REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

CASE NO: A 115/14

In the matter between:

TSHEPO MASHISANE **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

MOLOPA-SETHOSA J

[1] The Appellant was charged in the Malamulele Regional Court on a charge of rape of a 2 year old girl. He pleaded guilty to the charge.

He was found guilty on his plea and statement in terms of section 112 (2) of the Criminal Procedure Act 51 of 1977, as amended ("The CPA"), and was convicted on 04 July 2013. The appellant was subsequently sentenced on 05 September 2013 to 5 (five) years' imprisonment, 2 (two) years of which are suspended for 5 (five) years on condition that he is not convicted of rape committed during the period of suspension. [The date of sentence on the J15, to wit 11 July 2013 is incorrect. From the record, p.71 the date of sentence appears to be 05 September 2013, as set out above.

[2] In the section 112(2) statement the following admissions were made:

> ".. .I further admit that on 27 October 2011, at or near Xithelani I [the appellant] did unlawfully and intentionally had sexual penetration ***sic*** intercourse with a female girl aged 2[two years old], to wit

N[...] M[...] ***sic.***

I was playing with the victim, and after playing I called her and had sexual intercourse without her consent ***sic***.

I admit that having intercourse with a child below 16 [sixteen] years is wrong and punishable by law". [My underlining].

[3] From the above admissions it appears that the appellant knew and understood the proceedings, and that he pleaded guilty fully appreciating the wrongfulness of his conduct.

[4] The appellant, who was 16 years old at the time of the commission of the offence, was legally represented during the trial, and his mother/guardian was always at court to stand by him.

[5] At no stage during the proceedings, prior to conviction, was it brought to the attention of the learned regional magistrate ***a quo*** that the appellant had some and/or any mental defect/illness.

[6] After conviction the court ***a quo*** requested a pre-sentence report and a victim impact assessment report.

[7] Ms Charity Ndzadza (a designated social worker) interviewed the girl/victim's mother and prepared a victim impact assessment report dated 21 August 2013 , in which she sets out the trauma the little girl/victim is still going through, and recommending that the child/victim be referred for counselling.

[8] Mr Khaukanani Nyamande (a probation officer), amongst others, interviewed the appellant and his family members; and prepared a report dated 29 August 2013 [Exhibit B], in which report he stated that, from the interview he conducted (with the appellant and his family members) it appeared that the appellant was suffering from some mental illness. In his recommendations to the court he recommended that the sentence be postponed, and that the appellant be referred for mental observation to determine the status of his mental illness (my emphasis).

[9] Mr Khaukanani Nyamande ("Nyamande") had also compiled a developmental assessment progress report dated 08 November 2011 in respect of the appellant. In this developmental assessment progress report he/Nyamande stated that the appellant was at some stage referred to a doctor for a medical report; and that the said doctor certified that the appellant is mentally retarded. In this developmental assessment progress report Nyamande refers to an 'attached report'; unfortunately there is no doctor's report attached to the developmental assessment progress report aforesaid and/or anywhere in the record. Nyamande had also recommended in the developmental assessment progress report that the sentence be postponed for appellant's further mental observation by the psychiatric, ***sic*** [psychiatrist], to assess [appellant's] suitability to stand

trial.

[10] Both Nyamande and Ndzadza confirmed the contents of their respective reports and recommendations under oath before the learned magistrate ***a quo*** during sentencing proceedings on 29 August 2013.

[11] From the record it appears that the learned regional magistrate ***a quo*** ignored these recommendations by Nyamande, the probation officer, ***viz.*** that the sentence be postponed, and that the appellant be referred for mental observation to determine the status of his mental illness.

[12] The learned regional magistrate ***a quo*** proceeded to sentence the appellant without having referred him for mental observation as recommended. No reasons appear in his judgement as to why he did not take the probation officer's recommendations into account; nor does he make any mention whatsoever of the recommendations aforesaid in his judgement. He only commented on the findings of Ndzadza, the designated social worker on the effect of the rape on the young girl. This in my view is not a balanced approach. He had a duty to look at all factors placed before the court, including the probation officer's report and recommendations.

