NOT REPORTABLE

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Case No: A 74/2011

DATE:12/06/2013

In the matter between

THABO McPHERSON TSHABALALA Appellant

and

THE STATE Respondent

JUDGMENT

Oosthuizen AJ:

[1] This is an appeal against the conviction of the Appellant in the Sebokeng Regional Court, on 4 August 2010, of having contravened section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (‘Act 32 of 2007") in that he had raped a thirteen (13) year old girl more than once on 4 December 2009, and against his sentence of sixteen (16) years imprisonment, imposed on the same date. His conviction and sentence also resulted in an order that his personal particulars and other information be included in the National Register of Sexual Offenders (as contemplated in section 50(1)(a) (i) read with section 50(2) of Act 32 of 2007) and in him becoming unfit to posses a firearm (as contemplated in section 103(1)(g) of the Firearms Control Act 60 of 2000), with the further order by the Sebokeng Regional Court in terms of section 103(4) of the Firearms Control Act 60 of 2000 (“Act 60 of 2000") of an immediate search for and seizure of all competency certificates, licences, authorisations and permits issued to the

Appellant in terms of Act 60 of 2000, as well as all firearms and ammunition in his possession.

[2] An application for leave to appeal against the conviction and the sentence was heard by the Sebokeng Regional Court and leave tc appeal was granted on 6 August •2010. There is some lack of clarity as to what leave was precisely granted, but in the end nothing turns on it.

[3] The matter was enrolled in the High Court for an appeal hearing that was to be held on 15 May 2012. On that day the matter came before our brothers LOUW J and WRIGHT AJ. They considered the matter and came to the prima facie view that the appeal against conviction should partially succeed, in that the conviction and sentence should be set aside but that it should be replaced with a conviction of having contravened section 15(1) of Act 32 of 2007, as a competent verdict on the original charge in terms of section 261(1)(g) of the Criminal Procedure Act 51 of 1977 (“Act 51 of 1977'). That section, read with the definition of a “child” in section 1(1) of Act 32 of 2007, creates the statutory offence of having committed an act of consensual sexual penetration with a child, that is with a person twelve (12) years or older but under the age of sixteen (16) years.

[4] The court was then made aware of a judgment that was given a few days earlier on 11 May 2012 in Director of Public Prosecutions, Western Cape v Prins 2012 (2) SACR 67 (WCC). That judgement of the Full Bench of the Western Cape High Court held unanimously that, because section 5(1) of Act 32 of 2007 which creates the offence of sexual assault but does not prescribe a penalty and with no penalty for the offence being prescribed elsewhere in Act 32 of 2007, that section falls foul of the nulla poena sine lege principle and the Constitution; consequently the Full Bench held that an indictment or

charge-sheet alleging a contravention of section 5(1) of Act 32 of 2007 did not disclose an offence. The same reasoning would have held good for an indictment or charge-sheet alleging a contravention of section 15 of Act 32 of 2007 and, on that basis, the conviction of the Appellant on section 15 of Act 32 of 2007 would have been impermissible. The appeal hearing was postponed so that counsel could consider the aforesaid judgement.

[5] On that same date, 15 May 2012, the court also ordered the release of the Appellant on bail, subject to a number of conditions, pending the final outcome of this appeal. The Appellant, having been arrested on 16 December 2009, would have spent at least twenty-nine (29) months in custody. There is nothing on record before us to show that the Appellant made bail but we were informed from the bar that on 23 May 2012 he was indeed released on bail.

[6] On 15 June 2012 the Supreme Court of Appeal, in Director of Public Prosecutions, Western Cape v Prins and others 2012 (2) SACR 183 (SCA), overturned the aforesaid judgment of the Full Bench of the Western Cape High Court. The Supreme Court of Appeal held that the various provisions defining criminal offences in chapters 2, 3 and 4 of Act 32 of 2007 clearly and unequivocally created criminal offences and it was also clearly and unequivocally within the contemplation of the legislature that on conviction the courts will impose an appropriate sentence on the accused. In the absence of an express penalty provision in Act 32 of 2007 (which has since been rectified by the insertion of section 56A with effect from 26 June 2012 therein, in terms of section 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act 6 of 2012), there is a legal basis for the imposition of sentences on persons convicted of the various offences set out in Act 32 of 2007 to be found in section 276(1) of Act 51 of 1977. The said section 276(1) was described as a general empowering provision authorising courts to impose sentences

in all cases, whether at common law or under statute, where no other provision governs the imposition of sentence. See also SvBooi 2012 (2) SACR 52 (FB).

