

**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable: NO

Case No: RC167/23

Magistrate's Serial No: 03/24

High Court Ref No: 59/2024

In the matter between:

THE STATE

And

M[...] M[...]

Accused

Coram: DAFFUE J AND HEFER AJ

In Chambers: 21 NOVEMBER 2024

Delivered: 5 DECEMBER 2024

ORDER

1. The conviction of the accused is confirmed.
2. The sentence imposed is set aside and substituted with 5 (five) years compulsory residence at the Bizzah Makhathe Medium D Youth Centre, Kroonstad.

REVIEW JUDGMENT

Hefer AJ (Daffue J concurring)

[1] The matter served before us in terms of s 85 of the Child Justice Act 75 of 2008 which reads as follows:

“85 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 has been sentenced to any form of imprisonment or any sentence of compulsory residence in a child and youth care centre providing a program 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 –

- (a) the duration of the sentence;
- (b) the period the judicial officer who sentenced the child in question has held the substantive rank of Magistrate or Regional Magistrate;
- (c) whether the child in question was represented by a legal representative; or
- (d) whether the child in question appeared before a District Court or a Regional Court sitting as a Child Justice Court”.

[2] The salient facts are as follows: The accused, who was represented by a legal representative, appeared in the Sasolburg Regional Court on a charge of rape in that the accused had during August 2023, unlawfully and intentionally committed an act of sexual penetration with the complainant, a girl aged four years, by penetrating her private parts without the consent of the said complainant. He was duly convicted

pursuant to pleading guilty. Thereupon he was sentenced to 10 (ten) years compulsory residence in a child and youth care centre.

[3] From a suitability report, prepared by Mr N A Tshehle of the Department of Correctional Services which was admitted as Exhibit D, it appears *inter alia*:

‘The accused is a first offender. He pleaded guilty to the allegation levelled against him and did not waste the Court’s time and expressed remorse for his action’.

[4] The report reads further as follows:

‘The accused is a suitable candidate for a sentence of correctional supervision in that he meets the minimum requirement for such sentence in terms of section 276(1)(a) of the Criminal Procedure Act 51 of 1997 on the basis that he has a fixed address and a sound support system. However, as far as whether which sentence is indeed an appropriate one in this regard, it is left to the hands of the Court to consider the merits of the case and the interests of the community before deciding on the most suitable sentence.’

[5] At the time of the report and also on the date of sentencing, the accused was 16 years of age. He was 15 years old when he committed the crime.

[6] A pre-sentence report was obtained from a probation officer, read into the record and accepted as Exhibit F. The relevant portions of this report read as follows:

‘The accused’s attitude towards offence:

According to the accused he was told by his friends to experiment the (tsubi tsubi) game (sexual intercourse). The accused decided to have sexual

intercourse with the 4 year old victim. The incident took place at the victim's home at the chick coop where he penetrated the victim.

The victim's mother said that the ordeal has a negative impact on the victim. She does not want to bath her private part and she complains about vaginal pains sometimes. The victim was not eating after the incident and when she is forced to eat, she sometimes vomits. She can cry with no valid reason. She has aggressive behaviour and she push other children without reason ... She further said that the victim lost weight after the ordeal.'

[7] In respect of what is to be considered to be an appropriate means of punishment, the report reads as follows:

'Correctional supervision:

This sentence option was considered as the best suitable sentence for the accused. The accused appears to be a person who might likely be able to comply with his conditions. This sentence will give the accused opportunity to be rehabilitated from outside a prison. Considering the accused's age he is a minor and he is attending school and no behavioural challenges were reported. The accused understands his wrongful doing and takes responsibility of the offence and shows remorse.'

[8] The probation officer recommended, in her report, that the accused be subjected to section 75 and section 72(2)(a) of the Child Justice Act 75 of 2008.

[9] Hereafter the matter was postponed in order to establish whether the accused could be accommodated in a child and youth care centre. Mr Tshehle then testified again and his further report was handed in as Exhibit G. In his report the Bizzah Makhate Medium B Youth Centre, Kroonstad was shown to be a suitable centre with the necessary capacity.

[10] A victim impact report was handed in as Exhibit H. It appears *inter alia* from the report, that according to the biological mother of the victim, the child was taken to the Netcare Vaal Park Hospital for medical assessment and treatment following the rape. The mother indicated that the child sustained some injuries in her genitals. It appears, according to the report, that the rape incident was traumatic to the child as well as to the mother. The mother indicated that the pain which her daughter went through during the rape incident brought trauma to their lives. The child would wake up in the middle of the night due to nightmares and sometimes she struggles to sleep. The child's mother explained further that the rape incident has brought anger and hostility to her daughter. The child would shout and scream at her little brother for no apparent reason, which affected the siblings' relations and the relationship with the family.

[11] As far as the financial aspects are concerned, the rape incident had, according to the report, a negative impact on the family's finances. The biological mother of the child, according to the report, had to pay taxi fare to take the child to Netcare Hospital in Vaal Park for medical treatment and check-ups. It does not however appear from the report how many times the child needed to be taken to hospital for treatment and check-ups. According to the report however:

‘A portion of the household income that was supposed to be utilised for meeting the survival needs of the family was used to transport the concerned child and the biological mother to and from the hospital for treatment.’

[12] In considering sentence, the Regional Magistrate first of all referred to the physical injuries of the victim as well as the fact that the victim as well as her family had been traumatised. She then further referred to the fact that the family of the victim has had to redirect their restrained funds to cater for the complainant. This affected their living and further constituted a strain on already budgetary constraints.

