terms of s 50(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and s 120(4) of the Children's Act 38 of 2005, are set aside and replaced with the following:
(i) Count 1: 11 years' imprisonment.
(ii) Count 2: five years' imprisonment.
(iii) Count 3: five years' imprisonment.
(iv) Count 6: 11 years' imprisonment.
(v) The sentences on counts 2, 3 and 6 are to run concurrently with the sentence on count 1, so that the effective sentence is one of 11 years' imprisonment.
(vi) The sentence is antedated to 30 April 2015.
5 The order made on 20 August 2026 that the applicant be released from custody forthwith is confirmed

KE MATOJANE

JUDGE OF APPEAL

Appearances:

For the applicant:	L Barnard
Instructed by:	Mlilo Attorneys, Pietermaritzburg
	Blair Attorneys, Bloemfontein
For the respondent:	A Khanyile
Instructed by:	Director of Public Prosecutions, Pietermaritzburg
	Director of Public Prosecutions, Bloemfontein.