REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

29/4/16
CASE NO: A557/2015
Reportable: No
Of interest to other judges: Yes

In the matter between:

MAVIMBELA MZOBANZI **APPELLANT**

and

STATE **RESPONDENT**

JUDGMENT

KUBUSHI, J

[1] Initially, when this matter appeared before the trial court, the appellant pleaded not guilty to the charge of rape of a child of thirteen (13) years. Before he could plead, the trial court explained the competent verdicts on a charge of rape. When the appellant was asked to plead, he pleaded not guilty and proffered a plea explanation that he had a relationship with the complainant. The appellant's legal representative confirmed the appellant's plea of not guilty and intimated that the appellant would provide a full explanation as well as certain admissions in terms of s 220 of the *Criminal Procedure*

Act 51 of 1977 ("the *Criminal Procedure Act*"). The appellant's legal representative, in the plea explanation he tendered on behalf of the appellant, stated that, the appellant admits to having sexual intercourse with the complainant, with consent. The appellant was, however, unaware of the age of the appellant at the time when they had sexual intercourse and the appellant was under the impression that the complainant was sixteen (16) years of age. The appellant was not sure about the date when such sexual intercourse occurred but they were in a relationship during the time of October 2012. The appellant confirmed the plea explanation tendered by his legal representative. He also admitted that the admissions made in the plea explanation were in terms of s 220 of the *Criminal Procedure Act.* The admissions were recorded as such. Later during the proceedings the appellant, through his legal representative, offered to make more admissions in terms of s 220 of the *Criminal Procedure Act.* The said admissions were read into the record by the appellant's legal representative with the consent of the appellant. The admissions are recorded as follows:

> '1. The accused admits that on or during July and October 2014 [this should read 2012], he did contravene Section 15 (1) of Act 32 of 2007:
>
> a. I, the accused, admit that during July and October 2012 and at Crystal Park in the Regional Division Gauteng, I did unlawfully and intentionally commit an act of sexual penetration with a girl, L. M., age 13 years old, by inserting my penis in her vagina and had sexual intercourse with her.
>
> b. Although I admit that the sexual penetration was with consent, I do realise that the complainant was under 16 years of age at the time.
>
> c. I further admit that I knew it was an offence in law to have sexual intercourse with a girl under the age of 16 years of age and I do plead guilty.
>
> 2. I also plead guilty and make these submissions of my own free will and I was not induced by anyone to so plead or make these admissions.'

[2] The respondent accepted the admissions and confirmed that the said admissions were consistent with the state's evidence. From the record, it appears that such acceptance was done after consultation with the complainant, the complainant's mother and the prosecution. The respondent at that stage closed its case without calling any witnesses to give evidence. The appellant also closed its case without leading any

further evidence.

[3] Consequently, the trial court found the appellant guilty of the alternative charge of contravening the provisions of s 15 (1) of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007 ("the Act").

[4] The state proved no previous convictions against the appellant. However, before the parties could address the trial court on sentence the defence requested a postponement in order to be afforded an opportunity to procure, a pre-sentence report, a suitability report for correctional supervision as well as a victim impact report. The matter was thus postponed.

[5] When the matter resumed for sentencing, only two of the three reports were available, namely, the victim impact report and the pre-sentence report. The parties agreed to proceed without the suitability report for correctional supervision.

[6] The pre-sentencing report recommended a sentence of correctional supervision in terms of s 276 (1) *(h)* of the *Criminal Procedure Act* to be imposed on the appellant. It also appeared from the victim impact report that there was no consent by the complainant. I shall deal more fully with this issue later in this judgment as it is a subject of the appeal before us.

[7] Having heard the submissions made by the parties' legal representatives on sentence, the trial court sentenced the appellant to twelve (12) years imprisonment. In terms of s 103 of the *Firearms Act* 60 of 2000, the appellant was declared unfit to possess a firearm. An order was also made in terms of s 50 (1) of the *Criminal Law (Sexual and Related Matters) Amendment Act* 32 of 2007 [which the trial court erroneously stated as the Sexual and Related Matters Act and Criminal Law Amendment Act 42 of 2007), to record the appellant's name in the National Register for sexual offenders and to declare the appellant not allowed to work with children or to work in an environment where there will be children.

[8] Pursuant to the sentence imposed, the appellant applied and was granted leave to appeal sentence by the trial court. Hence, he is before us appealing the sentence only.

