

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
REPUBLIC OF SOUTH AFRICA

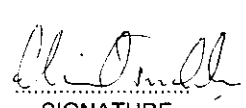
CASE NO: A263/12

In the matter between:

20/8/2012.

THE STATE

and

(1)	REPORTABLE:	YES / NO
(2)	OF INTEREST TO OTHER JUDGES:	YES / NO
15/08/12		
DATE		SIGNATURE

FM

Accused

and

CENTRE FOR CHILD LAW

Amicus Curiae

JUDGMENT

Tuchten J:

- 1 This matter comes before us on special review from a regional magistrate under 303(4) of Chapter 30 of the Criminal Procedure Act, 51 of 1977 ("the CPA") . It relates to the review procedure when a child, as defined in the Criminal Justice Act, 75 of 2008 ("the CJA") is sentenced by a regional court to a form of imprisonment which is not wholly suspended. Because of the importance of the issue, the

Deputy Judge President directed that the case be heard before a full court of three judges.

- 2 The Centre for Child Law sought leave to be admitted to the review as *amicus curiae*. Its main objective is to contribute to the establishment and promotion of the best interests of children in South Africa and in particular to use the law as an instrument to advance such interests. There was no objection to the admission of the *amicus*, which has both knowledge of and an interest in the legal issues raised by the review. We accordingly granted an order permitting the *amicus* to enter the proceedings and to present both written and oral submissions. Adv Skelton appeared for the *amicus* and we are grateful for her contribution.
- 3 The accused was charged in a regional court with the crime of contravening the provisions of s 3 of the Criminal Law Amendment Act (Sexual Offences and Related Matters Act) 32 of 2007, corresponding to the common law crime of rape. It was alleged that on 8 September 2010 he committed an act of sexual penetration of the complainant, an 11 year old girl who, the evidence revealed, suffered from mental disability.

- 4 The accused was found to have been born on 26 July 1994. Although other dates of birth are reflected in some of the documents before the court, I shall accept that this was his true birth date. He was legally represented. His only living parent, his mother, attended the proceedings. The accused was also assisted by a relative described as his uncle. The accused decided to plead guilty. His legal representative prepared a statement in terms of s 112(2) of the Criminal Procedure Act, 51 of 1977 ("the CPA") which the accused signed. The statement was handed up by the legal representative of the accused after he pleaded guilty.
- 5 In the statement, the accused admitted that he committed an "act of sexual penetration with" the 11 year old complainant by inserting his penis in her vagina without her consent and that he was detected during the commission of the act, after which he ran away. The regional magistrate established from the accused that he understood the statement and confirmed that its contents were true and correct. The prosecutor then informed the court that the state accepted the facts set out in the statement, whereupon the regional magistrate found the accused guilty as charged. This aspect of the proceedings is uncontroversial. The regional court then proceeded to the next stage of the trial, the consideration and imposition of an appropriate sentence.

- 6 The evidence of a senior probation officer with a degree in social work presented a report, which he confirmed under oath. The report disclosed that the accused had no previous convictions but had been previously charged with offences involving violence, sexual assault and theft, committed on 7 January 2009, 20 August 2009 and 25 November 2009. On each such occasion, the charge was diverted under the provisions of chapter 8 of the CJA.
- 7 The institution of diversion, in terms of which a child in conflict with the law is dealt with in a procedure over which a judicial officer presides but outside the scope of the traditional justice system of plea and trial, is beyond the scope of this judgment. Suffice it to say that diversion cannot take place unless the presiding officer is satisfied that a *prima facie* case against the child exists and the child acknowledges responsibility for the offence. Although a diversion order made in terms of the CJA does not constitute a previous conviction referred to in the CPA, such an order is a matter for record. Under s 60(2)(a)(iii) of the CJA, particulars of such diversion orders are legitimately accessible for the purposes of a subsequent trial of the child offender for an offence other than that which was the subject of diversion. The evidence relating to the charges diverted was not challenged by the legal representative of the accused.

