IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG Case No. AR96/15

In the matter between:

Bonginkosi Makhanyana Appellant

and

The State Respondent

Judgment

Lopes J:

[1] The appellant in this matter was charged with one count of contravening the provisions of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, in that on or about the 24th February 2008 he raped a minor girl. On the 28th July 2009 he was convicted as charged and sentenced to undergo life imprisonment.

[2] Leave to appeal against sentence only was granted by this court on the 27th March 2015. The application for leave to appeal against conviction was refused. As the appellant was sentenced on the 28th July 2009, he had an automatic right to appeal against his conviction by virtue of s 309 (1) (a) of the Criminal Procedure Act, 1977, as it then was and prior to its subsequent amendments.

[3] The facts of this matter, as testified to by the witnesses may be summarised as follows:

(a) The complainant, who was 13 years' old and in Grade 8 at the school she attended, had gone to the G home to assist her friend N G with her homework. The complainant intended to sleep in her own home that night.

(b) Whilst they were sitting in the residence together with two others, the appellant opened the door and entered, asking who was talking about him. This had happened very shortly after one M G had come into the dwelling and asked whether the persons there had heard a firearm being discharged. The appellant then addressed his question to M and K who was also present in the dwelling.

(c) The appellant then assaulted M, and thereafter helped himself to some food and he then went to the door to leave. He looked at the complainant, and pointed a firearm at her and beckoned her towards him. The complainant went outside the house with the appellant who asked her why she had rebuffed his romantic advances. She told him she did not love him and then the complainant called M out of the house.

(d) The appellant told the two of them to accompany him to the shop. Suddenly the appellant stopped and told M to say goodbye to the complainant because he would not see her again. The appellant then suggested that the complainant shoot him because she did not love him. She declined to do so. At that stage the appellant told M to take off his white clothes and lie down on the ground so that the police would not see him. Whilst M was lying on the ground, the appellant told the complainant to take off her clothes. She refused and the appellant removed her panties.

(e) At that moment three persons arrived on the scene, E, Mp and another. E, who was a member of the appellant's family, discharged a firearm, and the appellant ran away. E then asked the complainant and M what they were doing at that place. E took the appellant's firearm which had been rolled up

in a garment and placed it on one side. M and the complainant were told by E and Mp that they should go home.

(f) The complainant and M went to Kh's kraal, the family of M's mother, where they told the whole story to one S X. Whilst they were there, the appellant knocked on the door and the complainant and those with her crept away and hid behind a cupboard. The door was eventually opened by a child named Cynthia who was told by the appellant that she would be stabbed if she did not open the door. She was crying and opened the door.

(g) The appellant then saw where the complainant was hiding and pulled her outside. He had a knife in his hand and he pushed and pulled the complainant along to an area where there was long grass and trees. He again took off her panties, but before anything else could happen, they heard the voices of people walking past nearby. The appellant told the complainant that they must run away, which they did. The complainant was crying while she did so. She could hear the people talking and it was Si and, apparently, some police officers, who were looking for the complainant. The appellant took the complainant to the river nearby and when the complainant fell, the appellant wanted to have intercourse with her. When the complainant refused, he struck her. He then raped her.

(h) They then heard a motor vehicle approaching where they had previously been. The appellant then took the complainant's hand and pulled her into the long grass and raped her again. The second rape took place after midnight. At some stage the appellant took the complainant back to the river and raped her again. She was crying continually and the appellant threatened her with a knife and said he would stab her if she did not submit. They then proceeded back in the direction of G's kraal where the appellant told her she must not tell anybody what had happened because he would shoot her and her family.

(i) When they passed G's kraal, the appellant saw a police vehicle. The appellant stopped and the complainant ran away to her house. As there

was nobody there, she ran to the home of her neighbour Si M. On the way she passed the appellant sitting on the side of the road, and when she told him she was going to M's kraal, he told her not to say anything about what happened. He reminded her that if she did so he would shoot her. The complainant assured him she would not tell anyone and continued on her way.

(j) When she got to M's kraal, Mrs M opened the door. The complainant told her what had happened and Mrs M said they should go to sleep until the morning. They did so, and the next morning at approximately 5am they got up, and the police were phoned. The complainant was taken to the doctor the next day.

(k) The complainant was cross-examined and it was suggested to her that she and the appellant had had consensual sex on one occasion only, on the night in question.

