THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 6/2017

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG **APPELLANT**

and

MORNE GROBLER **RESPONDENT**

Neutral Citation:	*Director of Public Prosecutions, Gauteng v Grobler* (6/2017) [2017] ZASCA 82 (2 June 2017).
Coram:	Lewis, Petse and Mathopo JJA and Gorven and Mbatha AJJA
Heard:	2 May 2017
Delivered:	2 June 2017

Summary: Appeal by Director of Public Prosecutions: s 311 of the Criminal Procedure Act 51 of 1977: appeal against the decision of a Provincial or Local Division on appeal to it competent before this court only on a question of law: the High Court's finding that a complainant below the age of 12 years acquiesced in a sexual act defined as rape and then considered this as a mitigating factor in sentencing, is a question of law: appeal upheld and matter remitted.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Preller J and Kganyago AJ, sitting as court of appeal):

1 The appeal is upheld.

2 The question of law raised by the State is determined in its favour.

3 The sentence imposed by the High Court is set aside.

4 The matter is referred back to the High Court for the appeal on sentence to be dealt with in accordance with the principles set out in this judgment.

JUDGMENT

Petse JA (Lewis and Mathopo JJA and Gorven and Mbatha AJJA concurring):

[1] This is an appeal by the Director of Public Prosecutions, Gauteng, arising from what it submits is a question of law in relation to sentence, decided in favour of the respondent, which informed the sentence imposed by the Gauteng Division of the High Court, Pretoria (Preller J and Kganyago AJ), sitting on appeal from a judgment of the Regional Court, Louis Trichardt, Limpopo. I shall refer to the court as the High Court for convenience. This court granted special leave to appeal against sentence.[1] It is more properly an appeal under s 311 of the Criminal Procedure Act[2]

[1] See *Director of Public Prosecutions, Gauteng Division, Pretoria v Moloi* (1101/2015) [2017] ZASCA 78 (2 June 2017), paras 70-71, in which this court by majority held that an appeal under s 311 does not require special leave to appeal. And that any order granting special leave to appeal is neither necessary nor competent. Since the appeal is brought in terms of s 311 of the CPA leave should not have been sought nor granted.

[2] Criminal Procedure Act 51 of 1977.

(the CPA) and was argued on that basis. It concerns the question whether imputing consent to a sexual act (defined as rape) by a child under the age of 12 years for purposes of sentence is competent.

[2] The respondent, Mr Morne Grobler, was arraigned in the regional court on the following seven charges: (a) three counts of rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 1997 (the Sexual Offences Act); (b) using a child for child pornography in contravention of s 20(1) of the Sexual Offences Act (count 4); (c) exposing, displaying or causing the exposure or displaying of child pornography in contravention of s 19*(a)* of the Sexual Offences Act (count 5); (d) sexual grooming of children in contravention of s 18(2)*(a)* of the Act (count 6); and (e) possession of a film or publication containing child pornography in contravention of s 27(1)*(a)*(i) of the Films and Publications Act 65 of 1996 (the Films Act) (count 7). In the regional court, he pleaded not guilty to all seven counts.

[3] Briefly, the background to which the charges relate is as follows. The respondent and the complainant's mother, AG, married each other during September 2006. The complainant, CC, who was ten years old at the time, and her younger brother, TT, lived with the respondent and their mother at the Air Force Base in Louis Trichardt. The complainant and her brother were AG's children from a previous relationship. All of the offences in respect of which the respondent was charged were alleged to have been committed during the period spanning from September to November 2009 at the family home on various occasions when the complainant's mother was not at home. The allegations against the respondent, broadly stated, were that on various occasions during this period, the respondent, unlawfully and intentionally, penetrated the complainant's vagina, anus and mouth with his penis. And that he took photographs of the sexual acts with his cellular phone, thus creating pornographic material, and transferred and stored these on the family computer. It was also alleged that he had shown the complainant pornographic images of him and her mother having sex, and that he sexually groomed the complainant.