[13] From the record there is no indication that the appellant had brought an application for leave to appeal and that the leave to appeal was granted by the court ***a quo.*** However, a notice to appeal against both conviction and sentence appears to have been filed by one Tsakani Ulenda Mahundla of the Legal Aid South Africa, Tzaneen Justice Centre. I may just state here that the aforesaid Ms Tsakani Mahundla ("Ms Mahundla") was the appellant's legal representative during the trial at the court ***a quo.***

[14] The grounds of appeal are stated by Ms Mahundla as follows; that:

> "1. Appellant was sixteen (16) years old at the time of the commission of this offence.
>
> 2. The appellant is the first offender.
>
> 3. The appellant is attending at a special school.
>
> 4. The psychiatrist recommended medical treatment. [This is not correct as there is no psychiatrist's report on the record]. [My emphasis].
>
> 5. The victim did not sustain any injuries." [This of course is contrary to the reports filed on record that the 2 year old victim sustained injuries to her vagina] my emphasis.

[15] On a proper analysis of the notice of appeal filed by Ms Mahundla, the grounds of appeal set out therein have to do more with sentence than with conviction; not surprisingly so, as Ms Mahundla was involved [as

appellant's legal representative] from the beginning to the end of the trial at the court ***a quo***, and surely the appellant pleaded guilty, surely after consulting with him, and probably with her advice.

[16] The Legal Aid South Africa, Pretoria Justice Centre subsequently filed an amended notice of appeal against both conviction and sentence.

[17] The grounds of appeal are stated as follows:

> ''***AD MERITS***
>
> 1.
>
> The Magistrate erred in accepting the appellant's guilty plea without establishing:
>
> 1.1 The Appellant's mental status.
>
> 1.2 Court erred by not sending the appellant for mental observation.
>
> 1.3 Disregarding the recommendations of the probation officer.
>
> **2**.
>
> ***AD SENTENCE***
>
> It is respectfully submitted that the court erred in the following respects:
>
> 2.1 Sending the appellant to direct imprisonment and putting less weight to his personal circumstances.
>
> 2.2 The court erred in not considering other form of punishment other than direct imprisonment.

[18] The grounds raised **under <u>conviction</u>** lose sight of the fact that the issue about appellant's possible mental defect/illness only came to the fore after conviction. Prior to the conviction, the learned regional magistrate was not aware of the situation. Appellant was legally represented; his mother was also present throughout the trial prior to conviction and at no stage was this mental defect issue brought to the attention of the magistrate prior to conviction. The grounds raised under conviction should in fact have been raised under sentence.

[19] As much as the record does not reflect that leave to appeal was granted, it is so that the appellant was

sixteen (16) years old at the time of commission of the offence, and therefore, as submitted by Mr Kgagara, representing the appellant, section 84 (1) (b) of the Child Justice Act 75 of 2008 applies. The said section 84 (1) (b) provides as follows:

> "***Appeals***
>
> *84. (1) An appeal by a child against a conviction, sentence or order as provided for in this Act must be noted and dealt with in terms of the provisions of Chapters 30 and 31 of the Criminal Procedure Act: Provided that if that child was, at the time of the commission of the alleged offence-*
>
> ***(a)****.....*
>
> ***(b) 16 years*** *or older but under the age of 18 years and has been sentenced to any form of imprisonment that was not wholly suspended,*
>
> *he or she may note the appeal without having to apply for leave in terms of section 309B of that Act in the case of an appeal from a lower court and in terms of section 316 of that Act in the case of an appeal from a High court.....*

[20] The appellant cannot be prejudiced by the fact that he has not applied for leave to appeal; he was 16 (sixteen) years old at the time of the commission of the offence, and he has been sentenced to a term of sentence not wholly suspended as envisaged by section 84 (1) (b) of the Child Justice Act 75 of 2008. He therefore has a right to automatic appeal.

[21] As already stated above, during the sentencing proceedings a presentence report regarding the appellant was obtained. In the report the probation officer, Mr Khaukanani Nyamande states that the appellant is alleged to be suffering from mental illness and was attending a special school for people with disabilities at Nsovo day care centre, and that he was also receiving a disability grant. He recommended in his report that the appellant be referred for mental observation to determine the status of his mental illness.

