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Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

CASE NO: **42/2015**
DATE DELIVERED: **15/04/2016**

In the matter between:

H. M. A.

and

THE STATE

Coram: Olivier J et Lever AJ

JUDGMENT ON REVIEW

Olivier J:

- [1.] The accused was convicted of rape¹ and was sentenced to 6 years imprisonment. It was ordered that he serve his sentence in the Bosasa Youth and Child Care Centre in De Aar until he reached the age of 21 years, when the court would, upon receipt of a report from the centre, consider whether further imprisonment would be appropriate.
- [2.] This resulted in the accused being deemed unfit to possess a firearm² and the Regional Magistrate did not order otherwise.
- [3.] The accused had pleaded guilty to having raped a 7 year old girl. The two of them had been walking together when the accused, who had been 15 years old at the time, suggested to the complainant that they have intercourse. She agreed, undressed and they had intercourse. Afterwards both of them got dressed and when the girl complained of pain the accused accompanied her home.
- [4.] The complainant suffered a genital laceration that was sutured in theatre. There was no evidence of lasting physical or psychological effects, although the complainant's family experienced the events as very traumatic. It also appeared that the complainant was being ridiculed about the incident.
- [5.] The accused was 17 years old at the time of the trial. He was attending school and was in grade 9. Even though the accused

¹ In contravention of the provisions of section 3 of the **Criminal Law (Sexual Offences and Related Matters) Amendment Act**, 32 of 2007.

² In terms of the provisions of section 103(1)(g) the **Firearms Control Act**, 60 of 2000.

appeared *“to have low intellectual abilities”*³, his academic progress had been average. According to the social worker the accused was, even at the age of 17 years, in the *“adolescent stage of development”*, which is according to the social worker *“often associated with the search for identity”*.

- [6.] According to the report of the social worker the accused was *“aware of the harm he (had) done to the victim”*, felt sorry for her and whenever he saw her he wanted to cry. These observations are difficult to reconcile with the social worker’s remark that the accused showed little concern for the impact that his deed had on others.

- [7.] The accused was a first offender. He told the social worker that the delay in the case caused him a lot of stress and that he wanted it to be finalised.

- [8.] Despite financial constraints and living in an area of Douglas where social problems were common, the accused’s parents provided him with a stable upbringing. The social worker described him as *“attached with his siblings”*⁴ and as part of a close-knit family. He had a very strong bond with his parents. The accused had never before *“manifested behavioral problems”* and according to the social worker the accused *“easily accepts to be disciplined”*.

³ According to a report of a social worker.

⁴ Most of whom were still living with the accused and his parents in Douglas.

- [9.] The accused and his parents were distressed at the prospect of him having to leave Douglas to go to the Bosasa Child and Youth Care Centre in De Aar⁵.
- [10.] The Regional Magistrate has conceded that the sentence, as formulated, is not a competent sentence.
- [11.] Section 76(1) of the **Child Justice Act**⁶ (the “Act”) provides for a sentence of “*compulsory residence*” in a child and youth care centre⁷; not for a sentence of imprisonment to be served at such a centre. That a sentence of imprisonment is to be distinguished from a sentence of compulsory residence at such a centre is evident from the provisions of section 76(3)(a) of the Act, which provides that a sentence of imprisonment, to be served after completion of the period of compulsory residence in a child and youth care centre, may be imposed “*in addition to*” a sentence of compulsory residence in such a centre.
- [12.] Such additional imprisonment may only be imposed “*if substantial and compelling reasons exist*”⁸ which would justify it, and then “*only ... as a measure of last resort and for the shortest appropriate period of time*”⁹. Even then the need for such an additional sentence of imprisonment to be served will, in terms of subsections (b) and (c)

⁵ There is no child and youth care centre in Douglas.

⁶ 75 of 2008.

⁷ As envisaged in section 191 of the Children’s Act, 38 of 2005.

⁸ Section 76(3)(a) of the Act.

⁹ Sections 77(1)(b) and 69(1)(e) of the Act.

of section 76(3) of the Act, have to be reconsidered upon completion of the period of compulsory residence at the centre.

