IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/**NO**

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/**NO**

(3) REVISED **NO**

DATE: **16 November 2022**

SIGNATURE:.....

Case No. A387/2019

In the matter between:

NDABA, PETER MZIKAYISE **APPELLANT**

And

THE STATE **RESPONDENT**

Coram: Molopa-Sethosa & Millar JJ

Heard on: 9 November 2022

Delivered: 16 November 2022 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 14H00 on 16 November 2022.

Summary: Criminal law – appeal against conviction and sentence – appellant a former schoolteacher and Bishop of church attended by minor complainant – admitted numerous sexual acts with minor over 2 year period before discovery – complainant groomed to acquiesce – no true consent – imposition of minimum sentences appropriate - appeal dismissed.

ORDER

It is Ordered:

1. The appeal against conviction and sentence is dismissed.

JUDGMENT

MILLAR J

1. On 11 May 2017, the appellant was arraigned in the Springs Regional Court on 2 counts of rape. He was informed that the respondent would seek the imposition of the minimum sentence prescribed by law for the offences for which he had been charged, which included imprisonment for life[1]. The appellant was legally represented throughout the proceedings and pleaded not guilty to both counts.

2. Upon conclusion of the trial, the appellant was convicted[2] on both counts of the indictment and sentenced[3] to life imprisonment on the first count and to a period of ten years imprisonment on the second count. It was also ordered that his name be entered onto the National Register for Sex Offenders[4] and furthermore he was declared unfit to work with children and his name to be entered onto the National Child Protection Register[5].

3. The appeal in this matter is brought in terms of Section 309(1)(a) of the Criminal Procedure Act 51 of 1977. Seven witnesses were called to testify at the trial – for the State the complainant, her mother and her aunt and for defence, the accused, two police officers and a medical doctor.

4. The complainant was a young girl who was born on 14 February 2000. When she testified, she was 17 years of age and in grade 11 at High School. Notwithstanding this, the learned Magistrate had some reservation about whether the complainant understood and could properly be placed under oath for her testimony. The complainant was for this reason admonished to tell the truth[6].

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1 In terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997; Mpontshane v S [2016] 4 All SA 145 (KZP)
2 On 28 June 2018
3 On 23 October 2018
4 In terms of section 50(2)(a)(i) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007
5 In terms of section 120(4) of the Children's Act 38 of 2005
6 As provided for in section 186(1) of the Criminal Procedure Act 51 of 1977

5. The complainant testified that she lives in the area of Springs on the East Rand of Johannesburg in Gauteng. She lived with her grandmother, mother, aunts and other family members in a single home. From the evidence led it is apparent that the circumstances of the family are humble. During 2013 or 2014 the complainant and her mother (later joined by other family members) started attending and joined a church in the area. The accused, a 50-year-old man, was the bishop of the church. Services were conducted 3 days a week on Mondays, Wednesdays and Sundays. The weekday services took place after work hours and finished when it was dark. The bishop who had his own motor car used to assist congregants who did not have their own transport by driving them home – this included the complainant and her mother.

6. The complainant's mother had been unemployed but after joining the church, her fortunes changed, and she became employed – ascribed to the assistance of the accused.

7. On the day of her 15th birthday, the accused had fetched the complainant and a friend and had taken them out to a local fast food outlet for a meal to celebrate. A week later on 21 February 2015, he had approached her mother with a request that the complainant and her friend be allowed to come to his home on the Friday night and to stay until they attended church on Sunday. The reason given by him was that as he had no wife at home, he needed assistance with the cleaning of his house. Permission was given and the complainant and her friend had accompanied him to his house. The complainant and her friend had been shown to a guest bedroom where they would both stay.

8. Later and after everyone had gone to sleep, the complainant had been awoken by the accused and asked to accompany him to his bedroom. Her friend had remained asleep in the guest room. She followed him. He then proceeded to undress her. He also undressed. He then raped her. Her evidence was that she had been scared and in pain but had been prevented from crying out. This was her first sexual encounter. When he was finished, he had told her that he loved

her but that she should not tell anyone what had happened. It was impressed upon her that should she tell anyone it would be to no purpose as he knew policeman and judges and besides who would believe her over him – a bishop. He also told her that he would place a curse upon her and her family.

