

SOUTH AFRICA / JUDGMENT

E.S.M v S (A488/2014) [2015] ZAGPPHC 291 (21 April 2015)

[2015] ZAGPPHC 291

COURT

North Gauteng High Court, Pretoria

BEFORE

N V Khumalo, D S Fourie

CASE / FILE NUMBER

A488/2014

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REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT

OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE NO:

A488/2014

DATE: 21 APRIL

2015

E[...] S[...]

M[...].....APPELL

ANT

and

THE

STATE.....RESP

ONDENT

JUDGMENT**KHUMALO J****INTRODUCTION**

- [1] The Appellant was arraigned and convicted in the Middleburg Regional Court on a charge of rape for contravening s 3 read with s 1, 56 (1), 57, 58, 59, 60, and 61 of the Criminal Law Amendment Act (Sexual Offences and Related Matters) 32 of 2007 ("the Sexual Offences Act"), with s 256, and 261 of the Criminal Procedure Act 51 of 1977 ("the Act") subject to the provisions of s 51 (1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 ("the Minimum Sentence Act"). He was sentenced to life imprisonment. With leave of the trial court he is appealing against the conviction and sentence.
- [2] It was alleged in the charge sheet that during September to November 2009 at Mhluze the Appellant unlawfully and intentionally committed an act of sexual penetration with the complainant, to wit, ND, an 11 year old girl by penetrating her vagina with his penis, without the consent of the complainant.
- [3] The complainant is related to the Appellant in that their mothers are half-sisters. During the trial the Appellant, who was duly represented, pleaded not guilty, alleging that the sexual intercourse was consensual and initiated by the complainant.
- [4] At the beginning of the trial he made the following formal admissions in terms of s 220 of the Act -
- [4.1] That he admits that he engaged in sexual intercourse with the complainant during the period mentioned in the charge sheet.
- [5] He further in his explanation of Plea stated that during June 2009 the complainant and her mother visited his grandmother's residence in Wonderfontein. During this time the complainant approached him and told him that she was in love with him and requested to engage in sexual intercourse. He enquired on her age and complainant told him she was 16 years old. His response was that they must wait until complainant was 21 years old before they can engage in any sexual intercourse. He then travelled to Middleburg from Wonderfontein with the complainant and her mother, more specifically to the residence of the Appellant's grandfather, where they resided from September to November 2009. During that period the Appellant engaged in sexual relations with the complainant at her request for the first time.
- [6] It is argued on Appellant's behalf that due to the fact that the complainant consented to the sexual intercourse and claimed to the Appellant that she was 16 years old, Appellant was not supposed to be convicted of s 3 of the Sexual Offences Act but of s 15 of the said Act for an act of consensual sexual penetration with a child. The argument was based from a point of view that since the allegation was that the complainant projected herself to be 16 years old,

the issue should be whether or not Appellant believed the complainant and if he did his believe should exculpate him from s 3 criminal liability diminishing his moral blameworthiness to that of s 15 offence (a lesser offence).

- [7] The learned magistrate on the other hand decided the case, regarding the fact in issue to be whether the accused was aware of the age of the complainant. However on referring to the relevant legislation/statute, I consider the starting or focus point to be whether or not the complainant was according to the law capable of consenting to sexual intercourse.

APPLICABLE LAW

- [8] The offence of rape is defined in s 3 of the Sexual Offences Act as follows:

"Any person (A) who unlawfully and intentionally commits an act of sexual penetration with a complainant (B) without the consent of (B), is guilty of the offence of rape."

And s 15 of the Sexual Offences Act reads:

"A person (a) who commits an act of sexual penetration with a child (B) is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child."

- [9] In terms of s 1 of the Sexual Offences Act a child is defined as follows:

"child" means-

- (a) A person under the age of 18 years; or
- (b) With reference to sections 15 and 16, a person 12 years or older but under the age of 16 years"

Therefore for the application or purpose of s 15 and 16, a child would have to be 12 years or older and under the age of 16.

