

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A278/13

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:

THOMAS FREDERICK STEYN

Appellant

And

THE STATE

Respondent

J U D G M E N T

KEIGHTLEY, AJ:

INTRODUCTION

[1] In this appeal the appellant pleaded guilty to, and was convicted of the following offences under the Criminal Law (Sexual Offences) Amendment Act 32 of 2007 ("the Act"):

[1.1] sexual grooming of a child in terms of section 18(2)(b) of the Act (Count 1);

[1.2] compelling or causing a child to witness a sexual offence in terms of section 21(1) of the Act (Count 2); and

[1.3] Sexual assault in terms of section 5(1) of the Act (Count 3).

[2] The appellant was sentenced in the Johannesburg Regional Magistrates' Court to direct imprisonment for a period of four years on count 1, one year on count 2 and four years on count 3. The magistrate ordered that the sentences in respect of counts 1 and 2, but not count 3, should run concurrently. In effect, therefore, the magistrate sentenced the appellant to an effective period of imprisonment of eight years.

[3] In addition to this, the magistrate made an order in terms of section 276B(2) of the Criminal Procedure Act 51 of 1977 fixing a non-parole period of four years in respect of the appellant's imprisonment, meaning that the appellant would be required to serve a minimum of four years of his sentence before being eligible to be considered for parole.

- [4] The appeal against the sentence imposed by the magistrate comes to this court following a successful petition made by the appellant under section 209C of the Criminal Procedure Act.
- [5] We were advised by counsel representing the appellant at the hearing of the appeal that the appellant has been serving his sentence for approximately 22 months.
- [6] Let me dispense with a minor procedural issue right away: the appellant seeks condonation for non-compliance with Rule 51(3) of the Uniform Rules of Court for his failure timeously to file a proper record of the appeal. This application is not opposed, and there would seem to be no reason not to grant the condonation that is sought. Although there was some delay in the filing of a full record, and hence in the hearing of the appeal, this court ultimately received the benefit of a clear and full record of the trial.
- [7] Before dealing with the appellant's grounds of appeal, and the merits of the submissions advanced in support of them, it is necessary to set out the relevant facts pertaining to the offences in respect of which the appellant was convicted.

THE RELEVANT FACTS

- [8] The complainant in this matter is SR. The appellant is his stepfather. The appellant married SR's mother when SR was about 4 years old. From the time of the marriage onwards, and until after the commission of the offences

that are the subject matter of this appeal became public, SR lived together with his mother, the appellant and the two younger children born of their marriage. The youngest of these children has Down's syndrome. Although SR is the appellant's stepson, they were part of a family unit.

[9] In 2006, when SR was in Grade 7, he was given a sex education lesson at his school. The appellant stated in his plea explanation that during the December holidays that followed, he found out from SR what had been discussed during the sex education lesson. The appellant told SR that he also wanted to discuss this topic with him. Thereafter, he provided SR with a book, "Wat seuns will weet" (What boys want to know). From January 2007, he "started working through the book" with SR. This involved a discussion of masturbation.

[10] The appellant did not explain, in either his plea explanation or in his evidence in mitigation, what led him to take the steps that followed thereafter. He testified that he could not remember the precise details. However, essentially, what occurred was that for the next two years, the appellant persistently engaged in conduct with SR that involved him climbing into bed with SR in the mornings, rubbing his body against SR's, engaging in self-masturbation while he was with SR, and masturbating SR. This also occurred in the bathroom of the family home, while SR showered. On some occasions he would shower together with SR and masturbate him. The appellant admits that he engaged in acts of self-masturbation in the presence of SR in order to encourage SR to do the same. While this activity was being

conducted, SR's mother, and his two young half-siblings would have been present in the family home.

[11] The appellant recorded in his plea explanation that these incidents occurred up to three to four times a week.

