CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 124/11
[2013] ZACC 15

In the matter between:

MANDLA TRUST MPOFU	Applicant
and	
MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First Respondent
SOUTH GAUTENG HIGH COURT, JOHANNESBURG	Second Respondent
DIRECTOR OF PUBLIC PROSECUTIONS SOUTH GAUTENG HIGH COURT, JOHANNESBURG	Third Respondent
together with	
CENTRE FOR CHILD LAW	Amicus Curiae

Heard on : 29 November 2012

Decided on : 6 June 2013

JUDGMENT

VAN DER WESTHUIZEN J (Khampepe J and Nkabinde J concurring):

Introduction

[1] Children[1] are a particularly vulnerable group in our society, deserving of protection. Yet, heinous crimes are sometimes committed by teenage offenders. The sentencing of child offenders is thus an important issue. This area of law has developed significantly in recent years under section 28 of the Constitution, which states the best interests of the child as a guiding principle,[2] as well as that every child has the right not to be detained except as a measure of last resort and only for the shortest period of time.[3] The impact of the enactment of the Child Justice Act[4] promulgated in 2008 is also significant.

[2] This matter is an application for leave to appeal against a judgment of the South Gauteng High Court, Johannesburg (High Court). The applicant, Mr Mandla Trust Mpofu, asks this Court to set aside the sentence of life imprisonment imposed by the High Court. He argues that he was a child at the time the crime was committed and that this was not taken into consideration when he was sentenced. The application is opposed by the Director of Public Prosecutions of the South Gauteng High Court

[1] Section 28(3) of the Constitution states: "In this section 'child' means a person under the age of 18 years."

[2] Section 28(2) provides: "A child's best interests are of paramount importance in every matter concerning the child."

[3] Section 28(1)(g) states:

> "Every child has 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 sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—
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> (i) kept separately from detained persons over the age of 18 years; and
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> (ii) treated in a manner, and kept in conditions, that take account of the child's age".

[4] 75 of 2008.

(DPP). The Centre for Child Law was admitted as a friend of the Court (*amicus curiae*).

[3] It is trite that sentences may be interfered with on appeal only if the sentencing court misdirected itself, or if the sentence is shockingly inappropriate. The main question would be whether the sentencing of Mr Mpofu by the High Court constitutes a misdirection. In order to determine this, however, some clarity is needed as to how old he actually was at the time of the commission of the offences, what his age was in the opinion of the High Court and whether the High Court adequately dealt with his youthfulness in the sentencing process. If it is indeed found that a misdirection occurred, or that a shockingly inappropriate sentence was imposed, the question would arise whether this Court should set aside the sentence and replace it with another. However, the very first issue to consider is whether it is in the interests of justice to grant leave to appeal, given the circumstances of this case.

Background

[4] In 2001 Mr Mpofu – with other accused – was convicted in the High Court of murder and other serious offences, committed in January 1998. On 25 September 2001 he was sentenced to life imprisonment for the murder, as well as to 28 years' imprisonment for the other offences, to run concurrently with the life term. Apparently he has served 13 years of his sentence.

[5] Applications by Mr Mpofu for leave to appeal against his sentence to the High Court and the Supreme Court of Appeal were dismissed on 16 November 2004 and 17 August 2006, respectively. He applied on the ground that the High Court had failed to take into account that he was under age, amongst other things.[5]

[6] In 2008 he approached this Court with an application for leave to appeal, on the basis that the presiding judge was not impartial and violated his constitutional right to a fair trial. He further argued that the fact that the record of his trial could not be traced infringed his right of access to information. The application for condonation of the late filing of papers and the application for leave were dismissed.[6] In 2009 Mr Mpofu again approached this Court on the basis that his right of access to information, his right of appeal and his right to a fair trial were infringed. This application was also dismissed.[7] In both cases this Court stated in short reasons that it was "not in the interests of justice" to hear the matter.

[7] In the present application,[8] he seeks leave to appeal against his sentence. He submits that the High Court did not give due consideration to his age at the time of the

[5] In his application to the Supreme Court of Appeal, the applicant contended that the murder and other offences were not premeditated on his part. Further, he was promised that if he acted as a state-witness his sentence would be mitigated. He denied having committed the murder and requested the Court to read the eye-witness testimony again to prove that he was not the one who pulled the trigger on the deceased. Finally, he submitted that the trial Court had failed to take into consideration that he was under age. He stated: "Accused 4 was 20 years old, the judge did not take into consideration that the appellant was under-age when the crime was committed, compare with the ring leader accused 2 who was 38 years when the crime was committed."

[6] CCT 66/08.

[7] CCT 101/09.

[8] CCT 124/11.

commission of the offences. He relies on section 28(1)(g) of the Constitution,[9] which provides that a child may only be imprisoned as a matter of last resort and for the shortest possible time. He argues that his life imprisonment should be set aside and replaced by a sentence that utilises the provisions of the Child Justice Act, even though this statute came into operation long after his sentencing.