[4] The complainant's mother testified at the trial that on the morning of 2 November 2009 whilst she was scrolling through the family computer she came

across pornographic images of adult women and later stumbled upon photographic images of the respondent engaged in sexual acts with the complainant. This fortuitous discovery set the wheels of justice into motion and culminated in the prosecution of the respondent on the seven charges mentioned earlier. It is, however, not necessary in my view to recapitulate all the evidence led at the trial. Rather, this judgment will focus on a single issue decisive of this appeal, namely, whether the appeal is one based on a question of law: that the High Court wrongly took into account that the complainant could have consented to the sexual act (defined as rape) when she was but ten years old. I shall deal with the facts underlying the application of the wrong principle more fully below.

[5] At the conclusion of the trial the respondent was convicted on six counts, but was acquitted on count 6. After hearing both the defence and the State on mitigation and aggravation of sentence, the regional magistrate sentenced the respondent, in terms of s 51[3] of the Criminal Law Amendment Act 105 of 1997, to life imprisonment on each of the three rape counts. The three remaining counts (counts 4, 5 and 7) were treated as one for purposes of sentence and a sentence of 10 years' imprisonment was imposed. In addition, the regional magistrate directed that the respondent's particulars be recorded in the sexual offences register in accordance with s 50(2)*(a)*[4] of the Sexual Offences Act.

[6] It bears mention that the sentences of life imprisonment imposed in respect of counts 1 to 3 were in consequence of the finding by the regional magistrate that there were no substantial and compelling circumstances present. Thus, it held that a departure from the mandatory sentence of life imprisonment was not justified.

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[3] Section 51 (1) 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 I of Schedule 2 to imprisonment for life.' Those subsections (s 51(3)*(a)* and (6)) in turn provide for departures from the prescribed sentence if a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed and where the accused was under the age of 16 years at the time of the commission of an offence (in terms of the old s 51(6)).

[4] Section 50(2)*(a)* provides: **'**A court that has in terms of this Act or any other law— (i) convicted a person of a sexual offence against a child or a person who is mentally disabled and, after sentence has been imposed by that court for such offence, in the presence of the convicted person; must make an order that the particulars of the person be included in the Register.'

[7] Aggrieved by his conviction and resultant sentences, the respondent unsuccessfully applied for leave to appeal to the North Gauteng High Court, Pretoria in terms of s 309B of the Criminal Procedure Act (the CPA). However, the respondent successfully petitioned the High Court for leave to appeal in terms of s 309C of the CPA.

[8] The respondent was successful in his appeal to the High Court. As to the convictions, the High Court found that in relation to counts 4, 5 and 7 and having regard to the conspectus of the evidence led at the trial, these charges had been proved beyond a reasonable doubt. It then proceeded to consider whether the rape convictions on counts 1, 2 and 3 were sustainable on the evidence. In regard to counts 2 and 3, the High Court said that on the complainant's evidence, which was corroborated by the medical evidence, she was neither anally nor vaginally penetrated by the respondent. The High Court decried the fact that no medical evidence by the doctor who had examined the complainant was presented at the trial to substantiate these counts. Relying on this court's judgment in *S v MM* [2011] ZASCA 5; 2012 (2) SACR 18 (SCA) (para 24), it consequently set aside the respondent's convictions on these two counts. It substituted the two convictions with sexual assault in contravention of s 5(1) of the Sexual Offences Act.[5]

[9] In the event the High Court concluded that although the complainant's evidence – approached with the necessary caution, given her tender age and the fact that in relation to the actual sexual acts she was a single witness – was not without blemish, it was nevertheless to be preferred to that of the respondent. Accordingly, it found that the regional magistrate's rejection of the respondent's version as false beyond a reasonable doubt could not be faulted.

[10] With regard to the sentence on the conviction on rape, count 1 (namely, the intentional and unlawful insertion by the respondent of his penis in the complainant's mouth), it is apposite to make reference to some of the passages in the High Court's judgment which bear directly on the crucial issue raised in this appeal. When analysing the State's evidence in relation to this count, the High Court said:

[5] In terms of this provision, 'a person ('A') who unlawfully and intentionally sexually violates a complainant ('B'), without the consent of B, is guilty of the offence of sexual assault.'

