

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

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

CASE NO: AR375/2021

In the matter between:

NKOSINATHI NGWANE

Appellant

and

THE STATE

Respondent

ORDER

On appeal from: the KwaZulu-Natal Local Division, Mtubatuba, Gyanda J and assessors presiding:

1. The appeal against sentence is dismissed;
2. The sentence of the court *a quo* is confirmed.

JUDGMENT

Henriques J (Bedderson J and Jikela AJ concurring)

Introduction

[1] This is an appeal against the sentence of life imprisonment imposed by Gyanda J on 14 August 2007.

[2] The appellant in this matter was convicted on one count of rape in a regional court on 23 February 2007 of a minor. The regional magistrate found that the rape was an offence referred to in section 51 of Schedule 1 of the Criminal Law Amendment Act 105 of 1997 (the Act), the prescribed minimum sentence for which was life imprisonment. At the time the regional court did not have jurisdiction to impose such a sentence and was required in terms of s 52(1)(b) of the Act to stop the proceedings and commit the appellant for sentencing to the high court.

[3] This was done and on 14 August 2007 the matter served before Gyanda J presiding with two assessors in Mtubatuba. He was of the view that the conviction was in accordance with justice and confirmed the conviction of the appellant for rape. After considering the submissions of the respondent and appellant's representatives, the court *a quo* imposed a sentence of life imprisonment having found no substantial and compelling circumstances to exist warranting a deviation from the prescribed minimum sentence.

[4] In the judgment on sentence, the court *a quo* had regard to the triad of *Zinn*¹ and that it was obliged to enquire whether there were substantial and compelling circumstances justifying the imposition of a sentence other than the prescribed minimum sentence.²

[5] The court *a quo* had regard to the submissions of the appellant's counsel that the cumulative effect of his personal circumstances amounted to substantial and compelling circumstances justifying the imposition of a sentence other than life imprisonment. These were that the appellant was 31 years old at the time of the imposition of

¹ *S v Zinn* 1969 (2) SA 537 (A).

² *S v Malgas* [2001] ZASCA 30, 2001(1) SACR 469 (SCA).

sentence, had passed standard 7, was a first offender, was gainfully employed at the time of his arrest, had two children and was in custody for a year and eight months. The court *a quo* was urged to consider the fact that no weapon was used in the commission of the offence and the injuries sustained by the complainant were those associated with the act of sexual intercourse.

[6] However, in deciding to impose the prescribed minimum sentence, the court *a quo* had regard to the fact that the appellant was an uncle and father figure to the complainant and had breached such trust. In addition, the court *a quo* was of the view that given the nature of the injuries the appellant was not someone capable of being rehabilitated. The appellant did not take the court into his confidence and made false allegations against his family as to why they would falsely accuse him in the commission of the offence. It additionally concluded that the aggravating features of the case far outweighed the mitigating circumstances and consequently imposed a sentence of life imprisonment.

[7] The appellant sought leave to appeal the sentence imposed based on the fact that the sentencing court had erred in finding that the complainant was below the age of 16 years at the date of the commission of the offence and that the respondent had discharged the onus in the regional court of proving her age. It was submitted on the appellant's behalf that the court *a quo* had failed to consider that the complaint was above the age of 14 and had a previous sexual experience.

[8] On 7 September 2012, the appellant was granted leave to appeal the sentence imposed on this ground alone as the court *a quo* was of the view that another court may come to a different conclusion, namely that the respondent had not discharged the onus of proving that the complainant was under the age of 16 years at the time of the offence and that her date of birth had not been proved. Consequently, the provisions of the Act would not have applied. It is this appeal which serves before us.

[9] The main bases for seeking this court's intervention in setting aside the sentence of the court *a quo* advanced by Mr Pillay, who appeared for the appellant, were two fold. First, he submitted that the provisions of the Act had not been explained to the appellant at the commencement of the trial and that he was not aware that he was facing a term of life imprisonment. He submitted that in convicting the appellant the regional court found him 'GUILTY AS CHARGED'.