[4] Mr *Marimuthu,* who appeared for the appellant submitted that the conviction of the appellant should be set aside for the following reasons:

(a) the learned magistrate did not conduct a proper enquiry into the competence of the complainant as a witness.

(b) the age of the appellant was not properly established during the trial, and accordingly cannot constitute a factor in applying the minimum sentencing provisions.

(c) the complainant was a single witness to the actual charge.

[5] Mr *Marimuthu* referred the court to the provisions of ss 162, 163 and 164 of the Criminal Procedure Act, 1977 together with the dicta in *S v Raghubar* 2013 (1) SACR 398 (SCA). He submitted that the learned magistrate was obliged to have conducted an enquiry in order to satisfy himself as to the competence of the

complainant. He did not do so, and accordingly her evidence is inadmissible and falls to be set aside.

[6] Section 164(1) of the Act provides that any person who is found not to understand the nature and import of the oath or affirmation may nonetheless testify after being admonished to speak the truth. The purpose of that section and the other sections referred to by Mr *Marimuthu* is to ensure that reliability can be placed upon the evidence of a witness. Section 192 of the Act prescribes that all persons are both competent and compellable as witnesses. Section 193 provides for a court in which criminal proceedings are conducted to decide any question concerning the competence or compellability of any witness to testify.

[7] In *Raghubar* the learned magistrate clearly thought that the complainant may not be a competent witness. That is why he questioned the complainant. The Supreme Court of Appeal decided that the learned magistrate's questioning fell short of what was required in order to establish the complainant's competency. This is also what happened in *S v B* 2003 (1) SA 552 (SCA) which concerned the admissibility of the evidence of two young witnesses. Two minors, the complainant and a witness both 13 years' of age, had given evidence in the Regional Court. They were not asked to take an oath and were merely admonished to tell the truth. The court *a quo* set aside the resulting conviction, *inter alia*, on the basis that the complainant's evidence was inadmissible. The Supreme Court of Appeal held that no formal enquiry was necessary in order to determine whether a witness, by reason of youthfulness, may not understand the import of an oath. No formal noting of such a finding was required.

[8] In the circumstances of the present case, although the learned magistrate did not raise the question of the complainant's competence as a witness, he was clearly of the view that the witness was competent to testify, and she did so under oath. It appears from the evidence led at the trial that the complainant was 14 years' of age at the time when she testified. The learned magistrate queried her date of birth

because she stated that she was born on the 8th September 1996. His query was raised almost at the outset of the complainant's evidence, and he placed on record that the reason he did so was that the complainant appeared to be considerably older than 13, as she had testified. (In fact she never mentioned her age but simply her date of birth which, if she was born on the 8th September 1996, would have made her 12 years' old at the time she testified.) The learned magistrate went on to record that because of her general appearance and build he would not have disputed it if anyone had suggested that she was 17 or even 18 or 19 years' old.

[9] The learned magistrate also deal with his impressions of the age of the complainant in his judgment. It was because of his doubts that he insisted that the complainant's mother be called as a witness in order to testify to her age.

[10] In my view there is no hard and fast rule that an enquiry into the competence of each and every witness must be carried out by a judicial officer prior to allowing the witness to testify. The judicial officer will, no doubt, raise the issue of a witness's age where it appears to him or her that there is reason to do so, or otherwise to doubt the competency of the witness. There can be no doubt that in the present matter the learned magistrate was satisfied that the complainant was competent to testify. Indeed, his observations and impressions are confirmed by his findings as to the way in which the complainant testified. I am accordingly of the view that this point has no merit.

[11] Mr *Marimuthu* submitted that as the age of the complainant was not properly established at the trial, the fact that she may have been a minor when the offence occurred cannot be invoked against the appellant in deciding whether to apply the minimum sentencing provisions. In my view this submission has no merit. The learned magistrate insisted that the biological mother of the complainant, one F N, testify. The complainant's mother stated that the complainant was born on the […]

February 1995 which would have made her 12 years' old at the time of the offence and 14 years' old when she testified. The complainant's mother also testified that her original birth certificate had been lost and the subsequent birth certificate which was issued incorrectly records the complainant's date of birth.

[12] In my view the best evidence of the date of birth of any person is established:

(a) by the person who gave birth to the child, and who thereafter witnessed the child growing up in order to be able to confirm the child's identity when any issue as to the child's age is raised; or

(b) any other person who was present at the birth, and is similarly able to confirm the identity of the child when the issue is raised.

