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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: A20/2023

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 28 Feb 2025

SIGNATURE

In the matter between:

Z[...] N[...] S[...]

Appellant

and

THE STATE

Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date and for hand-down is deemed to be 28 February 2025.

JUDGMENT

Gcawu-Dambuza AJ (Mfenyana J concurring)

Introduction

[1] Although the present appeal was against both the conviction and sentence imposed by the learned Regional Court Magistrate for the Regional Division of Gauteng held at Springs, Ms P Lazarus, during the hearing of the appeal it emerged that the appellant had abandoned his appeal against conviction. I am satisfied that such concession was correct. I am satisfied that the court *a quo* correctly convicted the appellant on his plea.

[2] The appellant pleaded guilty to the crime of rape in contravention of section 3 of Sexual Offences and Related Matters Act of 2007 as amended. State alleged the provisions of section 51 Schedule 2 of Criminal Law Amendment Act 105 of 1997. In terms of section 112(2) statement, the appellant admitted all the elements of the offence.

[3] The powers of the court of appeal in relation to sentencing are an established principle. The Constitutional Court stated the position as follows in *Bogaards v S*¹:

"[41] Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by courts below is circumscribed². It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it. A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another."

[4] Accordingly in this judgment this Court shall direct its attention to the sentence of life imprisonment as imposed by the trial Court.

¹ CCT 120/11[2012] ZACC 23; 12 BCLR 1261 (CC); 2013 (1) SACR 1 (CC) para 41.

² In this regard see also: *S v Anderson* 1964 (3) SA 494 (AD).

Pertinent background facts to the present appeal

[5] As stated above, the judgment will only deal with appeal against sentence. It is however important that regard is had to the totality of the evidence. This is to put in perspective whether or not interference by the sentencing court is warranted.

[6] On or about 3 August 2014, the appellant was driving a company vehicle. He stopped next to the Springs Hotel and offered the victim a lift to Secunda. Instead of driving to Secunda, the appellant made a detour and ultimately stopped at some place next to where mine workers stayed. He then asked whether the victim had money and whether she could have sexual intercourse with him, to which she replied in the negative. Thereafter, the appellant alighted from the vehicle, opened the passenger door, grabbed the victim and dragged her into the bush.

[7] In the bush, the appellant instructed the victim to undress. She complied, whereafter, he had sexual intercourse with her without her consent. After the sexual act, the appellant left the victim there and drove away. Ultimately, the appellant was arrested and arraigned for a charge of rape. As already alluded to above the accused pleaded guilty and was convicted on the strength of his plea.

[8] In considering the sentence to impose, the trial court took into consideration the victim impact report and pre-sentence report. It considered both mitigating and aggravating factors and imposed a sentence of life imprisonment, having found that there were no substantial and compelling factors to deviate from the prescribed minimum sentence.

[9] As a result of such sentence the appellant enjoyed an automatic right of appeal as prescribed by section 309(1)(a) of the Criminal Procedure Act, 51 of 1977 (CPA)

Discussion

[10] The question for decision is whether the sentence of life imprisonment

was competent given the factual matrix. The charge stated that the accused is guilty of the crime of rape in that accused did unlawfully and intentionally commit an act of sexual penetration with the complainant with, who was 26 years old at the time, by inserting his penis into her vagina and having sexual intercourse without her consent. The charge sheet further recorded that section 51(1) and Schedule 2 of Criminal Law Amendment Act is applicable if the accused is convicted of the charge. The section prescribes a minimum sentence of life imprisonment in the absence of substantial and compelling circumstances.

[11] In his amended notice of appeal, the appellant challenges the applicability of section 51(1) of the Criminal Law Amendment Act 105 of 1997. The question for determination is whether section 51(1) was applicable for purposes of sentence. The trial court needed to be satisfied that the facts alleged or proven trigger the applicability of life imprisonment as prescribed by the minimum sentence legislation. In the circumstances of this case, the only factor considered by the trial court as to trigger the applicability of section 51(1) is that the complainant was HIV positive.

