

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : A90/10

In the matter between:-

KOOS PAULOS

Appellant

and

THE STATE

Respondent

CORAM: H.M. MUSI, JP *et* C.J. MUSI *et* JORDAAN, JJ

HEARD ON: 13 SEPTEMBER 2010

DELIVERED ON: 23 SEPTEMBER 2010

JUDGMENT

H.M. MUSI, JP

[1] This is an appeal against the sentence imposed by a single judge of this court and is before us with leave of the court *a quo*. The appellant was convicted of rape of a minor child of nine years. This rendered applicable the provisions of section 51(1) of the Criminal Law Amendment Act, 105 of 1997 (the Act), read with Part 1 of Schedule 2 thereto, which meant that the appellant had to be sentenced to life

imprisonment, unless it was found that there were substantial and compelling circumstances justifying the imposition of a lesser sentence. The court *a quo* found that there were no such substantial and compelling circumstances in this case and accordingly imposed the prescribed minimum sentence of life imprisonment.

- [2] The only ground of appeal disclosed in the appellant's notice of appeal, is that the court *a quo* erred in finding that there were no substantial and compelling circumstances justifying a departure from the prescribed minimum sentence of life imprisonment. However, in the heads of argument drawn by Mr. Nkhahle and which Advocate Kruger, who represented the appellant in this appeal, has adopted, a further ground was raised, namely that the court *a quo* committed an irregularity in applying the minimum sentence provisions. It was submitted that the provisions were not explained to the appellant in the regional court where the appellant was tried and convicted and that that being so, the minimum sentence provisions were not applicable.

- [3] Now, although this ground does not form part of the notice of

appeal, it raised an important point of law that could be decisive of the appeal. Moreover, no prejudice could be caused to the other party by hearing it and indeed counsel for the State raised no objection and, in fact, conceded the point. We considered it in the interest of justice that the point be argued.

- [4] It is trite that if it is intended to invoke the provisions of the Act, it must be brought to the attention of the accused that he faces the prospect of the prescribed minimum sentence being imposed in the event of conviction. Failure to do so may render the trial unfair. See **S v LEGOA** 2003 (1) SACR 13 (SCA) at 26 a – b; **S v NDLOVU** 2003 (1) SACR 331 (SCA) para [12], [13] and [14]. In **S v NDLOVU**, *supra*, at 337 e – f Mpati JA (as he then was) had this to say:

“...in my view, where the minimum sentencing provisions apply an accused must not be subjected to the risk of being visited with them without having been made fully aware that such will be the case unless substantial and compelling circumstances are present which would justify a lesser sentence.”

And further at 337 h – i the learned Judge expressed himself

as follows:

“By invoking the provisions of the Act without it having been brought pertinently to the appellant's attention that this would be done rendered the trial in that respect substantially unfair. That, in my view, constituted a substantial and compelling reason why the prescribed sentence ought not to have been imposed.”

- [5] *In casu*, the appellant was legally represented in the regional court. He pleaded guilty to the charge of rape and his legal representative handed in a statement in terms of section 112 of the Criminal Procedure Act, 51 of 1977. This statement gives no hint whatsoever that the appellant was aware of the applicable minimum sentence. The relevant provisions were not incorporated in the charge sheet, nor were they alluded to in the entire proceedings. There was in fact no indication that they would be invoked, when suddenly it was decided after conviction to refer the matter to the High Court for sentence. Even at that stage there is no indication that the appellant was apprised of what may befall him. In the High Court the matter simply proceeded on the basis that the jurisdictional facts that would trigger the application of the minimum sentencing provisions were present. Neither the

legal representatives for the State and the defence, nor the sentencing judge pondered the question of whether the appellant was aware that he faced the prospect of life imprisonment. It is plain to me that the appellant was not made aware that the minimum sentence of life imprisonment would be invoked and under those circumstances the imposition of life imprisonment would render the trial substantially unfair in this respect. On the authority of NDLOVU, *supra*, this in itself constituted substantial and compelling circumstances justifying a departure from the prescribed minimum sentence.

In the premises, the sentence imposed has to be set aside.