9. The complainant testified that she believed what the accused had told her. What followed was an almost two-year period during which the complainant and a friend, sometimes alone, would go to the accused's home on the weekends. During this time, he bought her cellular telephones, clothing and other gifts. What had occurred on the first night then took place fairly regularly.

10. At some stage the complainant had become friendly with a young man who was also a pastor at the church. The accused had reacted badly to the prospect of her relationship with the young man and had beaten and threatened her over it. Rumours amongst the congregants at the church had resulted in her mother asking her if she knew anything about the bishop sleeping with 'young girls' – something which she denied. Her mother had told her that she was no longer allowed to go to the bishop's house but she refused to comply and told her mother that no-one would stop her going to church.

11. On 4 November 2016, the complainant had informed her family that she would be staying overnight with a friend at a female pastor's home. When her mother had called to speak to her, she was told that she was not there. This caused consternation amongst her family who did not know where she was and so the next day, they had gone to her school to find her.

12. The complainant testified that she had been called to the principal's office and after being questioned as to her whereabouts, had told them she had been at the bishops' house. It was then that she had told them what had happened on 21 February 2015 and that it had happened again as recently as the night before on 4 November 2016.

13. Charges were then laid with the police and the complainant was taken some 10 days later for a medical examination. Two statements were made to the police. The complainant denied that the statements had been read back to her or that the contents accurately reflected what she had told the police – the cross-examination on this aspect centered upon the description of the relationship between the complainant and the accused – described in the statement as a 'love' relationship and whether she had told the police that they had 'slept together' instead of saying she had been raped.

14. The complainant's mother testified that during 2014, the accused had asked her how old her daughter was and that she had told him that she was turning 15 the following year. She testified that she had told him that she was going to buy a cake to celebrate and that she would make sure he was given a piece. She testified that permission had been given to her daughter to go and clean the bishop's house.

15. Her evidence was that the appellant was highly regarded by them, so much so, that when he had needed petrol for his car, she had given him her bank card to go and draw money to put petrol in the car. She also testified that she had heard the rumours and that she had asked the complainant if she knew anything about them and further that when she had asked that the complainant refrain from going to the accused's home, she had refused.

16. Both the complainant's mother and her aunt both testified that they had attended her school together with her father and met with the principal and complainant. They were present when she told them all that the accused had raped her on 21 February 2015 and also the night before on 4 November 2016. Both her mother and aunt disputed that they had read the statements taken from the complainant and her aunt who had signed the second, ostensibly as a witness, testified that she had been asked to leave while the statement was being taken and only called to sign once the police were finished.

17. Besides the appellant, two police officers and the doctor who completed the J88 were called to testify. The evidence of the police officers and the doctor was led to corroborate the taking of the statements contained in the respective documents and to lay a basis for the cross examination as set out in paragraphs 13 and 16 above.

18. The appellant testified that he was the bishop of the church the complainant attended. She and her mother had started attending during 2014 and he had first interacted with them more closely after the new year service on 1 January 2015. The complainants and her mother had both told him, in a conversation in 2014, that she was 15 years of age, turning 16 on Valentine's day 14 February 2015.

19. The appellant testified that it was the complainant who had expressed an interest in him and who had initiated the relationship. The appellant did not deny that he had sex with the complainant on either 21 February 2015 or 4 November 2016. His evidence was that there had been numerous occasions upon which they had had sex but that he thought she was 16 years old and it was consensual – usually on a Friday night and when she was unaccompanied by a friend.

20. The appellant described the start of the relationship in the following way:

> *'On the day of her birthday Your Worship. We hold each other's hands and there was just a normal hug of each other. If I hug her Your Worship, it is not just any ordinary hug whereby I will hug a person and then that person will move. I will be hugging in such a way of like grabbing closer to my chest and that person will stand for some time. That happened on her birthday that is where we started discussing other things.'*

21. He testified that he had bought the complainant cellular telephones and other gifts and had given her money on occasion over the almost two-year period. He had also on occasion been given the complainant's mother's bank card to go and draw money out of her account. He testified that he had counselled young people in his church and had sought to teach them to live responsibly and to abstain from

sex before marriage. He kept his relationship with the complainant a secret from his congregation but when pressed on this characterized it as an 'open secret' which although morally wrong was consensual.

