

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO.: A14/14

In the matter between

MANUEL JOHANNES

Appellant

And

THE STATE

Respondent

JUDGMENT DELIVERED: 24 NOVEMBER 2014

SAMELA, J

[1] The Appellant was charged with one count of rape in the Mitchells Plain Regional Court, Cape Town, alternatively with the contravention of Section 14 (1) (a) of Act 23 of 1957 on the 2 November 2001. He pleaded not guilty to both charges. He exercised his constitutional right regarding the plea explanation, and elected to remain silent. He was legally represented throughout his trial. After evidence was led he was found guilty of rape on the 12 April 2002 and referred to the court a quo for sentencing under the Criminal Law Amendment 105 of 1997 (“the Act”).

[2] Van Der Westhuizen AJ in the court a quo confirmed the conviction by the Regional Magistrate. On the 25 March 2003, after finding that there were no substantial and compelling circumstances, the court a quo sentenced the Appellant to life imprisonment in terms of Section 51 (1) of the prescribed minimum Act.

[3] On the 23 May 2003, the court a quo refused the Appellant leave to appeal against both his conviction and sentence. On petitioning the Supreme Court of Appeal, the Appellant was granted leave to appeal against his sentence on 28 January 2013.

[4] The factual findings by the Regional Magistrate are uncomplicated. A.... P....., the Complainant, lived with her father at M..... P..... in the C.... F...., Cape Town. The parents were divorced when she was 10 years old. She was in Grade 10 at school at the time of the incident. She testified through intermediary Ms L..... W..... in terms of Section 170 A of the Criminal Procedure Act 51 of 1977 (as amended). She testified that she was 16 years old, born on 20 March 1985. She knew the Appellant as Johannes Manuel or Manuel Johannes, who was introduced to her by her boyfriend, during January 2000. She saw the Appellant daily, and they became friends. On the 23 September 2000 she was at her boyfriend's house. Later, that same day, as her boyfriend was not at home, she was accompanied home by her boyfriend's sister and her boyfriend. They had walked through the park, where they met the Appellant who offered to walk her home as he was going towards that direction. The Appellant on the way took out a knife, threatened and forced her to go with him to his house. The Appellant had threatened to

kill her if she refused to go with him. She complied because she was scared. She was taken to the Appellant's house which was dark as the lights were not on. At one stage the Appellant left and came back after a while having locked her inside the house. She informed the Appellant's brother that the Appellant wanted to rape her, however, the Appellant had ordered his brother to leave the room.

[5] The Appellant pressed the knife against her side, grabbed and pulled her to the bedroom. Inside the bedroom he threw her onto the bed, took off her jeans and panties. He took a plastic bag, put it over his penis and had sexual intercourse with her. The complainant testified that when she cried the Appellant ordered her to keep her mouth shut. When he had finished raping her, he instructed her to get dressed and informed her that he would walk her home. According to the Complainant when the door was opened, she ran away and the Appellant chased and grabbed her and threatened to have sexual intercourse with her again. The Complaint stated that the Appellant eventually accompanied her home at 3 a.m. (the next day). He further instructed her not to disclose to anyone what had happened. Notwithstanding the instructions, she testified that she decided to tell her best friend W.... W..... who in turn informed her mother. W.....'S mother phoned the police.

[6] The Appellant was 39 years old at the time of the trial. He testified that on the day of the incident, he was drinking beer at his house when he saw the Complainant and two other persons in front of his gate. He had noticed that there was a problem as the two people tried to walk the Complainant to her home and she was refusing to go home. He offered to accompany her half

way home and the two people left them. They went to P..... place where they bought liquor (beers), and went back to his (the Appellant) house. Whilst he fetched a track suite for her, he noticed that she had taken her pants off. They kissed each other and had sexual intercourse. After they had finished they drank one more time before he accompanied her halfway home as she was afraid that her father would see him. In a nutshell, his defence is that sexual intercourse was consensual.

[7] The crux of this appeal concerns the age of the victim. This court is required to establish whether the court a quo was correct in sentencing the Appellant in terms of Section 51 (1) read with Part 1 of Schedule 2 of the prescribed minimum sentence Act. Such application by the court a quo attracted a life imprisonment sentence.

