THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 895/17

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS:

GAUTENG DIVISION, PRETORIA **APPELLANT**

and

FUNEWER COASTER HAMISI **RESPONDENT**

Neutral citation: *DPP: Gauteng v Hamisi* (895/17) [2018] ZASCA 61 (21 May 2018)

Coram: Lewis and Dambuza JJA and Rogers AJA

Heard: 3 May 2018

Delivered: 21 May 2018

Summary: Criminal law - plea of guilty under s 112(2) of the Criminal Procedure Act 51 of 1977 - 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 - respondent admitted having had sexual intercourse with the 12 year old complainant - sentence

of life imprisonment improperly set aside by the high court on appeal on the basis of lack of evidence of complainant's age - appeal by the National Director of Prosecutions on a point of law upheld.

ORDER

On appeal from: Gauteng Division, Pretoria (Molefe J and Swanepoel AJ).

1 The appeal succeeds.

2 The conviction is re-instated.

3 The sentence of 15 years' imprisonment is set aside and replaced with the following:

'The accused is sentenced to 20 years' imprisonment'.

4 The sentence is antedated to 24 June 2010.

JUDGMENT

Dambuza JA (Lewis JA and Rogers AJA concurring)

[1] The respondent, Mr Hamisi, was convicted by the regional magistrate, Bronkhorstspruit on a charge of rape of a 12 year old girl in contravention of s 3 of the Sexual Offences and Related Matters Act 32 of 2007 read with the provisions of s 51(1) and schedule 2 part 1 of the Criminal Law Amendment Act No 105 of 1997. He had pleaded guilty to the charge in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 (CPA) and admitted to having had sexual intercourse with the complainant who was 12 years old at the time of the incident. He was duly convicted based on his plea and was sentenced to life imprisonment. On appeal in terms of s 309 of the CPA the Gauteng High Court, Pretoria, found that, despite the admission

in the respondent's written plea explanation, the state should have led evidence to prove the complainant's age. That court then set the sentence of life imprisonment aside and replaced it with a sentence of 15 years' imprisonment. The Director of Public Prosecutions appeals, on a point of law, in terms of s 311 of the CPA, against the reduction of the sentence of life imprisonment.

[2] In the relevant part of his written plea of guilty, the respondent, who was legally represented, said:

'I am the accused and I am guilty of the crime of contravening the provisions of section 1, 56(1), 57, 58, 59, 60 and 61 of Act 32 of 2007 also read with section 256 and 261 of the Criminal Procedure Act 51 of 1977 (read with the provisions of section 51 and schedule 2 of the Criminal Law Amendment Act 105 as amended. In that on or about 31 October 2009 and at Tweefontein in the Regional Division of Gauteng I did unlawfully and intentionally commit an act of sexual penetration with the complainant to wit [N] 12 years old by inserting [my] penis into her vagina and penetrating her without the consent of the said complainant.

At the time I knew that what I was doing was wrong and punishable in Court and I admit I do not have a defence in law for my action.'

[3] The State accepted the respondent's plea and also handed in a J88 medico-legal report. Having convicted the respondent, in its judgement on sentence, the trial court referred to the contents of the J88 report and a probation officer's report. In the J88 report the examining medical practitioner had recorded the complainant's date of birth as 23 May 1997 and that she was 12 years on the day of the incident. The same information was contained in the probation officer's report which had been intended to motivate for appointment of an intermediary to assist the complainant in the trial.

[4] As stated, the respondent then appealed to the high court. The relevant grounds of appeal as set out in the respondent's notice of appeal were mainly directed at the sentence. In setting aside the sentence of life imprisonment the high court found that the state had failed to tender admissible evidence of the

complainant's age. That court also remarked that the written plea together with the J88 medico-legal report and probation officer's report which formed part of the record did not constitute the requisite proof of the complainant's age in the absence of oral evidence by the authors thereof. These were the reasons for the setting aside of the conviction and reduction of the sentence imposed by the trial court.

[5] In this appeal the point of law is raised as follows:

'When an accused pleads guilty in terms of s 112(2) of the Criminal Procedure Act and makes an admission 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?'

[6] The respondent insists that despite the plea of guilty to the offence of rape of the complainant, and the admission therein that the complainant was 12 years of age at the time of the incident, the State still had a duty to prove the complainant's age.

[7] Section 112 of the CPA regulates the procedure in terms of which guilty pleas are made and considered by courts. Section 112(1) regulates the conviction and sentence of an accused on a verbal plea of guilty. Section 112(2) regulates guilty pleas made in writing. The section provides that:

'If an accused or his legal adviser 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'

[8] It is clear therefore that a court considering a statement made in terms of s 112(2) exercises its discretion to determine, whether the statement admits all the elements of the offence in question. If it is not satisfied that that is so, it must question the accused as set out in s 112(1)(b) to clarify a matter raised in the written plea. If it determines that the statement is satisfactory and admits all the elements of the offence it shall convict the accused on the plea of guilty. When the written plea detailing the facts on which the plea is premised is accepted by the prosecution, it constitutes the factual matrix on the strength of which an accused will be convicted and the sentence imposed.[1] The written plea is aimed at ensuring that the court is provided with an adequate factual basis to make a determination on whether the admissions made by an accused support the plea of guilty tendered.

