IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No.:A392/10

In the matter between:

KEVIN GOODALL **Appellant**

and

THE STATE **Respondent**

JUDGMENT DELIVERED: TUESDAY 26 APRIL 2011

SALDANHA, J

[1.] The appellant, Mr. Kevin Goodall, was convicted on the 1st of August 2007 in the Parow Regional Court on two counts of rape. He was sentenced on the 24th October 2008 in the Western Cape High Court in terms of the Minimum Sentence legislation Criminal Law Amendment (Act 105 of 1997) to 15 years of imprisonment on each count. The sentences were ordered to run concurrently.

[2.] Leave to Appeal was granted against both the conviction and sentence and the appellant was released on bail pending the outcome of the appeal.

[3.] The charges arise out of incidents on the 22nd and 24th December 2004 at 151 Victoria Road, Parow. where the appellant was alleged to have had sexual intercourse with T M, a 15 year old girl, without her consent.

[4.] The appellant was legally represented at the trial and. having pleaded not guilty, confirmed that he understood the provisions of the Minimum Sentence legislation which was applicable to the charges. He elected not to disclose the basis of his defence save to admit the identity of the complainant The State called five witnesses while the appellant testified in his own defence and called two witnesses.

[5.] The central issue raised on appeal by the appellant was whether the State had proved beyond reasonable doubt that he had raped the complainant on the two occasions.

The evidence.

[6.] The complainant was seventeen years old when she testified in the regional court. She did so through the use of an intermediary and by close circuit television in terms of section 170A of the Criminal Procedure Act 51 of 1977 (as amended). A report on the intellectual development and mental state of the complainant, which was prepared by a psychologist. **Ms Gillian Douglas** (Douglas) of Cape Mental Health, was used in support of the application Douglas also testified during the trial and described her evaluation and findings on the complainant's mental and intellectual ability, her ability to consent to sexual intercourse and her competence as a witness At the time of the assessment the complainant was sixteen years old. She was born on 12 May 1989. Douglas recorded the complainant's background and history of her intellectual development.

[7.] The complainant's father, Mr. John Hayes, had informed Douglas about the complainant having been behind in her developmental milestones. Her medical files revealed that she had at the early age of four years undergone repeated assessments at the Wynberg Military Hospital with regard to concerns about her delay in language articulation and in other areas of difficulty. She received occupational and speech therapy. In 1995 she was assessed as having significant development delays across a range of areas. She was found to have been cognitively handicapped on a verbal scale and on a borderline range in respect of her performance skills and her global intelligence. She attended pre-primary school and went on into an adaptive class until the end of 2001. It appeared from her school reports that despite having had good relationships with her teachers she suffered significant emotional and behavioral difficulties, was regarded as disruptive and appeared isolated at school. Her academic progress was generally slow and difficult She received psychological counseling in the

year 2000. In February and March of that year she also received individual play therapy following two attempts of suicide. She was found unsuitable for a placement at a special needs high school, Vista Nova School, because of her delay in global and intellectual development. She was referred to the Therapeutic Learning Centre at the Red Cross Children's Hospital for the purpose of a comprehensive diagnosis and therapeutic input. She attended the centre for the better part of the year 2000 and her parents also received counseling. She was provided with behaviour modification and social skills programmes. She had also been placed at the Khanyisa Special School and thereafter attended the Batavia School, also a special needs school, where she reported continued unhappiness and isolation.

[8.] Douglas assessed the complainant in accordance with the recognized DSM (Diagnosis and Statistical Manual of Mental Disorders of the American Psychiatric Association, 4th Ed) and administered two further tests for increased reliability. The scales used covered three areas, namely, communication, daily living skills and socialization. In the domain of communication she scored in the range of moderate intellectual disability with an age equivalent of seven years and nine months. In the domain of daily living skills she scored in the range of mild intellectual disability with an age equivalent of nine years and four months In the domain of socialization she scored in the range of moderate intellectual disability with an age equivalent of five years and eight months In her overall adaptive functioning she scored in the range of moderate intellectual disability By comparison with other people with intellectual disabilities her scores were regarded as average in all the three areas of functioning. Her scholastic aptitude score fell within the range of mild intellectual disability and an age equivalent of nine years and eight months. This assessment was consistent with her reported difficulties at school

