

10/08/2012

Date of judgment: 13/08/2012

RESPONDENT

1 "the accused is guilty of rape read with the provisions of Section 51(2) Part 1 Schedule 2 of the Criminal Law Amendment Act 105 of 1997." (my translation) See p. 7 – Charge Sheet, p10 line 8 – 13.

proceedings were stopped and committed to the High Court for sentence as envisaged in terms of section 52 of the Criminal Law Amendment Act 105 of 1997 (the Act).²

[2] Bertelsmann J confirmed the conviction by the regional court. In sentencing the appellant to life imprisonment, the judge stated that the lawgiver has prescribed life imprisonment if you are convicted on the basis that you have been convicted in this case³

[3] Leave to appeal was granted in respect of sentence only.

[4] It is trite that the appeal court's power to interfere with the trial court's sentence is circumscribed. The appeal court may interfere only where, among others, misdirection may be found on the part of the trial court.

[5] The appellant's counsel⁴ submits that the court a quo misdirected itself in its view that it was bound to impose the minimum prescribed sentence. She further submits that the sentencing court relied on the provisions of section 51(1) of the Act whereas the annexure to the charge sheet refers to the applicability of section 51(2). On perusal of the charge sheet on record and when the charge was put to the appellant on the date of

² The section has since been repealed by section 2 of Act 38 of 2007.

³ Page 112 line 20 – 22.

⁴ Adv LA van Wyk,

trial, it is clear that the charge was read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997.

[6] It is stated in **S v Makatu 2006 (2) SACR 582 SCA** that “as a general rule, where the state charges the accused with an offence governed by section 51(1) of the Act...it should state this in the indictment.”⁵ It was further contended that the trial court had misdirected itself in imposing sentence under section 51(1) when the indictment referred to section 51(2). The principle was followed in **S v Mashinini 2012(1) SACR 604 SCA** where Mhlantla JA penned that ‘the misdirection lies in the fact that the appellants were sentenced for an offence different to the one for which they were convicted. Undoubtedly, the judge below erred in sentencing the appellants in terms of section 51(1) instead of section 51(2)...’⁶

[7] In both **Makatu** and **Mashinini**, the appellants were sentenced in their trial courts to life imprisonment as provided in terms of section 51(1) of Act 105 of 1997 whereas the indictment referred to the provisions of section 51(2) of the Act. In both

⁵ Paragraph 7 at page 587

⁶ Paragraph [18] at page 611

cases, the appeal courts found that as misdirection on the part of the trial court.

[8] In *casu*, when sentencing the appellant, the presiding judge stated that the “lawgiver has prescribed life imprisonment if [the appellant is] convicted⁷. The charge put to the appellant was read with the provisions of section 51(2) and not 51(1). Sentencing the appellant to life imprisonment as provided for in terms of section 51(1) of the Act is a misdirection that warrants interference with the sentence of the trial court.

[9] Section 51(2) provides that notwithstanding any other law but subject to subsection (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in

(a)...

(b) Part III of schedule 2, in the case of

- ii) a first offender, to imprisonment for a period not less than 10 years...

⁷ Op cit paragraph [3] above

[10] Section 51(3)(a) provide that If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence:

(aA) When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

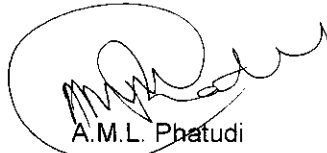
- (i) The complainant's previous sexual history;
- (ii) an apparent lack of physical injury to the complainant;
- (iii) an accused person's cultural or religious beliefs about rape;
- or
- (iv) any relationship between the accused person and the complainant prior to the offence being committed."

[11] It is not clear from the record⁸ as to what was placed as substantial and compelling circumstances. I cannot find any substantial circumstances compelling deviation from the prescribed minimum sentence notwithstanding the appellant's testimony that he laboured under the impression that the complainant was 17 years.

⁸ Pg 111 from line 9

[12] In the result I make the following order:

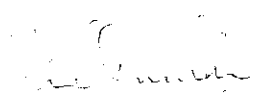
1. The appeal succeed
2. The sentence imposed is set aside and replaced with the following:
"The accused is sentence to 15 years imprisonment"
3. The sentence is antedated to 20 April 2007.



A.M.L. Phatudi

Judge of the High Court

I agree



NB Tuchten

Judge of the High Court

I agree



P van der Byl

Acting Judge of the High Court

On behalf of the Appellant:

Legal Aid SA

FNB Building

C/O Church & Paul Kruger Str.

Church Square

Pretoria

Adv. L A Van Wyk

On behalf of the State:

DPP

Pretoria

Adv. M.N.C Menigo