[9] The following grounds of appeal are raised by the appellant:

9.1. The trial court erred in considering the contents of the victim impact report insinuating that the victim did not consent to sexual intercourse, as this is inconsistent with the contents of the guilty plea.

9.2. In concluding that the sentence of correctional supervision was not the correct sentence, the trial court erred in not inviting the parties to address it on the issue of imposing a different sentence than the one the parties seem to have been in agreement on.

9.3. The trial court failed to attach sufficient weight to the following factors:

a. The appellant pleaded guilty;
b. The appellant was twenty (20) years old at the time of the commission of the offence;
c. The state accepted the appellant's plea that the complainant consented to sexual intercourse, after consultation with the complainant and her mother;
d. No evidence on injuries was led; and
e. The complainant does no longer suffer from psychological trauma.

[10] The respondent submits that there was no misdirection on the part of the trial court. The trial court took all relevant factors into consideration when sentencing the appellant and the sentence imposed is fair and appropriate in the circumstances, so it is argued.

[11] The Act does not prescribe a penalty for any of the various offences set out therein. As a result, it was held in the Supreme Court of Appeal judgment in *Director of Public Prosecutions, Western Cape v Prins and Others* 2012 (2) SACR 183 (SCA), that on conviction of any one of the various offences set out in the Act, the courts are enjoined in terms of s 276 (1) of the *Criminal Procedure Act* to impose an appropriate sentence on the person so convicted. Section 276 (1) was held, in that judgment, to be 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.

[12] It is not in dispute that there is no penalty prescribed, either in the Act or any other

Act, for a conviction in terms of s 15 (1) of the Act. In this instance, the appellant having been convicted in terms of s 15 (1) of the Act, the trial court was enjoined to sentence the appellant in terms of the provisions of s 276 (1) of the *Criminal Procedure Act* read with s 56A (1) *(b)* of the Act. Section 56A (1) *(b)* of the Act provides as follows:

> 'A court shall, if a penalty is not prescribed in respect of that offence in terms of this Act or by any other Act, impose a sentence, as provided for in section 276 of the Criminal Procedure Act, 1977 (Act 51 of 1977), which that court considers appropriate and which is within that court's penal jurisdiction.'

[13] The issue before this court is whether the sentence imposed by the trial court is fair and appropriate in the circumstances of this case. There are two underlying issues in this regard, namely, whether the trial court erred in considering the contents of the victim impact report insinuating that the victim did not consent to sexual intercourse; and, whether the trial court erred in not inviting the parties to address it on the issue of imposing a different sentence than the one the parties seem to have been in agreement on, that is, a sentence in terms of s 276 (1) *(i)* of the *Criminal Procedure Act* instead of direct imprisonment.

Was the trial court correct to consider the contents of the victim impact report?

[14] The submission by the appellant is that the trial court misdirected itself in considering the contents of the victim impact report insinuating that the complainant did not consent to sexual intercourse, as this is inconsistent with the contents of the guilty plea. In support of this contention, the appellant's counsel refers to the judgment in S *v Khumalo* 2013 (1) SACR 96 (KZP) wherein the appellant pleaded guilty to a charge of murdering her husband. The appellant in that judgment made a statement in terms of s 112 (2) of the *Criminal Procedure Act* in which she admitted the elements of the offence and alleged further that the deceased subjected her to abuse and financial neglect. The state made no objection to the plea. The appellant gave evidence in mitigation of sentence which included evidence in regard to the abuse. The trial court was not impressed by the appellant's evidence in regard to the abuse by her husband and sentenced her to life imprisonment. On appeal against this decision, the court considered whether the state was bound by the s 112 (2) statement. It was held that,

having accepted the appellant's plea, the state was bound by the fact that, as a result of the conduct of her husband, she had become depressed and desperate, as disclosed in the s 112 (2) statement.

[15] In its heads of argument, the respondent submits that there was no misdirection by the trial court in considering the contents of the victim impact report as alleged by the appellant but concedes that a careful reading of the victim impact report does reveal that the complainant did not consent to these sexual acts by the appellant. The respondent submits further that although the failure by the complainant not to give consent cannot, at this stage, affect the conviction, it should not simply be ignored but be regarded as an aggravating factor. This is so, it is argued, because the victim impact report was handed into evidence by consent and its contents were not challenged by the appellant.

