

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case Nr: 342/2004

Case Heard: 13/02/2006

Date delivered: /03/2006

In the matter:

Jan de Klerk

Appellant

versus

The State

Respondent

Coram: Kgomo JP et Lacock J et Williams J

JUDGMENT

KGOMO JP:

1. The five accused in this case appeared in the Regional Court sitting at Delportshoop, Northern Cape, on one charge (Count 1) of rape and another (Count 2) of assault with the intent to do grievous bodily harm. Only one of the accused, Mr Jan de Klerk who was Accused 2 at the trial (henceforth "the appellant"), appeals against his sentence of life imprisonment with the leave of the sentencing court, **Majiedt J.**
2. Accused 1 (Mr Karel Titus), the aforesaid appellant (Accused 2), Accused 3 (Ms Gloria Morwe) and Accused 4 (Mr Michael Mabe) were convicted as charged. Accused 5 (Mr Barendt Morwane) was found not guilty and was discharged. By virtue thereof that this was a multiple rape case the Regional Magistrate invoked the provisions of Section 52 (1) of the Criminal Law Amendment Act, 105 of 1997, and committed the appellant and accused 3 and 4 to the High Court for sentencing.
3. As far as accused 1, Mr Titus, was concerned the Regional Magistrate was,

correctly so, of the view that seeing that he was under 16 years, and in fact 15 years old, when the offence was committed the provisions of section 51 relating to the minimum sentence were not applicable to him. See Section 51 (6). The Magistrate then proceeded to sentence accused 1 to 10 (ten) years imprisonment whereof 4 (four) years imprisonment were suspended for 5 (five) years on condition that he was not convicted of rape or attempted rape committed during the period of suspension. I revert later to the propriety or impropriety of the Magistrate's fragmentation of the sentencing phase of an already fragmented procedure.

4. According to the accepted evidence of the complainant accused 1 and the appellant had penetrative sexual intercourse with her. The forensic DNA genetic material analysed confirm that a mixture of semen was found on the swabs taken from the complainant. Accused 3, the only woman amongst the accused, was physiologically evidently incapable of have penetrative sexual relations with the complainant. Accused 4 declined to have sexual intercourse with the complainant on the invitation of accused 1. Accused 3 and 4 were accordingly convicted as accomplices on the strength of their participation in the crime in that they were involved in the abduction of the complainant from her home, holding her to enable accused 1 and the appellant to rape her and accused 3 burned complainant's private parts afterwards.
5. On these facts I am satisfied that there had been a multiple rape situation brought about by accused 1 and the appellant and that the Magistrate competently committed the appellant to the High Court for sentence. This case is to be distinguished from **S v Kimberley and Another** 2005 (2) SACR 663 (SCA) where the complainant was raped by only one man and then only once and the appellant in that case merely held the complainant down to facilitate the rape or aid the rapist.
6. At p668g-669e (paras 9-11) of **S v Kimberley Zulman JA** stated:

“[9] The Act is concerned in s 51(1) to deal with what it terms the imposition of 'minimum sentences for certain serious offences'. In the case of what may be described as 'ordinary' rapes not falling within the ambit of Part I of Schedule 2, these attract a minimum sentence of ten years' imprisonment for a first offender (Part III of Schedule 2). (Both appellants are first offenders.) Accordingly the rapes referred to in Part I of Schedule 2

which attract a minimum sentence of life imprisonment are obviously of a more serious nature. The 'mischief' which the Legislature sought to deal with, in my view, was the situation where a woman is subjected to multiple rapes either by one person or by any 'co-perpetrator or accomplice'. Paragraph (a)(i) of Schedule 2 covers the situation where 'the victim was raped more than once'. Paragraph (a)(ii) also deals with the situation where the victim is raped by more than one person in the 'execution or furtherance of a common purpose or conspiracy'. "

7. In my view, there is a further jurisdictional factor that entitled the Magistrate to refer the case to the High Court for sentence. Part 1 of Schedule 2 of the Act provides that a High Court shall have jurisdiction to impose life imprisonment on an offender who has been convicted of Rape:

“(a) when committed-

i)

.....

ii) *By more than one person, where such person acted in the execution or furtherance of a common purpose or conspiracy.”*

A common purpose had been established in this case. See: **S v Mgedezi & Others** 1989 (1) SA 687 (A) at 705j-706c.

