IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 657/12

Not Reportable/Reportable

In the matter between:

S P M **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral Citation: *M v S* (657/12) [2013] ZASCA 43 (28 March 2013)

Coram: MAYA, SHONGWE JJA and ERASMUS AJA

Heard: **15 February 2013**

Delivered: **28 March 2013**

Summary: **Criminal Law – rape, indecent assault, *crimen injuria* – whether the trial court erred in convicting the Appellant – absence of consent – consent through conduct – whether it is not reasonably possibly true that the Appellant believed that the complainant had consented to the intercourse – sexual grooming – whether the sentence is shockingly inappropriate.**

ORDER

On appeal from: South Eastern Cape Local Division, Port Elizabeth
(Dambuza J sitting as court of first instance).

The appeal is dismissed.

JUDGMENT

ERASMUS AJA (MAYA AND SHONGWE JJA concurring)

Introduction

[1] This is an appeal against the appellant's conviction on several charges relating to the sexual abuse of his adopted minor daughter and the sentence imposed on the charge of rape. The South Eastern Cape Local Division (Dambuza J) convicted and sentenced the appellant as follows:
Count 1: Rape (15 years imprisonment)
Count 2: Indecent assault (18 months imprisonment)
Count 3: Crimen injuria (18 months imprisonment)
Count 5: Contravention of s 27 (1)(a) read with ss 1, 30 and 30B of the films and publications Act 65 of 1996 – Child pornography (3 years imprisonment)
Count 6: Contravention of s 4(a) or 4(b) read with ss 1, 13, 17 to 25 and 64 of the drugs and drug trafficking Act 140 of 1992 – Possession of drugs (a fine of R500.00 or one month imprisonment)
Count 7: Fraud – Alternative: Forgery and uttering (2 years imprisonment)
It was ordered that the sentences on counts 2-7 should run concurrently with the sentence on count 1.
The effective sentence is thus 15 years' imprisonment.

[2] The trial court granted the appellant leave to appeal to this court against the convictions on counts 1, 2 and 3 and the sentence on count 1. The appeal against the convictions, ie those charges dealing with the direct sexual misconduct against the complainant, is based on two separate legal issues.

These can be summarised as whether:

(a) the complainant consented to the acts in question (the consent issue); and

(b) the appellant was under the impression that the complainant had legally consented (the *mens rea* issue).

[3] In the court a quo, the appellant denied that he was guilty of any of the three charges, claiming that the complainant had consented to the acts in question. In the event that the court found that she did not consent, he argued that he had subjectively believed that she had. Moreover, he claimed that she was in fact the one who had misled him and offered herself to him. The High Court rejected his version of the facts, which finding was wisely not challenged in this court. The only questions that remain are whether the complainant legally consented to the acts in question and whether the appellant had the requisite *mens rea* to be convicted of the charges.

[4] To determine the above, it is necessary to review in some detail the progression of the interaction between the appellant and the complainant, so to assess whether, on the facts of the matter, the apparent submission and acquiescence of the complainant amounted to consent in the legal sense.

[5] The facts are that the appellant was a senior pastor of a church in Port Elizabeth, after obtaining diplomas in theology and ministerial training in the United Kingdom and Namibia. The appellant’s former brother-in-law is the biological father of the complainant. The biological mother had abandoned the complainant when she was a baby after which the complainant was placed in a place of safety. For the first few years of her life, the complainant was cared for by her extended family as her parents were unable to maintain her, and

her father was a chronic drug addict. When the complainant was approximately seven years old, her mother – who was also a drug addict and prostitute – approached the appellant and his wife with a request for them to foster the complainant. The mother explained that she was unable to cope with raising the complainant any longer. An informal agreement was then reached, which saw the complainant living permanently with the appellant, his wife and their two daughters. As the complainant grew older, she became self-conscious regarding her identity within the family, and the appellant and his wife decided to formally adopt her.

