THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 731/2015

In the matter between:

ABOO BAKER SEEDAT **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral Citation: *Seedat v S* (731/2015) [2016] ZASCA 153 (03 October 2016)

Coram: Tshiqi, Seriti, Saldulker and Mathopo JJA and Fourie AJA

Heard: 24 August 2016

Delivered: 03 October 2016

Summary: Criminal Law and Procedure – Conviction of rape where minimum sentence applied – Appeal by the state on a question of law – Section 311 of the Criminal Procedure Act applicable – Sentence imposed by court and 'restorative justice award' not competent in terms of ss 279(1) and (4) of the Act – Sentence set aside and substituted with sentence of four years' imprisonment.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mavundla J and Strauss AJ sitting as court of appeal): reported *sub nom S v Seedat* 2015 (2) SACR 612 (GP).

1. The appeal against the conviction is dismissed.
2. The appeal by the State against the sentence imposed by the full bench is upheld.
3. The sentence imposed by the full bench is set aside and is substituted as follows:

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

JUDGMENT

Tshiqi JA (Seriti, Saldulker, and Mathopo JJA and Fourie AJA concurring)

[1] The appellant, Mr Aboo Baker Seedat, aged 60 at the time, was charged in the Schweizer-Reneke Regional Court with rape, read with the provisions of ss 51 and 52 of the Criminal Law Amendment Act 105 of 1997 (the minimum sentence legislation). He had legal representation and pleaded not guilty. It was alleged that he raped Ms J M, then a 57 year old woman, by inserting his penis into her vagina. He was convicted and sentenced to 7 years' imprisonment and was at the time of the sentence aged 63 years.

[2] The rape for which the appellant was convicted allegedly occurred at the complainant's home in her bedroom. It is common cause that on the day of the alleged incident the appellant, a general dealer visited the complainant's home in order to deliver a bed-side lamp and groceries that were bought by the complainant's

daughter from the appellant's shop. When he arrived the complainant was alone in her home and she allowed him to enter the house and also permitted him to enter the bedroom, apparently to test whether the lamp was in working condition. He connected the lamp and they were both satisfied that it was indeed in working condition.

[3] Their respective versions on what occurred thereafter differ. The complainant testified that as she turned around to leave the bedroom, the appellant grabbed her, threw her against the dressing table, pulled off her trousers and panties, picked her up and threw her on her back and penetrated her from behind and had anal intercourse with her. Thereafter he turned her around and had vaginal intercourse with her. After finishing he then left. She stated that during the incident she screamed but no one heard her.

[4] She ran outside screaming but no one was there. She then went back into the house and tried to phone the police at Schweizer-Reneke, but her phone-call was not picked up. She then dialled her daughter's cellular phone number so as to send her a "missed call"'. When her daughter called her back, she accused her of having sent the appellant to her house, but this she said was 'want ek was baie geskok en dit was baie lelik wat ek vir haar gese het. En sy het gedink ek maak n grap.' She thereafter cleaned herself because she was full of blood between her legs and the blood was running down her legs. She drank sleeping pills and went to her bed, and slept. The next day she woke up around 10h00, drank coffee, ate and paced around in her house. When her domestic worker came to her house, she told her about the incident and the domestic worker in turn called the complainant's neighbour who was also informed about the alleged incident. When her daughter ultimately came the complainant was accompanied to the police station and thereafter to hospital where she was examined by a medical practitioner, Dr D M Nganda.

[5] A medico-legal examination report completed by Dr Nganda after the examination (J88) was admitted into evidence by agreement between the parties and its contents were not in dispute. In fact, defence counsel admitted it in terms of s 220

of the Criminal Procedure Act 51 of 1977 (the Act). As a result Dr Nganda, who was available, was not called to testify. He recorded the following findings on the J88:

'[P]atient was anxious, stressed and crying that day.

Clinical findings

After my physical, psychological and genital examination there is evidence probable of dry penetration.