[8] Mr M. Calitz for the Appellant made the following submissions:

- (a) viewed objectively the rape does not fall within the category as reserved by the Supreme Court of Appeal for life sentences;
- (b) although a knife was used to subdue the Complainant, she nevertheless did not sustain serious injuries in the process;
- (c) the incident took place six (6) months short of her 16th birthday, a factor that brought the rape within the purview of the Criminal Amendment Act 105 of 1997;
- (d) the court unduly considered the Appellant's previous convictions (which were committed in 1982, 1984, 1985 and 1991 respectively), which were older than 10 years and bore no similarities to the offence before the court;

- (e) the court a quo failed to consider the eight (8) months the Appellant had already served incarceration;
- (f) the Appellant's brother had testified that the Appellant had expressed remorse for what he had done;
- (g) the court a quo took the view that remorse was diminished by putting the Complaint through a trial, and that the Appellant had a constitutional right to plead not guilty and test the state's case and that the exercise of that right should not be held against him; and
- (h) That since twelve (12) years of incarceration, the Appellant started a gym in F....., and that was indicative of the fact that the Appellant intended to better himself and to contribute to the society.

[9] Ms P.A. Thaiteng argued on the state's behalf that the Appellant's argument was flawed and could not be regarded as a substantial and compelling factor to deviate from the prescribed minimum sentence. She referred to the record and conceded that age indeed was not fully established.

[10] Where it is pivotal that the victim's age should be ascertained for the purposes of sentencing in a rape case or any other offence/s, it is incumbent on the state to establish the victim's age beyond reasonable doubt.

[11] In **S v Vilakazi** 2009 (1) SACR 552 (SCA) at 564, para 25 and 26, the court said the following:

“[25] It is convenient at the outset to deal with the three features relating to the complainant that the court below took account of in weighing what sentence to impose.

[26] The Complainant was not 11 years old when the offence was committed. According to the complainant she was 15 when she gave evidence, which places her age at between 14 and 16 when the offence was committed. (In answer to a question the complainant, who had no formal schooling, said that she could not remember the date of her birth). A witness who encountered the complainant for a short time on the day the incident occurred said that he estimated her age to be about 11 or 12 years but that evidence naturally carries no weight. The district surgeon who examined the complainant on the day of the incident recorded her age as 13 years. The source of that information was not disclosed and nobody bothered to enquire nor to query its inconsistency with the evidence of the complainant. The Magistrate estimated her age to be below 16 years and her own evidence of her age was accepted by the prosecution and the defence alike, both at the trial and in the proceedings before us. The age of the Complainant at the time the offence occurred was clearly a material factor to be taken account of in sentencing. To take account of the fact that she was 11 when in fact she was at least 14 and might have been over 15 was misdirection”.

In the above case the following factors are clear:

- (i) the Complainant testified that she was 15 years when she gave evidence. Later in the trial, answering a question, the Complainant who had no formal schooling, said she could not remember her birth date;

- (i) the district surgeon who had examined the Complainant on the day of the incident had recorded her age as being 13 years;
- (ii) the Magistrate had estimated her age to be below 16 years as the Complainant's testimony as to her age was accepted by both the state and the defence;
- (iii) the court pointed out that taking into account that the Complainant was eleven (11) years, when in fact she was at least fourteen (14) years and might have been over 15 years was a misdirection; and
- (iv) the Appellant was sentenced to 15 years imprisonment.

[12] Similarly *in Mapule v S* [2012] JOL 29242 (SCA) at 3 paras 6,7 and 8.

The court said the following:

"[6] The magistrate convicted the appellant of rape, "as charged". The charge-sheet reads:

The accused is guilty of the offence of rape in that upon or about the 1st day of January 1999 and at or near Madodonga Village in the Tshilwavirusiku district in the Regional Division of Northern Province the said accused did unlawfully and intentionally have sexual intercourse with . . . a female person, without her consent.

No mention is made of the complainant's age or the provisions of the minimum sentence legislation. The obviously hearsay and unreliable evidence by the complainant that she was (twelve) 12 years old at the time of the incident, was gainsaid by the doctor who examined her. His impression from her physical development was that she might well have been older. The

State failed to tender reliable evidence to resolve the uncertainty regarding the complainant's age.