[16] It is so that the trial court did consider the contents of the victim impact report and came to the conclusion that the facts provided by the complainant to the probation officer do not suggest any consent or 'lover relationship' between the appellant and the complainant. The trial court as such took this evidence into account in aggravation of sentence when sentencing the appellant to twelve (12) years direct imprisonment.

[17] Even though the victim impact report was handed into evidence by consent of the parties, in light of the decision in S *v Khumalo* above, with which I am in agreement, the respondent was still bound by the admissions made by the appellant in terms of s 220 of the *Criminal Procedure Act.* The appellant admitted to having had consensual sexual intercourse on two occasions, that is, in July and in October 2012, with the complainant. These admissions were accepted by the respondent, after consultation with the complainant and her mother, as being consistent with the evidence of the respondent.

[18] It is therefore, my view that, in considering this evidence for sentencing purposes, the trial court misdirected itself. This calls for a relook at the sentence by this court afresh.

Should the trial court have invited the parties to address it before imposing a different sentence than the one the parties seem to have been in agreement on?

[19] In his heads of argument and in argument before us, the appellant's counsel submits that it was expected of the trial court to invite all parties to address it on the issue of imposing a different sentence than the one all the parties seem to have been in agreement on. It is further submitted that where a sentencing court is not of the intention to impose a sentence to which all parties were clearly in agreement on, such a court ought to invite the parties to address the court further on this issue. In this regard appellant's counsel refers to the judgment in *S v Makela* 2012 (1) SACR 431 (SCA), wherein it was held that it was irregular for a sentencing officer to vary conditions attached to a sentence without having invited the accused to address the court on the critical question whether such conditions ought to be varied.

[20] In my opinion, the principle laid down in the *Mokela*-judgment above, finds no application on the facts before this court. That judgment dealt with the variations of conditions attached to a sentence which is not the case in this instance.

[21] Sentencing is said to be a matter pre-eminently for the discretion of the trial court. In exercising its discretion, the trial court has considerable freedom in deciding which sentence to impose. It should, however, first establish all the facts which may be relevant to the question of the most appropriate sentence.[1]

[22] I align myself with the findings of the court in *S v Magano* above, in that a sentencing court requires the presence of sufficient information to enable it to produce an informed and balanced sentence. I am however not in agreement with the submission by the appellant's counsel that when the trial court opted to impose a different sentence from the one the appellant had anticipated, it ought to have invited all the parties to address it specifically on that issue.

[23] On perusal of the record it is apparent that all the parties were provided an opportunity to address the trial court on sentence. Two reports were handed in, namely the victim impact report and the pre-sentencing report. The pre-sentencing report recommended a sentence in terms of s 276 (1) *(h)* of the *Criminal Procedure Act.* The appellant's legal representative chose on his own volition to persuade the trial court to

[1] See S v Magano 2014 (2) SACR 423 (GP).

impose a sentence in terms of s 276 (1) *(i)* of the *Criminal Procedure Act* and the respondent recommended that sentence as well. It is clear on perusal of the judgment on sentence of the trial court that the trial court considered all the recommended sentences and found direct imprisonment to be the only appropriate sentence in the circumstances of the case.

[24] A further submission by the appellant is that when considering the sentence to impose, the trial court failed to consider all the factors stated in paragraph [9.3] of this judgment. I do not agree.

[25] It is common cause, in this instance, that when meting out sentence, the trial court considered all the factors traditionally taken into account when imposing sentence. The trial court considered the nature and seriousness of the offence, the interest of society and the personal circumstances of the appellant.

[26] The factors the appellant is complaining about constitute some of the personal circumstances of the appellant. It is indeed true that when considering sentence, the trial court did not mentioned some of the factors referred to by the appellant in paragraph [9.3] of this judgment. On perusal of the trial court's judgment on sentence it can be noted that the trial court took into account the fact that the appellant was a first offender and that he pleaded guilty. Other than that nothing more is said about the personal circumstances of the appellant. This, however, does not necessarily mean that if the trial court did not mention the factors in paragraph [9.3] of this judgment, in its judgment, it did not consider them. From the pre- sentence report it can be gleaned that the appellant was twenty (20) years old at the time of the commission of the offence, he had a child who was residing with its mother who is unemployed but receives a child grant, the appellant was gainfully employed at the time of his arrest - he did part time work as a taxi marshal and earned an income of approximately R1 500 on busy days. All these factors were before the trial court when it considered the appropriate sentence to impose.

Is the sentence imposed by the trial court fair and appropriate?

