Republic of South Africa

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE No: A 180/2010

In the matter of

HENRY STEYN **Appellant**

and

THE STATE **Respondent**

JUDGMENT DELIVERED : 19 AUGUST 2010

Matter heard on 28 July 2010

Coram: Louw, Moosa et Steyn, JJ

For Appellant	: Adv P J Burgers
Attorney(s)	: Legal Aid Board (Cape Town Justice Centre)
For Respondent	: Adv A Y Allchin
Attorney(s)	: Director of Public Prosecutions

Judgment delivered by MOOSA, J

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE No: A 180/2010

In the matter of

HENRY STEYN **Appellant**

and

THE STATE **Respondent**

JUDGMENT DELIVERED : 19 AUGUST 2010

MOOSA, J:

[1] On 21 March 2000 the appellant was convicted on a charge of rape in the Regional Court held at Caledon. He was convicted together with two other accused. The proceedings in the Regional Court were stopped in terms of section 52 (1) of the Criminal Law Amendment Act, No 105 of 1997 ("the Act") and referred to the High Court for the purpose of sentence. The complainant was raped by more than one person with a common purpose. In terms of section 51 of the Act, the appellant and his co-accused qualified for life imprisonment in the absence of substantial and compelling circumstances.

[2] On 17 March 2003 the High Court found that the proceedings in the Regional Court were in accordance with justice and confirmed the conviction against the appellant and his co-accused. The court further found that there were no substantial and compelling circumstances to deviate from the prescribed sentence of life imprisonment and sentenced each of them to life imprisonment. The appellant comes to this court on appeal against his sentence with the leave of the court *a quo*. Leave to appeal against his conviction was refused.

[3] It is common cause that the charge sheet does not reflect that the charge fell under the aegis of the Act. There is no indication from the record at the commencement of the trial or during the course of the trial in the Regional Court, that the charge resorted under the provisions of the Act. It is only after the appellant and his co-accused were convicted that the Regional Magistrate indicated that the sentence he is required to impose for the offence exceeds his sentencing jurisdiction and he is obliged to refer the matter to the High Court for purpose of sentence.

[4] The court in **S v Legoa** 2003 (1) SACR 13 (SCA) at para 21, however, stated that there is no general rule that the indictment must *"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".* According to the court, the essential issue to be dealt with is whether the accused's *"substantive fair trial right, including his ability to answer the charge, has been impaired".*

[5] The facts in **S v Legoa** (*supra*) are briefly that the accused, who had legal representation, after having been charged with the offence of dealing in dagga, pleaded guilty to such offence. The charge sheet made no mention of the value of such dagga

and only referred to penalties under the Drugs and Drug Trafficking Act 140 of 1992. However, the trial court convicted the accused and sentenced him under the minimum sentence provisions section 51 (2) (a) (i) of the Act. The Supreme Court of Appeal set aside the prescribed minimum sentence and at para 27 held as follows:

> *"The appellant was not warned that the minimum sentencing legislation might be invoked. In fact, the charge-sheet misled him as to the applicable penalty by referring only to the 1992 Act. The trial court, in convicting him, did not question him or satisfy itself (as enjoined by* ***Ramsbottom JA****) as to the elements of the form of the offence to which he was pleading guilty. It was therefore highly unfair to confront the appellant thereafter with the minimum sentences."*

[6] The court in **S v Ndlovu** 2003 (1) SACR 331 (SCA) at para 12, after referring to **S v Legoa** *(supra)* stated the following:

> *". . . 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."*

[7] The facts in **S v Ndlovu** (*supra*) are that the accused, who was legally represented at his trial, was charged with unlawful possession of a firearm and ammunition. The accused was found guilty of the charge, and the magistrate, finding that the weapon was a semi-automatic firearm, sentenced the accused to 15 years imprisonment in terms of s 51 (2) (a) (i) of the Act. Apart from a reference in the charge sheet to section 50 of the Act, which in any case did not relate directly to the imposition of a minimum sentence, the accused was at no stage pertinently warned that he was in danger of being sentenced in terms of the minimum sentence legislation. The learned judge in the appeal at para 14, p 337 found that this failure "*constituted a substantial and compelling reason why the prescribed sentence ought not to have been imposed".*

