THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 266/2023

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS, LIMPOPO **APPELLANT**

and

JACOB KWINDA **RESPONDENT**

Neutral citation: *DPP, Limpopo v Kwinda* (266/2023) [2024] ZASCA 175 (12 December 2024)

Coram: HUGHES, MABINDLA-BOQWANA and MEYER JJA

Heard: This appeal was, by consent between the parties, disposed of without an oral hearing in terms of s 19(*a*) of the Superior Courts Act 10 of 2013.

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and released to SAFLII. The date for hand down is deemed to be 12 December 2024 at 11h00**.**

Summary: Appeal in terms of s 311(1) of the Criminal Procedure Act 51 of 1977 (the CPA) – whether the question raised is a question of law or fact – plea of guilty under s 112(2) of the CPA – where all the elements of an offence are admitted in a written plea of guilty an accused may be convicted accordingly on the basis of the plea – the respondent admitted having had sexual intercourse with two eight-year-old complainants – sentence of life imprisonment improperly set aside by the high court

primarily based on lack of evidence of both complainants' ages – appeal by the National Director of Prosecution on a point of law upheld.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Kganyago J and Naude AJ) sitting as a full court of appeal:

(1) The appeal is upheld.

(2) The order of the high court is set aside and substituted with the following:

'(a) The appeal is dismissed.

(b) The conviction and sentence of the trial court are confirmed.'

(3) The sentence is antedated to 21 November 2017.

JUDGMENT

Hughes JA (Mabindla-Boqwana and Meyer JJA concurring)

[1] Jacob Kwinda (the respondent) was convicted in the Regional Court, Modimolle (the regional court), for two counts of rape of two eight-year-old girls. Thus, a contravention of s 3 of the Criminal Law: Sexual Offences and Related Matters Amendment Act 32 of 2007 (SORMA Amendment Act), applying s 51(1) read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997(CLAA). On 21 November 2017, the respondent was sentenced to life imprisonment for each count. In terms of s 309(1)(*a*) of the Criminal Procedure Act 51 of 1977 (CPA), as amended, he had an automatic right of appeal to the Limpopo Division of the High Court, Polokwane (the high court).

[2] The respondent, 59 years of age, legally represented, pleaded guilty to two counts of rape. The details of the offences he committed were set out in his guilty plea. Briefly, they are that the respondent was at one of the 'spaza shops' in Rooiberg,

buying bread when he met the two complainants and instructed them to accompany him to his home. At his home he pulled out a revolver and ordered them to undress. He pulled down their panties, used Vaseline to lubricate their vaginas, and inserted his penis into their vaginas, one after the other, without their consent.

[3] Set out below is the relevant portion of the respondent's written guilty plea:

'I admit that on the 25th of October 2015 at Rooiberg in the Regional Division of Limpopo, I did unlawfully and intentionally commit an act of sexual penetration with a female person *sic* to wit, [SM], 8-year-old by inserting my penis into her vagina without her consent …. After having sexual intercourse with [SM] I then ordered [BS], an 8-year-old, … and I inserted my penis into her vagina and had sexual intercourse with her, without her consent. I admit that I had sexual intercourse with both complainants without their consent and further admit that my actions were wrongful and punishable by law, [and] I have no justification for my actions. I therefore plead guilty to two counts of rape as charged.'

[4] The state accepted the guilty plea. The regional court was satisfied that the respondent had pleaded guilty to all the elements of the offences and before pronouncing on the conviction, stated that:

'The admission that the accused had made are very clear that he did penetrate the two complainants … Furthermore, the accused also admits to the fact that … [the complainants] with whom he had sexual intercourse, [are] 8 years old. It is clear that the two complainants could not have consented to sexual intercourse because of their age… The court is satisfied that the accused admit[s] all the elements of the offence of rape in both counts.'

The regional court duly convicted the respondent of the two counts of rape.

[5] Prior to sentencing, the respondent's representative requested that the pre-sentencing report, victim impact report and a probation officer's report, be obtained. From these reports, it emerged that the complainants knew the respondent as he was a neighbour. The social worker, instructed to compile the victim impact report, Ms Unity Kopano Motlatla (Ms Motlatla), testified as follows in relation to the respondent, 'he was further described as a trusted person and when he comes back from work the children in his neighbourhood would run to him, knowing that he is going to give them bread.' She further testified that the complainants reported to her that [the respondent] told the complainants not to report him, but both responded that they would. To this, he reacted by laughing at them and saying, 'no such thing will happen because he is

a very well-known man.' The regional court acknowledged in sentencing that the complainants knew the respondent well and trusted him, and he abused their trust.

[6] Dr Anatroekal Hlaywani Lamola, a medical practitioner, completed two J88 forms regarding each complainant, which records the maturity and the injuries sustained by both the complainants. The regional court enquired from the respondent whether he understood the contents of the reports duly interpreted to him, and he responded in the affirmative. This was further confirmed by the legal representative of the respondent and thus the J88 forms were admitted into evidence.

