

Director of Public Prosecutions, Gauteng Division, Pretoria v Hamisi 2018 (2) SACR 230 (SCA)

KEY CONCEPTS	
Rape of 12-year-old girl	Life sentence
Evidence to be led on child complainant's age for minimum sentencing	Guilty plea
Admission of child's age in guilty plea	Substantial and compelling circumstances

Facts of case

The respondent was convicted by the regional court on a charge of rape of a 12 year old girl in contravention of s3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. He pleaded guilty and admitted to having had sexual intercourse with the complainant who was 12 at the time of the incident. He was convicted on his plea and sentenced to life imprisonment.

On appeal in terms of s309 of the Criminal Procedure Act 1977, the Gauteng High Court found that, despite the admission in the respondent's written plea explanation, the state should have led evidence to prove the complainant's age. The court then set aside the life sentence and replaced it with a sentence of 15 years' imprisonment. The Director of Public Prosecutions appealed.

Issue before the Supreme Court of Appeal

The Director of Public Prosecutions appealed in terms of s311 of the CPA against the reduction of the sentence of life imprisonment. The relevant part of the written plea of guilty made by the respondent, who was legally represented, reads as follows:

"I am the accused and I am guilty of the crime of contravening the provisions of s1, 56(1), 57, 58, 59, 60 and 61 of Act 32 of 2007 also read with s256 and s261 of the Criminal Procedure Act 51 of 1977... 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."

The state accepted the respondent's plea and handed in a J88 medico-legal report. The respondent was convicted and the court referred to the contents of the J88 and a probation officer's report for sentencing. In the J88 report, the medical practitioner recorded the complainant's age as 12, and the same information was contained in the probation officer's report, which had been used to motivate for the use of an intermediary for the complainant at the trial.

The respondent appealed to the High Court, the grounds of the appeal were mainly directed at the sentencing. The High Court found that the state had failed to tender admissible evidence of the complainant's age, and that the written plea, together with the J88 and the

probation officers report did not constitute the requisite proof of the complainant's age in the absence of oral evidence by the authors thereof.

The point of law raised in the Supreme Court of Appeal was as follows: *"When an accused pleads guilty in terms of s112(2) of the CPA 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?"*

Guilty pleas are governed by s112 of the CPA and s112(2) regulates guilty pleas made in writing. The section provides:

"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."

The court, therefore, has the discretion to determine whether the statements admits all the elements of the offence. If the court is not satisfied, it must question the accused to clarify a matter raised in the written plea. If the statement is satisfactory and admits all the elements of the offence, the court shall convict the accused on the guilty plea. When accepted, the plea "constitutes the factual matrix on the strength of which an accused will be convicted and the sentence imposed."

The respondent's contention that evidence of the complainant's age should have been led finds no support in law. This element of the offence was admitted together with the other elements of the offence, and s112 of the CPA dispensed with the need for evidence other than that of the accused. For these reasons the High Court erred and the conviction of rape of the 12-year-old complainant had to be reinstated.

Sentencing of the respondent

In terms of s311(a) of the CPA the court, having decided the matter in favour of the appellant, may reinstate the conviction and the sentence originally imposed, either in its original form or in such modified form as it considers desirable. The SCA had to then determine whether it was desirable to reinstate the original sentence, and took the following into account:

- prescribed minimum sentence for offence respondent has been convicted of is life imprisonment;
- submissions were made to court relating to the respondent's personal circumstances as well as the impact of the rape on the complainant;
- respondent was a 23-year-old first offender; he was single with a 3-year-old child who lived with his mother in Zimbabwe; his mother was blind and he was the sole breadwinner in his family; before his arrest he worked at a chicken farm and earned R1400 per month and sent R800 to his mother in Zimbabwe;

- court considered the seriousness and prevalence of the offence;
- the complainant and respondent were well known to each other and the complainant was raped in the sanctity of her own home;
- the complainant had sustained a laceration, bruises and fresh tears on her private parts; the doctor who examined her described her mental health and emotional status as sound but grossly shaken;
- the trial court found no substantial and compelling circumstances.

The trial court has a wide discretion in the assessment of punishment and in the absence of a misdirection by the trial court, the appeal court cannot approach the question of sentence as if the appeal court were the trial court and simply substitute the sentence of the trial court with that which it prefers. However, where the appeal court finds sufficient disparity between the sentence imposed by the trial court and that which it would have imposed itself, then the court of appeal is obliged to interfere. The Appeal court took the following into account:

- the offence committed by the respondent was abhorrent;
- the prevalence of sexual violence against women and children in communities;
- the complainant will live with the impact of the crime for a considerable time;
- the crime was perpetrated against her at a vulnerable time in her life;
- the respondent, who was 23, a first offender and pleaded guilty, was a good candidate for rehabilitation;
- the court would have liked more information about the respondent's upbringing and personal circumstances and the trial court should have called for a pre-sentence report.

In view of the above, the SCA found that the circumstances mentioned above were just enough to show that a life sentence would be disproportionate, and that substantial and compelling circumstances do exist to depart from the prescribed minimum sentence. The SCA was of the opinion that a sentence of 20 years' imprisonment was sufficiently long punishment for the horrendous crime committed by him, but it would offer him a second chance in life if he changed his behaviour.

The appeal, therefore, was successful.