From genital organ there was abrasion on perennial area.

From anus there is traumatic lesion with penetration.

Gynaecological Examination:

Painfully, Labia majora inflamed

Fourchette: Abrasion

Perineum, anus: perineum abrasions and inflamed anus

Discharge, haemorrhage: slight blood'.

On the schematic drawing Dr Nganda noted that there was an abrasion on the vaginal area and that the anus was inflamed.

In response to a standard question in the J88 on whether the person bathed, urinated, douched or changed clothing since the alleged offence took place, the doctor circled 'no' as the applicable option.

[6] The State also led the evidence of the complainant's daughter, Ms M K. She confirmed that she had received a missed call notification from the complainant's phone on the date of the alleged rape and that when she spoke to her the following day, the Sunday, the complainant accused her of sending the appellant to her house to rape her. She also confirmed that she was there when the complainant was taken to the police station and to hospital.

[7] The appellant testified in his own defence and called two witnesses: his son, Mr Josef Seedat and the complainant's neighbour, Mr C L Butler. The appellant agreed that he had visited the complainant's home to deliver the lamp, confirmed that he entered the house, tested the lamp and that only the two of them were inside the house. He however denied that he raped her. He stated that he left immediately after satisfying himself that the lamp was in working condition. He did not dispute the complainant's version that she was raped but instead suggested that she may have

been raped by someone else. He also suggested that the complainant was intoxicated on the day of the incident and that she probably falsely accused him because she had been too drunk to recall who had raped her.

[8] The evidence of Mr Josef Seedat and Mr Butler did not really assist the appellant. They both did not know what happened at the complainant's house or in her bedroom. Mr Butler confirmed that he saw the appellant when he arrived as he was outside but that he subsequently entered his house. Whilst in the house he did not see or hear anything and when he went outside again he realised that the appellant was gone. Mr Butler could thus not shed light on what happened inside the complainant's house and her yard. Mr Josef Seedat was not even there on the day of the incident. The complainant was thus a single witness in connection with the alleged rape incident.

[9] The magistrate found that although the complainant was a single witness, she did not contradict herself and was able to answer the questions honestly despite having been subjected to lengthy cross-examination. The magistrate accepted her evidence, rejected that of the appellant, convicted him of one count of rape and postponed the matter for sentencing.

[10] On the day on which the sentencing proceedings were scheduled to commence, appellant's counsel made an application for the case to be re-opened as he wished to lead further medical evidence of Drs Kajee and Okanlomo, and to present DNA results which were not presented to the court by the State. The two doctors did not examine the complainant but had looked at the clinical findings on the J88 and would have been called in order to express certain opinions on the findings. Regarding the DNA results, counsel for the appellant wished to take issue with the finding on the DNA results which stated: 'no presumable semen could be detected and consequently no DNA comparison was carried out'. This, counsel argued, was at odds with the examining doctor's note on the J88 stating that she did not bath, urinate, douche or change clothing since the alleged offence took place. Counsel contended that the medical evidence and the DNA results would show that the complainant was not raped. This submission was made despite the fact that the J88

was admitted by agreement and the appellant did not dispute its contents and also did not dispute that the complainant was raped. Counsel also took issue with what was described as dry penetration in the J88. He submitted that it was necessary for it to be clarified. The magistrate dismissed the application to re-open the case on the basis that he was *functus officio* as he had already convicted the appellant. The matter then proceeded to the sentencing stage.