[7] Therefore, when subsequent to conviction, the magistrate advised the appellant of his rights and said that because the complainant was twelve (12) years old at the time of the incident, the provisions of the minimum sentence legislation compelling the imposition of life imprisonment had to be applied, he erred in two aspects. First, the complainant was not proved beyond reasonable doubt to have been under the age of 16 years at the time of the incident. Second, the State did not prosecute the appellant for the rape of a girl under the age of sixteen (16) years in terms of section 51(1) read with Part 1 Schedule 2 of the minimum sentence legislation. When the court below sentenced the appellant, it erred in the same respects.

[8] The wording of the minimum sentence legislation makes it clear that it applies to persons *convicted* of the offences listed in the schedules. The particular crime a person is convicted of is therefore a jurisdictional fact essential to the application of the various sentences prescribed in the minimum sentence legislation. The rape of a child under the age of 16 years resorts under Part 1 Schedule 2 in terms of section 51 (1) attracts a minimum sentence of life imprisonment, unless substantial and compelling circumstances are shown to exist that justify the imposition of a lesser sentence".

In the above matter the following was illustrated:

- (a) the hearsay and unreliable evidence by the complainant that she was 12 years at the time of the incident;

- (b) the doctor who had examined her was of the impression from her physical development that she was well older than what she had testified concerning her age;
- (c) the state failed to tender reliable evidence to resolve the uncertainty regarding the victim's age;
- (d) the Appellant was convicted of rape (and not rape of a girl under the age of 16 years);
- (e) the court pointed out that in terms of section 51 (2) (b) of the Criminal Law Amendment Act, such a conviction attracted a minimum sentence of 10 years' imprisonment in the absence of substantial and compelling circumstances; and
- (f) the court was of the view that a discretionary sentence of 10 years imprisonment would be appropriate in the circumstances.

[13] In ***Rammoko v Director of Public Prosecutions*** 2003 (1) SACR 200 (SCA) the court had this to say in paras 1,4,9,12,13 and 14:

"[1] Since the complainant was under the age of 16 years a sentence of imprisonment for life had to be imposed on the appellant (section 51 (1) unless substantial and compelling circumstances existed which justified the imposition of a lesser sentence (section 51(3)). The regional magistrate accordingly committed the appellant for sentence in the High Court.

[4] In ***S v Malgas*** 2001 (1) SA 1222 (SCA); 2001 (1) SACR 469, this Court held that the imposition of the prescribed sentence need not amount to a shockingly injustice ("skokkende onreg") before a departure from it is justified. That such a sentence would be an injustice is enough (paragraph

[23]). The suggestion that for circumstances to qualify as substantial and compelling they must be exceptional was also rejected (paragraphs [10], [30] and [31]. It follows that the interpretation given by Cillié J to the concept “substantial and compelling” circumstances is erroneous and amounts to a misdirection. This Court is thus at large to consider the question of sentence afresh.

[9] From a perusal of the record in this matter one cannot but conclude that the case for the State was presented casually, both in the regional court and in the court *a quo*. As I have already stated no evidence was led before Cillié J. The evidence reveals that following the rape the complainant’s grandfather sent the complainant away to live with her mother. Her mother was called as a witness but was never asked how and to what extent the complainant had been affected by the rape. Dr Storm was never invited to comment on the likely effect the ordeal will have on the complainant as she grew older.

[12] For the rape of a girl under the age of 16 years (as in the present case) the prescribed sentence is life imprisonment. However, the court’s discretion to impose a different sentence has not been eliminated by the Act, but in the absence of weighty justification the prescribed sentence must be imposed (Malgas, paragraph [25]). In the matter of The ***State v Boesman Mahamotsa*** (case 85/2001, 31 May 2002, yet to be reported), a case where the respondent, a 23 –year-old man, had raped two 15-year-old girls, I had occasion to say the following:

“[17] The rapes that we are concerned with here, though very serious, cannot be classified as falling within the worst category of rape. What emerges from this is that a victim may be under the age of 16 years is not the

only criterion necessary for the imposition of a sentence of life imprisonment.

