

SOUTH AFRICA / JUDGMENT

S v Ngada [2009] ZAECGHC 8 (16 March 2009)

[2009] ZAECGHC 8**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

Jones, Pickering, Sangoni

CASE / FILE NUMBER

CA 379/08

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Source record**FORM****A****FILING****SHEET FOR EASTERN CAPE HIGH COURT, GRAHAMSTOWN JUDGMENT****ECJ:****PARTIES:**THEMBILE
SYDWELL NGADA
And
THE
STATE**Registrar:**CA
379/08**Magistrate:**

High

Court:EASTERN
CAPE HIGH COURT, GRAHAMSTOWN
DATE**HEARD:**09/03/09
DATE**DELIVERED:**

16/03/09

JUDGE(S):JONES
J, PICKERING J, SANGONI J
LEGAL
REPRESENTATIVES –**Appearances:**

for

the Appellant(s):

ADV: J. R. Koekemoer
for

the Respondent(s):

ADV: P. Zantsi
Instructing

attorneys: for

the Appellant(s): NEVILLE
BORMAN & BOTHA
for

the Respondent(s): DEPUTY
DIRECTOR OF PROSECUTION (GHT)
CASE
INFORMATION –
.
Nature of proceedings
APPEAL
THE
HIGH COURT OF SOUTH AFRICA
In
the Eastern Cape High Court
Grahamstown
CA
379/08
Not
reportable
In
the matter between
THEMBILE
SYDWELL NGADA
Appellant
and
THE
STATE
Respondent
Coram
JONES, PICKERING AND SANGONI JJ
Summary
Appeal – sentence – 23
years’ imprisonment imposed for the rape of 15 year old
complainant, after a finding that
there were substantial and
compelling circumstances present which justified a sentence other
than the sentence of life imprisonment
prescribed by section 51 of
Act No 105 of 1997 – misdirection on sentence by the trial
court in failing to apply a balanced
approach to sentence – the

court emphasized the need to stamp out the crime of rape generally by imposing ever-increasing sentences, and in doing so failed to take into account the facts and circumstances of the case in hand – sentence reduced to 18 years' imprisonment.

JUDGMENT

JONES J

[1] On 5 December 2005, the appellant, a 42 year old family man of Indwe in the Eastern Cape Province, appeared in the Eastern Cape Division of the High Court, Grahamstown on a charge of rape. He was alleged to have raped his 15 year old stepdaughter at his home in Indwe on 8 July 2004. Section 51(1)(a) of the Criminal Law Amendment Act 105 of 1997 prescribes a sentence of life imprisonment where the victim is under the age of 16 years. The appellant was found guilty as charged,

and, on 8 December 2005, he was given a sentence of 23 years' imprisonment, the learned judge having found the presence of

substantial and compelling circumstances which justified a lesser sentence than life imprisonment. On 23 October 2008 the learned judge dismissed an application for leave to appeal against the conviction, but granted leave to appeal to the full bench against the sentence. That appeal is now before us.

[2] The powers of the court hearing an appeal on sentence are confined by the well known restriction that the discretion to impose sentence is given to the trial court, and that the appellate court can interfere only if the trial court does not exercise that discretion in a proper judicial manner . The usual grounds advanced for this on appeal are

(a) that the trial judge precluded himself from exercising his discretion properly by misdirecting himself in a material respect either in law or on the facts, or (b) that the inference is inescapable that he could not have exercised his discretion properly because his sentence is unreasonably severe or inappropriate (*S v Kgosimore* 1999 (2) SACR 238 (SCA) per Scott JA 241 para 10). Mr Koekemoer, who argued the appeal on behalf of the appellant, relied on three misdirections by the trial court, which, he said, vitiated the

sentence and opened the door to the court of appeal imposing sentence afresh.

[3] The first two misdirections are (a) that the court erred in finding as proved that the complainant was a girl under the age of 16 years, and (b) that it was not proper for the court to take into account in aggravation of sentence that the appellant showed no remorse for what he had done. In my view they are both without substance.