[13] The Regional Magistrate then proceeded as follows in addressing the accused:

'You have no contribution towards the recuperating of this complainant. Nor any financial contribution towards the family who had to now see to the welfare of the complainant. You did not take any corrective steps towards the welfare of the complainant. The complainant and her family were left to deal with the ordeal.'

[14] The Regional Magistrate then incorrectly continued to inform the accused as follows:

'I want to advise you at this stage rape of a minor renders you liable for imprisonment for life.'

She then continued stating:

'There are more aggravated factors in this case than mitigating factors. I mean you affected this child very negatively.'

[15] In *S v Zinn*¹ it was held that in imposing sentence, what has to be considered is the triad, consisting of the crime, the offender and the interests of society.

[16] 'It is the duty of a presiding officer to consider all relevant facts and factors relating to sentence. Failure to consider an important fact (mitigating or aggravating) may clearly cause an unjust sentence (See: *S v Fazzie and Others* 1964 (4) SA 673 (A) at 684B – C; *S v Pillay* 1977 (4) SA 531 (A) (534H – 535G).'²

[17] 'Where a material fact has been ignored, or given inadequate weight by the Court, the Court has failed to exercise its discretion properly (*State v Pillay supra* 535E – G). All relevant factors must therefore be taken into account, and no fact may be over-emphasized or under-emphasized.'³

¹ 1969 (2) SA AD.

² Du Toit and De Jager, *Commentary on the Criminal Procedure Act*, Volume 2, p. 28-2M

³ Du Toit *supra*

[18] In *S v Pillay*⁴ Trollip JA held as follows:

‘As the essential enquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree or seriousness that it shows directly or inferentially, that the Court did not exercise the discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court’s decision on sentence.’

[19] In considering the Regional Magistrate’s reasons for sentencing, it appears first of all that she did not take into account the young age of the accused, save in respect of where the accused is to incarcerated, namely in a youth centre. The age of the accused obviously did not play any role in consideration of the period that the accused is to be imprisoned. On the contrary, it appears that the Regional Magistrate at some point lost sight of the accused’s age when she stated that the accused, although attending school and being 16 years of age, should make a financial contribution towards the victim and the family of the victim.

[20] In *Centre for Law v Minister of Justice and Constitutional Development and Others (National Institute for Crime Prevention and Re-integration of Offenders as amicus curiae)*⁵, the Constitutional Court pointed out the following in regards to the incarceration of children:

‘Detention must be a last or even intermediate resort and when the child is detained, detention must be only for the shortest period of time. The principles of last resort and shortest appropriate period bear only not only on whether prison is a proper sentencing option, but also on the nature of the incarceration imposed. If there is an appropriate option other than imprisonment, the Bill of Rights, requires that it be chosen. In this sense,

⁴ 1977 (4) SA (AD) 531 at p. 535 E – F.

⁵ 2009 (2) SACR 477 (CC) p. 31.

incarceration must be the sole appropriate option. But if incarceration is unavoidable, its form and duration must also be tempered, so as to ensure detention for a shortest period of time.’

[21] Not only does the record show that the Regional Magistrate did not take into account the age of the accused in determining the appropriate period of detention, but it is also patently clear that she failed in totality to deal with the recommendation pertaining to correctional supervision contained in both relevant reports placed before Court in this regard.

[22] In view of the seriousness of the crime, pertaining to in particular the very young age of the victim, correctional supervision is not regarded as a suitable sentence for the accused, but the Regional Magistrate should at least have taken into account the age of the accused in sentencing and particular sentencing the accused to a form of detention.

[23] The guidance in s 69(3) of the Child Justice Act should be followed in determining whether to impose a sentence of compulsory residence in a child and youth care centre.

‘The first point is that all the considerations that guide the imposition of imprisonment in s 69(4) should be followed. These considerations are appropriate as residence in a centre entails detention, which incorporates the last-resort principle.’⁶

[24] In *S v CS*⁷ it was held that the Court has to show how it considered the factors specified in s 69 of the Child Justice Act. It is not evident from the record how the Regional Magistrate has indeed taken these factors into consideration.

[25] The Regional Magistrate did not take into consideration the fact that the accused has pleaded guilty. She over-emphasized the alleged financial implications due to the rape incident whereas no evidence had been placed before the Court of

⁶ Terblanche SS, *A Guide to Sentencing in South Africa*, 3rd ed p. 377.

⁷ 2013 (2) SACR 323 (ECG) par [20]

how many times the victim had to be taken for treatment and the estimated costs involved therewith.

[26] Coupled with the above, the provisions of s 76(2) of the Child Justice Act had to be adhered to. In terms thereof, pertaining to the duration of the sentence, a sentence of compulsory residence in a child and youth care centre may *“be imposed for a period not exceeding five years or for a period which may not exceed the date on which the child in question turns 21 years of age, whichever date is the earliest”*. The Regional Magistrate committed a serious misdirection in sentencing the accused to 10 (ten) years of compulsory residence in a child and youth care centre. The maximum period of compulsory residence is five years. In terms of the imposed sentence the accused would have to be kept at the centre until he reaches the age of 26.

[27] Taking into account all the above factors, I consider compulsory residence of 5 (five) years in a Child and Youth Care Centre to be appropriate.

Order

Therefore, I make the following order:

1. The conviction of the accused is confirmed.
2. The sentence imposed is set aside and substituted with 5 (five) years compulsory residence at the Bizzah Makhathe Medium D Youth Centre, Kroonstad.

J J F HEFER, AJ

I concur:

J P DAFFUE, J