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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: AR70/2023

In the matter between:

MUSAWENKOSI NGUBANE

APPELLANT

and

THE STATE

RESPONDENT

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (formally the Natal Provincial Division) (Van Der Reyden J, with assessors, presiding):

1. The appeal against sentence is upheld.
2. The sentence imposed by the high court is set aside and replaced with the following sentence:

‘The accused is sentenced to 25 years’ imprisonment.’

3. Such sentence is ante-dated to 7 September 2000.

JUDGMENT

Delivered on 7 June 2024

Henriques ADJP (Pillay AJ and Beket AJ concurring):

Introduction

[1] This is an appeal against the sentence of life imprisonment imposed by the high court in terms of the provisions of s 52(1)(b) of the Criminal Law Amendment Act 105 of 1997 ('the CLAA'), prior to its amendment.

The grounds of appeal

[2] The appellant advances three main grounds of appeal. In respect of the first ground of appeal, the appellant submits that there was no indication from the record of the proceedings that the applicability of the prescribed minimum sentence was explained to him prior to pleading to the charge nor is it apparent from the charge sheet itself. He ought to have been advised of the prescribed minimum sentence that he was facing, and in addition, in the absence of a reference to the CLAA in the charge sheet, the regional court erred in remitting the matter to the high court in terms of s 52(1)(b) for sentencing purposes as the regional court ought to have imposed sentence.

[3] Secondly, it is further submitted that the high court erred in confirming the conviction in the absence of a reference in the charge sheet to the CLAA and that the high court ought not to have imposed the prescribed minimum sentence of life imprisonment as there was no reference in the charge sheet to the fact that it was applicable.

[4] Thirdly, the high court erred in not finding substantial and compelling circumstances to exist which warranted a deviation from the prescribed minimum sentence, having regard to the triad of *Zinn*,¹ specifically the fact that the appellant was a first offender, pleaded guilty, and was 19 years old at the time of sentence.

¹ *S v Zinn* 1969 (2) SA 537 (A).

Background facts

[5] The appellant was charged in the Regional Division of Stanger for having wrongful and unlawful sexual intercourse with Ms D[...] M[...], a female aged six years old, without her consent and against her will. It is common cause that the charge sheet did not make reference to the provisions of the CLAA.

[6] The appellant, who was legally represented at the time, pleaded guilty, which plea was accepted by the respondent. However, the presiding regional magistrate required the respondent to lead evidence in relation to the age of the complainant, the medical evidence relating to the J88 form, and the injuries sustained, which were consistent with those of rape.

[7] On 12 December 1999, the appellant was convicted pursuant to his written plea explanation, which also did not make reference to the provisions of the CLAA. This occurred after the regional court had heard evidence to establish the age of the minor child, as well as the evidence of the district surgeon in relation to the examination of the minor child. What is noteworthy in relation to the evidence of the medical practitioner who conducted the physical and gynaecological examination of the complainant was that she had indicated that she had twice been sexually abused before, although it had not been reported to the police.

[8] The regional magistrate was required in terms of section 52(1)(b) of the CLAA to remit the matter for sentencing to the high court, as the offence of which the appellant had been convicted merited punishment in excess of the jurisdiction of the regional court, as the appellant had raped a child under the age of 16. As a consequence, the matter was then remitted to the high court for sentencing purposes.

[9] On 7 September 2000, the sentencing proceedings served before Van Der Reyden J and two assessors. After hearing submissions from the legal representatives, the high court was of the opinion that it was bound by the provisions of sections 51 and 52 of the CLAA to sentence the appellant to imprisonment for life, unless it could find substantial and compelling circumstances to impose a lesser

sentence. The high court emphasised the aggravating features of the offence, namely that the appellant, who was 19 years old at the time of the commission of the offence, raped a minor child who was seven years old at the time. The high court was of the view that substantial and compelling circumstances did not exist, despite the submissions of the appellant's legal representative at the time of his youthful age, that he was a first offender, that he had showed remorse by pleading guilty, and that he was a good candidate for rehabilitation. The high court was of the view that these were factors which

'are present in most of the young first offenders, and if the totality of those facts were to amount to substantial and compelling circumstances, it would have meant that the aim of the Legislature would not be achieved.'

