IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A 371/2014

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED.
(4) DATE. **23 August 2023**

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In the matter between:

KHASELA, TSHEPO Appellant

v

THE STATE Respondent

JUDGMENT

SPILG, J:

INTRODUCTION

1. The appellant was convicted of raping a young girl on 7 November 2009. She was then a few months past her sixteenth birthday.

2. The appellant had pleaded guilty and a statement by him under s 112(2) of the Criminal Procedure Act 51 of 1977 (*"the CPA"*) setting out the facts was admitted.

3. Judgment was handed down on 13 October 2009 and the case was remanded to 21 October for sentencing.

4. The prosecutor produced the SAP 69 which purported to have been extracted from the SA Criminal Record System on the very day of the sentencing hearing, namely 21 October 2010.

   The document recorded a series of four previous convictions from January 1999 to November 2002. The appellant disputed the last two convictions which involved robbery and the unlawful possession of a firearm in respect of which he allegedly had been sentenced to a total of 21 years imprisonment. He claimed that these had been upset on appeal. The prosecutor elected not to prove these two convictions.

5. The appellant then testified in mitigation of sentence. He said that he was then in custody serving another sentence for which he had been convicted on 5 October 2010- some two weeks earlier. He disclosed that the convictions were for armed robbery and rape and that he had received three life sentences and a further two sentences of 15 years each.

6. The prosecutor informed the court that the SAP 69 was not up to date and submitted, according to the record, that the court should not have regard to the other rape conviction for purposes of sentencing[1]. The court pointed out that the other crimes appeared to have been committed during August 2006 which was prior to the commission of the rape in the present case. The prosecutor then urged that the appellant be treated as a second offender.

[1] See p9 of the record

7. This case again brings to the fore the importance of the SAP 69s when considering sentencing. The appellant now takes the point that the admission of a previous conviction, not supported by the SAP69, does not constitute the necessary evidence required by s 271(1) of the CPA.

   The section reads:

   > *'The prosecution may, after an accused has been convicted but before sentence has been imposed upon him, produce to the court for admission or denial by the accused a record of previous convictions alleged against the accused.'*

8. I do not read the section in its terms to preclude an accused volunteering the information. It may be argued that it falls under s 220 although that section contemplates that there must be a "*fact placed in issue at such proceedings"* whereas this was not an issue raised.

9. The difficulty is twofold: The one concerns the sufficiency of evidence; the other is whether the court has sufficient details of the previous conviction to properly discharge its function under s 271(1).

10. As to the first: In *S v Sethokgoe* 1994(2) SACR 434 (T) at 545i-546g the court was reluctant to accept the accused's evidence regarding the exact description of his previous convictions because his recollection might be faulty. In the present case the risk is slim because he had been sentenced only two weeks earlier in the other case. Nonetheless verification that the offences were committed prior to the present must be provided from an official source.

11. Secondly; in regard to the sentences imposed, no evidence was presented as to whether the sentence of life imprisonment or the sentence of 15 years imprisonment was imposed for the rape conviction or whether the victim was under 16 years of age.

    These aspects are relevant not only in respect of the proper sentencing to be imposed in the present case but they can also impact on considerations which may weigh with a parole board in due course.

    A court should therefore neither overlook nor underestimate the relevance of establishing whether or not an accused has previously committed a serious offence when confronted by that real possibility. This information is essential in weighing the interests of society in the triad of factors a court is obliged to consider when sentencing[2].

    At the fundamental level it informs the court of the potential risk of recidivism which the accused poses to society or a particularly vulnerable sector of society with the indelible effects such crimes exact on the victim or victim's family, as in the case of the rape of young children.

    The need for the imposition of a properly informed sentence by a court has other significant consequences. By way of illustration: If both victims were very young (in the present case the complainant was a few months past her 16th birthday) then the parole board in its deliberations on the appellant's fitness to be reintegrated into society may wish to assess the risk he poses to young girls and the adequacy of the rehabilitative courses he may have undergone.

12. Moreover, the courts have a duty to ensure that the sentence fits the crime and that such sentence, while tinged with mercy, is fair to both society and the

[2] The triad of factors are the gravity of the offence, the circumstances of the offender and the public interest. They take into account the following factors; prevention, deterrence, retribution and rehabilitation and tempering the punishment with a degree of mercy. See generally *S v Zinn* 1969 (2) SA 537 (A); *S v Rabie* 1975 (4) SA 855 (A) at 862A and G-H; *S v Ingram* 1995 (1) SACR 1 (A) at 8i – 9b

offender[3]. I also assume that a parole board will have before it at least details of the sentences imposed on the offender if not the actual judgments on sentencing. In *S v Nhlapo* 2012(2) SACR 358 (GSJ) I had occasion to deal with the requirements of s 271(1) and the prosecutor and court's responsibilities to secure their proper fulfilment. It is unnecessary to repeat them.[4]

FAILURE TO OBTAIN THE SAP 69

13. In the present case I do not believe that the trial court could have properly discharged its judicial duty and function without receiving an up to date SAP 69 and other relevant information that would have indicated when the earlier rape offence took place, whether it was associated with the robbery, if it was a single count of rape, whether the appellant had been sentenced to life imprisonment for the rape, if there were any special circumstances mentioned by the court if the victim was under 16 years of age and, if above that age, an explanation as to why the sentence was above the minimum imposed for a first time offender.