- 8 The accused's father is dead. He is the second of four siblings and lives with his mother. He left school during his grade 3 year, probably then aged 12, and began manifesting anti-social behaviour. He got into bad company and used alcohol and drugs, including dagga, which he smoked regularly at the time of his arrest, and a concoction called *nyaope*, apparently a mixture of dagga and heroin, which the accused claimed to have given up using. At the time of his arrest he helped an uncle to sell firewood. He did not contribute any of the meagre sums he earned in this way towards maintenance of the family but spent them on his own needs, both lawful and illicit. The accused comes from a profoundly impoverished background. He did not participate in family activities. For example, at the time of his arrest, he no longer attended the church to which the family was affiliated.

- 9 After his arrest, the accused was detained at a Secure Centre. There he got into fights with other residents but participated well in programmes designed to transform inappropriate and anti-social behaviour. As the probation officer observed, it was clear that the accused seemed to have gained something from the programmes but it remains to be seen whether he will practise the values there articulated. The probation officer recommended that the accused be sentenced to a term of imprisonment.

- 10 As can be expected, the rape had a dreadful effect on the victim and her family. I have mentioned that the victim is mentally disabled. A victim impact report prepared by a social worker attached to the Department of Health and Social Development was submitted to the court *a quo*. The only physical injuries she suffered were minor abrasions and scratches. She was given medication to prevent various sexually transmissible diseases. Fortunately, the victim did not develop any such disease. The victim's mother no longer thinks it is safe for the victim to play with other children. The victim herself wants her mother to be with her at all times to protect her against being raped again. She has suffered what the regional magistrate called a behavioural change as a result of her ordeal.
- 11 The victim's mother indicated that there was no relationship between the victim and the accused. Against this, the accused claimed that the victim was his girlfriend. In context, this claim would appear strongly to suggest that the accused had previously abused the victim. The victim's family are rightly angered by the conduct of the accused and believe that he should go to prison for his crime. The complainant herself appeared to be mentally unfit to testify. The social worker who prepared the victim impact report also recommended that the accused be sentenced to a term of imprisonment.

- 12 In passing sentence, the regional magistrate took into account the personal circumstances of the accused, the youth of the offender and the victim, the mental disability of the victim and the brutal invasion of the privacy, dignity and person of the victim of a rape in general and the victim in particular. He accepted and gave weight to the evidence of the probation officer and the social worker. Drawing on the reasoning in *Centre for Child Law v Minister of Justice and Constitutional Development and Others (National Institute for Crime Prevention and the Reintegration of Offenders, as amicus curiae)* 2009 2 SACR 477 CC, the regional magistrate pointed out that while the minimum sentencing regime created by s 51 of Act 105 of 1977 ("the minimum sentence regime") did not apply to children aged 16 and 17 years old, the prescribed sentence for the rape of a child was life imprisonment and a court sentencing an offender aged 16 or 17 could legitimately have regard to the purposes of the minimum sentencing regime even though its provisions did not apply directly to such offenders. This was described in *Centre for Child Law v Minister of Justice and Constitutional Development and Others, supra*, para 21 as the "weighting effect" of the minimum sentences.- as to which see *S v B* 2006 1 SACR 311 SCA para 24.

- 13 The regional magistrate found that the accused was a person who could be rehabilitated without having to endure a prolonged period of imprisonment and proceeded to consider the available sentencing options. He came to the conclusion that imprisonment as contemplated in s 276(1)(b) of the CPA was the only appropriate option. He sentenced the accused to 15 years imprisonment of which 5 years were suspended for five years on appropriate conditions.
- 14 The accused did not appeal against his conviction or sentence. However, the regional magistrate who heard the case, uncertain whether cases in which sentence was imposed on a child accused by a regional magistrate or where a child accused was legally represented were subject to automatic review under the CJA, has submitted the matter to the High Court for consideration. The question now arises whether a person in the position of the accused, who was legally represented and who was sentenced by a regional court to a period of imprisonment and has elected not to appeal is entitled to have his case automatically reviewed by a judge.