Further in the *Boesman Mahamotsa* case:

“Even in cases falling within the categories [of rape] delineated in the Act there are bound to be differences in the degree of their seriousness. There should be no misunderstanding about this: they will all be serious but some will be more serious than others and, subject to the *caveat* that follows, it is only right that the differences in seriousness should receive recognition when it comes to the meting out of punishment. As this Court observed in ***S v Abrahams*** 2002 (1) SACR 116 (SCA) ‘some rapes are worse than others and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust’ (paragraph 29).

[13] Life imprisonment is the heaviest sentence a person can be legally obliged to serve. Accordingly, where section 51 (1) applies, an accused must not be subjected to the risk that substantial and compelling circumstances are, on inadequate evidence, held to be absent. At the same time the community is entitled to expect that an offender will not escape life imprisonment – which has been prescribed for a very specific reason – simply because such circumstances are, unwarrantedly, held to be present.

[14] And the placing of this important information before the sentencing court is not the responsibility of State counsel alone. The presiding officer, who must satisfy himself before imposing the prescribed sentence that no substantial and compelling circumstances are present, also bears some responsibility”.

[14] In the above matter the court clearly pointed out the following:

- (i) raping a person who was under the age of 16 years, a sentence of life imprisonment has to be imposed on an Appellant (section 51 (1) unless substantial and compelling circumstances exist which justify the imposition of a lesser sentence (section 51 (3));
- (ii) where the Appeal court find a misdirection by a sentencing court, it is at large to consider the question of sentence afresh;
- (iii) for the rape of a girl under the age of 16 years, the prescribed sentence is life imprisonment. The court's discretion to impose a different sentence had not been eliminated by the Act, however, where there is absence of weighty justification, the prescribed minimum sentence must be imposed (para 12);
- (iv) that life imprisonment is the heaviest sentence on anyone the sentence has to be imposed on;
- (v) placing of an important information before sentencing is not only the responsibility of the state also judicial officer/s bear some responsibility;
- (vi) some rapes are worse than others and that life imprisonment should be reserved for cases devoid of substantial factors; and
- (vii) the matter was remitted to the court a quo for reconsideration of the sentence.

[15] The seriousness of rape and the challenges the courts are facing was clearly stated by Mahomed CJ in **S v Chapman** 1997 (2) SACR 3 (SCA) at d-f where the court said:

“Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person

of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation. Women in South Africa are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives. The Courts are under a duty to send a clear message to the accused in the present case, to other potential rapists and to the community that the Courts are determined to protect the equality, dignity and freedom of all women, and they will show no mercy to those who seek to invade those rights”.

[16] Our courts continue condemning sexual violence to women and children see **DPP v Prins** (*Minister of Justice and Constitutional Development & two amici curiae intervening*) (369/12) [2012] 106 ZASCA (15 June 2012), the court said:

“No judicial officer sitting in South Africa today is unaware of the extent of sexual violence in this country and the way in which it deprives so many women and children of their right to dignity and bodily integrity and, in the case of children, the right to be children; to grow up in innocence and, as they grow older, to awaken to the maturity and joy of full humanity. The rights and bodily integrity are fundamental to our humanity and should be respected for that reason alone. It is a sad reflection on our world, and societies such as our own, that women and

children have been abused and that such abuse continues, so that their rights require legal protection by way of international conventions and domestic laws, as South African has done various provisions of our Constitutional and in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act)".

[17] In the present matter, the state in establishing the Complainant's age dealt with it in the following manner:

"State Prosecutor: [A.....] how old are you?

Complainant: 16 years old;

State Prosecutor: What is your date of birth [A...]?

Complainant: The 20th of the third month 1985".

[18] When Mr W..... P..... (Complainant's father) was led by the State Prosecutor regarding the Complainant's age, he replied in the following manner:

"State Prosecutor: Mr P..... is it correct that A..... P....., the Complainant in this case is your daughter?

Mr P..... It is correct yes.

State Prosecutor: How old is she sir?

Mr P.....: She is now 16 years old.

State Prosecutor: Can you tell the court what her birth date is?

Mr P..... It is her birthday the 2....th of the third month.

Court: Sorry will she be 17 this year?

Mr P.....: She will be 17.

Court: So is it 1.....?

Mr P.....: That is correct, yes”.

[19] Ms A..... K.....’s evidence (Complainant’s mother), was in complete variance with that of Complainant’s father. She testified as follows:

“State Prosecutor: Ma’am is it correct that you are a biological mother of the Complainant in this matter, A..... P.....?