[12] I detail the nature of the appellant's conduct, unappetising as it may be, because in my view it is important for purposes of appreciating fully the nature and seriousness of the offences involved. The commission of these offences spanned a period of two years. On the appellant's own version, these were not isolated incidents, but took place up to three to four times a week. The appellant's sexual abuse of SR occurred at a time when SR's own sexuality was developing, from the time that he was 14 years old until he was 16. The acts were committed by his stepfather, someone to whom SR was entitled to look for guidance and protection. What is worse is that they occurred in the sanctuary of the family home. The appellant used the guise of showing a parental interest in SR's development to encourage SR into sexual acts with him at a time when he was young and impressionable, and dependent on SR. The abuse of trust at the heart of the appellant's conduct is manifest.

[13] The appellant only ceased these activities when, in his words, SR "cracked" one day when the appellant approached him in the usual way. According to the appellant's testimony, on this occasion, SR reacted extremely

traumatically. The appellant came to the realisation of what he had done and from that time on, he did not repeat his conduct.

[14] The appellant's conduct remained a secret for more than a year after this. The appellant did not seek help from anyone, nor did he tell his wife what had occurred. Matters only came out into the open in June 2010 when, after an altercation with the appellant, SR told his mother what had happened.

[15] When confronted by his wife, the appellant did not deny what he had done. He also sought the help of a therapist, Professor Spies, with whom he remained in therapy for a considerable time. Prof Spies provided expert evidence in mitigation of sentence at the trial. She explained that the root of the appellant's conduct lay in his childhood. At some point in his childhood the appellant's parents had become involved in business ventures and were less present in the home. The appellant was sent to a new school as a boarder. In high school he struggled to make friends. Eventually he befriended a boy who introduced the appellant to masturbation. The appellant engaged in masturbation with this boy, and with other boys because he was afraid of losing their friendship. He withdrew from these activities when he was in about Grade 10.

[16] The appellant testified that it was only as a result of his therapy that he realised that these childhood events gave rise to unconscious "drivers" ("dryfvere") over which he had no control. These "drivers" had spurred him onto committing the acts with SR even though he knew they were wrong.

- [17] In her testimony, Prof Spies told the court that in view of the progress made by the appellant in therapy, and in his understanding of the drivers that had caused him to commit the offences with SR, she doubted whether he would re-offend.
- [18] The court *a quo* also received evidence on the impact of the appellant's offences on SR. The clinical psychologist who prepared a report on SR, Dr van Tonder, concluded that although SR was mentally fit and able to testify in court, "*... he will not be able to effectively testify in open court facing his abuser, he will be severely further traumatized and ... (will) suffer undue mental stress due to the fact that his alleged abuser, is and was in a position of power, was the father figure in the home environment, and was the adult and parent in the alleged abuse.*" Dr van Tonder concluded that SR would suffer undue mental stress and that it was not in his best interests to testify in open court.
- [19] Consequently, SR did not give evidence in court. The court relied on the report of Dr van Tonder, as well as on the testimony of SR's biological father and his mother, for purposes of determining the impact of the abuse on him.
- [20] Dr van Tonder reported that SR suffers from a range of clinical symptoms as a result of the "long-term multiple traumas" that were inflicted on him by the appellant. These include, among others, anxiety, depression, nightmares, poor memory and concentration, paranoid ideation and hyper vigilance, poor self-esteem, anger and incidental suicidal ideation. Dr van Tonder concluded

that these symptoms were significant and impaired SR's schoolwork and social functioning. SR explained the emotional effect of the trauma to Dr van Tonder as follows: *"Ek voel altyd soos 'n gebreekte mens, en voel jaloers op van my vriende wat sulke perfekte gesinne het. Die mooi van seks het vir my lelik geword, want dit herinner my aan pyn and hartseer. Ek pak gereeld op as gevolg van te veel herinneringe van die verlede. ... (Die appellant) het my hanteer asof ek 'n vloerlap en 'n stuk gemors was. Ek het gevoel ek is 'n disaster, en dit sou beter wees as ek nie bestaan nie."* This extract perhaps says it all: SR felt as if he was a disaster, and that it would have been better had he never been born.