- 15 The question turns largely on the relationship between s 85 of the CJA and s 302 of the CPA. Section 85 of the CJA reads:

Automatic review in certain cases

(1) The provisions of Chapter 30 of the Criminal Procedure Act dealing with the review of criminal proceedings in the lower courts apply in respect of all children convicted in terms of this Act: Provided that if a child was, at the time of the commission of the alleged offence-

- (a) under the age of 16 years; or
- (b) 16 years or older but under the age of 18 years, and has been sentenced to any form of imprisonment that was not wholly suspended, or any sentence of compulsory residence in a child and youth care centre providing a programme provided for in section 191 (2) (j) of the Children's Act,

the sentence is subject to review in terms of section 304 of the Criminal Procedure Act by a judge of the High Court having jurisdiction, irrespective of the duration of the sentence.

(2) The provisions of subsection (1) do not apply if an appeal has been noted in terms of section 84.¹

¹ I shall in what follows describe a child deprived of his or her freedom as contemplated in s 85(1)(b) as being a child in detention. This is consistent with the meaning of detention in the definitions section of the CJA.

Section 302 of the CPA reads:

Sentences subject to review in the ordinary course

(1) (a) Any sentence imposed by a magistrate's court-

(i) which, in the case of imprisonment (including detention in a child and youth care centre providing a programme contemplated in section 191 (2) (j) of the Children's Act, 2005 (Act 38 of 2005)), exceeds a period of three months, if imposed by a judicial officer who has not held the substantive rank of magistrate or higher for a period of seven years, or which exceeds a period of six months, if imposed by a judicial officer who has held the substantive rank of magistrate or higher for a period of seven years or longer;

[Sub-para. (i) substituted by s. 13 (a) of Act 26 of 1987 and by s. 99 (1) of Act 75 of 2008.]

(ii) which, in the case of a fine, exceeds the amount 29 determined by the Minister from time to time by notice in the Gazette for the respective judicial officers referred to in subparagraph (i),

[Sub-para. (ii) substituted by s. 8 of Act 109 of 1984 and by s. 15 of Act 5 of 1991.]

(iii)

[Sub-para. (iii) deleted by s. 2 of Act 33 of 1997.]

shall be subject in the ordinary course to review by a judge of the provincial or local division having jurisdiction.²

²

I have included reference to amending measures because of an argument advanced on behalf of the state, with which I shall deal below.

- 16 Section 1 of the CPA defines certain terms relevant to this enquiry. "Lower court" means any court established under the provisions of the Magistrates' Courts Act, 32 of 1944 (Act 32 of 1944). 'Magistrate' does not include a regional magistrate. 'Magistrate's court' and 'regional court' mean a court established under the provisions of the Magistrates' Courts Act respectively for any district and for a regional division. 'Regional magistrate' means a magistrate appointed under the provisions of the Magistrates' Courts Act to the court for a regional division. A reference in the CPA to a magistrate is a reference to the judicial officer presiding in a district court and not to the judicial officer presiding in the regional court.
- 17 These terms are not defined in the CJA. Under s 63 of the CJA, the trial of a child accused must be conducted in accordance with the relevant provisions of the CPA relating to plea and trial of accused persons, as extended or amended by the provisions as set out in Chapters 9 and 10 of the CJA. Appeals and reviews in such cases must also be conducted in accordance with the procedures provided for in the CPA, subject of course to provisions in the CJA in amplification or to the contrary. It therefore seems appropriate that where an expression is defined in the CPA but not in the CJA, the meaning ascribed to the expression in the CPA should be applied

when interpreting the CJA, unless from the context a different meaning is to be preferred.

18 The case for a positive answer to the question posed in relation to regional magistrates was made by counsel for the accused and the *amicus*. Counsel for the state submitted that on a proper reading of the two measures, the traditional position, that the judicial work of senior magistrates and regional magistrates was not subject to automatic review, was preserved. In this context, one may add that, over the years, regional magistrates have been given increased responsibilities and may even presently impose a sentence of imprisonment for life.