[9.] The complainant has received sex education at school and the basic knowledge of conception, contraception and sexually transmitted diseases. She was however under

the age to legally consent to sexual intercourse at the time the alleged rapes took place. She was found to be a competent witness during trial but because of her vulnerabilities Douglas recommended that she receive court preparation as support and that an intermediary be used to minimize the anxiety associated with testifying in court. In testimony Douglas also claimed that because of the complainant's good communication skills her disability was not obvious and only emerged in the subtleties of her reasoning and lack of judgment. The complainant was too trusting and vulnerable to flattering advances. She was unable to judge the safety of precarious situations that she may have been faced with.

[10.] At the outset of her testimony the complainant expressed an extreme ambivalence to testifying against the appellant. She testified that she had met the appellant through his older brother Anthony who had given her his cellular phone number. She made the initial contact with him and they eventually agreed to meet. She described her meeting with him at the Kenilworth Shopping Centre, where she had worked in a hairdressing salon on a casual basis. She claimed that although the appellant appeared to be much older than her she had immediately fallen in love with him. She knew that both her parents were against her having a relationship with him because of their age difference. Her mother had left a message for the appellant on his cell phone not to have anything to do with her because of his age. A few days after their first meeting, she on the 22nd December 2004, initiated a second meeting with him. He picked her up on the same day from the Kenilworth Centre and took her to his residence in Parow At his residence, which was described as an open plan flatlet, she met two of the appellant's friends. They warned her about having a relationship with the appellant as he was much older than her and that he could be sent to jail if he had sexual intercourse with her. They also warned her of the risk of falling pregnant to which she responded that it would never happen. She also described how she had teased the appellant about being gay after looking at photographs of him on the wall of his residence. In response he said that he would show her that he was not gay and they began kissing one another. She claimed that despite her protestations he proceeded to have sexual intercourse with her during which she

experienced extreme pain in her private parts.

[11.] She thereafter accompanied the appellant to a shopping centre in Parow and he later dropped her off at the Kenilworth Centre. She claimed that she was scared of the appellant because of his muscular build and the way that he had looked at her and therefore did not tell anybody about the incident. She also claimed that she did not call out to his friends, who were on the premises during the incident, because she feared that they would simply have participated in the rape.

[12.] On the 24th December 2004 she once again called the appellant and he arranged to meet her at the Kenilworth Centre. She had asked her colleagues at the hairdressing salon to tell anyone who was looking for her while she was with the appellant that she had gone home early. From the Kenilworth Centre they proceeded to his flatlet where he changed his clothes and she thereafter accompanied him to Atlantis, in Atlantis he appeared to have handed over money at various places and she had also met his elder brother, Anthony, who lived in the area. They thereafter returned to his flat in Parow. While watching the television she asked him for a glass of water. He gave her a glass of water which she described as having tasted bitter while drinking it. She felt drowsy and did not know what had happened thereafter. She claimed though that the appellant had pushed her down onto the bed where he forcefully had sexual intercourse with her. He did so by unzipping his pants and inserting his penis into her while pushing her panty aside. She claimed that she had experienced pain during the incident She also claimed that she had protested against having sexual intercourse with him because she was scared that she would fall pregnant. He said to her that if that happened he would put her up in an expensive hospital and would love the baby as much as he loved her. She testified that although she was angry about what had happened she accompanied the appellant thereafter on his shopping for Christmas presents. He thereafter took her back to the Kenilworth Centre. She claimed that she had disclosed to the appellant her age and his response was to the effect that age did not matter, what was more important was

what was in the heart.

[13] When she returned to the hairdressing salon she was ecstatic, which she ascribed to the water that she drank at the appellant's place Her parents had earlier called the hairdressing salon to find out where she was, as they were concerned that she was late in returning home. Her mother had picked her up at the salon but she initially resisted going home with her. She refused to disclose to her mother where she had been and claimed that she did so to protect the appellant whom she at that stage desperately loved. Upon her arrival at home she maintained her silence and her father, a member of the police services, gave her a beating with a spoon in an endeavour to elicit where and with whom she had been. Her mother assisted her father by holding her down. She later disclosed to a friend of her mother Desire, who was present at their home at that time that she had been with the appellant. Desire in turn told her mother. She thereafter had a bath which she described as particularly painful because of the beating. She was taken to her grandmother's house where more pressure was put on her to disclose where she had been that day. Her uncle, also a policeman, also threatened to beat her up because of her relationship with the appellant.