[7] The matter was again enrolled in the High Court for an appeal hearing that was to be held on 23 November May 2012. On that day the matter came before our brother RANCHOD J and our sister MOLOPA-SETHOSA J. They, under circumstances not known to us, postponed the matter sine die apparently because they were of the view that our brothers LOUW J and WRIGHT AJ should deal with the matter as they have dealt with it before and became seized with it. The matter has now been enrolled again in the High Court for an appeal hearing today, 10 June 2013, and serves before us. We see no reason why it should be postponed for a third time and why we cannot entertain the appeal. Both the representative for the Appellant as well as the representative for the State were asked whether there is any objection to us continuing with the appeal hearing and there was no objection. We therefore continue to deal with the merits.

[8] A charge of rape under section 3 of Act 32 of 2007 was duly put to the Appellant at the start of the trial on 7 July 2010, informing him that he stood accused of the rape of the child N, a thirteen (13) year old female person, in that he allegedly, on 4 December 2009 and at or near Sebokeng, unlawfully and intentionally committed an act of sexual penetration with her by inserting his finger in her vagina and by having sexual intercourse with her. Before he pleaded to the charge, he was made aware of an informed of the provisions of section 51 (1) of the Criminal Law Amendment Act 105 of 1997 (incorrectly referred to by the Sebokeng Regional Court as the Criminal Law Amendment Act 38 of 2007) concerning the possibility of a sentence of life imprisonment in the event of a conviction. He pleaded not guilty to that charge and his legal representative, for the purposes of section 115 of Act 51 of 1977, started to explain that the Appellant (then

himself 20 years old) had a love relationship with N.

[9] The regional magistrate interrupted the explanation and took the initiative to ask whether it should be recorded as a formal admission that the Appellant admits that on 4 December he had consensual sexual intercourse with N, and upon a confirmative answer from the Appellant's legal representative a formal admission to that effect was recorded in terms of section 220 of Act 51 of 1977 without any comment, objection or criticism from the prosecutor. An admission tendered on behalf of an accused, in terms of section 220 of Act 51 of 1977, does not bind the State to a meaning which is radically at variance with the State's case: see S v Groenewald 2005 (2) SACR 597 (SCA). Nevertheless, one would have expected the prosecutor to make it clear on that occasion that, whilst it was common cause between the parties that sexual intercourse took place on the date and at the place alleged, the alleged consensual nature thereof was not common cause.

[10] The proceedings proceeded in camera and N, the complainant, testified first. Her evidence in chief was that, during the morning of the day of the incident, she was on her way to visit her grandmother when she encountered the Appellant on the street. She knew him "from the street and for quite a long time. The Appellant grabbed her and dragged her into a house, where he assaulted her (by slapping her repeatedly with an open hand through the face) and told her that she can tell her parents or the police about the assault because they will do nothing to him and he is not afraid to be arrested. N stated that on this occasion she sustained no injuries. According to her, she was then locked inside the bedroom whilst the Appellant went outfor a brief period. She states that he returned, smoking a cigarette, and assaulted her by again slapping her once through the face with an open hand. He then pushed her onto the bed, undressed her and first inserted his finger into her vagina where after he had sexual intercourse with her. On her version they only had sexual intercourse once, albeit that two sexual penetrations took place.

At this juncture the prosecutor asked N whether she had consented to the Appellant putting his finger in her vagina. The question was clear and she answered affirmatively but qualified her answer by stating she consented because she was afraid of the Appellant. The question was rephrased without objection by the presiding officer or the legal representative of the Appellant, asking whether N gave permission for that conduct of the Appellant, whereupon the answer was that she did not allow it. The next question was whether she consented to sexual intercourse and this time N answered directly that she did not consent to sexual intercourse.

N confirmed in her evidence that the Appellant used a condom during sexual intercourse. When that was finished, he told her to get dressed but, despite her request, refused to open the door of the bedroom or house and only allowed her to leave at about 22h00. Immediately after he released her, he came running after her with someone else to assault her a third time with his open hands and was told by an older man (presumably in the street) to leave her alone.