8. **Majiedt J**, having satisfied himself that the convictions of the appellant, accused 3 and 4 are in order, proceeded to sentence them as follows:
- 8.1.Appellant: On the Rape, life imprisonment and on the assault (Count 2) 2(two) years imprisonment;
- 8.2.Accused 3: On the Rape, 16 (sixteen) years imprisonment and on the assault: 2 (two) years imprisonment;
- 8.3.Accused 4: On the Rape, 12 (twelve) years imprisonment and on the assault: 18 (eighteen) months imprisonment.

It was then ordered that the sentences in Count 2 of assault run concurrently with those of Rape in Count 1 in respect of each accused including the appellant.

9. **Lacock J**, elsewhere in this judgment, says that the wording of section 52 (1) is unequivocal that only the accused who has been convicted of vaginal

penetrative sexual intercourse had to be committed to the High Court for sentence. He abstracts and underscores the phrases “**after it (the regional court) has convicted an accused of an offence referred to in Schedule 2**” and later “**in excess of the jurisdiction of a regional court in terms of s51**” in section 52 (1) to reach such conclusion. I disagree with his narrow interpretation. No useful purpose will be served in repeating the points he makes because they speak for themselves. I prefer to deal with how I construe the section and its related provisions.

10. I wish to commence with the uncanny similarities in the wording in the aforequoted section 52 (1) of the Act and section 116 (1) of the Criminal Procedure Act 51 of 1977. This section stipulates:

“116 (1) If a magistrate's court, after conviction following on a plea of not guilty but before sentence, is of the opinion-

(a) that the offence in respect of which the accused has been convicted is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of a magistrate's court;

(b) that the previous convictions of the accused are such that the offence in respect of which the accused has been convicted merits punishment in excess of the jurisdiction of a magistrate's court; or

(c) that the accused is a person referred to in section 286A (1), the court shall stop the proceedings and commit the accused for sentence by a regional court having jurisdiction.”

11. In **S v Dzukuda and Others** 2000 (2) SACR 443 (CC) at 457j – 458d (paras 15 en 16) the Constitutional Court states:

*“[15] **Lewis J** correctly pointed out that the split procedure, where an accused is convicted in one court and sentenced in another, is not something new, but that s 116 of the Criminal Procedure Act 51 of 1977 (the CPA) provides for the referral of an accused for sentence from a district court to a regional court; indeed s 52 of the Act is, in regard to pleas of guilty, modelled on s 114 of the CPA and in regard to pleas of not guilty, modelled on the provisions of s 116. Section 116 of the CPA has been implemented and reviewed by the Courts for many years but, as correctly observed by the High Court, this does not by itself establish that it, or any comparable procedure, passes constitutional muster. The learned Judge drew attention to the fact that the implementation of s 116 had been the subject of adverse criticism in cases such as **S v Ngubane** (1991 (1) SACR 163 (N) at 165i-j) and **S v Cele and Others**, (1994 (1) SACR 616*

(N) at 619f-g) in which the advantages of sentence being imposed by the same court have been stressed.

[16] *It is unfruitful, in my view, to consider whether, as the High Court concluded, there are significant differences between s 116 of the CPA and s 52 of the Act, which place the accused under the latter in a substantially inferior position compared with that of an accused under the former. This comparison does not assist in determining whether the split procedure under s 52 infringes the accused's right to a fair trial. The question is whether the procedure under s 52 is fair, not whether it is inferior to s 116 of the CPA."*

12. I am not aware whether the debate alluded to by **Lewis J** (as she then was) has ever been propounded upon or finally decided by the Supreme Court of Appeal or the Constitutional Court relating to the question whether all the accused convicted in a district court ought to be transferred to the regional court. *In casu* the Regional Court was fully entitled to sentence accused 1 (Mr Titus) because the provisions of the minimum sentences were not applicable to him and the Magistrate retained his jurisdiction. See: **S v Cele & Others** (supra) and **S v Ebrahim** 1999 (1) SACR 106 (C).