[10] The high court opined that 'there must be present very special circumstances before they constitute substantial and compelling circumstances' and held that it was left with no discretion but to impose imprisonment for life.

Merits of the appeal

[11] Turning now to the first issue on appeal, it is evident that the charge sheet is silent on the applicability of the CLAA and did not make reference to it. Although the appellant was legally represented at the time, it would appear that the parties were cognisant of the fact that the age of the complainant had to be established, as this was a relevant factor in sentencing the appellant and remitting the matter for sentencing to the high court. This is evident from the record of proceedings, as the presiding magistrate makes reference to the following:

'However I'll still need the doctor to come and testify.... (indistinct) These matters which involve children and the sentences that should be dealt by the high Court'.

[12] It is for these reasons that the medical professionals were called to testify to establish the age of the complainant, as well as the nature of the injuries, and the discrepancy with the age as reflected on the two J88s completed.

[13] There have been a plethora of decisions in relation to the effect of the failure to explain the applicability of the CLAA to both a represented and an unrepresented accused. In *S v Mseleku*,² the court held as follows:

‘Where no mention is made, notwithstanding its factual framework, the provisions should be brought to the attention of the accused by the court whether the accused is represented or not. Where mention of the Act is made in the indictment, and the accused is unrepresented, the court must pertinently draw the accused’s attention to its provisions.’

[14] In *S v Ndlovu*³ the following was held:

‘The enquiry, therefore, is whether, on a vigilant examination of the relevant circumstances, it can be said that an accused had had a fair trial. And I think it is implicit in these observations that where the State intends to rely upon the sentencing regime created by the Act a fair trial will generally demand that its intention pertinently be brought to the attention of the accused at the outset of the trial, if not in the charge-sheet then in some other form, so that the accused is placed in a position to appreciate properly in good time the charge that he faces as well as its possible consequences. Whether, or in what circumstances, it might suffice if it is brought to the attention of the accused only during the course of the trial is not necessary to decide in the present case. It is sufficient to say that what will at least be required is that the accused be given sufficient notice of the State’s intention to enable him to conduct his defence properly.’

[15] I acknowledge that these decisions were ex post facto the date on which these proceedings commenced and were finalised. However, s 35 of the Constitution guarantees the right to a fair trial, and the question to be answered in the circumstances is whether the accused had a fair trial as a consequence of the failure to be pertinently apprised of the provisions of the CLAA.

² *S v Mseleku* 2006 (2) SACR 574 (D) at 581d-e.

³ *S v Ndlovu* 2003 (1) SACR 331 (SCA) para 12.

[16] The Constitutional Court in *S v MT*⁴ has held that such failure will not automatically render a trial unfair. Paragraphs 39 and 40 are incisive in this regard, and provide as follows:

‘[39] This precedent has not created a hard-and-fast rule that each case where an accused has not been explicitly informed of the applicability of the Minimum Sentences Act will automatically render a trial unfair. However, a practice has developed to include the relevant section of the Minimum Sentences Act in the charge-sheet because of this precedent.

[40] It is indeed desirable that the charge-sheet refer to the relevant penal provision of the Minimum Sentences Act. This should not, however, be understood as an absolute rule. Each case must be judged on its particular facts. Where there is no mention of the applicability of the Minimum Sentences Act in the charge-sheet or in the record of the proceedings, a diligent examination of the circumstances of the case must be undertaken in order to determine whether that omission amounts to unfairness in trial. This is so because, even though there may be no such mention, examination of the individual circumstances of a matter may very well reveal sufficient indications that the accused's s 35(3) right to a fair trial was not in fact infringed.’

