IN THE GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO: A382/2014

17/7/2015

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED
DATE: 17 July 2015
SIGNATURE: Jansen

In the matter between:

MBONGISENA MZWAKHE MAHLANGU Appellant

and

Respondent

THE STATE

JUDGMENT

JANSEN J

[1] On 7 March 2013 appellant was convicted on a count of rape of a minor girl (then five years old) in the Regional Court held at Ermelo by the learned magistrate Mr S Hallat.

[2] On the 2nd of May 2013 the appellant was sentenced to 20 years imprisonment in terms of section 51(2) of the Criminal Law Amendment Act 105 of 1997, which prescribes a minimum sentence of 15 years imprisonment. The appellant's name was to be entered into the register for sexual offences. The appellant was declared unfit to possess a fire-arm in terms of section 103 of Act 60 of 2000

[3] The appellant was 17 years old when he committed the offence, a fact which the magistrate and the High Court seemed to have overlooked. In terms of section 84(1)(b) of the Child Justice Act 75 of 2008, the appellant has an automatic right of appeal. Thus, the magistrate erred in denying the appellant leave to appeal in respect of conviction and sentence and the High Court in granting leave to appeal against sentence only.

[4] The point was taken *in limine* that the mediator, who assisted the complainant in answering questions, was not sworn in. It was argued that this was an irregularity. When regard is had to the function of a mediator, it is to assist a child complainant in understanding questions posed to her and the mediator, in no instance, furnishes the answer given by the child witness. As the questions posed and the answers are recorded, a court can immediately ascertain when a mediator is paraphrasing or restating a question or answer inaccurately. Thus the mediator is not furnishing any evidence. Although it is clearly preferable that a mediator be sworn in, this seems to be more of a precaution to alert a mediator to the grave repercussion of misinterpreting or misrepresenting questions posed, rather than a necessity.

[5] In the case of ***S v Booi and Another* 2005 (1) SACR 599 (B)** it was regarded as a material irregularity where the names, qualifications and the oath or affirmation of an intermediary were not recorded. An intermediary was placed on an even keel with a district surgeon, a pathologist or a police officer. This cannot be correct. An intermediary does not give evidence.

[6] The argument was that the intermediary was also an interpreter and thus a species of "expert witness" and reliance was placed on the case of ***S v Motaung* 2007 (1) SACR 476 (SE)**. However, in the ***Motaung*** matter, even though it was held that a failure to swear in an intermediary was an irregularity, it was further held that it did not *per se* render the witness's evidence inadmissible, because it did not necessarily mean that the proceedings were not in accordance with justice.

[7] Furthermore in ***S v QN* 2012 (1) SACR 380 (KZP)**, it was held not to amount to an irregularity when an intermediary is not sworn in. It was held that it was not apposite to liken an intermediary to an interpreter and although the best route to follow was to swear in an intermediary, the failure to do so did not constitute an irregularity. A mediator does exactly what her epithet depicts – she mediates the questions put, not the answers.

[8] I am in agreement with the authorities which hold that the failure to swear in an intermediary cannot vitiate the proceedings.

[9] The point *in limine* is therefore dismissed.

[10] Having had due regard to the evidence of the five-year-old complainant, a young friend of the complainant, who was nine years old, and who came looking for her, in the company of a friend, and taking into account the evidence of the appellant, I am of the view that the state has proved its case beyond a reasonable doubt. I state this based upon the following analysis of the evidence.

[11] The appellant assisted in a shop ("tuck-shop"), which was part of a RDP house, and the complainant often visited the shop. When the complainant arrived at the shop during September 2010 the appellant pulled her into the kitchen or dining area and raped her.

[12] The complainant testified convincingly in all material respects and did not deviate from her version. Although a single witness and although very young, she was a credible witness, as observed by the magistrate. Even though she only told her mother long afterwards (three years later) what had happened, she immediately told her friends who came looking for her what had transpired in the tuck-shop.