- [6] We considered the option of remitting the matter to the regional court for imposition of an appropriate sentence and the judgment in S v KIMBERLEY AND ANOTHER 2005 (2) SACR 663 (SCA) was brought to our attention. In this matter the Supreme Court of Appeal found that the jurisdictional facts which would render the minimum sentences provisions applicable, were not present and that the High Court had no jurisdiction to invoke those provisions. The matter was

accordingly remitted to the regional court for sentencing.

- [7] In my view, the instant case is distinguishable from the **KIMBERLEY**-judgment. *In casu*, the jurisdictional fact that triggered the application of the minimum sentencing provisions is present, namely, that the complainant was a minor child under the age of 16. This means that, *in casu*, the High Court had jurisdiction to entertain the matter. However, the court *a quo* erred by overlooking the fact that the appellant had not been made aware that the minimum sentence provisions would be invoked. This, in itself, constituted substantial and compelling circumstances justifying a departure from the prescribed minimum sentence, an issue that the court *a quo* was competent to consider. Besides, in **KIMBERLEY** the issue of whether it was competent for the court of appeal to itself deal with the matter and impose an appropriate sentence, was not pertinently considered. All the parties there had been *ad idem* that the matter should be referred to the regional court for sentence. *In casu*, counsel on both sides submitted that we should dispose of the matter in order that finality be reached in the interest of justice. It was pointed out that the

matter had been dragging for too long and, moreover, the appellant has served a portion of his sentence. I may add we have all the necessary material on record to enable us to impose an appropriate sentence. In my view, it is only proper and fair that we dispose of the matter here and now.

[8] In the premises, we are at liberty to impose an appropriate sentence but we should take into account the fact that the regional court's penal jurisdiction in respect of rape was limited to 15 years imprisonment at the time of conviction.

[9] In considering sentence, one has to take into account the so-called triad of sentence and also weigh up the mitigating factors against the aggravating factors. In this case there are strong mitigating factors. These are:

- (i) that the appellant was a first offender;
- (ii) He was relatively young (24 years) at the time that the offence was committed;
- iii) He acted under the influence of alcohol;
- iv) He pleaded guilty and showed remorse;
- v) He had been in custody for two and a half years whilst awaiting trial.

[10] As against these mitigating factors the nature and gravity of the offence and the interest of society must be considered. There can be no gainsaying that rape is a very serious crime, especially so when committed against a child of the age of the complainant in this case. In addition, this crime is prevalent throughout the breadth and length of this country. I must also take into account that though the complainant does not appear to have suffered serious physical injuries, and no evidence was led as to how she may have been affected psychologically, it can be accepted that she was seriously traumatised and that the rape would have a negative impact on her emotional wellbeing.

[11] Finally, even if the appellant had been made aware that the prescribed minimum sentence would be imposed, this appeal would still have succeeded on the basis that the court *a quo* erred in finding that there were no substantial and compelling circumstances justifying a lesser sentence. In **S v MALGAS** 2001 (1) SACR 469 (SCA) at 482 c – d it was made clear that ordinary mitigating circumstances when taken together may provide weighty reasons for departing from the

prescribed minimum sentence. The mitigating factors mentioned in para [9] cumulatively justified a departure from the prescribed minimum sentence. Moreover, the sentence of life imprisonment in the circumstances of this case would be disproportionate to the offence charged and imposing it would perpetrate an injustice. Compare **S v VILAKAZI**, 2009 (1) SACR 552 (SCA) para [20].

[12] Counsel for the state and the defence were of the view that an appropriate sentence in this case would be between 10 (ten) and 12 (twelve) years imprisonment. In my view, a longer period of imprisonment is called for and I think 15 (fifteen) years would be appropriate.

[13] In the result, the following order is made:

The appeal succeeds and the sentence of life imprisonment imposed on the appellant is set aside and for it is substituted a sentence of 15 (fifteen) years imprisonment, to be antedated to 17 May 2002.

H.M. MUSI, JP

I concur.

C.J. MUSI, J

I concur.

A.F. JORDAAN, J

On behalf of appellant:

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Instructed by:
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On behalf of respondent:

Adv. D.W. Bontes
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/sp