[6] During 2002 – the year before the formal adoption – when the complainant was 14 years of age, she discovered that the appellant had installed a hidden video camera that could record images of her when using the bathroom and shower. Upon the discovery, she stopped using that particular bathroom, opting to use a second bathroom instead. The appellant then installed another camera in the second bathroom and connected it to a video recorder. The recordings were not limited to the complainant but also captured her sisters, the natural daughters of the appellant. The complainant would in some instances cover the lens of the camera, but often forgot to do so when using the bathroom. She did not inform anybody about these incidents at the time.

[7] During that same year, the complainant recorded an intimate moment with a certain boy in her personal diary. The appellant discovered the entry and suggested to her that the boy would hurt her. He expressed his preference that such intimate moments should be with him rather than another. The complainant's response was to laugh. She never told her adoptive mother about this conversation, nor did the appellant tell his wife about the diary entry. However the relationship between the appellant and the complainant grew more intimate, and; they would progressively start to share secrets and even go to restaurants together, without other members of the family being present. The appellant regularly bought the complainant gifts, including expensive clothes, shoes and CDs, which were hidden from the

appellant's wife. When his spouse eventually became aware of the unequal treatment, she complained about the special privileges the complainant was getting from the appellant. This situation led to the deterioration of the relationship between the complainant and her adoptive mother.

[8] Eventually, the appellant came to frequently touch the complainant inappropriately. He would always apologise thereafter, claiming it was an accident. The complainant hid this conduct from her mother.

[9] During 2003, the appellant's wife often travelled out of town on business, while their one daughter was living overseas and the other working. As a result, the complainant was sent to a boarding school in Graaff-Reinet. During the September school holidays of that year, the complainant returned home with a friend. Her mother subsequently grounded her for disciplinary reasons. When the complainant and her friend wanted to attend an under 18's club, in contravention of the mother's grounding order, the appellant granted her permission on the condition that she afford him certain "privileges". The appellant subsequently took the complainant and her friend to the club and later fetched them.

[10] On returning home, and after the friend had gone to bed, the appellant called the complainant to his study and told her that she had to repay him by having an intimate moment with him. She refused. Later that same evening, whilst the appellant's wife was sleeping in her bedroom, the complainant was again summonsed by the appellant, and told to keep her end of the deal.
The appellant kissed her, rubbed her breasts and put his hand down her pants, touching her private parts. She was scared and said nothing. The complainant's silence was met with the appellant's pronouncement that it was not as bad as she had feared after all. The complainant did not report this to the mother.

[11] Before the end of the same school holidays, whilst the mother was again away on business, the appellant called the complainant to his bedroom

and ordered her to get into bed with him. She protested that her sister was in the house, but eventually succumbed, got into bed with him and performed oral sex on the appellant.

[12] At the end of the school holidays, when the complainant returned to Graaff-Reinet, the relationship between herself and the appellant intensified. The two exchanged text messages and would call one another, but never spoke about the incidents of the holidays. The complainant did not report these incidents to anyone.

[13] During the final school term of that year (2003), the appellant and the complainant arranged to meet in Graaff-Reinet on a Friday before she would visit Port Elizabeth for the weekend. The complainant was aware that the visit of the appellant was intended for them to have sexual intercourse. She thought that by inviting a friend she would somehow be able to get out of the arrangement. The appellant took the complainant and the friend to a local restaurant where he bought them food and alcohol. While still at the restaurant, the complainant suggested that her friend spend the night with the appellant and herself at the guesthouse. The appellant refused, stating that he and the complainant already had plans. As the evening progressed, the appellant plied the complainant with more liquor, whereafter the complainant became very drunk.

[14] Upon their arrival at the guesthouse from the restaurant, the complainant continued drinking until she was drifting in and out of consciousness. She was not willing to engage in sexual intercourse and tried to push the appellant away, but as a result of her inebriated state, she was too weak to succeed. The appellant then carried her to the bed, undressed her, and had sexual intercourse with her. It being the first time she had had sexual intercourse, it was painful and she bled.

