Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED

11 April 2024

DATE

[redacted]

SIGNATURE

CASE NO: A238/23

In the matter between:-

MOTLATSI AHMED MAHLANGU Appellant

VS

THE STATE Respondent

Coram: Kooverjie J

Heard on: 15 February 2024

Delivered: 11 April 2024 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 15:00 on 11 April 2024.

ORDER

It is ordered:-

1. The appeal is upheld.
2. The sentence of eight (8) years of imprisonment imposed in the regional court on 16 February 2023 in terms of Section 276(1)(b) of the Criminal Procedure Act, Act 51 of 1977, is hereby set aside and replaced with the following sentence:

   Three (3) years of imprisonment wholly suspended in terms of Section 297(1)(b) of the CPA, Act 51 of 1977, for a period of five (5) years on condition that the appellant is not convicted of contravening Section 15(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007, and for which direct imprisonment is imposed, committed during the period of suspension.

JUDGMENT

KOOVERJIE J (Hassim J concurring)

[1] The appellant was charged in the Regional Court on one count of contravening Section 15(1) of the Sexual Offences and Related Matters Amendment Act, 32 of 2007, read together with the relevant provisions of the Criminal Procedure Act 51 of 1977 ("the CPA"). The accused was charged for statutory rape.

[2] The appellant pleaded guilty to the aforesaid charge on 17 October 2022 and filed his plea of guilty statement in terms of Section 112(2) of the CPA. Such plea was accepted by the State. The court sentenced the accused to eight (8) years direct imprisonment.

[3] The appellant appealed the sentence on the following grounds, namely that the magistrate failed to take into account:

3.1 the fact that the appellant was 18 years old when he committed the offence;

3.2 after viewing the video footage, the magistrate failed to take into account that the complainant was not threatened and no force was used. The video showed that the complainant was a willing participant;

3.3 that even though the accused was 18 years old he was still a Grade 12 student who needed guidance;

3.4 that the complainant was in fact leading the appellant as depicted in the video footage.

[4] It was argued that the sentence was shockingly inappropriate. It is appreciated that the imposition of sentence is a matter that falls in the discretion of the sentencing court and a court of appeal may only interfere where it is satisfied that the trial court's sentencing discretion was not judicially exercised.

[5] In ***S v Anderson***[1] the court held:

"Over the years our Courts of Appeal have attempted to set out various principles by which they seek to be guided when they are asked to alter a sentence imposed by the trial court. These include the following: the sentence will not be altered unless it is held that no reasonable man ought to have imposed such a sentence, or that the sentence is out of all proportion to the gravity or magnitude of the offence, or that the sentence induces a sense of shock or outrage, or that the sentence is grossly excessive or inadequate, or that there was an improper exercise of his discretion by the trial Judge, or that the interests of justice require it."

[6] This court is mindful that it will not alter the determination unless the decision of the magistrate, regarding the sentence imposed, was startling or disturbing.[2]

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[1] 1964 (3) SA 494 (AD) at 495 C-E
[2] S v Sadler 2000 (1) SACR 331 (SCA)

[7] It is appreciated that the essential enquiry in an appeal against sentence 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 its discretion at all or exercised it improperly or unreasonably. Such misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence.[3]

[8] In argument it was submitted that the trial court did not take into account the personal circumstances, the seriousness of the offence and whether the sentence imposed is in the interest of justice.

[9] The appellant was convicted on 16 February 2023 and sentenced to 8 (eight) years direct imprisonment. The appellant is currently out on bail. At the time of the incident both the appellant and the complainant were attending the same school. The complainant was 14 years old and the appellant was 18 years old. The appellant was a Grade 12 student and the complainant was in Grade 8.

[10] In pleading guilty to the charge, the contents of the plea explanation included the following information which was placed on record, that:

10.1 the appellant admitted that he was 18 years and the complainant was 14 years at the time of the incident;

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[3] S v Pillay 1977 (4) SA 531 (A) at 535 E-F

10.2 while standing with friends in the school yard the complainant approached one of the appellant's friends and told him that the appellant is cute;

10.3 the appellant and the complainant were not in a relationship;

10.4 after a while the complainant approached the appellant and asked him to accompany her. She led the way as they were walking;

10.5 at some point the complainant started to kiss the appellant. He however stopped, advising her that there is a camera and that they should move to another location;

10.6 when reaching the new location they continued kissing and engaged in consensual sexual intercourse;

10.7 the incident was captured on cctv camera.

[11] The State accepted the plea and confirmed the facts as reflected in the plea explanation as being in accordance with the information and considered as the appellant's version.