[27] Sentencing is a matter pre-eminently for the discretion of the trial court. The court

hearing an appeal should be careful not to erode that discretion and would be justified to interfere only if the trial court's discretion was not judicially and properly exercised which would be the case if the sentence that was imposed is vitiated by the irregularity or misdirection or is disturbingly inappropriate.[2]

[28] The offence in terms of s 15 (1) of the Act is said to be aimed for matters where the complainant is a willing party, as the sexual intercourse is consensual and places the issue of sentence in an entirely different category than those reserved for sexual offences where the complainant is unwilling.[3]

[29] In this instance, the appellant's legal representative and the respondent contended at the trial that the most relevant sentence which ought to be imposed is one in terms of s 276 (1) *(i)* of the *Criminal Procedure Act.* This is the same submission argued by the appellant's counsel before us.

[30] The case before us is an odd one in that though the respondent had accepted the admission made by the appellant that the sexual intercourse was consensual, it, however, appears from the victim impact report that there was in fact no consent.

[31] This resulted in the victim impact report providing a report based on the fact that there was no consent. I have, earlier in this judgment, dealt with this issue and concluded that the respondent is bound by the admission made by the appellant. Having concluded that the respondent is bound by the appellant's admission that the sexual intercourse was consensual should the negative result of the impact be attributed to the appellant? I do not think so.

[32] It is reported in the victim impact report that the sexual intercourse has emotionally and psychologically negatively affected the complainant. This is an anomaly in the sense that normally the complainant would have consented to the sexual intercourse. And, as such, it would not be expected that she would have been negatively impacted by the act of sexual intercourse to which she had consented to.

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[2] See S v Packereysammy 2004 (2) SACR 169 (SCA).

[32] The trial court considered its judgment on sentence in the light of the negative victim impact report which to me is unfair to the appellant more so because the respondent accepted his plea after consultation with the complainant and her mother. If the complainant did not consent to the sexual intercourse the plea should not have been accepted.

[33] In that sense, it is my view that the sentence imposed by the trial court is disturbingly inappropriate and should be set aside and replaced with an appropriate one. The appellant is still relatively young, he was twenty (20) years at the time of the commission of the offence and was twenty-two (22) years of age when he was sentenced; he was gainfully employed as a taxi marshal; he is a first offender; and although he initially pleaded not guilty, the admissions he subsequently made are an indication that he wanted to plead guilty; this is a sign of remorse; the personal circumstances of the appellant show that he is a good candidate for rehabilitation.

[34] According to the record the appellant has been in custody for almost a year now awaiting this appeal. In my opinion, a suspended sentence of imprisonment with the relevant conditions attached will be a suitable sentence in the circumstances of this case. The sentence will suit the crime and be in the interest of the community and serve to rehabilitate the appellant.

[35] In the premises, I would propose the following order to be made:

1. The conviction is confirmed.
2. The appeal on sentence is upheld.
3. The sentence of twelve (12) years imprisonment imposed by the trial court is set aside and replaced with the following:

    "1. The accused is sentenced to six (6) years imprisonment of which five (5) years is suspended for five (5) years on condition that the accused is not convicted of contravening section 15 (1) of Criminal Law (Sexual and Related Matters) Amendment Act 32 of 2007 or an offence of which rape is a competent verdict, committed during the period of suspension.

    2. In terms of section 103 (1) of Firearms Act 60 of 2000 the accused

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[3] See S v Booi 2012 (2) SACR 52 (FB) para 6.

remain unfit to possess a firearm.

3. In terms of section 50 (1) of Criminal Law (Sexual and Related Matters) Amendment Act 32 of 2007 the accused name is to be recorded in the National Register of Sexual Offenders and the accused is not allowed to work with children or to work in an environment where there will be children."

4. The sentence is, in terms of section 282 of the Criminal Procedure Act, antedated to 30 April 2015.

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E.M.KUBUSHI
JUDGE OF THE HIGH COURT

I concur and it is so ordered

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P.M. MASUSE
JUDGE OF THE HIGH COURT

Appearances:

On behalf of the appellant:	Mr Adv L. A Van Wyk Instructed by: **PRETORIA JUSTICE CENTRE** 2nd Floor FNB Building 206 Church Street PRETORIA 0001
On behalf of the respondent:	Adv. M. J. Makgwatha Instructed by: **DIRECTOR OF PUBLIC PROSECUTIONS**

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