[10] He relied on the regional court magistrate's judgment, which made reference to the fact that the appellant was charged with '. . . rape read with section 51, Part II of Schedule 1, Act 105 of 1997.' He submitted that the appellant was not charged under the provisions of s 51, Part I, which attracted a minimum sentence of life imprisonment and that there did not exist a Part II of Schedule 1 in the Act.

[11] He submitted that at no stage during the proceedings in the regional court did the respondent make any application for the amendment of the charge sheet to reflect that the offence fell under the provisions of s 51 of Part I of Schedule 2.

[12] Secondly, he submitted that the appellant did not have a fair trial warranting interference with the sentence imposed, as the onus rested on the respondent in terms of s 51(7) of the Act to prove the age of the complainant beyond a reasonable doubt in particular, that the complainant was a minor under the age of 16 years. He submits that the respondent had failed to prove beyond reasonable doubt that the complainant was a minor under the age of 16, which would normally attract a minimum sentence of life imprisonment if convicted.

[13] In this regard he submitted that the evidence presented by the respondent was unreliable in relation to the age of the complainant. The evidence of Ms Z[...] M[...] M[...], the stepmother of the complainant, was not sufficient to discharge the onus as she testified that she was not present when the complainant was born and applied for an identity document for the complainant on 13 January 2006. At the time she applied for

the identity document the complainant did not have a birth certificate or a clinic card indicating what her age was.

[14] Lastly, he submitted that the court *a quo* did give proper consideration to the issue of rehabilitation and the fact that the appellant was a first offender when imposing the prescribed minimum sentence.

[15] Turning now to the first ground of appeal, Mr Pillay submitted that because the appellant was not adequately informed that if convicted of rape he was facing a minimum prescribed sentence of life imprisonment, this failure constitutes a substantial and compelling circumstance warranting a deviation from imposing the prescribed minimum sentence. He relied on the decision of Mpati JA in *S v Ndlovu*³ where the court held the following:

‘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.’

[16] In my view, the question that needs to be considered is whether the appellant received a fair trial in the context of the applicability of the prescribed minimum sentence for an offence referred to in Part I of Schedule 2 of the Act. At the outset it must be mentioned that the appellant was legally represented in the court *a quo*. The annexure to the charge sheet read as follows:

‘The accused is guilty of the crime of **RAPE**, read with Section 51 Part II of Schedule 1 Act 105 of 1997.

In that on or about 30 November 2005 and at or near Macekane Reserve in the Regional Division of KwaZulu/Natal, the accused did unlawfully and intentionally have sexual intercourse with N[...] M[...]. 14 yrs without her consent.

³ *S v Ndlovu* [2002] ZASCA 144; 2003 (1) SACR 331 (SCA) para 14 (*Ndlovu* SCA).

In terms of the above legislation if the accused is convicted as charged the sentence shall be as follows: life imprisonment

...

Unless the accused shows the existence of compelling and substantial circumstances which warrant the imposition of a lesser sentence.'

[17] The factual allegations in the annexure to the charge sheet were that the appellant unlawfully and intentionally had sexual intercourse with the complainant, who was 14 years old at the time, without her consent on 30 November 2005.

[18] A transcript of the proceedings reflects that the charge was put to the appellant and he confirmed that he understood the charge and pleaded not guilty. His legal representative confirmed that his plea was in accordance with her instructions and that he elected to remain silent.

[19] The relevant starting point in my view is the principle that an accused should be informed of the charge that he is facing before he is asked to plead. The charge sheet alleged that the appellant was guilty of the crime of rape in that he intentionally and unlawfully had sexual intercourse with the complainant, aged 14 years, without her consent. In addition, it also mentioned that if convicted, the sentence he was facing was that of life imprisonment in the absence of substantial and compelling circumstances.

