IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: AR21/20

In the matter between:

SIHLE JETRO KUNENE APPELLANT

and

THE STATE RESPONDENT

REASONS FOR JUDGMENT

Seegobin J (Vahed J concurring):

[1] After hearing argument in this matter on 30 April 2021, we issued an order setting aside the appellant's conviction and sentence, thereby allowing for his immediate release. We indicated at the time that reasons for the order will follow. These are the reasons.

[2] The appellant was arraigned in the Vryheid Regional Court on four counts of rape involving a young complainant who was 11 years old at the time. According to the charge sheet, the appellant was alleged to have committed these offences in the period from 1 January 2012 to 31 December 2012 at or near Bilanyoni in the Regional Division of KwaZulu-Natal. The appellant was 17 years old and a scholar at the time. He was 18 years old when he was charged.

[3] The appellant was legally represented throughout. Notwithstanding the severity of the charges, he was released on a warning. After protracted proceedings spanning some seven years, the appellant was eventually convicted on 7 January 2019 of two counts of rape. He was sentenced to 15 years' imprisonment on each count. The sentences were ordered to run concurrently.

[4] The appellant's application for leave to appeal against conviction and sentence was refused by the court *a quo* on 30 October 2019. Such leave was granted by this court on petition on 10 February 2020.

[5] A fundamental issue that arose on appeal was whether the appellant's fair trial rights had been infringed, given the number of lengthy postponements and delays that took place from the time of the appellant's first appearance in 2013 until the matter was finalised on 12 March 2019. It should be pointed out at the outset that the issue relating to the appellant's fair trial rights was not pertinently raised either by Ms Andrews on behalf of the appellant or by Mr Mthembu on behalf of the State. Counsel were nevertheless agreed that given the manner in which the matter was dealt with in the court *a quo*, this was an issue that could not be ignored by this court.

[6] To place matters in perspective the record reveals the following:

(a) The J15 records that the appellant was arrested on 14 September 2012 and made his first appearance on the same day. It seems that the appellant was released on warning on this occasion. The record does not reveal how many appearances were made since 14 September 2012, however on 29 April 2013 the magistrate recorded on a document that the matter was remanded finally for trial in the regional court on 14 May 2013. Between that date and 23 October 2013, one has only the magistrate's notes to go by.

(b) On 14 May 2013 the notes indicated that the 'attorney [is] reportedly unwell' and the matter was adjourned to 31 May 2013. For this appearance, the appellant was represented by Mr Gumbi (from Legal Aid). On 31 May 2013 the notes suggest that the

appointment of a defence attorney was awaited and the matter was adjourned to 11 June 2013. On 11 June 2013 Mr Gumbi again represented the appellant and the matter was adjourned to 24 June 2013. The notes suggest that the reason for this was 'for consultation' but do not indicate whether it was the State or the defence who required time to consult.

(c) On 24 June 2013 the matter was adjourned to 'the Pre-Trial Court' on 19 July 2013. Mr Gumbi represented the appellant. From this point onwards it must be assumed, unless indicated otherwise, that Mr Gumbi appeared on each occasion. On 19 July 2013 the matter was again adjourned to 23 September 2013. Again the notes suggest that the reason was 'for consultation' but once again did not indicate whether it was the State or the defence who required time to consult. On 23 September 2013 the matter was adjourned to 9 December 2013. The notes suggest that the reason for this was because there were no witnesses present.

(d) On 9 December 2013 the matter was adjourned to 22 April 2014. Again, the notes suggest that the reason for this was because no witnesses were present. On 22 April 2014 Mr Gumbi was not present but the notes suggest that, by prior arrangement, the matter was adjourned to 10 July 2014. The notes also record that 'attorney on back up roll' but there was no indication as to what precisely that meant. On 10 July 2014 the courtroom in Vryheid was occupied by 'a magistrate visiting from Pietermaritzburg' and the matter was adjourned to 30 October 2014.

