REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

High Court Case no: 65/2012
Magistrate's serial no: 01/12
Magistrate's Court Case no: RC 101/12

DATE: 31/05/2012

REPORTABLE
THE REGIONAL MAGISTRATE
WYNBERG REGIONAL COURT 3
(MS PRINSLOO)

In the matter between

THE STATE

and

MK ACCUSED

Criminal Procedure - automatic review in terms of s 85 of Child Justice Act 75 of 2000 - sentence - accused convicted on two counts of rape - accused 15 years old - sentence of 5 years' imprisonment strikingly inappropriate.
Sentence - child offenders - general principles – factors to be taken into account - recommendation by probation officer - aimed at rehabilitation of accused outside prison environment by way of alternative care - sentence set aside and matter remitted to trial court to impose sentence afresh based on probation officer's recommendation.
Diversion in terms of chapter 8 section 52(1) of Child Justice Act 75 of 2000 – option of diversion can be considered at any time during the trial and not only prior to conviction.

J U D G M E N T

VAN OOSTEN J:

[1] This matter comes before me by way of automatic review provided for in s 85 of the Child Justice Act 75 of 2008 (the Act). The accused, a 16 year old youth, on his pleas of guilty, was convicted in the regional court, Wynberg, on two counts of rape involving acts of sexual penetration *per anus* with two male complainants, aged 8 years and 12 years respectively. The two counts were taken together for the purpose of sentence and the accused was sentenced to undergo 5 years' imprisonment, which was antedated to the date of his arrest. He was furthermore declared unfit to possess a firearm in terms of s 103(1) of the Firearms Control Act 60 of 2000.

[2] The conviction of the accused is in order. The appropriateness of the sentence however, in my view, is questionable in consequence of which I requested an opinion from the National Director of Public Prosecutions. Ms *Naidu*, of the office of the NDPP, promptly responded and I am grateful for her assistance in furnishing a well-considered opinion which is in accordance with the conclusion I have come to.

[3] The accused was 15 years old at the time of commission of the offences. A pre-sentence report in respect of the accused's personal circumstances, family relations, socio-cultural background and upbringing was obtained and admitted into the evidence by agreement. I shall revert to the salient aspects thereof. The social worker having evaluated all the information she had obtained concluded in recommending that the accused be dealt with in terms of s 53(4)(c) and (d) of the Act. This section of the Act falls within chapter 8 thereof which deals with diversion. The regional magistrate, however, made short shrift of the recommendation in holding "the court is of the opinion that

this Act is a diversion option which is available prior to a person being convicted". She further reasoned that the seriousness of the crimes outweighed correctional supervision sentence options and that "there are sufficient youth prisons in South Africa that are more than equipped with dealing with the accused (sic) disorders as well as programmes to assist him".

[4] As to diversion it is at the outset necessary to consider the provisions of s 52(1) of the Act which provides as follows:

(1) A matter may, after consideration of all relevant information presented at a preliminary enquiry, or during a trial, including whether the child has a record of previous diversions, be considered for diversion if-...' (underlining added)

As is made clear by the underlined portion of the section, the option of diversion can be considered at any time during the trial. The regional magistrate accordingly, wrongly jettisoned the option of diversion resulting in a misdirection, which, undoubtedly, seriously prejudiced the accused. It is however necessary to refer briefly to the principles applicable in sentencing of juveniles as the judgment on sentence of the trial court displays a disturbing lack of consideration thereof.

[5] The circumstances, needs and well-being of child offenders require careful, vigilant examination, evaluation and consideration by a court in imposing sentence (*see Hiemstra's Criminal Procedure* 28-60; SS Terblanche *Guide to Sentencing* 2nd Ed 316). The Act, according to its long title, aims to establish a criminal-justice system for child offenders, in accordance with the values underpinning the Constitution and the international obligations of the

Republic of South Africa (*Brandt v S* [2005] 2 ALL SA 1 (SCA)). In *Centre for Child Law v Minister of Justice and Constitutional Development and others* 2009 (6) SA 632 (CC) (2009 (2) SACR 477) (2009 (11) BCLR 1105) Cameron J, in the majority judgment, with reference to s 28 of the Constitution, held:

'The Constitution draws this sharp distinction between children and adults not out of sentimental considerations, but for practical reasons relating to children's greater physical and psychological vulnerability. Children's bodies are generally frailer, and their ability to make choices generally more constricted, than those of adults. They are less able to protect themselves, more needful of protection, and less resourceful in self-maintenance than adults. These considerations take acute effect when society imposes criminal responsibility and passes sentence on child offenders. Not only are children less physically and psychologically mature than adults: they are more vulnerable to influence and pressure from others. And, most vitally, they are generally more capable of rehabilitation than adults. These are the premises on which the Constitution requires the courts and Parliament to differentiate child offenders from adults. We distinguish them because we recognise that children's crimes may stem from immature judgment, from as yet unformed character, from youthful vulnerability to error, to impulse, and to influence. We recognise that exacting full moral accountability for a misdeed might be too harsh because they are not yet adults. Hence we afford children some leeway of hope and possibility.'

A sentence of imprisonment should be imposed only as a last resort. In *Centre for Child Law*, Yacoob J put it thus (para 86):

'All our courts are obliged when imposing sentence to ensure that a sentence of imprisonment must be imposed on any child, who by definition is any person under the age of 18 years, only as a matter of last resort and only for the shortest appropriate period.'

[6] What are the relevant circumstances of the accused in the present

matter? He comes from an unsophisticated, poor, albeit stable, family background. Juvenile delinquency soon stepped in: he disappeared from home for long periods of time and lived on the streets and, not surprisingly, engaged in substance abuse. This impacted negatively on his scholastic performance and he prematurely abandoned school. He himself was the victim of sexual assault, having been raped on several occasions, and for this reason professed ignorance that rape was a crime. A psychiatric report emanating from Sterkfontein hospital, where the accused was assessed pursuant to an order of court in terms of s 79 of the Criminal Procedure Act 51 of 1977, indicates a diagnosis of moderate mental retardation, reactive attachment disorder and substance abuse (cannabis, alcohol and glue). He was at some stage admitted to Tara hospital and detained at the Walter Sisulu secure centre but his behavioural problems necessitated a transfer to Bosasa.

[7] From what I have set out above it is abundantly clear that the accused is in dire need of guidance, correction, rehabilitation and re-integration into his family and the community (*S v Williams and others* 2002 (1) SA 632 (CC); (1995 (2) SACR 251)). Those objects, which were seemingly ignored by the trial court, in my view, can best be achieved outside the prison environment

(*S v Nkosi* 2002 (1) SACR 135 (W) 147f-i) in providing appropriate alternative care. Direct imprisonment exposing the accused to the many detrimental effects of incarceration, in my view, would merely be counter-productive to the prospects of rehabilitation (*see S v Kwalase* 2000 (2) SACR 135 (C); *S v Blaauw* 2001 (2) SACR 255 (C) 262i-263c). The sentence of 5 years' imprisonment accordingly, is strikingly inappropriate and therefore ought to be set aside.

[8] The social worker's recommendation, as I have mentioned, was that the accused be dealt with in terms of s 53(4)(c) and (d) of the Act, in the following manner: that he be detained at Sterkfontein Hospital for intensive therapy and treatment; that he thereafter be referred to and be ordered to attend sexual offenders programmes and finally, that he be placed under the supervision of a probation officer for purposes of monitoring and follow-up (*S v Z en vier ander sake* 1999 (1) SACR 427 (O) 438j-439b). I am satisfied that the recommendation is in the best interests of the accused and that it ought to be implemented. In view however, of the administrative and other requirements having to be complied with and to be provided for in the sentence to be imposed, I have decided to remit the matter to the trial court for imposing sentence afresh in the light of the findings I have made. In view of the time the accused has already spent in custody it is hoped that this matter will urgently be re-enrolled in the trial court for finalisation.

[9] In the result the following order is made:

1. The sentence imposed on the accused, on 12 April 2012, is set aside.

The matter is remitted to the trial court to consider and impose sentence afresh in the light of the above judgment.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.

H MAYAT
JUDGE OF THE HIGH COURT