

REPUBLIC OF SOUTH AFRICA

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, (PRETORIA)

CASE NO: A767/2014

In the matter between

ALLEN MNIKELO MTHIYANE

Appellant

And

THE STATE

Respondent

J U D G M E N T

NKOSI AJ

INTRODUCTION

[1] On the 23rd of June 2011 the Appellant pleaded not guilty to the following charges in the regional court, Ermelo:

- Count 1: Exposure or display of or causing exposure or display of genital organs, anus or female breasts to a child ("flashing")- contravention of **section 22 of Act 32 of 2007**; in that on or about the 27-09-2009 at or near Breyton in the Regional Division of Mpumalanga the said accused did unlawfully and intentionally commit an act to wit expose his private part whether for the sexual gratification of the accused person to expose or display or cause the exposure or display of the genital organs of the accused to a child complainant to wit N..... M..... a 08 year old female child or without the consent of the said child complainant by undressing himself naked and exposing his penis to the child.
- Count 2: Exposure or display of causing of genital organs, anus or female breasts to a child ("flashing")- contravention of **section 22 of Act 32 of 2007**; in that on or about the 27 -09-2009 and or near Regional Division of Mpumalanga the said accused did unlawfully and intentionally commit an act to wit expose his private part whether for the sexual gratification of the accused person to wit expose or display or cause the exposure or display of the genital organs, of the accused to a child complainant to wit N..... K..... a 07 years old female without the consent of the child complainant by undressing himself naked and exposing his penis to the child.
- Count 3: Exposure or display of or causing exposure or display of genital organs, anus or female breasts to a child ("Flashing")- contravention of **section 22 Act 32 of 2007**; in that on or about the 27-09-2009 and at or near Breyton in the Regional Division of Mpumalanga the said accused did unlawfully and intentionally commit an act to wit expose his private parts sexual gratification of the accused person to wit, expose or display or cause the exposure or display of the genital organs, of the accused or the said person to a child complainant to wit M..... K..... a 08 year old female without the consent of the child complainant by undressing himself naked and exposing his penis to the child.
- Count 4: Crimen iniuria; In that on or about 27 September 2009 and at or near Breyton in the District/Regional Division of Mpumalanga, the accused did unlawfully and intentionally injure and insult and impair the dignity of N..... M....., N..... K..... and M..... K..... Minor children by inviting them to his room where upon arrival he locked them in the room and undressed his pants and underwear exposing his private part to the children.
- Count 5: Rape - contravention of **section 3 Act of 32 of 2007**; in that upon or about December 2009-January 2010 Breyton in the District of Ermelo and in the Regional division of Mpumalanga the said accused did unlawfully and intentionally commit an act of sexual penetration with the complainant to wit N..... M..... (10) Years old by: penetrating the vagina of the complainant with penis without the consent of the said complainant.

[2] On the 27th of September 2011 the Appellant was convicted on charges 1 and 5 by the presiding magistrate, Mr S Hallet. He was acquitted on counts 2, 3 and 4.

[3] Sentence was imposed on the 2nd of February 2012 as follows:

Count 1: 1 year of imprisonment;

Count 2: Life Imprisonment.

[4] The trial court ordered that the sentences should be served concurrently.

[5] The Appellant applied for leave to appeal in respect of sentence on the 15th of March 2012. Leave to Appeal was refused by the trial magistrate. Leave to appeal

was unnecessary because the Appellant had at the time an automatic right of appeal in terms of **section 309 of the Criminal Procedure Act, Act 51 of 1977 read with sections 10 and 43 (2) of the Judicial Matters Amendment Act, Act 42 of 2013.**

Section 309 (1) (a) of the Criminal Procedure Act, Act 51 of 1977 reads as follow:

“Subject to section 84 of the Child Justice Act, 2008 (Act 75 of 2008), any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the high court having jurisdiction: provided that if that person was sentenced to imprisonment for life by a regional court under section 51 (1) of the Criminal Law Amendment Act, 1997 (Act 105 of 1997), he or she may note such appeal without having to apply for leave in terms of section 309B: Provided further that the provisions of section 302 (1)(b) shall apply in respect of a person who duly notes an appeal against a conviction, sentence or order as contemplated in section 302 (1) (a).”

Section 43 (2) of the Judicial Matters Amendment Act, Act 42 of 2013

provides as follows:

“Sections 10 and 11 are deemed to have come into operation on 1 April 2010 and section 42 is deemed to have come into operation on 20 September 2010.”

[6.] The Appellant was legally represented throughout the trial by Mr Van der Bank.

While the respondent was represented by Mrs Thomu.

[7.] The appellant made an application for condonation for the late filing of his heads of arguments which in the absence of any opposition was granted.

Summary of Evidence

[8.] The state called 6 witnesses to prove their case. The birth certificate of N.....

M..... was handed in by consent as Exhibit ‘A’, as was the J88, which was compiled by Doctor PC Ngwenya of Nompulo Mazibuko, as Exhibit

‘B\

[9.] N..... M..... testified that in March 2010 she was in the company of M..... and N..... at B..... Town. They asked the Appellant for 50c. He took them to his bedroom and told them to close their eyes, as he was making a film.

Miss M..... testified that she peeped and saw that the Appellant was undressing himself. She testified that they saw the private parts of the Appellant. They ran away. The following day N..... informed her mother of the incident.

[10.] N..... K..... did not testify as the presiding magistrate had difficulty in admonishing the witness.

[11.] N..... K..... testified that N..... had made a report to her that a certain man wanted to rape them. N..... informed Mrs K..... that she had been in the company of M..... and N..... The matter was reported to the police, whereafter the children had identified the Appellant to the police.