14. That being so, and since the court cannot interrogate the accused regarding previous convictions in the absence of the SAP 69 (see *S v Khambule* 1991(2) SACR 277 (W) at 283b-c as explained in *S v Maputle* 2002(1) SACR 550 (W) at 555e) it appears that unless the SAP 69 itself contains sufficient information it may be necessary for the prosecutor to present further evidence before the court.

15. I accept that this places an onerous task on the prosecutor who is already weighed down with heavy case-loads. Nonetheless s 271(1) places a responsibility on the court to ensure that the triad of factors are properly considered. In the present case this cannot be done without knowing why life

[3] Id.
[4] See especially at paras 22-24 and 27-28

imprisonment was imposed instead of 15 years if the appellant was convicted as a first offender for the previous rape.

The reasons would have appeared in the judgment of the court on sentencing. If there remains a lack of clarity then it may be necessary for the prosecution to obtain a transcript of the entire sentencing proceedings and the judgment, including that on conviction.

16. This court is acutely aware of the preventative aspects of punishment which serve to protect members of the community at large and the more vulnerable in particular. If the previous life sentence was imposed for rape then in terms of s 51 read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, it had to have been in egregious circumstances which by their nature may, although not necessarily will, pose ongoing risks to society. These must be considered by a sentencing court and presumably a parole board. In cases of rape life imprisonment is imposed if it is;

> *" (a) … committed—*
>
> *(i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;*
>
> *(ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;*
>
> *(iii) by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions; or*
>
> *(iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;*
>
> *(b) where the victim—*

(i) is a person under the age of 16 years;

(ii) is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or

(iii) is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or

(c) involving the infliction of grievous bodily harm."

17. Each of these situations requires a heightened awareness on the part of the sentencing court of its responsibility to impose a sentence which properly protects the community. In the case of rape, the risk of serial behaviour needs to be properly considered. The provisions of s 271(1) are there as much to ensure that a fair sentence is imposed on the accused as it is to ensure that the sentence is also fair to the interests of society.

    In cases where the accused was previously sentenced to life imprisonment for rape, the provisions of s 271(1) will not be complied with if the court is not properly informed of the circumstances which resulted in the earlier life sentence being imposed.

18. This court finds that the appellant should not have been treated as a second offender without the production of the SAP 69. In the result there was not a proper sentencing process undertaken and the sentence is set aside for a failure to comply with s 271(1).

APPROPRIATE RELIEF

19. In terms of s 19 of the Superior Courts Act 10 of 2013 a court sitting on appeal has in addition to any power conferred by other legislation the power to:

> ' *(a) dispose of an appeal without the hearing of oral argument;*
>
> *(b) receive further evidence;*
>
> *(c) remit the case to the court of first instance, or to the court whose decision is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Supreme Court of Appeal or the Division deems necessary; or*
>
> *(d) confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require.'*

20. The power of a court sitting on appeal is amplified by s 309 of the CPA which in turn renders s 304(2) applicable. Section 309(3) reads:

> *(3) The provincial or local division concerned shall thereupon have the powers referred to in section 304(2), and, unless the appeal is based solely upon a question of law, the provincial or local division shall, in addition to such powers, have the power to increase any sentence imposed upon the appellant or to impose any other form of sentence in lieu of or in addition to such sentence: Provided that, notwithstanding that the provincial or local division is of the opinion that any point raised might be decided in favour of the appellant, no conviction or sentence shall be reversed or altered by reason of any irregularity of or defect in the record or proceedings, unless it appears to such division that a failure of justice has in fact resulted from such irregularity or defect.*

while s 304(2) provides:

(a) If, upon considering the said proceedings, it appears to the judge that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice, he shall obtain from the judicial officer who presided at the trial a statement setting forth his reasons for convicting the accused and for the sentence imposed, and shall thereupon lay the record of the proceedings and the said statement before the court of the provincial or local division having jurisdiction for consideration by that court as a court of appeal: Provided that where the judge concerned is of the opinion that the conviction or sentence imposed is clearly not in accordance with justice and that the person convicted may be prejudiced if the record of the proceedings is not forthwith placed before the provincial or local division having jurisdiction the judge may lay the record of the proceedings before that court without obtaining the statement of the judicial officer who presided at the trial.