Ms K.....: Yes

State Prosecutor: Can you tell the court what her date of birth is?

Ms K.....: The 20th of the third 1..... She will be 17. So it’s 1..... Sorry sir.

State Prosecutor: How old was she in the year 2000:

Ms K...... 15.

State Prosecutor: Okay. Ma’am the date of birth. Are you certain about the date of birth you gave earlier?

Ms K.....: 1985 or 1984 but she will be 17 next week. Please excuse me for that because I get very confused with that.

State Prosecutor: Are you in possession of her date of birth?

Ms K.....: No I haven’t got it on me.

State Prosecutor: Pardon your Worship I’m incorrect. He said ’85. She said ’84 _ _ _ But she’s got an ID but I don’t know if she’s got it on her.

Court: But you say she will be 17 this year?

Ms K..... No next week she will be 17.

Court: Next week. So according to my calculations then it will be – if you say she’s 17 then it must have been 1985.

Ms K.....: Ja”

[20] From the above, it is evident that the question of the Complainant’s age was dealt with casually, as there was no evidence beyond reasonable doubt placed before the court as to the exact birth date of the Complainant. There was no birth certificate or any documentation proving the Complainant’s age. There was no medical evidence produced in court regarding the Complainant’s age. She was not examined by the district surgeon to establish her age (J88 form absent). Also the Complainant’s parents seem not to be *ad idem* regarding the Complainant’s birth date. The issue of the Complainant was indeed casually discussed by the court *a quo*, which in my view amounted to a misdirection.

[21] The Appellant’s personal circumstances were as follows:

- (a) the Appellant was 41 years;
- (b) he was married and was the sole breadwinner;
- (c) had previous convictions committed more than ten years as stated in the SAP 69;
- (d) the Appellant was involved in community work, for example, he had established a body building club in F.....;

Aggravating factors were amongst other things:

- (i) the Appellant showed no remorse, only his brother testified that the Appellant was remorseful;

- (ii) Appellant breached the Complainant's trust as well as her friends who had entrusted with taking care of the Complainant to safely walked her to her home;
- (iii) threatened the Complainant with a knife and raped her at his own house; and
- (iv) Appellant was not moved by the Complainant's cries when he forced himself onto her sexually.

The court a quo further remarked that :

- (a) the Complainant was of big built and according to the Appellant's wife, she looked like an adult;
- (b) the Complainant sometimes served alcohol at a private bar;
- (c) she was 15½ years old at the time of the incident;
- (d) the J88 form which should have been completed by a district surgeon or surgeon was absent;
- (e) the court accepted that the Complainant sustained no serious physical injuries during the incident;
- (f) regarding psychological injuries the court said:

“The psychological side however, is a different story. The social worker's report in this regard shows that the plaintiff has to a large extent be psychologically damaged by this crime, to such an extent that she was unable to successfully continue her schooling and that she had to repeat a year as a result of that. Her inter-personal relationship with her friends and family has been adversely affected and she feels rejected. Your conduct

caused her to be admitted to hospital for a period, in order for her to calm her mind and getting her emotions under control. It is clear that you had, in more than one respect broken her spirit”

[22] In sentencing the Appellant, the court a quo did not find any substantial and compelling circumstances and sentenced the Appellant to life imprisonment in terms of section 51 (1) of the Criminal Law Amendment Act 105 of 1997 (“the Act”).

[23] Section 51 (1) of the Act provides:

“Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part 1 of Schedule 2 to imprisonment for life”.

Section 3 of the Act provides:

“If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.

(Aa) When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

- (i) the complainant's previous sexual history;
- (ii) an apparent lack of physical injury to the complainant;
- (iii) an accused person's cultural or religious beliefs about rape; or
- (iv) any relationship between the accused person and the complainant prior to the offence being committed".

Part 1 of Schedule 2 of the Act, referring to rape provides:

"Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 –

(a) when committed –

- (i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;
- (ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;
- (iii) by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions; or
- (iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;

(b) where the victim –

- (i) is a person under the age of 16 years;
 - (ii) is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or
 - (iii) is a person, who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or
- (c) involving the infliction of grievous bodily harm.