22. He also testified that since the sex was consensual, he did not threaten to curse the complainant. He sought to create the impression that it was the complainant's mother who had suggested that she visit and stay over at his home:

> *'No Your Worship its not me who initiated that it was an idea that was brought up by the mother of the complainant and myself based on what the mother was seeing that her daughter was too much a little bit loose moving around.'*

23. In so far as the commencement of the relationship was concerned, he was asked by the prosecution:

> *'Did the complainant now say to you that I am ready I need to have sexual intercourse with you, like you said she initiated to have a relationship with you?'*

His response was:

> '*It was only after her birthday on the 14th that she came and inform me of that that she was ready. When we were coming back from KFC.*'

24. The appellant testified that the complainant had been forced to say she raped him although this was never put to her in evidence.

25. The evidence of the two police officers was that they had written down what the complainant had told them and had given her an opportunity to read the statement. They also testified that the statement had been taken down in the presence of a guardian. Significantly, in both instances they recorded that while they had both spoken to the complainant in isiZulu, they had written the respective statements down in English. The evidence of the doctor who completed the J88 was similarly that he had written down what she told him.

26. On a consideration of the evidence as a whole, it is undisputed that the appellant engaged in sexual intercourse with the complainant from 21 February 2015 to 4 November 2016. Besides his own testimony, the appellant argued that the statements made to the police and to the doctor, in their terms, where they referred to:

> '*started sleeping together*'[7]

and

> '*we normal (sic) have sexual intercourse with him and nobody suspected anything that I was in love with Bishop Jabu Ndaba*'[8]

and

> '*she reported she had consensual sex many times*'[9]

were corroborative of the relationship being a consensual one.

27. The contents of the statements do not to my mind establish conclusive corroboration of the fact that all the sexual interactions between the complainant and the appellant were consensual.

28. In this regard the reference to 'sleeping together' in the first statement cannot be considered in isolation of the rest of the statement which in its terms corroborates the version given by the complainant to the court. The same can be said of the second statement and the version recorded by the doctor that:

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7 In the first statement taken on 14 November 2016
8 In the second statement taken on 15 November 2016
9 In the J88 completed on 14 November 2016

'*And the patient was not scared she was promised many things that he will do everything for her*'.

The highwater mark of the doctor's statement, at least for the appellants case, was his recordal that the complainant had told him:

'*she was not threatened, assaulted or forced.*'

29. On a consideration of the evidence as a whole, it is apparent that the complainant is an unsophisticated young girl from a humble background. Her family are not possessed of financial means and her mother was unemployed for some time. She was alienated from her biological father who did not live with or support her or her mother. It was only after beginning to attend the appellant's church that her and her mother's fortunes changed – all, at least as far as they were concerned, directly connected to and provided by the appellant. The complainant clearly conflated the church and the appellant as being one and the same. It is through the lens of this evidence that whether or not the intercourse was consensual is to be considered.

30. The version of the complainant was that there was absolutely no consent to what occurred on the 21 February 2015, a week after her 15th birthday. It is simply not 'reasonably possibly true' that both the mother of the complainant and the complainant misrepresented to the appellant the true age of the complainant or that he for that matter reasonably believed that she would be turning 16 and over that age on 21 February 2015[10]. On that day, it was her evidence that she had acquiesced because the appellant was physically bigger and stronger than her.

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[10] Section 56(2)(a) of the Criminal Law (Sexual Offences and related matters) amendment Act 32 of 2007 provides that it may be *"a valid defence to such a charge to contend that the child deceived the accused person into believing that she was 16 years or older at the time of the alleged commission of the offence and the accused person reasonably believed that the child was 16 years or older."*

Thereafter, it was her evidence that she had acquiesced to the ongoing sexual advances of the appellant because of the threats that he had made were she to have disclosed to anyone what had occurred between them.

