REPORTABLE

IN THE NORTH GAUTENG HIGH COURT,

PRETORIA (REPUBLIC OF SOUTH AFRICA)

CASE No. A 129/12

DATE:16/11/2012

In the appeal of:-

NADIA NTOMBOXOLO BANGISO **Appellant**

and

THE STATE **Respondent**

JUDGMENT

Van der Byl AJ:-

[1] This is an appeal, with leave of the magistrate, against sentence only.

[2] The Appellant (to whom I will for the sake of convenience refer to as “the

Accused") was charged in the regional court, sitting at Pretoria, on four charges, namely -
(a) two charges of contravention of section 10(a) of the Sexual Offences Act, 1957 (Act 23 of 1957) (counts 1 and 2), in that upon or about March 2007 and at or near Pretoria the Accused did wrongfully and unlawfully procure or attempt to procure P M, a girl aged 16 years, and N N, a girl aged 15 years, to have unlawful sexual intercourse with any other person other than the Accused herself or in any way assist in bringing about such intercourse by instructing the said girls to have sexual intercourse with unknown adult male persons;
(b) two charges of kidnapping (counts 3 and 4) in that upon or about the same period and at or near the same place the Accused did unlawfully and intentionally deprive the said P M and N N of their liberty against their will or deprive their guardians of their lawful control of these girls by keeping them against their will in Lodge Ingwe No. 94, Reilly Street, Pretoria.

[3] The Accused pleaded not guilty to all these charges, but was convicted as charged on all counts on 12 November 2008 and was on 26 February 2009 sentenced -
(a) on counts 1 and 3, taken together for purposes of sentence, to five years imprisonment in terms of section 276(1)(/) of the Criminal Procedure Act, 1977 {‘-the Act'):
(b) on counts 2 and 4, taken together for purposes of sentence, similarly to five years imprisonment in terms of the said section 276(1)(/).

[4] The Accused filed an application for leave to appeal against the sentences imposed on 13 November 2009, almost nine months late (and after having served almost all of the compulsory one-sixth of one of the two sentences), but was granted condonation for such late-filing and leave to appeal against the sentences imposed (and on the same date released on bail pending this appeal).

[5] As is apparent from the Accused's Notice of Appeal, her appeal is in effect based on the grounds thereof -

(a) that the magistrate erred in sentencing the Accused to two terms of imprisonment under section 276(1)(/) of the Act "without ordering that the two terms run concurrently, thereby sentencing the (Accused) to an effective term of imprisonment, before the (Accused) would be eligible to be placed under correctional supervision in the discretion of the Commissioner of Correctional Services" which sentence is, so it is submitted, shockingly inappropriate;

(b) that the magistrate erred in imposing a sentence that does not give affect to the magistrate's intention at the time.

[6] In order to duly appreciate these grounds they must be seen against the background of the averments made in the Accused's affidavit filed in support of her application for condonation for the late-filling of her application for leave to appeal.

[7] In this affidavit she stated -

(a) that at the time she was sentenced she was advised that she would only have to serve 10 months in respect of each of the sentences imposed and elected to accept the sentence as such;

(b) that she was later advised by an officer of the Department of Correctional Services that the effect of the sentence was that she should serve the full five years of her sentence and thereafter to serve 10 months of the second sentence imposed before she can be considered for correctional supervision;

(c) that she was then taken back to court to obtain clarity on the sentence where the magistrate on that occasion on 1 July 2009 confirmed that the sentences were not to run concurrently.

[8] A transcription of the proceedings held on 1 July 2009 shows -

(a) that the question whether she was first to serve five years of the first sentence imposed and thereafter to serve 10 months of the second sentence before she can be considered for correctional supervision, was debated with a view of persuading the magistrate to refer the matter for special review;

(b) that the magistrate indicated that what she had in mind was that the Accused should serve at least 20 months of the 10 years period of imprisonment she was imposed;

(c) that the magistrate indicated that there is in her view nothing wrong with the sentences she imposed and that, in so far as the Commissioner of Correctional Services may have a problem in interpreting the sentences, it is for the Accused to take the Commissioner's decision on review, but that the Accused can take her decision on review on the grounds thereof that the sentence imposed is an incompetent one or to otherwise take the matter on appeal (hence the eventual application for leave to appeal).

[9] The question which we are in my view called upon to pronounce upon is whether the sentences imposed by the magistrate are competent sentences as envisaged in section 276(1)(/) of the Act and, if so, whether they give effect to the magistrate's intention.

[10] These questions first of all call for a consideration of the relevant legislative provisions.