[14.] She claimed that the atmosphere in their house was particularly unpleasant thereafter. The next day she was taken by her father to an emergency medical facility for a drug test. The tests proved negative.

[15.] The following day, 26 December 2011 she accompanied her father to Parow where she pointed out the appellant's residence. She saw him in the company of another woman and she claimed that immediately made her feel very sad. Her father thereafter took her to Karl Bremmer Hospital where she was examined by a doctor. The doctor told her that she was no longer a virgin and she became very upset about it She told the doctor that it was the appellant who had had sexual intercourse with her without her consent.

[16] She also claimed that she had been taught at the Batavia School about sex and that she knew exactly what it was all about. She had made two statements to the police. The first was prior to the medical examination wherein she did not disclose that the appellant had raped her. In the second statement she claimed that the appellant had raped her. During the cross-examination she angrily gestured at the appellant in court for his repeated denials of having had any intimate relationship or any love for her. She emotively described her anger at the appellant for having deceived her about his love for her and for having a relationship with another woman She crudely taunted the appellant from the witness stand that she was yet to vent her anger at his pregnant girlfriend

[17.] In cross-examination she claimed that the first rape occurred on the 24th of December 2001 and prior to their going to Atlantis. However, it appears that her confusion in this regard was compounded by an incorrect version put to her by the appellant's legal representative. She also blamed herself for the incident with reference to her relationship with the appellant and her love for him. She claimed that she had flashbacks and dreamt of the appellant sitting on the roof of their house looking down at her and attempting to scare her away. She thought at times that such dreams were real. She also claimed that she had wanted to phone the appellant on the 24lrt December 2004. after having returned to the hairdressing salon, to thank him for having spent the day with her.

[18.] Both parents of the complainant testified and claimed that they had forbade the complainant from having a relationship with the appellant as he was much older than her. The complainant's mother confirmed that she had left a message on the cell phone of the appellant in which she warned him not to encourage the relationship with her daughter because of his age. She claimed that when she had picked up the complainant from the hairdresser on the 24,b December 2004 she immediately noticed that the pupils of her eyes were dilated and that she was aggressive Her clothes were also in a disheveled state. She confirmed that both she and her husband had given the

complainant a hiding and that the complainant had threatened to leave their house and had packed her bags to go and live with the appellant with whom she claimed that she was in love. The complainant was also very tearful, refused to eat anything and was extremely uncooperative with them. She suspected that the complainant had been protecting the appellant. Her suspicions were strengthened by the opinion of the policeman who had taken the first statement from the complainant that she was hiding something from them. They therefore had the appellant tested for drugs the following day. The complainant's mother claimed that her friend, Desire, who had accompanied the complainant and her husband to the appellant's house, had telephonically reported to her that the complainant had *"admitted that the appellant had raped her that they actually had sex."* She repeated that Desire had said that the complainant had admitted that *"Kevin had sex or that he raped her."* The complainant was thereafter taken to Karl Bremmer Hospital for a medical examination.

[19.J The complainant's mother claimed that both she and her husband were not happy with the pace of the investigation and that her husband had consequently intervened with the police.

[20] The complainant's father had 15 years of experience as a police officer and mainly dealt with crime intelligence. He confirmed the evidence with regard to the intellectual disability of the complainant He regarded her as particularly vulnerable and both he and his wife were therefore overly protective of her. He confirmed the evidence of both the complainant and his wife where it related to his involvement but claimed that it was after he had confronted the complainant in the car on the way back from the appellant's house that she said that the appellant had raped her. He testified that the complainant had claimed that the appellant had threatened her with a firearm and to harm the rest of the family if she revealed to the police what had happened He immediately contacted the police again and arrangements were made for the complainant to be medically examined at the Karl Bremmer Hospital. He claimed that no statement was taken from him despite his repeated requests to the investigating officers and subsequently to the prosecutor to do so. He also claimed that he had been dissatisfied and frustrated with the investigating

officer and the delay and what appeared to be a lack of effort in tracing and arresting the appellant. He therefore complained to the superiors of the investigating officer and as a result thereof somebody else was assigned to the investigation of the case.