- [4] The age of the complainant was of central importance in this trial. The indictment specifically alleged that the complainant was a 15 year old girl. It went on to state that in the event of conviction the Director of Public Prosecutions requested sentence against the appellant according to law and that he would rely on the provisions of section 51(1)(a) of Act 105 of 1997, in that the victim was a girl under the age of 16 years. That section, as I have said, prescribes a sentence of life imprisonment. From the very beginning the importance of the complainant's alleged age was highlighted and it was drawn pertinently to the attention of the appellant and his legal representative.
- [5] During the course of her evidence in chief the complainant was asked when she was born. She replied: 'on 5 November 1988'. She was then shown a document and was asked to confirm whether it was a copy of her birth certificate. She confirmed it. The prosecutor asked that the copy be admitted as Exhibit A. The judge asked whether the appellant and his counsel had seen the document. Counsel said they had not, but the record then reflects that he did not have a problem with it being submitted as an exhibit. This must be taken as a seriously made admission on a point of the utmost importance: its effect was an acceptance that the document related to the complainant and that on the face of it she was under the age of 16 years at the time of the alleged rape. The judge then admitted the copy of the birth certificate as Exhibit A.
- [6] Exhibit A is an extract in standard form of particulars of birth from the population register kept by the Department of Home Affairs. It reflects the person's identity number, surname and first names, date of birth (1988-11-05), sex, country of birth and the date of its issue (1995-11-27). It bears an official stamp by a member of the South African Police Services bearing the date 1997-09-01. The stamp states that the police official certified (a) that the document was a true reproduction (copy) of the original document which was handed to him for authentication and (b) that from his observation an amendment or change had not been made to the original. There is no suggestion that there was anything irregular about the authenticity of the document, or its production and its presentation before the court. There is no reason to believe that it was not issued in accordance with the provisions of sections 6, 9 and 28(1) of the Births and Deaths Registration Act No 51 of 1992.
- [7] Notwithstanding the appellant's acceptance of the document as an exhibit at the trial, his counsel argued on appeal that the State failed to prove that the complainant was a girl under the age of 16 years when the offence was committed. He correctly pointed out that the complainant's evidence of her date of birth did not prove her age (*S v Moeketsi* 1976 (4) SA 838 (O) 840E-F). But he went on to submit that the admission of the birth certificate as evidence also did not prove her age. In this context he again referred to the *Moeketsi* case and also to *S v Mbelo* 2003 (1) SACR 84 (NC). This submission is unsound. These cases exclude proof by a baptismal certificate, which, as far as I know, has not been accepted in our courts as proof of an exact date of birth largely because of the possibility of inaccuracy. But the cases are not authority for the argument that an official birth certificate is inadmissible for this purpose. Birth certificates have always been admissible and acceptable

evidence of age. They are given statutory recognition by section 28 of the Births and Deaths Registration Act No 52 of 1992 which provides in ss (1) that the Director-General may on application issue a certificate from the population register in such form as he may deem fit and in ss (2) that every certificate issued in terms of ss (1) shall in all courts of law be prima facie evidence of the particulars set forth therein. There can therefore be no doubt about its admissibility. While it is not conclusive evidence of age, production of a certificate will ordinarily harden into proof beyond reasonable doubt in a criminal case in the absence of challenge or any reasons emerging from the evidence to doubt the accuracy of its contents. In this case there was no challenge to the correctness of the information in the certificate. There was no suggestion, for example, that the information in it was doubtful because it was inconsistent with the complainant's appearance, or with her general behaviour, or with other documents, or that there was reason to believe from the facts attendant upon the registration of her birth that the date or

other information in the certificate may not be reliable. If there were reason to believe that such information was not reliable the court would not only be justified in going behind the certificate; it would be obliged to do so, especially in a case such as this where the age of a person is an important component of the offence charged and may have far-reaching consequences, such as the imposition of life imprisonment. But that is not the position here. In the light of the provisions of s 28 the trial judge cannot have misdirected himself by accepting an official birth certificate as prima facie evidence of the child's age unless there was a proper factual basis for doubting its authenticity or reliability. There was none. Mr Koekemoer could go no further than to refer to an entry by the district surgeon in her medical report dealing with the complainant's date of birth or apparent age, which noted that her apparent age was 16 years. I assume that the doctor did not ask for a date of birth. The doctor was not asked to confirm or explain or elaborate upon this entry when she testified. As it stands, then, the entry in the medical report is no more than a record of the doctor's general impression of the child's apparent age. It was not the result of a medical examination designed to establish her age scientifically. It is in reality broad support for the information in the birth certificate based upon general appearance: as is clearly confirmed by other entries in the medical