[20] In *S v Legoa*⁴ Cameron JA said that under the common law it was 'desirable' that the charge sheet should contain the facts the State intended to prove to bring the accused within an enhanced sentencing jurisdiction. It was not essential. Having regard to a number of decisions in the Constitutional Court, he held that under the constitutional dispensation it was no less desirable than under the common law that the

⁴ *S v Legoa* [2002] ZASCA 122; 2003 (1) SACR 13 (SCA) (*Legoa*).

facts the State intended to prove to increase the sentencing jurisdiction under the Act should be clearly set out in the charge sheet.

[21] Cameron J, in his judgment, remarked further:⁵

‘The matter is, however, one of substance and not form, and I would be reluctant to lay down a general rule that the charge must in every case recite either the specific form of the scheduled offence with which the accused is charged, or the facts the State intends to prove to establish it. A general requirement to this effect, if applied with undue formalism, may create intolerable complexities in the administration of justice and may be insufficiently heedful of the practical realities under which charge-sheets are frequently drawn up. The accused might in any event acquire the requisite knowledge from particulars furnished to the charge or, in a Superior Court, from the summary of substantial facts the State is obliged to furnish. Whether the accused's substantive fair trial right, including his ability to answer the charge, has been impaired, will therefore depend on a vigilant examination of the relevant circumstances.’ (footnotes omitted)

[22] Cameron JA held further that the question, which remained was ‘whether or not the accused had a fair trial under the substantial fairness protections afforded by the Constitution.’⁶

[23] Referring to Cameron JA’s judgment in *Legoa*, Mpati JA in *Ndlovu* said the following:⁷

‘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.

⁵ *Legoa* para 21.

⁶ *Legoa* para 22.

⁷ *Ndlovu* SCA para 12, *Legoa* para 21.

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.'

[24] In *S v Makatu*⁸ Lewis JA said:

'As a general rule, where the State charges an accused with an offence governed by s 51(1) of the Act, such as premeditated murder, it should state this in the indictment. This rule is clearly neither absolute nor inflexible. However, an accused faced with life imprisonment - the most serious sentence that can be imposed - must from the outset know what the implications and consequences of the charge are. Such knowledge inevitably dictates decisions made by an accused, such as whether to conduct his or her own defence; whether to apply for legal aid; whether to testify; what witnesses to call; and any other factor that may affect his or her right to a fair trial. If during the course of a trial the State wishes to amend the indictment it may apply to do so, subject to the usual rules in relation to prejudice.' (footnotes omitted)

[25] In *Ndlovu* the accused was charged with rape read with the provisions of section 51(2) of the Act. The minimum sentence in terms of section 51(2) was ten years imprisonment for a first offender. The magistrate convicted him 'as charged' but sentenced him to life imprisonment in terms of section 51(1) on the basis that the rape involved serious bodily harm. On appeal to the Constitutional Court,⁹ Khampepe J held that the appellant had been convicted of rape as contemplated in section 51(2), in other words, an offence referred to in Part III of Schedule 2, the prescribed minimum sentence for which was 10 years imprisonment.

⁸ *S v Makatu* 2006 (2) SACR 582 (SCA)

⁹ *S v Ndlovu* [2017] ZACC 19; 2017 (2) SACR 305 (CC); 2017 (10) BCLR 1286 (CC) (*Ndlovu* CC).

[26] She criticised the failure by the magistrate and the prosecutor to ensure that the appellant was prosecuted or convicted in terms of the correct provisions of the Act. She said¹⁰

‘Courts are expressly empowered in terms of s 86 of the Criminal Procedure Act to order that a charge be amended. Upon realising that the charge did not accurately reflect the evidence led, it was open to the Court *at any time before judgment* to invite the state to apply to amend the charge and to invite Mr Ndlovu to make submissions on whether any prejudice would be occasioned by the amendment. This the Magistrate failed to do. It was only after conviction, at sentencing, that she sought to invoke the correct provision.’ (footnote omitted)

[27] In *S v MT*,¹¹ the Constitutional Court in dealing with prejudice to the accused said that the question whether the applicants in that case (for leave to appeal) were prejudiced by not knowing that the Act might apply was a factual enquiry. Dlodlo AJ said that the applicants had failed to prove prejudice. He added the following

