REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

Case No: CA & R 25/2018

In the matter between:

NEIL PIETER LE ROUX **Appellant**

and

THE STATE **Respondent**

JUDGMENT

GOVINDJEE AJ

Background

[1] The appellant appeared in the Regional Court, East London, and was convicted on the following counts on 27 September 2018:

a. Rape of Ayandiswa Sowazi ('Sowazi') (in contravention of section 3 of the Sexual Offences Act, 2007)[1] ('the Act');

b. Sexual assault of Kolosa Jadula ('Jadula') (in contravention of section 5 of the Act);

c. Sexual grooming of Heather Ann Sandison ('Sandison') (in contravention of section 18(2)(d) of the Act); and

d. Sexual assault of Sandison (in contravention of Section 5 of the Act).

[2] The appellant was sentenced to eight years' imprisonment on the count of rape of Sowazi, four years' imprisonment on the count of sexual assault on Jadula and Sandison (taken together for purposes of sentencing) and a further six years' imprisonment on the count of sexual grooming. The sentences were ordered to run concurrently, so that the appellant was to serve eight years' imprisonment.

[3] The magistrate refused the appellant leave to appeal against the convictions but granted leave to appeal against the sentences imposed. On petition, the appellant was also granted leave to appeal the conviction in respect of count 1, namely the rape of Sowazi. The appellant is presently on bail.

<u>The rape conviction</u>

[4] The appellant was a grade 7 school teacher at Clarendon Primary School in East London. Sowazi was a 30-year-old female teacher at the school, residing in the school hostel. The incident occurred in the appellant's classroom during the late afternoon following a pre-arranged meeting. The appellant was charged with rape on

[1] Act 32 of 2007.

the basis that he had unlawfully and without Sowazi's consent inserted his finger into her vagina.

[5] It is trite that a court of appeal will rarely interfere with findings of fact of the trial court, including credibility findings with regard to witnesses. In the absence of demonstratable and material misdirection by the trial court, its findings of fact are presumed to be correct, and would be disregarded only if the recorded evidence shows them to be clearly wrong.[2] In assessing the evidence, a court must, in the ultimate analysis, view the evidence holistically in order to determine whether the guilt of the appellant is proven beyond a reasonable doubt. The trial court made credibility findings in favour of Sowazi and accepted her version of the incident.

[6] The respondent supports the findings of the court *a quo* on the basis that it had been established that the accused had imposed his will on Sowazi and overbore her resistance. It was argued that Sowazi's conduct made it clear that she did not consent to the appellant's conduct, even though she had been passive at the time she was penetrated. This passivity was attributed to the unequal relationship between Sowazi and the appellant.

The legal principles

[7] Any person who unlawfully and intentionally commits an act of sexual penetration with a complainant, without that person's consent, commits the offence of rape.[3] The sexual penetration must take place without the consent of the

[2] *S v Hadebe* 1997 (2) SACR 641 (SCA) at 645.
[3] Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007) ('the Act').

complainant for a conviction of rape. The notion of 'consent' is defined in the Act as 'voluntary or uncoerced agreement'.[4] The Act also provides illustrations of circumstances that are indicative of a person not voluntarily or without coercion agreeing to an act of sexual penetration.[5] One such illustration refers to 'an abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act.'

[8] The court reflected on the test for establishing an accused's guilt in ***S v Van der Meyden:***[6]

> 'The onus of proof in a criminal case is discharged by the state if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible he might be innocent…These are not separate and independent tests but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward, might be true. The two are inseparable, each being the logical corollary of the other. In which ever form the test is expressed, it must be satisfied upon consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt and so too does it not look

[4] Section 1(2).
[5] Section 1(3).
[6] 1999 (2) SA 79 (WCD).

> at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true.'

[9] On a rape charge, it is trite that if the state cannot prove non-consent beyond reasonable doubt, the prosecution must fail and the victim's consent is assumed so that the accused should be acquitted.[7] The true enquiry, it has been suggested, is whether the coercion overcame the victim's opposition to the sexual penetration. The fact that a complainant did not physically resist, or otherwise submitted to intercourse or penetration is not directly relevant to the central question of whether she or he voluntarily consented.[8] A mere *submission* does not necessarily include consent. Submission without consent was held to have occurred in ***R v Swiggelaar***.[9] The court held that:

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

---

[7] *South African Criminal Law and Procedure – Volume III: Statutory Offences* RS 24, 2014 chE3-p9.
[8] *Ibid*.
[9] 1950 (1) PH H61 (A) at 110-11.