[13.] The maximum period of compulsory residence (in a child and youth care centre) that may be imposed is 5 years or until the child reaches the age of 21 years, whichever occurs first¹⁰. The Regional Magistrate has stated that he intended the accused to remain in the centre until the age of 21 years, but also to impose an additional sentence of 2 years imprisonment in view of the seriousness of the offence.

[14.] The problem is that it does not appear from the judgment on sentence, or from the Regional Magistrate's subsequent comments, whether the Regional Magistrate was aware of the requirement of substantial and compelling reasons for such an additional sentence of imprisonment and, if so, what the Regional Magistrate considered to be such reasons.

[15.] Much emphasis was placed on the seriousness of the offence. It goes without saying that sexual intercourse with a 7 year old girl is a serious offence, but the particular circumstances nevertheless have to be kept in mind. The complainant was not subjected by force or threat. She "*agreed*" to a suggestion made by a particularly small built 15 year old friend.

¹⁰ Section 76(2) of the Act.

- [16.] Although mention was made of the fact that the accused was at the time of sentence still a child who had to be dealt with in accordance with the provisions of the Act, no particular consideration appears to have been given to the fact that the accused had actually been only 15 years old at the time of the offence¹¹.
- [17.] That he had no previous convictions and had pleaded guilty were only mentioned in passing. No mention at all was made of the issue of remorse, or of the delay in the prosecution and the resulting “*mental anguish*”¹² and “*suspense*”¹³ for the accused¹⁴.
- [18.] Factors like the accused’s limited intellectual capacity and his particularly small physique appear not to have been considered.
- [19.] It is against this background that the Regional Magistrate should have considered whether there nevertheless existed substantial and compelling reasons for an additional sentence of imprisonment. In doing so the Regional Magistrate would have had to deal with the fact that the social worker had recommended only compulsory residence as a sentence and had advised against the imposition of imprisonment.
- [20.] In my view the sentence should therefore be set aside and the matter remitted to the Regional Magistrate to impose sentence afresh, keeping in mind what has been said above, as well as cases

¹¹ Compare **S v Kwalase** 2000 (2) SACR 135 (C) at 141i-142a

¹² **Michele and Another v S**, [2010] 1 All SA 446 (SCA), para [13]

¹³ **S v Roberts**, 2000 (2) SACR 522 (A) at 529D

¹⁴ Compare also **Hendricks v S**, [2010] 4 All SA 184 (SCA)

like **S v Gqamana**¹⁵, **S v Fhetani**¹⁶, **S v TLT**¹⁷ and **Johannes v S**¹⁸, to the extent that they may be comparable, and any period already spent in the centre by the accused.

[21.] Should a sentence be imposed which would again result in the accused being deemed unfit to possess a firearm, the Regional Magistrate must give the accused's legal representative the opportunity to address the court on the issue of whether the court should determine otherwise¹⁹. If such a sentence is not imposed the Regional Magistrate must "*must enquire and determine whether (the accused) is unfit to possess a firearm*"²⁰

[22.] In my view the conviction is in accordance with justice and the following orders are therefore made:

1. **THE CONVICTION IS CONFIRMED.**
2. **THE SENTENCE IS SET ASIDE AND THE MATTER IS REMITTED TO THE MAGISTRATE TO SENTENCE AFRESH, TAKING INTO ACCOUNT THE PERIOD ALREADY SPENT BY THE ACCUSED IN THE CHILD AND YOUTH CARE CENTRE.**

¹⁵ 2001 (2) SACR 28 (C)

¹⁶ 2007 (2) SACR 590 (SCA)

¹⁷ 2013 JDR 1482 (GSJ)

¹⁸ [2013] 4 All SA 483 (WCC)

¹⁹ See section 103(1) of the **Firearms Control Act**.

²⁰ Section 103(2) of the **Firearms Control Act**.

**C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION**

I agree.

**LEVER L G
ACTING JUDGE
NORTHERN CAPE DIVISION**