[8] In considering the application for leave to appeal, this Court was of the view that the application could not be determined without more information concerning Mr Mpofu's age. Therefore, the Court appointed Mr Yakoob Alli of the Johannesburg Bar as *amicus curiae* to investigate the age of the applicant.[10] He also acted as counsel for the applicant. We are grateful for Mr Alli's assistance in this regard. The content of his report is discussed below.

[9] After Mr Alli's report had been received, this Court directed the DPP to lodge those portions of the High Court record that contained evidence relevant to determine the age of the applicant. The DPP was unable to trace the criminal record case file

[9] Quoted above n 3.

[10] The order of this Court dated 15 February 2012 reads:

> "The Constitutional Court has considered this application for leave to appeal and in the light of:
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> (a) its conclusion that the application cannot be determined without accurate information concerning the age of the applicant and that it is therefore in the interests of justice to appoint an advocate of the Johannesburg Bar to investigate and provide this Court with a report containing all relevant information that will enable the Court to ascertain the age of the applicant;
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> (b) the fact that Mr Yakoob Alli of the Johannesburg Bar has consented to investigate and report to this Court on the issue of the age of the applicant;
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> appoints Mr Yakoob Alli as a friend of the Court to investigate and provide this Court, as soon as is practicable, with a report containing all relevant information that will enable the Court to ascertain the age of the applicant. The Registrar is requested to furnish a copy of all the papers lodged in this case to Mr Yakoob Alli."

and submitted that the only available information regarding his age is that which is alluded to in the High Court judgment and Mr Alli's report.

[10] This Court then directed the DPP to procure the assistance of the South African diplomatic representatives in Harare, Zimbabwe, in order to obtain any available official documentation authenticating Mr Mpofu's date of birth. The DPP did not procure this information.

Leave to appeal

[11] In order to determine whether leave to appeal should be granted in this case, three issues need to be considered, namely whether a constitutional matter is raised; whether the matter has already been adjudicated (*res judicata*); and whether it is in the interests of justice to grant leave.

[12] Is a constitutional matter raised? In theory, every alleged unlawful detention or imprisonment directly affects the individual's right to freedom and security of the person, protected in section 12(1) of the Constitution.[11] But, appeals against sentence are not automatically constitutional matters falling within the jurisdiction of this Court. In this matter though, a constitutional issue does arise. The applicant relies

[11] Section 12(1) states:

> "Everyone has the right to freedom and security of the person, which includes the right—
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> (a) not to be deprived of freedom arbitrarily or without just cause;
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> (b) not to be detained without trial;
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> (c) to be free from all forms of violence from either public or private sources;
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> (d) not to be tortured in any way; and
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> (e) not to be treated or punished in a cruel, inhuman or degrading way."

directly on the effect of the protection of children's rights in section 28 of the Constitution on sentencing.

[13] I now turn to the issue of whether the matter is *res judicata*. The DPP submits by way of a "special plea" that the application should be "removed from the roll", because it has already been decided by this Court and is thus *res judicata*. The DPP relies on the need for finality in criminal matters and views this to be a rigid bar to leave being granted in this case. Counsel for the DPP submitted that concerns about youthfulness and even childhood should not create any exception. Counsel for the applicant submits that the *res judicta* principle does not apply, because the previous application was so "ill-advised" that it was a nullity or "bordered on a nullity".[12]

[14] The general principle is that a convicted and sentenced person cannot appeal more than once against the same conviction or sentence. Once an application for leave to appeal is dismissed, this is a judicial decision, which is final and determinative, involving the same parties, cause of action and relief sought.[13] The fact that an application for leave to appeal or an appeal is without merit, or "ill-advised", cannot easily make it a nullity and open the way for further appeals, every time on a different ground.

[12] The parties dealt only with application CCT 66/08 and not CCT 101/09.

[13] *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (AD) at 835F-G; *S v Khumalo* 2009 (1) SACR 503 (TPD) at 505F-H; and *R v Kriel* 1939 SA 221 (CPD) at 222. See also Van der Merwe et al (eds) *Commentary on the Criminal Procedure Act* Service 48 (Juta and Co Ltd, Cape Town 2007) at 31–15 to 31–16.

[15] However, one has to look a little deeper into the history and reason behind the principle of *res judicata* before concluding that it is an absolute bar to the granting of leave, even in a case like this which possibly involves the sentencing of a child. Historically, its use was mainly to prevent the difficulties that might arise from discordant or contradictory decisions in the same suit.[14] In the context of civil matters it operates in tandem with the so-called "once and for all" rule that a plaintiff may generally only claim for damages arising out of the same cause of action once.[15] But, under our Constitution, there may be scope for situations in which the *res judicata* principle is softened in relation to unrepresented accused persons. When unrepresented persons apply for leave to appeal, without necessarily properly knowing their rights and what arguments may be available to them, it could be unduly harsh to preclude them from subsequently applying for leave to appeal where they may have a valid point, particularly where there is a possible violation of one of their rights protected in the Bill of Rights.