[15] After the intercourse, the appellant went to sleep. He and the complainant left for Port Elizabeth the next morning. The complainant testified

that she did not tell her mother as she was ashamed and felt she had brought the incident on herself. Furthermore, she thought the mother would take the appellant's side.

[16] A few weeks later, the appellant again visited Graaff-Reinet. He took the complainant to a different guesthouse where he again had sexual intercourse with her. The complainant did not resist his sexual advances as at this stage, she felt she had no choice but to go along with what he was doing.

[17] The incidents of sexual intercourse between them became more frequent, particularly after she went to study at a different educational institution closer to home and when the appellant's wife was out of town. The appellant and the complainant developed codes for their sexual episodes; 'partying' meant that they would drink, watch a pornographic movie and then have sex, whereas 'play' meant they would just spend quiet time together and then have sex. They would regularly drink and watch pornographic movies before sexual intercourse. The appellant would discuss his future ideas for sexual acts with the complainant. On one occasion, when the appellant's wife was at home, they took a drive along the seaside to a quiet spot in order to have intercourse there.

[18] During that year, 2004, the complainant told a friend about the details and nature of her relationship with the appellant. Her friend tried to convince her to report the problem, but the complainant did not as she felt she had brought it upon herself. Later that same year, she told her friend that the incidents had ceased, later admitting in the court below that she had lied as she was afraid that the friend would tell someone about it and this would have detrimental consequences for the family. The episodes of sexual intercourse were frequent until about June of that year. Then there was a break of approximately six months.

[19] During January 2005, the appellant and the complainant decided to have a 'party' on an occasion when the appellant's wife was out of town. The

appellant provided the complainant with an 'ecstasy'[1] tablet, telling her that it would make her more relaxed when they were having sexual intercourse. He indicated that she should take the tablet as he 'did not want to have sex with a lifeless body'. According to the complainant the effect of the tablet was to give her lots of energy. They continued to watch a pornographic movie and took liquor, and after a while her vision got blurred. Her first recollection thereafter was the next morning when her sister was shouting at her, demanding to know what the appellant was doing in her bed. The appellant was in fact in her bed, and both were completely naked. When the appellant woke up, he provided the complainant with a tablet indicating that it would assist in reversing the effect of the ecstasy tablet. He proffered an explanation that the complainant should give to his wife upon her return. However, the appellant's wife was not convinced by this tale and the complainant was taken to the house of family friends where she was to stay for a while. The appellant was told to leave the house as well.

[20] After a few weeks, the complainant was confronted by her mother, with a request that she tell the truth of the relationship between herself and the appellant. However she stuck to the fabrication that she and the appellant had agreed upon because she thought her mother and sisters would not believe her. Additionally, they had told her what the impact would be if the appellant and his wife should divorce – including the likelihood that the complainant would once again be sent back to a place safety.

[21] After a while, however, she moved back home to her mother and sister. At this stage, she also developed a relationship with a male friend. When the appellant learned of this, he requested that the complainant spend the night with him, but the complainant refused. The next morning, she found the appellant in the common home where he was engaged in an altercation with his wife. He demanded that he be permitted to live somewhere else with the complainant. The complainant agreed to the arrangement in an effort to halt the trouble within the family.

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[1]This refers to the well-known illicit drug.

[22] Instead of the appellant and the complainant moving, his wife and daughter moved to an apartment. He remained in the common home with the complainant. There arose a pattern in which the appellant and his wife tried to reconcile but it constantly proved unsuccessful.

[23] The complainant told the appellant about an incident between herself and a female friend where the female friend attempted to kiss her. The appellant suggested that they invite this female friend to the home and that he would set up a camera and film them when they engaged in activities of ‘a lesbian nature’. He told the complainant that he would give her a tablet that would make her forget what had happened. On the day in question, the camera having been set up where the appellant would watch the complainant and her friend kissing, the complainant could not go through with the act and the plan was abandoned.

