

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

REV NO: 74/2019

(1)	REPORTABLE: NO/ YES
(2)	OF INTEREST TO OTHER JUDGES: NO/ YES
(3)	REVISED. 13/08/20
DATE	SIGNATURE

In the matter between

THE STATE

AND

NICOLE MAGEZA MUSHWANA AND OTHERS

REVIEW JUDGMENT

KGANYAGO J.

- [1] This matter was laid before me as automatic review in terms of section 85(1) of the Child Justice Act 75 of 2008 (the Act) read with chapter 30 of the Criminal Procedure Act 51 1977 (the CPA). Offender number 2 (child offender) who was aged 17 years at the time of the commission of the offence is regarded as a minor child offender in terms of the Act. The child offender was sentenced to seventeen (17) years imprisonment of which five (5) years was suspended for a period of (5) years on condition that he is not convicted of contravening section 3 of Act 32 of 2007 during the period of suspension. The child offender together with five others were charged with rape of a fifteen (15) year old girl. The child offender was the only one convicted of rape whilst four of the other accused were found not guilty and discharged. The fifth accused did not attend trial and his trial was separated from the others.
- [2] I have requested the opinion of the Deputy Director of Public Prosecutions (the DDPP). They have furnished me with a helpful opinion and I am indebted to them. The DDPP is of the opinion that the conviction is in order, but that the sentence is not in accordance with justice and should be set aside.
- [3] The child offender was legally represented throughout the proceedings. The child offender pleaded not guilty to the charge and denied all the allegations levelled against him. However, as the trial

progressed, it came to light that his defence was that of consensual sex.

- [4] According to the evidence of the complainant on the day of the incident she was visiting her aunt. At about 19h00 she was walking with her friend when they met four boys. She knew all the four boys. The four boys told her friend to leave of which she did. After her friend had left, the child offender started assaulted her. After assaulting her, the child offender parted ways with the other four boys and took the complainant to his homestead.
- [5] Upon arriving at the child offender's homestead, they found five boys sitting under a mango tree smoking tobacco. The child offender unlocked the door of the house and they entered. The five boys who were sitting under the mango tree also entered the house. Inside the house the child offender forced her to undress and ordered her to lie on top of a bed where he raped her. After the child offender had finished raping her, the five boys formed a queue and all raped her. As it was dark she could not identify the five boys, but was only able to identify the child offender whom she came to the house with. The following day in the morning, the child offender accompanied her to her aunt's home.

- [6] On arrival at her aunt's place, she found one Agreement and reported to her that she was raped by the child offender and others. They then went to the police station where they opened a criminal case. Her friend testified that when she saw the complainant the following day, she had finger marks on her face and also could not walk properly.
- [7] The child offender testified and his evidence was that he met the complainant at White House tavern where he was attracted to her. He greeted the complainant and ask to talk to her. The complainant told him that they will talk later. He later realized that the complainant had left. He then went to Ntembane's tavern where he found the complainant. He proposed love to her and she agreed. He sat together with the complainant's friend and talked. Later the complainant's friend left.
- [8] After some time, the child offender left with the complainant and they went to his homestead. On arrival at his homestead, they sat on the bed, talked and joked with each other. They ended up having consensual sex. After sex they slept and woke up the following morning. After waking up, he accompanied the complainant to the homestead she was visiting, and left her at the gate of that homestead. From there he went back home and slept. He never saw the complainant again.

- [9] On conviction I am satisfied that the trial court has properly analysed the evidence before it and was therefore correct in rejecting the child offender's version as not reasonably possibly true, but false beyond reasonable doubt. The child offender was correctly convicted of rape and therefore in relation to conviction, the proceedings appears to be in accordance with justice.
- [10] Turning to sentence, it is trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been an appropriate penalty. Something more is required, it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows that it did not exercise its discretion at all or exercised it improperly or unreasonably when imposing it. So, interference is justified only where there exists a 'striking' or 'startling' disparity between the trial court's sentence and that which the appellate court would have imposed. And in such instances the trial court's discretion is regarded as having been

unreasonably exercised. (**See S v Hewitt 2017 (1) SACR 309 (SCA) at para 8**)

[11] The trial court has convicted a child offender and in terms of section 28(1) (g) of the Constitution, every child has a right not to be detained except as a measure of last resort. In addition to the rights a child enjoys under section 12 and 35, the child may be detained only for the shortest appropriate period of time.