N then went straight home, instead of to her grandmother as she originally intended. She explained that the reason for this was that she was released so late by the Appellant. She reported the incident to her mother immediately upon her arrival at home. On her testimony she only reported the sexual penetrations to her mother and not the three incidents of assault. She was taken to a hospital where a doctor examined her, recording the result of his medico-legai examination on the J.88 medical report form. Afterwards she went for counselling and, on the date of the trial, she did not fee! good about what happened to her.

[11] During cross-examination the complainant N denied that she was friends with the

Appellant but she confirmed that she knows his name and that they do not live far apart from each other in the township. She maintained that when she was grabbed on the street at about noon, and dragged into the house by the Appellant, there were no-one else in sight or on the street. She also answered that she and the Appellant went through the only gate at the house in question, which turned out to be the Appellant's place of residence. When she was confronted with the fact that there is a salon in the front of that yard, she answered that the people in that salon did not see them because they went in through a back door of the house. She added that she was crying softly but did not shout for help because she was afraid of the Appellant and he told her not to make a noise. Once inside the house, the Appellant locked the house and then he started slapping her for quite a long time but she was not injured on that occasion. She then mentioned that she had some swelling under her eyes and that the doctor at the hospital saw that. In passing we note that no such swelling or any kind of related injury is recorded on the aforesaid J.88, which was handed in by consent during the case for the prosecution and with the legal representative for the Appellant admitting the correctness and the admissibility thereof. When the Appellant briefly left, she was still afraid of him and of his sudden return, which is why she never thought to shout for help, from the house in which she was held captive, from the people in the salon. Cross- examination confirmed the evidence in chief on what happened upon the return of the Appellant to the bedroom and elicited the further evidence that the Appellant undressed her roughly but was gentle during sexual intercourse. She experienced severe pain in her vagina during sexual intercourse but no bleeding. She denied consent and she denied being in any love relationship with the Appellant. She also denied having told the Appellant, when they met, that she was 1514 years old and volunteered the evidence that, when the Appellant started giving her trouble, her father warned him to leave her alone because she was still young. She therefor insisted that the Appellant knew her age but it later transpired that her evidence in this regard was hearsay;

in any event and although the Appellant may have been told that she was young, there is no evidence that he was told how young she was or what her actual age at the time was. The said J.88 form recorded that the complainant N had semen in her vagina and she was asked to explain this in view of her evidence that the Appellant had a condom on before, during and after sexual intercourse. She could not explain the discrepancy.
The questions in cross-examination suggested, and the complainant N conceded, that she look older that her biological age. Unfortunately the presiding officer did not record his observations at the time on what is an important aspect of this matter. In the later evidence of her mother this was also confirmed, that she looks older than she actually is.

[12] Nothing of any particular relevance came forth in the rest of the cross-examination of the complainant N and there was no re-examination.

[13] The mother of the complainant N then testified and corroborated that her daughter left the house on 4 December 2009 ostensibly to go and visit the mother's sister (which we assume is a reference to the person that the complainant N regarded as her grandmother). The mother testified in more detail about the report to her than the complainant N testified about, but some minor differences and discrepancies are to be expected. If their evidence on this report was identical in all respects, that would have been suspicious. She also confirmed the reprimand by the father of the complainant N to the Appellant, that he must stop "troubling" her, but she had very little if any personal knowledge of these events.

[14] That was the case for the prosecution. The Appellant testified in his own defence. He was at the time of the trial (in July 2010) 20 years old and selling fruit as a hawker to make a living. He knew the complainant N because for the past year and five months she was his girlfriend. He believed that she was fifteen (15) years old and saw her at his residence

the previous year on 4 December 2009. He does not know how she arrived there but was told by one Musendo that she was looking for him. He returned home and found her in his yard. They then went into the house where he washed the dishes and they conversed with each other. Thereafter they had three rounds or bouts of consensual sexual intercourse with each other in the open bedroom during the afternoon. In the course of that afternoon the same Musendo came in to the house in order to put the equipment, used in the hair salon, away. The complainant N left at about-19h00 that evening and he started to accompany her. They then had a verbal altercation because she wanted him to accompany her to her house whilst he remembered that he had some errands to run for his sister. They did not part on good terms.