[21] SR's school marks dropped dramatically and he left school in Grade 11. He subsequently re-enrolled at a private teaching institution and wrote matric in 2011. However, he failed and had to rewrite matric in 2012. Although he passed, some of his results were quite poor.

[22] SR's biological father testified that he suffered massive mood swings and became aggressive, particularly if the subject matter of the appellant's trial was raised. In 2011 he was admitted to a psychiatric hospital for a week when he suffered a breakdown. SR is resistant to continuing in therapy and taking medication for his symptoms. His mother told the court *a quo* that sometimes it is as if SR is possessed by demons, and that this can be triggered by anything, even small things.

THE GROUNDS OF APPEAL

[23] The appellant submitted that the magistrate had misdirected himself in the following respects in imposing the sentences on the appellant:

[23.1] he over-emphasised the interests of the community and under-emphasised the personal circumstances of the appellant;

[23.2] he ought to have attached more weight to the appellant's expressed and demonstrated remorse for his actions;

[23.3] he ought to have attached more weight to the best interests of the minor children of the appellant, particularly the youngest, who suffers from Down's Syndrome and requires special consideration;

[23.4] he should have attached more weight to the evidence of Prof Spies and her expert report;

[23.5] a sentence of direct imprisonment was unreasonable, not in the interests of justice, or was disproportionate to the seriousness of the offences upon which the appellant was convicted; and

[23.6] the magistrate ought to have imposed instead, a sentence of correctional supervision and, if appropriate, a suspended sentence.

[24] In addressing the court, counsel for the appellant, Mr Scheepers, chose to deal with the grounds of appeal by grouping them into logical categories. For purposes of this judgment, we will deal with the grounds of appeal in line with these categories.

REMORSE

- [25] Firstly, Mr Scheepers dealt with appeal grounds two and four, viz. the remorse of the appellant and the evidence of Prof Spies.
- [26] In this regard, Mr Scheepers submitted that the magistrate had wrongly found that the appellant had not shown genuine remorse. He pointed to extracts from the transcript of the evidence to demonstrate that the appellant had in fact expressed remorse.
- [27] In addition, he pointed to what he submitted was an error in the magistrate's judgment in finding that Prof Spies's report expressed the view that the appellant did not know that what he was doing was wrong, and that this conflicted with the appellant's own evidence in this regard. Mr Scheepers indicated that Prof Spies's report accepted that the appellant knew that his conduct was wrong, and that in fact the report was consistent with the appellant's evidence in this regard.
- [28] Mr Scheepers also pointed to what he indicated was a further error in the magistrate's judgment, where the magistrate seems to have noted that the appellant only ceased his abusive behaviour after SR told his mother what had occurred. It was common cause on the facts that he ceased this behavior more than a year before SR made the revelation to his mother, although it is also common cause that the appellant took no steps to rectify matters or to seek help until after SR had revealed what the appellant had done.

[29] Mr Scheepers submitted that these errors were misdirections that influenced the exercise of the magistrate's discretion in imposing a custodial sentence on the appellant. He submitted that these errors affected the magistrate's conclusion that the appellant was not genuinely remorseful for the offences he had committed.

[30] I am unable to accept the appellant's submissions in this regard.

[31] If one has regard to the judgment of the magistrate it is apparent that he was acutely aware of the need to determine the existence or not of genuine remorse with reference not only to what an accused person says, but also from the surrounding actions or circumstances. The magistrate cited the dictum of Ponnann JA in S v Matyityi,¹ in this regard to the effect, *inter alia*, that:

“Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught is a factual question. It is to the surrounding actions of the accused rather than what he says in Court that one should rather look.”²

[32] Bearing this in mind, it is clear that the magistrate was not bound to determine this issue solely on the basis of the appellant's expressions of remorse in court. It is so that the appellant did express remorse. However, it is also so that time and again in his evidence he resorts to the explanation

¹ 2011 (1) SACR 40 (SCA)

² Para 13

that although he knew what he was doing was wrong, he was driven to act by unconscious factors over which he had no control. This detracts somewhat from the impact of the expressed remorse, and indicates that the appellant may not yet have come to a full appreciation and acknowledgment of his errors.

