IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A700/2010

DATE: 11 MARCH 2011

In the matter between:

SIPHENATHI QEYU Appellant

and

THE STATE Respondent

JUDGMENT

MOSES, AJ

The appellant, an adult male whose date of birth is reflected as 4 June 1987, was charged and convicted in the Regional Court Khayelitsha on two counts of rape on 17 October 2008. He was subsequently on 29 January 2009 sentenced to 20 years' imprisonment on the first count and 18 years' imprisonment on the second count.

The trial Court ordered that:

> "These sentences are not to run concurrently."
>
> (See page 34 of the transcript record.)

After the appellant noted and launched an application for leave to appeal against the above-stated sentences, such leave was granted by the trial Court on 23 March 2010.

The question to be answered in this appeal is whether these sentences of 20 years' imprisonment and 18 years' imprisonment on the first and second counts respectively, and which were ordered to run successively, are appropriate in the circumstances of this particular case. The appellant contends that, given the circumstances of this particular case, more particularly the appellant's personal circumstances which, so it is submitted, were not properly and/or sufficiently considered by the sentencing Regional Court Magistrate, these sentences are startingly inappropriate and should be set aside and be replaced with a suitable sentence. That is to be gleaned from paragraph 13 and 14 of the appellant's heads of argument.

On the other hand counsel for the State's main contention was that, given the nature of the offence, namely a young 4-year old girl being raped within her own family and the societal

interests, both of which outweighed the personal circumstances of the appellant, the sentences which the Magistrate imposed were appropriate in the circumstances. On that basis, so it is submitted, these sentences should be left undisturbed.

In considering these opposing contentions and in answering the above-stated questions, it is important to consider the facts of this case, albeit briefly. The salient facts with regards to the commission of the offences committed by the appellant are set out crisply in his written plea explanations tendered in terms of section 112(2) of the Criminal Procedure Act 51/1977 and which had been admitted and handed in marked exhibit A. The plea explanation reads as follows:

> "Plea in terms of section 112(2) Act 51/1977. I, Siphenathi Qeya, declare as follows:
> I am the accused in this matter and know and understand the charges against me. I plead guilty to both charges mentioned in the charge sheet and do so freely and voluntarily without any undue influence. I admit the following:
> Charge 1: In that upon or about the said day in January 2008 near Khayelitsha in the Regional Division of the Western Cape I unlawfully and

intentionally had sexual intercourse with a female, Akhona Noqazo (4 years old). The incident happened as follows:

> On the date in question I was in my caravan and saw the complainant outside the caravan. I went outside and took the complainant by the hand and put her inside the caravan. I placed her on the bed and took off her panty. I placed my erect penis into her vagina and made up-and-down movements. At that stage I knew my actions were unlawful as she was 4 years old and could not consent to sexual intercourse. She cried out and indicated that I was hurting her and that it was painful. I then stopped and put her underwear back on and let her out of the caravan.

Charge 2: in that upon or about 7 March 2008 and near Khayelitsha in the Regional Division of the Western Cape I unlawfully and intentionally had sexual intercourse with a female, Akhona Noqazo (4 years old). The incident happened as follows:

> On the said date I was at home with my sister, husband and their children. I had just arrived from a nearby shebeen. I took the

complainant from her mother and took her back to the backroom. I placed the complainant on the bed and removed her underwear. I inserted my erect penis into her vagina and made up-and-down movements. At that stage I knew my actions were unlawful as she was 4 years old and could not consent to sexual intercourse. While I was raping the complainant the mother walked in, started screaming and pushed me off her daughter. She grabbed the complainant and ran out. I went to my caravan and 3 days later I was arrested.

I admit on both charges that I had sexual intercourse with the complainant without her consent. I admit that I acted unlawfully and intentionally and I knew the complainant was 4 years old and therefore unable to consent to sexual intercourse. I admit that this Honourable Court has jurisdiction to hear the matter. I admit that I knew my actions were wrongful and that I could be punished by the Honourable Court. I regret my actions and ask the Court to show mercy on me."

The statement which was dated 17 October 2008 at

Khayelitsha was signed by both the appellant and his legal representative. It is common cause that the State accepted the plea explanation and based on that the appellant was duly convicted on both counts by the learned Magistrate.