[10] It is clear that a man that intimidates a woman to the extent that she is induced to abandon her resistance and submit to intercourse or penetration, for which she would otherwise have been unwilling, commits the crime of rape.[10] The definition of coercive circumstances in the Act extends beyond such cases of actual force or intimidation. It includes instances where the complainant is inhibited from expressing unwillingness or resistance to sexual penetration, or unwillingness to participate therein. In *S v S*, for example, a policeman made no threat as such to a woman. She agreed to his demand for sexual intercourse because she believed that he had it within his power to cause her harm. That apprehension was sufficient to vitiate consent.[11] Such cases arise, it seems, when the accused exercises some sort of power, actual or potential, over the complainant, which leaves her unable to resist the demand that she engage in the sexual activity in question.[12]

[11] The facts in ***Otto v The State***[13] provide a useful illustration:

> "[17] The court below considered the twin issues of consent and intention in some detail. It considered the evidence of the complainant that, when the appellant first kissed her, 'she refused and said no'; that after the appellant left the room and then returned, she refused to turn around and look at him as he had instructed her to do; that when he physically forced her head towards him, he thrust his penis into her face; that he then told her to suck his penis and that she had, at first, refused but then did so in the hope that by 'playing along' for a while, he would then leave her alone; that, after he had choked her by thrusting his penis too deep into her

---

[10] *Ibid*.

[11] *S v S* 1971 (2) SA 591 (A) at 596-7.

[12] [12] *South African Criminal Law and Procedure – Volume III: Statutory Offences* RS 24, 2014 chE3-p10.

[13] [2017] ZASCA 114.

mouth, he pushed her to the kitchen, took off her panties and pants and penetrated her.

[18] The court below concluded from this evidence:

'The legal principles applied to the complainant's evidence on consent as highlighted *supra*, demonstrates that the consent by the complainant was neither real, given voluntarily nor demonstrated tacitly. The appellant irrespective of denying intercourse could not have reasonably believed that the complainant had consented to the kissing, the sucking of his penis or the vaginal or anal penetration, all acts which on their own constitute either sexual penetration or sexual violation. In that regard he acted both unlawfully and had the requisite *mens rea* to rape the complainant.'"

[12] The question whether there is *mens rea* for the offence of rape arises in connection with the element of lack of consent. X must know or foresee the possibility that Y is not a consenting party, and yet proceed with sexual penetration.[14] Put differently, if X genuinely believes that Y consents (whether because of Y's conduct, active or passive, or otherwise), then, even though his belief is unreasonable, he lacks *mens rea*.[15]

[13] To determine this issue requires a detailed review of the interaction between the appellant and the complainant, so as to assess whether, on the facts of the matter, the apparent submission and acquiescence of the complainant amounted to consent in the legal sense.[16]

---

[14] *R v K* 1958 (3) SA 420 (A) at 421-2, 423.
[15] See *S v B* 1996 (2) SACR 543 (C).
[16] See *M v S* [2013] ZASCA 43 at para 4.

[14] The complainant was 30 years' old and was engaged in a learnership. One of her mentors was the appellant. This involved observation on classroom management and teaching and a quarterly report. The complainant had avoided meeting the appellant after school on a few occasions. She had suspicions about his motive but tried to block this out and give him the benefit of the doubt as her mentor and father figure. He had nagged her to meet for a short while on the evening of the incident. Snacks had been provided and the appellant had referred to champagne, which the complainant assumed would be non-alcoholic. She tasted the drink and realised it had alcohol and continued to drink. A song played on the appellant's laptop resulted in the complainant agreeing to a dance, albeit reluctantly:

> 'Yes, reluctantly, because I found it weird that he would want to dance with people, but at the same time, in my head I thought you know what, maybe it's not what I think it is because he is my mentor at the end of the day, and to me he's like a father figure.'