[22] The same probation officer who compiled the pre-sentence report, Mr Nyamande, also compiled a developmental assessment progress report for the appellant. In this report he said that the Doctor certified that the appellant is suffering from mental retardation, he again recommended that the case be postponed for mental observation by the psychiatrist to assess appellant's suitability to stand trial.

[23] Both the state/respondent and the appellant are ***ad idem*** that the learned regional magistrate ***a quo*** ignored these recommendations and proceeded to sentence the appellant without taking into account the said recommendations. He did not give reasons why he ignored the said recommendations. The judgement on

sentence does not at all mention and/or refer to the probation officer's reports and/or recommendations. It is as if no such reports served before him, despite the fact that it was the court ***a quo*** self that had requested the pre-sentence reports. I find this conduct by the learned regional magistrate ***a quo*** to be misdirection on his part, and this court is entitled to interfere.

[24] Section 77(1) of the Criminal Procedure Act 51 of 1977, as amended, reads as follows:

> "*If it appears to the court at any given stage of the proceedings that the accused is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence, the court* **shall** *direct that the matter be enquired into and be reported on in accordance with the provisions of section 79?* **[My emphasis].**

[25] It is clear from this section that once uncertainty envisaged by section 77 (1) exists, the court is obliged to refer the accused for observation; it is thus mandatory that where the issue of fitness to stand trial arises during the course of the trial, the court should adjourn the case so that the accused can be referred for assessment, and the necessary reports can be obtained.

[26] From the record it appears that the magistrate only became aware during the sentencing stage, and after conviction that the appellant is possibly suffering from some form of mental illness, [this of course has to be confirmed by the relevant experts]. It is at this stage, i.e. before sentencing, that he should have stopped the proceedings, and referred the appellant for observation.

[27] Counsel for the appellant submitted that both the conviction and sentence should be set aside, and that the appellant should be referred for mental observation to be assessed by a panel of psychiatrists; stating that the appellant's rights to a fair trial have been infringed in this matter because there was no psychiatric report on the record to show the mental status of the appellant, despite the social worker's recommendations. Further that there is no evidence to the effect that the appellant was of sound mind and that it cannot be said that the appellant understood the proceedings and that this vitiated the proceedings.

[28] The state counsel on the other hand submitted that both the conviction and sentence should not be set aside, stating that the sentence is not in dispute, as long as the court can deal with the issue of the appellant's fitness to stand trial; that the appellant should thus be referred for mental observation, and only after the reports are out should the matter be revisited to see if the reports warrant that the conviction and/or sentence should be set aside or not.

[29] In **S v Mokie 1992 (1) SACR 430 (T)** it was held that "where there is a reasonable possibility that the accused suffers from mental illness or disorder, the trial court is obliged to order an investigation in terms sections 78 (2) and 79. In this matter [Mokie], the accused had pleaded guilty to murder and he was

convicted. Thereafter he gave evidence in mitigation during the course of which he stated that he could not remember the events immediately before and during the incident. The majority held that circumstances gave rise to a reasonable doubt as to the accused's mental state and that the court ought to have ordered an investigation into the accused's mental state.

[30] It is so that prior to the conviction of the appellant it does not appear anywhere on the record that the appellant was and/or might be mentally challenged. He was legally represented during the trial proceedings. At no stage, prior to conviction, did Ms Mahundla, his legal representative, inform the court ***a quo*** that he/appellant was mentally challenged. His mother, who was present at court at all times during the proceedings, [prior to conviction], also does not seem to have informed the court ***a quo*** and/or the appellant's legal representative that the appellant had some form of mental illness or disorder.

[31] It was therefore not within the learned magistrate's knowledge, prior to conviction, that the appellant might be having some mental defect/challenge. And from the appellant's statement in terms of section 112 (2) of the CPA, the appellant, who was legally represented, seemed to understand the proceedings and what he was pleading guilty to. This fact only came to the fore after conviction, when the probation officer investigated the accused's circumstances and prepared a report, that on information by his family members the accused is alleged to have mental illness. The allegation that he was referred to a doctor who after examination stated that the accused was mentally retarded is not supported by any evidence. The doctor's medical certificate is not attached to the report. Also, it is not clear whether the doctor in question is an expert or not on mental issues.

