Reportable:	YES / **NO**
Circulate to Judges:	**YES** / NO
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)

CASE NO: **CA&R120/2016**
DATE HEARD: **27/02/2017**
DATE DELIVERED: **03/03/2017**

In the matter between:

OLYN, RAMON Appellant

and

THE STATE Respondent

Coram: Olivier J *et* Snyders AJ

JUDGMENT

Olivier J:

[1.] The appellant, Mr Ramon Olyn, appeared in the Regional Court, Kimberley, on two counts of rape[1]. In both charges it was alleged that the appellant had penetrated the vagina of the 6 year old girl, with his penis (count 1) and with his finger (count 2). The appellant pleaded not guilty to both counts and tendered no plea explanation. He was convicted on both counts and sentenced to life imprisonment, on the two counts taken together. The present appeal is directed at the conviction on count 1, and at the sentence.

[1] In contravention of the provisions of section 3 of the **Criminal Law (Sexual Offences and Related Matters) Amendment Act**, 32 of 2007.

[2.] From what was common cause and from factual findings of the Regional Magistrate that are not challenged at this stage, it appears that the complainant went to look for her mother at a shebeen when the appellant came upon her and took her into an outside toilet on the premises. In the toilet the appellant removed both his own pants and the pants of the complainant, and it was at that stage that the appellant sexually assaulted the complainant.

[3.] When other people wanted to use the toilet and could not get the appellant to vacate the toilet, the door was opened from the outside and the appellant and the complainant were discovered in the toilet. The complainant then left the toilet trembling and the appellant's pants were down. The complainant made a report to the effect that the appellant had sexually molested her. The complainant's mother was summoned and when she arrived the complainant started crying.

[4.] A gynecological examination of the complainant revealed injuries indicating penetration. The injuries, however, were consistent with penetration by a penis and/or a finger, in other words the possibility of the injuries having been caused by only a finger was not ruled out.

[5.] The DNA profile of a sample containing material removed by a swab from the vulva of the complainant was identical to that of the appellant. The most conservative possibility that someone else could have a DNA profile identical to that of the appellant was 1 in 31 000 people.

[6.] The appellant did not testify in his own defense, but from statements made in cross-examination by his attorney it appeared that his version was that he was never inside the toilet with the complainant, that he had merely assisted her outside the toilet to pull up her pants and that his finger may in that process have touched her vagina. The rejection by the Regional Magistrate of that version is not challenged on appeal.

[7.] In fact, the appeal against the conviction on count 1 is based solely on the contention that the Regional Magistrate erred in finding that the appellant had penetrated the complainant with his penis. Counsel for the respondent, Mr R R Makhaga, concedes that this finding of the Regional Magistrate was wrong.

[8.] In my view the concession is correct. The complainant testified that the appellant had "*missed*" when he attempted to penetrate her with his penis and that he had penetrated her with his finger.

[9.] The Regional Magistrate erred in finding that the genetic material inside the complainant, and which was on the swab that was analysed, was semen. There was no evidence by the complainant that the appellant had ejaculated at any stage. On the evidence of the forensic analyst the material on the swab could also have been, *inter alia*, skin cells or hair. Material like that could arguably have been left behind after the appellant's finger had penetrated.

[10.] In my view the reasonable possibility was not excluded that the complainant was only penetrated by the appellant's finger, and that his penis had only, as the complainant herself put it, "*poked*" against her waist or hip, which she clearly understood to be an area of her body different from the vagina.

[11.] Both legal representatives suggested that the conviction on count 1 be set aside and substituted with a conviction of attempted rape. In my view it is indeed clear from a reading of the whole of the evidence of the complainant that the appellant's penis had made contact with her hip or waist when he attempted to "*poke*" her vagina with it and "*missed*", which would obviously have constituted attempted rape.

[12.] The Regional Magistrate deemed a sentence of life imprisonment appropriate on the two convictions of rape, taken together, both of which carried prescribed sentences of life imprisonment. The fact that one of the two convictions will now be substituted with a lesser conviction, carrying no prescribed sentence at all, necessitates a reconsideration of the sentence/s.

[13.] It is so that technically speaking life imprisonment would in any event still be the prescribed sentence in respect of the remaining rape conviction (count 2), but in my view it would be unduly harsh and inappropriate on the facts of this matter. This was also conceded by counsel for the respondent. The complainant sustained no physical injuries (other than relatively minor gynecological injuries) during the incident. She was not subjected forcibly. There was no evidence that she sustained lasting psychological harm. The appellant had only one unrelated previous conviction (theft). The appellant had permanent employment at the time of his arrest and it was placed on record that he had contributed towards the maintenance of one of his minor children before his arrest (the other child having been born while the appellant was in custody on these charges).

[14.] The age of the victim in this case is most definitely an aggravating factor, as is the fact that the appellant for all intents and purposes had abducted her when she was looking for her mother. There is also no telling at what point the appellant would have stopped, had he not been interrupted. Even weighed up against these factors, however, the abovementioned mitigating factors, viewed cumulatively, in my view constitute substantial and compelling circumstances justifying a deviation from the prescribed sentence of life imprisonment. Despite her tender age the penetration of the complainant by the appellant with his finger "*cannot be classified as falling within the worst category of rape*"[2].

[15.] In considering an appropriate sentence on count 2 a prescribed sentence of life imprisonment must still however serve as a bench mark[3]. At the same time, however, sight must not be lost of the fact that the appellant had spent 18 months in custody awaiting trial.

[16.] Mr Van Tonder, the attorney who appeared on behalf of the appellant, suggested that the facts of this matter are comparable with those in **S v MMM**[4] and that the

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[2] **S v Nkomo** 2007 (2) SACR 198 (SCA), para [17]; Compare **S v Molefe** 2014 JDR 1317 (GP) para 18.3
[3] Compare **Director of Public Prosecutions, Transvaal v Venter** 2009 (1) SACR 165 (SCA) para [53]
[4] 2013 (2) SACR 292 (SCA)

appellant should there also be sentenced to 15 years imprisonment. I disagree. The most important distinction is that the complainant in that matter had been more than twice as old as the present complainant.

[17.] The preceding attempt by the appellant to penetrate with his penis was essentially part of the same incident and in my view it would, especially where the prescribed sentence in respect of count 2 will be deviated from, be appropriate to take the two convictions together for purposes of sentencing.

[18.] The covering sheet in this matter reflects that the appellant is in custody and it therefore appears that he has been serving the imposed imprisonment pending this appeal. The substituted sentence will therefore be antedated to date that the original sentence was imposed.

[19.] In the circumstances the following orders are made:

1. **THE CONVICTION OF RAPE ON COUNT 1 IS SET ASIDE AND SUBSTITUTED WITH A CONVICTION OF ATTEMPTED RAPE.**
2. **THE SENTENCE OF LIFE IMPRISONMENT IS SET ASIDE AND IT IS SUBSTITUTED WITH A SENTENCE OF 18 YEARS IMPRISONMENT, IMPOSED ON COUNTS 1 AND 2 TAKEN TOGETHER, AND THE SENTENCE IS ANTEDATED TO 8 FEBRUARY 2016.**

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C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION
I concur.

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J A SNYDERS
ACTING JUDGE
NORTHERN CAPE DIVISION

For the Appellant:	**MR A VAN TONDER** **(Kimberley Justice Centre)**
For the Respondent:	**ADV R Makhaga** **(Office of the Director of Public Prosecutions)**