

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case number: R08/2022

Reportable: YES/NO

Of interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

THE STATE

And

THABANG VICTOR MOFOKENG

Accused

CORAM: DANISO, J *et* MPAMA, AJ

JUDGMENT BY: DANISO, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 11H00 on 29 April 2022.

- [1] The accused was convicted by the regional magistrate, Bloemfontein following a guilty plea in terms of section 112 (2) of the Criminal Procedure Act 51 of 1977 ("The Act") on a charge of attempted rape. The charge was brought in terms of section 55 of Sexual Offences and Related Matters Amendment Act 32 of 2007.
- [2] The charge sheet alleged that provisions of section 51 (1) of the Criminal Law Amendment Act 105 of 1997 ("*The CLAA*") were applicable and having found

that there were substantial and compelling reasons that justified a deviation from the prescribed minimum sentence of life imprisonment, the regional magistrate sentenced the accused to fifteen (15) years imprisonment in terms of section 276 (1) (i) of the Act. Ancillary orders were also made including declaring the accused unfit to possess a firearm, unsuitable to work with children and that his name be included in the national register for sex offenders.

- [3] The regional magistrate has requested a special review of these proceedings. His reasons in that regard are embodied in his letter dated 14 March 2022 as follows:

“...6. The sentence imposed is the subject of this request for special review.

6.1. I sentenced the accused to 15 years imprisonment, in terms of Section 276 (1) (i) of the Criminal Procedure Act 51 f 1977 (CPA). However a close look at Section 276A (2) (b) of the said CPA, clearly shows that the sentence is incompetent. In terms of Section 276A, a sentence cannot be more than five (5) years if imposed in terms of Section 276(1)(i).

6.2. I also refer the Honourable reviewing Judge to S v Slabbert 1998 (1) SACR (A), which clearly shows that I misdirected myself.

6.3. Having had the privilege, albeit late, of studying the judgment of Free State High Court in Lekeka v S ZAFSHC A13/2019 [2019], I concede that the minimum sentences regime is also not applicable (Section 51 of Act 105 of 1997)...”

- [4] The sentence imposed by the regional magistrate is erroneous in respect of its nature and also the sentencing regime under which it was imposed.

- [5] Section 276A of the Act specifically states that a sentence imposed in terms of section 276(1) (i) shall not exceed a period of five (5) years imprisonment. In this matter the accused was sentenced to fifteen (15) years imprisonment.
- [6] In relation to sexual offences perpetrated against children, the mandatory minimum sentence of life imprisonment is applicable to an offender who is convicted of an offence listed in Part I of Schedule 2 of section 51(1) of the CLAA namely, rape of a child under the age sixteen (16) years.
- [7] Attempted rape is not listed in Part I of Schedule 2 therefore, it does not attract the minimum sentence of life imprisonment as contemplated in section 51(1). The regional magistrate erred in invoking the provisions of section 51(1) when sentencing the accused. The sentence is irregular it cannot stand.
- [8] The irregularity does not vitiate the proceedings. It can be rectified by the imposition of a competent sentence.

Order

- [9] In the circumstances I make the following order:
- (1) The conviction is confirmed.
 - (2) The sentence is set aside and the matter is remitted to the magistrate to impose sentence afresh.

N.S. DANISO, J

I concur and it is so ordered.

L. MPAMA, AJ