[15] The lights were turned off by the appellant. The complainant was told to relax and that she would not be hurt, as she was keeping a distance and leaning back and testified as follows:

> 'He started nibbling on my ear and kissing my neck. I told him I'm not comfortable with what he was doing, but he kept telling me that I must relax and that he won't hurt me or do anything that I don't want him to do to me. His hand also moved down and it started touching my buttocks…I would try and move his hand away from that area, but then every now and then, his hand will go down to my buttocks…After some time…I got tired of

> fighting and not fighting, but like trying to push his hand away and after some time his hand then moved to the front of my pants…He then pushed his hand down to the vagina and he started fingering me…After some time…he took my hand and he put it in his pants and made me rub his penis. I did also…try to pull my hand away…And then I don't (know) what made him stop after some time…and he walked me back to the hostel and that was that…'

[16] All in all, the incident had lasted approximately 35-40 minutes. The dancing incident, including actual penetration, lasted approximately ten minutes. The complainant's evidence was that she told the appellant that she was feeling uncomfortable at the time when he placed his hand on her buttocks. His response was to repeat that she should relax. She never stated specifically to him that he should stop, also not at the time when the appellant placed his hand close to her pubic area, and never moved towards the door to exit. According to the complainant this was due to the shock she was experiencing. The complainant later testified as follows:

> '…I was also in – under traumatic stress and when I said I could not stop him, it's not that I could not stop him more than the fact that I had a brain freeze at that particular moment…I was in shock, so because I was in shock, I could not think straight and I was trying to register everything that was happening at that particular moment…psychologically I was paralysed at that particular time…'

[17] The complainant testified under cross-examination that the appellant had kissed her with his tongue, and she had pulled away. She also indicated that she

had not acted awkwardly when the appellant walked her back to the hostel, and had chatted to him during that journey. Their relationship continued as before until the appellant's conduct towards the second complainant became known, approximately one year later.

[18] The facts of this matter appear to be distinguishable from cases such as ***M v S***,[17] which dealt with an appeal against the appellant's conviction on several charges relating to the sexual abuse of his adopted minor daughter. In that case the complainant consistently registered her objection throughout earlier incidents of inappropriate touching. The manner in which the appellant leveraged gifts, privileges and threats in that manner created a situation wherein the complainant felt indebted and fearful, which vitiated any perceived consent to the sexual activities. Alcohol and drugs also negated any perceived consent. In that case the complainant's state was fragile and the appellant utilised his stature in the community to slowly invite the complainant to acquiesce to his advances. This was improper and calculating, rendering the appellant culpable. The appellant in that case was conniving and distorted his position of authority by providing the complainant with alcohol and drugs to weaken her resistance and cloud her judgment. The court concluded that 'the appellant went out of his way to entice the complainant's consent by effectively subduing her ability to give consent freely and voluntarily. This evidenced his guilty mind, and rendered him culpable.'[18]

[19] The facts in relation to the complainant are largely common cause. Considering the evidence presented, it cannot be held beyond reasonable doubt that

---

[17] [2013] ZASCA 43 at para 46 *et seq*.
[18] At para 52.

the appellant abused the limited power or authority he held over the complainant (as one of her mentors) *to the extent that she was inhibited from indicating her unwillingness or resistance.* In fact, it is clear that she resisted parts of the events that unfolded on the evening in question, leaning back with her body during their dance and removing the appellant's hand from her buttocks, while expressing her discomfort. Given those expressions, it is difficult to conclude that the complainant was inhibited from indicating her resistance *to the sexual act*, or unwillingness to participate, only *because of an abuse of power or authority* by the appellant. The court *a quo* overstated the impact of the element of subservience that was present, as well as the relevance of the age difference in respect of determining whether there was apparent consent.[19] That was in any event not the complainant's version and she had deflected the appellant's advances for some time before agreeing to meet him on the night in question. In doing so, she was also alive to his possible motivation, which was reinforced by her testimony about her state of mind at the time she was asked to dance (quoted above). There was also no evidence of actual force or intimidation, or that the circumstances amounted to coercion which inhibited her from expressing her unwillingness.[20] The appellant's actual or potential power over the complainant was minimal and on a different level to cases involving policemen or even employers. The existing power dynamic was insufficient on its own to cause the complainant to be unable to resist the sexual activity in question. While the complainant's submission to the sexual act is not to be taken to amount to consent, it cannot be said that the complainant had been intimidated or otherwise coerced to such an extent that she was induced to abandon her resistance and unwillingly submit to sexual penetration.