[12] In **S v BF 2012 (1) SACR 298 (SCA)** at para 11 the court said:

"The attention given to a child when considering sentence is not done vacuum. The seriousness of the offence, its impact on the victims and the interests of the broader society must be taken into consideration. The law does not prohibit incarceration of children. However, s 28(1) (g) provides that the child 'may be detained only for the shortest appropriate of time'. Undoubtedly the use of 'may' suggest that where circumstances demand incarceration as the only appropriate sentence, it can be imposed."

[13] Incarceration of a child offender should be the last resort, and even in that case the child offender should be incarcerated for the shortest appropriate of time. In the case at hand the child offender has been sentenced to seventeen (17) years imprisonment of which 5 years has been suspended for a period of five years. In other word the effective term imprisonment is twelve years.

[14] The child offender has been convicted of a serious offence of rape of a complainant who was below the age of sixteen (16) years. Had the child offender been an adult, the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 would have been applicable. However, as the court had convicted a child offender, the minimum sentences regime is not applicable and the appropriate sentence is left to the discretion of the trial court.

[15] In sentencing of the child offender, the trial court has found that he was an immature youth at the time of the commission of the offence. Immaturity on its own is a strong mitigating factor. Despite finding that the child offender was an immature youth, the trial court concluded that the only factor that counted in favour of the child offender was that he was under the age of eighteen (18) years at the time of the commission of the offence. That in my view contradicts the earlier finding that the child offender was an immature youth. By finding that the child offender was an immature youth, means that immaturity played a role in the child offender committing that offence. The only aggravating factors that the trial court has stated is that the offence was very, very serious; the victim had suffered, and is still suffering.

- [16] The trial court has correctly referred to the provisions of section 28(1) (g) of the Constitution, but did not state reasons why the child offender may not be incarcerated for the shortest appropriate time. In my view, the trial court has approached the sentence of the child offender with anger. The probation officer had recommended a sentence in terms of section 77(1) (b) of the Act, which also emphasised that imprisonment of a child offender must be the last resort and be for the shortest appropriate period of time.
- [17] The trial court did not take into consideration that the child offender was a first offender. The trial court has over-emphasised the seriousness of the offence and did not attach any weight that the child offender was a first offender and an immature youth. It went on to state that the court is from the township itself and when they grew up they were taught by their parents and grandparents to respect people and not go out there to rape girls. In my view, this was an irrelevant statement and what the trial court was supposed to do was to apply section 28(1) (g) of the Constitution read with section 77(1) (b) of the Act which it has failed to do. Therefore, the trial court has misdirected itself by imposing a lengthy sentence of imprisonment by ignoring that offender number 2 was child at

the time of the commission of the offence and was therefore duty bound to impose the shortest appropriate term of imprisonment.

[18] The State is of the view that a sentence of 8 years imprisonment will be appropriate in this matter taking into consideration that the child offender was seventeen (17) years at the time of the commission of the offence of rape. I agree with the State's submission. In my view, with regard to sentence, the proceedings does not appear to be in accordance with justice and stand to be reviewed and set aside.

[19] **In the result I make the following order:**

19.1 The conviction of child offender is confirmed.

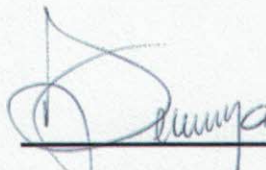
19.2 The sentence of 17 years imprisonment is reviewed and set aside and substituted with the following:

"The child offender is sentenced to eight (8) years imprisonment antedated to 16th August 2019."



MF KGANYAGO J
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA, LIMPOPO
DIVISION, POLOKWANE

I agree



MV SEMENYA J

**JUDGE OF THE HIGH COURT
OF SOUTH AFRICA, LIMPOPO
DIVISION, POLOKWANE**