[16] Furthermore – and closer to the facts of this case – the present application does not necessarily call for a decision on the merits which may contradict the previous decisions of this Court. Both the 2008 and 2009 applications were dismissed on the basis that this Court did not regard it as "in the interests of justice" to hear the matter. The merits of the applicant's specific claim in the present application, namely that he was a child when he committed the offences and that the sentencing Court did not take

[14] See Voet *Commentarius ad Pandectas* 44.2.1 translated by Gane *The Selective Voet* (Butterworth & Co. (Africa) Ltd., Durban 1957) at 553.

[15] *Custom Credit Corporation (Pty.) Ltd. v Shembe* 1972 (3) SA 462 (AD) at 472.

this into account, were not decided by this Court. No finding was made on the prospects of success of the applicant's case, as this Court often does. The fundamental reason for the *res judicata* principle, namely to avoid conflicting decisions on the same issue and to bring about finality,[16] does not apply fully.

[17] But, is it in the interest of justice to grant leave to appeal, in view of concerns about *res judicata* and finality, uncertainty about the applicant's age and the question whether he was indeed a child offender, the long time that has elapsed since the commission of the offences in 1998 and the sentencing in 2001 and also the missing trial record? The answer depends partly on the importance given to the sentencing of children under section 28 of the Constitution as a constitutional issue.

[18] In my view, the sentencing of children is a constitutional matter of great concern and import for the criminal justice system, beyond and above the interest of a specific applicant with a criminal record whose credibility may not be above suspicion. Mr Mpofu raises a constitutional issue. Whether he should be successful must be determined. In *Fraser v ABSA*[17] this Court stated:

> "[A]n applicant could raise a constitutional matter, even though the argument advanced as to why an issue is a constitutional matter, or what the constitutional implications of the issue are, may be flawed. The acknowledgement by this Court

[16] See above n 14.

[17] *Fraser v ABSA Bank Ltd (National Director of Public Prosecutions as* Amicus Curiae*)* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) (*Fraser v ABSA*).

> that an issue is a constitutional matter, furthermore, does not have to result in a finding on the merits of the matter in favour of the applicant who raised it."[18]

[19] We do not need absolute certainty on the applicant's age to come to the conclusion that it is in the interests of justice to grant leave to consider on appeal the constitutional issue he raises. As shown below, the report by Mr Alli, who was appointed by this Court, and the High Court's judgment contain sufficient indications of the real possibility that he was a child.[19] Only an analysis of all the evidence available to us, properly argued by legal representatives, could bring us closer to a conclusion.

[20] In my view the missing trial record is a great pity, but cannot be determinative. This application is not about the evidence to determine the guilt or innocence of the applicant and his co-accused or about alleged procedural irregularities. It is about sentencing specifically with regard to age. This is dealt with in detail in the judgment on sentence. The judgment on conviction is also available. Lastly, the time that has elapsed whilst Mr Mpofu brought several applications from behind prison bars cannot in principle override a potential injustice with serious and direct constitutional implications.

[18] Id at para 40. See also *Fraser v Naude and Another* [1998] ZACC 13; 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC) at para 7, where this Court stated: "The prospects of success are obviously an important issue in deciding whether or not to grant leave to appeal. But they are not the only issue to be considered when the interests of justice are being weighed." (Footnote omitted.)

[19] Mr Alli concluded that Mr Mpofu was 16 years old at the time he committed the offence.

[21] In view of section 28 of the Constitution, this Court's role as the guardian of the Constitution and the High Court's role as the upper guardian of all children, a flexible approach must be followed.[20] The concerns surrounding Mr Mpofu's age were raised by him in the context of the possible application of the Child Justice Act.

[22] In my view it is in the interests of justice to grant leave to appeal. In the sentencing of a child, every court must take into account the contents of section 28. This includes treating as paramount the best interests of the child[21] and imprisoning a child only as a matter of last resort and for the shortest appropriate amount of time. Under the Constitution, childhood is not merely one mitigating factor to be balanced against factors in favour of a harsher sentence. Section 28 demands a different enquiry into sentencing. As the *amicus* helpfully phrased it, the starting point in sentencing may well be different. This does not mean that every sentencing court must expressly refer to section 28, but its contents cannot be ignored. The application also bears reasonable prospects of success. The attention of this Court is well warranted.

[20] See *Kotze v Kotze* 2003 (3) SA 628 (T) at 630G:

> "[T]he High Court sits as upper guardian in matters involving the best interests of the child (be it in custody matters or otherwise), and it has extremely wide powers in establishing what such best interests are. It is not bound by procedural strictures or by the limitations of the evidence presented, or contentions advanced or not advanced, by respective parties."

[21] See section 28(2) quoted above n 2.

