THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

CASE NO: A1003/2013

DATE HEARD: 08/10/2014

DATE: 24 OCTOBER 2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

W[...] H[...] P[...] Appellant

and

THE STATE Respondent

JUDGMENT

J W LOUW. J

[1] The appellant was charged in the Pretoria North regional court on a count of rape of his daughter, a count of indecent assault of his daughter, a count of rape of his step-daughter and a count of indecent assualt of his step-daughter. Both girls were below the age of 16 when the alleged rape occurred. He was convicted on all four counts. At the request of the prosecutor, the matter was then transferred to the high court for the imposition of sentence. At the time, the regional court did not have the jurisdiction to impose life imprisonment for the rape of a child below the age of 16 years, which was, and still is, the prescribed sentence in terms of s 51(1) of the Criminal Law Amendment Act 105 of 1997 ("the Act") read with Part 1 of Schedule 2 of the Criminal Procedure Act 51 of 1977. The matter came before Mabuse, J, who imposed life imprisonment on each of the rape charges and six years imprisonment on each of the indecent assault charges. The sentences were ordered to run concurrently. He granted the appellant leave to appeal against the

sentences imposed.

[2] It was submitted by Adv. van Wyk, who appeared for the appellant, that the court erred in imposing the two life sentences in terms of the aforesaid statutory provisions. The charge sheet for each of the two rape charges commences with the words: *"DAT die beskuldigede skuldig is aan die misdaad VERKRAGTING, gelees met artikel 51 van die Strafregwysigingswet 105 van 1997 en artikel 94 van Wet 51 van 1977"*. The argument was that s 51 has two sub-sections and that the charge sheet should have referred to either s 51(1) or s 51(2). In the absence of a specific reference to the one or the other sub-section, the appellant did not know whether he was facing a sentence of life imprisonment in terms of s 51(1) or whether he was facing a lesser sentence in terms of s 51(2). He did therefore not have a fair trial and was prejudiced.

[3] In *S v Kolea*[1] the Supreme Court of Appeal had to consider whether the appellant had had a fair trial in circumstances where the appellant had been convicted and sentenced in terms of s 51(1) where the charge sheet had erroneously referred to s 51(2). The court held that the appellant, who was legally represented at the trial, well knew of the charge he had to meet and that the state intended to rely on the minimum-sentencing regime created in the Act. There was no objection that the matter was being transferred to the high court and to the prospect of a sentence of life imprisonment being imposed. There was at no stage any objection to the indictment or the summary of essential facts. During the entire process, up to the time the full court dismissed the appellant's appeal against conviction, there was never any complaint by the appellant that he was in any way prejudiced in the conduct of the proceedings. He pleaded not guilty and fully participated in the trial. He was convicted in accordance with the evidence that was led in relation to the charge of rape. It had also not been demonstrated that the appellant would have acted differently had the mistake not been made in the charge sheet.[2] The court did therefore not uphold the contention on behalf of the appellant that, as he was charged and convicted under s 51(2), it was not thereafter open to the state to invoke s 51(1) which provides for a more severe sentence.

[3] In the present matter, no mistake was made in the charge sheet. The charge sheet referred to s 51. That, in my view, was adequate warning to the appellant that the state would rely on the minimum-sentencing regime. The state was therefore entitled to rely on any of the subsections of s 51.

[4] In the present matter, as in *Kolea*, the appellant, who was legally represented at the trial, also knew what the charges were that he had to meet and that the state intended to rely on the minimum-sentencing regime created in the Act. The charge sheet relating to the rape of his daughter clearly alleged that he had raped her during the period 2000 to January 2004 and that she was a 12 year old girl. That was her age at the date of commencement of the trial. In the case of his step-daughter, the charge sheet alleged that the rape occurred during the period 1997 to January 2004 and that she was a 16 year old girl. That was also her age at the

commencement of the trial. Those allegations, if proved, would have entitled the state to ask that a sentence in accordance with s 51(1) be imposed.

[5] As in *Kolea*, there was also no objection that the matter was being transferred to the high court and to the prospect of a sentence of life imprisonment being imposed; there was also at no stage any objection to the indictment; during the entire process there was never any complaint by the appellant that he was in any way prejudiced in the conduct of the proceedings; he pleaded not guilty and fully participated in the trial; he was convicted in accordance with the evidence that was led in relation to the charge of rape; and he had also not demonstrated that he would have acted differently if the charge sheet had specifically referred to s 51(1) and not simply to s 51. The submission that the charge sheet should specifically have referred to s 51(1), and not simply to s 51, was made for the first time during the hearing of the present appeal.

[6] I conclude, therefore, that the appellant did have a fair trial and that he was not prejudiced in any way in the conduct of his trial.

[7] It then has to be considered whether the court *a quo* erred in finding that there were no substantial and compelling circumstances which justified the imposition of a lesser sentence than life imprisonment. The only circumstances relied upon by Ms van Wyk in this regard were that the appellant was a first offender and that he had spent four years in custody awaiting the finalisation of his trial.

[8] Although it is correct that the fact that an accused is a first offender can be taken into account when considering whether there are substantial and compelling circumstances which justify a lesser sentence than life imprisonment, and although the appellant was only charged with one count of rape in respect of his daughter, she testified that she was raped and indecently assaulted over a long period of time. The appellant started raping and indecently assaulting her when she was nine years old. She was repeatedly raped and indecently assaulted by her own biological father. The traumatic impact which this has had on the appellant's daughter is evident from the victim impact report. The appellant was also only charged with one count of rape of his stepdaughter, but she also testified that she was raped and indecently assaulted on many occasions over a long period of time. This happened to her while she was still in primary school. The traumatic effect which this has had on the appellant's stepdaughter is also evident from the victim impact report. The abuse by the appellant of his own daughter and of his stepdaughter are in my view seriously aggravating factors which far outweigh the factor that the appellant was first offender.

[9] It is also correct that the time which the appellant spent in custody is a factor which may be taken into account when determining whether there are substantial and compelling circumstances which justify a lesser sentence than life imprisonment. But the continued abuse by the appellant of his daughter and of his stepdaughter over many years again, in my view again far outweighs that factor. The appellant furthermore

showed no remorse and persisted to the end with his denial that he had committed the offences.

[10] The court *a quo took* all the abovementioned factors into account and concluded that there were no substantial and compelling circumstances which justified a lesser sentence. The appellant has in my view failed to show that the court *a quo* misdirected itself in so finding.

[11] In the result, I would dismiss the appeal.

J.W. LOUW

JUDGE OF THE GAUTENG DIVISION

OF THE HIGH COURT, PRETORIA

I agree

P.D. MOSEAMO

ACTING JUDGE OF THE GAUTENG DIVISION

OF THE HIGH COURT, PRETORIA

I agree, and it is so ordered

V.V. TLHAPI

JUDGE OF THE GAUTENG DIVISION

OF THE HIGH COURT, PRETORIA

footnote1