**SUPREME COURT OF APPEAL OF SOUTH AFRICA**
**JUDGMENT**

Not Reportable
Case No: 979/2016

In the matter between:

**SHAWN PALMER** **APPELLANT**

**and**

**THE STATE** **RESPONDENT**

**Neutral citation:** *Shawn Palmer v The State* (599/2016) [2017] ZASCA 107 (13 September 2017)

**Coram:** Shongwe AP, Seriti JA and Mokgohloa AJA

**Heard:** 16 August 2017

**Delivered:** 13 September 2017

**Summary:** Criminal Procedure **–** rape – sentence – life imprisonment – minimum sentence in terms of Criminal Law Amendment Act 105 of 1997 – substantial and compelling circumstances – proper approach – to require exceptional circumstances for the determination of whether substantial and compelling circumstances exist, incorrect – sentence of life imprisonment set aside and replaced with 15 years' imprisonment.

## ORDER

**On appeal from:** Gauteng Local Division of the High Court, Johannesburg (Wright and Keightley JJ sitting as court of appeal):

1 The appeal is upheld.

2 The order of the court below is set aside and replaced with the following:

'(a) The appeal is upheld.

The sentence imposed by the trial court is set aside and replaced with a sentence of 15 years' imprisonment which is antedated in terms of s 282 of the Criminal Procedure Act 51 of 1977 to 30 October 2013.'

## JUDGMENT

**Seriti JA (Shongwe AP and Mokgohloa AJA concurring):**

[1] The appellant Mr Shawn Palmer, appeared in the regional court, Johannesburg on a charge of rape in contravention of the provisions of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, read with the provisions of s 51(1)(*a*) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997.

[2] The allegations levelled against the appellant were that on 21 August 2008 he unlawfully and intentionally sexually violated the complainant (then 13 year old girl) by having sexual intercourse with her against her will.

[3] On 6 September 2013 the appellant was convicted as charged and sentenced to life imprisonment on 30 October. On 10 January 2014 the trial court granted the appellant leave to appeal against the sentence imposed. On 17 March 2016 the appellant's appeal against his sentence was dismissed by the Gauteng Local Division, Johannesburg. The appellant with the special leave of this court now appeals against his sentence.

[4] The issue in this appeal is whether the trial court erred in concluding that there were no substantial and compelling circumstances present that justified the imposition of a lesser sentence than the prescribed minimum sentence of life imprisonment for the rape of a person under the age of 16.

[5] The complainant RJ was 13 years old at the time of the offence and she was staying at Abraham Kriel Children's Home at Langlaagte. On 21 August 2008 the complainant and her 16 year old friend Amanda who was also staying at the same children's home, absconded from the children's home through the fence which they had cut open. According to the complainant when they absconded from the children's home they intended going to her father's house in Newlands, they instead ended up at a soccer ground in the Crossby area. Prior to this incident, the complainant had absconded from the children's home on several occasions and was admitted into a dagga rehabilitation program.

[6] At the soccer ground, the complainant and her friend met the appellant and his friends namely Slo and Kenny. The three men introduced themselves. The complainant and her friend met the three men for the first time on that day. They had a discussion with the three men

and later Amanda said she was hungry, Kenny offered to buy them food and they all went to a shop where they bought chips and bread. They then went to a shebeen in the vicinity where they all ate the food and consumed alcohol.

[7] After leaving the shebeen they made their way to one Michael's place where dagga was sold, which they then purchased and subsequently smoked. At that stage it was late in the evening between 18h00 and 19h00 and they made arrangements for where they were going to sleep that night. It was arranged that Amanda will go and sleep with Slo and the complainant will go and sleep at the appellant's place. Upon leaving Michael's place, Amanda left with Slo and the complainant left with the appellant and they proceeded to the appellant's place of abode. The appellant took the complainant to his room in the backyard where he stayed. In the said room, the appellant requested her to have sexual intercourse with him, but she refused. She informed the appellant that she wanted to go to where Amanda was after which the appellant agreed to take her there.

[8] They left the appellant's place of abode and walked a long distance to a certain block of flats. They passed the said block of flats and walked into a veld where the appellant grabbed her, put her down on the grass, loosened her trousers and raped her, without the use of any protection. At this juncture it is also pertinent to mention that the appellant threatened the complainant with a knife to her throat that if she screamed he would kill her.

[9] After raping her, the appellant took her to the place where Slo stayed. There they found Slo, Amanda and Kenny in front of Slo's house

and they were chatting. She then informed both Amanda and Kenny that the appellant had raped her.

[10] All five of them, namely the complainant, the appellant, Amanda, Kenny and Slo then proceeded once again to Michael's place. When they arrived at Michael's place, the appellant said that the complainant must go with him but she refused. The appellant then tried to force her to go with him, she screamed and Michael and two of his friends came out of the house. At this point the appellant let go of her and the complainant and Amanda then went into Michael's flat. They slept at Michael's place and the following morning the complainant was taken to the children's home.