The Appellant testified that everyone knew about their relationship, including his sister who warned them repeatedly against getting pregnant. The Appellant confirmed that there was an incident when the father of the complainant N warned him not to have a relationship with his young daughter and claimed that he then told her father that they loved each other. When this incident took place and how long it was before the incident of 4 December 2009 do not appear from the record and there are some unsatisfactory aspects in the evidence of the Appellant concerning this incident.

[15] The cross-examination of the Appellant by the prosecutor did not shake or destroy the evidence of the Appellant. The Appellant persisted that, although he knew that the complainant N was still at school, he did not know that she was thirteen (13) years old at the time. He did not contest a birth certificate stating her day of birth to be 21 April 1996 and that became evidence by consent. Questions were put to the Appellant on the basis that he knew the complainant N was still a child, but without stating or putting that the Appellant had an actual subjective knowledge of her real age. Some of the questions

became argumentative and called for speculation on the part of the Appellant. He remained steadfast in his version.

Even the accusation by the prosecutor, that the defence of sexual intercourse by consent was a fabrication because of a realisation that there was incriminating evidence against the Appellant, was met with the calm answer that that was not what happened. This accusation falls strange on the ear. The same prosecutor stood by passively when it was formally admitted that the sexual intercourse between the two on 4 December 2009 was consensual. The same prosecutor allowed the J.88 medical report and its content to become common cause between the prosecution and the defence, contradicting the claim by the complainant that she had some swelling or injury to her face as a result of the assault or assaults upon her and the doctor allegedly saw this. Save for the oral evidence of the complainant, there was also no incriminating evidence against the Appellant that would compel the strategy of which he was accused of by the prosecutor.

[16] The said Musendo, a 25-year old male whose full name is Musendo Mathavele, was called as a witness for the defence. He corroborated the evidence of the Appellant in all major respects. He works in the hair salon in the yard at the Appellant's residence. The complainant arrived and enquired about the Appellant. The said Musendo knew why she was there, namely because she had a love relationship with the Appellant, and he saw her regularly at that house. He went and called the Appellant. The Appellant came back to the house and went indoors with the complainant. The said Musendo carried on with his work and at some time, when he closed up the salon, went to put his equipment in the house. He estimated the age of the complainant to be 16 or 17 years old. He never saw anyone being dragged from the street nor did he see any assault upon the complainant that day. In cross- examination he was taken to task on the improbability that he as a 25-year old

would go and call someone like the Appellant who is younger than he is at the request of a young girl and, to boot, leave his salon without supervision. However, that is not so inherently improbable as to be rejected. In this regard the remarks in Viviers v Killian 1927 AD 449 at 454 at springs to mind (own underlining for the sake of emphasis):

“But then we are asked to say that Hughes' evidence is so grossly improbable that it should not have been accepted by the court below.

That, however, is an argument that cuts both wav's. It is true that the circumstances deposed to by Hughes are exceedingly strange. That Mrs. Kilian should not have noticed him as she passed near him on her way to meet the appellant, and that the alleged adultery should have taken place in the manner described by him on a bright moonlight night within a few yards of where he was sitting and on the border of a public street, does seem highly improbable. On the other hand, it is not difficult to understand that Mrs. Kilian should not have observed Hughes. His house was in darkness, he was sitting in the shadow, and if his story is true, her attention would naturally have been directed to the appellant, who was in the street, so that she might very well have passed Hughes without noticing him. Moreover the very improbability of the story is to some extent evidence of its truthfulness. Truth. we know is sometimes stranger than fiction. Had the story been concocted, it is difficult to believe that it would have taken the form which it did. It would have been so much easier to ha ve made up a simple story without any of the improbabilities with which this one abounds, demanding a wealth of imagination with which one could scarcely credit any of the witnesses for the respondent.

The learned Judges who saw Hughes and heard his evidence were satisfied that he was speaking the truth, and I can find no good ground for dissenting from their conclusion."

He was also criticized for saying that he remembered the incident because the police arrived whilst he was present. The answer by the said Musendo was then taken out of

context. He never testified that the police arrived the same day on 4 December 2009.

[17] The case for the defence was closed after this testimony, argument followed and the Sebokeng Regional Court gave an ex tempore judgment on 4 August 2010. No previous convictions were proven against the Appellant. Submissions on punishment followed, after which sentence was imposed.