[11] The sentences imposed upon the Accused purport, as I have already indicated, to have been imposed in terms of section 276(1)(/) of the Act which reads, in so far as it is relevant for present purposes, as follows:

" (1) Subject to the provisions of this Act and any other law and of the common law. the

following sentences may be passed upon a person convicted of an offence, namely-

(i) imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner or a parole board ”.

[12] The circumstances under which a sentence may be imposed in terms of section 276(1)(/) is regulated by section 276A(2) of the Act which reads, in so far as it is likewise relevant, as follows:

v'(2) Punishment shall..... only be imposed under section 276 (1)

(O’

(a) if the court is of the opinion that the offence justifies the imposing of imprisonment, with or without the option of a fine, for a period not exceeding five years; and

(b) for a fixed period not exceeding five years.”.

[13] In relation to a period of imprisonment imposed in terms of section 276(1)(/) to be served, section 73(7)(a) of the Correctional Services Act, 1998 (Act 111 of 1998), provides as follows: “A person sentenced to incarceration under section 276 (1) (i) of the Criminal Procedure Act, must serve at least one sixth of his or her sentence before being considered for placement under correctional supervision, unless the court has directed otherwise." (My emphasis).

[14] From these sections it is in my opinion obvious -

(a) that the court concerned must be of the opinion that the offence concerned justifies the imposition of imprisonment (whether or not coupled with a fine) for a period not exceeding five years in which event the imprisonment imposed should not exceed a fixed period of five years, obviously, without the option of a fine (section 276A(2));

(b) that at least one-sixth of the period of imprisonment imposed which can never, if the

maximum period of five years imprisonment is imposed, be less that 10 months, being the period after which placement under correctional supervision should be considered by the Commissioner “unless the Court has directed otherwise” (section 73(7)(a)), by determining a longer period than the envisaged one-sixth of the period of imprisonment imposed.

[15] In applying the provisions of this section to the circumstances of this matter, it would appear as if the magistrate were of the opinion that the four offences in question justified an aggregate period of 10 years imprisonment of which the Accused should serve 20 months, being one-sixth of 10 years.

[16] As is apparent from the provisions of section 276A(2), a court is not competent to impose a sentence in terms of section 276(1)(/) in respect of an offence which in the court’s opinion justifies a sentence in excess of five years imprisonment.

[17] The question, however, is whether or not the five year period prescribed in section 276A(2) should be calculated only in respect of the one offence of which the accused is to be sentenced or in respect of the aggregate period of imprisonment
imposed in respect of that one offence, together with any other periods of imprisonment, whether or not in terms of section 276(1)(/), which may also have been imposed in respect of any other offence or offences the accused may have been convicted.

[18] In S v Gouws 1995(1) SACR342(T) the Judges were concerned with a matter on review where the accused had, apart from having been convicted on a charge of theft, also been convicted on a charge of having escaped, in contravention of section 48(1)(a) of the then Correctional Services Act, 1959, from a police cell. On the theft charge he was sentenced to

five years imprisonment in terms of section 276(1)(/) and on the charge of having escaped to six months imprisonment. On the question whether the sentence imposed on the theft charge was a competent sentence as the aggregate period of imprisonment imposed on the accused on the two charges exceeded the five years imprisonment prescribed in section 276A(2) of the Act, the Judges in effect held (at 343i-344d) that the sentence in terms of section 276(1)(i) is not rendered invalid by the imposition of a sentence for another offence which, together with the former sentence, exceeds the period of five years as stipulated by section 276A(2). The practical problems arising from compliance with section 280(2) in such a situation can be overcome, so it was held, in two ways, namely, the court can order that the sentence of ordinary imprisonment be served before the sentence in terms of s 276(1)(/) or, in the absence of such an order, the Commissioner of Correctional Services can determine in terms of section 32(2) of the (then) Correctional Services Act, 1959 (section 139(2) of the now existing Correctional Services Act, 1998), that the sentences be served in that order. Subsections (1) and (2) of section 280 of the Act to which reference is made in that judgment, reads as follows:

280. (1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose.

(2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.".

Section 139(2) of the Correctional Services Act, 1998, to which is also referred to in that judgment, reads as follows:

“(2) (a) Subject to the provisions of paragraph (b), a person who receives more than one

sentence of incarceration or receives additional sentences while serving a term of incarceration, must serve each such sentence, the one after the expiration, setting aside or remission of the other, in such order as the (Commissioner of Correctional Services) may determine, unless the court specifically directs otherwise, or unless the court directs such sentences shall run concurrently.....

[19] Upon a proper analysis of the reasoning in this judgment, the result is that a court may, for instance, where an accused is sentenced on various charges, none of which justifies the imposition of a period of imprisonment in excess of five years, impose in respect of one of them a period of imprisonment in terms of section 276(1)(/) and in respect of the others such other sentences as the court may deem fit, whereupon, the Commissioner of Correctional Services may direct, unless the court has directed otherwise, that all the other sentences be served first before the section 276(1)(/) sentence is served.