report, the complainant was not a little girl who was undeveloped, and she was not yet an adult woman. She was 15 years and 8 months

old, which was confirmed by the doctor's generalized observation that her apparent age was 16 years. The medical evidence

therefore gives no proper basis for doubting the correctness of the date of birth contained in the certificate. There was no other

evidence before the court which could be thought to create a basis for doubting it. In the result the court properly accepted the birth certificate as evidence beyond reasonable doubt that the complainant was 15 years and 8 months old when she was raped.

- [8] The second alleged misdirection arises from the trial court's attitude to the appellant persisting in protesting his innocence, and to his regarding as aggravating the appellant's failure to show remorse. The submission in counsel's heads, based on statements in the judgments of *S v Mpite* 1969 (1) SA 298 (T) 299D-E and *S v Makhudo* 2003 (1) SACR 500 (SCA) at 501, was that whereas remorse on the part of an accused person can be taken into account as a mitigating factor when sentence is considered, the absence thereof can never be considered as an aggravating factor. This, in my view, is incorrect in principle, and is not borne out by the dicta in the cases referred to above. Those judgments do not say that lack of remorse can never be considered in aggravation of sentence. In the judgment in *Makhudo's* case *supra* (at 504f-h) the Supreme Court of Appeal indeed acknowledges that lack of repentance may be relevant to sentence:
- [7] While the behaviour of an accused during the trial may be indicative of a lack of repentance or intended future defiance of the laws by which society lives and therefore be a relevant factor in considering sentence, neither the fact that an accused's defence is conducted in an objectionable manner nor the fact that the accused's demeanour in court is obnoxious, is a proper factor to be taken into account unless it is of a kind which satisfactorily establishes that the accused is the kind of person who would best be deterred from future criminal activity by being dealt with in a firmer manner than would have been appropriate if the accused was not that kind of person.
- [8] A court should be slow to jump to conclusions regarding an accused's character and reaction to punishment when such conclusions are based solely upon the accused's demeanour and behaviour in court.

The headnote in *Mpite's* case incorrectly says that the magistrate misdirected himself in having regard to a failure to show signs or repentance. The crux of the case is that it may be a misdirection to punish an offender for the way he conducted himself in court, for example because in his attempt to establish his defence he suggested to the State witnesses that they were not telling the truth (*R v Tazwigwira* 1949 (2) SA 656 (SR) 658). The role of absence of remorse in aggravation of sentence must be put in proper perspective.^[1] The real question is its relevance to the imposition of sentence. This seems to me to be at the heart of the passage quoted above from the judgment in *Makhudo's* case. Lack of remorse may, for example, be relevant to the issue of rehabilitation, the possibility of repeat offences, or the need to protect society from the conduct of callous, relentless and remorseless offenders. As *Makhudo's* case warns us, it is necessary to guard against the danger in, and the potential impropriety and injustice of, increasing a sentence because of the way in which a defence is conducted, or because of an accused person's poor demeanour or arrogant behaviour in the witness box or in court. These considerations may go hand in glove with a lack of remorse but they will usually be irrelevant. An accused person should not, of course, be penalized for exercising his right to plead not guilty, to challenge the State evidence, and to require the prosecution to prove his guilt. This does not give him licence to conduct his defence in a vexatious manner. But even if that is what he does, this is not necessarily relevant to sentence.