"consent" means voluntary or coerced agreement. And

- (2) Circumstances in subsection 2 in respect of which a person (B) (The complainant) does not voluntarily or without coercion agree to an act of sexual penetration, as contemplated in s 3 and 4 include but are not limited to, the following:

- (a) ... (b)... (c)...
- (d) Where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act;
 - (i) Unconscious;
 - (ii)
 - (iii) A child below the age of 12 years; or

(iv) A person mentally disabled

Therefore a child does not voluntarily agree to an act of sexual penetration when the child is below the age of 12 years. In that regard there cannot be consensual sexual penetration in respect of a child of that age.

[10] Section 261 (1)

(g) of the Act provides as follows:

"if the evidence on a charge of rape or compelled rape, as contemplated in s 3 or 4 of the Sexual Offences Act respectively, or any attempt to commit any of those offences, does not prove any such offence or an attempt to commit any such offence, but the offence of

(a) to (f)

(g) having committed an act of consensual sexual penetration with a child as contemplated in s 15 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, the accused may be found guilty of the offence so proved."

[11] Whilst s 56 (2)

(a) of the Sexual Offences Act provides that:

"Whenever an accused person is charged with an offence under section 15 or 16, it is, subject to subsection (3) a valid defence to such a charged person to contend that the child deceived the accused person into believing that he or she was 16 years or older at the time of the alleged commission of the offence and the accused person reasonably believed that the child was 16 years or older."

s 57 of the Act concerning the inability of children under 12 years and persons who are mentally disabled to consent to sexual acts provides that:

"(1) Notwithstanding anything to the contrary in any law contained, a male or female person under the age of 12 years is incapable of consenting to a sexual act."

[12] It was argued that it was therefore of utmost importance if the Appellant was indeed deceived into believing that the complainant was 16 years old. His believe being reasonable under the circumstances.

[13] It was common cause that the couple met when the complainant and her mother visited the farm in Middleburg. However the consensual sex took place when the Appellant was now visiting the complainant's home in September 2009 in Mhluze.

- [14] According to Complainant it was the Appellant's idea that they have sexual relations. She had informed the Appellant that she was 11 years old. She never told the Appellant that she is 16 years old or that she does not want to have sexual intercourse with him. She actually wanted to have sexual intercourse with Appellant and had told him that she loved him. The first time she met Appellant her mother told him her age.
- [15] Whilst Mrs Dlamini testified that according to her the Appellant was aware of the complainant's age and aware of the school that complainant attended that goes up to grade 7 as he sometimes took the house keys to the complaint at school. She also recalled that when the Appellant arrived with his uncle at Mhluzi she introduced the complainant and complainant's younger sister to the Appellant and mentioned the ages of the children as 11 and 8 years old, respectively. When the Appellant was staying with them she had noticed that the Appellant and complainant would sometimes whisper to each other and at the same time observed a change in complainant's behaviour. She was called by the school and informed that complainant wanted to commit suicide but when she confronted the complainant she cried and refused to talk. A report was then made by appellant to her that he and complainant were in a love relationship. When she mentioned that complainant was a child, he said he wanted to have her as his wife.
- [16] Captain Badernhorst, a forensic social worker who at the request of the state assessed and conducted two forensic interviews with the complainant said in her testimony that was backed by her report that, the 11 year old child has not yet reached sexual maturity and therefore highly unlikely that she would have been able to make informed decisions about sexual activity or about entering into a sexual relationship. According to her the child is very, very vulnerable for intimidation. Regarding sexual matters, a child aged 11 is very young to go into or even think about sexual relationships, the nature and extent of which she does not fully comprehend. At that age she saw the child, due to her being highly vulnerable, "entering into a relationship" with the Appellant and submitting to his sexual demands as the only way in which to keep Appellant from committing suicide. The reason the complainant acquiesced in court to have initiated the sexual contact with the Appellant was that she was helping him, trying to protect him. The child is damaged emotionally and gave the Appellant sex because he wanted it.
- [17] Appellant alleged that it all started in September 2009, they were in a room listening to DVD's. The complainant came to his room while he was asleep and laid down next to him on the bed. He woke up and the two of them started kissing. A conversation started during which there were discussions about the Appellant's past relationship where he lost a girlfriend in an accident and his attempt to commit suicide and complainant's loss of a friend through suicide. Complainant then told him that she loved him and would not like to find herself in the same situation. Appellant thereupon inquired from her what her age was, to which the complainant responded that she was 16 years old. He believed her because she told him about another boy that was proposing love to her. He told her, however, to wait until she had finished school and turned 21 before they could become involved in a sexual