‘The first thing that struck me about the evidence of the complainant’s mother was that she never mentioned finding any indication of distress or trauma about the incidents on the part of the victim when she asked her about what the appellant had done to her. She testified in chief that she had asked her child whether the appellant had touched her inappropriately, which she confirmed.’

[11] The court then proceeded to say the following:

‘In her evidence the complainant stated that she participated in these activities with the appellant because he had told her that there would be trouble if she did not do as he told her. It is not clear on her evidence that she acted out of fear or that the threat was repeated on any subsequent occasion. It is in any event not her version that there was any form of compulsion on every occasion. Apart from the alleged threat there is no indication in her evidence of how she felt about the incidents – no expression of fear, disgust, embarrassment or any other negative emotion. That also appears from the two photographs in the exhibits on which her facial expression can be seen and which show no sign of fear, anguish, embarrassment, disgust or any other negative emotion. *Based on the above evidence there is a strong suspicion that the victim was not an unwilling participant in the events*. I am fully aware that she was at the time only ten years old and that the absence or otherwise of her consent is irrelevant as an element of the commission of the offence. *It must, however, be an important factor in considering an appropriate sentence*.’ (Own emphasis.)

[12] When the High Court said that the complainant was under the age of ten years at the time of the rape – thus under the age of 12 years – and that ‘the absence or otherwise of her consent [was] irrelevant as an element of the commission of the offence’ it obviously had in mind s 57(1) of the Sexual Offences Act. The section reads, in material parts:

‘Inability of children under 12 years and persons who are mentally disabled to consent to sexual acts.—(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.

(2) . . . ’

[13] Having disposed of the appeal against the convictions, the High Court proceeded to deal with the appeal against the sentences. First, it noted that the regional magistrate had found that there were no substantial and compelling

circumstances justifying a departure from the mandatory sentence ordained by law. It also took cognisance, as the trial court had done, of both the prevalence and seriousness of the crime of rape and its traumatic consequences for its victims and the fact that the respondent had betrayed the complainant's trust. It nonetheless lamented the fact that the respondent's personal circumstances – which it enumerated – were in its view not accorded sufficient weight in determining an appropriate sentence. On this score it will be recalled that in dealing with count 1 the High Court had indicated that the fact that the complainant had been a willing party to the sexual act would be a mitigating factor in relation to sentence. The High Court concluded that the trial court had overlooked material factors and that the sentences were therefore not appropriate ones.

[14] The High Court then proceeded to consider what sentences to impose on the respondent in substitution of those imposed by the trial court. In relation to the inquiry as to whether or not substantial and compelling circumstances existed, it said:

'The personal circumstances of the appellant, the fact that he is a first offender who spent 18 months in custody awaiting trial, the nature of his offence and the limited effect that it had on the complainant and the serious consequences that his offence already had for himself, cumulatively constitute substantial and compelling circumstances that justify the imposition of a lesser sentence.'

It then imposed a globular sentence of ten years' imprisonment, treating all counts as one for purposes of sentence, five years of which were conditionally suspended.

[15] Dissatisfied with the sentence imposed, particularly in respect of count 1, which it believed to be disproportionate to the gravity of the rape perpetrated by the respondent – and other issues which are no longer material for present purposes – the State applied for and was granted special leave to appeal against sentence to this court.

[16] The right of the State to appeal under s 311 is expressly regulated by the CPA and the Superior Courts Act 10 of 2013 therefore finds no application.[6] As already mentioned, the State appeals on the basis that a question of law was decided in favour of the respondent which formed the foundation for the sentence imposed by the High Court on appeal to it. The High Court accordingly substituted sentences for those imposed by the trial court. Unlike convicted persons, such a right of appeal relating to a sentence imposed by a High Court sitting as a court of appeal arises only where the High Court has given a decision in favour of the convicted person on a question of law.