[24] The appellant indicated that they should include a female sex worker in their acts as he wanted to sleep with two females at the same time. The complainant resisted the idea, which led to heated arguments. One evening, the appellant was extremely upset and indicated to the complainant that he had already arranged to get ecstasy and cocaine and to obtain the services of a female sex worker. This arrangement could not be reversed, he said. In preparation for the night ahead, the complainant took ecstasy and consumed copious amounts of alcohol.

[25] At approximately 03h00 that morning, the appellant set off to collect the third sexual partner. The group watched a pornographic movie. The appellant and the complainant used cocaine, whereafter he directed the complainant and the sex worker to engage in sexual conduct. All of this was photographed by the appellant. The sex worker stayed until early the next morning. On a subsequent occasion, the complainant and the sex worker had to get in and out of the shower and perform sexual acts on a bed whilst the appellant photographed them.

[26] The complainant was still seeing her male friend and requested permission from the appellant to do so. He agreed on the condition that she would offer him a ‘party night’ on her return. She went to the male friend and told him about the relationship with the appellant.

[27] During the course of that night the appellant insisted that she return home and indicated that she was ‘wasting’ his night. He threatened her, saying that he would report to the police that she had stolen his car, whereupon she returned home. Arriving there, she found the appellant smoking marijuana, drinking and using ecstasy. He again accused her of wasting his night and instructed her to take an ecstasy tablet. She pretended to do so, but spit it into the toilet instead. The complainant then informed the appellant that she had told her male friend of the relationship between herself and the appellant. The argument between the complainant and the appellant continued and the appellant took his firearm, threatening to kill himself. When the complainant told the appellant that her biological father would kill him if he found out about the relationship, he intimated that people would believe his story rather than hers.

[28] At some stage during the argument the appellant left the room to go to the bathroom, at which point the complainant hid behind a table. On returning to the room, the appellant could not find the complainant and, assuming that she had run away, left in his car. On leaving, the appellant dropped some ecstasy tablets on the ground. The complainant took these tablets, the cocaine, the CD with photos of the complainant and the female sex worker and the appellant’s firearm and hid these items in the bedroom of one of her sisters. In doing this, the complainant felt that she had secured sufficient proof of the events to convince people of the veracity of her claims. The complainant then left the house and hid in a nearby vacant plot for the duration of the night and the next morning.

[29] By the following afternoon, the complainant became very tired and re-entered the house. The appellant was present and the complainant tried to run away, but the appellant chased after her, caught her and brought her back into the house. He enquired where his gun was, but the complainant would not tell him. Some time later the complainant managed to go to her sister's room and hid under the bed. The appellant again left the house but came back later. The complainant noticed the spare keys to the appellant's car in a drawer in his study. She took the keys, climbed out of the study window and drove to the house of her male friend. She was pursued by the appellant.

[30] When the appellant arrived at the house of the complainant's friend, his car was parked in the driveway. He shouted for the complainant, and demanded she return his car keys. The complainant's friend gave the keys to the appellant, but he continued to demand that the complainant come outside.

[31] The complainant's friend activated his security alarm and guards from the security company arrived and phoned the police. The friend's mother also arrived on the scene and demanded that the appellant leave her property.

[32] The complainant then phoned her mother. When the mother arrived, the complainant disclosed the details of the relationship between herself and the appellant, informing her mother that all the suspicions she had had regarding the relationship were in fact true. They went to the police station, where the complainant was asked to identify a CD with photos of herself and the female sex worker. She was then taken to hospital and tested for drugs.

[33] At the ensuing trial, the court below dealt with the above evidence holistically in finding that the complainant had not consented to the acts, and that the appellant had the requisite *mens rea* to commit same. The court rejected the defence of the appellant as to consent and *mens rea,* by evaluating the complainant's behaviour in the context of the relationship that existed at the time of the commission of the offence, including the vulnerabilities of the complainant and the application of general logic.