The age of the applicant

[23] The High Court accepted Mr Mpofu's youthfulness as a mitigating factor.[22] The question is whether he was under the age of 18 – the constitutional dividing line between a child and an adult – and, if so, whether the High Court was aware of it and duly took it into account. It is necessary to outline the conflicting information that has been put forward as to the applicant's age. I deal first with the High Court judgment and thereafter with the parties' submissions and the evidence they rely on.

The High Court judgment

[24] Mr Mpofu was accused number four in the proceedings in the High Court. In his judgment on conviction, Labuschagne J referred to the age of the accused: "Accused 1 was employed by the deceased and he stayed in the same quarters as the other three state witnesses. He appears to be the youngest of all the accused."[23]

[25] In the sentencing judgment accused one is described as "19 years old and . . . a first offender" and later as "at this stage . . . in his early 20s, he was 19 when the incident occurred".[24]

[26] In determining the appropriate sentences, the High Court took into account the personal circumstances of each accused. In describing Mr Mpofu, the Court held:

[22] *S v Thabo Sipho Ndlovu and Others*, Case No 12/99, 25 September 2001, unreported (High Court judgment on sentence) at 29.

[23] *S v Thabo Sipho Ndlovu and Others*, Case No 12/99, 4 May 2001, unreported (High Court judgment on conviction) at 13.

[24] High Court judgment on sentence above n 22 at 26 and 29.

> "Accused 4 is 20 years old. He is not married and has no children. He passed matric in KwaZulu-Natal. He was arrested on 31 January 1999 when he was a student at the Boston College. His parents are both pensioners. He has a previous conviction for robbery."[25]

[27] Later it is stated that Mr Mpofu is 20 years old and that his age could be a mitigating factor:

> "Accused 1 and 4 are the youngest. Accused 1, at this stage, is in his early 20s, he was 19 when the incident occurred and I was informed that accused 4 is 20 years of age. The youthfulness of accused 1 and 4 is a factor that I must consider and could be a mitigating factor, at least to an extent which may influence me to differentiate between their sentences and those of the other accused."[26]

[28] The judgment later returns to the question of age stating that it is a concern that people "in their late teens" are committing such violent crimes.[27] I later return to the High Court judgment.

The parties' submissions and the evidence presented

[29] Mr Mpofu submits that his date of birth is 25 September 1981 and that the High Court accepted that his age was 20 at the time of sentencing. He relies on the wording of the High Court judgment.

[25] Id at 27.

[26] Id at 29.

[27] Id at 30.

[30] The *amicus* appointed to investigate the question of age concluded that the applicant was 16 at the time of the commission of the crime, but did not have the benefit of verifiable, objective evidence. A virtually illegible copy of a birth certificate, which was received from Mr Mpofu's previous school, was attached to the report. Shortly before the hearing of this matter, the applicant requested this Court to admit an "original birth certificate". It appears that this certificate and the illegible copy contain notable differences. None of the documents provides conclusive proof of the birth date.

[31] The DPP points to the indictment in this case, which indicates that he was 20 years of age when arrested on 4 March 1998. Further, according to the Criminal Record System, he gave two different dates of birth: 4 April 1977 and 4 September 1979. Mr Mpofu submits that he gave the South African authorities two birthdates in an attempt to avoid being linked to a criminal offence in another case pending against him at the time. He submits that his true date of birth is the one in the birth certificate attached to the *amicus'* report, namely 25 September 1981.

[32] The DPP presented an affidavit from a Control Immigration Officer from the Department of Home Affairs. The officer matched Mr Mpofu's identity number with his record in the National Population Registry database. However, it indicates the date of birth assigned to the applicant as 4 April 1977. Accordingly, the DPP argues that the evidence provided by the Department of Home Affairs establishes beyond reasonable doubt that the applicant was not a minor at the time of the commission of

the crime. This evidence is not conclusive, as it cannot be ascertained from where the information contained in the immigration registry record originates, or when it was entered into the database.

[33] On all of this information the applicant was born in 1977, 1979 or 1981, and he was between 16 and 20 years old when the offences were committed. However, none of the new evidence is admissible under the requirements of Rule 31 of this Court.[28] The evidence is neither common cause nor incontrovertible. It is not capable of easy verification. During oral argument, counsel for the parties agreed that this Court has to rely on the record, including the High Court's judgment, rather than on evidence that has subsequently come to light and which appears contradictory and confusing.

Conclusion on age

[34] It is not possible to reach a conclusion on the applicant's age based on the above. In my opinion we are largely left with the references in the judgment of the High Court. However, the language used is not entirely clear.

[28] Rule 31 states:

> "Documents lodged to canvas factual material
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> (1) Any party to any proceedings before the Court and an amicus properly admitted by the Court in any proceedings shall be entitled, in documents lodged with the Registrar in terms of these rules, to canvas factual material that is relevant to the determination of the issues before the Court and that does not specifically appear on the record: Provided that such facts—
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> (a) are common cause or otherwise incontrovertible; or
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> (b) are of an official, scientific, technical or statistical nature capable of easy verification.
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> (2) All other parties shall be entitled, within the time allowed by these rules for responding to such document, to admit, deny, controvert or elaborate upon such facts to the extent necessary and appropriate for a proper decision by the Court."

