

## Director of Public Prosecutions, Gauteng v MG 2017 (2) SACR 132 (SCA)

KEY CONCEPTS	
Child pornography	Rape of 10 year-old stepdaughter
Minimum sentencing	Substantial and compelling circumstances
Rape despicable crime	

### Introduction

This was an appeal by the Director of Public Prosecutions (DPP) on a question of law in relation to sentence. The respondent was convicted in the Regional Court on 3 counts of rape and several other counts relating to child pornography of his 10-year-old step-daughter and sentenced to life imprisonment on each of the rape counts and 10 years' imprisonment for the other counts. He appealed to the High Court against conviction and sentence. The convictions were reduced to sexual assault and the sentence was reduced to 10 years' imprisonment. The DPP appealed against this decision of the High Court in terms of s 311 of the Criminal Procedure Act 51 of 1977 (CPA).

### Charges

The respondent was charged with the following counts:

- 3 counts of rape (s3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA));
- using a child for child pornography (s20(1) of SORMA);
- exposing, displaying or causing the exposure or displaying of child pornography (s19(a) of SORMA);
- sexual grooming of children (s18(2)(a) of SORMA); and
- possession of a film or publication containing child pornography (s27(1)(a)(i) of the Films and Publications Act 65 of 1996 (Film Act).

The respondent was convicted on all the counts except the charge of grooming, and he was sentenced to life imprisonment on the rape counts as there were no substantial and compelling circumstances present to deviate from the sentence.

### Facts of the case

The respondent married the complainant's mother, AG, in 2006. The complainant, who was 10 years old at the time, and her younger brother (TT) lived with the respondent and their mother. They were AG's children from a previous marriage. The alleged offences were committed in the period 2006 - 2009 at the family home on various occasions when the complainant's mother was not at home. During this period it was alleged that the respondent penetrated the complainant's vagina, anus and mouth with his penis, and he took photographs of the sexual acts with his cell phone which he transferred and stored 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. These images were discovered by the complainant's mother, who happened to scroll through the family computer and came across pornographic images of adult women and then stumbled upon photographic images of the respondent engaged in sexual acts with the complainant. This discovery culminated in the prosecution of the respondent.

### **Appeal to High Court**

The respondent appealed to the High Court and was successful. The High Court found the charges relating to child pornography had been proved beyond reasonable doubt. With respect to two of the counts of rape, the High Court found that there was no proper proof of penetration. There was no medical evidence presented at the trial by the doctor who examined the complainant. The High Court set aside the respondent's convictions on these two counts. These two convictions were substituted with sexual assault in terms of s5(1) of the SORMA.

With regard to the remaining conviction of rape, which related to the insertion by the respondent of his penis into the complainant's mouth, the High Court upheld the conviction. However, the High Court was of the opinion that the complainant was a not an unwilling partner to the offence from the expression on her face in the pornographic photographs, but accepted that consent was irrelevant as she was under the age of 12 and could, therefore, not consent. The High Court had the following to say in this regard:

"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 child whether the appellant had touched her inappropriately, which she confirmed."

Further, the High Court said:

"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."

The High Court accepted that her consent was not relevant to the conviction, but found that it was indeed an important factor in considering an appropriate sentence. The trial court had found no substantial and compelling circumstances justifying a departure from the mandatory sentence. It took into account both the prevalence and seriousness of the crime of rape and its traumatic consequences for the victim, and the fact that the respondent had betrayed the complainant's trust. However, it found that the respondent's personal circumstances were in its view not accorded sufficient weight in determining an appropriate

sentence. The High Court 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 the sentences were therefore not appropriate ones.

The High Court found the following to be substantial and compelling factors:

- the fact that he is a first offender who spent 18 months in custody awaiting trial;
- the nature of the offence and the limited effect that it had on the complainant;
- the serious consequences that his offence already had for himself.

The High Court imposed a sentence of 10 years' imprisonment, treating all the counts as one for the purposes of sentencing.

### **Appeal to the SCA**

The state, dissatisfied with the sentence imposed, which it believed to be disproportionate to the gravity of the rape perpetrated by the respondent, appealed to the SCA. The state brought its appeal in terms of s311(1) of the CPA in that the High Court wrongly took into account that the complainant had consented to the sexual acts in question in imposing sentence:

“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.”

The SCA could, therefore, only enter into the merits of the appeal if it was satisfied that the ground of appeal relied upon by the state involved a question of law.

The state argued that in terms of s57(1) of SORMA a child under the age of 12 years is incapable of consenting to a sexual act. Therefore, the `consent' to or `acquiescence' in the sexual act by the complainant (who was only 10 years old) could not, as a matter of substantive law, be taken into account in determining an appropriate sentence. This was wrong in law because it undermined the clear and unambiguous provisions of s57(1) of SORMA. The respondents argued that there was sound and enduring jurisprudence that the nature of a sentence could never be a question of law.

The SCA found that the High Court had imputed consent to the complainant, despite the clear and unequivocal provisions of s57(1) of the SORMA. In so doing, the High Court committed an error of law. The present case falls within the purview of s311 of the CPA and the interests of justice dictate that the sentence imposed by the High Court must be set aside. The dictum that `exercise of judicial discretion in favour of a convicted person in regard to sentence cannot be a question of law' is too wide, because it does not deal with the position where that discretion has been exercised on an incorrect legal basis.

The SCA were of the opinion that the High Court overemphasised the respondent's personal circumstances at the expense of the gravity of the crimes and the interests of society, including those of the complainant. The SCA said:

- rape is unquestionably a despicable crime;
- its enormity was aggravated by the fact that the complainant was sexually abused by her stepfather;
- in **S v Jansen** 1999 (2) SACR 368 (C) rape was described as “an appalling and perverse abuse of male power;”
- in **S v D** 1995 (1) SACR 259 (A) the vulnerability of young children was underscored:  
“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 ... 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.”
- the Constitutional Court in **De Reuck v Director of Public Prosecutions, Witwatersrand and Others** 2003 (2) SACR 445 (CC) said that the purpose of the Films Act was to curb child pornography, which is seen as an evil in all democratic societies. Child pornography is condemned universally because strikes at the dignity of children, 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. Society has recognised that childhood is a special stage in life which is to be both treasured and guarded;
- in this case the respondent gratuitously violated the complainant's rights to dignity, privacy and physical integrity in a most humiliating and demeaning manner;
- in relation to sentence one must keep uppermost in the mind “with a measure of abhorrence” the respondent's unfatherly conduct in sexually molesting his stepdaughter.

The appeal was upheld and the question of law raised by the state determined in its favour. The sentence by the High Court was set aside and the matter referred back for the appeal on sentence to be dealt with according to the principles set out in this judgement.