Subsequently and before sentence the appellant's sister was called by the State to give evidence after the defence has made oral submissions on behalf of the appellant in mitigation of sentence. The appellant's sister is Ms Nomonde Noqazo, who is also the mother of Akhona, the 4-year old victim of the appellant's heinous acts. When asked about how the young Akhona reacted after the second incident she testified as follows:

> "She was always scared. She suffered from nightmares when she was sleeping. She was no longer urinating on herself but now she did after that. She became very rough that she always was – she was always overpowering over other children, even me, and that sometimes she would like to play alone with dolls next to the house. She wouldn't come and ask for food. I always think to myself that maybe she is hungry now."

When asked about her relationship with her brother, the

appellant, the salient parts of her evidence in this regard are the following (on page 20 of the typed record):

"We are three at home. He is the lastborn. I love him more than my younger brother because that he never saw his mother and that I could not even assist him - okay. I could see the way he was suffering but I could not assist him. When he was 4 years old he was staying with my aunt and he was staying a little bit far from where I was staying. Then I missed him, Your Worship. Then I decided to go and visit him. On that day when I came from school then I went to him or to the place ...(intervention)

COURT: Ms Noqazo, you may be seated or you can take a moment to compose yourself if you require. --- I will continue talking, Your Worship. Then I went to visit him, Your Worship. When I got there it was locked and at which I knocked, Your Worship. And then when I was still outside knocking, Your Worship, I heard that there was somebody – like somebody it seems like was calling from inside the house. Your Worship, then I opened the window. Your Worship, he was dirty, Your Worship, in a way that ...

INTERPRETER: Your Worship, I just want to get the word now. I am very sorry. His faeces, Your Worship, his faeces was all over his body and there was cold porridge, Your Worship, next to him. When I looked at him, Your Worship, he could not even cry, Your Worship. He had some wounds. My grandmother, Your Worship, was still alive, so I went to report the matter to her. --- Your Worship, now since after this incident, Your Worship, I have tried to bring about this, Your Worship, like I am a person who always like to read about humanity, Your Worship, and then I just – this took me back, Your Worship, about what happened to him, Your Worship, when he was locked for three days and that maybe that will have affected him, Your Worship, in his mind of what had happened to him. That time he was locked three days inside the house. I was the one who always tried assisting Siphenathi, Your Worship, to whatever he desired, Your Worship, and that I am the one who even said he must come over to come and stay with me because it was almost time for him to go to initiation school. I used to share and discuss things but this is most sensitive. I never discussed it with him because ... we used to discuss it with

him. Okay, but I never discussed or told him, Your Worship, about what happened to him when he was locked up."

She further testified that she, upon discovering what he was doing, was very disappointed and upset and could not accept his apology and could not forgive him for what he did and decided to lay charges against him. She then went on to say:

"I would like to tell this Court, Your Worship, that Siphenathi, as I am his mother, Your Worship. As I am standing here, I am his mother, also his sister and I love him very much. But what he did, Your Worship, is very painful. I would like the Court, Your Worship, not to sentence him, not to sentence him, Your Worship, because of my pain. I would like, Your Worship, the Court to sentence him in an appropriate way, Your Worship, so that he again become human."

When during cross-examination it was put to her that her brother is facing two life sentences and whether she would want him to be sent away for life she answered no. After her testimony the following documents were handed in:

a) the medico-legal examination report by Dr Josias dated 10 March 2008 regarding the medical examination conducted in respect of the little girl, Akhona, at approximately 11h30, commonly referred to as the J.88, which was marked exhibit B. I return to exhibit B hereunder;

b) a victim impact report compiled by one Ms M Hendricks dated 29 October 2008 regarding the victim, Akhona Noqazo, handed in and admitted as exhibit C;

c) a "Report in terms of section 276(A)(1)(a) of the Criminal Procedure Act 51/1977; consideration of correctional supervision as sentence", which was handed in as part of a sworn statement by one Mbulelo Mfanikizo dated 29 October 2008, admitted and received as exhibit D;

d) a pre-sentence report in respect of the appellant by another probation officer, one Mr E Mulder, dated 29 January 2009 admitted and received as exhibit E.

All these reports, exhibits B, C, D and E were handed in by agreement between the defence and the State and no evidence

was led in respect of either of the reports. The above-stated evidence therefore constitutes the factual matrix within which the trial Court had to consider and decide upon an appropriate sentence.

I will deal briefly then with the powers of a Court of Appeal regarding sentence. In deciding this appeal and in evaluating the trial Court's findings and grounds for the sentences imposed upon the appellant, this Court is guided by the well-established principle that the determination of an appropriate sentence in a criminal trial resides pre-eminently within the discretion of the trial Court. See Director of Public Prosecutions v Mngoma 2010 (1) SACR 427 (SCA) at 431D, paragraph 11.