[13] The evidence of the complainant's biological mother stands uncontested on the record. An incorrect recording in the births register cannot be preferred to her evidence. On either basis there can be no doubting the evidence which was placed before the learned magistrate that the complainant was a minor when the alleged offences took place.

See: *S v Lubando* 2016 JDR 0352 (SCA), para 15.

[14] With regard to the fact that the complainant was a single witness to the actual charge, her evidence is significantly corroborated by the admissions made by the appellant. He admitted that he had had sexual intercourse with the complainant on the night in question, albeit he alleged that was only on one occasion and by consent. The complainant's evidence is also substantially corroborated by the other witnesses.

In my view the appeal against conviction has no substance and falls to be dismissed.

[15] With regard to the appropriate sentence which the learned magistrate should have imposed upon the appellant, factors which may be regarded as mitigating for the appellant are the following:

(a) The appellant has no previous convictions.

(b) At the time of the incident the appellant was 19 years' old.

(c) When he was arrested the appellant was trying to complete his Matriculation Certification.

(d) According to the complainant the appellant was under the influence of alcohol and the complainant testified that she was able to say that because the appellant had trouble with his balance and his eyes were red.

(e) Given the age of the appellant he should be given the benefit of an opportunity to be rehabilitated.

[15] Facts which are aggravating are as follows:

(a) The brutal way in which the appellant dealt with the complainant.

(b) The appellant raped her on three occasions.

(c) That she was twelve or thirteen years' of age at the time of the rapes.

(d) The appellant carried a firearm and a knife, which he used to threaten the complainant.

(e) The appellant stated in his evidence that he had not consumed any liquor on the day in question, and stated that he does not consume alcohol.

(f) Having been frustrated earlier when attempting to rape her, he made a further plan which he executed.

(g) He could not have been in any doubt that his conduct was criminal.

(h) He was given two warnings to reconsider or desist from continuing with his conduct, both of which he ignored.

[16] No effort was made by either the appellant's legal representative or the learned magistrate to investigate the past circumstances of the appellant when it came to sentence. Indeed, his representative recorded only that the appellant had no children, was not employed and was doing matric. She referred also to the presence of alcohol and the brutality of the crime and the youthfulness of the appellant leading to the prospect of rehabilitation. This took up all of nine lines of the record. Given the relative youth of the appellant, the learned magistrate should have enquired as to the obtaining of a probation officer's or social welfare officer's report, or both, prior to passing sentence. See: *S v Dlamini* 2000 (2) SACR 266 (T) at 269 A-D.

[17] To enquire into the obtaining of such reports is to ensure that justice is done. There may be cogent reasons for omitting to do so. However, by making the enquiry at least, a court ensures that any such omission is not inadvertent.

In *S v Mashigo* 2015 JDR 0907 (SCA) Bosielo JA stated the following with regard to the evidence available to enable a judicial officer to pass sentence:

> '[35] It is axiomatic that the sentencing stage is different to the trial stage where the issue of the burden of proof is crucial in determining the guilt or innocence of an accused. Where sentencing is involved no sentencing officer can remain supine and leave the fortunes of an accused to the vagaries of trial lawyers. A sentencing court must be proactive to ensure that he or she is fully informed of all the facts which impact on the accused, like his/her family history, upbringing, career, his psycho-emotional well-being, his moral and ethical standards and any other factors which may have had an influence on him or her committing the crime for which he or she is convicted. This is normally done through reports by expert witnesses. Equally, to have a complete and balanced picture, a sentencing officer will require a victim impact report, essentially to inform him or her of the victim; her family history, upbringing, career and, crucially, the impact and the effect of the offence on her and

her family. Self-evidently such reports will enable a sentencing officer to explore a whole range of sentencing options to be able to decide on a sentence which is balanced, fair to both the accused and the victim, whilst taking appropriate account of the moral indignation engendered in the right-thinking members of the community.'

[18] I refer also to the dicta of O'Linn J in *S v Sagarias* 1991 (1) SACR 231 (Nm) at 233j – 234a*:*

'It must again be emphasised that the court always has a duty to ensure that it is in possession of all the relevant and available information to enable it to impose a balanced sentence… The aforesaid duty of the court is exercised not only in the interests of the accused, but also of the complainant, the administration of justice and the community as a whole The objective must be to establish the truth, whether or not such truth is for or against the accused.'