[11] In mitigation of sentence, counsel for the appellant led the evidence of Dr Kajee who testified that the appellant had been suffering from heart problems for some time before the date of sentencing and had a very severe skin problem called psoriasis which caused arthritis complications. Appellant's counsel also led the evidence of a clinical psychologist who prepared a pre-sentencing report after she had interviewed both the appellant and the complainant. Concerning the appellant's personal circumstances, the clinical psychologist stated inter alia that: The appellant is married, his wife is unemployed, he uses medication for his heart condition, has cholesterol and hypertension. He is a businessman, but he informed the clinical psychologist that his business was adversely affected by the incident as people in the community labelled him as a man of Indian origin who had raped a white woman. The clinical psychologist also stated that she had interviewed other members of the appellant's community who told her that he is a helpful and caring person and is involved in many charity organisations. She also informed the court that she had sight of the appellant's schedule reflecting previous convictions (SAP 69) and noted that his convictions dated back 17 years.

[12] Regarding the complainant, the clinical psychologist stated that the complainant had informed her that she received counselling after the rape and was able to move on with her life but would never forget the rape incident. She confirmed that the complainant was 58 years old at the time of the incident and had not had any sexual relationship for 26 years. An HIV test conducted after the rape was negative. The clinical psychologist informed the court that the complainant had informed her that she wished that the court would impose a community based sentence on the appellant and also make an order for financial compensation to be paid by the appellant to her for the rape and trauma she suffered. She asked the clinical

psychologist to convey her request to the court. She wanted the appellant to pay her R500 000 and also purchase a Toyota motor vehicle for her but was even willing to accept an amount of R100 000 as she was in a dire financial situation at the time. She also told the clinical psychologist that she gave up her home subsequent to the incident as it was destroyed by unknown people.

[13] The clinical psychologist also conveyed to the court that the complainant had informed her that she and her daughter had approached the prosecutor soon after the criminal proceedings had commenced and made her request for compensation. The complainant also told her that she had a serious problem with alcohol and at times experienced blackouts such that her children had, in the past asked for intervention from social workers.

[14] The complainant testified in aggravation of sentence. She confirmed that she had asked for compensation in the amount of R500 000 and also asked for a Toyota motor vehicle. Her testimony in that regard proceeded as follows:

'Prosecutor: . . . Wat watse vonnis moet die beskuldigde opge-lê word?

Complainant: Ek glo nie daar is regtig 'n regverdige veroordeling vir hom behalwe doodstraf. Want wat hy aan my gedoen het, is baie erg. En daarom het ek besluit om van sy geld weg te vat, wat ek in my paar dae (tussenbei).

. . .

Prosecutor: Sê vir my die, die idee van geldelike vergoeding vir die saak, van wanneer af het u die idee gehad ten opsigte van die aangeleentheid se afhandeling?

Complainant: Ag weet jy my, die tyd het, ek kan nie glo dis al so lank wat ek sukkel met hierdie saak om afgehandel te kry nie en dit het nou plus-minus 'n jaar en 'n half, miskien gouer, miskien ag reg van die begin af wou ek geld eis dalk, ek weet nie regtig wanneer het dit tot by my, my deurgedring, hoekom moet ek swaar kry? Hy gaan sit in die tronk, more or oormore word hy vrygelaat en loop en lag en ek sit nog steeds waar ek sit.

. . .

. . . Ek word ouer by die dag. My vervoer is pateties. Hoekom moet ek nog bly sukkel as ‘n voordeel kan trek vir die skade wat ek gely het.’

[15] After the complainant testified in aggravation of sentence, the matter was adjourned for a few minutes to enable the State and the defence counsel to discuss the request for financial compensation by the complainant. When the trial court reconvened, the State did not support her request for financial compensation but argued for a lengthy term of imprisonment.

[16] In imposing sentence, the trial court found the factors that: the complainant was a first offender (in the light of the fact that his previous convictions were more than 10 years ago); his advanced age; and the fact that he was not in good health – to be substantial and compelling circumstances that justified deviation from the prescribed minimum sentence of 10 years imprisonment. It then sentenced the appellant to a term of 7 years’ imprisonment.