[18] That brings us to this appeal. We have a number of problems with the evidence of the complainant N, testifying as a single witness and as a youthful one.

[18.1] According to the complainant she was grabbed in clear daylight on a public street with nobody in sight and dragged, past a hair salon with people in attendance there, into a yard and through the back door of the house. In this regard it was never in dispute, and is in fact common cause, that at least the one defence witness was in or at that salon on that day and he saw nothing. In our view her version is inherently improbable.

[18.2] She claims that during this incident on 4 December 2009 she has been assaulted on three separate occasions (when she was taken from the street, when the Appellant returned to the bedroom and immediately after she was released by the Appellant that evening) by the Appellant slapping her with the open hand through the face; yet the medico-iegal examination showed no injuries on her consistent with that version.

[18 .3] On the crucial aspect of this case, namely whether sexual intercourse took place with or without consent, the answers had to be coached out of the complainant. We realise that testifying in court may be a harrowing experience for any witness, especially a child, and that sometimes there is no other way to put the evidence before court. The overall

impression of the evidence in chief by the complainant is however that she answered all questions without difficulty except for those pertaining to her consent.

[18.4] The discrepancy between her oral evidence (that the Appellant had a condom on before, during and after sexual intercourse) and the objective medical evidence (recorded in the said J.88 medical form, that she had semen in her vagina) was never explained or clarified by the prosecution. In addition the use of a condom seems to be more consistent with an afternoon of consensual sexual intercourse between the Appellant and the complainant than a violent grabbing of the complainant from the street, dragging her into the nearest house and then raping her after a number of slaps through the face.

[18.5] The overall picture sketched by the witnesses is that, from shortly after noon until at least early that evening on 4 December 2009, the complainant and the Appellant were together. The incident thus occupied some seven (7) hours or longer. The version of the complainant simply does not account for all that time. On her version she was grabbed around noon, dragged into the house, assaulted, then raped and afterwards told to dress before she was held against her will until early evening when she was released. On that version and in the hours before she was released, she and the Appellant apparently simply waited for the time to go bye and did nothing. This version does not have the ring of truth to it and is highly improbable.

[18.6] On the complainant's version she had more than one opportunity to escape, to make alarm or to call for help. She did neither and this passiveness, over a sustained period of time, cannot be explained simply on the basis that she was afraid of the Appellant. That alleged fear would have been all the more reason to get away from him at the first available opportunity, especially if she also feared for her life, as she claimed in

her testimony.

[18.7] Her explanation as to why she returned to her mother's house instead of continuing to visit her grandmother is also unsatisfactory. She explains that she returned to her mother's house because the Appellant released her so late but one would have thought that, after the ordeal that she went through, she would go straight home for that reason: the ordeal itself and not because of the lateness of the hour.

[19] The Appellant's version is, in our view, not only one that may be reasonably possibly true but is corroborated by a defence witness and some elements of the evidence presented on behalf of the prosecution. The Appellant and the complainant knew each other for quite some time before the incident on 4 December 2009. They lived in the same neighbourhood within walking distance from each other. During 2008 her parents had a problem with the Appellant because he was seeing their daughter and they wished the relationship to end. The said Musenko confirmed that he went to call the Appellant after the complainant had already arrived at the house, where the Appellant found her when he arrived there. The said Musenko also confirmed that during the course of that afternoon he entered the house to put away his equipment upon closing the hair salon.

[20] The Sebokeng Regional Court rejected the Appellant's version as false. This it did on the basis that the complainant disclosed the incident to her mother on 4 December 2009 voluntarily whilst, if the Applicant's version was true, she would have had no reason to do so and she would have had no reason to be crying. We find this logic unacceptable. Firstly, this leaves out of consideration the evidence of the Appellant that he and the complainant had a verbal altercation just before she left for home and they did not part on good terms. Secondly, the version of the complainant and the version of the Appellant are mutually destructive. We cannot see how the version of the complainant can be accepted as the