[33] In any event, the magistrate quite correctly considered the surrounding circumstances in determining the question of remorse. Even if, as Mr Scheepers submitted, the learned magistrate was wrong in respect of the two issues described above, this does not take the matter further for the appellant. Whether the magistrate understood Prof Spies's report correctly as regards the appellant's knowledge of the wrongfulness of his conduct is not of material significance. Nor, in my view, is the fact that the magistrate mistakenly recorded in his judgment that the appellant ceased his activity when SR revealed the matter to his mother. What the magistrate correctly concluded was that the appellant knew that what he was doing was wrong, and that he continued for a period of two years with his abusive conduct despite this knowledge. This was a significant and relevant factor forming part of the surrounding circumstances that placed doubt on the genuineness of the appellant's expressions of remorse.

[34] In my view, the learned magistrate committed no misdirection in concluding from a consideration of all the surrounding circumstances that the appellant had not shown true remorse for his actions.

[35] I should add that, in any event, even if the remorse expressed by the appellant were to be accepted as undoubtedly genuine, this would not be the end of the matter. Remorse is but one of the factors relevant to a court's discretion in imposing an appropriate sentence. It is not the only or necessarily the determining factor. In my view, in the circumstances of this case, given the nature and seriousness of the offences committed, and their impact on SR, a custodial sentence would have been warranted even in the face of genuine remorse on the appellant's part.

[36] In my view, therefore, and for these reasons, the appellant cannot succeed in his appeal based on these grounds.

THE INTERESTS OF THE COMMUNITY VERSUS THE INTERESTS OF THE APPELLANT

[37] The appellant contends that the magistrate placed too much emphasis on the interests of the community and too little emphasis on the interests of the appellant in imposing the sentences on him.

[38] As far as the interests of the appellant are concerned, the judgment of the magistrate reflects that he took careful account of his personal circumstances, and of Prof Spies's report in this regard. The court accepted that the appellant, as a chartered accountant, was a productive member of society, and that he financially supported his two minor children and had an emotional bond with them. The court took note of the appellant's personal history, and his own negative sexual experiences when he was a boy. The

magistrate furthermore accepted that there were indications of a good prognosis for rehabilitation in respect of the appellant.

[39] The magistrate weighed against all of this the interests of the community, the nature and gravity of the offences in question, and the impact on the complainant, SR. The court regarded as an aggravating circumstance the fact that the offences had been committed on a child as young as 14, that the conduct had persisted for a period of two years, that the offences were committed in the family home, and that the appellant had abused his position by committing these offences with his stepson.

[40] The magistrate also took into account the prevalence of this type of crime and the community's expectation that courts will impose sentences that show that such offences will not be tolerated. In addition, the court took into account that the sentence should serve a deterrent purpose, not only in respect of the appellant, but also in respect of other members of society who might be tempted to engage in such activities.

[41] The appellant contends that the magistrate erred in finding that it was necessary to protect other youngsters from the appellant, including the appellant's own young son. While the appellant is correct that there is no evidence that he committed similar acts on anyone other than SR, this does not reflect a misdirection on the part of the magistrate. As I have indicated, the magistrate reached the conclusion that a custodial sentence was appropriate after a careful weighing of the appellant's circumstances, the

broad interests of the community in preventing these types of offences, and the particular impact on SR. In this, the magistrate did not place any particular emphasis on the danger that the appellant might actually pose to other youngsters and to his young son. Nor was this the sole or even predominant reason for the magistrate imposing a custodial sentence on the appellant. The magistrate noted the possibility of this danger. However, he went further than this in that he also based his decision regarding sentence on other community-related factors, including the expectations of the community, the prevalence and seriousness of the offences, and the deterrent impact of sentencing on other would-be offenders. In my view, these are all relevant factors and the learned magistrate cannot be faulted for the manner in which he undertook the balancing exercise between personal and community interests.