[17] The appellant brought an application for leave to appeal against the conviction and sentence and simultaneously brought an application for leave to adduce further evidence in terms of s 309B of the Act. Leave to appeal against the conviction and sentence was granted by the trial court to the high court, but it did not grant leave to adduce further evidence. Leave to appeal the refusal of the application to adduce evidence was subsequently granted by the high court on petition. The high court thus had to deal with the merits of the appeal against the conviction and sentence together with the application to adduce further evidence.

[18] The Gauteng Division, Pretoria (Mavundla J and Strauss AJ) dismissed the application for leave to adduce further evidence. In respect of the merits, it dismissed the appeal on the conviction but set aside the sentence imposed and substituted it as follows: (para 50):

‘That the sentencing of the accused is suspended for a period of five years on the following conditions:

(i) That the accused pays the complainant a total amount of R100 000 as follows:

(a) R10 000 within ten days of the delivering of this order;

(b) R2 500 per month to be paid on or before 7th of every subsequent month until the full payment of the total amount of R100 000 mentioned herein above.
(c) That all the above mentioned amounts shall be paid into the bank account of the complainant the details of which to be provided to the appellant by the complainant, within ten days of the grant of this order.'

[19] The Director of Public Prosecutions, Gauteng sought special leave to appeal to this court against the sentence of the high court on the basis that the sentence was incompetent and invalid. This court granted special leave in that regard to the State on 3 August 2015. The appellant now also appeals against the conviction, special leave to appeal against the conviction having been granted by this court on 10 November 2015. However in terms of the heads filed on his behalf, he also seeks an order that the matter be remitted to the trial court for a re-hearing on two grounds: First, in that the high court erred in dismissing his application to lead further evidence; and second, he contends that the quality of legal representation during the trial was poor and that he, as a result did not enjoy a fair trial. The appeal of the State on the other hand is grounded on s 311 of the Act and it submits that the high court, sitting as a court of appeal committed an error on a question of law.

The application for leave to adduce further evidence and the attack on the quality of legal representation

[20] The State has correctly submitted that this court did not grant the appellant special leave to appeal against the refusal by the high court to allow the appellant to lead further evidence and the issue pertaining to the quality of legal representation. These issues were raised in the appellant's application for special leave to appeal to this court but the court granted the appellant special leave to appeal against conviction only. These two issues are thus not before us. I shall however deal with them briefly merely for the purposes of illustrating that they both have no merit.

[21] The grounds for leading of further evidence, were summed up by this court in *S v De Jager* 1965 (2) SA 612 (A) as follows (at 613D):

(a) There should be a reasonably sufficient explanation, based on allegations which may be true, why the evidence which is sought to be led was not led at the trial.

(b) There should be a prima facie likelihood of the truth of the evidence; and

(c) The evidence should be materially relevant to the outcome of the trial.

(See also *S v Britz* [2010] ZASCA 71; 2010 (2) SACR 524 (SCA) para 5; *S v Marais* [2010] ZACC 16; 2010 (2) SACR 606 (CC) para 21; and *S v Mulula* [2014] ZASCA 103 paras 12-14.)

[22] On the first requirement, I agree with the magistrate that there was no reasonable explanation given why the evidence was not led earlier. On the further two requirements, the high court was correct in stating that the medical evidence sought to be introduced would not negate the fact that the complainant had abrasions on her genitalia and inflammation of her anus. It would also not show that Dr Nganda was wrong when he noted that there had been slight blood on her genitalia and that 'she was anxious, stressed and crying that day'. The discrepancy between Dr Nganda's notes in the J88 and the evidence of the complainant on whether she had bathed, urinated, douched or changed clothing since the alleged offence cannot be resolved by medical evidence. In any event, the appellant's defence was not that the complainant was not raped. He simply denied that he was the culprit. All that was required of the State was to prove that he was the perpetrator. Absent any misdirections on the part of the trial court, it is not in the interests of justice that issues of fact, once judicially investigated and determined, should lightly be re-opened and amplified. There is always a possibility that an accused, having seen where the shoe pinches – to put it colloquially, may tend to recast evidence to meet the difficulty. It seems to me that this is what the appellant seeks to do in this matter. (See *S v Ndweni & others* 1999 (2) SACR 225 (SCA) at 227*e*). There is thus no merit in the application to lead further evidence.