[21.] He was also upset that the appellant had been released on bail subsequent to his arrest notwithstanding the seriousness of the charges against him.

[22] Dr Pierre **Mugabo** conducted the medical examination of the complainant at Karl Bremmer Hospital on the 26th December 2004 and completed the J88 medical examination form. He had recorded that the complainant had been "sexually assaulted on the 24th December 2004 between 17h00 and 18h00 in Parow by a 27 year old man who had introduced his penis without her consent." He recorded a blue mark on her left thigh. Her genital area appeared normal except for the bleeding of a tear near the *viculahs.* The tear was approximately half a centimetre in length. Her hymen was absent. He concluded that the tear could have been associated with vaginal penetration. In cross examination he conceded that the tear could have occurred as a result of consensual sex.

[23] The appellant in his testimony denied any intimate or emotional relationship with the complainant. He claimed that she had repeatedly called and sent him sms's (cellular phone messages) and sought out his attention. He denied reciprocating and claimed that he had merely enjoyed her company when she accompanied him to his flat and shopping and to Atlantis. He found her to be a "jolly person" and regarded her as a younger sister. He claimed that when he initially met her he told her that she looked more like a primary school child, to which she responded that she was eighteen years old and had just completed school He steadfastly denied ever touching her on either the 22nd or 24m

December 2004. He claimed that it was because of a "stupid mistake" of his relationship with the complainant that he had landed up in court and in the situation that he found himself in He blamed the complainant's father, who he claimed had conspired against

him in the prosecution of the charges.

[24.] **Inspector Singwane** the initial investigating officer in his testimony confirmed that the complainant's father had assaulted the appellant once during his arrest, and also confirmed the complaints against him by the complainant's father with regard to the investigation. The appellant's brother, Patrick Goodall, claimed that he had seen the complainant at the appellant's house in Parow but he did not appear to be sure of which day it was. He claimed that it was apparent to him that the complainant was no older than eighteen years old and that he had in fact warned the appellant that she had spelt trouble for him.

Evaluation

[25.] The magistrate in the court a *quo* made a detailed assessment of the evidence and in particular the intellectual capacity of the complainant. She was of the view that the complainant had portrayed a realistic picture of the events that had occurred and that her version was not inherently improbable. She claimed that the complainant's version was consistent both in examination-in-chief and in cross-examination. Although the complainant did not give a methodical or sequential description of the events, she had introduced extraneous information and descriptions of her own opinions that in the view of the magistrate merely lent credence to her version given that her functioning was no higher than that of a nine year old child. The magistrate had found that the complainant's version made logical sense and that given her intellectual difficulties and limitations it was improbable that she would have invented the allegations against the appellant. The magistrate was also mindful of the complainant's ambivalence towards the appellant and her conflicted emotional loyalty to him on the one hand and her anger towards him on the other. She considered these feelings as militating against the risk of the complainant having constructed a false version of events against the appellant. She was also of the view that had the complainant invented the allegations against the appellant she would hardly have had the insight to know how it felt when she was sexually penetrated. She

also found that there was no undue influence placed on the complainant by either of her parents. She regarded the anger of the father of the complainant and his role in the investigation as understandable and irrelevant to the complainant's claims against the appellant. The magistrate accepted the evidence of Dr Mugabo as consistent with the complainant having been sexually penetrated. Although the complainant was a single witness the magistrate found her evidence to be reliable. The magistrate rejected the appellant's version and in particular his explanation and description of the nature of his relationship with the complainant. She also found it improbable that the appellant would have accepted that the complainant was eighteen years old despite his own perception of her being no older than a primary school child. She also found the appellant's evidence with regard to the complainant persistently phoning him as an exaggeration and that he had inappropriately encouraged her relationship with him. She rejected his denial of having sexual intercourse with the complainant.