The parameters within which a Court of Appeal is entitled to interfere with the sentence of a lower court has authoritatively been set out by Marais JA in S v Malgas 2001 (1) SACR 469 SCA at 478D – G, paragraph 12 as follows:

> "A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial Court and then substitute the sentence arrived at simply because it prefers it. To do so would be to usurp the

sentencing discretion of the trial court. Where material misdirection by the court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the court trial is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'. See also S v N 2008 (2) SACR 135 (SCA) at 140B – D paragraph 11. See also The Director of Public Prosecutions v Mngoma supra at 431E – G paragraph 11."

In their written heads of argument neither counsel for the State nor counsel for the appellant submitted or suggested that the Magistrate's finding regarding the existence of substantial and compelling circumstances and the basis of such finding was wrong. Both counsel seemed to accept the correctness of the Magistrate's finding in that regard as well as the grounds for

such a finding. In the circumstances, particularly having regard to the above-stated evidence of Ms Noqazo, this Court also agreed that the Magistrate was correct in finding that on the particular facts and circumstances of this case substantial and compelling circumstances existed. The effect of such a finding was that the Magistrate was not bound to impose the obligatory life sentences in respect of the appellant and she was accordingly "at large" in respect of exercising her discretion in imposing an appropriate sentence in respect of the appellant.

The question remains and it falls for determination whether the learned Magistrate in the exercise of that discretion committed an error or a misdirection which vitiates her exercise of that discretion. See S v Malgas supra. In this regard Maya JA in S v N 2008 (2) SACR 125 (SCA) at 140 para 11 had also authoritatively stated the correct approach as follows:

> "[I]t must be borne in mind that an error committed by a court in determining or applying the facts for assessing the appropriate sentence does not necessarily spell the end of the enquiry. A mere misdirection is not by itself sufficient to entitle the appeal court to interfere; 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 as to vitiate its decision on sentence. Assuming, without deciding, that the misdirections are not of a vitiating nature when proper regard is had to all the relevant factors, it must nonetheless be considered whether the sentence was appropriate in the circumstances of the case."

It should be said at the outset that counsel for the State in its written submissions made two important and material concessions, namely a) that the trial Court:

"did not discuss the age of the appellant or the aspect of rehabilitation."

(See Respondent's heads of argument paragraph 44.) And b):

"Having determined that the facts before her warranted a departure from the imposition of life imprisonment, the learned Magistrate imposed an effective term of 38 years of imprisonment. The court did not discuss how the practical effect of this sentence differs from that of life imprisonment."

(See Paragraph 45 of the respondent's heads of argument, emphasis added).

With regards to the State's first-mentioned concession it must be pointed out that although the Magistrate has clearly considered the various reports, exhibits B, C, D and E, referred to above, the Magistrate misconceived the import of the findings in respect of the J.88, exhibit B, and the recommendations of the probation officers (in exhibit C and exhibit D) and that of the correctional supervision report, exhibit E. I deal with those hereunder.

With regards to the J.88, exhibit B, it must be pointed out at the outset that the J.88 reveals that little Akhona suffered no serious and/or severe physical injuries upon a physical and gynaecological examination by the doctor. Despite the fact that the Magistrate accepted these findings, namely the absence of any significant physical and gynaecological injuries (that's on page 33 of the judgment) she used these physical injuries as a basis for the imposition of 20 years' imprisonment in respect of count 1. This finding and sentence by the Magistrate was made against the appellant, and as a basis for the imposition of 20 years' imprisonment in respect of count 1. (See judgment page 34 lines 22 to 23.)

In addition the evidence, in good part derived from the abovementioned reports, reveals the following personal circumstances regarding the appellant which, seen in its proper perspective, are important mitigating factors:

1) the appellant was only 21 years old during the commission of these offences and he is still relatively young;

2) he is a first offender;

3) he had a seriously disruptive and unpleasant family background;

4) his parents passed away at a very early stage of his life;

5) the absence of a father figure may have negatively impacted upon his upbringing;

6) despite all the above difficulties:

a) his school career was above average;

b) he has no history of antisocial behaviour;

c) there is no drug and/or alcohol dependency on his

part; and

d) he was enrolled as, and busy studying towards a Diploma in Nursing at the time of the commission of these offences.

7) importantly, he showed remorse for his actions. (See paragraph 16 of exhibit B) and

8) despite the fact that little Akhona suffered both physical injuries and psychologically, she was receiving counselling and had responded well to this.