(e) On 30 October 2014 the courtroom at Vryheid was again occupied by a visiting magistrate and the matter was adjourned to 4 and 5 May 2015. The notes record that the matter was accorded preference for those dates. However, on 4 May 2015 the matter could not proceed, as the notes reflected that 'intermediary got a medical appointment' (sic). The matter was adjourned until the following day, 5 May 2015. On 5 May 2015 the trial commenced before the learned magistrate Ms Luvuno. This was two years and eight months after the appellant's arrest and first appearance in court. After the intermediary was sworn in and the complainant underwent the prescribed competency test, she commenced her evidence in chief. At 14h30 the matter was adjourned 'due to the lateness of the hour' to 8 July 2015.

(f) On 8 July 2015 the matter did not proceed. It seems that the complainant was not brought to court and, in addition, that Mr Gumbi was indisposed. The matter was adjourned to 3 August 2015. On 3 August 2015 Mr Gumbi was again ill. The matter was adjourned to 19 August 2015, and on that date, the State witnesses were absent and the matter was again adjourned to 7 October 2015.

(g) On 7 October 2015 Mr Gumbi was ill again and the matter was adjourned to 2 December 2015. On 2 December 2015 the matter was adjourned to 2 June 2016. Again, the State witnesses were not present. On 2 June 2016 the matter was adjourned again, this time to allow 'the attorney to listen to the tapes'. On this occasion Mr Nkosi appeared for the appellant. The matter was adjourned to 20 June 2016.

(h) On 20 June 2016 Mr Nkosi was absent without prior arrangements being made. The matter was adjourned to 21 July 2016 'for attorney to listen to CD' (sic). On 21 July 2016 the matter was adjourned to 28 July 2016 with the reason being that it was 'to arrange [a] date with [the presiding officer] for [further evidence]'. The notes reveal that the appellant was excused from attendance on 28 July 2016. On 28 July 2016 the appellant was understandably absent but a warrant for his arrest was nevertheless issued and stayed. The matter was adjourned to 1 September 2016.

(i) On 1 September 2016 the presiding magistrate, the defence attorney and the appellant were absent. The matter was adjourned to 15 September 2016. On 15 September 2016 Mr Goqo indicated that he was now appearing for the appellant. He indicated that he had listened to the recordings of the proceedings thus far and was ready to proceed. The presiding magistrate was absent and the matter was adjourned to 12 October 2016. Mr Goqo was told that telephonic arrangements would be made with him if his presence was required on 12 October 2016.

(j) On 12 October 2016 Mr Goqo was absent. The matter was adjourned to 25 October 2016. On 25 October 2016 the presiding magistrate was absent. The matter was adjourned to 10 January 2017. From this point on Mr Goqo represented the appellant unless otherwise stated.

(k) On 10 January 2017 the intermediary was not available and the matter was adjourned to 27 February 2017. On 27 February 2017 the recording system was found to be defective and the matter was adjourned to 4 May 2017. On 4 May 2017 the CCTV

and recording systems were out of order and the State witnesses were not present. The matter was adjourned to 26 July 2017.

(l) On 26 July 2017 the presiding magistrate was 'indisposed'. The matter was provisionally adjourned to 31 July 2017, and Mr Goqo complained about the delays. On 31 July 2017 the matter was adjourned to 18 July 2017, with no reasons given. On 18 July 2017 a new prosecutor was present, and certain exhibits were handed in. A new intermediary was examined and sworn in. The complainant was processed through a further competency test and was admonished to tell the truth. Her evidence in chief was led *de novo*. While the complainant was still 'in chief', the proceedings were adjourned at 14h30 to 23 October 2017.

(m) On 23 October 2017 the complainant and the social worker (carer) were not present. Mr Goqo opposed a further adjournment, citing inordinate delays since 2012. The matter was however adjourned to 27 November 2017. On 27 November 2017 Mr Goqo was not present and no reason was indicated for this. The matter was adjourned to 23 January 2018. On 23 January 2018 further evidence in chief from the complainant was led, and cross-examined by Mr Goqo. The court at 15h00 adjourned to 13 March 2018.

(n) On 13 March 2018 the presiding magistrate was again 'indisposed'. The matter was adjourned to 12 April 2018. Arrangements were made for the appellant not to be present on 12 April 2018 as a further date would be set. On 12 April 2018 the appellant was not present by prior arrangement and the matter was adjourned to 24 May 2018. On 24 May 2018 the matter was adjourned to 26 June 2018 because the presiding magistrate had to attend a funeral in the Eastern Cape.