relationship. Despite the Appellant's initial concern they eventually ended up having sexual intercourse after the complainant undressed and insisted to have sexual intercourse with the Appellant.

- [18] Under cross examination Appellant said they started kissing and then he asked complainant her age. When he was asked if they started by kissing before he knew her age, he turned around and said he asked complainant her age before they started kissing and she told him she was 16 years old. He then again said he kissed her before he was informed of her age as complainant wanted them only to kiss. Later when confronted about the inappropriateness of that behavior he reverted to the initial assertion that he knew her age before they started kissing as complainant informed him that she was older than 16 years. He also alleged to have taken steps to make sure that the complainant was indeed 16 years old by asking the complainant on numerous occasions about her age and enquiring from her if she was indeed telling the truth and not lying to him. According to him it was difficult to can say how old the complainant was because by mere seeing her one cannot tell. He had sexual intercourse with her even if he knew she was young because complainant wanted proof that he does love her.
- [19] The learned magistrate accepted that since it was not an issue that sexual intercourse took place, a fact that remained in issue after all was whether the accused was aware of the age of the complainant. It related to consent.
- [20] The trial court assessed the evidence and stressed that it was aware and had taken into account that the complainant's evidence had a number of discrepancies, vagueness and what it referred to as confusions, and also aware that it had to carefully consider such evidence because of the double sword application of complainant being young and a single witness. However due to the report that was prepared by Badenhorst, explaining the contradictions and consistencies the court was assured into accepting her evidence. See S V Teixeira 1980
- (3) SA 755 (A) at 761 where the court in evaluating the evidence of a single witness stressed that 'a final evaluation can rarely, if ever,
- be made without considering whether such evidence is consistent with the probabilities/ The fact that it is corroborated would also strengthen its probity, without which it may be rejected if it also has a litany of intrinsic probabilities, omissions and
- contradictions.
- [21] The court recognized that the complainant's evidence that the Appellant was informed of her age by herself and her mother was corroborated by her mother. The court also found it improbable that complainant would have lied to the Appellant and said she is sixteen because a child of her age is unlikely to know what the consenting age is, or understand the relevancy thereof to consider it important to inform the Appellant that she is 16, which also by chance happens to be the age of consent. Appellant alleges that he believed her but his

testimony that he on numerous occasions asked her if she was telling the truth and not lying gainsay that assertion and instead confirms that he was aware of her age and just fabricating the allegation about complainant lying about her age. Besides, he according to his evidence in chief engaged himself in inappropriate behavior with the child, kissing the child right from the beginning, only after he was confronted about it did Appellant then allege to have asked the complainant her age.

- [22] The court further on its own observed that complainant's physical appearance on the date she testified did not appear to be that of a 16 year old child, that she might have a demeanor of a child older than 11, but certainly not of a person of 16 years of age. It therefore noted that there was no chance that the Appellant could have been deceived to think that the complainant was 16 years old. Appellant, despite showing some measure of doubt in believing her, did not try to find out from other family members what her exact age was, notwithstanding that they were related. Appellant never told the mother that complainant said to him she was 16 when the mother complained that complainant is a child.
- [23] The Appellant's argument, that the court's observation that complainant's demeanor may have appeared to be slightly older than 11 years old, should have led the court to a finding that the charge of s 3 of the Sexual Offences Act rape was not proven beyond reasonable doubt, has no merit, factually or legally. The Appellant's argument fails to take into account that the court's observation was made when complainant testified in court and she was at the time actually 12 years old about to turn 13. She was therefore slightly older than 11 years old as correctly observed by the court but not anything near 16 years. She would have looked even younger, a year and a half ago. The Appellant's argument is therefore ill-informed. In its assessment the court a quo took that observation together with the corroborated evidence that Appellant was told that complainant was 11 years old and his unreliable allegations that he asked the complainant her age and she alleged to be 16 into account and all the other evidence, to arrive at a conclusion regarding Appellant's conduct. The court then found that the Appellant could not have been deceived to thinking that complainant was 16 years old.
- [24] The learned magistrate therefore correctly found Appellant to have knowingly had sexual intercourse with an 11 year old complainant