truth without showing that the version of the Appellant is false, especially where the version of the Appellant, in our view, does not suffer from any improbabilities, inherent or otherwise. See in this regard, for example, National Employers Mutual General Insurance Association v Gany 1931 AD 187; Koster Ko-operatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorwee en Hawens 1974 (4) SA 420 (W), which held that where, at the conclusion of the evidence, the versions of a plaintiff and a defendant were mutually destructive, the onus rested on the plaintiff to prove on a balance of probabilities that the plaintiffs version was true and that of the defendant false; African Eagle Life Assur Company Ltd v Cainer 1980 (2) SA 234 (W) where the same judge explained that the aforesaid approach (that where there are two stories mutually destructive, before the onus is discharged the court must be satisfied that the story of the litigant upon whom the onus rests is true and the other false) only applies in cases where there are no probabilities one way or the other; Senekal v Roodt 1983 (2) SA 602 (T). The correct approach is, in our view, neatly summed up in National Employers' General Insurance Company Ltd i/ Jagers 1984 (4) SA 437 (E) 440D-G:

It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiffs allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities

favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."

The reasoning of the Sebokeng Regional Court was in essence that the evidence of the Appellant must be false because it does not explain the conduct of the complainant later that same evening. We have already pointed out that it did. We also pointed out that whereas her evidence abounds with improbabilities, the brunt of his evidence does ..... not. Furthermore his version is consistent with the objective and common cause medical evidence whilst hers is not.

[21] Another flaw in the reasoning of the Sebokeng Regional Court is the fact that the evidence of the defence witness was not canvassed at all in that reasoning, not even indirectly. That evidence corroborated the version of the Appellant directly and, upon our understanding of the case, could only have been dismissed, rejected or ignored out of hand on the basis that the Appellant and the defence witness conspired to present the court with a concocted fabrication. There is no room on the evidence for such a finding or conclusion.

[22] On the facts before us we find that the sexual intercourse between the Appellant and the complainant on 4 December 2009 was not proven beyond a reasonable doubt to be without her consent; in fact, on the available and admissible evidence the conclusion must be that they had consensual sexual intercourse that day.

[23] We therefore come to the same conclusion that our brothers LOUW J and WRIGHT

AJ reached previously, albeit that they reached only a prima facie view that the appeal against the conviction on rape under section 3 of Act 32 of 2007 should partially succeed in that the said conviction and sentence thereon should be set aside. That leaves us with the question whether that conviction should be replaced with a conviction of the Appellant having contravened section 15(1) of Act 32 of 2007. The provisions thereof are as follows:

“A person ... who commits an act of sexual penetration with a child... is, despite the consent of [that child] to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child”

Section 56(2)(a) of Act 32 of 2007 affords the Appellant a defence if the child in question deceived him 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. In this case it was never the case for the Appellant that he believed the complainant to be older that 16 years at the time: he testified that he believed her to be 15'years old at the time. There is some indication in the evidence that this is what the Appellant believed, on the basis of information received from the complainant, at the time when their relationship started approximately 1years before the incident, but that is contradicted by his clear and unambiguous evidence at the outset of his evidence in chief. We therefore find that such a defence was not made out on the evidence. It follows that the aforesaid conviction should be replaced with a conviction of the Appellant having contravened section 15(1) of Act 32 of 2007.

[24] That brings us to the issue of sentence, which needs to be considered afresh. At the time of the commission of the conduct for which the Appellant was convicted and at the time of the conviction and sentencing before the Sebokeng Regional Court, the present

section 56A of Act 32 of 2007 was not yet on the statute books. We accordingly approach this matter on the basts that section 276(1) of Act 51 of 1977 is a general empowering provision authorising this court to impose a sentence in this case even where no other provision governs the imposition of sentence.

[25] The offence of which the Appellant now stands convicted is one aimed at the protection of children. There can be very little doubt that it is regarded as a serious offence regardless of the fact that sexual penetration took place by consensus. Although the Appellant attempted to draw himself and the complainant as both children and although the complainant had the physical appearance of being a child older than 13 years, the facts are that at the time the Appellant was 20 years old whilst the complainant was only 13 years old. He was already a young man whilst she was still a child and there was an age difference of 7 years between them. The fact that her parents were not in favour of a relationship between them, to the knowledge of the Appellant, compounds the seriousness of the offence. On the other hand, the complainant suffered no physical injuries and her testimony that, some 6 months after the incident, she did not feel “good" about what happened to her is not a sound evidential foundation to hold that she carried emotional scars from and since the incident (as was submitted by the prosecutor in the Sebokeng Regional Court). In this regard it is unfortunate that the prosecutor did not tender additional evidence during sentencing proceedings.