[32] Be that as it may, the fact remains that there are allegations from the probation officer's reports that the appellant might have some form of mental illness or disorder; and the recommendations by such probation officer, correctly so, was that the appellant be referred for assessment by the relevant experts. The court would then have had expert reports indicating what the mental status of the appellant is, and would have got to the bottom of the issue. The court ***a quo*** was obliged to order an enquiry in terms of section 78(2) and 79 of the CPA; it has no discretion to refuse such enquiry. See **S v Mokie 1992 (1) SACR 430 (T)** at p440.

[33] It will be a travesty of justice if this court was to ignore the facts before it, as was done by the court ***a quo.*** Once the reports came to the fore and after confirmation thereof by Nyamande under oath, the probation officer, on his findings/information he had about the alleged mental illness of the appellant, it was incumbent upon the learned regional magistrate to stop the proceedings, and to refer the appellant for mental observation in terms of section 78 read with section 79 of the CPA.

[34] Failure to do so is not only misdirection on the part of the learned regional magistrate ***a quo***, but also a travesty of justice; and this court ought to interfere. At this stage I am of a considered view that the

conviction should not be set aside; that only the sentence should be set side. The court ***a quo*** will in due cause, after appellant's assessment and after expert reports have served before it, indicating what the status of the appellant's mental condition is, deal with the matter accordingly. In any event the learned regional magistrate is, in terms of section 78(6)(b), entitled to set his own conviction aside and find the accused not guilty.

[35] The jurisdictional facts required for an order in terms of section 78 of the CPA are an allegation or appearance of doubt with regard the accused's criminal responsibility because of mental disease or defect. Nyamande's reports aforesaid state that the appellant is said to suffer from mental illness; that he attends a special school for people with disabilities, though it does not specifically state what kind of disabilities. However, there is an **allegation** that the appellant has some mental illness. The appellant should thus be referred for observation in terms of section 79 of the CPA.

[36] In S v Sindane and Another 1992 (2) SACR 223 (A) at p228, the following was stated:

> "Should the trial Court, as a result of the proposed order of this Court, direct that the first appellant be examined in terms of s 79, the report may reveal mitigating facts acceptable to the Court, though falling short of a conclusion that first appellant is either unable to stand trial or was not criminally responsible. This is envisaged by s 78(7) which reads as follows:
>
> > *If the court finds that the accused at the time of the commission of the act in question was criminally responsible for the act but that his capacity to appreciate the wrongfulness of the act or to act in accordance with an appreciation of the wrongfulness of the act was diminished by reason of mental illness or mental defect, the court may take the fact of such diminished responsibility into account when sentencing the accused.'*
>
> In such a case an appropriate sentence, having regard to the provisions of the amended s 277 of the Act, would follow. However, if the Court should find that the first appellant is incapable of standing trial or not criminally responsible, the peremptory provisions of s 77***(6)(b)*** and s 78(6)(ft) respectively would apply. In that eventuality, one should perhaps add, the fact that ***in the result*** the conviction on the murder charge would have to be set aside and therefore no sentence could be substituted would be due to the provisions of the said two subsections, and not as a result of s ***\9{\2)(b)(}n)*** of the amending Act functioning beyond its prescribed limits."

[37] After giving the matter careful consideration I am of a considered view that the sentence imposed by the court ***a quo*** on 05 September 2013 should be set side; that the matter be remitted back to the trial court, [court ***a quo]*** for an order that the appellant should be referred for mental observation to be assessed by a

panel of psychiatrists, for an investigation in terms sections 78 (2) and 79 of the CPA.

[38] In the result the following order is made:

1. The sentence of 5 (five) years' imprisonment, 2 (two) years of which are suspended for 5 (five) years on condition that the accused is not convicted of rape committed during the period of suspension is set aside;

2. The matter is remitted back to the trial court for an order that the appellant should be referred for mental observation at a mental institution to be assessed by a panel of psychiatrists, for an investigation in terms sections 78 (2) read with section 78(7) and section 79 of the CPA.

L M MOLOPA-SETHOSA

JUDGE OF THE HIGH COURT

I agree

M V SEMENYA

ACTING JUDGE OF THE HIGH COURT