without her consent as per s

3. Whether consent in the context of sexual offences will be recognized in law is determined with reference to considerations of public policy. In *S v SM* 2013
- (2) SACR 111 (SCA) Erasmus AJA recognized that in law, consent has the following requirements:
 - (a) The consent must be recognized in law;
 - (b) it must be real consent; and

(c) it must be given by a person capable of consent.

[25] Consent of an 11 year old is irrelevant as it is not recognized in law, age 12 being the minimum age below which any sexual relations would be illegal. A child under 12 years of age cannot, in terms of the law be able to agree to having sexual intercourse; see s 57 (1) of the Sexual Offences Act. Therefore whether consensual or not, it is a severe criminal offence to have sex with a child under the age of 12 as she is in terms of the statute incapable of giving consent. The reasoning behind that is as stated by Dr Badenhorst that an 11 year old child has not yet reached sexual maturity and therefore highly unlikely that she would have been able to make informed decisions about a sexual activity or about entering into a sexual relationship, being very young to go into or even think about sexual relationships, the nature and extent of which she does not fully comprehend. The law has recognized that as provided in s 1 (3) (d) (4).

[26] As a result Appellant's argument that the court should have made a finding of a consensual sexual penetration with a child as envisioned by s 15 of the Sexual Offences Act has no substance. Due to the prohibition of any consensual sex to be performed with a child that is younger than 12 years .The section is applicable to 12 year olds or older children but under the age of 16.

[27] I am satisfied that the conviction of the Appellant for the contravention of s 3 of the Sexual Offences Act for having had sexual intercourse with the complainant without her consent was in order.

AD SENTENCE

[28] With regard to sentence the Appellant alleges that the sentence of life imprisonment is disproportionate given the circumstances of the case, so a lesser sentence ought to have been imposed. He criticizes the court that it failed to attach sufficient weight to the following factors:

- (i) The lengthy period of imprisonment that the Appellant spent in custody awaiting the finalisation of the trial (almost 2 years);
- (ii) The fact that he was a first offender, and that no evidence was presented to indicate that the Appellant cannot rehabilitate;
- (iii) The finding of the trial court that the complainant had consented;
- (iv) The absence of serious physical injuries;