[12] When there was such reference to section 51(1) of the Act, it was required of the State to establish the HIV status of the appellant. This is so because that fact brings this category of rape under the purview of section 51(1).

[13] The Supreme Court of Appeal in *S v Legoa (Legoa)*³ accepted that where the element specified in the schedule relates to the person and not the offence, it is not required of the evidence of such to be led to secure a conviction on the scheduled offence. On the strength of *Legoa*, the element that the appellant knew that he has AIDS or HIV, was not required to be led before the conviction of rape. However, the Court in ***Legoa*** endorsed the view of the Full Court in *S v Seleke (Seleke)*⁴⁵ that in order to ensure fair trial it is desirable that the charge

³ 2003(1) SACR 13 (SCA)

⁴ 1976 (1) SA 675 (T).

⁵

sheet should refer to the penalty provision.

[14] In ***R v Zonele others* 1959(3) SA 319 (A)** the court said it is only desirable that the facts which the Crown intends to prove as constituting aggravating circumstances should be set at the onset of the indictment. It was further held when accused pleads guilty to the charges and it appears from the indictment that the Crown intends to prove aggravating circumstances were present, the presiding officer must be satisfied that accused intends to admit only that he is guilty of the offence charged but also aggravating circumstances as alleged in the charge-sheet were present. The words in my opinion convey the meaning that the facts that must be present to make the minimum sentence applicable must be established at conviction in the sense *that they must be included in the facts on which the conviction is based*" It is clear that the accused must be informed of the applicable mandatory sentencing regime by referencing it in the charge-sheet. The court is also required to explain the mandatory provisions. The timeous warning referred to in *Seleke* relates to the stage before sentencing as opposed to before conviction. In considering the views expressed in *Zonele*, the Court in *Legoa* confirmed that *desirable* does not mean essential⁶. The Court pertinently concluded thus:

"[20] ... But under the constitutional dispensation it can *certainly be no less desirable* than under the common law that the facts the State intends to prove to increase sentencing jurisdiction under the Criminal Law Amendment Act of 1997 should *be clearly set out in the charge sheet*.

[15] In conclusion this Court is of the firm view that it is not necessary to allege the elements of the schedule in the charge sheet in order to secure a conviction for offences contemplated in the schedules. As such, even where the elements contemplated in the schedules are not independently alleged in the charge sheet and proven, a conviction must follow if all the essential elements of the offence charged with are present.

[16] To my mind, the facts set out in the schedule are only relevant to establish

⁶ See *S v Moloi* 1969 (4) SA 421 (A).

enhanced penalty jurisdiction. In other words, they are not essential elements of an offence but the necessary jurisdictional requirements to impose the prescribed sentence. In this regard the case stated the position as *Legoa* reached the following binding conclusion: "[18] It is correct that, in specifying an enhanced penal jurisdiction for particular forms of an existing offence, the legislature does not create a new type of offence... The offences scheduled in the minimum sentencing legislation are likewise not new offences. They are but specific forms of existing offences, and *when their commission is proved in the form specified in the Schedule, the sentencing court acquires an enhanced penalty jurisdiction. It acquires that jurisdiction, however, only if the evidence regarding all the elements of the form of the scheduled offence is led before verdict on guilt or innocence. and the trial court finds that all the elements specified in the Schedule are present.*

[17] In this particular matter, the state secured a conviction as set out in section 3 of Sexual Offences and Related Matters Act as amended. However, the state did not lead evidence that appellant knew that he had Aids or HIV. The state also did not lead evidence that there was infliction of grievously bodily harm by the appellant.

[18] Therefore, in order for the court to impose a sentence of life imprisonment, the state must after conviction which is in the course of state case lead evidence to prove the requirements of section 51(1) Part 1 of schedule 2. In the absence of such jurisdictional facts the regional court lacked the requisite authority to impose a sentence prescribed in terms of Section 51(1).