13. Having made the finding in para 12 of this judgment it must not on that basis be concluded that a regional magistrate, once the jurisdictional fact that has been established that he/she was entitled to commit an accused or some of them to the High Court for sentence, they would *ipso facto* be prohibited from referring unaffected accused to the High Court. I am strengthened in this view by the following remarks:

13.1. In **S v Dzukuda** (supra) at 459g-j (para 21) as a High Court becomes a Court of first instance: "*.... Section 52(3)(d) of the Act enables all evidential material relevant to sentencing to be placed before the High Court, an advantage which a Court of appeal does not ordinarily enjoy. In fact the High Court, exercising the powers under s52 consequent upon a s 52(1) committal, is exercising an original sentencing jurisdiction. In this regard s 274(1) of the CPA provides that '[a] court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed'. In **S v Dlamini** (1992 (1) SA 18 (A) at 30D-31D) the Appellate Division of the Supreme Court, in the context of this provision, commented on the fact that there was no legal reason why a Judge should, in considering sentence, be restricted to the material placed before the Court by the parties. It also alluded critically to the fact that often so little and such superficial attention is given to sentencing, in stark contrast to the time, resources and talent devoted to procuring the conviction of an accused."*

13.2. See further: **S v B** 2003 (1) SASV 52 (SCA) at 61c-f (para9) where the same jurisdictional issue is expounded upon as follows:

“[9] Uit hierdie bepalings (section 52 93) as it then read) blyk dit dat die verhoor van 'n beskuldigde wat deur 'n streekhof vir vonnis na 'n Hoë Hof verwys word nie afgehandel is nie. Die oorkonde van die verrigtinge in die streekhof maak deel uit van die oorkonde in die Hoë Hof en indien die Hoë Hof van mening is dat die verrigtinge nie ooreenkomstig die reg is nie of dat twyfel bestaan of die verrigtinge ooreenkomstig die reg is, kan die Hof, onder andere, nadat getuienis ingevolge art 52(3)(d) aangehoor is, die skuldigbevinding bekragtig, wysig, of tersyde stel; die saak na die streekhof terugverwys; of 'n bevel maak wat die regspleging waarskynlik sal bevorder. Die skuldigbevinding in die streekhof is dus, in effek, 'n voorlopige skuldigbevinding wat finaal word indien dit aanvaar word of bekragtig word deur die Hoë Hof. Met ander woorde die Strafreghwysigingswet het 'n spesiale prosedure geskep ingevolge waarvan die verhoor van 'n beskuldigde in die streekhof begin en in die Hoë Hof afgehandel kan word.”

14. As I pointed out at the inception of this judgment only appellant (Mr de Klerk) has appealed. I therefore see no basis on which we can intervene or interfere with the sentence imposed on accused 3 (Ms Morwe) and accused 4 (Mr Mabe) as **Lacock J** suggests in his judgment. However, even if we were entitled to review the decisions I can see no reason why we have to refer back their case to the Regional Court for sentence as we are competent and in a good position to do so.

15. To sum up then:

15.1. If a jurisdictional factor is present for the committal of an accused or accused persons, to whom the minimum sentences provisions are applicable, to the High Court it is preferable that Regional Magistrates transfer all the accused to High Court for sentencing;

15.2. It is not irregular or unprocedural or incompetent for a judge to sentence co-accused who are not affected by the minimum sentences provisions, in the situation described in para 15.2 (above) because there is no prohibition in the legislation against doing so. See paras 13.1 and 13.2 (above);

15.3. There is no basis to review the sentences of accused 3 and 4 who have not appealed.

16. **As far as the appellant, Mr de Klerk's, sentence is concerned I**

agree with Lacock J for the reasons advanced by him, that the Life Imprisonment sentence be set aside and be replaced with a sentence of: 20 (twenty) years imprisonment.

F D KGOMO
JUDGE PRESIDENT
NORTHERN CAPE DIVISION