[17] In its heads of argument, the State relied on four grounds of appeal which it contended constitute questions of law. It argued that, if this court determines any one of the questions of law upon which it relies in its favour, it would have jurisdiction to entertain this appeal.[7] But, at the hearing before us, the State expressly disavowed reliance on three of its grounds of appeal. It persisted in the remaining ground, that is whether the High Court wrongly took into account its own inferences that the complainant had consented to the sexual acts in question in imposing sentence. This appeal by the State is therefore brought in terms of s 311(1) of the CPA. Accordingly, this court can only enter into the merits of the appeal if it is satisfied that the ground of appeal relied upon by the State involves a question of law.

[18] Section 311(1) provides:

'(1) Where the provincial or local division on appeal, whether brought by the attorney-general or other prosecutor or the person convicted, gives a decision in favour of the person convicted on a question of law, the attorney-general or other prosecutor against whom the decision is given may appeal to the Appellate Division of the Supreme Court, which shall, if it decides the matter in issue in favour of the appellant, set aside or vary the decision appealed from and, if the matter was brought before the provincial or local division in terms of-

(a) section 309(1), re-instate the conviction, sentence or order of the lower court appealed from, either in its original form or in such a modified form as the said Appellate Division may consider desirable; or

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[6] See s 1 of the Superior Courts Act 10 of 2013 which provides: '"appeal" in Chapter 5, does not include an appeal in a matter regulated in terms of the Criminal Procedure Act, 1977 (Act 51 of 1977), or in terms of any other criminal procedural law.'

[7] Compare: *S v Seedat* [2016] ZASCA 153; 2017 (1) SACR 141 (SCA) paras 29-30.

….'

[19] The only remaining question pursued by the State on appeal, which it considered a question of law, was formulated in its heads of argument as follows:

'That the [High] Court erred in law in imputing consent by conduct and/or acquiescence to the commission of the offences, by a child below the age of 12 and in its consideration thereof as an important factor in mitigation of sentence.'

[20] The State contended that in terms of s 57(1) of the Sexual Offences Act a child under the age of 12 years is incapable of consenting to a sexual act. Thus, so the argument went, the 'consent' to or 'acquiescence' in the sexual act by the complainant – who was only ten years old at the time – could not, as a matter of substantive law, be taken into account in determining an appropriate sentence.

[21] It was submitted on behalf of the State that the fact that the High Court did so was wrong in law because it undermined the clear and unambiguous provisions of s 57(1) of the Sexual Offences Act. Further, that it was illogical to find that the complainant's supposed 'willing participation' in the sexual acts could ever be a mitigating factor when it came to the question of sentence.

[22] Counsel for the respondent submitted with reference to certain decisions of this court,[8] that: (a) this court does not have jurisdiction to entertain an appeal by the State against a sentence substituting the one imposed by a regional court; (b) that the State was not empowered to appeal against factual findings, however patently wrong they might be; and (c) that there is sound and enduring jurisprudence of this court that the nature of a sentence could never be a question of law.

[23] Furthermore, it was contended on behalf of the respondent that even if this court were to accept that the High Court was wrong in imputing consent to the complainant in relation to sentence that would still not avail the State in this case. For this submission counsel relied on *S v Mosterd* 1991 (2) SACR 636 (T) at 640C-

[8] *Director of Public Prosecutions v Olivier* 2006 (1) SACR 380 (SCA) paras 13-15; *Director of Public Prosecutions, Transvaal v Mtshweni* 2007 (2) SACR 217 (SCA) para 19; *Director of Public Prosecutions, Western Cape v Kok* [2015] ZASCA 197; 2016 (1) SACR 539 (SCA); *Director of Public Prosecutions, Gauteng v Mphaphama* [2016] ZASCA 8; 2016 (1) SACR 495.