[19] This court takes a view that the learned Regional Court Magistrate erred in imposing a sentence of life imprisonment. Nothing in the evidence justifies the imposition of a sentence of life imprisonment as imposed by the Regional Court. The Learned Regional Magistrate reached the following conclusion: "Life imprisonment is the only sentence a person be legally obliged to serve". The trial court was alive to the fact that life imprisonment is only sanctioned when section 51 (1) applies. However short of being satisfied that the requirements

stated in Part 1 of Schedule 2 have been established, the trial court erroneously took a view that only section 51(1) of Criminal Law Amendment Act (CLAA) finds application rape. The trial court ignored section 51(2) of Criminal Law Amendment Act which finds application to sentences referred to in part 1 of schedule 2

[20] In its judgment the trial court dealt with the issue of AIDS and HIV as well as involvement of grievously bodily harm in the following manner: -

[28] "She got infected with terminal illness because of your actions. You knowingly infected her with HIV virus by selfishly choosing not to use a condom. You inflicted injuries on her foot to such an extent she could not put her safety boot. The victim sustained injuries on her most intimate part as well as body, as she was dragged through the fields".

[21] The critical issue was whether the appellant was aware of his AIDS or HIV status when he committed the rape. The accused pleaded guilty to the charge as set out in the charge sheet, referenced to section 51(1) (a) of Minimum Sentence Act. The appellant never admitted he was in the know that he acquired HIV or AIDS. He did not admit specifically that he acquired the virus at the time of rape. The admission by the accused or proof by the State would have brought the offence under the purview of section 51(1) and would have clothed the trial court with the jurisdiction to impose life imprisonment if no compelling and substantial factors were found to exist.

[22] The issue of HIV or AIDS only emerged when the victim impact report was submitted to court on the 13 July 2022. This was almost 7 years after the rape incident had occurred. There was no evidence before the learned regional court magistrate to suggest that the appellant was aware of his HIV/AIDS status when he perpetrated the offence. He was not given an opportunity to deal with such revelation after it came to attention of the court.

[23] It is important that before a court imposes life imprisonment it should satisfy itself that all the jurisdictional facts have been established. This is required even

where an accused person has tendered a plea of guilty. See *S vs Vilakazi 2012 (6) SA 353 (SCA at paragraph 18 and 59*. I am also not satisfied that the State proved the infliction of grievous bodily harm. The medical report made reference to abrasions and bruises. The injuries were as result of being dragged.

[24] In the light of foregoing this court is satisfied that the regional court did not have jurisdiction to impose life imprisonment in terms of section 51(1) and that the court should instead have acted in terms of section 51(2). The regional court magistrate was in the circumstances required to impose a minimum sentence of 10 years. Section 51(2) further provides that a regional court may impose sentence in terms of subsection (2) shall not exceed the minimum term of imprisonment in term of subsection 2 by more than five years. Thus, the court *a quo* was limited to imposing a maximum sentence of 15 years.

[25] I am satisfied that the trial court misdirected itself when considering sentence. The appellant was not convicted of an offence contemplated in section 51(1). This court is therefore entitled to interfere with sentence and alter it accordingly. This court must also be satisfied that substantial and compelling reasons which justify a lesser sentence do not exist. Having perused the record, I agree with trial court that there are no exceptional and compelling circumstances to deviate from the prescribed minimum sentence.

[26] In the result a sentence of 15 (fifteen years effective imprisonment is an appropriate sentence to impose. In accordance with section 282 of Criminal Procedure Act, the 15 years imprisonment is antedated to 18 November 2022.

Order

1. The appeal against sentence is upheld.
2. The sentence imposed by the court *a quo* is replaced with the following:

"The accused is sentenced to 15 years imprisonment."

3. The sentence of 15 years imprisonment is antedated to 18 November 2022.

N GCAWU -DAMBUZA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

S MFENYANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

(I agree and it is so ordered)

APPEARANCES:

For the Appellant:

M Botha instructed by Legal Aid SA-
Benoni

For the State:

A Coetzee instructed by the DPP,
Pretoria

Date of the
hearing:

22 January 2025

Date of
Judgment:

28 February 2025