[34] The court a quo noted that, on the facts, the complainant had not displayed any particular conduct which indicated her lack of consent over and above her objections as described above. However, any perceived acquiescence could not be construed as consent, as the appellant had 'slowly groomed (the complainant)' to ensure that she ultimately submitted.

[35] The court further accepted the complainant's explanation that:

(a) she was wholly convinced that she would not be believed should the appellant deny her allegations;

(b) she had nowhere else to go and might have been returned to the place of safety should she 'cause trouble' for her adoptive family;

(c) her disclosure would cause trouble for the church and the community, more particularly given the appellant's stature within the family, community and church; and

(d) she felt guilty and believed that she has brought this upon herself.

[36] The common law crime of rape can only be committed where a complainant has not consented to sexual intercourse. Consent – specifically the lack thereof – is therefore an essential element of the crime and thus the consent of the complainant, should it have been given, would nullify or vitiate the unlawfulness of the conduct.[2] In the absence of serious physical harm – insofar as it relates only to the crimen injuria and indecent assault charges herein – the presence of consent would have an effect on the element of unlawfulness thereof.[3]

[37] In law, consent has the following requirements:

(a) the consent itself must be recognised by law;

(b) it must be real consent; and

(c) it must be given by a person capable of consent.

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[2]See CR Snyman *Criminal Law* 5 ed (2008) at 355 and the cases cited therein.

[3]J Burchell *Principles of Criminal Law* (2010) at 333.

[38] The question of whether consent in the context of sexual offences will be 'recognised in law' is determined with reference to considerations of public policy, with the following factors relevant in the making of such a determination:

'[T]he nature and extent of the harm, both physical and psychological; and the age and relationship of the parties, especially if the conduct involves the exploitation or abuse of children.'[4]

[39] The first and last of the aforementioned requirements need no further discussion for the purposes of the instant matter. Rather, as noted earlier, it must be assessed whether, on the facts of this matter, the apparent submission and acquiescence of the complainant amounted to consent in the legal sense.

[40] The law requires further that consent be active, and therefore mere submission is not sufficient. In *Rex v Swiggelaar*,[5] Murray AJA commented as follows:

'The authorities are clear upon the point that though the consent of a woman may be gathered from her conduct, apart from her words, it is fallacious to take the absence of resistance as *per se* proof of consent. Submission by itself is no grant of consent, and if a man so intimidates a woman as to induce her to abandon resistance and submit to intercourse to which she is unwilling, he commits the crime of rape. All the circumstances must be taken into account to determine whether passivity is proof of implied consent or whether it is merely the abandonment of outward resistance which the woman, while persisting in her objection to intercourse, is afraid to display or realises is useless.'

[41] While it follows that consent could encompass submission, the converse is not always true. One has to have regard to the totality of facts in order to determine whether acquiescence to certain sexual conduct also constitutes consent. This is particularly so as there are various factors which may operate to nullify consent. These include age, considerations of public

[4] Burchell s*upra* at 339.

[5] *Rex v Swiggelaar* 1950 (1) PH H61 (A).

policy and a failure to appreciate the nature of the conduct being consented to.

[42] In light of this, in the context of sexual relations involving children, any appearance of consent to such conduct is deserving of elevated scrutiny, with particular attention to be paid to the fact that the person giving the consent is a child. The inequalities in the relationship between the child victim and the adult perpetrator are of great importance in understanding the construction, nature and scope of the child's apparent consent to any sexual relations. These inequalities may most likely influence the child's propensity to consent to sexual relations, as 'the outcome of forced choices, precluded options, constrained alternatives, as well as adaptive preferences conditioned by inequalities',[6] the latter being particularly relevant in the instant matter. It is of great relevance that this power differential – and the effect it has in negating the legitimacy of sexual relations between children and adults – was explicitly recognised by Satchwell J in *S v Muller*.[7]