[42] The appellant contends further under this head that the learned magistrate misdirected himself by referring to remarks made by a government Minister at a conference expressing concern that in the eyes of the community courts were too lenient in the sentences they imposed for offences of this nature. The appellant submits that in this the magistrate permitted himself to be influenced in his decision on sentencing the appellant, and that this amounts to a misdirection warranting interference by this court.

[43] I cannot accept this submission. In referring to remarks made by the Minister in his judgment, the learned magistrate was hardly stating something new. The opinion that courts need to impose sentences that reflect the

seriousness of sexual offences against children is expressed repeatedly and publicly in our country, for good reason: these offences are serious and pervasive.

[44] The Preamble of the Act records the impact of sexual offences on particularly vulnerable members of society, such as children. It records the pervasiveness of sexual offences, and the need, and indeed South Africa's international obligation under the United Nations Convention on the Rights of the Child, to put effective measures in place to combat sexual offences against children. The Act further records the inadequacy and ineffectiveness of the existing common law and statutory law in dealing with sexual offences against vulnerable persons.

[45] The Minister's remarks referred to by the magistrate in his judgment were in accordance with an appreciation of the objectives of the Act. So too, was the learned magistrate's reference to ex-President Mbeke's historic comment that as a result of the promulgation of the Act, it was no longer "business as usual" in respect of sexual offences. In light of this, the magistrate cannot be said to have misdirected himself in any way by referring to these comments, and taking them into account.

[46] In my view, therefore, and for these reasons, the appellant cannot succeed in his appeal based on this ground.

THE ALLEGED FAILURE TO TAKE INTO CONSIDERATION THE BEST INTERESTS OF THE APPELLANT'S MINOR CHILDREN

[47] The appellant submits that the trial court misdirected itself in not fully taking into consideration the best interests of the appellant's minor children, and in particular the best interests of his young son, who was born with Down's Syndrome. The appellant relies on the Constitutional Court judgment in the matter of *S v M (Centre for Child Law as Amicus Curiae)*³ in support of this submission.

[48] As the learned magistrate correctly pointed out in his judgment, in that case the Constitutional Court was expressly, and solely concerned with the sentencing of primary caregivers, and not to a wider class of breadwinners. In other words, it was concerned with the case where a parent with whom a child lives, and who performs the necessary everyday tasks, faces a custodial sentence. The Constitutional Court was careful to express that its judgment did not pronounce on the duties of a sentencing court where the breadwinner is not also the primary caregiver.⁴

[49] In the appellant's case, although the evidence established that he was the principal breadwinner, in that his earning capacity exceeded that of his wife and mother of the children, he was not the primary caregiver. The children lived with their mother, and had done so from the time that the appellant was asked to leave the family home when his conduct with SR came to light. The appellant had regular access to the children, and had developed a good

³ 2008 (3) SA 232 (CC)

⁴ Para 28

bond with them, but that is as far as it went. There was no dispute that their mother was the primary caregiver in every sense.

[50] The appellant supported his minor children financially. Evidence led at the trial indicated that the family would suffer a financial setback if they lost his financial support as a result of him being sent to prison. However, the mother was in steady employment, and she indicated that they would make do. She also gave evidence that she had moved house to be closer to her family and would have easier access to their support. In addition, she testified that although the two children would miss their regular contact with their father if he went to prison, she would make sure that she did everything to ensure that they maintained their bond with him. To this end, she was prepared to take them to visit him in prison.