[11] In her evidence, the complainant testified that the act of sexual penetration was painful and it felt like something tearing inside of her. During the time he was raping her she called out aloud to God for help and the appellant mockingly retorted and said that not even God can help her. The complainant testified that she suffered severe pain not only during the rape but also for a substantial period after the rape, stating further that she could not walk properly for nearly two to three weeks after the rape and that she no longer had any trust in men, including her father.

[12] Dr Morgan examined the complainant on 22 August 2008. No physical injuries were observed during the medical examination. The doctor testified that the complainant, at the time of the alleged rape, was sexually active.

[13] The pre-sentencing report was submitted to the trial court. The report amongst others indicated that at the time of the commission of the offence, the appellant was 29 years old and he was a first offender. He was raised by his mother and stepfather since he was 10 years old. He was raised in a stable home environment where morals and values were instilled in him. He left school when he was in grade 11. He was employed in the family taxi business. He was intoxicated on the day of the commission of the offence but still remembered what transpired. He still denied that he raped the complainant and stated that he had consensual intercourse with the complainant.

[14] The appellant was arrested on 20 October 2008 and released on bail on 25 March 2009. On 27 October 2011 his bail was withdrawn and he was rearrested on 14 September 2012. In mitigation of sentence, the appellant's legal representative informed the trial court that the compelling circumstance was that the appellant was under the influence of dagga and alcohol at the time of the commission of the offence.

[15] The offence for which the appellant was convicted falls within the ambit of s 51(1) of the Criminal Law Amendment Act 105 of 1997 which prescribes that a sentence of imprisonment for life should be imposed in the absence of substantial and compelling circumstances.

[16] When considering the sentence to be imposed, the trial court found that there were mitigating factors present which included the following: (a) that the appellant was employed; (b) he was a first offender; (c) that he has a five year old son that he maintains; (d) that he was in detention for some time and; (e) that the complainant did not sustain any serious physical injuries. The trial court then considered the aggravating factors

and tabulated same as follows: (a) that rape is a serious offence, particularly of minor girls; (b) that the legislature prescribed life imprisonment for such offences; (c) that rape is rife in the country; (d) that he threatened the complainant with violence and; (e) that the incident took place at night in a deserted place.

[17] After considering both the mitigating and aggravating factors the trial court held that the mitigating factors were of a general nature and were not exceptional mitigating factors, and therefore concluded that there were no substantial and compelling circumstances that justified the imposition of a sentence lesser than the prescribed minimum sentence of life imprisonment.

[18] In *S v Mohomotsa* 2002 (2) SACR 435 (SCA) para 10, this court rejected the suggestion that for circumstances to qualify as substantial and compelling they must be exceptional. In *S v Sikhipha* 2006 (2) SACR 439 (SCA) para 16, this court again stated that where substantial and compelling circumstances exist that justify the imposition of a sentence lesser than the prescribed minimum sentence, such circumstances need not be exceptional. It is for the court imposing sentence to decide whether the particular circumstances of the case warrant the imposition of a sentence lesser than the prescribed sentence or not. In this process, factors that are traditionally taken into account for purposes of determining an appropriate sentence are considered.

[19] In my view the trial court committed a serious misdirection in considering whether exceptional circumstances were present in order to determine whether it can deviate from the prescribed minimum sentence. The sentence of life imprisonment imposed by the trial court must

therefore be set aside and this court must consider what an appropriate sentence would be in the circumstances of this case. When considering an appropriate sentence the court must keep in mind the sentence that the legislature considers appropriate in a case of this nature together with the aggravating and mitigating factors. A court must also have regard to the triad of factors relevant to sentence, which include the personal circumstances of the appellant, the seriousness of the offence and the interests of society (see *S v Zinn* 1969 (2) SA 537 (A) at 540G-H). *S v Sikhipha* supra para 16 and *S v Abrahams* 2002 (1) SACR 116 (SCA) para 13.

[20] In the present case, when the aggravating and mitigating factors are taken into account, together with the facts of this case, my view is that the prescribed minimum sentence of life imprisonment is not an appropriate sentence. There were therefore substantial and compelling circumstances justifying a sentence lesser than life sentence imposed.

[21] In my view, after taking into account all the circumstances of this matter and the benchmark created by the Act, I consider a sentence of 15 years' imprisonment to be an appropriate sentence.

[22] In the circumstances I make the following order:

1 The appeal is upheld.

2 The order of the court below is set aside and replaced with the following:

'(a) The appeal is upheld.

The sentence imposed by the trial court is set aside and replaced with a sentence of 15 years' imprisonment which is antedated in terms of s 282 of the Criminal Procedure Act 51 of 1977 to 30 October 2013.'

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**LW SERITI**

**JUDGE OF APPEAL**

**APPEARANCES**:

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| For Appellant: | P du Plessis |
| Instructed by: | BDK Attorneys |
| | David H Botha, Du Plessis & Kruger Inc, Johannesburg |
| | Symington & De Kok |
| | Attorneys, Bloemfontein |
| For Respondent: | Mr P Schutte |
| Instructed by: | The Director of Public Prosecutions, Johannesburg |
| | The Director of Public Prosecution, Bloemfontein |