[13] In Trynie Boezaart (ed) **Child Law in South Africa** Juta 2009 at page 580 the following is stated: —

"*The legislature has recently addressed another aspect that has often caused misunderstanding amongst judicial officers, namely children's delayed disclosure of sexual abuse. In order to rectify the erroneous assumption that when a child has been abused, the very first thing he or she will do is to disclose the abuse, the following section was enacted:*

> *In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.*

A finding of untruthfulness of a child's allegation of sexual abuse may thus not solely depend on the fact that a considerable time has elapsed since the abuse happened and the disclosure thereof. This is in recognition of research that indicates disclosure of a gradual process. In addition, many factors may influence the disclosure process such as the perpetrator's threats to silence the child, the child's shame or in intra-familial cases of

abuse the non-abusing parent may not want disclosure for various reasons such as economic or emotional dependency on the perpetrator."

[14] Something was sought to be made of the fact that the door of the shop was differently described by the complainant and her friend (in that it was contended by the one that one could see through the safety door, and by the other that one could not as it was a steel door). Nothing turns on this.

[15] The complainant's evidence was consistent with her friend's testimony. The friend did not witness the incident but went to look for the complainant at the tuck-shop as she had not returned home. She took a friend along. When the two friends arrived at the tuck-shop the door was closed, which was unusual as it was always open during the week. The one friend then knocked and the appellant opened the door. When she asked the appellant where the complainant was, he remained silent. She immediately noticed that the buttons of the appellant's trousers were open. As they were leaving the complainant exited in a frightened state with her skirt

twisted. The complainant told her two friends that appellant had dragged her to the dining room and raped her.

[16] The appellant was not a credible witness. It was put to the complainant by the appellant's legal representative that the complainant had allegedly falsely accused the appellant of raping her on a previous occasion. Whereas, of her own volition, the complainant testified upfront that he had only raped her on one occasion. Later on the appellant proffered a version that the complainant's family had fabricated the evidence of rape against him, a version never put to the complainant by the appellant's legal representative.

[17] The mother also testified that the aunt, who seemed to be the complainant's main caregiver, had heard from the complainant's friends that she had been raped and hence she enquired about it and the complainant told her that she had been raped. It was sought to be argued on behalf of the appellant that the fact that the complainant had reported the rape so late to her mother had to be taken into consideration. There is no merit in this contention as section 59 of the Criminal Law (Sexual Offences and Related

Matters) Amendment Act 32 of 2007 Children's Act 38 of 2005 stipulates that this fact may not be taken into consideration. Furthermore, she reported it immediately to her friends. It was further sought to be argued that her evidence should be doubted as she had allegedly reported two incidents of rape. However, of her own volition, as set out above, she made it clear that she was raped only once by the appellant.

[18] It was also sought to be argued that the wrong appellant was before the court because of the different names used by the appellant. It is not unusual to have nicknames. In the appellant's heads of argument the accused is referred to by the name of Mbonisela, whereas the appellant conceded that his name was Mbongiseni. Sibongeseni was the name used by the complainant. Clearly his real nickname was Mbongiseni whereas his birth certificate depicts him as Mzwake Norman Mahlangu. It was clear that everybody knew that Sibongeseni was a reference to the appellant and this defence is similarly without merit. This is so, particularly because the appellant admitted that he knew the complainant very well. In any event, the prosecutor and the magistrate clearly accepted that it was

not in dispute that Sibongeseni was a reference to the accused Mbongiseni.

[19] After the incident the complainant was taken to a forensic nurse. From the J88 report, it was clear that her hymen had been perforated, which suggests vaginal penetration.

[20] A pre-sentencing report was obtained from the Department of Social Welfare which demonstrated that the complainant had suffered severe emotional and social trauma as a result of the rape incident such as: —

[20.1] Phobia of being alone;

[20.2] Low self-esteem;

[20.3] Decline in school performance;

[20.4] Over sensitivity;

[20.5] Withdrawal; and

[20.6] Fear of men.

[21] The complainant was a happy child and had good relationships within the family and with her peer group before the incident. Since the incident the complainant's school work has suffered and she can hardly cope at school. The complainant also struggles to sleep at night and to venture outside the house when it is dark. She fears being alone and she cannot sleep alone. She has become very quiet and shy. She also indicated that she is ashamed of what happened to her and is also ashamed that the other children in the neighbourhood are aware of the incident and what happened to her.

[22] A report was obtained from a senior probation officer, who emphasised that the appellant did not acknowledge the charges against him. What weighed with the probation officer was that the complainant trusted the appellant as that he was her uncle. However, the probation officer paid lip service to the fact that the age of an accused should be taken into account and ruled out a fine, or a suspended sentence even though he was a first time offender based on the seriousness of the crime. Direct imprisonment was recommended as, according to the probation officer, this option would prevent the appellant "*from committing further crime*".