[19] In *S v Mathole & Another* 2002 (2) SACR 484 (T) para 10 Bosielo J recorded:

'There is yet another aspect of the case which caused me grave concern. It is clear from the record that the magistrate did not make any serious attempt to get any evidence regarding sentence in respect of the two unrepresented accused. The record of the proceeding reveals a highly perfunctory enquiry, which elicited the following response by both the accused: 'I am not married. I am not employed. I have no money.' With respect, this can hardly qualify as an honest attempt by the magistrate to inform himself as much as he should have of facts that could assist him to exercise his sentencing discretion judicially and properly.

As the learned Nicholas AJA correctly remarked in *S v Dlamini* 1991 (2) SACR 655 (A) (1992 SA 18) at 667c-d (SACR) and 301 – 31 C(sic) (SA*)*:

> "More than 100 years ago, Mr Justice Stephan said that, while it is commonly thought that England's countless Acts of Parliament, Judges of first-rate ability, elaborate systems of procedure and careful rules of evidence are concerned essentially with the punishment of the offender, "there is no part of the whole matter to which so little attention is paid by those principally concerned with it." He regretted the fact that Judges paid so little and such superficial attention to sentencing. Yet, he argued, sentencing was the gist of

> the criminal trial. “It is”; he said, “to the trial what the bullet is to the powder. And more recently, in *The Machinery of Justice in England*, Jackson wrote:
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> “An English criminal trial, properly conducted, is one of the best products of our law, provided you walk out of the court before the sentence is given. If you stay to the end you may find that it takes far less time and enquiry to settle a man’s prospects in life than it took to find out if he took a suitcase out of a parked motor car”.’

Bosielo J then went on to refer to *S v Siebert* 1998 (1) SACR 554 (SCA) where Olivier JA stated, inter alia:

> ‘Sentencing is a judicial function *sui generis*. It should not be governed by considerations based on notions akin to *onus* of proof. In this field of law, public interest requires the court to play a more active, inquisitorial role. The accused should not be sentenced unless and until all the facts and circumstances necessary for the responsible exercise of such discretion have been placed before the court … If there is insufficient evidence before the court to enable it to exercise a proper judicial sentencing discretion, it is the duty of that court to call for such evidence. Especially as regards correctional supervision this duty can be discharged easily and without any cost to the accused, by calling for the probation officer’s report required by s 276 (A) (1) of the Act.’
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> Undoubtedly I find myself in respectful agreement with the dicta quoted above.’

In *Mathole* the court set the sentence aside and referred the matter back to the learned magistrate for a reconsideration of an appropriate sentence after the magistrate has received and considered evidence which shall include the evidence of either a probation officer or a correctional official. If the approach of the judiciary is correctly directed by the sentiments above, with which I am in respectful agreement, with regard to a sentence of two years’ imprisonment for a crime of assault with intent to do grievous bodily harm, how much more so are the principles applicable where life imprisonment is to be imposed?

[20] I do not want to be misunderstood as suggesting that because of the shortfalls referred to above the appellant did not receive a fair trial. What I would suggest however, is that where there is a paucity of information available to the learned

magistrate, albeit that an accused is defended, the learned magistrate should, in all cases of life imprisonment, call for assistance in enabling him to establish the necessary facts upon which his or her sentence is founded. In this regard Bosielo J stated in *Mashigo* in paragraph 26:

> 'It is correct as counsel for the first appellant submitted that imprisonment for life which is the ultimate sentence should not be likely imposed. It is the kind of sentence that should be imposed only after due consideration of all the facts and circumstances relevant to sentencing, in particular the life history of an accused, his or her upbringing, his or her career if any, prospects of rehabilitation and, of course, the nature, impact and effect of the offence on the complainant. See *S v Siebert* 1998 (1) SACR 554 (SCA).'

[21] In his judgment on sentence the learned magistrate found that there were no substantial and compelling circumstances which would have entitled him to impose a sentence of less than the minimum prescribed by law. Although the learned magistrate stated that the appellant could be described as youthful, he recorded that the appellant was not a child and did not concern himself with child-like behaviour. The learned magistrate's view was that the appellant did not belong in society, and it was the duty of the learned magistrate to make sure that the appellant was removed from society for as long as possible.