---

[19] At p 792 of the record.

[20] See *S v B* 1996 (2) SACR 543 (C)

[20] But the reference to abuse of power or authority in the Act is illustrative, and that is not the end of the enquiry. At the time leading up to the sexual penetration which resulted in the conviction, the complainant's unwillingness or resistance was caused by her mental state. Can it be said that the state has proven beyond reasonable doubt that the appellant knew that the complainant did not consent to the actual sexual penetration, even though the brain freeze, shock or paralysis that the complainant testified about prevented her from manifesting her lack of consent? Put differently, and accepting that the complainant was ultimately not a consenting participant to the sexual penetration that she experienced, did the appellant know or foresee the possibility that the complainant was not a consenting party and nevertheless proceed with the penetration? When all is considered, the evidence suggests that it cannot be beyond reasonable doubt that the appellant did not genuinely believe that the complainant was a consenting but passive participant during the ten minute period in question, even though this belief may have been unreasonable due to her expression of discomfort and occasional removal of his hand from her body. He accordingly lacked the *mens rea* for a conviction of rape and that conviction must be overturned.

<u>Sentence</u>

[21] The court *a quo* considered a correctional supervision report, a probation officer's report and the accused's affidavit in mitigation in considering the sentence to be imposed. The *Zinn* triad of factors were also considered and applied, and the magistrate remarked that emphasis had to be placed on the elements of deterrence and prevention, bearing in mind the context underpinning the Act. The magistrate was also influenced by the testimony of Sowazi, who testified in aggravation of

sentence. He found that 'the psychological damage caused (to Sanderson) by your exploitation and grooming is similar and on par with that which is usually encountered with rape victims.' The fact that the crimes were committed on the premises of a primary school was considered to be an aggravating factor. The magistrate also appears to have considered the offences as a whole, at times conflating the charges involving the minor (Sanderson) with the other adult female complainants:[21]

> 'The commission of the crimes needed calculation, strategizing and forethought to prey on these *girls* and set them up as we heard' (own emphasis).

[22] The appellant was found to lack remorse (only expressing sorrow once caught and only in respect of the consequences of the actions, without considering the impact on the victims), and this was linked to the possibility of the offences being repeated in future. His personal circumstances (particularly his health and age) were also taken into account as substantial and compelling circumstances justifying departure from the prescribed minimum sentence for the rape conviction. Direct imprisonment on each count was determined to be appropriate, with the sentences to run concurrently due to the appellant's personal circumstances.

[23] The appellant appeals against that sentence on the following grounds:

a. The magistrate over-emphasised the seriousness of the offences and the interests of society;

[21] At p 874 of the record.

b. The court did not have sufficient regard to the actual offences and over-emphasised the issue of deterrence;

c. The magistrate did not have sufficient regard to the personal circumstances and other aspects of the applicant as set out in his affidavit;

d. The court rejected the evidence of the correctional services report for no apparent reason.

e. Once the rape conviction falls away, it is argued that there is no need for the appellant to be incarcerated, so that correctional supervision in terms of section 276(1)(h) of the Criminal Procedure Act, 1977, would be appropriate.

[24] It is trite that a court of appeal ought not to interfere with a trial court's discretionary powers in respect of sentencing. The exception to this is where there has been an irregularity or misdirection by the trial court, or if the sentence is so disproportionate with what the court of appeal would have imposed as a court of first instance, that it warrants interference. A court of appeal is certainly entitled to interfere with an imposed sentence which induces a sense of shock or which appears to be so inappropriate that it suggests that the presiding officer had acted unreasonably. When imposing a sentence, the trial court should have regard to the personal circumstances of the offender, the offence committed and the interests of society. The sentence typically also demonstrates an element of mercy given that the purpose of punishment is to reform an offender for the benefit of himself and society.

[25] In this instance, the court must reconsider the sentences imposed given that the most serious conviction has been overturned. The sentences imposed for the convictions that remain are, in addition, incommensurate and there is a striking disparity between the imposed sentences and what this court considers to be appropriate.[22] The degree of misdirection is sufficient to warrant the conclusion that the trial court did not exercise its discretion reasonably, so that this court must exercise its power to interfere with the sentence imposed by setting that sentence aside.