The magistrate described the rape on the 24' December 2004 as a "date rape scenario" where despite the objections by the complainant the appellant had merely overrode her objections and had sex with her anyway. She found that the complainant had not only objected to his sexual intentions, but, because of her disability and her not being able to fully comprehend the situation in which she was in, was. also unable to negotiate safe sex and that she could not have consented to sexual intercourse.

[26] The State is required to prove the guilt of the appellant beyond reasonable doubt

[27.] The evidence of the complainant as a single witness and a child has to be approached with the appropriate measure of caution. This should be especially so , given the moderate intellectual disability in which she functioned at the level of a child of nine years and eight months.

[28] The guidelines in dealing with the evidence of a single witness who is also a child was usefully tabulated in the recent decision of Jones J in **S v Dyira 2010 (1) SACR 78**

(ECG) at para [10]:

> *"(a) a court will articulate the warning in the judgment, and also the reasons for the need for caution in general, and with reference to the particular circumstances of the case;*
>
> *(b) a court will examine the evidence in order to satisfy itself that the evidence given by the witness is clear and substantially satisfactory in alt material respects;*
>
> *(c) although corroboration is not a pre-requisite for a conviction, a court will sometimes, in appropriate circumstances, seek corroboration which implicates the accused before it will convict beyond reasonable doubt;*
>
> *(d) failing corroboration, a court will look for some feature in the evidence which gives the implication by a single child witness enough of a hallmark of trustworthiness to reduce substantially the risk of a wrong reliance upon her evidence. (S v Artman 1968 (3) SA 339(A) at 340h**

[29] Zulman JA in **S v V 2000(1) SACR 453 (SCA) para [z]**said that

> "... whilst there is no statutory requirement that a child's evidence must be corroborated, it has long been accepted that the evidence of young children should be treated with caution *(R v Manda 1951(3) SA 158 (A) at 163 C; Woji v Santam Insurance Co Limited 1981 (1) SA 1020 (A) at 1028B-D):* and that the evidence in a particular case involving sexual misconduct may call for a cautionary approach *(S v J 1998(2) SA 984 (SCA) at 1009B)"*

[30] Moosa J in this division held in **S** v **Janse Van Rensburg and Another 2009(2) SACR 216 (C) at para [9]:**

> *"Section 208 of the Act (Criminal Procedure Act) stipulates that an accused may be convicted on the evidence of a single and competent witness. This does not displace an important principle in our law that the evidence of a single witness must be approached with caution. Before the Court can place any reliance thereon, the evidence of a single witness must be clear and satisfactory in every material respect. In other words, the evidence must not only be credible, but must*

also be reliable. In this respect see S v Makoena 1956 (3) SA 81 (A); S v Webber 1971 (3) SA 754 (A) at 758G; S v Sauls and Others 1981 (3) SA 172 (A) at 179G-180G; S v Stevens [2005] 1 All SA 1 (SCA) at 5d-h; and S v Gentle 2005 (1) SACR 420 (SCA) at para 17. However, our courts have repeatedly warned that the exercise of caution should not be allowed to replace the exercise of common sense (S vArtman and Another 1968 (3) SA 339 (A) at 341 Cy

[31.] in respect of the first count of rape the complainant clearly contradicted her testimony in chief when she claimed in cross examination that the appellant had raped her for the first time on the 24,h December 2004 prior to them going together to Atlantis. Her confusion it appears was compounded by the inaccurate version of her evidence-in-chief put to her by the appellant's lawyer. However, save for her testimony in court about the first incident there did not appear to have been any disclosure to either her parents, or Ms Douglas, or her friends or in her statements to the police about the incident on the 22nd December 2004. Moreover, her explanation for not calling out to the appellant's friends who were at the premises while she was being forcibly raped was particularly unconvincing given that she herself had testified about the warnings of the two friends to her about the appellant's age and the risk of her being impregnated by him. Further, there appeared to be nothing in her conduct after the first rape that either alerted any of her friends or parents of the incident or that she had laboured in any pain, discomfort or emotional distress. There was no evidence of fear or intimidation by the appellant. If she did in fact have any fear for the appellant it was clearly undermined by her initiating contact with him again on the 24tn December 2004 in pursuance of their relationship. The evidence in respect of the first count appeared extremely tenuous in the circumstances and it is apparent from the magistrate's judgment that she had given insufficient consideration to the inherent improbability and contradictions of the complainant's version.