[35] As indicated above, it is stated in the sentencing judgment that Mr Mpofu – as accused four – "is 20 years old", as well as that the Court "was informed that accused 4 is 20 years of age". If these statements refer to his age at the time of sentencing – September 2001 – he must have been 17 when the offences were committed in January 1998. This is contradicted only by the Court's statement that accused one – and not Mr Mpofu – "appears to be the youngest of all the accused", read together with the statement that accused one was in his early 20s at the stage of sentencing and was 19 when the incident occurred. This would make Mr Mpofu older than 19 when the offences were committed. However, it has to be noted that accused one only *appeared* to the Court to be the youngest of the accused. This statement was made in the judgment on conviction as a part of the trial judge's summary of evidence. The ages of the accused were not relevant and had not been investigated at that time. The observation based on accused one's appearance cannot outweigh the direct reference to age in the sentencing judgment, where the personal circumstances of the accused were specifically scrutinised.

[36] It is to be noted that the references to the age of accused one – in the sentencing judgment – are also contradictory. First, he is stated to be "19 years old", and then to be "at this stage [presumably of sentencing] . . . in his early 20s [and] . . . 19 when the incident occurred".[29]

[29] High Court judgment on sentence above n 22 at 26 and 29.

[37] On the face of the above it would appear that Mr Mpofu was not older than 17 at the time of the offences, if he was 20 at the time of the sentencing. The applicant and *amicus* agree that the High Court accepted that he was 16 or 17 – in any event under 18 – but did not deal with his status as a child and referred only to his youthfulness. The DPP argues that the High Court's statement that he was 20 does not necessarily mean that the Court thought him to be 20 at the time of sentencing. The Court could also have been referring to 1998, when the offences were committed.

[38] The DPP submits that the onus to prove age as a mitigating factor is on the accused and that it was not met in this case, because the applicant did not testify on his age. Counsel for the applicant disagrees. Indeed, the responsibility to impose a sentence belongs to the court. Although the court should not be left to speculate, all that is required from an accused is to provide a sufficient factual basis for mitigation, which counsel for the applicant contends was done in this case. The Court should have satisfied itself as to the age of the accused.

[39] In my view it appears from the High Court's remark that it "was informed that accused 4 is 20 years of age", that Mr Mpofu's counsel must have conveyed this information to the Court. This statement is made after the straightforward one that "[a]ccused 4 is 20 years old." Surely the prosecution, or the Court, could have questioned this, based on the applicant's appearance, or on any apparently contradictory information. The judgment does not show any indication that the information was disputed. It appears that the High Court was informed and accepted

that Mr Mpofu was 20 at the time of sentencing, thus no older than 17 at the time when he committed the offences. The only indication to the contrary is the reference in the judgment on conviction to the youthful appearance of accused one and the later references to accused one's age. As indicated above, this cannot outweigh the direct references to Mr Mpofu's age in the sentencing judgment. According to the indictment, which is part of the record, Mr Mpofu is older. But the indictment does not contain proven facts and the facts stated in it were not taken into account by the Court in sentencing.

[40] Other interpretations of the High Court judgment may be arguable. One is that the Court only accepted Mr Mpofu to be a youthful offender, but not a child. This interpretation is supported by the language of the sentencing judgment, which purports to consider Mr Mpofu's "youthfulness" in determining an appropriate sentence. Given that nowhere in the sentencing or the conviction judgments is Mr Mpofu referred to as a child, it is possible that the Court perceived him to be a youth.[30] This would mean that the Court's remark that Mr Mpofu "is 20 years old" should not be taken to mean that he was 20 at the time of sentencing, but rather at the time of the commission of the offences. The use of the present tense would then simply be a mistake. This is unlikely though, in view of the very specific use of the past tense ("was") and present tense ("is") by the Court in that particular paragraph.[31]

[30] See also the High Court judgment on sentence above n 22 at 30: "In regard to the youthfulness of some of the accused . . .".

[31] See [27] above for the exact wording.

[41] A third possibility is that we are unable to determine with any accuracy what the High Court accepted with regard to Mr Mpofu's age because of the imprecise language in the judgment to describe the ages of the accused individuals, as indicated earlier. This would leave open the possibility that he was indeed a child and that the sentencing Court disregarded this fact.

Was there a misdirection?