[26] The fundamental enquiry to be addressed is whether a non-custodial sentence is appropriate for the present matter. Counsel for the appellant submitted that a sentence of correctional supervision in terms of section 276(1)(*h*) of the CPA was appropriate should the rape conviction be overturned. But is a sentence of correctional supervision truly appropriate in circumstances where an offender has been convicted of sexual grooming of a child, bearing in mind the scourge of gender-based violence and national efforts to protect children and prevent their sexual exploitation? This question can only be answered by having regard to, and balancing, the three main interests at stake, namely the accused's personal circumstances, the seriousness of the offences and the interests of the community, as well as by having appropriate regard to the purposes of punishment, namely, prevention, retribution, deterrence and rehabilitation.

[27] There are indeed circumstances where correctional supervision as a sentencing option would be improper and disproportionate to the gravity of the

---

[22] See *S v Kotze* 1994 (2) SACR 214 (O).

offence.[23] Put differently, while it is so that imprisonment should not lightly be imposed if the objective of punishment can be met by another form of punishment, a serious offence of whatever nature can give rise to imprisonment. Sexual grooming of children, while not forming part of the minimum sentences regime, is certainly, from a principled perspective, an offence serious enough to warrant imprisonment. The further question is whether it is appropriate to result in this outcome in this instance, when considering the various factors relating to the nature of the offence, the circumstances of the offender and the interests of society.

[28] As part of this enquiry, due weight must be given to the range of mitigating factors in favour of the appellant. In addition to his age and health problems (which include partial deafness, chronic medication to control blood sugar, cholesterol and blood pressure, vertigo and an eye problem) the public shaming that the appellant has experienced and his prior unblemished record must also be considered.[24] The appellant voluntarily resigned from his position as a teacher at Clarendon Primary School, which saved the school further embarrassment.[25] The appellant is involved with English language and Mathematics worksheets for teachers and learners designed to improve literacy and numeracy skills. He supports his mother through the income generated via this work, which will cease should he be incarcerated.[26]

---

[23] *S v Mngoma* 2009 (1) SACR 435 (E). See, in general, Du Toit *et al Commentary on the Criminal Procedure Act* (Juta) (2017) 28-10F.
[24] See *Kleinhans v The State* [2014] ZAWCHC 68 at para 21.
[25] This was considered to be an important mitigating consideration in *S v Mohlakane* 2003 (2) SACR 569 (O) at para 14.
[26] Given a point of argument raised on appeal, it is perhaps important to note that these facts appear in the appellant's affidavit in mitigation of sentence, which was submitted and accepted prior to the imposition of sentence by the prosecution and trial court without contestation.

[29] The pre-sentencing reports received by the court *a quo* were based largely on the appellant's conviction for rape. The report from East London Community Corrections noted that various treatment programmes were available to address the appellant's behaviour and suggested the possibility of a sentence of correctional supervision in terms of section 276(1)(*h*) of the **CPA**. It appears to be clear that the only reason that report stopped short of actually recommending this outcome was due to the appellant's rape conviction and perceived failure to take full responsibility in that regard.

[30] By contrast, the report compiled by the probation officer recommended imprisonment in terms of section 276(1)(*i*) of the **CPA** based on the seriousness of the crimes and the interest of the community. Again, emphasis was placed on the appellant's failure to take full responsibility for his crimes, with particular reference to his denials in respect of the alleged rape. Given that the rape conviction is to be overturned, these reports are of limited value, a matter to which I will return. They do, however, provide insight regarding the impact of the other offences on Jadula and Sandison. The reports illustrate that Jadula felt anger and embarrassment, and that Sandison's mother reported that her child had required psychiatric and psychological help and that the incidents involving the appellant had affected her academic performance negatively.