19 In *Natal Joint Municipal Pension Fund v Edumeni Municipality* [2012] 2 All SA 262 (SCA) at par 18, the proper approach to interpretation was explained:

[I]nterpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the

apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. ... The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

- 20 When a statutory provision is reasonably capable of different meanings, a court should prefer the interpretation which better promotes the spirit, purport and objects of the Bill of Rights. That would be a more effective interpretation through the prism of the Bill of Rights. *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 1 SA 337 CC paras 46, 84 and 107.
- 21 There is considerable legislative indication that current legal policy favours a high degree of scrutiny over sentences imposed on child offenders. Section 28(1)(g) of the Constitution gives every child the right not to be detained except as a measure of last resort, in which

case, in addition to the rights a child enjoys under ss 12 and 35 of the Constitution, the child may be detained only for the shortest appropriate time.

22 The CJA refers in its preamble to these provisions of the Constitution and to the United Nations Convention on the Rights of the Child ("the UN Convention") and the African Charter on the Rights and Welfare of the Child, under which South Africa has obligations as a party.³ Art 37 of the UN Convention prescribes in terms similar to s 28(1)(1)g) of the Constitution that deprivation of liberty should be a measure of last resort and for the shortest possible time. Art 3 of the African Convention provides that the essential aim of treatment of every child found guilty of infringing the penal law shall be his or her reformation, re-integration into his or her family and social rehabilitation.

23 Sections 82 and 83 of the CJA provide:

82 Child to be provided with legal representation at State expense in certain instances

(1) Where a child appears before a child justice court in terms of Chapter 9 and is not represented by a legal representative of his or her own choice, at his or her own expense the presiding officer must refer the child to the Legal

³

The text of the Conventions can be read at www2.ohchr.org/english/law/crc.htm and http://www.africa-union.org/official_documents/Treaties respectively.

Aid Board for the matter to be evaluated by the Board as provided for in section 3B (1) (b) of the Legal Aid Act, 1969 (Act 22 of 1969).

(2) No plea may be taken until a child referred to in subsection (1) has been granted a reasonable opportunity to obtain a legal representative or a legal representative has been appointed.

83 Child may not waive legal representation in certain circumstances

(1) No child appearing before a child justice court may waive his or her right to legal representation.

(2) If a child referred to in subsection (1) does not wish to have a legal representative or declines to give instructions to an appointed legal representative, the court must enter this on the record of the proceedings and a legal representative must, subject to the provisions of the Legal Aid Guide referred to in section 3A of the Legal Aid Act, 1969 (Act 22 of 1969), be appointed by the Legal Aid Board to assist the court in the prescribed manner.

- 24 A 'child justice court' means, under s 1 of the CJA (the definitions section) any court provided for in the Criminal Procedure Act, dealing with the bail application, plea, trial or sentencing of a child. It is well nigh inconceivable under the CJA, particularly in the light of the provisions of s 83(2), for a child accused competently to be unrepresented in a criminal case. It was accepted by all counsel who appeared before us that the case of a child accused who is legally represented is not disqualified for that reason alone from being subject to automatic review. In my view this must be the correct position. If it were otherwise, almost no case

at all involving a child accused would be subject to automatic review. That, to use the language of *Natal Joint Municipal Pension Fund, supra* would require imputing to s 85(1) of the CJA an unreasonable and insensible meaning.

25 This measure, making it to all intents and purposes compulsory for a child to be legally represented in any criminal trial, even against the will of the child, is a sharp break with the past - even with our early post-Constitutional past. It is also an indication that the CJA requires safeguards against a potential failure of justice, of which legal representation is one, to promote the constitutionally derived value as identified in the preamble to the CJA that the plight of children in conflict with the law should be approached in a comprehensive and integrated manner that takes into account their vulnerability and special needs.