[42] The inquiry 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 misdirection that could result in the setting aside of a sentence on appeal is an error committed by the Court in determining or applying the facts for assessing an appropriate sentence. However, a mere misdirection is not by itself sufficient to entitle a court to interfere with the sentence on appeal. It must be of such a nature, seriousness or degree that it shows that the Court did not exercise its discretion or exercised it improperly or unreasonably.[32]

[43] Whether a misdirection has occurred in this case depends on the interpretation of the High Court judgment. On the second of the above-mentioned possible interpretations of the High Court judgment, the Court regarded the applicant as a youthful offender and took his youth into account. The Court did not regard him as a child at the time of the commission of the offences and thus never mentioned childhood as a factor, or any of the contents of section 28 of the Constitution. If this is

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

indeed the correct interpretation of the High Court judgment, there would be no misdirection.

[44] But the two direct references in the High Court's judgment on sentencing to Mr Mpofu's age, namely that "[a]ccused 4 is 20 years old" and that the Court "was informed that accused 4 is 20 years of age" stand in the way of this interpretation. In my view one cannot simply accept that the High Court meant to say that Mr Mpofu was 20 at the time of the offences, rather than at the time of sentencing, in spite of the explicit language used. This is especially so with regard to the second of the references, where the High Court first deals with accused one's age "at this stage" as well as "when the incident occurred" and then proceeds to say that "I was informed that accused 4 is 20 years of age". To interpret all of these to mean that the High Court actually stated that the applicant was 20 when he committed the offences, would be stretching the language of the judgment unduly, particularly the important question of whether an accused was a child when committing a serious offence. The first of the above-mentioned three interpretations is in my view the only one consistent with the language of the judgment.

[45] The possibility of a flexible and lenient approach in the language used by the High Court calls up the third of the above-mentioned interpretations of the judgment, namely that the imprecise use of language renders it impossible accurately to determine the age of the applicant, or the High Court's understanding of his age. One appreciates the pressures, workload and time constraints of the High Court in the area

of criminal cases and does not wish to be unduly critical. However, the sentencing of any convicted person is a delicate and important issue. This is all the more so when youthfulness is taken into account as a circumstance in the mitigation of punishment. It becomes extremely important when childhood is at issue, directly invoking the guidelines and demands of section 28 of the Constitution. An inadequate and inconclusive investigation into the possibility that a person about to be sentenced was under 18 when the offences were committed, or loose, imprecise or contradictory language to describe a conclusion on this point, could in itself be a misdirection.

[46] If the High Court accepted that Mr Mpofu was 20 at the time of sentencing, then did the Court take into account that he was a child when he committed the offences? According to the applicant and the *amicus*, it did not. The DPP conceded that if childhood were taken into account, the consideration of sentencing might have been different. The DPP's argument that it did not really matter much to the prosecution and the Court whether he was 20 at the time of sentencing (thus 16 or 17 at the time of the offences) or 20 at the time of the offences is unpersuasive. If this were the attitude of the Court, it would be a clear example of a misdirection.

[47] I thus conclude that the High Court misdirected itself. From the references in the judgment it appeared to have accepted that Mr Mpofu was a child at the time he committed the offences, but failed to take it into account when considering what an appropriate sentence would have been.

Appropriate sentence

[48] The misdirection was sufficiently serious that the sentence has to be set aside. However, would life imprisonment not in any event have been appropriate?

[49] The *amicus* informed us that on the reported case law life sentences imposed on children do not stand up to scrutiny on appeal. The DPP stated that children are often sentenced to life imprisonment, but that these cases are not reported. Although we can perhaps accept that life imprisonment may in some cases be appropriate for a person under the age of 18, it is clear that in order to sentence a child to life imprisonment the court must give very strong reasons and show that the possibility of rehabilitation has been properly investigated. The *amicus* submitted that it can only happen under very exceptional circumstances. This must be correct.

[50] Are Mr Mpofu's circumstances highly exceptional? The crime is very serious and he has a previous conviction for robbery. But I am not able to conclude that a life sentence for a child was acceptable in this case, particularly because section 28(1)(g) of the Constitution states that every child has the right not to be detained except as a measure of last resort and only for the shortest appropriate period of time.[33]

[51] What sentence would then be appropriate? Should this Court, on appeal, impose an appropriate sentence or refer the matter back to the High Court to re-investigate the issue of the applicant's age, perhaps even by hearing further evidence,

[33] Quoted above n 3.

and to decide on a proper sentence? Under the present circumstances a referral back to the High Court would not be useful. The offences were committed 15 years ago and the sentence imposed almost 12 years ago. A range of aggravating and mitigating factors was placed before the High Court and dealt with by the Court in its judgment. One of these was the age of the applicant. It is unlikely that new evidence would shed much light on the issue. The DPP has been unable to trace the full record of the criminal proceedings. Evidence gathered on the initiative of this Court is vague, contradictory and inconclusive. The High Court made its findings. It would not be appropriate to refer the matter back mainly to afford the High Court an opportunity, or to expect of the High Court to reconsider, clarify or reformulate its own previous findings.