[23] With regard to the criticism levelled at the quality of legal representation of the appellant during the trial, the high court correctly stated that the issue whether an accused had a fair trial is a value judgment arrived at by looking at the trial record. Ultimately, fairness is an issue which has to be decided upon the facts of each case,

and the trial judge is the person best placed to make that decision. (See *Key v Attorney-General, Cape Provincial Division & another* [1996] ZACC 25; 1996 (4) SA187 (CC) para 13; *S v Bogaards* [2012] ZACC 23; 2013(1) SACR 1 (CC) para 91.) A perusal of the trial record shows that counsel representing the appellant during the trial had subjected the State witnesses to intense cross-examination and was a well-grounded and seasoned practitioner. The finding by the high court concerning the quality of the legal representation can thus not be faulted.

The merits of the conviction

[24] The appellant and the complainant knew each other before the day of the incident. He admitted that on the day of the incident, he visited the complainant's home, entered the house to deliver the bed-side lamp and checked whether it was in working condition, thus placing himself at the scene of the alleged rape. His evidence in that regard supports that of the complainant. The only point of difference in their versions is whether he raped her as alleged by the complainant or delivered the lamp and left, as he stated. The complainant did not contradict herself on what happened during the alleged rape incident. Although she was only examined by a doctor the next day, the J88 supports her version that vaginal and anal penetration took place in that it states that her genitalia were bruised and the anus inflamed. Her version that she called her daughter's cellular phone immediately after the incident was corroborated by her daughter who confirmed that she had received a missed call notification from the complainant's phone on the date of the alleged rape. Her daughter also confirmed that when she spoke to the complainant the next day, the complainant accused her of sending the appellant to her house to rape her.

[25] In an attempt to attack the complainant's credibility and consequently the conviction, counsel for the appellant has suggested that the complainant's repeated requests for monetary compensation and for the purchase of a motor vehicle should be taken to mean that the complainant was not raped but that she falsely implicated the appellant in order to extort money from him. That inference is not supported by the evidence. When the complainant was questioned on her request for financial compensation she explained her thinking and stated:

‘[H]oekom moet ek swaar kry? Hy gaan sit in die tronk, more or oormore word hy vrygelaat en loop en lag en ek sit nog steeds waar ek sit.

. . .

. . . Ek word ouer by die dag. My vervoer is pateties. Hoekom moet ek nog bly sukkel as ‘n voordeel kan trek vir die skade wat ek gely het . . .’

[26] I accept, that it is very rare, that a complainant in a rape case would motivate for a lenient sentence to be imposed on an accused in exchange for financial compensation. But does this mean that she fabricated the rape allegations? I think not. She informed the court that she believed that the appellant would be freed very soon, come back and laugh and nothing would have changed on her part. She also informed the court that she needed the motor vehicle as her own motor vehicle was not in a good condition. Her request may have been unusual and unwise but, in light of the evidence, I am not convinced that it was in perpetuation of a desire to blackmail the appellant.

[27] I am fortified in this view by the fact that she did not approach the appellant directly about this request immediately after the date of the alleged incident even though she knew where his business is located. She made the request approximately a year after the incident and when she eventually did so, she did not approach him directly but made it through the prosecutor and also informed the clinical psychologist about it. In court, during her testimony in aggravation of sentence, she repeated the requests. I did not get the impression that she was blackmailing him. In fact it appears that she genuinely thought that it was the best way to punish the appellant. I say so because she prefixed the request by saying that the crime is very serious and she believed that an appropriate punishment was nothing short of a ‘death sentence’. She said:

‘Ek glo nie daar is regtig ‘n regverdige veroordeling vir hom behalwe doodstraf. Want wat hy aan my gedoen het, is baie erg.’