- [9] I do not believe that in this case the trial judge misdirected himself in having regard to lack of remorse. This is particularly so in the light of the evidence of the psychological after effects suffered by the plaintiff, which were in no small manner attributable to the appellant's role in turning the child's mother against her. Lack of remorse in these circumstances is not only indicative of indifference to the plight of an abused child. It is also relevant to the possibility of repetition, and to the issue of undoing the effects of wrongdoing where this is possible. I am of the view, in any event, that the role ascribed by the trial judge to lack of remorse was not significant.
- [10] The appellant argued that the learned trial judge misdirected himself in one further respect. This arose out of the following passage in the judgment on sentence. After remarking that the legislature intended that rape and the other offences listed in Part 1 of Schedule 2 of Act 105 of 1997 should in future be punished more severely than in the past, he said:

The type of crime the court is dealing with today is without doubt prevalent in the country. This is the second case in which I have been confronted with a sordid crime of sexual assault emanating from wedlock and where there was no physical violence used. In that case (which I dealt with in East London last Friday) I imposed a sentence of 22 years imprisonment. In comparison, I am of the view that a sentence of 23 years imprisonment should serve the aim of retribution as well as deterrence. This court will not tolerate continued violation of bodily integrity of women and children. In your case I have added one more year. I will be prepared to add more years should I feel that the commission of rapes does not abate. I shall be prepared to increase sentences, circumstances permitting, until I reach life imprisonment as I believe that to do so will reflect the legislative purpose of the Act. Failure to adopt this approach will be an act of defying the constitutional order enshrined in the Bill of Rights.

This, Mr Koekemoer argued, was a misdirection. It shows that the trial judge over-emphasized one consideration – the prevalence of the offence – at the expense of the facts and circumstances of the offence and the interests and personal circumstances of the offender, and that he regarded it as proper to approach sentence for rape on the basis that ever increasing sentences should be imposed to

curb its prevalence, whatever the gravity of the offence or the interests of the offender might be. I think that Mr Koekemoer's criticism is justified. Nowhere in the judgment on sentence is there an assessment of the gravity of this offence viewed against the background facts of this case. Nowhere is the extent of the abuse of this child measured by considering the presence and absence of aggravating circumstances. Nowhere does the trial judge attempt to place the moral blameworthiness of this perpetrator in the perspective of all the relevant considerations on sentence, whether aggravating or mitigating. Nowhere does he explain why his sentence of 23 years' imprisonment is proportionate to the offence, the offender and legitimate interests of society.

- [11] I do not believe that the judgment on sentence should be criticized because it fails to detail all the aggravating and mitigating elements of the case, especially where it has been preceded by a full judgment on the merits. But it is necessary for a judgment on sentence to explain, with reference to the facts, why this is an offence warranting the minimum 10 year sentence, or one which calls for a sentence of 15 or 20 or 25 years' imprisonment, as the case may be. That is missing from this judgment. The reason appears to be that the trial judge was pre-occupied with stamping out rape cases by the imposition of escalating sentences, and, because of that, he failed to have regard to the facts of the case before him. This was a material misdirection which requires the court of appeal to set aside the sentence and impose the sentence that it considers should have been imposed.
- [12] In order to do so it is necessary for us, as members of the court of appeal, to consider the facts of the case in relation to the offence, the offender and the requirements of society. The most important aggravating factor is that this was the rape of a girl under the age of 16 years. The legislature has ordained a sentence of life imprisonment for it, unless there are substantial and compelling reasons for imposing a lesser sentence. Despite the trial judge having made a finding of the presence of substantial and compelling circumstances, this offence remains an extremely serious one on account of the fact that the complainant was under the age of 16 years. As against that she was already 15 years and 8 months old, not far from the statutory cut off age of 16. It goes without saying that if she had been a tiny child, the offence would have been more serious.
- [13] The act of rape is always serious in itself, especially when the victim is a child. But in this case it was not aggravated by permanent injury. There were still signs of genital injury a few days later, which indicated that the intercourse was painful and must have been unpleasant. But apart from tears to the hymen and some swelling, slight bleeding and tenderness, this victim came through the ordeal without serious physical damage. The rape was not accompanied by physical violence or threat of physical violence, and there were no injuries to the other parts of the body.
- [14] Another aggravating factor is that this rape was committed in the complainant's home, in her own bed, by her stepfather, a person whom she should have been able to trust and upon whom she should have been able to rely upon for protection. The evidence disclosed that the rape occurred when appellant's wife (the child's mother), a nurse, was on night shift and the child had already gone to bed. She was woken by the appellant's amorous overtures. She burst into tears and made it plain that she found the appellant's conduct unacceptable. He desisted. She cried herself back to sleep. She was later again woken by the appellant who, this time, raped her. He then told her that it would do her no good to report the matter to her mother because her mother had always known from the inception of the marriage that something like this was going to happen. The result was that she reported the matter, not to her mother, but to her grandmother the following day. Her grandmother took the matter up with other relatives, and then took her to the police station at the nearby town of Dordrecht, where she was referred to hospital for a medical examination. This was performed on 10