[52] This Court has to consider an appropriate sentence. In doing so, competing interests have to be weighed. On the one hand, there is the Constitution's high regard for the interests of children and recognition that those under the age of 18 years are indeed children. On the other hand, there is the general principle that a court of appeal does not interfere easily with sentencing by a lower court, as well as the constitutional concern for the safety of all and the need to combat crime.

[53] It was argued on behalf of the applicant that the Child Justice Act which was promulgated in 2008 could give guidance in the sentencing, even though it came into operation after the sentencing in this matter and is not applicable to Mr Mpofu. It may be noted that section 77(4) of the Child Justice Act creates a maximum sentence limit

of 25 years' imprisonment for a child who is 14 years or older at the time of being sentenced.[34]

[54] Given the seriousness of the crime, his previous conviction as well as the need to protect society against serious crime through, amongst other means, the preventative effect of punishment, considered together with his age, I would impose a sentence of 20 years' imprisonment. As Mr Mpofu has served more than half of this term, he might be eligible for parole.[35] However, that is not an issue for this Court to consider.

Conclusion

[55] Mr Mpofu was convicted of serious offences, including murder. His age at the time he committed these offences is not factually certain. The evidence is inconclusive and the veracity of the information put forward by Mr Mpofu is not above suspicion. However, it is possible that he was 16 or 17 years old at the time of the commission of the offences. From statements in the High Court judgment that he was 20 at the time of sentencing it appears that the Court found that this was the case.

[34] Section 77(4), read with section 77(3), states:

> "A child [who is 14 years or older at the time of being sentenced for the offence, but not 16 years or older at the time of the commission of an offence referred to in Schedule 2 to the Criminal Law Amendment Act 105 of 1997] may be sentenced to a sentence of imprisonment for a period not exceeding 25 years."

[35] Section 136(1) of the Correctional Services Act 111 of 1998 (new Act) provides that any person serving a sentence of imprisonment, immediately before the commencement of the new Act, is subject to the provisions of the Correctional Services Act 8 of 1959 (old Act). This section preserves the policy and guidelines that applied at any time before the new Act came into operation in 2004. As Mr Mpofu was sentenced in 2001 it seems clear that in terms of section 136(1) of the new Act the parole provisions applicable to him are those set out in section 65(4)(a) of the old Act. Section 65(4)(a) provides that a prisoner serving a determinate sentence imposed prior to July 2004, may be considered for parole after having served half of the sentence, unless the date for considering parole is brought forward as a result of credits earned.

It did not consider his childhood in sentencing him. This is a serious misdirection, especially in view of the high demands of the Constitution with regard to the sentencing of children, which are of great importance for society and the criminal justice system, over and above the situation of the individual applicant in this case.

[56] Therefore the sentence of life imprisonment has to be set aside and replaced with a sentence that is appropriate under the circumstances. The sentence of 28 years' imprisonment also has to be reduced, so that a cumulative sentence of 20 years is imposed. In the circumstances, I would have upheld the appeal.

SKWEYIYA J (Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Yacoob J and Zondo J concurring):

Introduction

[57] I am unable to agree with the outcome reached in the judgment of my colleague Van der Westhuizen J. I would refuse the applications for condonation and leave to appeal.

Constitutional context

[58] From the outset, I must emphasise that children's rights are of the utmost importance in our society. Courts are required to distinguish between children and adult offenders when sentencing and children must enjoy preferential sentencing

treatment.[36] However, it is not the seriousness of the right relied upon by an applicant alone that is decisive of whether leave to appeal will be granted in this Court. In my view, Mr Mpofu has failed to cross a preliminary hurdle. Leave to appeal and condonation should be refused, both on the ground that it is not in the interests of justice to grant them.

Leave to appeal

[59] It is trite law that leave to appeal to this Court should be granted only when two conditions are met. The application must raise a constitutional matter or an issue connected with a decision on a constitutional matter, and the interests of justice must favour the grant of leave.

[60] What constitutional basis exists for this Court to intervene in Mr Mpofu's sentence which essentially concerns a factual dispute? Ordinarily this would not be a constitutional issue. Mr Mpofu relies on section 28 of the Constitution to found this Court's jurisdiction. The right enshrined in section 28 entitles a defined group – children – to its enjoyment, to the exclusion of others – adults. But the answer to the factual question as to Mr Mpofu's age in this case determines the applicability of a constitutional right. It is also the first step in determining whether the South Gauteng

[36] Section 28 of the Constitution provides in relevant part:

> "(1) Every child has the right—
>
> . . .
>
> (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time".

High Court, Johannesburg (High Court) unconstitutionally failed to take account of Mr Mpofu's age in sentencing, as is alleged.

[61] The application of a right, and adherence to the dictates of section 28 when sentencing a child,[37] are clearly constitutional issues.[38] And if Mr Mpofu's claim is true then a constitutional failure arises in this case.

Interests of justice

[62] The question whether it is in the interests of justice to hear a matter depends on a myriad of relevant considerations. Mr Mpofu relies on section 28 of the Constitution, and he argues that, because of the public importance of the issue, the interests of justice require that this application for leave to appeal be granted.