Her sentiments on the seriousness of the offence cannot be ignored and a conclusion that she falsely implicated the complainant in order to extort money from him is not justified.

[28] Counsel for the appellant sought to persuade us to find that the failure by the State to adduce evidence of the sexual assault evidence kit is indicative of the complainant not having been raped at all, and the fact that the DNA test was negative indicated that possibly no sexual act took place. The DNA results are self explanatory and simply state:

'No presumable semen could be detected on (3 genital, 2 rectal oral swabs) panty and cotton. Consequently no DNA comparison will be carried out.

Due to numerous factors that can lead to negative preliminary results, the possibility of penetration and/or ejaculation cannot be excluded.'

That does not, in my view, support the submission that she was not raped. On the contrary the DNA results state that that the negative finding does not exclude penetration or ejaculation. The fact that no semen could be detected is also not a conclusive indication that sexual intercourse did not take place. It may well be attributed to the fact that the complainant reported the rape to the police station the next day after she had 'cleaned herself'. Although she did not elaborate on how she cleaned herself, the J88 states there was still discharge and slight blood in her genitalia. At best for the appellant the DNA results are neutral but it cannot be concluded that they show that no sexual act took place. For all those reasons there is no basis to find that the trial court erred in convicting the appellant.

The appeal by the State against sentence

[29] The appeal by the State is against the sentence imposed by the high court sitting as a court of appeal. The right of the State to appeal against sentence imposed by lower and superior courts was clarified by this court in *Director of Public Prosecutions v Olivier* [2005] ZASCA 121; 2006 (1) SACR 380 (SCA) para 13 to 15, thus:

'The Criminal Law Amendment Act, 107 of 1990 introduced ss 310A and 316B, which granted the DPP the right to appeal against sentences imposed by lower and superior courts. Before that no such right existed.

Section 310A(1) deals with an appeal by the DPP against a sentence imposed by a lower court:

"The attorney-general may appeal against a sentence imposed upon an accused in a criminal case in a lower court, to the provincial or local division having jurisdiction, provided that an application for leave to appeal has been granted by a Judge in chambers."

Section 316B(1) of the CPA deals with appeals against sentence by the DPP to this court:

"Subject to subsection (2), the attorney-general may appeal to the Appellate Division against a sentence imposed upon an accused in a criminal case in a Superior Court."

This subsection provides for appeals to this Court from a sentence imposed by a superior court. This does not mean a superior court sitting as a court of appeal. It clearly means a superior court sitting as a court of first instance.'

(See also *Director of Public Prosecutions, North Gauteng v Thabethe* [2011] ZASCA 186; 2011 (2) SACR 567 (SCA) paras 15 and 21; *S v Nabolisa* [2013] ZACC 17; 2013 (2) SACR 221 (CC) para 81 to 82.)

[30] In *Olivier*, this court was not required to deal with the right of the State to appeal from a decision of a provincial or local division on appeal, where the State seeks to set aside a decision on the basis that it was occasioned by an error on a question of law. Such appeals may be brought in terms of s 311 of the Act but its provisions did not arise in *Olivier* and were thus not considered. Section 311 of the Act 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

(b) section 310 (2), give such decision or take such action as the provincial or local division ought, in the opinion of the said Appellate Division, to have given or taken (including any action under section 310 (5)), and thereupon the provisions of section 310 (4) shall *mutatis mutandis* apply.

This appeal falls squarely within the scope of the provisions of s 311 and this court has jurisdiction to entertain it.

[31] The criticism levelled at the high court, before us, is that when it sought to justify its decision to substitute the sentence imposed by the trial court, it sought to place reliance on ss 297(1) and (4) of the Act, but that in its reasoning, it conflated those provisions. As a result, so the argument goes, it imposed a sentence that is incompetent, unenforceable and which exceeded its powers.