31. In S v M[11], Satchwell J stated pertinently that:

> "*South African Courts have interpreted the absence of evidence of undue influence, threats or promises to persuade the child to allow physical interaction as mitigating. Our courts have not always had the benefit of information on this grooming process and tend to look for violence in the normal sense of the word or undue influence on the part of the perpetrator to persuade victims to 'allow' him to start touching or fondling them."* And "*It has been explained that the sex offender tends to rely on befriending a child and gaining a hold over him or her, thus allowing the offender to control the victim."*

32. In S v Mugridge[12], in a case involving a perpetrator substantially older than the complainant in circumstances where he had claimed that the sexual intercourse was consensual, the court set out the test for determining consent and having regard to the particular facts stated:

"

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

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[11] 2007 (2) SACR 60 (W) at paragraphs [36] and [37]. See also the minority judgment of Cameron J in Marx v S [2005] 4 All SA 267 (SCA) at paragraphs 203 – 205.

[12] 2013 (2) SACR 111 (SCA) at paragraphs [36] – [42] (footnotes and references omitted)

(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.

[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.'

[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, 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 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', 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."

33. On a conspectus of the evidence[13] in the present matter, even on the version proferred by the appellant, it is apparent that:

"*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*"[14].

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[13] See S v Crossberg 2008 (2) SACR 317 (SCA) at 349f-I and 354b-g
[14] S v Mugridge ibid paragraph [52]

34. On the evidence of both the complainant as well as the appellant, it is to my mind readily apparent that there was no true consent by her to sexual intercourse with the appellant on either 21 February 2015 or any of the subsequent occasions, with the last being on 4 November 2016. The learned Magistrate was correct in her finding that the State had proved its case beyond a reasonable doubt and convicting the appellant on both counts of the indictment and there is in the circumstances no reason to interfere with the conviction.

35. In regard to sentence, it was held in S v Kumalo[15] that:

> *"Punishment must fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances. The last of these four elements is often overlooked."*

36. The test to be applied, when considering sentence on appeal is set out in S v Kgosimore[16] -

> "*It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing sentence. Various tests have been formulated as to when the Court of appeal may interfere. These include whether the reasoning of the trial court is vitiated or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the Court of appeal would have imposed. All of these formulations, however, are aimed at determining the same*

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[15] 1973 (3) SA 697 (AD) at 697B-C
[16] 1999 (2) SACR 238 (SCA) at paragraph 10

thing; viz. whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence."

37. The appellant himself did not testify in mitigation of sentence. A pre-sentence report by a social worker from the Department of Social Development who had interviewed him and members of his family was tendered into evidence and the social worker questioned on it by the appellant's counsel. A victim impact report, prepared by the same social worker, was also tendered into evidence and similarly questioned.

38. When the appeal was argued, the appeal in respect of sentence was not pursued with any vigour. Counsel for the appellant simply referred us to what had been set out in the heads of argument. On consideration of both the pre-sentence report as well as the victim impact report, it is clear that the appellant still does not appreciate the gravity of his conduct or its consequences for the complainant and also her family.

39. In its evaluation of the evidence before it, the trial court did not overemphasize the interests of the complainant (and the wider community) and was not dismissive of the personal circumstances of the appellant. The prevalence of this type of crime and the seriousness with which it is viewed are the very reason for the imposition of minimum sentences. There was nothing in the pre- sentence report or for that matter in any of the evidence before the court relating to the personal circumstances of the appellant that could be characterized as either 'substantial' or 'compelling' to motivate for the imposition of lesser sentences than

the minimum sentences in respect of the two counts upon which he was convicted[17].

40. On consideration of the personal circumstances of the appellant, both individually and cumulatively, none in my view rise to the standard of substantial and compelling circumstances for the trial court to have departed from the minimum sentences either in respect of Count 1 or Count 2 of the indictment.

41. In the circumstances, I propose the following order:

41.1 The appeal against conviction and sentence is dismissed.

AP MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I AGREE AND IT IS SO ORDERED

LM MOLOPA-SETHOSA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

[17] S v Malgas 2001 (1) SACR 469 (SCA) at paragraph 8; S v Salzwedel & Others 2000 (1) ALL SA 229 (AD) at 232I

HEARD ON:	9 NOVEMBER 2022
JUDGMENT DELIVERED ON:	16 NOVEMBER 2022
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REFERENCE:	RC 2/178/16