(b) Such court may at any sitting thereof hear any evidence and for that purpose summon any person to appear and to give evidence or to produce any document or other article.

(c) Such court, whether or not it has heard evidence, may, subject to the provisions of section 312—

(i) confirm, alter or quash the conviction, and in the event of the conviction being quashed where the accused was convicted on one of two or more alternative charges, convict the accused on the other alternative charge or on one or other of the alternative charges;

(ii) confirm, reduce, alter or set aside the sentence or any order of the magistrate's court;

(iii) set aside or correct the proceedings of the magistrate's court;

(iv) generally give such judgment or impose such sentence or make such order as the magistrate's court ought to have given, imposed or made on any matter which was before it at the trial of the case in question; or

(v) remit the case to the magistrate's court with instructions to deal with any matter in such manner as the provincial or local division may think fit; and

(vi) make any such order in regard to the suspension of the execution of any sentence against the person convicted or the admission of such person to bail, or, generally, in regard to any matter or thing connected with such person or the proceedings in regard to such person as to the court seems likely to promote the ends of justice.

21. The presiding magistrate has already determined a sentence and, although not argued, it may be in the interests of justice and the avoidance of a possible recusal application that instead of remitting the matter we exercise our powers under s 304(b) and (c) to hear evidence, summon the clerk of the criminal court where the previous rape case involving the appellant was heard to give evidence and produce the judgment and sentencing decision of the presiding magistrate as well as the court file which will record the magistrate's decision.

ORDER

22. It will be necessary to set aside the sentence and after hearing evidence impose such sentence as the magistrates' court ought to have imposed.

23. This court accordingly orders in terms of s 309 read with s304 of the CPA that:

1. The sentence proceedings before the presiding magistrate are set aside;

2. By ……** the State will;

    i. obtains a current SAP69 reflecting all convictions for offences committed by the appellant up to 21 October 2009;

    ii. establish in which court the appellant was convicted of the earlier robbery and rape offences and cause to be summoned on behalf of this court the clerk or registrar (as the case may be) of the relevant court to appear before this court on ……. ** with the relevant court file and judgement in respect of such conviction and sentence;

3. This court will hear evidence and receive the aforesaid documents on …..**

(** The dates had to be extended because of the difficulty experienced in obtaining the SAP69. Ultimately it was *Adv Miller*, representing the appellant, who took it upon himself to obtain the SAP69)

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24. Since making the earlier order, defence counsel struggled to obtain the SAP 69, apparently due to lack of cooperation on the part of the authorities. Eventually he was able to.

It reflected that on 22 June 2011 the appellant was convicted on three counts of rape. He was sentenced on each count to life imprisonment. By reason of the applicable legislation he serves a single life sentence. The effect is that he will serve a minimum of 25 years imprisonment before being eligible for parole. The distinction between sentencing an offender to life imprisonment and to 25 years is that in the former case the offender will ordinarily only be eligible for parole in 25 years time, whereas in the latter case the offender will be eligible for parole after serving a minimum of half the sentence imposed. [5]

25. *Adv Miller* was afforded an opportunity to supplement his heads of argument. Sadly he passed away and the supplementary heads of argument he prepared found their way to us much later.

26. Adv Miller noted that the appellant did not wish to testify further in mitigation of sentence. Accordingly the last two paragraphs of the earlier order falls away.

The appellant had also admitted the correctness of the amended SAP 69 by signing it.

27. It was accepted that the three previous convictions for rape did not involve minors.

28. In the supplementary heads Adv Miller argued that the Magistrate should have stood the matter down and obtained the necessary information or else sentence the appellant as a first offender. It was submitted that the Magistrate

[5] Section 73(6) of the Correctional services Act 111 of 1998

had acted irregularly in doing neither but rather relying on what the appellant had told him about just having been convicted of rape. It was further submitted that this court sitting on appeal should have remitted the case back to the Magistrate or to another Magistrate.

29. Earlier I expressed concern about remitting the matter. Moreover, both this court and the Magistrates Court function under extreme pressure with limited resources. To remit this case back only to be faced with an inevitable appeal will result in the preparation of records by both this court and the Magistrates Court and their logistical delays as well as unnecessary costs being incurred both by the State and by Legal Aid. There is nothing which precludes this court from acting in the interests of justice and expediting the finalisation of the case. The sections of the CPA conferring such powers were mentioned earlier. The position remains that set out in *Nhlapo* which has since received support in *Smith v S* [2018] JOL 40441 (WCC). See also *A Guide to Sentencing in South Africa* by Prof Terblanche at paras 6.2.2 and 6.2.5.[6]

In my view counsel's argument that cases such as *S v Khambule* 1991 (2) SACR 277 (W) are to be preferred has therefore not stood the test of time and this court will follow the more recent case of *Nhlapo.*