[7] The regional court stated that '[t]he accused knew the children very well and he knew they trusted him very well, but he abused the trust that the children had in him. Children are vulnerable to abuse and the younger they are the more vulnerable they are. They are usually abused by those who think they can get away with it and all often do.' The regional court considered the mitigating and aggravating factors, the interests of society and the interest of the complainants and concluded that there were no substantial and compelling factors to deviate from the imposition of the minimum prescribed sentence of life imprisonment.

[8] On appeal in the high court, the respondent abandoned his appeal against his conviction and only pursued the appeal against his sentence. The high court upheld his appeal primarily on the basis that the State had not proven the age of the complainants and set aside the sentence imposed by the regional court, by replacing it with the following: On both counts 1 and 2, a sentence of eight years' imprisonment was imposed for each count and half of the sentence imposed in respect of count 2 was to run concurrently with the sentence in respect of count 1. Cumulatively, the respondent was to serve an effective sentence of 12 years' imprisonment. Dissatisfied with the reduction of the sentence of life imprisonment, the State launched an appeal to this Court, on a point of law, in terms of s 311 of the CPA.

[9] In terms of s 311 of the CPA, the State has an automatic right of appeal where the appeal is from the high court and that court sitting as a court of appeal determined the appeal in favour of the convicted person on a question of law. The respondent submitted that the question in this appeal is not a question of law but a question of fact.

That being, the age of the two complainants, which is a requirement of the offence, the respondent was charged with, and duly admitted to in his s 112(2) plea statement. In the circumstances proposed by the respondent, this Court will not entertain an appeal by the State, if it is not persuaded, that the grounds of appeal advanced, do not involve a question of law.

[10] In this Court, the State submitted that the question of law is:

'Where the accused pleads guilty to a charge of rape of a girl under 16 years as envisaged in section 51(1) of the Criminal Law Amendment Act 105 of 1997 and tenders a statement in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 in which he admits the victim was below 16 years at the time of the commission of the offence, would the State be required to prove the victim's age despite the accused's admission?

When [an] accused pleads guilty in terms of section 112(2) of the Criminal Procedure Act and makes admission[s] in the statement regarding the age of the complainant, in a matter where the age of the complainant is a prerequisite for the offence, does such admission absolve the State of its duty to prove the age of the complainant?'

[11] The high court concluded that the State had failed to prove the ages of the complainants, which was a 'vital element in the determination by the trial court whether a prescribed minimum sentence has to be imposed. It establishes jurisdictional facts.' Significantly, the high court appreciated the import of the ages of the complainants having a jurisdictional effect on the prescribed sentence to be imposed. In addition, the high court found that there were substantial and compelling circumstances that the regional court did not consider, that being, the time served by the respondent of 21 months and the advanced age of the respondent.

[12] The State contends that the high court erred in finding that they had to prove the ages of the complainants even though the respondent had admitted this in his guilty plea statement. Therein, the respondent admitted having sexual intercourse with the complainants who were under the age of 16 years, it is such admission that 'dispensed with the need for proof in regard to the victim's ages.' Thus, the high court erred in law, so argues the State.

[13] The respondent's representative submits in his heads of argument that there is no question of law to be determined in terms of s 311 of the CPA in this matter. The reasoning for this position is that the respondent's representative views the reliance of the high court's finding, that the State failed to prove the ages of the complainants, as being 'a question of fact.'

[14] That the complainants are minors under the age of 16 years old clearly brings the offences for which the respondent is convicted, within the purview of the prescribed minimum sentence of life imprisonment. Their ages were specifically mentioned by the respondent in his admission statement. The conduct of the respondent in these circumstances and the respondent's criminal liability invokes the law applicable and, as set out in Part 1 Schedule 2 of the CLAA. This amounts to the legal basis upon which the minimum sentence may be imposed, as referenced in *S v Malgas.*[1]

[15] The high court did not appreciate that there was no need to lead evidence of an admitted fact in terms of s 112(2) of the CPA. The State argues that the high court made an erroneous interpretation of the law. On the other hand, the respondent submits that the age of the complainants is disguised as a question of law, when in fact it is a question of fact. Without a doubt, the question raised by the State does not deal with the nature of the sentence, which is trite that it then could never amount to a question of law in favour of the convicted respondent, as enunciated in *Director of Public Prosecutions, Gauteng v MG* [2], but an incorrect interpretation of what the import of a written statement in terms of s 112(2), an admission of the age of the complainants, where age is an essential element for the offence committed. As such, this places the matter within the purview of s 311 of the CPA.

[16] There is sound jurisprudence that the nature of a sentence imposed could never be a question of law in favour of the convicted respondent, as enunciated in *MG*.[3] In this case the respondent sought to advance that the import of a written statement in terms of s 112 (2), wherein an admission of the age of the complainant is made, where age is an essential element for the offence, could never amount to a question of law

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[1] *S v Malgas* 2001 SACR 496 (SCA), 2001 3 All SA 220 (A).
[2] *Director of Public Prosecutions, Gauteng v MG* 2017 (2) SACR 132 (SCA) at para 28.
[3] Ibid paras 24 - 29.

incorrectly interpretation, despite the provisions of s 57(1) of the Sexual Offences Act. This in my view places this case squarely within the preview of s 311 of the CPA.