(o) On 26 June 2018 the evidence of two further witnesses was taken and at 15h00 the matter was adjourned to 26 July 2018. On 26 July 2018 the matter was adjourned to 23 October 2018 for evidence from the doctor to be led. On 23 October 2018 the doctor testified, and the State thereafter closed its case. The defence argued for a discharge in terms of s 174 of the Criminal Procedure Act 51 of 1977. The matter was adjourned to 19 November 2018.

(p) On 19 November 2018 the s 174 application was dismissed. The appellant testified and completed his evidence, whereafter the matter was adjourned to 24

January 2019 for further defence witnesses. On 24 January 2019 the appellant decided to close his case, and argument followed immediately thereafter. After a brief adjournment, judgment was delivered on the same day. The appellant was found guilty on two counts, and the matter was adjourned to 12 March 2019 for sentence.

(q) On 12 March 2019 the appellant was sentenced to 15 years' imprisonment in respect of each of the two counts of rape, with the sentences ordered to run concurrently. On 14 May 2019 the appellant applied for leave to appeal. The matter was adjourned to 19 June 2019 for transcripts to be obtained, and then on that date again adjourned to 31 July 2019 for the same reason.

(r) On 31 July 2019 the matter was again adjourned to 13 August 2019 for transcripts to be obtained, and then on 13 August 2019 again adjourned to 25 September 2019 for the same reason. On 25 September 2019 the matter was adjourned to 1 October 2019 for the hearing of the application for leave to appeal.

(s) On 1 October 2019 the new Legal Aid attorney indicated that she had 'too much on her plate' and did not have time to consult with the appellant. The matter was then adjourned to 17 October 2019. On 17 October 2019 the matter was adjourned to 23 October 2019, and on that date, further adjourned to 29 October 2019.

(t) On 29 October 2019 the application for leave to appeal against both conviction and sentence was refused. On 10 February 2020 Balton and Van Zÿl JJ granted leave to appeal against both conviction and sentence. On 22 June 2020 Madondo DJP ordered the reconstruction of the record, as certain evidence appeared to be missing.

[7] The appeal was set down for 30 April 2021. From the appellant's first appearance in the court *a quo*, his matter has been in court on at least 46 occasions with only eight of these being occupied with actual trial proceedings (one of the eight being a repetition).

[8] Section 35(3)*(d)* of the Constitution provides that:

'35(3) Every accused person has a right to a fair trial, which includes the right –

. . .

(d) to have their trial begin and conclude without unreasonable delay.'

[9] The right to a speedy trial was considered by the Constitutional Court in *Sanderson v Attorney-General, Eastern Cape*[1] where the accused complained about a breach of his constitutional right to a public hearing within a reasonable time after having been charged. He relied in that regard on s 25(3)*(a)* of the interim Constitution. In *Van Heerden v NDPP*[2] the observations and findings of the Constitutional Court in *Sanderson* were summarized by Navsa ADP as follows:

'[47] The court in *Sanderson* noted that the right to a trial within a reasonable time is fundamental to the fairness of a trial. It went on to consider how a determination is to be made of whether a particular lapse of time is reasonable. In arriving at a conclusion the court warned that regard should be had to the imperfections in the administration of criminal justice in our country, including those of law enforcement and correctional agencies. It acknowledged that they were all under severe stress.

[48] In *Sanderson* it was stated that the amount of elapsed time was central to the enquiry. The following part of the judgment is important:

> "(T)ime has a pervasive significance that bears on all the factors and should not be considered at the threshold or, subsequently, in isolation."

[49] Kriegler J, in *Sanderson*, stated that the relevant considerations are not only conditioned by time, but that time is conditioned by them. He referred to the factors generally relied upon by the state to diminish the effect of elapsed time. Generally these are waiver of time periods, time requirements inherent in the case and systemic reasons for the delay. As to how courts should approach the lapse of time the following is said in para 30:

> "The courts will apply their experience of how the lapse of time generally affects the liberty, security and trial-related interests that concern us. Of the three forms of prejudice, the trial-related variety is possibly hardest to establish, and here as in the case of other forms of prejudice, trial courts will have to draw sensible inferences from the evidence. By and large, it seems a fair although tentative generalisation that the lapse of time heightens the various kinds of prejudice that s 25(3)*(a)* seeks to diminish."