- (v) The evidence that Captain Badenhorst had testified that the complainant had a case history of neglect within then family; the complainant was abandoned by her biological father; she was experiencing a negative relationship with her mother as well as her step father; a friend who had committed suicide and the complainant feeling responsible for her death. The Appellant could not be solely be held accountable for the psychological trauma that the complainant was going through.
- [29] He submitted that all these factors considered cumulatively constitute substantial and compelling circumstances justifying the imposition of a sentence less than life imprisonment.
- [30] It is trite that the sentence should reflect the severity of the crime committed, the blameworthiness of the offender and serve the interest of society, as propagated by the Zinn triad (5 v Zinn 1969
- (2) SA 537 (A)). The courts are implored that when considering the appropriate sentence they must have due regard to the purpose of punishment, that is deterrence, rehabilitation, retribution and prevention. Where the Minimum Sentence Act is applicable, like in casu, that the legislature had singled out the identified offences for severe punishment due to their seriousness. The imposition of a sentence should then be approached by the courts conscious that those are the sentences that should ordinarily be imposed and any deviation therefrom should occur if there are "substantial and compelling circumstances that justifies the imposition of a lesser sentence."
- [31] The legislature considered rape one of the worst crimes and ordained life imprisonment as the sentence to be imposed as it was highlighted by the SCA in 5 v SMM 2013
- (2) SACR 292 (SCA) ([2010] ZASCA 56) at 297c) when it was held that:
- 'Rape is undeniably a degrading, humiliating and brutal invasion of a person's most intimate and private space. The very act itself, even absent any accompanying violent assault inflicted by the perpetrator, is a violent and traumatic infringement... free from all forms of violence and not to be treated in a cruel, inhumane or degrading way.'
- [32] The court a quo therefore recognised that the provisions of s 51 of the Minimum Sentence Act are peremptory, creating a benchmark against which appropriate sentence ought to be measured without compromising justice. Also that it weighs on the discretion of the court. It therefore accepted that to incorporate the objectives of sentencing it had to consider, besides the seriousness of the offence, the accused's personal circumstances, the interest of society which is to be blended with an element of mercy without overemphasising any one to the exclusion of the others, decide each case upon its own facts to determine if substantial and compelling circumstances exist that justify deviation from the ordained prescribed period.

- [33] The court a quo also recognised that when establishing the presence or absence of substantial and compelling circumstances the presiding officer generally has due regard to those facts which are traditionally considered as mitigating and aggravating circumstances. I support that sentiment; see *S v Blaauw* 1999
- (2) SACR 295 (W), *S v Dithotze* 1999
- (2) SACR 314 (W), *S v van Wyk* 2000
- (1) SCAR 45 (C). It therefore considered that the Appellant was 22 years old at the time of the commission of the offence and 24 on sentencing, unemployed, unmarried with a 3 year old child. He is a pastor at his church, has no previous convictions. He was brought up by his grandparents.
- [34] On the other hand the court considered as one of aggravating factors Appellant's lack of remorse, persisting with his plea of not guilty. During the whole trial proceedings he did not show or express any feelings of guilt even after he was convicted, instead he exacerbated the situation by blaming the complainant for what happened. Remorse somehow suggests regret and willingness to change, a feeling of trauma or guilt stimulated by the vile that one has brought to bear upon another; see *S v Martin* 1996
- (2) SCAR 378 (W) at 383h. However the Appellant disassociates himself from the trauma that complainant suffered after the whole ordeal of the rape and the trial and alleges in his appeal that the court did not put any weight on the fact that the trauma was caused by her past history, even though there was no evidence that complainant ever tried to kill herself prior the rape.
- [35] The significance of the age of the victim and the psychological effect of the incident on her was set out in the victim impact report. Subsequent to the conviction evidence was led confirming that she tried to commit suicide and was hospitalised for two and a half months after the Appellant was convicted because she blames herself for what happened. She twice broke down in tears during her testimony, which was indicative of the severity of her suffering, whilst Appellant stood by and persisted with his plea of not guilty. Appellant caused the complainant's wretchedness and that can only influence the court to stand by the harsher sentence.
- [36] The seriousness of the offence, its prevalence in our society as well made the court a quo consider the views of the broader community on rape and their justified expectation that the courts will correctly punish the offenders, severely punishing those who commit serious crimes. It also had an opportunity to weigh all these factors that were highlighted by Appellant's counsel during sentencing which Appellant now alleges were overlooked by the court.
- [37] The court also dealt with the issue of absence of violence and related that to what Borchers stated in *S v G* 2004

(2) SACR 296 (W) that:

"A physically immature child of ten is no match for an adult man and little violence is needed to achieve his purpose."

Therefore that cannot be viewed for the benefit of the Appellant to get a lesser sentence. Further that in S v E 1992

(2) SACR 625 AD the court held that the absence of violence or coercion was, however, not mitigating. Physical force is often not used by a sex offender particularly where the perpetrator exerts an emotional hold over his victim. Because of the trusting relationship with an offender the use of physical force is rarely necessary to engage a child in sexual activity. Appellant had an emotional hold on the complainant and exploited her vulnerability. He therefore did not have to use force. Complainant was made to feel that Appellant deserved to be pleased and protected. We must not forget that the act itself constitutes the violation of one's dignity and amounts to cruel and inhumane treatment of a child by an adult.