[32] Section 297(1)*(a)*(i)*(aa)* and (4) provide:

'(1) Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion-

(a) postpone for a period not exceeding five years the passing of sentence and release the person concerned-

(i) on one or more conditions, whether as to-

(aa) compensation;

. . .

(4) Where a court convicts a person of an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion pass sentence but order the operation of a part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph *(a)* (i) of subsection (1).'

[33] Section 297(1) *(a)*(i)*(aa)* permits a court that convicts a person for an offence *other than an offence in respect of which any law prescribes a minimum punishment*, to *postpone* the passing of sentence for a period not exceeding five years and release that person concerned on one or more conditions , including compensation. Section 297(4) on the other hand permits a court that *convicts a person of an offence of which any law prescribes a minimum punishment*, to pass sentence in its discretion and to order the operation of a part thereof to be *suspended* for a period not exceeding five years on any condition referred to in paragraph *(a)* of subsection (1).

[34] The high court accepted that the trial court was correct in its finding that there were substantial compelling circumstances that justified deviation from the prescribed minimum sentence. It then stated that the trial court did not consider s 297(1). The high court then reasoned that once the magistrate was no longer enjoined to

sentence the appellant in terms of the prescribed minimum sentence, ‘he was at large to suspend the imposition of sentence for five years, and make a restorative justice award’.

[35] This reasoning by the high court is flawed. Section 297(1), was not available as a sentencing option in this matter and could not be invoked because it specifically prohibits postponement of a sentence where a person has been convicted of an offence in respect of which the law prescribes a minimum sentence. In any event Section 297(1) does not provide for *suspension* but for *postponement* of sentence.

[36] If it was the intention of the high court to invoke the provisions of s 297(4), it could do so, as it had already accepted that there were substantial and compelling circumstances that justified a deviation from the prescribed minimum sentence. However, in order for that sentence to be competent, the court would have to impose a sentence for a specific term of imprisonment. The court could then order that the operation of a part of that term of imprisonment be suspended for a specific period not exceeding five years on any condition, including compensation. This is not what the court did. It instead stated that ‘the *sentencing of the appellant is suspended for a period of five years* on the following conditions. . .’ In so doing, it did not impose a specific sentence or a specific term of imprisonment. Such a sentence is not competent in terms of s 297 and there is no provision in law permitting a court to so *suspend* the sentencing of an accused. The unintended consequence occasioned by the error committed by the high court was that there was no competent sentence imposed on the appellant.

[37] There is another reason why the sentence imposed by the high court cannot stand. Section 297(4) envisages that only *a part of the sentence should be suspended* and not the whole sentence. So, even if the court sought to impose a suspended sentence, it could not suspend the whole sentence. For all those reasons the high court thus committed an error on a question of law and the sentence it imposed stands to be set aside. It thus remains for this court to consider an appropriate sentence.

[38] I have no difficulty in accepting the finding by both the trial and high court that there were substantial and compelling circumstances that justified deviation from the prescribed minimum sentence. The appellant is an elderly man who was a first offender (in the light of the fact that his previous convictions were more than 10 years ago), and he was not in good health. I, however do not share the sentiments of the high court that restorative justice is an appropriate sentencing option in this matter. As this court stated in *Director of Public Prosecutions, North Gauteng v Thabethe* [2011] ZASCA 186; 2011 (2) SACR 569 (SCA) para 20:

'I have no doubt about the advantages of restorative justice as a viable alternative sentencing option provided it is applied in appropriate cases. Without attempting to lay down a general rule I feel obliged to caution seriously against the use of restorative justice as a sentence for serious offences which evoke profound feelings of outrage and revulsion amongst law abiding and right-thinking members of society. An ill-considered application of restorative justice to an inappropriate case is likely to debase it and make it lose its credibility as a viable sentencing option'.