[43] In *Marx v S*,[8] Cameron JA (dissenting) recognised the extent to which apparent consent by a child to sexual relations with an adult acquaintance does not render such conduct lawful absent a clear understanding of the surrounding circumstances which underlie the child's acquiescence. In particular, the child's vulnerability and resultant openness to manipulation is deserving of heightened scrutiny. A system of gifts and privileges being accorded as a reward for compliant behavior – effectively acquiescence to sexual relations in response to sexual grooming – serves to extract what appears to be consent from the child victim. As in the *Marx* matter, the complainant in this instance 'was entangled in a web of rewards and punishments at the hands of an elder whose intrusive conduct became increasingly difficult to resist. The very complexity of the situation lay in the

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[6] SW Mills *'Reforming the law of rape in South Africa'* in C McGlynn and VE Munro (eds) *Rethinking Rape Law: International and Comparative Perspectives* (2010) at 259.

[7] *S v Muller* 2007 (2) SACR 60 (W) para 37.

[8] *Marx v S* [2005] 4 All SA 267 (SCA).

fact that the comforts and rewards it offered – the attention and love she craved – were given subject to a sinister overlay of mounting sexual intrusion'.[9]

[44] The court a quo equated the conduct of the appellant to sexual grooming.[10] At common law, the clearest definition of sexual grooming to emerge from our courts was that laid out by Satchwell J in *S v Muller* 2007 (2) SACR 60 (W) para 35, namely that grooming is 'a psychological process used by the paedophile to access his victim(s)'. The court[11] also referred to Duncan Brown's definition of sexual grooming,[12] being that:

'Grooming . . . is explained as an ongoing process aimed at the child accepting sexual activities . . . It "is generally seen as a cycle of abuse, and can include for example befriending a potential victim to allow the child to acquiesce to sexual activity." The grooming aspect involves an aspect of deceptive trust created by the offender and manipulation of the child by the adult. It is the fact that one of the parties to the relationship is in such a position of power over the other that renders such sexual activity morally wrong and punishable within the realms of the criminal law.' (My emphasis).

[45] It is accepted that sexual grooming consists of the perpetrator of the subsequent sexual abuse utilising and manipulating a position of authority over the victim and the victim's environment in a manner which opens the

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[9] *Marx v S* [2005] 4 All SA 267 (SCA) para 108.

[10] It is common cause that the offence of grooming, pursuant to s 18 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 is of no application to the merits of this matter, as the conduct in question occurred prior to the coming into effect of that Act. Nevertheless, it is apparent that the Appellant's conduct can be equated to 'sexual grooming'. The question that arises is thus whether the conduct of grooming, as found by the court a quo, vitiated any perceived consent that was given by the complainant.

[11] Para 37.

[12] JD Duncan Brown *'Developing strategies for collecting and preventing grooming evidence in a high tech world'* (2001) 14 American Prosecutors' Research Institute: National Centre for Prosecution of Child Abuse Update No. 11.

victim up to the intended abuse itself.[13] Ost[14] notes that '[a]ny behaviour that is designed to build up a relationship of trust with a child with the longer-term goal of involving the child in some sexually related act or acts could constitute grooming'.

[46] Turning to the facts in the instant matter: The complainant's history is characterised by instability which undoubtedly had a negative effect on her. The appellant himself testified that he had observed her at school, showing off and having a 'tremendous inferiority complex'. She was exposed to undue hardship in the early years of her life, at which time the appellant and his wife had come to her assistance in offering her the comforts and support she had not otherwise enjoyed. They brought her up in a strict environment, yet an environment in which she was spoilt by the appellant.

[47] The facts indicate that the complainant did not consent to the acts, as illustrated, for instance, by the filming incidents where she became aware of the cameras and moved the cameras or tried to cover the lens. This constitutes clear objection. Moreover, the complainant had consistently registered her objection throughout the earlier incidents of inappropriate touching by the appellant.

