IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: A153/16

In the matter between:

CHRISTOPHER JOSEPH PRINS Appellant

And

THE STATE Respondent

JUDGMENT DELIVERED ON 19 SEPTEMBER 2016

GAMBLE, J:

[1] The appellant appeared before the regional magistrate for Parow on three charges under the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ("SORMA"). He was charged with two contraventions of sec 3 of SORMA (rape through penile penetration of the vagina) and one

contravention of sec 5(1) (an act of sexual assault through the touching of the complainant's vagina). He pleaded not guilty to all charges. After hearing the evidence of various witnesses the regional magistrate convicted the appellant of one charge of statutory rape and acquitted him on the remaining two charges. The appellant was sentenced to 15 years imprisonment and it was directed that his name be included in the Register of Sexual Offenders. His appeal against both conviction and sentence is with the leave of the trial court.

[2] The appellant was duly warned before the trial court that he faced a minimum sentence of life imprisonment in respect of the charges of statutory rape by virtue of the fact that the victim was said to be "*a person who is mentally disabled as contemplated in section 1 of* [SORMA]". In such circumstances the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997 read with Part III of Schedule 2 thereto, oblige a court to impose the ultimate sentence unless it is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence. The trial court found that such circumstances did exist and accordingly a sentence of 15 years was imposed.

[3] At the commencement of the trial the regional magistrate heard the evidence of Ms Janine Hundermark, a clinical psychologist in the employ of Cape Mental Health, a local NGO with more than 100 years of involvement in the field of mental health. Ms Hundermark conducted an assessment of the victim for purposes of evaluating the level of intellectual functioning, her ability to consent to sexual intercourse and her competence to testify. The assessment comprised various

interviews with the victim, her uncle and aunt (with whom she resided at the time) and another aunt. The victim's mother was not interviewed. The reason for this is not directly ascertainable from the record but judging from the evidence of Ms Hundermark it seems but it may have been due to the mother's perceived unreliability and sympathy for the appellant who is her husband and the stepfather of the victim, who was 19 years old at the time of the assault upon her.

[4] The report of the psychologist relied on certain basic tests to establish the intellectual ability and scholastic aptitude of the victim, as also to establish her current level of functioning. It was found that the victim had an IQ range of between 50 and 69, which placed her in the range of mild intellectual disability, while in regard to her scholastic aptitude it was found that the victim's "test age" was 6 years and 0 months and that she functioned at the level of a Grade 1 child. On this assessment she was regarded as suffering a moderate intellectual disability.

[5] Ms Hundermark investigated the victim's understanding of sexual matters and noted that, while she had received sex education at school and was aware of the correct names for the male and female sexual organs, she had no knowledge whatsoever of sexual matters and had no understanding of the concepts of contraception, sexually transmitted illnesses or conception. The psychologist came to the conclusion that the victim was, in the circumstances, unable to consent to sexual intercourse by virtue of the provisions of section 57 (2) of SORMA.

[6] As regards the victim's ability to testify, Ms Hundermark was of the opinion that the victim would be a competent witness in court provided that she was properly briefed in advance as to the process confronting her, and provided further that use was made of an intermediary. The regional magistrate accepted this recommendation and the victim testified with the assistance of such an intermediary.

[7] At plea stage the appellant offered no explanation in terms of section 115 of the Criminal Procedure Act 51 of 1977, preferring to exercise his right to silence. However it became apparent fairly early on in the cross examination of the victim that the defence on the first rape charge was one of consent: the appellant admitted to a single incident of sexual intercourse with the victim at the family home one morning in the absence of the victim's mother who had taken her two younger children to school. His claim was that the victim had pleaded with him to satisfy her sexually and after expressing his reluctance in that regard on a couple of occasions (and candidly admitting to the court that it was not the right thing to do) he succumbed to her entreaties.