30. I am therefore satisfied that both the Magistrate and this court could properly have regard to the accused's own unsolicited statement concerning his previous convictions[7]. However the Magistrate erred in not obtaining the SAP 69 or other official evidence regarding the exact nature of the previous convictions, when they occurred and when the accused was sentenced. [8]

[6] In *A Guide to Sentencing in South Africa* at para 6.2.1 to 6.2.5 Prof Terblanche considers that *Nhlapo* reflects the correct present legal position and that the following cases no longer do so: *S v Khambule* 1991 (2) SACR 277 (W) at 283c; *S v Maputle* 2002 (1) SACR 550 (W); *S v Njikaza* 2002 (2) SACR 481 (C); *S v Smith* 2002 (2) SACR 488 (C); *S v Sethokgoe* 1990 (2) SACR 544 (T) at 545h; *S v Miya* 1996 (1) SACR 449 (N) at 451d; *S v Delport* 1995 (2) SACR 496 (C) at 500j-501a; *S v Kiewiets* 1977 (3) SA 882 (E) at 883B-C

[7] In the present case the appellant volunteered the existence of his most recent previous convictions to the presiding Magistrate.

[8] In *Guide to Sentencing in South Africa* at para 6.2.4 and 6.2.5 Prof Terblanche noted:

> *"6.2.4 It is submitted that, as long as the process which is followed is fair, it should not be unfair for the court to determine the truth about the offender's previous convictions. It has on occasion been to*

31. If this case had not taken the various turns it did, the appellant may have been asked to argue why this court should not have heard argument on an increase in sentence and to deal with the provisions which required a serial rape offended to be sentenced to life imprisonment. As will appear from the contents of the next paragraph, the issue is effectively moot.

32. In his supplementary heads of argument Adv Miller correctly drew the courts attention to a fact which could readily have been overlooked- that the Magistrate had directed the sentence to commence only after the expiry of the pre-existing sentences. Since the appellant was sentenced to three life sentences prior to the present conviction, he submitted that the 15 year sentence imposed by the Magistrate could not be served after the expiration of the life sentences. This is by reason of s 39(2)(a)(i) of the Correctional Services Act.[9]

    The effect is that even if this court were to require the appellant to present argument as to why he should not also receive a life sentence for the present offence because of the previous three life sentences imposed on him for rape, he is already serving the cumulative maximum of one life sentence.

33. In my view the appellant was most fortunate that the Magistrate had not called for the SAP 69 and that he only received a fifteen year sentence. There is no

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the advantage of the accused to obtain the correct details regarding his previous convictions
6.2.5 This does not mean that it is acceptable to question the accused about the details of her previous convictions. Rather, the court should, when it suspects the accused of having previous convictions, determine these details from an independent source, in accordance with its duty to impose a just sentence and in accordance with its central role in this whole process."

[9] Section 39(2)(a)(i) provides:

(2) (a)Subject to the provisions of paragraph (b), a person who receives more than one sentence of incarceration or receives additional sentences while serving a term of incarceration, must serve each such sentence, the one after the expiration, setting aside or remission of the other, in such order as the National Commissioner may determine, unless the court specifically directs otherwise, or unless the court directs that such sentences shall run concurrently but—

(i) any determinate sentence of incarceration to be served by any person runs concurrently with a life sentence or with sentence of incarceration to be served by such person in consequence of being declared a dangerous criminal;

ground set out for seeking a lesser sentence save for the contention that the appellant had displayed remorse. It is difficult to place any weight on his professed remorse when he had raped three other women prior to this incident. Moreover on this occasion the victim was just past her sixteenth birthday and will bear its scars.

34. Adv Miller overcame so much in his life. His life stands as an inspiration to the indomitability of the human spirit. The appellant was most fortunate to have been represented by him in the appeal. It is hoped that this court has done justice to the arguments Adv Miller presented.

ORDER

35. This court previously ordered that the sentence imposed by the Magistrate must be set aside.

36. The following consolidated order is made:

1. The sentence imposed by the Magistrate is set aside

2. The sentence imposed by the Magistrate is substituted with a custodial one of fifteen (15) years imprisonment commencing from the date on which he was sentenced in the Magistrates' Court, being 21 October 2010

3. In terms of s 39(2)(a)(i) of the Correctional Services Act 111 of 1998 the sentence of 15 years is to run concurrently with the life sentences which the appellant commenced serving prior to being sentenced in this case

THOBANE AJ

I agree

_____ _____

SPILG J **THOBANE AJ**

DATE OF FINAL JUDGMENT: 23 August 2023

FOR APPELLANT: Adv M Miller
Adv D Nair
Legal Aid South Africa

FOR THE STATE Adv Serepo
(Adv EHF Le Roux drew the heads of argument)
Office of the Director of Public Prosecutions