[12] It is further common cause that the complainant had not reported this incident on her own. The school came across the video footage a few days after the incident. On the advice of the School Governing Body it was decided to institute disciplinary action against the complainant. The complainant was informed that her mother was required to attend the hearing. It was only then that the complainant claimed that she had been raped. She then laid a complaint against the appellant with the police.

[13] Notably the State, during the proceedings, conceded that the complainant played a very active role during this sexual encounter, that she was not forced to participate and further no violence was involved. In fact the State informed the magistrate that the charge of rape was changed to a charge in terms of Section 15(1) of the Sexual Offences and Related Matters Act. The State accepted that the parties had consensual sex.

[14] It was argued that the magistrate misdirected herself when considering the sentence. The magistrate considered a version which was not accepted by the State and which was not in accordance with the facts set out in the plea explanation. Amongst other findings, the magistrate found that the appellant had taken advantage of the complainant. She was the appellant's junior and out of fear she complied with his instructions.

[15] It was pointed out that, in principle, when the written plea detailing the facts on which the plea is premised is accepted by the prosecution, it constitutes the factual basis on which an accused is convicted and the sentence is imposed. The written plea is aimed at ensuring that the court is provided with an adequate factual basis to make a determination on whether the admissions made by the accused support the plea of guilty tendered.[4]

[16] The plea, once accepted, defines a *lis* between the prosecution and a defence. The version cannot be otherwise or a court cannot take into account a different version.

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[4] Director of Public Prosecutions, Gauteng Division, Pretoria v Hamisi 2018 (2) SACR 230 (SCA) par 8

[17] Having considered the record and the submissions of both parties, there can be no doubt that the trial court erred in relying on facts not admitted by the appellant and not accepted by the State. The misdirection, in my view, was material and justifies interference on appeal.

[18] Moreover the mitigating factors were not weighed. The magistrate erred in failing to take into account the fact that the appellant was a first offender and that there are no previous convictions in his name. The appellant was 18 years old at the time and did not have the mindset of a mature adult. He has continued with his studies since the incident. He also tendered a guilty plea which illustrates that he took responsibility for his actions.

[19] Much emphasis was placed on two other incidents of violence that occurred at the school, one against a teacher and one against a fellow learner. The State advised that he was not prosecuted for the incidents and there was no basis to charge the appellant. The magistrate overemphasized these incidents.

[20] In fact the prosecutor informed the magistrate at sentencing stage that on the facts there was no basis to prosecute the appellant. A proper case was not made out to convict the appellant. The following was said:

"I concede, your worship, that there were allegations made against him. I personally decided not to prosecute those allegations, as there was no proper case ...."

[21] The magistrate did not review the social worker's report or the victim impact report with circumspection. The victim impact report merely recorded the complainant's version. It was evident that the video footage was not considered. The magistrate erred in accepting the version set out in the victim impact statement. The victim impact statement in fact made recommendations that the sentence should be suspended and that correctional supervision could be an appropriate form of rehabilitation. It was however recommended that imprisonment was not the appropriate form of punishment.

[22] It is also noted that even the prosecution proposed a suspended sentence, alternatively a sentence in terms of Section 276(1)(h) of the CPA (correctional supervision).

[23] The appellant's background was not considered. When the accused was interviewed it became evident that he experienced instability in his early childhood. However overall there were no behavioral problems except for certain incidents that took place in his matric year. In fact the magistrate found the appellant took responsibility for his actions by admitting his guilt and did not waste the court's time.

[24] Furthermore the magistrate's concerns regarding the video footage could not be relied upon as the video footage was not audible. The view expressed was that since the court was not privy to what was said before the incident, the complainant's version should stand. The magistrate accepted her version,

namely that she was on her way to an extra class when she met the accused. This is when she was raped.

[25] There can be no doubt that the explanation set out in the plea records the true events of the day in question. The State had accepted such version. The parties engaged in consensual sex. It became an offence as the complainant was under age as envisaged in Section 15(1) of the Sexual Offences Act. In fact the prosecutors consulted with the witness after viewing the video footage. They affirmed that the complainant confirmed that she was a willing participant.

[26] The pre-sentencing report suggested that a suspended sentence would be appropriate, alternatively correctional supervision as he could be rehabilitated within his environment. However the recommendation was that due to the seriousness of the offence, he should be punished in terms of Section 276(1)(i) of the CPA (custodial sentence).

[27] It is evident that the magistrate was required to exercise her discretion and consider all the facts, which included the mitigating as well as the aggravating factors. The magistrate failed to consider whether correctional supervision or rehabilitation was appropriate. The prosecution motivated that after consulting with the school, the conclusion arrived at is that he did not have a violent or negative character. According to his paternal grandmother with whom the appellant was staying described him as "disciplined" in her interview with Ms Molepo (who compiled the pre-sentencing report).