[23] The magistrate failed to take into consideration the Constitutional prescript set out in section 28(2) of the Constitution of the Republic of SA, 1996 that "***(a) child's best interests are of paramount importance in every matter concerning the child***".

[24] It is clear that a minimum sentence should not be applicable to children aged 16 and 17, as was pertinently held in the constitutional case of ***Centre for Child Law v Minister of Justice and Constitutional Development and Others*** **2009 (6) SA 632 (CC)**. In the majority judgment of this case Cameron J made the following order: —

> *"1.* ***It is declared that sections 51(1) and (2) of the Criminal Law Amendment Act 105 of 1997, as amended by the Criminal Law (Sentencing) Amendment Act 38 of 2007, are inconsistent with the Constitution and invalid, to the extent that they apply to persons who were under 18 years of age at the time of the commission of the offence.***
>
> *2.* ***It is declared that:***

i. *Section 51(6) of the Criminal Law Amendment Act 105 of 1997, as amended by the Criminal Law (Sentencing) Amendment Act 38 of 2007, is inconsistent with the Constitution and invalid; and*

ii. *To remedy the defect, section 51(6) of the Criminal Law Amendment Act 105 of 1997, as amended by the Criminal Law (Sentencing) Amendment Act 38 of 2007, is to read as though it provides as follows:*

"This section does not apply in respect of an accused person who was under the age of 18 years at the time of the commission of an offence contemplated in subsection (1) or (2)."

[25] As stated in SS Terblanche **Guide to Sentencing in South Africa** 2nd edition LexisNexis 2007 at 3.7.2: —

"This provision creates a second category of young offenders: those who were 16 and 17 years of age when the offence was committed. As a general principle, this category should be treated in the same way as children under 16 years of age. Accepting this approach did not come easily. In fact, this provision has been the object of a remarkable range of judgments, and has only recently been settled, in Brandt v S [2005] 2 All SA 1 (SCA).

The essence of this judgment is that the minimum sentences prescribed in the Act are not applicable to these offenders, unless the court decides, on the basis of the particular circumstances of the case, that they should be applied. In reaching this decision the court found that the Act clearly distinguishes child offenders from adult offenders. In the case of adult offenders the starting point is the prescribed sentences. But with children "the court starts with a clean slate". Nevertheless, it can impose the sentences prescribed in section 51(1) or (2). If the court "decides" to impose these sentences, it has to give reasons for its decision. It also

> ***follows that the "'substantial and compelling' circumstances formula finds no application to*** [this category of] ***offenders.***"

[26] If the trial court committed a misdirection of the nature and extent indicated in ***S v Pillay*** **1977 (4) SA 531 (A)**, it means that the presiding officer did not properly exercise the discretion imposed on him to decide on an appropriate sentence. The relevant portion in ***S v Pillay*** reads as follows: —

> ***"Now the word 'misdirection' in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that***

the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence."

[27] When the Constitutional Court handed down its judgment in the ***Centre for Child Law v Minister of Justice and Constitutional Development and Others*** *supra*, section 77(2) of the Child Justice Act (then still in the format of a Bill) remained as it had not yet been approved by Parliament when the court *a quo* heard the matter. (Subsequently of course, section 77(2) has been deleted from the Child Justice Act by section 4(a) of the Judicial Matters Amendment Act 14 of 2014.)

[28] In general, however, it is clear that it can be assumed that the minimum sentencing regime does not apply to 16 and 17 year old children given the provisions of section 28(1)(g) of the Constitution which provides that a child may only be detained as a measure of last resort.[1]

[1] Cf The international-law principles and the South African Law Commission Report on Juvenile Justice (Project 106) dealt with in detail by Ponnan JA in ***S v Brandt*** **[2005] 2 All SA 1 (SCA).**

Sentence:

[29] The appellant was sentenced to 20 years imprisonment. Given the age of the child, and because he was a first offender, it could not be stated, as was done by the probation officer, that only a sentence of direct imprisonment was warranted.

[30] Rather, the appellant should have been sentenced in terms of section 276(1)(i) of the Criminal Procedure Act read with section 77(3) and (4)(b) of the Child Justice Act 75 of 2008 to a term of imprisonment. However, section 276(1)(i) relates only to sentences of five years.