[50] The court in *Sanderson* thought that the nature of the prejudice suffered by an accused is the first of the most important features bearing on the enquiry presently under discussion. This,

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[1] *Sanderson v Attorney-General, Eastern Cape* [1997] ZACC 18; 1998 (1) SACR 227 (CC); 1998 (2) SA 38; 1997 (12) BCLR 1675.

[2] *Van Heerden and another v National Director of Public Prosecutions and others* 2017 (2) SACR 696 (SCA) paras 57-53.

said the court, would be considered on a continuum, from incarceration through restrictive bail conditions and trial prejudice and mild forms of anxiety. In the balancing act the more serious the prejudice, the shorter the period within which the accused is to be tried. The following appears in para 31:

> "Those cases involving pre-trial incarceration, or serious occupational disruption or social stigma, or the likelihood of prejudice to the accused's defence, or — in general — cases that are already delayed or involve serious prejudice, should be expedited by the State. If it fails to do this it runs the risk of infringing s 25(3)*(a)*."

[51] Kriegler J stated that if an accused has been the primary agent of delay he should not be able to rely on it in vindicating his rights to a trial within a reasonable time. An accused, so the court said, should not be allowed to complain about periods of time for which he has sought a postponement or delayed the prosecution in ways that are less formal.

[52] The second factor, according to *Sanderson*, is the nature of the case. In that regard the following appears:

> "Judges must bring their own experiences to bear in determining whether a delay seems over-lengthy. This is not simply a matter of contrasting intrinsically simple and complex cases. Certainly, a case requiring the testimony of witnesses or experts, or requiring the detailed analysis of documents is likely to take longer than one which does not. But the prosecution should also be aware of these inherent delays and factor them into the decision of when to charge a suspect. If a person has been charged very early in a complex case that has been inadequately prepared, and there is no compelling reason for this, a court should not allow the complexity of the case to justify an over-lengthy delay."

[53] The third and final factor set out in *Sanderson* is "so-called systemic delay". Under this heading the following was listed:

> "(R)esource limitations that hamper the effectiveness of police investigation or the prosecution of a case, and delay caused by court congestion."

The court also issued a warning in the following terms:

> "Systemic factors are probably more excusable than cases of individual dereliction of duty. Nevertheless, there must come a time when systemic causes can no longer be regarded as exculpatory."' (Footnotes omitted.)

[10] In determining whether an accused person's right to a speedy trial has been infringed, a holistic approach is required. Such an approach in the context of delays was

emphasized in *S v Le Roux.*[3] In this case a period of 13 years had elapsed since the commission of the offence (public violence) and the eventual appeal hearing. The trial itself lasted six years. Whilst holding that there was no explanation for the delay, the SCA nevertheless found that the delay by itself did not provide a basis for a referral back to the trial court in the absence of a conclusion that the right to a fair trial had been infringed.

[11] In *Bothma v Els and others*[4] the Constitutional Court (per Sachs J) emphasized that the nature of the offence must also be considered, together with the other factors referred to above. The court held that any analysis which only takes into consideration factors like the duration of the delay, the reason for the delay and the potential trial prejudice but not the nature of the offence (especially when vulnerable persons like young children have been the victims of sexual offences) will be too narrow.

[12] In light of the factors mentioned above, it becomes necessary in the present matter to have regard to the lapse of time, the causes thereof as well as the nature of the offence in question in order to determine what real prejudice was suffered by the appellant herein. As stated earlier, a period of some seven years had passed from the time when the appellant was first charged until the trial was finalized. The detailed history set out above shows that the delays in the matter were occasioned by what might rightly be termed as systemic delays, and that periods of time were lost mainly because of the non-availability of the presiding magistrate and/or the absence of witnesses. On the occasions on which the appellant himself was absent, it was because arrangements had already been made for the trial to be adjourned due to the reasons mentioned above. On every other occasion the appellant was present only to be informed that the matter could not proceed. The prejudice to the appellant in these circumstances is self-evident.

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[3] *S v Le Roux and others* 2010 (2) SACR 11 (SCA).
[4] *Bothma v Els and others* 2010 (1) SACR 184 (CC).