[31] While section 18(2)(d) sexual grooming is, in my view, a very serious offence, it cannot be equated with rape, which carries with it a minimum sentence in terms of the applicable legislation.[27] Sexual grooming has been described as a process over

[27] Section 51 of the Criminal Law Amendment Act, 1997 (Act 105 of 1997).

time on several and different occasions to prepare a child for sexual assault. The intent is to groom, which means to tutor, train, prepare and to coach. The perpetrator seeks to gain control to commit, among others, sexual assault or rape.[28]

[32] In this case, the appellant was convicted of sexual grooming in that he had met Sandison on various occasions in East London and unlawfully and intentionally communicated to her by means of inviting, persuading, seducing, inducing, enticing or coercing her to commit a sexual act with him by putting his tongue in her ear, embracing her, placing his head on her breast, touching her legs (the court *a quo* accepted the complainant's evidence that she had pushed away the appellant's hands when he felt her inner thigh) and kissing her neck. The appellant had also discussed sharing a sleeping bag with the complainant and holding her tightly while naked and shared metaphors with her enticing her to push boundaries, with reference to deep dark pools, forests with pillars of gold coin and 'breakthrough' moments. The court *a quo* accepted that the appellant was preparing Sandison for sex, and rejected suggestions that the kisses and hugs could be viewed in isolation. Sandison, it was found, had become entrapped and susceptible to abuse and exploitation.

[33] The interests of the community cannot be ignored in determining an appropriate sentence.[29] Some of the components of the offences occurred on the premises of a primary school. It is also necessary to continue to impress upon

---

[28] *BC v S* [2020] ZAFSHC 180 at para 47. In *S v M* 2007 (2) SACR 60 (W) at para 37, Satchwell J held that grooming 'involves an aspect of deceptive trust created by the offender and manipulation of the child by the adult'. In *S v RC* 2015 JDR 1685 (KZP) at para 55, the court held that manipulation of a child's sexual psyche by an adult for his or her own amusement or sexual diversion is harmful conduct which may have far reaching consequences for the child, even if the adult has no intention of ultimately performing any overt sexual act with the child.

[29] See *S v Nel* 1995 (2) SACR 362 (W).

people in positions of responsibility that they cannot leverage their power, and the esteem with which they may be regarded, in order to satisfy their sexual urges. This is particularly the case with primary school teachers, who are entrusted with shaping the minds of children, and in whom parents place great trust. Such an approach also finds support in the constitutional rights dedicated to children, including the right to be protected from maltreatment, abuse or degradation.[30] Despite the general sentiments regarding overcrowded prisons and the like, members of the community may well regard correctional supervision as an insufficient sentence in the circumstances. The actual victims of the indecent assault and grooming may also side with that view.[31]

[34] Nevertheless, sentences must ultimately serve the public interest and must be based on the facts and circumstances of the case, and not on concern regarding any likely sense of outrage of the public as to whether or not the sentence is appropriate, based on public perceptions of the severity of a particular offence.[32] This does not imply that the natural indignation of interested persona and of the community at large should not be given any recognition whatsoever when sentencing is considered.[33]

[35] Considering all of the above, the core question remains whether the appropriate punishment for the remaining offences warrants a period of imprisonment. In ***S v R***,[34] the court noted that the legislature has clearly indicated that as a whole, punishment, whether it be rehabilitative or, if needs be, highly

---

[30] Section 28(1)(d) of the Constitution of the Republic of South Africa, 1996.

[31] See A Gouws, referencing women's activism calls for "rapists to rot in jail" in 'The state owes women redistributive justice' *The Mercury* (4 May 2021).

[32] See *S v Mhlakaza & another* 1997 (1) SACR 515 (SCA) at *518e-f*. *BR* Southwood *Essential judicial reasoning* (LexisNexis) (2015) 114, 115. *S v Makwanyane and Another* 1995 (2) SACR 1 (CC) at 38-9, paras 87-9.

[33] *R v Karg* 1961 (1) SA 231 (A) at 236B-C; *Reg v Sargeant* [1974] 60 CR App Rep at 71.

[34] 1993 (1) SACR 209 (A).

punitive in nature, is not necessarily or even primarily attainable by means of imprisonment. It is the duty to judicial officers to use the various means at their disposal to arrive at an appropriate, finely tuned sentence without merely defaulting to imprisonment.[35]

[36] The court is alive to the reality that it is possible to impose severe punishment even in cases of very serious offences without making use of imprisonment. Correctional supervision has, in particular, been considered to be an appropriate and severe punishment even for persons convicted of serious offences.[36] Correctional supervision should not be categorized as a lenient alternative to imprisonment.[37] In ***S v Ndaba***,[38] Kriegler AJA held that where a 28-year-old teacher had sexually molested a nine-year-old girl and where the accused suffered from a regressive form of paedophilia, long-term treatment was needed to control the deviation and that correctional supervision was accordingly appropriate.