D. There it was said that the nature of the sentence imposed could never be a question of law decided in favour of the convicted person. In *Director of Public Prosecutions, Gauteng v Mphaphama* this court cited the dictum in *Mosterd* (at 640C-D) with approval. It went on to say the following (para 11):

'[C]ertainly, when it comes to the exercise of a judicial discretion in favour of a convicted person in regard to sentence, that cannot be a question of law decided in favour of his or her favour. The definition of an appeal in the Superior Courts Act, however, overrides a consideration of s 311 of the CPA, in terms of the decision in *Kock*. This has to prevail, even if [the] argument that there is indeed a question of law were to be correct.'

[24] A brief analysis of some of the cases upon which counsel for the respondent strongly relied is essential. In *Olivier* this court was primarily concerned with the question whether the State can appeal against a lenient sentence imposed by a High Court substituting a sentence imposed by a magistrate's court. It found that the CPA does not provide for such an appeal when no question of law was implicated.

[25] In *Mtshweni* this court was called upon to determine a question of law reserved for decision in terms of s 319 of the CPA. And that question was whether the trial judge was obliged to call a witness under s 186 of the CPA whose evidence was essential to a just decision of the case. This court found that failure to do so amounted to an error of law. In addition, this court noted[9] that there could be no appeal by the State against an acquittal where the court had erred in evaluating the facts or in drawing inferences, even if the error was grave.

[26] Again in *Kock* this court dealt with a situation similar to that in *Olivier*. There the State had sought an increase of a sentence imposed by the High Court sitting as a court of appeal on the basis that such a sentence was disturbingly lenient. Whilst this court acknowledged that the State's disgruntlement with the sentence was understandable, it nonetheless struck the appeal from the roll for want of jurisdiction. As with *Olivier*, no question of law was implicated.

[27] In *Mphaphama* the State appealed against a sentence imposed by the High Court sitting as a court of appeal from the regional court. There the High Court had

[9] Paras 19-22.

reduced a sentence of life imprisonment to 20 years' imprisonment. At the outset, this court called upon counsel for the State to first argue whether the matter was appealable and indicated that only when this anterior question was determined in favour of the State would the appeal be heard on the merits. As the appeal had initially been brought in terms of s 316B of the CPA, counsel for the State sought to rely on s 311 of the CPA when she was confronted with the judgment of this court in *Director of Public Prosecutions, Western Cape v Kock.* However, reliance on s 311 did not avail the State because this court found that 'the definition of an appeal in the Superior Courts Act, however, overrides a consideration of s 311 of the CPA, in terms of the decision in *Kock*.' Consequently the appeal was struck from the roll.

[28] Having regard to the facts of the decisions discussed in paras 24-27 above and the issues to be determined, there can be no doubt that they are distinguishable from the facts of this case. In this case, the High Court imputed consent to the complainant. It did so despite the clear and unequivocal provisions of s 57(1) of the Sexual Offences Act referred to above. In doing so, the High Court committed an error of law. It therefore follows that the present case falls foursquare within the purview of s 311 of the CPA. In these circumstances the interests of justice dictate that the sentence imposed by the High Court must be set aside.

[29] Although the facts in *Mphaphama* are at first blush not materially distinguishable from the facts of this case, the issues raised in the two cases are different. Hence the different outcomes. Accordingly, the dictum in *Mphaphama* that 'the exercise of a judicial discretion in favour of a convicted person in regard to sentence cannot be a question of law', is cast too wide. In particular it does not deal with the position where that discretion has been exercised on an incorrect legal basis. An exercise of a judicial discretion based on a wrong principle or erroneous view of the law is clearly a question of law decided in favour of a convicted person. This also distinguishes the present matter from that of *Mosterd* because it is not the nature of the sentence, but the legal basis on which it was approached, which places this matter within the ambit of s 311 of the CPA.

