IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A83/2010

DATE: 28 JULY 2010

In the matter between:

IVAN BANDISA Appellant

and

THE STATE Respondent

J U D G M E N T

ZONDI, J:

The appellant, who at the time of the commission of the offences, was 15 years seven months old, appeared together with his co-accused in the George Regional Court on 19 August 2002, facing two charges of rape and robbery. With regard to the first charge it was alleged by the State that on or about 1 November 1998 and at or near N2 Highway, Pacaltsdorp, he raped a young girl of 13 years old. As regards the second charge, it was alleged by the State that at the same time and place, he robbed her of an unknown amount of

cash and a gold ring.

The appellant, who was legally represented at the trial, pleaded not guilty to the charges, but was convicted. Upon conviction, the regional court referred the appellant to this Court for sentence, as the charge of rape was allegedly subject to the provision of section 51 of Act 105 of 1997 (the Act). The appellant appeared before Van Zyl, J for sentence, who, on 10 March 2005, confirmed the appellant's conviction and sentenced him to 15 years imprisonment. The appeal against sentence is before this Court, with the leave of this court granted by Van Reenen, J on 15 October 2009.

The attack on sentence is based on three grounds. It is submitted by the appellant that the court *a quo* materially misdirected itself, firstly by applying the provision of Act 105 of 1997 in respect of the appellant, who was 15 years old at the time of the commission of the offences. Secondly, by attaching too much weight to the gravity of the crime and thirdly, by failing to take any account of the period that the appellant had already spent in custody awaiting trial.

The evidence which forms the basis of the appellant's conviction and sentence is to the following effect. On the day in question, the complainant and her cousin, one Jaco Rabie,

were on their way home when they were suddenly confronted by the appellant and two other suspects near N2 Highway, Pacaltsdorp. To get home, they had to walk in a footpath which leads through a forest. They were confronted while walking as aforesaid. The two suspects were armed with knives. The appellant, together with the two suspects, robbed the complainant of her cash and a ring before pinning her down to the ground. Her pants were pulled down and the appellant and his other suspects, raped her in turns.

The complainant cried for help, but all in vain. When she arrived home she related her ordeal to her mother, who immediately telephoned the police. The police collected the complainant and Jaco from her home and arranged for her to be seen by a doctor. At the time of the incident, the complainant was doing Grade 8. The complainant was emotionally traumatised by the ordeal. She struggled to concentrate in class and as a result thereof, she failed Grade 8. The trauma which the complainant endured appears from the impact assessment report compiled by a social worker on 23 September 2004, some six years after the incident. It is indicated in the report that she had not put the experience behind her, it was still haunting her.

According to the psychological report compiled in respect of

the appellant on 13 December 2004, at the time of the commission of the offences, the appellant was a 15 year old Grade 8 learner and was a first offender.

The question is whether the court *a quo* was correct in sentencing the appellant to 15 years imprisonment in accordance with the provision of section 51 of the Act, having regard to the fact that he was about 15 years old at the time of the commission of the offence.

It is correct that punishment is pre-eminently a matter for the discretion of the trial court and an appeal court will not readily interfere with the exercise of that discretion in the absence of material misdirection.

In my view, there are two bases upon which the court *a quo* misdirected itself in this matter. Firstly, it erred in finding that the provision of section 51(1) of the Act, was applicable to the charge of which the appellant was convicted. At the time of the commission of the offence, the appellant was 15 years old and section 51(6) of the Act specifically provides that provision of the Act does not apply in respect of an accused person who is under the age of 16 years at the time of the commission of an offence, contemplated in section 51(1) or (2). The court *a quo* accordingly erred in proceeding to sentence the appellant

as if the provisions of section 51 of Act 105 of 1997 were applicable.

The other basis upon which the court *a quo* misdirected itself, is by failing to give effect to the provisions of section 28(1)(g) of the Constitution, in sentencing the appellant, who was a juvenile offender. This sections provides that every child has the right not to be detained except as a measure of last resort, in which case he or she may be detained only for the shortest appropriate of time and has the right to be kept separately from detained persons over the age of 18 years and treated in a manner and kept in conditions that take account of his or her age.