In regard to the wishes of the victim the court stated (para 21):

'A controversial and intractable question remains: do the views of the victim of the crime have a role to play in the determination of an appropriate sentence? If so, what weight is to be attached thereto? That the victim's voice deserves to be heard admits of no doubt. After all, it is the victim who bears the real brunt of the offence committed against him or her. It is only fair that he/she be heard on, amongst other things, how the crime has affected him/her. This does not mean, however, that his/her views are decisive'.

[39] Whilst I accept that the complainant may have thought that it would be appropriate to make the appellant rather pay monetary compensation for what he did, her views are not the only factor to be taken into account. Rape has become a scourge in our society and the courts are under a duty to send a clear message, not only to the accused, but to other potential rapists and to the community that it will not be tolerated. (See *S v Chapman* 1997 (3) SA 341 (SCA) at 344-345D.) Whilst the object of sentencing is not to satisfy public opinion, it needs to serve the public interest. (See *S v Mhlakaza & another* 1997 (1) SACR 515 (SCA) at 518*e-f*; *S v Maseola* [2010] ZASCA 37; 2010 (2) SACR 311 (SCA) para 13.) Criminal proceedings need to instil public confidence in the criminal justice system with the public including those close to the accused, as well as those distressed by the

audacity and horror of crime. (*S v Jaipal* 2005 (1) SACR 215 (CC) para 29.) Indeed the public would justifiably be alarmed if courts tended to impose a suspended sentence coupled with monetary compensation for rape.

[40] As the State has contended, a sentence entailing a businessman being ordered to pay his rape victim in lieu of a custodial sentence is bound to cause indignation with at least a large portion of society. This is so because rape is considered one of the most serious offences ' constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, privacy and the integrity of every person are basic to the ethos of the Constitution and to every defensible civilization.' (See *S v Chapman* 1997 (3) SA 341 (SCA) at 344.)

[41] As stated above, the appellant's age and his deteriorating health are relevant factors to be taken into account in determining an appropriate sentence. However those factors do not necessarily mean that a custodial sentence cannot be imposed. Recently, in *Hewitt v S* [2016] ZASCA 100, this court, whilst acknowledging that the appellant was an elderly man of 75 years at the time of his conviction and was in poor health, stated that:

'he does not suffer from a terminal or incapacitating illness . . . It was also not disputed that the medical treatment and care that he requires would be available in prison. Regarding his age, whilst courts have considered oldness as a mitigating factor, it certainly is not a bar to a sentence of imprisonment.'

(See also *S v Zinn* 1969 (2) SA 537 (A) at 542B-C; *S v Heller* 1971 (2) SA 29 (A) at 55D; *S v Munyai & others* 1993 (1) SACR 252 (A) at 225*g*-256*a*.)

[42] Counsel for the state has informed us that the appellant has already sought to comply with the order of the high court and has paid an amount of R15000 to the complainant. She also stated that the complainant will probably not be able to return the amount if it is reclaimed from her as a result of the fact that the sentence is set aside. The state urged the court to take this into account when considering sentence as a factor that indicates the willingness on the part of the appellant to comply with what he thought was a competent court order and, if possible, to reduce sentence

accordingly. Whilst I am in no way endorsing the award of compensation for such a serious offence, I agree with the state that his willingness to comply with what he thought to be a competent court order is to be taken into account in his favour. As stated above, the application for leave to adduce further evidence and the attack on the quality of legal representation are not before us, it is thus not necessary to make an order concerning those two issues. The order will thus be confined to the appeal against the conviction and sentence.

[43] I therefore make the following order:

1. The appeal against the conviction is dismissed.
2. The appeal by the state against the sentence imposed by the high court is upheld.
3. The sentence imposed by the high court is set aside and is substituted as follows:

‘The accused is sentenced to four years’ imprisonment.’

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ZLL Tshiqi

Judge of Appeal

APPEARANCES

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