[38] The view then in S v E supro echoes the present views of the SCA as enunciated in 5 v SM supra [24] that 'the very act itself, even absent any accompanying violent assault inflicted by the perpetrator, is a violent and traumatic

infringement... free from all forms of violence and not to be treated in a cruel, inhumane or degrading way.' That is why there is no gradation of the offence and the legislature ensured that there is no misapprehension of its intention by specially providing that absence of apparent physical injuries will not lessen the offender's moral blameworthiness in s 51 (3)(aA)(ii) of the Minimum Sentence Act. Since the violence of inhumanity and wickedness of the act that has been proven to have had devastating effects on the self-worth of the child, scarring her sense of dignity and causing her deep torment cannot be measured by the existence or non-existence of physical wounds; see S v M at [116]. The trial court's approach was therefore in one way correct. Zondi J in 5 v Uithaler 2015

(1) SACR 174 (WCC), still held that:

"the fact that the victim of a sexual assault suffered no physical injury in the course of the assault does not, in my view, render the crime of rape less reprehensible."

[39] The contention by Appellant is brought, I guess in view of S v Nkawu 2009

(2) SACR 402 (ECG) where Plasket J considered the subsection unconstitutional if interpreted literally. The reason being that, it would result in the accused being deprived of his right to a fair trial. Plasket J instead advocated that s 51 (3) (Aa) be interpreted to mean that any one of the factors therein mentioned, on their own may not be regarded as a substantial and compelling circumstance justifying a departure from the prescribed sentence but that each one of them may be considered along with other factors cumulatively to amount to substantial and compelling circumstances. The full bench in S v SMM supra at [26] agreed

with that approach. I agree with the approach only if the absence of a physical injury is weighed against the impact the offence has had to the life and emotional wellbeing of the victim. Because It would be unjust to consider the absence of physical injuries a substantial and compelling reason to depart from the prescribed sentence, even cumulatively, contrary to s 51 (3) (Aa) (ii) when the offence has had devastating consequence upon the emotional wellbeing of the child victim. The absence of physical injuries therefore should be assessed against the psychological harm caused to the victim to establish if it can be considered cumulatively with other factors to be a substantial and compelling circumstance justifying a departure. In Du Toit, De Jager, Paizes, Skeen and Van der Merwe's Commentary on Criminal Procedure Act on p 28-18D-12 it is stated that the psychological damage to a rape complainant (and especially one of tender years) calls for special

consideration in assessing the appropriate sentence.

[40] The time that was spent in custody was considered by the trial court from the point of view that the period of life imprisonment is indeterminable and presiding officers are not meant to interfere with policies introduced by the correctional services for arrangements

regarding the early release of prisoners by way of remission or parole. The court a quo was of the opinion that 'as far as the

sentencing court is concerned, the date when the sentence commences should have no impact on its duration since theoretically it endures for the rest of the natural life of the person so sentenced/ How does one anyway tie or fetter in the period that the offender has already spent in custody on such a sentence? The court regarded that to be beyond the purview of a court. The general view enunciated in S v Radebe & Another 2013

- (2) SACR 165 (SCA) was that 'the period spent in prison cannot on its own constitute substantial and compelling circumstances/ In NDPP North Gauteng: Pretoria v Gcwala 2014
- (2) SACR 337 the Appeal Court had to deal with a similar question, that is, how should the period spent in custody be dealt with generally in cases where a life sentence is appropriate?, the accused had spent 4 years in custody (in this case 2 years). Its answer was that the sentencing court should consider in all cases whether the period of imprisonment proposed is proportionate to the crime committed, taking into account, for that purposes, the period spent in custody awaiting trial. It resolved that the trial court should have determined whether, all the circumstances shown to have existed, including the period spent in custody awaiting trial, justified

imposing a sentence less than that prescribed by the legislature. If life imprisonment as a sentence becomes inappropriate, still the court will still have to consider that the period of life imprisonment is indeterminable. So does one accommodate the period

spent in custody awaiting trial by guessing the period that he might have had to stay under a life sentence until parole and deduct the period he awaited trial? The NDPP North Gauteng: Pretoria v Gcwaia matter supra did not provide a solution.