[13] A most concerning feature of the delays herein is that a period of two years and eight months had elapsed from the time of the appellant's arrest and first appearance until the trial commenced on 5 May 2015. After commencing her evidence in chief, the matter was adjourned to 8 July 2015. Thereafter a period of two and a half years passed from the time that the young complainant commenced her evidence until the matter resumed again on 18 July 2017. What is concerning is that the new prosecutor (Ms Symington), in the absence of any formal application before the learned magistrate or reasons therefore, commenced to lead the evidence of the complainant *de novo*.

[14] The consequence of this was that the complainant's evidence was now at variance with what she had testified to on the first occasion. It suffices to mention just two crucial aspects in this regard. The first is that whereas on the first occasion she was adamant that the appellant had raped her on three consecutive occasions, when she re-testified she maintained that it only happened on two separate occasions, and she had denied that she had initially testified about three rapes. The second aspect relates to the type of pyjamas she wore: whereas on the first occasion she testified to wearing a top, pants and panty, on the second occasion she maintained that she wore a night dress without a panty.

[15] On the two occasions when she testified, the complainant maintained that she had identified the appellant by his voice only. No evidence was led to test the reliability of the voice identification. The room in which these incidents were alleged to have taken place was dark and she never saw the appellant at all. She further testified that the offences were committed on a small bed which was also occupied by two other children. How probable it was for these incidents to have taken place in these circumstances was never explored in the evidence.

[16] It is not clear from the record why the initial prosecutor was unable to continue with the trial after having led the complainant's evidence in chief on 5 May 2015. It is also not clear why Ms Symington (the new prosecutor) would elect to lead the complainant's evidence *de novo* knowing full well that the complainant had already

testified on a previous occasion. When Ms Symington embarked on this course of conduct, she did so without sight of the notes (which were available) of either the magistrate or the defence attorney involved. Nor did she consider it necessary to listen to the previous recording to satisfy herself about the evidence already given by the complainant. Quite strangely, Ms Symington informed the court that any discrepancies in the complainant's evidence could be clarified in cross-examination. What Ms Symington failed to appreciate is that any material contradictions found to exist in the complainant's evidence would render such evidence unreliable. Her failure to properly precognize and prepare the complainant to testify gave rise to material contradictions of the nature set out above.

[17] Bearing in mind that the charges in this matter were of a sexual nature involving both a young girl as well as a young offender, I consider that there was an overall duty, not only on the court but also on the prosecution, to ensure that the trial commenced and ended within the shortest time possible. The failure in this regard must be placed squarely at the doors of the learned magistrate and the prosecution. The result of course was the severe prejudice caused not only to the appellant but to the young complainant as well.

[18] By all accounts this was not a complex matter that required a wealth of evidence to be led. Ultimately only four witnesses were called by the State and it was only the appellant who testified in his defence. In my view the matter could have been finalized within a week or two. That it took seven years is simply astounding.

[19] From all the above it is quite clear that neither the court nor the prosecution paid any heed to the appellant's rights to a trial within a reasonable time. As mentioned already, it was the magistrate's and the prosecutor's tardiness and lack of interest that resulted in the huge delays herein. In matters such as this it is not only the interests of an accused person that should be considered but also those of the young complainant and the public at large. Given the fact that rape and other sexual offences have become endemic in this country there can be no confidence in a justice system that makes a

mockery of the rights not only of accused persons such as the appellant herein, but also of victims of crime. The conduct of the learned magistrate and the prosecutor/s involved requires censure of the strongest kind.

[20] Having regard to the applicable factors on which *Sanderson* is instructive, and considering the totality of the circumstances set out above, in my view, the passage of time in this case, relative to its facts, was unreasonable in the extreme. It was for these reasons that we felt compelled to set aside the convictions and sentence, thereby allowing for the appellant's immediate release on 30 April 2021.

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Seegobin J

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Vahed J

APPEARANCES:

COUNSEL FOR THE APPELLANT:	P Andrews (Instructed by Legal Aid, South Africa)
COUNSEL FOR THE RESPONDENT:	M E Mthembu (Instructed by Director of Public Prosecutions, Pietermaritzburg)
DATE OF HEARING:	30 April 2021

DATE OF REASONS FOR ORDER: 17 June 2021