[30] Counsel were agreed that if we came to the conclusion that the appeal must succeed, as we have, it would be desirable to remit the case to the High Court for a

proper determination of sentence in light of this judgment. This is, however, not expressly provided for in s 311 of the CPA. But in *Attorney-General (Transvaal) v Steenkamp* 1954 (1) SA 351 (A) at 357F-G, this court – in the course of dealing with the predecessor to s 311 – said that in a situation such as the present the case could be remitted as 'it could hardly have been the intention of the legislature that, where the order of this court does not finally dispose of the issues raised in the first Court of Appeal, some of those issues must . . . be left hanging in the air'. Furthermore, having regard to the lapse of time since the imposition of sentence by the trial court, the course suggested by counsel seems to me to be eminently reasonable as the sentence will have to be considered afresh. The respondent may well have already served the whole or part of the sentence imposed by the High Court. Accordingly, whatever fresh sentence will be imposed on him, will necessarily have to take this factor into account.

[31] Before concluding I am constrained to say that the High Court appears to have overemphasized the respondent's personal circumstances at the expense of the gravity of the crimes and the interests of society, including those of the complainant.

[32] It has repeatedly been said that rape is unquestionably a despicable crime. Its enormity in the context of the facts of this case is aggravated by the fact that the complainant was sexually abused by her stepfather. In *S v Jansen* 1992 (2) SACR 368 (C) at 378G, rape was rightly described as 'an appalling and perverse abuse of male power'. In *N v T* 1994 (1) SA 862 (C) at 863C-D,[10] the court said that rape is 'a horrifying crime and . . . a cruel and selfish act in which the aggressor treats with utter contempt the dignity and feeling of [the] victim'. In this case the respondent abused his 'position of authority and command' over his stepdaughter.

[33] In *S v D* 1995 (1) SACR 259 (A) the vulnerability of young children was underscored. There this court said the following (at 260F-I):

'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 too often do. .

[10] The court also found (at 378E-F) that 'an argument which seeks to invoke the consent of a nine-year old girl borders on obscene'.

. . Appellant's conduct in my view was sufficiently reprehensible to fall within the category of offences calling for a sentence both reflecting the Court's strong disapproval and hopefully acting as a deterrent to others minded to satisfy their carnal desires with helpless children.'

[34] As to the use of children as objects of pornography, the remarks of the Constitutional Court in *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division & others* 2004 (1) SA 406 (CC) are instructive. The Constitutional Court said (para 61):

'In determining the importance of s 27(1) of the [Films and Publications Act 65 of 1996], it is necessary to examine its objective as a whole. The purpose of the legislation is to curb child pornography, which is seen as an evil in all democratic societies. Child pornography is universally condemned for good reason. It strikes at the dignity of children, it is harmful to children who are used in its production, and it is potentially harmful because of the attitude to child sex that it fosters and the use to which it can be put in grooming children to engage in sexual conduct.'

[35] The Constitutional Court then went on to say the following (para 63):

'Children's dignity rights are of special importance. The degradation of children through child pornography is a serious harm which impairs their dignity and contributes to a culture which devalues their worth. Society has recognised that childhood is a special stage in life which is to be both treasured and guarded. The State must ensure that the lives of children are not disrupted by adults who objectify and sexualise them through the production and possession of child pornography. There is obvious physical harm suffered by the victims of sexual abuse and by those children forced to yield to the demands of the paedophile and pornographer, but there is also harm to the dignity and perception of all children when a society allows sexualised images of children to be available.'

In this case the respondent gratuitously violated the complainant's rights to dignity, privacy and physical integrity in a most humiliating and demeaning manner. Accordingly, on the facts of this case one must, in relation to sentence on count 1, keep uppermost in the mind with a measure of abhorrence the respondent's unfatherly conduct in sexually molesting his stepdaughter.

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

1 The appeal is upheld.

2 The question of law raised by the State is determined in its favour.

3 The sentence imposed by the High Court is set aside.

4 The matter is referred back to the High Court for the appeal on sentence to be dealt with in accordance with the principles set out in this judgment.

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X M PETSE
JUDGE OF APPEAL

APPEARANCES:

For the Appellant:	J Cronje Instructed by: The Director of Public Prosecutions, Pretoria c/o The Director of Public Prosecutions, Bloemfontein
For the Respondent:	H L Alberts Instructed by: Justice Centre, Pretoria c/o Justice Centre, Bloemfontein