[32] The complainant was under the age of sixteen years old and was clearly not able to

have consented to sexual intercourse with the appellant. I am of the view that in consideration of the totality of the evidence in respect of the first count the magistrate had incorrectly found that the state had proved the rape or any sexual intercourse between the appellant and the complainant beyond reasonable doubt.

[33.] In respect of the second count of rape the objective evidence of Dr Mugabo supports the claim that sexual intercourse occurred. He observed that the complainant's hymen was absent and that there was a tear which had still bled near her vicularis and which was also consistent with a sexual intercourse episode that could have taken place with the consent of the complainant. The complainant herself testified about her complete infatuation with the appellant. It appears that on the evidence of her mother the complainant had lost weight in order to please the appellant and that on the 24th of December 2004 both she and her husband had found it rather strange that the complainant had completely changed her style of dress. It appears also that the complainant completely trusted the appellant despite her suspicions that he was involved in a relationship with another woman. She accompanied him on visits to his flat and on a trip to Atlantis, all in complete defiance of her parents. She claimed that even after the incident of the 24th December 2004 she was completely protective of him and did not want to divulge her relationship with the appellant She did so even at the pain of receiving a hiding at the hands of both her parents. Moreover her her evidence with regard to the water that was given to her by the appellant which tasted bitter was not supported by the drug test conducted by the emergency medical facility the following day as having been laced. In the circumstances I am of the view that reasonable doubt exists with regard to whether the sexual encounter between the appellant and the complainant at his premises on the 24,fl December 2004 occurred without her actual consent. The appellant for his part knew full well that she was much younger than what she professed. He himself was of the view that she looked no more than a primary school child and could have been under no illusion that she was not able to legally consent to sexual intercourse with him. His version of the relationship with the complainant was correctly rejected by the magistrate as being false. It is apparent that the appellant had taken

advantage of the complainant's infatuation with him and through her youthful naivete and poor intellectual development, seduced her. In the circumstances the appellant had committed the offence of having sexual intercourse with a child under the age of sixteen years old in contravention of section 14(1)(a)of the Sexual Offences Act No. 23 of 1957 (now repealed).

Ad sentence

[34] The appellant had been sentenced to a term of imprisonment of 15 years on both counts based on a conviction of rape. In the circumstances, sentence has to be considered afresh based on his conviction of the contravention of section 14(1)(a) of the Sexual Offences Act. Section 14 provides for a maximum sentence of six years imprisonment and the alternative of a fine of R12000.00.

[35] In considering an appropriate sentence the court has to take into account the personal circumstances of the appellant, the nature and seriousness of the offence and the interests of society These factors have to be considered while balancing the objectives of sentence such as retribution, prevention and rehabilitation. The offence must also be considered within the increased prevalence of sexual abuse against young children and the ever increasing public demand that both the legislature and the courts protect vulnerable children from such abuse. In a survey of decisions dealing with sentencing in such circumstances it is apparent the limitation imposed on the courts with the maximum sentencing provision in the Sexual Offences Act was taken into account. In the matter of **S v Fhetani 2007 (2) SACR 590 (SCA),** the appellant, having pleaded guilty on the lesser offence of contravention of the statute as opposed to the main count of rape, was sentenced to fifteen years imprisonment. On appeal the court found that the magistrate had over-emphasized the deterrent nature of the sentence and had incorrectly imposed the sentence in excess of the statute and had therefore violated the appellant's right to a fair trial.

[36.] The court held at para 5:

> *"It is a well established principle of our law that the sentence imposed must fit the nature of the offence of which the accused was found guilty. Put differently, the severity of the sentence must not be grossly disproportionate to the offence itself.An exemplary sentence such as the one that we are concerned with here, is not a fair and just punishment because it is disproportionate to the true deserts of the offender."*

[37.] The court however, found that this did not mean that deterrence was no longer an object in sentencing. In that matter it had found that it was unlikely that the appellant would commit the same offence again. The court in assessing tne circumstances of the offence and the personal circumstances of the appellant imposed a sentence of three years imprisonment.