[51] The magistrate expressly took all of this into account in determining an appropriate sentence. He also referred to the injunction of the Constitutional Court in S v M to the effect that:

“... it is important to be mindful that the issue is not whether parents should be allowed to use their children as a pretext for escaping the otherwise just consequences of their own misconduct.”⁵

[52] In my view, it is plain from the learned magistrate’s judgment that he took full account of the impact that the appellant’s imprisonment would have on the interests of the minor children, including the appellant’s Down’s syndrome

⁵ Para 34

son, and that he did not misdirect himself in this regard. Of course, it would be better for them to have a father who was free to earn a living and support them. But this does not mean that the learned magistrate was compelled to impose a non-custodial sentence and that he misdirected himself in this regard. He was required to take all relevant factors into account, which he did. He also took into account that the minor children would remain with their primary caregiver if the appellant went to prison, and that they would be well looked after. I find that the learned magistrate gave sufficient consideration to the best interests of the minor children, and that he did not misdirect himself as averred.

[53] In my view, therefore, and for these reasons, the appellant cannot succeed in his appeal based on this ground.

REMAINING ISSUES

[54] I find that none of the grounds of appeal relied on by the appellant warrant an interference with the sentence imposed by the magistrate. The magistrate did not misdirect himself by imposing custodial sentences on the appellant as opposed to correctional supervision. Given that the appellant was convicted of persistent and repeated sexual offences involving a child for a period of two years, a sentence of correctional supervision would reflect a disproportionate emphasis on the appellant's personal circumstances at the expense of the interests of the community and the complainant. It would undermine one of the express purpose of the Act, viz. to provide more

effective protection for vulnerable victims of these types of crimes. In my view, one of the means of achieving this objective is to ensure that sentences act as a real deterrent, not only in respect of the sexual abuser in the dock, but also in respect of other would-be offenders. These were factors that quite correctly in my view weighed with the magistrate in imposing a custodial sentence on the appellant.

[55] Accordingly, the appellant's contention that he ought correctly to have been sentenced to correctional supervision falls to be rejected.

[56] However, that is not the end of the matter. There are two remaining issues that fall to be considered:

[56.1] In the first place, and as I indicated earlier, the magistrate attached a non-parole period of 4 years in respect of the concurrent sentences imposed on the appellant in respect of counts 1 and 2. In doing so, he applied section 276B(2) of the Criminal Procedure Act. In light of recent pronouncements by the Supreme Court of Appeal on the proper application of this section, it falls to this court to determine whether the magistrate misdirected himself in this regard.

[56.2] In the second place, the magistrate ordered that the 4 year terms of imprisonment imposed in respect of counts 1 and 3 should not run concurrently. This court must also consider whether there was a misdirection on the part of the magistrate in this regard.

[57] Dealing first with the section 276B(2) issue.

[58] Section 276B(2)(b) provides that:

“If a person who is convicted of two or more offences is sentenced to imprisonment and the court directs that the sentences of imprisonment shall run concurrently, the court shall, subject to subsection (1)(b), fix the non-parole period in respect of the effective period of imprisonment.”

[59] The Supreme Court of Appeal recently ruled on the proper interpretation of this section in S v Mthimkulu.⁶ It held that despite the use of the word “shall”:

“... properly construed, (s276B(2)) does not oblige a sentencing court to fix a non-parole period in respect of the effective period of imprisonment as a matter of routine whenever it has ordered two or more sentences imposed on a convicted person to run concurrently. What s276B(2) in fact does is to enjoin a sentencing court, once it has exercised its discretion under s276B(1)(a) against a convicted person, to then fix the non-parole period in respect of the effective period of imprisonment, taking cognisance of the provisions of s276B(1)(b)”.⁷

[60] In other words, a sentencing court must first exercise a discretion to determine whether the imposition of a non-parole period is appropriate, and

⁶ 2013 (2) SACR 89

⁷ At para 16

only if it has properly exercised this discretion is it obliged, under section 276B(2), to fix the non-parole period applicable.