[17] The principle which emanates from all the decided cases is the following: the ultimate consideration is whether such omission, in the circumstances of the case, rendered the trial unfair.

[18] In my view, although the express provisions of the CLAA were not specifically explained to the appellant, he had a fair trial given the circumstances, as during the course of the proceedings both his representative and the presiding officer were alive to the provisions of the CLAA, specifically the fact that the matter would have to be remitted to the high court for sentencing purposes. There is an additional

⁴ *S v MT* [2018] ZACC 27; 2018 (2) SACR 592 (CC).

reference in the transcript to this. This is evident at paragraph 22 of the transcript, where the regional court specifically references the fact that the possible sentence to impose exceeded the sentencing jurisdiction of the regional court and consequently, the matter had to be remitted to the high court for sentencing, given that the rape was committed in respect of a child under the age of 16.

[19] There is thus no merit in the first ground of appeal and consequently there is also no merit in the argument that the regional court erred in referring the matter to the high court for sentencing.

[20] Although the imposition of sentence falls pre-eminently within the discretion of the sentencing court, a court on appeal can interfere with it in circumstances where the proceedings are vitiated by an irregularity, where there is a misdirection, and in circumstances where the sentence imposed was disturbingly, and startlingly inappropriate.⁵

[21] In my view, the basis upon which the appeal ought to succeed relates to the misdirection committed by the high court, firstly in finding that it had no discretion but to impose the prescribed minimum sentence and that the facts justified the imposition thereof and secondly, its failure to find that substantial and compelling circumstances exist; alternatively, in failing to find, given the circumstances of this particular case, that the imposition of the prescribed minimum sentence would be disproportionate having regard to the triad of *Zinn*.

[22] As a consequence of these misdirections this court is entitled to impose sentence afresh.

[23] It is well accepted that there is no definition as to what constitutes substantial and compelling circumstances, but the existence thereof would depend on the particular circumstances and facts of a case. The facts in this particular matter are that the appellant pleaded guilty, was a first offender, and was 19 years old at the time. The aggravating factors were that the complainant was seven years old at the

⁵ *S v Kgosimore* 1999 (2) SACR 238 (SCA).

time of the rape, that he was known to her and her cousin, and that he had placed himself in a position of trust at the time of the rape. He took advantage of her fear of walking home alone at night and seized the opportunity to rape her.

[24] During the hearing of the appeal, Ms Fareed, who appeared for the appellant, submitted that, given the facts of the matter, an appropriate sentence would be one of 15 years' imprisonment. Mr Buthelezi, who had appeared for the respondent, on the other hand, submitted that the appellant's age, the fact that he was a first offender, and that he had pleaded guilty, paled into significance when one considered that the complainant was seven years old at the time and was injured as a consequence of the rape. It was submitted that a sentence of life imprisonment was appropriate.

Conclusion

[25] I do not agree with the submissions of Ms Fareed in relation to the period of imprisonment suggested. They lose sight of the aggravating factors in the matter. Mr Buthelezi's submissions, too, lose sight of the personal circumstances of the appellant, and the fact that the injuries to the complainant's face were caused by a hiding she had received from her grandmother.

[26] While I acknowledge that the rape of a minor is a most heinous crime, and that perpetrators of such offence must be suitably punished, any sentence imposed must be tempered with mercy and is dependent on the facts of a particular matter. Life imprisonment is the ultimate sentence which an accused must serve. On the facts of this matter, such sentence would not be proportionate having regard to the triad of *Zinn*. I am of the view that a term of imprisonment of 25 years is appropriate given the particular facts of the matter.

Order

[27] In the result the following order will issue:

- 1 The appeal against sentence is upheld.

2. The sentence imposed by the high court is set aside and replaced with the following sentence:

‘The accused is sentenced to 25 years’ imprisonment.’

3. Such sentence is ante-dated to 7 September 2000.

HENRIQUES ADJP

CASE INFORMATION

Date of Hearing: 10 May 2024

Date of Judgment: 07 June 2024

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