[38.] In the matter of **S v L 1998 (1) SACR 463 (SCA)** the court held that that sexual molestation of children had become a serious problem and there was no reason, despite weighty mitigating factors, for a finding that the magistrate's conclusion that both correctional supervision in terms of section 276 **(1)** (h) and imprisonment in terms of section 276 (1) were inappropriate and unreasonable as a sentence option in the matter. The appeal against a sentence of four years in that matter was dismissed.

[39] In **Dube v S 2004 JOL 13221(W)** Makhanya J in imposing a sentence under section 14 (1) A of the Sexual Offences Act stated the following;

> *"Although pubescent and females are by definition physically prepared for the act of sexual intercourse, a concern remains regarding the emotional, psychological and social effects on these giris. Further, these sexual crimes are regarded as serious because in the present times sexual molestation of children has become quite a serious social problem, giving rise as such to a legitimate uproar in the*

community (see the matter of S vM 1998 (1) SACR 463 (SCA)).

[40.] In that matter the appellant was sentence to a period of 12 months imprisonment.

[41.] It is apparent from the above cases that the consideration of an appropriate sentence for the contravention of the statute requires to be dealt with on its own set of circumstances.

[42] The appellant's personal circumstances were placed on record by his legal representative. He was at the time of sentencing forty years old, the father of two children and married to their mother. At the time of the offence he was not married but had been living with her. He had been employed in the tourism industry for a number of years and he had no previous convictions.

[43.] Douglas in her report recorded in her assessment of the complainant that she had expressed ambivalent feelings about her willingness to testify. She felt vulnerable with regard to her own safety and confused with regard to the nature of the relationship between herself and the complainant. She found the complainant to be preoccupied with the events and that she had required hospitalization for a period following the incident and was under the care of a psychiatrist. Both of the complainant's parents had also testified about the extent of the trauma that the complainant displayed after the incident. A Social Welfare Report which had been prepared for the purposes of sentencing by a Ms C Malan a social worker in the department of Social Services, was handed into evidence. It appeared from the information available to her that the complainant had become withdrawn after the incident and had on one occasion ran away from home She was also hospitalized during January and February 2005 at the Crescent Clinic for the treatment of depression and anxiety. Malan had also received a report from the Batavia School after the incident and it appeared that the complainant had become aggressive

and regularly got into fights with other learners. She had also lost weight after the incident She claimed that in her consultations with the complainant she at times experienced a longing for the appellant. The complainant had also become emotional during the consultations and it appeared that she found it difficult to talk about the incident. The complainant had also lost one of her best friends who had been unhappy about her relationship with the appellant in the first place. Ms Malan was also of the view that the incident had a dramatic impact on the family of the complainant and in particular because of her vulnerability and her mental development. The complainant's parents claimed that since the incidents they have become over-protective of her and do not allow her to leave the house and when she does they remain in constant telephonic contact with her. Malan was of the view that the complainant had experienced serious trauma as a result of the incident. She was of the view that the appellant had misused his position of trust with the complainant, who was a young, emotional and immature child with limited intellectual functioning. It appeared that the complainant would require on going counseling, particularly given her conflicted feelings for the appellant.

[44] The appellant, despite his relationship with the complainant, maintained that he had absolutely no physical contact with her. He displayed a complete lack of remorse or appreciation for the nature of his abuse of his relationship with the complainant His conduct is also aggravated by the huge age gap between them and the fact that he was in an existing relationship with another woman.

[45] In the circumstances I propose to impose a sentence of six (6) years imprisonment on the appellant of which two years is suspended on condition that he is not convicted of any offence under the new Sexual Offences and Related Matters Act 32 of 2007.

In the result I propose to make the following order;

(i) The conviction of rape on both counts is set aside

(ii) The appellant is acquitted on the first count and convicted of contravention of Section 14 (1)(a) of the Sexual Offences Act in respect of the second count

iii) A sentence of six (6) years imprisonment is imposed of which two years is suspended on condition that the appellant is not found guilty of contravention of any provision of the new (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

iv)

It is ordered that;

SALDANHA J

I agree

ALLIE, J

I agree and it so ordered

BLIGNAUT, J