[12.] A..... M..... testified that she observed that N..... was walking funny. When she inquired from N..... what the problem was, she replied that she had been raped. The matter was reported to the police, and N..... was taken to hospital.

N..... reported that she was in the company of other children. They were sent to fetch herbal medicine from a certain man. The man sent the other children to the shop, while he played a writing game with N.....

[13.] N..... M..... testified that she was raped by the Appellant on a day that she had accompanied other children to the Appellant. The other children were sent to

the shop, while she remained with the Appellant, and was subsequently raped by him.

- [14.] M..... K..... testified that on a certain day she was in the company of N..... and N..... She testified that they met a man from whom N..... asked for 50c. The man invited them to his house. They played a game, where after the man told them to close their eyes. They saw how the man undressed himself as they did not close their eyes. She testified that she saw the man's underwear. They thereafter ran away.
- [15.] The Appellant testified in his own case. No witnesses were called to testify on behalf of the Appellant. A..... M..... M..... testified that on the 27^h of September 2009 two girls and one boy followed him to his house. He testified that N..... asked him for 50c. The Appellant did not have his wallet with him as he was coming from the soccer field.
- [16.] The children followed him home where he gave them juice and biscuits. N..... then asked the Appellant for R20. He chased the children away. N..... threatened to lay an attempted rape charge against the Appellant. The Appellant denied having exposed himself to the children.
- [17.] The Appellant testified that the complainant in respect of count 5 was not raped by him. He testified that she was in the company of two other children who wanted money from him. He gave them cabbage and potatoes, and the following day gave them R100.

AD SENTENCE

- [18.] The Appellant only appealed against the sentence imposed.
The State proved no previous convictions against the Appellant.
- [19.] The following personal circumstances of the Appellant were placed on record by his legal representative:

The Appellant was 43 years old;

He is married;

He has two children aged 3 and 1 and a half years;

The Appellant was a Sangoma at the time of his arrest and earned an income of R3500 per month;

He was the sole breadwinner at home;

The Appellant was held in custody from his arrest on the 13th of January 2010 until 2 February 2012.
He was a first offender.

- [20.] The legal representative of the Appellant did not address the trial court in respect of any substantial and compelling circumstances which would justify the imposition of a sentence less than the prescribed minimum sentence. This means that the court of appeal will have to look into all circumstances which could have assisted the court coming to an appropriate sentence. The *Lacuna* left out by the Appellant's legal representative gives this court the power to reconsider this. The personal circumstances of the Appellant have to be looked at in the totality of evidence cumulatively.
- [21.] In terms of **section 51 (1) of the Criminal Law Amendment Act, Act 105 of 1997** a minimum sentence of life imprisonment is prescribed for a first offender of the rape

of a child.

[22.] In terms of **section 51 (3) of Act 105 of 1997** a lesser sentence must be imposed should a court be satisfied that substantial and compelling circumstances exist to justify such a lesser sentence.

The trial court did not find any such circumstances.

The only ground of appeal is that the trial magistrate failed to properly take into account the period which the Appellant had spent in custody while awaiting the finalisation of the trial.

[23.] In **S V Mqabhi** 2015 (1) SACR 508 (GJ) the court formulated the following guidelines in determining whether the period spent in custody ought to be considered a substantial and compelling circumstance justifying the imposition of a sentence less than the minimum prescribed sentence:

“After considering argument the court formulated the following guidelines: (a) pre-sentence detention was a factor to be taken into account when considering the presence or absence of substantial and compelling circumstances for the purposes of CLAA. (B) Such period of detention was not to be isolated as a substantial and compelling circumstance but had to be weighed as a mitigating factor; together with all the other mitigating and aggravating factors, in determining whether the effective minimum period of imprisonment to be imposed was justified in the sense of it being proportionate to the crime committed. If it were not then the want of proportionality constituted the substantial and compelling circumstances required under section 51 (3) (c) The reason for the prolonged period of presentence detention was a factor. If the offender were responsible for unnecessary delays then this might redound to his detriment, (d) There was no mechanical formula or rule of thumb to determine the period by which a sentence was to be reduced. The specific circumstances of the offender, which might include the conditions of his detention, were to be assessed in each case when determining the extent to which the proposed sentence should be reduced, (e) Where only one serious offence was committed, and assuming that the offender had not been responsible for unduly delaying the trial, then a court might more readily reduce the sentence by the actual period in detention prior to sentencing. ”

[24.] Counsel for the Appellant submitted that the trial court misdirected itself in not finding that the following factors, cumulatively considered, amounted to substantial and compelling circumstances justifying the imposition of a sentence less than life imprisonment:

1. That the Appellant had been in custody since 13 January 2010 until 2nd of February 2012, effectively meaning that the Appellant was in custody for a period of 2 years before sentence was imposed. This is one of the aspects the trial court should have taken into account.
2. The Appellant was a first offender;
3. That only count 5 is of a very serious nature;

4. The record does not reflect that any of the postponements were due to any fault on the Appellant. The submission has merit.
- [25.] The trial court, in my view, misdirected itself in not finding substantial and compelling circumstances which in my view, exist in this case. This entitles the appeal court to interfere with the sentence and impose an appropriate one having considered all facts presented.
- [26.] This court, in my view, is at large to reconsider the question of sentence afresh. The personal circumstances of the Appellant too, in my view, demonstrate the existence of substantial and compelling circumstances.
- [27.] For the reasons given above the appeal against sentence should succeed.
- [28] In the result I make the following order:
- (a) The sentence on count 1 is upheld.
 - (b) Life imprisonment imposed by the trial court is set aside and replaced with a sentence of 22 years imprisonment antedated to 2nd of February 2012 which is the date of sentence.
 - (c) Both sentences will run concurrently.

VRSN NKOSI

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.

W MSIMEKI

JUDGE OF THE HIGH COURT