[41] With regard to the Appellant being a first offender, I have pointed out in all cases that I hear where the issue is raised that the legislature has already taken into account that the accused is a first offender for the purpose of sentence and fettered that into the prescribed sentence to be imposed. Such factor was within the contemplation of the legislature when enacting the Minimum Sentence Act; see *S v litha & Others* 1999 (2) SCAR 404 (W). The absence of previous convictions is also used by the legislature to determine the parameters within which the sentences can be differentiated. The allowance of a lesser sentence is only used in categories of rape dealt with under part 3 of schedule 2 of the Minimum Sentence Act. For the crimes under part 1 and s 51(1) of the said Act, the same penalty is to be imposed to all. Therefore for the rape of a child under 16 years the sentence is the same to all and is one of the worst categories of rape according

to the legislature. The court a quo recognized that the legislature identified all acts of rape as deserving exemplary punishments, with non-excluded from the minimum sentence legislation to indicate how serious it regarded the situation. I fully understand that approach as in *S v Solomon & Another* 2008

(2) SACR 149 (E) the full bench agreed that where a person can be a suitable candidate for rehabilitation, this potential for rehabilitation does not in itself mean that life imprisonment cannot be imposed. However the court did not rule out consideration thereof with other factors if they can be substantial and compelling to justify deviation. I am thinking of the age of the Appellant, 24 years old at the time of sentencing.

[42] In *S v Tcoeib* 1996

(1) SACR 390 (Nm) at p397 it has been stated that life imprisonment has been described as a punishment of distressing severity. If permitted, it is only resorted to in extreme cases either because society legitimately needs to be protected against the risk of repetition of such conduct by the offender in future. Which means the potential to be rehabilitated plays an important role. However in casu where the Appellant had failed to acknowledge his flaws and does not see anything wrong with his action but blames the victim for his wrongdoing such potential to rehabilitate does not exist. It would therefore be reasonable to believe that there is a great risk of Appellant repeating his conduct in future; see *5 v Qamata* 1997

(1) SACR 479 (E). It is also not all dark and gloom as there is still a possibility of parole.

[43] Lastly, Appellant submitted that the fact that the complainant consented to the sexual intercourse should be considered mitigating. The circumstances under which the complainant acquiesced to the sexual intercourse was explained adequately and extensively by Dr Badernhost which occurred because she was vulnerable and immature, with Appellant exploiting her state of helplessness. Although the Appellant alleges that she

initiated the whole thing, an adult is supposed to know better. The Minimum Sentence Act made the child's consent irrelevant for the sake of conviction and sentence. It is not by chance that the legislature had deliberately taken away from children under 12 years of age, the responsibility of their actions and imposed the harshest punishment to those who seek to exploit their immaturity. Besides with her consent the legislature ordained a life imprisonment sentence, rejecting the issue of consent influencing the sentence to be imposed.

[44] Under the circumstances, after considerations of all the related factors individually or accumulatively I find that the Appellant has not shown that there is justification to interfere with the court's jurisdictional discretion. There is no evidence of the court a quo's findings on facts or law that merits either a reassessment or justifies the upholding of the appeal.

I therefore make the following order:

The appeal against conviction and sentence is dismissed.

N V KHUMALO

JUDGE OF THE HIGH COURT

GAUTENG DIVISION: PRETORIA

I concur and it is so ordered

D S FOURIE

For Appellant: Adv LA VAN WYK

Instructed by: LEGAL AID SA

PRETORIA

For Respondent: Adv M M Sono

Instructed by: The Director of Public Prosecutions

North Gauteng: Pretoria

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