26 The obligatory nature of legal representation for the child accused is relevant at a further level. Under s 302(3)(a) of the CPA, automatic review under s 302(1) is not required where an accused is legally represented at the time he or she is sentenced. But on any interpretation of s 85 of the CJA, as was recognised by all the parties who appeared before us, the fact that a child accused was legally represented is no longer a bar to automatic review. This too is an

indication of the enhanced scrutiny of the case of the child accused contemplated by the CJA and is entirely consistent with the spirit of the Constitution and the two Conventions to which I have referred.

- 27 On the interpretation advanced on behalf of the state, the measure requires that the bar to automatic review in relation to the legally represented child accused be raised only in the cases of those who are sentenced to an effective term of detention of three months or less by a judicial officer other than a regional court magistrate who has not held the substantive rank of magistrate or higher for a period of seven years and those who are sentenced to an effective term of imprisonment of between three and six months by such a judicial officer who has held the rank for seven years or longer.
- 28 This interpretation was criticised by counsel for the accused and the *amicus* on the ground that the effect would be, irrationally and contrary to the spirit of the Constitution, to exclude from the ambit of automatic review the cases of children found guilty of more serious offences, cases which are generally heard in regional courts and are likely to attract heavier sentences. This category, it was submitted, is more likely to include cases which require scrutiny in order to ensure at the very least that the period of detention to which the child accused is sentenced is the shortest appropriate period. In my view

there is merit in this criticism. One of the objects of the CJA, articulated in s 2(c) is to

provide for the special treatment of children in a child justice system designed to break the cycle of crime, which will contribute to safer communities, and encourage these children to become law-abiding and productive adults.

29 And as it was put in *S v N* 2008 2 SACR 135 SCA para 39:

Every day [a child] spends in prison should be because there is no alternative.

The extension of the protection of special scrutiny arising from automatic review to all (as opposed to merely some) children sentenced to detention, will in my view better promote the spirit, purport and objects of the Bill of Rights because it will better promote the object identified in s 2(c) of the CJA. *Wary, supra*. It will also reduce the risk that the time a child accused spends a period is longer than is appropriate.

- 30 At the level of language, counsel for the accused and the *amicus* placed emphasis on the fact that s 85(1) of the CJA refers to the review of criminal proceedings in the *lower courts*. This, counsel submitted, was an indication that the measure was designed to include cases emanating from the regional courts.
- 31 Counsel for the state, however, pointed out that Chapter 30 of the CPA has as its heading *Reviews and Appeals in Criminal Proceedings in Lower Courts* and submitted that the reference to “lower courts” in s 85 was more likely to have been copied from Chapter 30 than to indicate an intention to expand the ambit of s 302(1) beyond its traditional reach. Counsel for the state further referred to the principle of statutory interpretation that a proviso should generally be construed as excepting out of or qualifying something in the preceding portion of the measure and not as enlarging the scope of an enactment when it can be fairly and properly construed without contributing to it that effect. Craies, *Statute Law*, 7th ed 218.
- 32 The interplay between the introductory words of s 85(1) and the proviso was considered in *S v Fortuin* (reported apparently only at [2011] ZANCHC 28) by Olivier J. The learned judge pointed out at para 18 that a proviso does not always qualify in the sense of limiting the preceding part and sometimes provides something additional and

concluded that in the case of the proviso to s 85(1) something additional was indeed provided. I respectfully agree with the reasoning of the learned judge. See *R v Rosenthal* 1980 1 SA 65 A at 81E-H, a passage relied upon by Olivier J. Counsel are furthermore agreed that something additional is indeed provided by the proviso. The issue is not whether at all something further is provided but how much is in fact further provided.

33 Counsel for the state pointed to the fact that s 302 of the CPA was amended by s 99 of the CJA, read with Schedule 4 to the CJA and that the reference in s 302(1) to a *magistrate* had been left unchanged. Had it been the intention to extend the ambit of automatic review to cases from regional courts, counsel submitted, it would have been a simple matter to include words to that effect, making it perfectly clear that sentences imposed in the regional courts were subject to automatic review.