[61] As regards the discretion to make an order imposing a non-parole period, the SCA in S v Stander⁸ held that:

“An order under section 276B should ... only be made in exceptional circumstances, when there are facts before the sentencing court that would continue, after sentence, to result in a negative outcome for any future decision about parole ... (for example) undisputed evidence that the accused had very little chance of being rehabilitated.”⁹

[62] The court held further that before a sentencing court exercises its discretion, both parties must be given an opportunity to address the sentencing court, and that a failure to afford them this opportunity constitutes a misdirection.¹⁰

[63] In the present matter, it is plain from the record of the trial that the parties were not afforded an opportunity to address the sentencing court before it imposed an order under section 276B. In fact, the magistrate appeared to treat the section as obliging him to attach a non-parole period to the custodial sentences, meaning that the exercise of a discretion on his part was absent.

[64] In this, the magistrate clearly misdirected himself, and this court must correct the situation. As to what the consequences of the magistrate’s misdirection

⁸ 2012 (1) SA SACR 537 (SCA)

⁹ At para 16

¹⁰ At para 22

should be, I am guided by the manner in which the SCA dealt with the issue in S v Mthimkulu.¹¹ In its judgment, the court held that while it may be proper to remit the case back to the sentencing court for it to hear the parties on whether an order under section 276B is appropriate, this may not always be in the interests of justice. Thus, where there are particular facts to warrant it, an appeal court may for itself determine whether an order under section 276B is appropriate rather than remitting the matter back to the sentencing court. This is what the SCA did in S v Mthimkulu.

[65] As in the Mthimkulu case, there are indeed particular facts before this court to warrant our determination of whether an order under s276B is appropriate, rather than remitting the matter back to the magistrates' court. The appellant is a first offender who pleaded guilty to the offence. The evidence indicates that he never denied his actions. These are all factors that persuaded the court in Mthimkulu. Critically, in the present case the magistrate accepted that there were good prospects for the appellant's rehabilitation.

[66] In light of these factors, I am of the view that there are no exceptional circumstances warranting the imposition of a non-parole period under section 276B in this case. The interests of justice require that the magistrate's order in this regard must be set aside.

¹¹ At para 22-23

[67] I turn now to the decision of the magistrate that the sentences only in respect of counts 1 and 2 should run concurrently, and not the sentence in respect of count 3.

[68] An order that sentences are to run concurrently is called for where the evidence shows that the relevant offences are “inextricably linked in terms of the locality, time, protagonists and, importantly, the fact that they were committed with one common intent.”¹²

[69] The magistrate was alive to this when he gave his reasons for ordering that the sentences on counts 1 and 2 should run together. He indicated that this was appropriate because these two offences were closely connected. However, he did not indicate his reasons for concluding that the offence under count 3 was not similarly closely connected to those under counts 1 and 2.

[70] The charge against the appellant under count 1 was the offence of sexual grooming of children, under section 18(2)(b) of the Act. The elements of this offence are as follows (insofar as they are relevant to the facts of the present case):

[70.1] the commission of any act by the alleged perpetrator with or in the presence of a child complainant,

¹² S v Mokela 2012 (1) SACR 431 (SCA) at para 11

[70.2] with the intention of encouraging or persuading the child, or diminishing or reducing his or her resistance or unwillingness to,

[70.3] among others, perform a sexual act with the perpetrator, or

[70.4] perform an act of self-masturbation in the presence of the perpetrator, or

[70.5] be in the presence of or watch the perpetrator perform a sexual act or an act of self-masturbation, or

[70.6] expose his body parts or parts of his body to the perpetrator in a manner or in circumstances which violate or offend the sexual integrity or dignity of the child.

[71] “Sexual act” is defined under section 1 of the Act as meaning “an act of sexual penetration or an act of sexual violation” (emphasis added).

[72] The charge against the appellant under count 2 was that of compelling or causing a child to witness sexual offences, sexual acts or self-masturbation under section 21(1) of the Act. A person commits this offence if they:

[72.1] unlawfully and intentionally compel or cause a child complainant, without his consent,

[72.2] to be present or to watch the perpetrator,

[72.3] while the perpetrator commits a sexual offence.