[37] The full bench has commented with approval on sentiments suggesting that incarceration of offenders is to be limited as far as possible without violating the element of retribution, and that there is a distinction between different kinds of criminals. The people to be imprisoned are those that constitute a real danger to society because they act with premeditation or greed or lust, as opposed to offenders with an unblemished past who act in circumstances unlikely to repeat themselves.[39] The appellant does not appear to fall into the former group and the

---

[35] See *S v Samuels* 2011 (1) SACR 9 (SCA) at paras 9-10.
[36] *S v E* (unreported, GP case no. A274/2016, 14 December 2016).
[37] *S v M* 1996 (2) SACR 127 (T).
[38] 1993 (1) SACR 637 (A).
[39] *Mngoma supra* at para 10.

available evidence suggests that he is, to cite ***Mngoma***, a suitable candidate for rehabilitation.[40]

[38] A few cases provide useful illustrations of the dividing line between custodial and non-custodial sentences in cases involving sexual grooming. In ***S v RC***,[41] the appellant was a teacher who had been sentenced to three years' imprisonment, wholly suspended, for a conviction relating to sexual grooming of a child. The sentence was confirmed by a full bench of the High Court on appeal. In ***S v D***,[42] the appellant was convicted of indecent assault and sentenced to six years' imprisonment of which two years were conditionally suspended. The appellant had gratified himself between the legs of an eight-year-old girl. The majority held that the conduct was sufficiently reprehensible to fall within the category of offences calling for a sentence which would reflect the Court's strong disapproval and act as a deterrent to others minded to satisfy their carnal desires with helpless children. A sentence of only correctional supervision would be inadequate and the majority combined three years' imprisonment in terms of section 276(1)(*i*) of the **CPA** with two years' imprisonment suspended for five years. In ***S v N***,[43] the appellant was given a sentence of five years' imprisonment in terms of section 276(1)(*i*) of the **CPA** for rape, which meant that he had to be imprisoned for only a minimum of one-sixth of that period. In that case, correctional supervision was considered to be insufficient, despite the offender being 17 years of age, also because of the weighting effect of the statutorily prescribed minimum sentence for rape.

---

[40] *Mngoma supra* at para 8.
[41] 2015 JDR 1685 (KZP) at para 1. In this case, dealing with section 18(2)(b) of the Act, in addition to a detailed conversation relating to the meaning of certain sexual terms, the appellant had placed his knee between the legs of the complainant and moved his knee from side to side between her thighs.
[42] 1995 (1) SACR 259 (A).
[43] 2008 (2) SACR 135 (SCA).

[39] It is worth noting that a number of cases have considered correctional supervision to be appropriate, unless the circumstances of the case call for specific denunciation.[44] After careful consideration of the totality of factors, the circumstances of this case do not warrant such denunciation and direct imprisonment is not an appropriate sentence. The report supporting correctional supervision is reasonable and that sentence should be implemented for all the remaining convictions. However, the available reports lack sufficient details as to the terms and conditions that should attach to that sentence, and were obtained following a conviction of rape which is to be overturned. It therefore appears to be necessary for a further report or evidence to be obtained so as to achieve a finely-tuned, appropriate sentence. It would be appropriate for the trial court to consider that report and / or evidence in fixing appropriate conditions for correctional supervision, to accompany the inclusion of the appellant's details in the National Register for Sex Offenders, as a person who remains convicted of a sexual offence against a child.[45]

[40] **Order**

1. The appeal against the conviction on count 1 is upheld.
2. The sentence of imprisonment for counts 3, 4 and 5 is set aside. The matter is remitted to the magistrate's court for imposition of correctional supervision in terms of section 276A(1) of the **CPA**, after a further report and/or evidence is obtained for the purpose of fixing appropriate conditions.

---

[44] See *Mohlakane supra* at para 13.

[45] Section 50(1)(a) of the Act.

____

A GOVINDJEE

ACTING JUDGE OF THE HIGH COURT

Makaula J

I agree.

____

M. MAKAULA

JUDGE OF THE HIGH COURT

Appearances:

Obo the Appellant	:	*Adv A. D. Schoeman SC*
Obo the Respondent	:	*Adv H. Obermeyer*
Heard	:	*3 March 2021*
Delivered	:	*13 May 2021*