[8] The provisions of section 57(2) of SORMA are clear and to the point –

> "*57(2) Notwithstanding anything to the contrary in any law contained, a person who is mentally disabled is incapable of consenting to a sexual act"*

[9] That section must be read in conjunction with the following definition in section 1 of SORMA –

"person who is mentally disabled" *means a person affected by any mental disability, including any disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question was –*

(a) unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;

(b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;

(c) unable to resist the commission of any such act; or

(d) unable to communicate his or her unwillingness to participate in any such act;"

[11] The import of the definition is that it is not **any** form of mental disability, mental disorder or disability of the mind which will render purported consent by the victim proscribed under sec 57(2). Rather, the disability must be of such a nature and/or extent that it would preclude the victim from being able to appreciate one or more of the listed consequences contemplated in subsections (a) to (d) of the definition. Accordingly, if an accused raises the defence of consent on a charge of rape, and the State is unable to establish that the victim lack of understanding falls into one of the listed categories referred to in subsections (a) to (d), it would be open

to an accused to maintain that defence and the State would therefore have to adduce evidence to negative that allegation of consent, as part of its overall onus of proof.

[12] In argument before us, counsel for the appellant did not take issue with the fact that the victim suffered a degree of mental disability. Rather, he argued, the evidence had to be considered holistically before the court could be satisfied that the victim was unable to appreciate the consequences of engaging in sexual intercourse. In this regard counsel highlighted the anecdotal evidence that the victim was contemplating marriage at the time of the attack. It was said that the reason that she had not in fact concluded a marriage to her male friend was because her parents were not satisfied with the suitor's ability to care for the victim in a home of his own.

[13] Then, it was argued, there was the worrying fact that, despite 2 charges of sexual penetration and one of sexual assault having been laid against the appellant, the victim expressly denied that anything other than the admitted incident had occurred. Counsel suggested that the victim's ability to distinguish between incidents that had occurred and those that had not, implied that she had more knowledge of sexual matters than originally appeared to be the case.

[14] The concerns raised by counsel are by no means to be trivialized or ignored: they are very real concerns. But at the end of the day this court has before it the report and evidence of an expert qualified to comment on the victim's ability to appreciate what would happen to her should she engage in sexual intercourse. Ms Hundermark qualified as a clinical psychologist in 2004, conducts a private practice,

and, in addition, has consulted to Cape Mental Health for 10 years while working on a study of their's known as "The Sexual Abuse Victim's Empowerment Project". She appears therefore to be pre-eminently qualified to express an opinion about the victime's level of understanding of the consequences of sexual intercourse.

[15] In her report, the psychologist did not directly substantiate her finding that the victim was unable to consent to intercourse by virtue of the provisions of section 57 (2) of SORMA. However, having considered her evidence, it seems clear to me that Ms Hundermark's finding referred to in paragraph 5 above brings the victim's mental disability squarely within the ambit of the definition thereof contained in section 1(a) as set out above.

[16] Ms Hundermark was subjected to thorough cross examination by the appellant's erstwhile legal representative. From this it transpired that she had counsulted with the victim on more than one occasion, and then too for lengthy periods of time – about 8 hours in total. She was criticized for not consulting the victim's mother who, it was said, would have been the best source of background detail. Ms Hundermark provided the following explanation in that regard –

> *"We didn't consult with her mother because we were told by the police that the mother was very negative about this - this case and it - I hear that was second-hand that the mother had - the story had been that the mother had taken [L] and the other two girls originally to Saartjie Baartman and that then at some point the mother had decided to take*

her husband back and that the welfare and Saartjie Baartman did not believe that that was in the best interest of [L]. So she was put into the care of her uncle and aunt. She [ie the mother] *was then not interested in the assessment….*

…."(S)ometimes it's quite difficult to get access to the person and that was the case in - I mean that was in this case the - the mother was unwilling or unable to - to come and so she wasn't consulted with."