[26] As for the interests of the community, that interest also lies in the protection of its youth even if it requires protecting them against themselves. During argument before the Sebokeng Regional Court it was conceded that rape was a prevalent offence in the jurisdiction of that court and in all likelihood that is also the case with the offence of which the Appellant now stands convicted. In any event it is the interest of the community that

sexual intercourse with children be prevent or deterred by the threat of and by actual criminal sanction. The problems society face with unwanted teen pregnancies, with the spread of HIV, with violence against women and children and a host of other problems are generally known and are cause for real concern.

[27] The Appellant was at the time of the incident 19 years old and upon conviction 20 years old. He is a single young man with no children, yet, and his highest qualification is standard 7 (or grade 9, as it is now known). He left school when his father died. The whereabouts of his mother and her present circumstances are not known to the court. He is unemployed but tried to make a living hawking fruit on the street and thus have no assets or income of note. If we read between the lines, it is clear that both the Appellant and his family as well as the complainant and her family live in circumstances of poverty. He is taken care of by his older sister within her extended family. He is also a first offender. Furthermore he has been in custody for this matter since his arrest on 16 December 2009, as an accused awaiting trial, and as from 4 August 2010 he was held as a convict serving a term of imprisonment until he was released on bail on or about 23 May 2012. Effectively he spent some 36 months behind bars and already has served a period of 21 months and 19 days (from 4 August 2010 to 23 May 2012) of imprisonment.

[28] Taking into consideration the seriousness of the crime, the interest of the community and the personal circumstances of the Appellant, an appropriate sentence would be a sentence of imprisonment for the period already served.

[29] In view of the sentence we intend imposing, we are called upon by section 103(1)(g)"'of Act 60 of 2000 to consider whether, as a result of this conviction and sentence, the Appellant becomes unfit to possess a firearm. The circumstances of this matter is such

that we do not see any grounds upon which the Appellant should be visited with such an unfitness.

[30] That brings us to section 50(1)(a)(i) of Act 32 of 2007, which provides in peremptory language that the particulars of a person, who in terms of Act 32 of 2007 (as is here the case) or any other law has been convicted of a sexual offence against a child, must be included in the National Register of Sexual Offenders. Section 50(2) and (4) thereof makes it clear that a court order to that effect is mandatory. If we had any discretion in this regard, we would have exercised it in favour of the Appellant. However, in view thereof that these are appeal proceedings, this court does not make the order in terms of the said section 50(2) itself. Sub-section (3) thereof stipulates that where a court (such as the Sebokeng Regional Court and clearly intended to be a reference to the trial court) has made such an order under sub-section (2), the clerk of that court must forthwith forward the order to the Registrar of the High Court and that Registrar must immediately and provisionally enter the particulars of the person concerned in the said Register, pending the outcome of any appeal and must, after the appeal proceedings have been concluded, either enter or remove such particulars from the said Register, depending on the outcome of the appeal.

[31] Accordingly we propose that the following order be made:

1. The appeal against the conviction of the Appellant on rape under section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 is upheld and that conviction is set aside.
2. That conviction is replaced with a conviction under section 15(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, namely that the Appellant on 4 December 2009 and at or near
Sebokeng committed an act of consensual sexual penetration with a child aged 13 years.

3. The sentence of the Appellant is set aside and replaced with the sentence, of imprisonment of 21 months and 19 days (being the time already served) and, in terms of section 282 of the Criminal Procedure Act 51 of 1977, that sentence of imprisonment is furthermore antedated to 4 August 2010.

4. In terms of section 103(1)(g) of the Firearms Control Act 60 of 2000 it is determined that the Appellant does not become unfit to possess a firearm as a result of this conviction and sentence.

5. In view of the outcome of this appeal, the order made by Sebokeng Regional Court on 4 August 2010 in terms of section 50(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 is corrected by deleting the description of the sexual offence against a child of which the Appellant has been convicted, as one of “rape of a child', and replacing it with the following description: "an act of consensual sexual penetration with a child between person twelve (12) years and sixteen (16) years’’.

OOSTHUIZENA J

10 June 2013

[32] I concur in the judgment prepared by my brother OOSTHUIZEN AJ. In the result the orders set out in paragraph 31 above are made the orders of this court.

MURPHY J

10 June 2013