34 Counsel for the state further made reference to the notorious fact that the interpretation advanced on behalf of the accused and the *amicus* will add to the work load of an already overburdened and under-resourced justice system in this Division. I accept that this is so, although no statistics were presented so I do not know the extent of the increase in the work load. In my view, however, this consideration

should be accorded scant weight. The solution, consistent with the Constitution, is that additional resources must be made available to achieve the results which, *ex hypothesi*, the legislature has decreed must be realised under the legislation.

35 Counsel for the state further pointed out that the child accused who would be affected by the result of the present enquiry, ie under the age of 16 or between 16 and 18 and sentenced to an effective term of detention in any criminal court has an automatic right of appeal under s 84(1) of the CJA without having to apply for leave to appeal. It is also so that such cases which are taken on appeal are excluded from the ambit of automatic review under s 85(2) of the CJA.

36 At a linguistic level there is much merit in the submissions of counsel for the state. Despite this, in my view the interpretation advanced by counsel for the accused and the *amicus* must prevail. The position was in my respectful view correctly described in the hitherto unreported case of *S v CKM and Others* (NGHC; judgment delivered 12 January 2012) para 7:

[The CJA] introduced a comprehensive system of dealing with child offenders and children coming into conflict with the law regarding the treatment of children in conflict with the law that represents a decisive break with the traditional criminal justice system. The traditional pillars of punishment,

retribution and deterrence are replaced with continued emphasis on the need to gain understanding of a child caught up in behaviour transgressing the law ... and reintegration of the child into the community.

- 37 Although the child accused has always been treated with a measure of understanding of and compassion for his or her immaturity and lack of judgment, the introduction of the CJA sets new standards for the protection to which the child accused is entitled. Under s 28(2) of the Constitution, the child's best interests are paramount in every matter concerning the child, not least his or her collisions with the criminal justice system. The paramountcy principle does not necessarily override all other considerations but does call for appropriate weight to be given to the interests of the child. *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 CC para 42. In my view, while the interpretation urged upon us by counsel for the state is reasonable, the interpretation contended for by counsel for the accused and the *amicus* is at least equally so and will better promote the spirit, purport and objects of the Bill of Rights.
- 38 I have accordingly come to the conclusion, after balancing all the factors mentioned in *Natal Joint Municipal Pension Fund, supra*, that s 85(1) of the CJA should be interpreted to provide for the automatic review under s 85 of the CJA in respect of all children convicted in

terms of the CJA who are sentenced to any form of imprisonment not wholly suspended, or any sentence of compulsory residence in a child and youth care centre providing a programme provided for in s 191(2)(j) of the Children's Act, including children who are so sentenced in a regional court. My conclusion in this regard is consistent with that reached in *S v CS* 2012 1 SACR 595 ECP para 30.

39 I turn to a consideration of the facts of the present case. The serious nature of the offence needs no undue emphasis. I have perforce dwelt above on the protection under the CJA which should be afforded to the accused. One must however not forget that the victim of the accused was, like the accused, one of the children, particularly black children, referred to in the preamble to the CJA as in need of the protection of the law. I find it significant that the accused, when first confronted with his crime, raised in his perceived defence the claim that he regarded the victim as his girlfriend.

40 No 16 year old boy, particularly one who participated in the adult world to the degree to which the accused did, could honestly believe that he had a relationship with this mentally disabled 11 year old. What the accused meant when he made this claim was that when the mood

took him, he used the victim as a receptacle for the gratification of his sexual urges and when he did so, the victim did not object.

41 In the light of the history I have described above, the accused was at the time he was sentenced a menace to society. A custodial sentence was essential to protect society against a person who did not recognise the boundaries that the Bill of Rights imposes in respect of every person's dealings with every other member of society.

42 I bear in mind, however, the socio-economic circumstances in which the accused grew up. In all likelihood, he spent his formative years without adequate role models for decent behaviour. Of course, the vast majority of children growing up in such circumstances do not offend in the way the accused did or at all. But I think it is fair to say that the background of the accused probably deprived the accused of influences which would have tended to discourage anti-social behaviour. Such influences would in all likelihood have been present during the formative years of children growing up in more comfortable socio-economic circumstances. I think it is fair to take into account in favour of the accused that he is a disadvantaged person who succumbed to the temptations and pressures inherent in his situation.