[17] As already mentioned above, the question of law crisply is whether an accused person who pleads guilty in terms of s 112(2) of the CPA and makes an admission in the statement regarding the age of the complainants, where age is an essential requisite for the offence so charged, absolves the State of its duty to prove the age of the complainants?

[18] In the normal course of a criminal trial, the State has the duty to present evidence to prove the commission of the offence that an accused is charged with. However, s112(2) of the CPA provides that:

'If an accused or his legal advisor hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1)(*b*), convict the accused on the strength of such statement and sentence him as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty: Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement.'

[19] This Court in *Director of Public Prosecutions: Gauteng Division, Pretoria v Hamisi*[4], stated:

'The contention by the respondent that evidence of the complainant's age should have been led in the circumstances finds no support in law. This element of the offence with which the respondent was charged was admitted together with the other elements of that offence.'[5]

[20] *Hamisi* was correctly decided. It binds this Court and the reasoning upon which the decision is based is clearly not erroneous. In *Director of Public Prosecutions: Gauteng Division, Pretoria v Buthelezi,*[6] the purpose of the principle of *stare decisis* was expounded:

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[4] *Director of Public Prosecutions: Gauteng Division, Pretoria v Hamisi* [2018] ZASCA 61; 2018 (2) SACR 230 (SCA) (*Hamisi*).
[5] Ibid para 10.
[6] *Director of Public Prosecutions: Gauteng Division, Pretoria v Buthelezi* [2019] ZASCA 170; 2020 (2) SACR 113 (SCA).

'The object of the doctrine of stare decisis is to avoid uncertainty and confusion and ensure uniformity in the treatment of cases raising similar factual and legal issues. It serves to lend certainty to the law.' [7]

[21] The appeal before the high court and this Court pertains to the sentence imposed. In terms of s 51(1) of the CLAA the regional court and the high court have jurisdiction to sentence a person convicted of an offence in Part 1 of Schedule 2 to life imprisonment, unless there are substantial and compelling factors to deviate from the prescribed sentence. This matter involves the rape of complainants who are eight years old and, as such, these offences fall under Part 1 of Schedule 2.

[22] Pertinently in this matter, the respondent admitted the age of the complainants in his guilty plea. This was accepted by the State and, as such, this formed the factual matrix upon which the respondent was convicted and sentenced. The regional court was satisfied that it may convict the respondent accordingly. It is settled law that an accused person may be convicted based on the admissions made in his or her s 112(2) plea.[8]

[23] Turning to the sentence imposed by the high court. In terms of s 57(1) of the SORMA Amendment Act read with Part 1 of Schedule 2 of CLAA, the sentence prescribed for a sexual offence committed to a child under the age of 12 years is life imprisonment. The high court sitting as a court of appeal was wrong and misdirected itself when it approached the sentence imposed by the trial court, by merely replacing the sentence imposed and preferring a sentence it would have imposed as the trial court.[9] As a result thereof, this Court must interfere with the sentence imposed by the high court.[10]

[24] I cannot find any substantial and compelling circumstances justifying the imposition of a lesser sentence than the prescribed sentence of life imprisonment. This is informed by the following: the complainants were minor children of eight years of

[7] Ibid para 9.
[8] *Hamisi* para 8,9 and 10.
[9] *Malgas* at 478D.
[10] Ibid para 478G-H.

age. They trusted the respondent, knew him well, and he abused their trust. He threatened them with a revolver and warned them not to tell others of the rape. From the J88 it is clearly reflected that the complainants were injured by the because of this gruesome act.

[25] The fact that the respondent was at an advanced age, does not in my mind mitigate his case against a prescribed sentence, in fact, it aggravates it. The evidence shows that the community that the respondent and the complainants lived in, was a small community and they are close neighbours. The respondent was well known and respected in that community. He was, prior to the rapes, perceived not to be a threat to that community. He abused his position and exploited the complainants, who trusted him, by sexually violating them. The ordeal traumatised the complainants to an extent that one complainant no longer goes to school and both complainants are being referred to by their peers, individually, as the 'raped child'. I therefore conclude that the regional court was correct that there was no reason to depart from the prescribed minimum sentence of life imprisonment. The sentence imposed by the high court must be set aside and that which imposed by the regional court reinstated.

[26] In the result the following order is made:

(1) The appeal is upheld.

(2) The order of the high court is set aside and substituted with the following:

'(a) The appeal is dismissed.

(b) The conviction and sentence of the trial court are confirmed.'

(3) The sentence is antedated to 21 November 2017.

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W HUGHES

JUDGE OF APPEAL

WRITTEN SUBMSISSIONS

For the Appellant:	Heads of argument prepared by M Sebelebele
Instructed by:	Director of Public Prosecutions, Limpopo
	Director of Public Prosecutions, Bloemfontein
For the Respondent:	Heads of argument prepared by L M Manzini
Instructed by:	Legal Aid, Polokwane
	Legal Aid, Bloemfontein.