[48] The first instance of oral sex and the complainant's apparent submission thereto cannot be recognised as consent, due to the pressure which the appellant had applied to complainant in order to extract such submission. The manner in which the appellant leveraged gifts, privileges and threats, created a situation wherein the complainant felt indebted and fearful, vitiating any perceived consent to the sexual activities.

[49] In respect of the Graaff-Reinet incident, the first instance of sexual intercourse between the appellant and complainant, it is clear that the

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[13] See also D Minnie 'The grooming process and the defence of consent in child sexual abuse cases' (2008) at 34-35.

[14] S Ost *Child Pornography and Sexual Grooming* (2009) at 34.

complainant was not in a position to physically exert her resistance to the conduct of the appellant, because of her state of inebriation. She did not consent to the sexual intercourse, which is sufficient for the conviction of rape to be sustained. The court further found that the grooming of the complainant, by the appellant, also affected her ability to consent and his claim in regard of *mens rea* cannot be sustained.

[50] After the first sexual encounter, the appellant plied the complainant with drugs, aimed at inducing the complainant to become a willing partner to the sexual 'relationship', including the instances involving sexual acts with the prostitute. But it remained the appellant in charge, instructing the two to comply with his wishes and for his benefit.

[51] When the appellant was confronted in cross-examination as to why he would not initially go further than touching after the first incident, he indicated that he had already developed a sexual interest in the complainant but that there was no doubt that at that stage, she would not have consented to his sexual advances. It was clear from his own evidence that he realised that, by engaging in what the court a quo described as sexual grooming, he could extract a modicum of consent out of the complainant.

[52] The appellant had manipulated the complainant's fragile state and his stature in the community to his advantage, slowly inviting her to acquiesce to his advances. This was improper and calculating, and rendered the appellant culpable. In particular, the complainant's compliance with the appellant's demands was a consequence of his conduct and a direct result of his calculated distortion of his position of authority over her. This calculation encompassed his provision of drugs and alcohol, which were utilised in order to further weaken the complainant's resistance and cloud her judgment. Consequently, the appellant went out of his way to entice the complainant's consent by effectively subduing her ability to give consent freely and voluntarily. This evidenced his guilty mind, and rendered him culpable.

[53] Having found that real consent was absent, insofar as the perceived acquiescence or submission of the complainant was a direct result of manipulation by the appellant, the appellant's claim that he was under the impression of real consent need only be stated to be rejected.

[54] I now turn to the question of sentence. The appeal in respect of sentence relates only to the sentence imposed on the rape charge. Having found that the conviction on the rape charge attracted a prescribed minimum sentence,[15] the court a quo was obliged to consider whether substantial and compelling evidence existed before imposing a lesser sentence. The trial court found the personal circumstances of the appellant to be substantial and compelling and imposed a sentence of 15 years' imprisonment. The appellant argues that the gravity of the sentence induced 'a sense of shock' and was too harsh.

[55] The imposition of a sentence is a matter for the discretion of the trial court which, if exercised judicially, the appeal court will not interfere with.[16]

[56] Courts strive to balance various factors in order to arrive at a sentence that is just. In the careful consideration of the relevant factors, the public interest must be an ever-present concern. The prescribed sentences for particular crimes were set by the legislature in response thereto. When deviating from these sentences the public interest cannot be ignored due to the risk of confidence in the judicial system being undermined. The courts are not dictated to by public opinion but must be mindful thereof. Evidence of sexual abuse of particularly vulnerable individuals engenders the outrage it does in part due to the prevalence of sex crimes and their grievous impact on victims and society in general.

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[15] See s 51(1) of the Criminal Law Amendment Act 105 of 1997 read with s 51(3) and part 1 of Schedule 2 to the Act.