[31] It was clear that the magistrate had seen his surplus of rape cases and deemed it inappropriate that the child should serve a lifelong sentence of trauma and the appellant not, similarly, serve a long term of imprisonment. However, it is perturbing that not only the magistrate but also the legal representative were unaware of the Constitutional Court case of ***Centre for Child Law v Minister of***

Justice and Constitutional Development and Others *supra*, the constitutional mandate and the Child Justice Act 75 of 2008.

[32] The dictum in ***S v Nkosi*** **2002 1 SA 494 (WLD)** at 506F–I is as apposite: —

> ***"The following principles are applicable in guiding a court's discretion in deciding on the suitability of an appropriate form of punishment for a child offender: (i) Wherever possible a sentence of imprisonment should be avoided, especially in the case of a first offender. (ii) Imprisonment should be considered as a measure of last resort, where no other sentence can be considered appropriate. Serious violent crimes would fall into this category. (iii) Where imprisonment is considered appropriate it should be for the shortest possible period of time, having regard to the nature and gravity of the offence and the needs of society as well as the particular needs and interests of the child offender. (iv) If at all possible the judicial officer must structure the punishment in such a way as to promote the rehabilitation and reintegration of the***

child concerned into her or his family or community. (v) The sentence of life imprisonment may only be considered in exceptional circumstances. Such circumstances would be present where the offender is a danger to society and there is no reasonable prospect of his or her rehabilitation[2]*."*

[33] But in the case of ***S v Sinatsi and Another* 2006 2 SACR 291** it was stated: —

"*In the present matter the relative youth of the appellants must give way to the deterrent and retributive effects of punishment. The aggravating features of the case justify such an approach. This is one of those cases where any law-abiding and self-respecting citizen would be repelled by the conduct of the appellants. They took advantage of a man whose only sin was to offer them work. The punishment meted out by the trial Judge fits the particular*

[2] The same sentiment has been echoed by the Supreme Court of Appeal in ***S v BF* 2912 (1) SACR 298 (SCA)** at pages 302 paragraph [8]: —

" ... *A decision regarding an appropriate sentence becomes even more difficult when a juvenile has to be sentenced for having committed a very serious crime, like in this case. Whilst the gravity of the offences calls loudly for severe sentences with strong deterrent and retributive elements, the youthfulness of the appellant required a balanced approach reflecting an equally strong rehabilitative component. ...*"

circumstances of this case and there is no basis for us to interfere."

[34] Another dictum which is instructive is ***S v Phulwane and Another*** **2003 (1) SACR 631 (TPD)** at page 634J where Boshielo J held the following: —

"***I venture to suggest that every judicial officer who has to sentence a youthful offender must ensure that whatsoever he or she decides to impose will promote the rehabilitation of that particular young and have, as its priority, the reintegration of the youthful offender back into his or her family and, of course, the community.***"

[35] Section 69 of the Child Justice Act sets out a complex list of considerations to be borne in mind when sentencing a child. Section 71 provides that a pre-sentencing report must be obtained before a child is sentenced (as was done in this case). Sections 72 to 78 set out various sentencing options. These include the usual range of sentences found in the Criminal Procedure Act, but with

additional controls. In addition, there is provision for community-based sentences and restorative-justice sentences. Section 77 deals with imprisonment. Imprisonment may not be imposed on a child under fourteen. If a child is fourteen or older, imprisonment may only be imposed as a last resort. Additionally, if the offence is a Schedule 1 or 2 offence, there are further restrictions.

[36] Given the barbaric nature of the crime and the very young age of the complainant, I am of the opinion that a sentence of direct imprisonment is warranted. The appellant was in prison for six weeks since the date of conviction and has been in prison since sentencing from 2 May 2013. Thus the appellant has already served a prison term of two years and two months effectively.

[37] Taking account of the above considerations and dicta the appeal is upheld in respect of sentence.

Order

[38] I propose that the court *a quo*'s order be substituted with the following order: —

1. The accused is sentenced to ten years imprisonment.

2. The sentence is antedated to 2 May 2013 in terms of section 282 of the Criminal Procedure Act 51 of 1977.

JANSEN J
JUDGE OF THE HIGH COURT

I agree and it is so ordered

PRETORIUS J
JUDGE OF THE HIGH COURT

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