[17] The cross examination of the psychologist also traversed her understanding of the provisions of section 57 (2) of SORMA, to which the witness replied as follows –

"*I have a whole lot of criteria and when it comes to an (sic) person with intellectual disability they need to understand all about sex. She didn't if you ask the questions where does a baby come from or how does somebody become pregnant. So she didn't know anything about conception. She knows what sex is as in the actual act but she didn't know about conception, contraception, sexually transmitted illnesses so that means she doesn't have the information; she cannot make a decision with that; she cannot give or withhold consent and according to all of those criteria I'm coming to that conclusion."*

[18] When asked whether the victim understood that she could fall pregnant, Ms Hundermark said the following –

> "*In fact she did mention something about there being conversation about her being pregnant but I don't know if that came before or after but certainly in her general understanding of sexual matters how conception works, contraception, all of the consequences of being involved in sex she really did not know that much. I have to say that at some point in our conversation she did mention something about a baby but I got the feeling that that had been spoken about afterwards."*

[19] Finally, Ms Hundermark described the victim as having an "*incredibly anxious fearful nature",* adding that she was fearful towards adults, reluctant to take any initiative, and was generally unassertive and frightened.

[20] No persuasive evidence was put up by the defence in relation to the level of the victim's mental disability or functioning. All that there was from the appellant was his own limited observation that the victim could do maths and that he had helped her with her homework. This was not an aspect upon which the psychologist was cross-examined and so its evidential value is very limited.

[21] When it came to the question of the victim's ability to testify, there was no objection or challenge from side of the defence. Clearly her mental disability was apparent to those present in the court *a quo.* The record before us reflects that the examination of the victim (both in chief and under cross) was conducted in the most elementary fashion possible. The victim's replies to short and simple questions were mostly single words or short phrases. For example, when initially asked by the

prosecution to describe what the appellant had done to her she simply said "*Vir my geabuse het".* Thereafter she described in jilted phrases that he had "*in my vagina"*…. *"penis ingesit"*.

[22] The impression that one has after reading the record is that the victim is indeed an unsophisticated young woman with intellectual disability, as the evidence of the psychologist suggests. The victim was never asked in evidence to deal with the criteria which form the basis of the evaluation of her degree of impairment as required in the definition in section 1 of SORMA. That notwithstanding, I am satisfied that the State established beyond reasonable doubt that the victim was unable to understand the possibility of conception or of the contraction of a sexually transmitted illness should she engage in sexual intercourse, nor that she understood what contraception embraced. In the circumstances, I am satisfied that the victim was unable to appreciate both the nature and reasonably foreseeable consequences of participating in an act of sexual intercourse.

[23] Accordingly, the questioning of the victim in relation to the defence of consent was irrelevant. Similarly irrelevant was her persuasive evidence that she did not so consent. The regional magistrate correctly convicted the appellant on the first charge in light of the expert finding of the psychologist regarding the victim's mild mental disability. In my view then, the conviction is unassailable on appeal.

[24] As regards sentence, the regional magistrate took into account that the appellant was a first offender who was 53 years of age and was a sickly man. These

factors, she found, constituted substantial and compelling circumstances to deviate from the prescribed sentence of life imprisonment.

[25] The facts of this matter are all too commonplace in our society today. A variety of studies inform us that the incidence of rape is high in the domestic situation, particularly in poor communities where, in a case such the present, the parties live in cramped conditions as backyard dwellers. The dire socio economic circumstances in which this hapless victim found herself were exacerbated by virtue of the fact that she was mentally disabled and that the appellant took advantage thereof. The magistrate considered all the relevant circumstances and I can find no basis with which to interfere with the sentence.

[26] In the circumstances I would dismiss the appeal against both conviction and sentence.

GAMBLE J

I AGREE.
IT IS SO ORDERED - THE CONVICTION AND SENTENCE ARE CONFIRMED.

DESAI J

Date of Hearing: 10 September 2016

Appearances

For the Appellant - Adv G. Smith instructed by
Keith Hamblin & Co
Cape Town

For the Respondent – Adv E. Cecil
Ofiice of the director of Public Prosecutions
Cape Town