[63] The importance of the issue is indeed a highly relevant factor in determining the interests of justice. However, Mr Mpofu has failed to establish that the right is engaged at all. Whether or not section 28 of the Constitution has indeed been implicated can only be established by resolving the factual dispute as to Mr Mpofu's age. To base the interests of justice on his status as a child would be to beg the question.

[37] Section 28 of the Constitution demands that children are accorded different treatment in sentencing. A failure to do so is, in my view, a constitutional failure. See above n 36 for the full text of section 28(1)(g).

[38] Section 167(7) of the Constitution provides: "A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution."

[64] Prospects of success are another relevant factor in determining the interests of justice. Ordinarily, an appellate court can only interfere with the sentence of a lower court where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.[39] In addition, this Court, ordinarily, will entertain appeals on sentence only if a fair trial issue is at stake.[40] Without the possibility of reliable proof that one of these grounds has been established there are no prospects of success.

[65] The *amicus curiae* appointed by this Court to investigate Mr Mpofu's age, Mr Yakoob Alli, gave a detailed report concluding that it "appears" that Mr Mpofu was 16 years old at the time of the offences. However, Mr Alli, despite his commendable efforts, was without the benefit of verifiable, objective evidence and accordingly the factual dispute cannot be resolved by recourse to this report.

[66] Neither does the judgment of the High Court allow this Court to reach a neat, definitive conclusion on Mr Mpofu's age as we cannot determine, with any level of certainty, what that Court accepted with regard to Mr Mpofu's age. There is nothing in the High Court judgment that shows that Mr Mpofu had been represented to the Court on the basis that he was a child at the time of the offences. It is difficult to accept that, if he had in fact been a child, it would not have been revealed to the Court. Age is widely known as a highly relevant mitigating factor in sentencing. I also find it

[39] *Bogaards v S* [2012] ZACC 23; 2012 (12) BCLR 1261 (CC); 2013 (1) SACR 1 (CC) at para 41.

[40] Section 35(3) of the Constitution provides in relevant part: "Every accused person has a right to a fair trial".

difficult to accept that the High Court judgment would have made no mention of Mr Mpofu's minority if it had been revealed to it, especially given the centrality that minority occupies in the sentencing enquiry.

[67] Because we do not know what the High Court found in respect of Mr Mpofu's age, we are unable to determine whether it misdirected itself by failing to take account of it. Accordingly, the application lacks prospects of success because no misdirection can be established on these facts that could support an allegation that he did not have a fair trial. This militates strongly against it being in the interests of justice to grant leave to appeal.

[68] That the record in the High Court could not be sourced is a further reason why interfering with the sentence would not be in the interests of justice. This Court would not be well-positioned to grant the relief sought, namely, to re-sentence Mr Mpofu.

[69] Further, the interests of justice in granting Mr Mpofu's application are weakened by his failure to act timeously in bringing it. It has taken 10 years for this matter to be brought to this Court. The passage of this significant length of time has surely impacted on the possibility of establishing reliable evidence as to the facts on which Mr Mpofu's case rests. The interests of justice thus do not favour re-opening his case.

[70] Nor has Mr Mpofu adequately explained why he brought two previous applications to this Court for leave to appeal against his sentence in which this issue was not raised.[41] The interests of justice do not support this Court entertaining a further application.

Condonation

[71] Nor do the interests of justice support the grant of condonation. Mr Mpofu is well outside the time limits imposed by this Court's Rules for lodging an application.[42] He has not motivated his significant delay; he has not explained its extent nor accounted for the full period of the delay.[43] I see no good reasons why Mr Mpofu's application for condonation should be granted and his case fails at this juncture too.

Conclusion

[72] In the light of the above, I am of the view that the applications for condonation and for leave to appeal should be refused.

[41] See [6] above of the judgment of Van der Westhuizen J for a description of the applications, both of which were dismissed.

[42] Rule 19(2) of the Rules of the Constitutional Court provides in relevant part:

> "A litigant who is aggrieved by the decision of a court and who wishes to appeal against it directly to the Court on a constitutional matter shall, within 15 days of the order against which the appeal is sought to be brought and after giving notice to the other party or parties concerned, lodge with the Registrar an application for leave to appeal".

[43] See *eThekwini Municipality v Ingonyama Trust* [2013] ZACC 7; 2013 (5) BCLR 497 (CC) at para 28.

Order

[73] The following order is made:

The applications for condonation and leave to appeal are dismissed.

For the Applicant:	Advocate W Vermeulen SC and Advocate Y Alli at the request of the Constitutional Court.
For the Third Respondent:	Advocate C Britz and Advocate D Dakana instructed by the Director of Public Prosecutions South Gauteng High Court, Johannesburg.
For the Amicus Curiae:	Advocate A Skelton instructed by the Centre for Child Law.