[8] In **S v Makato** 2006 (2) SACR 582 (SCA) at para 5, the learned judge confirmed the court's approach in **S v Legoa** *(supra)* and **S v Ndlovu** (*supra*) that *"the relevant sentence provisions of the Act must be brought to the attention of an accused in such a way that the charge can be properly met before conviction".* The court went on to state at para 7 that: *"As a general rule, where the State charges an accused with an offence in terms of 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".*

[9] I must, however, hasten to point out that, where a court has found that substantial and compelling circumstances exist to deviate from the prescribed minimum sentence, then, in that event, the trial would not have been unfair despite the fact that the provisions of the Act have not been brought to the attention of the accused. The

rationale for that proposition is to be found in the fact that the accused would have suffered no prejudice as the court found that there were substantial and compelling circumstances to depart from the minimum prescribed sentence.

[10] It appears that the decisions of **S v Ndlovu** (*supra*) was not reported at the time this matter came before the court *a quo* for sentence. **S v Legoa** (*supra*), while reported at such time, was not brought to the notice of the Court *a quo*. On the principles enunciated in those cases as well as the case of **S v Makatu** (*supra*), I am of the view, that the court *a quo,* should have found that the state: *"By involving 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"*. In the circumstances the court *a quo* should have held that the appellant suffered prejudice and the omission *"constituted a substantial and compelling reason why the prescribed sentence ought not to have been imposed".*

[11] In view of the conclusion I have reached, I am of the view that there are substantial and compelling circumstances to deviate from the prescribed minimum sentence of life imprisonment and this court is entitled to sentence the appellant afresh. In doing so, I take into consideration the personal circumstances of the appellant: Firstly, the appellant was a youthful offender at the time of the commission of the offence. It appears that he was 22 years old at the time. He was 23 years old when he was convicted and 25 years old when he was sentenced. Secondly, he is a first offender and there is no evidence that the offence was premeditated. Thirdly, he passed standard 7, was in productive employment as a tractor driver on a farm and supported three children who were dependent on him. Fourthly, he was an awaiting-trial prisoner for two years.

[12] The court *a quo* in my view correctly found that: *"The circumstances in which the crime was committed were of a serious nature involving, inter alia, rape of the complainant (accused number 2 is the father of her own child) by accused numbers 1 and 3, in the presence of accused number 2, in a very humiliating and dehumanising manner".* In addition thereto what aggravates the matter further is the fact that she was threatened with a knife. In dealing with the incidence of the crime of rape within the jurisdiction of the court, the court *a quo* said: "*Rape is a serious offence and undoubtedly in the Western Cape in particular, crimes of this nature are on the rise".*

[13] I align myself with the observation of the court *a quo* when it considered the interests of the community. It said: *"The second factor that a court will take into account is the need to protect the interests of the community. There is no doubt in my mind that the community out there is crying out for protection from criminals who commit such violent crimes in a ruthless manner. Clearly the court would be failing in its duty if it ignored the interests of the community and the expectations and demands of the community with regard to the crimes of this nature".*

[14] Taking into consideration all the circumstances and factors pertaining to sentence, including but not limited to the seriousness of the offence, the interests of the community, the personal circumstances of the appellant, the fact that the appellant was in custody as an awaiting-trial prisoner in this matter for approximately two years and the various sentencing options open to the court, I am of the view that an appropriate sentence would be one of 16 years imprisonment. In the circumstances the appeal against the sentence in respect of the appellant should succeed and the sentence of life

imprisonment should be substituted by one of 16 (sixteen) years imprisonment.

E MOOSA

STEYN, J: I agree.

……
E T STEYN

LOUW, J: I agree and it is so ordered.

……
W J LOUW