[16] *S v Pieters* 1987 (3) SA 717 (A) at 727F, *S v Kock* 1988 (1) SA 37 (A) at 41C, *S v S* 1988 (1) SA 120 (A) at 123I, *S v Dhlamini* 1988 (2) SA 302 (A) at 310D, *Director of Public Prosecutions, Kwazulu-Natal v P* 2006 (3) SA 515 (SCA) para 10.

[57] In evaluating whether the sentence in the instant matter is just, it is important to note that the incidents happened when the complainant was a child, whose interest and protection is paramount within society.[17] Courts are enjoined to emphasise – by the sentences imposed for offences against children – the community's disgust in and repulsion of this type of behaviour.

[58] In this matter the appellant was unable to identify either any particular misdirection by the trial court or the presence of a factor that indicates that the trial court did not exercise its discretion judicially. However, the trial court had the benefit of the evidence of experts who described the effect of the offences on the complainant as profound, serious and pervasive. The appellant was not only in a position of trust as the complainant's adoptive father, but he also systematically abused that position to groom the complainant for his own nefarious exploits.

[59] It is submitted on behalf of the appellant that his age[18] and the fact that the complainant did not sustain any injuries during the incidents should have been accorded more weight by the trial court. I strongly disagree. The appellant exploited his superiority in standing, age and familial power to manipulate and subordinate the complainant, as was described by Cameron JA in *Marx*:

'The phenomenom of domestic sexual predation . . . requires like any other crime special understanding, appropriate to its distinct characteristics. The domestic or familial predator's means are not violent . . . [h]e exploits the opportunities that intimate engagement offers, and the physical spaces the home affords, to prey upon his victim. And he uses the ties that bind him to her – often both emotional and material – to secure both compliance and concealment.

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[17]See *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 (4) SA 22 (CC) paras 71-79 and *S v M* (*Centre for Child Law* as amicus curiae) 2008 (3) SA232 (CC) paras 12-26, and the cases and international law instruments cited therein. Of particular significance are the Universal Declaration of Human Rights, 10 December 1948, 217 A (III) art 25 (childhood is 'entitled to special care and assistance;); Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3; and the African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990). See also *S v McMillian* 2003 (1) SACR 27 (A) para 9.

[18]The appellant was 56 years of age at the time of sentence.

When the victim is less than half his age . . . and subject to his influence and authority as an elder, these factors operate with acute force. When she is a child craving affection and attention . . . her peculiar susceptibility to abuse and exploitation must be appreciated . . . .'.[19]

[60] This court has repeatedly stressed the gravity of this type of offence, and the sentence imposed in the instant matter can in no way be characterised as "inducing a sense of shock" or of "being too harsh".[20] There is no reason to interfere with the sentence imposed. If anything more has to be said, then having regard to the continuous and relentless manner in which the appellant groomed the complainant into sexual conduct, and the negative effects this has had on her and the family's life, the appellant should consider himself fortunate to have been sentenced to only 15 years' imprisonment.

Order

[61] I hereby give the following order:
The appeal is dismissed

N ERASMUS
ACTING JUDGE OF APPEAL

[19] *Marx v S* [2005] 4 All SA 267 (SCA) paras 203-204.

[20] See *S v RO* 2012 (2) SACR 248 (SCA) para 1*; S v Vilakazi* 2012 (6) SA 353 (SCA); 2009 (a) SACR 552 (SCA) para 2; *S v Abrahams* 2002 (1) SACR 116 (SCA) para 29; *Bailey v S* (454/11) [2012] ZASCA 154 (1 October 2012); *S v Kwanape* (422/12) [2012] ZASCA 168 (26 November 2012).

APPEARANCES:

FOR APPELLANT:	E Crouse (with her E Theron) Instructed by: Swarts Attorneys, Port Elizabeth Symington & de Kok, Bloemfontein
FOR RESPONDENT:	M L le Roux Instructed by: The Director of Public Prosecutions, Port Elizabeth The Director of Public Prosecutions, Bloemfontein