- 43 It is easy to be wise after the event but it does seem that if a deeper intervention had been ordered, eg the placement of the accused under the supervision of a probation officer under s 53(4)(d) of the CJA pursuant to the diversion procedures in which the accused participated, the tragic circumstances of the offence presently under consideration might have been avoided.
- 44 Furthermore, that the accused grew up in an environment of deprivation and has committed the crime of which he was found guilty does not mean that the accused cannot be reformed and reintegrated into society. The regional magistrate found that he could be, fairly soon, and I agree with him that it is possible. I do not however share the view of the regional magistrate that the accused showed remorse. There is no suggestion on the record that he sought the forgiveness of the victim's family or showed any kindness toward the victim herself. But one hopes that remorse will come in time.
- 45 I think that it is important that the accused should not be punished for his choices as an adult would be. It is true that he chose to leave school, consume drugs and alcohol and commit a number of crimes. But the choices he made were juvenile choices and the primary purpose of the sentence imposed on the accused must be not to punish him for those choices but to facilitate every effort to bring him

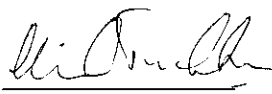
to understand that the choices he made which landed him in his present predicament are the wrong choices and that the world in which he lives does offer other choices and a way of life other than that in which he grew up.

- 46 I regret that the imposition of a sentence under s 276(1)(i) of the CPA, imprisonment from which such a person may be placed at any time under correctional supervision in the discretion of the Commissioner of Correctional Services or a parole board, would not be appropriate in this case. That is because when s 276(1)(i) is read with s 276A(2)(b) of the CPA, a sentence under s 276(1)(i) can only be imposed for a fixed period not exceeding five years. I think that a sentence permitting the detention of the accused for no longer than five years would not fit the crime and be fair to the community but even more importantly, would not be of sufficient length to provide adequate assurance that when the accused regains his freedom, he will be rehabilitated. So in that sense, such a sentence would not be fair to the accused either.
- 47 Had I been free to do so, I would have imposed a sentence that did not bind the Correctional Service authorities to keep the accused in prison after the date on which they considered him rehabilitated. I am however not free to do so because the law is presently not flexible

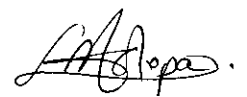
enough for me to do what I would consider justice in the present context. A sentence imposed under s 276(1)(b) is therefore, as the regional magistrate correctly found, the only suitable sentence.

48 I also agree that the sentence of 10 years effective imprisonment is appropriate for all the reasons I have mentioned. I however differ from the regional magistrate in relation to the period of 5 years which the regional magistrate suspended on certain conditions. A sentence of fifteen years, even with a portion suspended, is so far in excess of the sentence I would have imposed as to justify interference.

49 I would therefore confirm the conviction but alter the sentence imposed by substituting for the sentence imposed by the regional magistrate a sentence of 10 years imprisonment antedated to 17 October 2010 and, for avoidance of doubt, declaring that the other orders made by the regional magistrate during the sentencing process and reflected at pp33-34 of the record will stand.

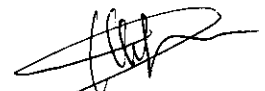

NB Tuchten
Judge of the High Court
15 August 2012

I agree. It is so ordered.



LM Molopa
Judge of the High Court
15 August 2012

I agree.



KE Matojane
Judge of the High Court
15 August 2012

FOR THE STATE: MR H L ALBERTS
INSTRUCTED BY: LEGAL AID BOARD
FOR THE ACCUSED: ADV A COETZEE
INSTRUCTED BY: DIRECTOR OF PUBLIC PROSECUTIONS
FOR AMICUS CURIAE: M COURTENAY
INSTRUCTED BY: CENTRE FOR CHILD LAW