[24] The above sections clearly indicates that where the rape victim was under the age of 16 years, a life imprisonment had to be imposed in terms of section 51 (1) read with Part 1 of Schedule 2 of the Act, unless substantial and compelling circumstances existed which justified the imposition of a lesser sentence, in terms of section 51 (3) of the Act.

[25] It follows that the following was of concern in this matter:

- (a) there was no birth certificate or identity document or any form of documentation which illustrated the Complainant's age placed before court;
- (b) both parents were not unanimous when testifying in court regarding the Complainant's birth date, as shown above; and
- (c) no medical evidence was placed before the court regarding the Complainant's age.

[26] As a result of the above evidence absence in court, I am of the view that the prosecution failed to prove the Complainant's age beyond a reasonable doubt. It follows that the state's failure amounted to a

misdirection. The misdirection led to the Appellant being charged with a wrong section of the minimum sentence Act, and sentenced incorrectly.

[27] The correct section which the court a quo should have applied is section 51 (2) (b) read with Part III of Schedule 2.

Section 51 (2) b of the Act provides:

“Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in –

(b) Part III of schedule 2, in the case of –

(i) a first offender, to imprisonment for a period not less than 10 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years”.

Part III of Schedule 2 provides:

“Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively in circumstances other than those referred to in Part 1.

Sexual exploitation of a child or sexual exploitation of a person who is mentally disabled as contemplated in section 17 or 23 or using a child for child pornography or using a person who is mentally disabled for pornographic purposes, as contemplated in section 20 (1) or 26 (1) of

the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively”.

The application of the above section, on conviction, would have attracted a minimum period of 10 years imprisonment, in the absence of substantial and compelling circumstances.

[28] It is suggested that the following guidelines should assist the court where age of a Complainant is an issue in a rape case or any offence. The following evidence should be placed before court:

- (a) birth certificate or identity document issued by the Department of Home Affairs or any document issued by any country recognised as proving birth date of a person by the Department of Home Affairs;
- (b) baptismal certificate or any religious document issued by an accredited religious institution indicating the birth date of a person, recognised by the Department of Home Affairs;
- (c) any foreign document, issued by any country, indicating birth date of a person recognised by Department of Home Affairs;
- (d) medical evidence by a district surgeon indicating the age of the person;
and
- (e) evidence produced or elicited by parents of the victim, which must be unanimous, not contradictory like in our present matter.

[29] The imposition of an appropriate sentence falls within the discretion of the trial court. It is only where the trial court has misdirected itself, which misdirection should appear *ex facie* the record that a court of appeal would

intervene. The appeal court would not lightly interfere with the sentence, see ***R v Dhlumayo and Another*** 1948 (2) SA 677 (A). In ***S v Rabie*** 1975 (4) SA 855 (A) at 857 D-E the court went further and said:

- “1. In every appeal against sentence, where imposed by a magistrate or a Judge, the Court hearing the appeal –
 - (a) should be guided by the principle that punishment is “pre-eminently a matter for the discretion of the trial Court”; and
 - (b) Should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been “judicially and properly exercised”.
2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate”.

After carefully perusing at the records in this case, the imposition of life imprisonment in the circumstances in my view is improper. In the light of this finding, this court is fully entitled to impose a fresh sentence.

[30] As earlier alluded to, the Appellant was sentenced to life imprisonment on the 25 March 2003. He has been incarcerated since that date. I have in this judgment held that a sentence of life imprisonment ought not to have been imposed as there is no proper basis on which it can be said that the age of the complainant was proved beyond reasonable doubt. Notwithstanding that, the offence which the Appellant is by its very nature serious. What I find aggravating is that the complainant is by its very nature serious. What I find aggravating is that the complainant was threatened with a knife. Not only that, she had placed her trust on the Appellant, who was well-known to her. I am of

the view that a discretionary sentence of 15 years would be appropriate in these circumstances.

[31] In the result, I would propose the following:

1. The appeal succeeds to the extent that the sentence of life imprisonment imposed on the Appellant is set aside;
2. The Appellant is sentenced to 15 years imprisonment antedated to the 25 March 2003, in terms of s282 of the Criminal Procedure Act 51 of 1977 (as amended).

I agree.

M.I. SAMELA
Judge of the High Court

I agree and it is so ordered.

V. SALDANHA
Judge of the High Court

T. NDITA
Judge of the High Court