Since the adoption of the Constitution, the principles of sentencing, which had until then underpinned the traditional approach regarding the sentencing of youthful offenders, needed to be adapted in order to give effect to the sentencing regime encompassed in the Constitution, more particularly the provisions of section 28, which have their origin in the international instrument enumerated in S v Nkosi 2002(1) SACR 135 (W), paragraph 13 and S v Brandt 2005(2) ALL SA 1 (SCA) at paragraphs 15 and 18; and The Director of Public Prosecution KwaZulu Natal v P 2006(3) SA 515 (SCA) at para 15. In the last mentioned case, Mthiyane, JA at paragraph 18,

came to the conclusion, on the basis of the provision of section 28(1)(g) of the Constitution and international instruments, that the ambit and scope of sentencing as regards juvenile offenders, require to be widened in order to give effect to the principles that juvenile offenders "are not to be detained except as a measure of last resort" and that if incarceration is unavoidable, it should be "only for the shortest appropriate period of time" and that a child's best interests are of paramount importance in any matter concerning him or her.

Ponnan, AJA, as he then was in Brandt's case, at paragraphs 19 and 20, held that in the sentencing of juvenile offenders, presiding officers should be guided by certain principles, including the principle of proportionality, the best interest of the child and the least possible restrictive deprivation of his or her liberty, and then only as a matter of last resort and for the shortest possible period of time. Sachs, J, in S v M (Centre for Child Law and *amicus curiae*) 2007(2) SACR 539 (CC) at paragraph 33, came to the conclusion that the requirements of the Constitution as regards the sentencing of children necessitate "a degree of change in judicial mindset" directed at the paying of focussed and informed attention to the interests of the child at appropriate moments in the sentencing process with the object of ensuring that judicial officers are in a position to adequately balance all the varied interest that are

all involved.

It is clear to me that the court *a quo* did not pay attention to these principles when it sentenced the appellant and this omission constituted material misdirection. In light of this background, I am of the view that this Court is accordingly entitled to interfere with the sentence, because of the instances of misdirection I have pointed out.

In the result the sentence of 15 years imprisonment imposed by the court *a quo* is set aside. The question is what sentence will be appropriate for a 15 year old boy who has been convicted of rape of a 13 year old girl. There is no doubt in mind that the offence of which the appellant has been convicted is very serious and must be treated as such. As correctly pointed out by Mthiyane, JA in The Director of Public Prosecution KwaZulu Natal v P supra, the Constitution and the international instruments do not forbid incarceration of children in certain circumstances. They may be imprisoned for serious offences, but the Constitution requires that they be detained only for a shorter period of time and that they be kept separately from detained persons over the age of 18 years.

The imprisonment sentence is called for in this case as the evidence reveals that the appellant was part of a group who

gang raped the complainant. She was threatened with knives and her cousin, who accompanied her, was held hostage by two other suspects while the appellant raped her. The appellant did not show at all any respect for the complainant's rights. He treated her with disdain. This Court was urged by counsel for the appellant to impose a sentence in terms of section 276(1)(h), or alternatively section 276(1)(i) of the Criminal Procedure Act 51 of 1977.

In my view a correctional supervision sentence is not appropriate in this matter, as it is only appropriate for an offence for which punishment without removal from the community is appropriate. See in this regard S v Ingram 1995(1) SACR 1 (A), paragraph 9E-F. In terms of section 276A(1) of the Criminal Procedure Act, the usual maximum period for correctional supervision is three years or five years in the case of a conviction for an offence under the Criminal Law (Sexual Offences and Related Matters), Amendment Act 32 of 2007. Similarly, a sentence in terms of section 276(1)(i) is inappropriate, as a long term custodial sentence is called for in this matter.

In my view, having regard to the personal circumstances of the appellant, the interest of society and serious nature of the offence, long term imprisonment coupled with a suspended

sentence is called for in this matter. In the result I would sentence the appellant to ten years imprisonment and suspend part of the sentence to deter the appellant from committing a similar offence. This type of sentence will also ensure the rehabilitation of the appellant and his reintegration into his community and family. The sentence imposed by the court *a quo* does not promote the rehabilitation and reintegration of the appellant into the community.

It is correct that society needs to be protected from violent crimes such as rape, but clearly the interest of society cannot be served by disregarding the interest of the appellant, who is a juvenile offender, and a misguided form of punishment might easily result in a person with a distorted personality, being eventually returned into society. Accordingly the appellant's sentence of 15 years imprisonment is set aside and is substituted with a sentence of TEN (10) YEARS IMPRISONMENT, FIVE (5) YEARS of which are SUSPENDED for FIVE (5) YEARS on condition that the appellant is not convicted of rape committed during the period of suspension.

ZONDI, J

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DAVIS, J: I agree.

DAVIS, J

DESAI, J: I agree and the appellant's conviction is confirmed. The sentence is set aside and substituted with the sentence indicated by my Brother.

DESAI, J