‘A second overlapping issue is what the applicants may have done differently had they known that the Minimum Sentences Act applied to their cases. Their counsel argued that if the applicants were informed of the applicability of the relevant penal provision of the Minimum Sentences Act, they may have pleaded guilty or entered into a plea bargain with the state. This suggestion militates against the applicants’ chosen defence. It is likely that they may have been even less inclined to plead guilty knowing that guilt attracted a minimum sentence of life imprisonment.’ (footnote omitted)

[28] The question of prejudice is determined by an objective fact-based enquiry as was found by Van Der Merwe JA in *S v Khoza*.¹²

[29] Taking all the above into consideration, in my view, an important factor to consider in this matter is the fact that the appellant was informed in the charge sheet

¹⁰ *Ndlovu CC* para 56.

¹¹ *S v MT* [2018] ZACC 27; 2018 (2) SACR 592 (CC); 2018 (11) BCLR 1397 (CC)

¹² *S v Khoza and another* [2018] ZASCA 133; 2019 (1) SACR 251 (SCA) para 11.

right from the outset that the respondent intended to seek the prescribed minimum sentence of life imprisonment. The factual basis for seeking such minimum sentence was that the complainant was 14 years old, being under the age of 16. He was legally represented and would have been in possession of the complainant's statement before the trial had started. The complainant also testified at the commencement of the trial that she was 15 years old.

[30] Whilst I acknowledge that the charge sheet incorrectly made reference to Part II of Schedule 1, instead of Part I of Schedule 2 to the Act, I am not persuaded that the appellant would have presented his case differently if the charge sheet had correctly reflected the correct part of the Act. At the outset it was made clear that a sentence of life imprisonment would be sought if he was convicted as the complainant was 14 years old. I also align myself with the decision of Van Der Merwe JA, which said that the question of prejudice is determined by an objective fact-based enquiry.

[31] In addition, I can find no indication of prejudice to the appellant as a consequence of the incorrect reference. I am also not persuaded that in the circumstances, the appellant's trial was unfair in any respects and therefore cannot find this as constituting a basis for a finding of substantial and compelling circumstances to exist warranting a deviation from the imposition of the prescribed minimum sentence.

[32] In addition, I agree with the submission of the respondent that at the time of the sentence being imposed only high courts could impose a life sentence for the offence and the regional courts could not do so. This is also evident from the transcript of the proceedings in the regional court as the magistrate stopped the proceedings in terms of s 52(1)(b) and committed the appellant for sentence to the high court.

[33] Turning now to the second issue on appeal, namely that the Act requires the age of the complainant to be proved beyond reasonable doubt. The reliance by Mr Pillay on s 51(7) in my view is misplaced. Properly interpreted, the age of the accused is relevant

to determine if the provisions of s 51 apply insofar as sentence is concerned and to what extent.¹³

[34] On a proper interpretation of s 51 these provisions apply to the offender and not the complainant. Section 51(6), prior to its amendment,¹⁴ provided that the Act did not apply to

‘The provisions of this section shall not be applicable in respect of a child who was under the age of 16 years at the time of the commission of the act which constituted the offence in question.’

[35] Section 51(7) of the Act, prior to its amendment, read as follows:¹⁵

‘If in the application of this section the age of a child is placed in issue, the onus shall be on the State to prove the age of the child beyond reasonable doubt.’

[36] As the appellant was not a child offender there was no onus on the respondent to prove his age.

[37] Turning now to the question of whether the age of the complainant was established beyond reasonable doubt in the court *a quo*. The following emerges from the transcript of the proceedings in the regional court. During the trial the complainant at the commencement thereof when the regional magistrate administered the competency test confirmed her age to be fifteen. This evidence was not challenged.

¹³ *S v Lubavu* [2009] JOL 23959 (Tk) paras 70-82, and *Ngcobo and another v S* [2005] JOL 13915 (N).