[9] Indeed, at the start of the trial the State had a duty to prove all the elements of the crime with which the respondent had been charged. Broadly this entailed leading evidence to prove the commission of the offence, the age of the complainant and the identification of the respondent as the perpetrator. Once the plea of guilty and the statement in explanation thereof was tendered and accepted by the State, and the court was satisfied that the admissions supported the conviction, it was entitled to convict accordingly.

[10] 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. In fact in *S v Mbelo*,[2] on which the respondent's counsel sought to rely, Majiedt J (as he then was) rejected a similar argument and convicted the appellant, who had pleaded guilty to sexual intercourse with a 14 year old girl.

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[1] *S v Kekana* [2014] ZASCA 158; *S v Thole* 2012 (2) SACR 306 (FB) at 8.0.
[2] *S v Mbelo* 2003 (1) SACR 84 (NC).

[11] The respondent's reliance on *R v C*[3] is equally misplaced. That case was decided under the predecessor of the current Criminal Procedure Act. In terms of s 286 of that Act, even where a plea of guilty had been tendered by an accused, lower courts could not convict in serious cases (ie offences carrying a sentence of imprisonment) unless there was evidence other than that of the accused that the offence in question had actually been committed. Section 112 of the CPA dispensed with the need for evidence other than that of the accused and replaced it with the questioning under s 112(1)(b) and/or the statement under s112(2).[4] For these reasons the high court erred and the conviction of rape of the 12 year old complainant must be reinstated.

[12] I now turn to the sentence. In terms of s 311*(a)* of the CPA this court, having decided the matter in favour of the appellant, may re-instate the conviction and the sentence originally imposed, either in its original form or in such modified form as it considers desirable. This Court therefore must determine whether it is desirable to re-instate the original sentence.

[13] In terms of s 51(1) read with part 1 of schedule 2 the prescribed minimum sentence for the offence of which the respondent stands convicted is life imprisonment. Submissions made to the trial court in respect of sentence related to the respondent's personal circumstances and the impact of the rape on the complainant. The respondent was a 23 year old first offender at the time. He was single, with a three year old child who lived with his (respondent's) mother in Zimbabwe. His mother is blind. He was the sole breadwinner in his family. Prior to his arrest in relation to this case he was employed at Tweefontein Chicken Farm, earning R1400.00 per month of which R800.00 would be sent to his mother in Zimbabwe.

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[3] *R v C* 1955(1) SA (C).
[4] *S v Sikhindi* 1978 (1) 1072 (N) at H.

[14] The trial court considered the seriousness and prevalence of the offence committed by the respondent, the fact that the appellant and complainant were well known to each other, and the fact that the complainant was raped in the sanctity of her home. The complainant had sustained a laceration, bruises and fresh tears on her private parts. In the J88 the examining doctor described the her 'mental health and emotional status' as 'sound but grossly shaken'. It was against this background that the trial court found no substantial and compelling circumstances.

[15] It is trite that a wide discretion is allowed to a trial court in the assessment of punishment.[5] In the absence of material misdirection by the trial court, the Appeal Court cannot approach the question of sentence as if the Appeal Court were the trial court and then simply substitute the sentence of the trial court by that which it prefers. On the other hand where the court of appeal finds sufficient disparity between the sentence imposed by the trial court and that which it would have imposed, the court of appeal is obliged to interfere.[6]

[16] The offence committed by the respondent is abhorrent. Much has been said about the prevalence of sexual violence against women and young children in our communities. By any account, for a considerable time the complainant will live with the impact of the crime perpetrated on her at such a vulnerable stage of her life. On the other hand, at 23 years, the respondent, who was a first offender and pleaded guilty to the offence, appears to be a good candidate for rehabilitation.

[17] Ideally one would have wanted more information about the appellant's upbringing and personal circumstances. The magistrate should have called for a pre-sentencing report. However the proceedings in the trial court were finalised nearly eight years ago and it would not be just at this late stage to have the matter remitted for further enquiry. The circumstances I have mentioned are just enough to show that a life sentence would be disproportionate and thus that substantial and compelling

[5] See s 283(1) of the CPA.
[6] *S v Malgas* 2001 (1) SACR 469 SCA at 478d.

circumstances exist to depart from the prescribed minimum sentence. I consider that a sentence of 20 years imprisonment to be a sufficiently long punishment for the horrendous crime committed by him. But it will afford him a second chance in life if he changes his behaviour.

[18] In the result the appeal succeeds. The order of the high court is set aside and replaced with the following:

1 The appeal succeeds.

2 The conviction is re-instated.

3 The sentence of 15 years' imprisonment is set aside and replaced with the following:

'The accused is sentenced to 20 years' imprisonment'.

4 The sentence is antedated to 24 June 2010.

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N Dambuza

Judge of Appeal

APPEARANCES:

For the Appellant:	G J C Maritz
Instructed by:	Director of Public Prosecutions, Pretoria
	Director of Public Prosecutions, Bloemfontein
For the Respondent:	J M Mojuto
Instructed by:	Pretoria Justice Centre, Pretoria
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