July 2004. Apparently, nothing official was done thereafter, and it was not until the complainant was asked what the matter was by a teacher at her school some three days after the rape that her mother laid an official charge at the local police station and the accused was arrested. The complainant was then put into the hostel at school and separated from her mother at a time when she needed maternal love and support. Far from getting love and support, her mother took the appellant's side, chose to believe his denial rather than the child's accusation, and gave evidence for the defence. The combined result of the rape and the rejection by her mother which followed has been an acute psychological stress disorder which required and still requires specialist therapy. This is yet a further aggravating consideration.

- [15] There is no doubt in my mind that the considerations outlined above aggravated what was already an inherently serious offence, although there are factors which take away to some extent from its seriousness – such as the lack of permanent or serious injury, and the fact that the complainant was nearly 16 years old. As is to be expected in rape cases, there was nothing in the commission of the offence which can be raised as a mitigating factor. The accused is a family man aged 42 years who is married to the complainant's mother and who has been contributing to the support of his wife, their child and his two stepchildren. He has no previous convictions. Until the commission of this offence he had shown himself to be a committed family man, a solid citizen, and a responsible member of the community who supported his household and educated his children. The trial judge correctly commented that these features make him a suitable candidate for rehabilitation. These personal circumstances and the fact that the rape was not accompanied by physical violence were sufficient, in the eyes of the trial judge, to warrant deviation from the compulsory sentence of life imprisonment. In my view, they should also be considered as mitigating factors in determining the nature and extent of the sentence. But it is inevitable that the personal circumstances of an offender recede in importance where the offence requires long term imprisonment.
- [16] The gravity of this offence, made worse as it was by seriously aggravating circumstances, imperatively calls for a sentence of long term imprisonment. Nothing less will suffice to meet the requirements of retribution and deterrence. Nothing less will bring home to the appellant the seriousness of his violation of the rights of a defenceless child, and his need to come to terms with what he did. In my view the requirements of society and the serious nature of this offence will be reflected by a sentence of 18 years' imprisonment. That sentence also achieves a proper balance between the serious nature of the offence and the interests and personal circumstances of the offender. A greater sentence would in my judgment be disproportionately heavy, a lesser sentence inadequate.
- [17] In the result the appeal on sentence is allowed. The sentence of 23 years' imprisonment imposed by the trial court is set aside and will be replaced with a sentence of 18 years' imprisonment, which is antedated to 8 December 2005.

RJW JONES

Judge of the High Court

11 March 2009

PICKERING J I agree.

JD PICKERING

SANGONI J I agree

CT SANGONI

said

[1]

Lack of remorse is frequently referred to among considerations which the courts have taken into account in aggravation (see for example *S v G* 2004

(2) SACR 296 (W), *R v Sole* 2004

(2) SACR 599 (Les) 606, *S v Magoro* 1996 (2) SACR 359 (A)) and this has not been regarded as a misdirection (see for example *S v Mvamvu* 2005 (1) SACR 54 (SCA), *S v Cornick* 2007 (2) SACR 115 (SCA) *S v D* 1995

(1) SACR 259 (A). As SS Terblanche points out (*Guide to Sentencing in South Africa* 2nd ed 189/190) lack of remorse has often been mentioned as an aggravating factor, although there has been little discussion about the reasons for this view.

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