¹⁴ Section 51(6) of the Criminal Law Amendment Act 105 of 1997 (the Act) was amended twice. The first amendment was in terms of the Criminal Law (Sentencing) Amendment Act 38 of 2007, with effect from 31 December 2007, which amended the wording of the sub-section. The second amendment was in terms of the Judicial Matters Amendment Act 42 of 2013, with effect from 22 January 2014, which amended the age from 16 to 18. Section 51(6) now reads:

‘This section does not apply in respect of an accused person who was under the age of 18 years at the time of the commission of an offence contemplated in subsection (1) or (2).’

¹⁵ Section 51(7) of Act was amended in terms of the Criminal Law (Sentencing) Amendment Act 38 of 2007, with effect from 31 December 2007, where the phrased ‘a child’ and ‘the child’ were replaced with ‘an accused person’ and ‘that person’, respectively.

[38] Her stepmother, Ms M[...], confirmed at the time of the incident (in 2005) the complainant was in standard 2 (grade 4) at school. When questioned by the court concerning proof of the age of the complainant, Ms M[...] confirmed she had been issued with a birth certificate for her by Home Affairs. She was requested to return to court and when she did, she produced a B1 document relating to an application by the complainant for an identity document, which reflected the complainant's date of birth as being 6 January 1991 and not a birth certificate. Although questioned about the document it was entered as an exhibit of the proof of age of the complainant.¹⁶

[39] There was no challenge to the age or date of birth of the complainant during the trial apart from questions by the appellant's legal representative as to the existence of a birth certificate or clinic card.

[40] There was nothing placed on record by the appellant during the course of the trial to challenge this evidence nor were any questions asked to indicate that there was anything in the complainant's physical appearance or demeanour which was indicative that she was older than 14. Given his relationship to the complainant, the appellant would have been best placed to place her age into question. He did not, which in my view is a further indication that he was aware she was below the age of 16 years.

[41] Section 51(7) has now been amended to reflect that the state bears the onus to prove the age of accused person if placed in issue. It reads as follows:

'If in the application of this section the age of an accused person is placed in issue, the onus shall be on the State to prove the age of that person beyond reasonable doubt.'

[42] Prior to the amendments, and reading s 51 of the Act as a whole, the sub-section (7) would have referred to where the age of the accused is in question, as the age of the accused is one of the deciding factors as to whether the sentencing regime within the

¹⁶ *Ngada v S* [2009] ZAECGHC 8 para 7

Act is applicable or not. The age of the complainant relates to a completely different enquiry.¹⁷

[43] In my view, the age of the complainant that she was a minor was established in the court *a quo*.

[44] What then remains is for us to consider whether there are any other substantial and compelling circumstances, which existed warranting a departure from the prescribed minimum sentence or whether same was disproportionate to the triad of *Zinn*.

[45] 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.¹⁸

[46] In my view, the court *a quo* did not commit any misdirection in imposing the prescribed minimum sentence. On the particular facts of this matter, I can find no basis warranting interference by this court on appeal with the sentence imposed.

[47] In the result the following orders will issue:

1. The appeal against sentence is dismissed;
2. The sentence of the court *a quo* is confirmed.

HENRIQUES J

¹⁷ See the principles of interpretation as set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13, 2012 (4) SA 593 (SCA) para 18, and later applied to statutory interpretation in *Johannesburg City v Zibi and another* [2021] ZASCA 97; 2021 (6) SA 100 (SCA) para 25

¹⁸ *S v Kgosi* 1999 (2) SACR 238 (SCA); *Director of Public Prosecutions, Gauteng Division, Pretoria v DMS and another* [2023] ZASCA 65; 2023 (2) SACR 113 (SCA).

CASE INFORMATION

Date of Hearing: 26 April 2024

Date of Judgment: 18 September 2024

For Appellant: Mr T P Pillay
Legal Aid
The Marine Building
22 Dorothy Nyembe Street
Durban
Email: ThiagrajP@legal-aid.co.za

For Respondent: Mr K Singh
Instructed by: DPP
286 Pietermaritz Street
Pietermaritzburg
Tel: 033 845 4485
Email: Kesingh@npa.gov.za