[73] The charge against the appellant under count 3 was that of sexual assault under count 5(1). Sexual assault under this provision is the unlawful and intentional sexual violation of a complainant.

[74] “Sexual violation” is defined under section 1 of the Act, in relevant part, as including any act that causes direct or indirect contact between the genital organs of one person and any part of the body of another person, or the masturbation of one person by another person.

[75] It is common cause on the facts that the acts constituting the offences under all three counts were committed by the appellant against the same complainant, SR, over the same period of time. As I indicated above, this overlap is relevant to the question of whether the sentences in respect of all three counts should run concurrently.

[76] Of further relevance, and critically so, for purposes of the present case, is the question of whether all of the offences were committed with a common intent.

[77] It is here that in my view the magistrate erred. While he correctly identified a close connection between counts 1 and 2, he regarded count 3 as not sharing a sufficiently close connection to warrant a concurrency of sentences. If one has regard to the elements of counts 1 and 3, it is difficult to justify the magistrate’s conclusion in this regard.

[78] The sexual grooming of a child complainant involves the perpetrator conducting himself in such a manner as to reduce the child's unwillingness to among others, perform a sexual act with the perpetrator. Sexual acts cover sexual violations, and sexual assault is a form of sexual violation. As such, a perpetrator's masturbation of a child complainant (which is a form of sexual assault) is a sexual act.

[79] The appellant admitted that his conduct over the two-year period involved not only self-masturbation in the presence of SR, but also his masturbation of SR. This latter conduct amounts to sexual assault for purposes of count 3.

[80] Clearly, therefore, the appellant's sexual grooming of SR (count 1) was committed with an intent not only to expose SR to witnessing the appellant's unlawful sexual conduct (count 2), but also to reduce SR's unwillingness to the appellant committing acts of sexual assault against SR (count 3). It seems clear to me that all three of the offences inherently involved, and were committed with, a common intent, and all three sentences ought to have run concurrently. In my view, the magistrate misdirected himself by separating out count 3 from the other two charges in this regard.

[81] The magistrate ought properly to have ordered that the sentences on counts 1, 2 and 3 should run concurrently. This would have reduced the effective period of the appellant's direct imprisonment from 8 years to 4 years.

[82] It may be that by ordering only counts 1 and 2 to run together, the magistrate intended to signal that the offence of sexual assault is a particularly serious

form of child sex abuse, and that, taken cumulatively, the appellant's conduct was such that he deserved an effective sentence of more than 4 years imprisonment. However, this amounts to no more than speculation on my part, as the magistrate's judgment is silent in this respect. Had this been the intention of the magistrate, he ought to have considered imposing a sentence of greater than 4 years in respect of count 3, rather than incorrectly directing that count 3 should not run concurrently with counts 1 and 2.

[83] In view of the magistrate's misdirection in this regard, I am constrained to amend the order to reflect that the sentencing on all three of the offences should run together.

ORDER

[84] I make the following order:

1. The appellant's appeal against his sentence succeeds only to the extent indicated below:

- 1.1 The magistrate's order under section 276B(2) of Act 51 of 1977 in terms of which a non-parole period of 4 years was imposed on the appellant, is set aside.

- 1.2 The magistrate's order to the effect that the sentences in respect of counts 1 and 2 should be served concurrently is set aside and is replaced by the following order:

“In terms of section 280(2) of Act 51 of 1977 the periods of imprisonment under counts 1, 2 and 3 shall be served concurrently.

R KEIGHTLEY
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree:

B MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date Heard: 06 October 2014

Date of Judgment: 16 October 2014

Counsel for the Appellants: Adv. JHL Scheepers

Instructed by: VFV Attorneys

Counsel for the Respondent: Adv. A Deoraj

Instructed by: The Office of the DPP