[28] The appellant has been pursuing tertiary education according to a letter from Rosetec College handed in at the time of his sentencing, the appellant was enrolled in office administration studies at Rosetec College as a full-time student.

[29] The prosecution in its submissions on sentencing, highlighted that the appellant never missed a grade at school. It was argued that a custodial sentence could impact on the appellant's studies and the prosecution mentioned limitations such as an inability to attend classes and to attend to studies. The learned Magistrate was mindful that the appellant was pursuing tertiary education. However found that notwithstanding this direct imprisonment was the only appropriate sentence and that the appellant could continue with his studies while serving a custodial sentence.

[30] Moreover though the appellant was 18 years old at the time of the rape, one must appreciate that courts have expressed that perpetrators at this age are immature. Often crimes committed by young offenders, stem from immature judgment, uninformed character, and their youth plays a significant role. Our courts in these instances have been cautious in imposing harsh sentences. The sentence imposed must fit the nature and seriousness of the offence of which the accused was found guilty and must be fair to both the offender and the society.[5]

[31] In ***S v Kualase 2000 (2) SACR 135 C at 139 J-I*** it was advised that:

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[5] The Director of Public Prosecutions, Kwazulu Natal v P 2006(1) SACR 243 (SCA) at paragraph [16]

"The judicial approach towards sentencing juvenile offenders, must be re-appraised and developed in order to promote an individualized response which is not only in proportion to the nature and gravity of the offence and the needs of society, but which is also appropriate to the needs and intents of the juvenile offender. If at all possible the sentencing must be standard in a way that would enable the reintegration of the juvenile into his or her family and community."

[32] What then is to be considered an appropriate sentence? Correctional supervision is defined as a community-based punishment and is a form of punishment executed within the community and in cooperation with and/or to the benefit of the community. It encompasses a wide range of measures executed within the community such as house arrest, community service, and monitoring rehabilitation programs. It value lies mainly in that it is lighter than direct imprisonment and offers an offender an opportunity of remaining within the community without the negative influences of prison while serving a substantial punishment.[6]

[33] In terms of Section 276(1)(i) of the CPA, a prisoner can be released to serve his/her sentence under correctional supervision. The advantage in terms of Section 276(1)(i) is that although it leads to imprisonment it is mitigating in that it creates a prospect of early release on appropriate conditions under the correctional supervision program. Based on the circumstances of this matter, a custodial sentence was inappropriate.

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[6] S v N 2008 (2) SACR 135 (SCA) at paragraph [18]

[34] During argument, counsel for the appellant motivated that a suspended sentence would be more appropriate. The rationale behind imposing a suspended sentence is twofold, namely deterrence and rehabilitation.

[35] In ***Persadh v R***[7] the court, in considering the effect of a suspended sentence, held:

"Ordinarily a suspended sentence has two beneficial effects: it prevents the offender from going to jail; the second effect of a suspended sentence, to my mind, is of very great importance. The man has a sentence hanging over him. If he behaves himself, he will not have to serve it. On the other hand, if he does not behave himself, he will have to serve it. That there is a very strong deterrent effect cannot be doubted."

[36] Having considered the record as well as submissions made by counsel, I find that a suspended sentence is appropriate since it has a deterring as well as a rehabilitative effect.

[37] I am mindful that the appellant's consensual sexual encounter with the complainant is a serious offence. However this court is required to consider all the facts, in particular the mitigating factors as well as the circumstances that led to the incident should have been considered.

[38] In the premises, this court is of the view that the appeal should be upheld. The following order is made:

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[7] Persadh v R 1944 NPD 357 at 358

1. The appeal is upheld.

2. The sentence of eight (8) years of imprisonment imposed by the court *a quo* on 16 February 2023 in terms of section 276(1)(b) of the Criminal Procedure Act, Act 51 of 1977 is hereby set aside and replaced with the following sentence:

   Three (3) years of imprisonment wholly suspended in terms of section 297(1)(b) of the CPA, Act 51 of 1977 for a period of five (5) years on condition that the appellant is not convicted of contravening section 15(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007, and for which direct imprisonment is imposed, committed during the period of suspension.

[redacted]

H. KOOVERJIE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree, and it is so ordered

[redacted]

S.K. HASSIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

Counsel for the appellant:	*Adv. F. van As*
Instructed by:	*Legal Aid South Africa*
Counsel for the respondent:	*Adv. L. Sivhidzho*
Instructed by:	*Office of the Director of Public Prosecutions*
Date heard:	*15 February 2024*
Date of Judgment:	*11 April 2024*