[20] Although such an approach may, depending on the length of the other sentences imposed, perhaps, defeat the aims of section 276(1)(/), which is aimed at mitigating a long term of imprisonment by allowing for the early release of the accused (S v Scheepers 2006 (1) SACR 72 (SCA) at 76d), the question, however, remains whether such an approach can be followed where, as in this case, two or more periods of imprisonment, not running concurrently, are imposed or considered to be imposed in terms of section 276(1)(/).

[21] In my opinion a court is, for obvious reasons, not competent to impose two or more sentences of imprisonment in terms of section 276(1)(/), which in total exceeds the prescribed five year period.

[22] As in this case the Accused has in effect cumulatively been sentenced to 10 years imprisonment in respect of which the provisions of section 276(1)(/) cannot find any application.

[23] In this regard some guidance can be obtained in the case of S v Cassiem 2001 (1) SACR 489 (SCA) in which the Court was concerned with a case where the accused was sentenced to five years imprisonment in terms of section 276(1)(/) plus a further two years imprisonment which was conditionally suspended. In relation to the effect of such a sentence the Court held at 494c as follows:
"The effect of this was the appellant was, in effect, sentenced to a total of seven years' imprisonment. This the magistrate was not empowered to do under s 276(1)(i). This Court in S v Stanley 1996 (2) SACR 570 (A) has already decided that the suspended period of imprisonment forms an integral part of the total period of imprisonment. It was held that to render the sentence under s 276(1)(i) competent the total period of imprisonment should not exceed five years, because such excess may interfere with the exercise of the discretion by the Commissioner of Correctional Services under the section. In my view, the sentence imposed by the magistrate offended against the provisions of s 276(A)(2)(b) which forbids the imposition of a sentence in excess of five years under s 276(1)(i).".

[24] In so far as the magistrate intended to impose a sentence in terms of which the Accused should at least serve 20 months, it could have been effected in two ways, namely -
(a) to combine, as provided in section 276(3)(a) of the Act, any period of imprisonment she deemed fit in the circumstances, which may even be in part suspended, with correctional supervision in terms of section 276(1)(h) with imprisonment (S v Stanley 1996 (2) SACR 570 (A) at 575d) on having, of course, considered correctional supervision after having obtained,

as provided in section 276A(1)(a), a report from a probation officer or a correctional official; (b) to have ordered the two sentences to run concurrently in the event of which there would have been no difficulty in the interpretation of the sentence and the relevant provisions to which I have already alluded to.

[25] I am accordingly of the opinion that the sentences imposed are incompetent sentences and in any event do not give affect to the magistrate's intention.

[26] I am, however, in considering the mitigating and extenuating circumstances referred to by the magistrate (which I do not need to refer to in this judgment), in agreement with the magistrate that this is a matter where the Accused should serve at least a period of 20 months imprisonment before her placement under correctional supervision may be considered.

[27] A period of 10 years imprisonment is, however, in my view to harsh in the circumstances.

[28] There is also in my view no reason why, the offences being similar offences not being separated in time, the sentences should not be ordered to run concurrently.

[29] In the result the following order is made:-

1. THAT the Appellant's appeal against the sentence imposed be upheld.
2. THAT the sentences imposed are set aside and replaced with the following sentence:

"The Accused is sentenced on counts 1, 2, 3 and 4, taken together for purposes of sentence, to 5 years imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act, 1977 (Act 51 of 1977), and it is, in terms of section 73(7)(a) of the Correctional Services Act, 1998 (Act

111 of 1998), directed that the Accused not be considered for placement under correctional supervision before she has served at least two-sixths of the period of five years. ”

3. THAT the sentence referred to in paragraph 2 of this order be antedated to 26 February 2009 and that in calculating the period of imprisonment the Accused is still to serve, the period between 26 February 2009 to 13 November 2009 should be takpn into consideration.

P C VAN DER BYL

ACTING JUDGE OF THE HIGH COURT

I agree

NIM MAVUNDLA JUDGE OF THE HIGH COURT

ON BEHALF OF THE APPELLANT:MR A C RUDMAN (ATTORNEY)

ON THE INSTRUCTIONS OF: ANTON RUDMAN ATTORNEYS

315 Paul Kruger Street Capital Park PRETORIA

ON BEHALF OF THE RESPONDENT:ADV M D MATJOKANA

ON THE INSTRUCTIONS OF: DIRECTOR OF PUBLIC PROSECUTIONS

DATE OF HEARING:16 NOVEMBER 2012

DATE OF JUDGMENT:16 NOVEMBER 2012