The Magistrate did not specifically refer to these personal circumstances of the appellant and its negative effect on the punishment to be imposed upon the appellant at all. In the circumstances the Magistrate appeared to have paid limited regard to these material facts and in certain instances clearly gave inadequate weight to the relevant and important facts and circumstances reflected above. In this regard it is trite that all the relevant factors must be taken into account and that no fact may be overemphasised or underemphasised at the expense of other equally relevant factors. The Magistrate also appeared to have overemphasised the gravity of the effect of the actions on the child at the expense of other material facts

and considerations. See generally S v Zinn 1969 (2) SA 537(A); S v Pillay 1977 (4) SA 537(A) at 534H – 535G.

As I have already pointed out with regards to the concession made by the State, the Magistrate appeared to overlook the entire aspect of the rehabilitative potential on the part of the appellant and its role in the determination of an appropriate sentence.

I turn briefly to the second concession made by counsel for the State. The practical effect of these two sentences coupled with an order that these sentences "ought not to run concurrently" is that the appellant may in effect serve a sentence longer than a person who had been sentenced to life imprisonment. This is in circumstances where the Magistrate concluded that she was not obliged to impose the obligatory life sentences on the basis of having found the existence of substantial and compelling circumstances. It is accepted by our highest courts that a person sentenced to life imprisonment would serve in practical terms a maximum of 25 years, whereafter they are generally considered for parole.

In S v Bull & Another, S v Chavulla & Others 2002 (1) SA 535 (SCA) at 552 – 554 the Supreme Court of Appeal set aside a

direction of the trial Court that the accused, all of whom have been found to be dangerous criminals, remain in prison for a period of between 30 years and 50 years, after which they were to be brought before the Court for reconsideration of their sentences. The Supreme Court of Appeal set aside these sentences and directions of the trial Court and replaced these with sentences of life imprisonment for all the accused on the basis *inter alia* that the direction by the trial Court constituted in essence a heavier punishment than a sentence of life imprisonment, in which case as a rule people would be considered or released on parole after approximately 20 years then; it's currently 25 years (in terms of the Correctional Services Act 111/1998, as amended).

In the event the Magistrate clearly failed to consider the cumulative effect of the sentences. Her only reason for having imposed these sentences to run successively seems to be that the offences were committed three months apart. The result thereof was a sentence which cumulatively is potentially longer than a life sentence. This in my view is a clear misdirection.

In the circumstances I am satisfied that the Magistrate has misdirected herself in several respects, which misdirections were of such a nature that in effect she failed to exercise her discretion properly and reasonably and such as to vitiate her

decision on sentence. See S v N supra.

In any event, the discrepancy between the Magistrate's sentences and that of this Court is so marked that it can only be inferred that she failed to exercise her discretion properly. Moreover, I am further of the view that the effective sentence imposed in this case is shockingly and disturbingly inappropriate. In the circumstances this Court is at liberty to interfere with the sentences imposed by the trial Court and in doing so can consider afresh what an appropriate sentence would be.

I have considered counsel's submissions as well as the facts and circumstances of this case. In all the circumstances I consider that the following sentence is appropriate:

Count 1: Imprisonment for a period of 18 years;

Count 2: Imprisonment for a period of 18 years.

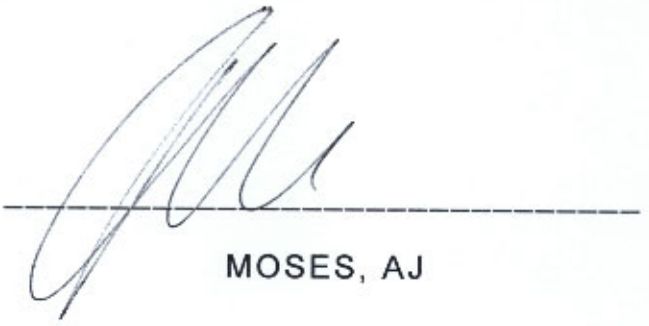
I would in addition order:

(a) in terms of section 280 of the Criminal Procedure Act 51/1977 that the two sentences run concurrently; and

(b) in terms of section 282 of Act 51/1977 that the sentences are anti-dated to 29 January 2009; and

/DH

(c) in terms of section 276B of Act 51 of 1977 that the appellant shall not be considered for parole before he has served at least 10 years of his effective sentence.



MOSES, AJ

BOZALEK, J: It is so ordered.

BOZALEK, J

/DH