[22] In my view the learned magistrate erred in this latter regard. He failed to take any proper cognisance of the fact that the appellant's age at the time he committed the offence which almost inevitably leads to the conclusion that there is some possibility that he could be rehabilitated. Without any proper reasoning the learned magistrate has reached a conclusion at odds with that possibility. He laid no basis for the conclusion that he should ensure that the appellant be removed from society for as long as possible. In my view he has misdirected himself in doing so. This court is accordingly at large to impose an appropriate sentence upon the appellant.

[23] With regard to the influence of alcohol, there is a dispute between the evidence of the complainant and the evidence of the appellant. The complainant referred to the appellant 'staggering' as a result of his intoxication. Her version is clearly to be preferred to his. Why he should have lied about this issue is uncertain, but a court should not disregard the evidence of intoxication and its possible effect upon the behaviour of the appellant.

[24] In addition, the learned magistrate's judgment does not in way deal with an approach containing any compassion or mercy. In *S v Rabie* 1975 (4) SA 855 (A) Holmes JA deal with this aspect of punishment at page 861D as follows:

> 'Then there is the approach of mercy or compassion or plain humanity. It has nothing in common with maudlin sympathy for the accused. While recognising that fair punishment may sometimes have to be robust, mercy is a balanced and humane quality of thought which tempers one's approach when considering the basic factors of letting the punishment fit the criminal as well and the crime and being fair to society: See *S v Narker & Another,* 1975 (1) SA 583 (A.D.) at p.586 D. That decision also pointed out that it would be wrong first to arrive at an appropriate sentence by reference to the relevant factors, and then to seek to reduce it for mercy's sake. This was also recognised in *S. v Roux,* 1975 (3) S.A. 190 (A.D.).'

[25] The learned Judge then went on to deal with the history of mercy or compassion in sentencing and indicated that it was not something which is of recent judicial origin. He then summed up the concept of mercy at 862D:

> '(h) To sum up, with particular reference to the concept of mercy –
>
> (i) It is a balanced and humane state of thought.
> (ii) It tempers one's approach to the factors to be considered in arriving at an appropriate sentence.
> (iii) It has nothing in common with maudlin sympathy for the accused.

(iv) It recognises that fair punishment may sometimes have to be robust.

(v) It eschews insensitive censoriousness in sentencing a fellow mortal, and so avoids severity in anger.

(vi) The measure of the scope of mercy depends upon the circumstances of each case.'

[26] I am acutely mindful that the complainant's trauma will remain a blight on her happiness and development until she is able to recover from her dreadful experience, if she ever does so.

[27] Taking into account all the relevant factors, I do not believe that life imprisonment is an appropriate sentence in the circumstances of this case. When he committed the offence the appellant was very young. It is true that his behaviour towards the complainant was appalling. However, that factor alone should not lead to the general conclusion that he is incapable of rehabilitation. The combination of having no previous convictions, the influence of alcohol and the appellant's youth all lead inevitably to substantial and compelling circumstances entitling a court to impose less than the minimum sentence of life imprisonment – a sentence which, in my view, is inappropriate given the circumstances of this case. Combining these factors with a lack of proper understanding of his background and circumstances because of a failure properly to investigate them, and blending the overall sentence with a sense of mercy and compassion, the sentence of life imprisonment is excessive.

[28] In saying this I am mindful of the purposes for which the minimum sentencing legislation was introduced. Those purposes include establishing consistency in sentencing, drawing the attention of the public to the prevalence and horror of rape, and the public's need to have an elevated range of sentences applicable to act as a deterrence for others.

[29] Taking into account all the relevant factors, justice would have been achieved if the appellant had been sentenced to undergo 25 years' imprisonment.

[30] I accordingly make the following order:

(a) The appeal against conviction is dismissed.

(b) The appeal against sentence succeeds.

(c) The sentence of life imprisonment imposed in the court *a quo* is set aside and replaced with a sentence of twenty five (25) years' imprisonment, which is backdated to the 28th July 2009.

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G Lopes J

I agree.

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D Pillay J

I agree.

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M Chetty J

Counsel for the appellant:	P Marimuthu
Instructed by:	Justice Centre Durban
Counsel for the respondent:	I Cooke
Instructed by:	Director of Public Prosecutions Pietermaritzburg
Date of hearing:	10 May 2016
Date of Judgment:	23 March 2017