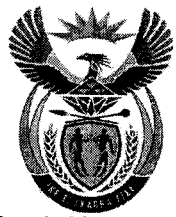

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

Case number: A630/10

In the matter between:

DEON DOY HENDRICKS Appellant

versus

THE STATE Respondent

JUDGMENT delivered this 23rd day of August 2011

NDITA, J:

[1] On 5 March 2001the appellant and his two erstwhile co-accused were convicted in the regional court, Caledon on a charge of rape. The case was then referred to the High Court in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997. Upon referral, Hlophe JP

confirmed the conviction and proceeded to sentence the appellant to a life term of imprisonment. With the requisite leave granted by Hlophe JP, the appellant now appeals against the sentence imposed on 17 March 2003. However, leave to appeal against the conviction was refused.

[2] The events giving rise to the conviction took place on 21 March 2000. During that period, the appellant and the complainant, Sara Buys, were involved in an intimate relationship and had a three year old child. On the day in question, the two were at their residence at High Noon hostel seated on a bed conversing, when the then accused no 3, Daniel Fortuin, arrived. Shortly, after his arrival, erstwhile accused no 1, Henry Steyn also arrived. The complainant testified that she felt uneasy by the manner in which the accused persons entered the house. She stood up from the bed but Henry grabbed her. At that point, sensing that she was in trouble, she walked towards the appellant with the hope that he would intervene on her behalf. The appellant however tripped her and she fell to the ground. As she was lying on the ground, Henry and Daniel took turns and had sexual intercourse with her without her consent. As the two men were violating her, the appellant was lying on a sponge mattress having an open knife in his possession. Whilst Daniel was raping her the appellant urged him to stab her saying *"Steek sommer die ding"*. It is common cause that the appellant did not have sexual

intercourse with the complainant. After the ordeal, the complainant got an opportunity to escape and report the incident to Anneta Theunissen.

[3] In an appeal to this Court, constituted of Louw J, Moosa J and Steyn J, the sentence of the appellant's first co-accused, Henry, was reduced to an effective period of 16 years imprisonment.

[4] Daniel Fortuin, who was accused no 3 at trial, applied for leave to appeal against the sentence imposed on him. Leave to appeal against sentence imposed on him was granted by Hlophe JP on 28 April 2010. As at the time the appellant's appeal was enrolled for hearing, no date had as yet been allocated for hearing of an appeal noted by Daniel Fortuin.

[5] The parties agreed that it would be in the interests of justice for the court to consider an appeal against sentence in respect of both the appellant and Daniel Fortuin simultaneously as the facts are not only identical but also arise from the same trial. Indeed the dictates of justice and fairness demand that there be uniformity of sentences, more so that the full bench has already reduced the sentence in respect of erstwhile accused no 1, Henry. Thus, in this appeal, the court ruled that although an appeal in respect of Daniel Fortuin had not as yet been enrolled for

hearing, an appeal against the sentence imposed on him would be considered simultaneously with this appeal.

[6] On receipt of the record, this Court requested counsel to file supplementary heads of arguments dealing with the following questions:

(a) whether it is open to the court to reconsider the conviction of the appellant.

(b) if so, whether the appellant was correctly convicted of rape in the light of the fact that he did not physically have sexual intercourse with the appellant.

Both counsel for the state and the defence filed extensive heads of argument dealing with the above questions, for which we are grateful.

[7] It appears to be settled law that if the trial judge grants leave against the sentence but not against the conviction, the full bench is on appeal precluded from considering an appeal against conviction as the appellate jurisdiction is not an inherent one. (See **S v Langa** 1981 (3) SA 186 a AT 189 E-H; **S v Van der Merwe** 2009 (1) SACR 673 SCA ; **S v Zulu** 2003 (2) 22 SCA) Thus, this court must consider the appeal against sentence only.

[8] The court a quo, in sentencing the appellant, invoked the provisions of Criminal Law Amendment Act, No.105 of 1997 ("the Act"). Section 51 (1) read with Part 1 of Schedule 2 of the Act provides that, unless substantial and compelling circumstances exist that justify the imposition of a lesser sentence, a court shall sentence to life imprisonment a person convicted of the crime of rape where it was committed by two or more persons. It came to the conclusion that there were no substantial and compelling circumstances justifying a departure from the ordained minimum sentence and imposed a sentence of life imprisonment. It is a firmly established principle that a court of appeal will not interfere with the sentence imposed by the trial court unless it is strikingly or disturbingly inappropriate or tarnished by a material misdirection.

[9] The appellant's counsel assailed the sentence imposed on the basis of numerous factors, the most significant of which is that the appellant was not apprised of the sentencing regime that the state intended to rely on. Since the enactment of the Act, there is judicial harmony that it is incumbent on the State to specify the case to be met such that an accused appreciates not only the charges but also the consequences in the event of a conviction. In **S v Legoa** 2003 (1) SACR 13 (SCA) at 24 b-c the Court held that:

"To ensure a fair trial it is advisable and desirable, highly desirable in the case of an undefended accused, that the charge sheet should refer to the penalty provision. In this way it is ensured that the accused is informed at the outset of the trial, not only of the charge against him, but also of the State's intention at conviction and after compliance with specified requirements to ask that the minimum sentence in question at least be imposed."

The Court further held that the essential question to be asked is whether the accused's right to a substantive fair trial, including his ability to answer to the charge, has been impaired. Similarly in **S v Ndlovu** 2003 (1) SACR 331 (SCA) at 337 a-c, the court re-affirmed the principles laid down in **Legoa** (supra) and stressed that the relevant sentence provisions of the Act must be brought to the attention of the accused in such a way that the charge can be properly met before conviction. Mpati JA said:

"The enquiry, therefore, is whether, on a vigilant examination of the relevant circumstances, it can be said that an accused 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 accused at the outset of the trial, if not on 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 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."

The court set aside the minimum sentence imposed since the appellant had not been pertinently warned that the minimum sentence might be imposed, rendering the trial, in that respect substantially unfair.

[10] In the present matter, there is nothing on the record, whether by way of the indictment, the summary of substantial facts, the evidence led, or the conduct of the appellant or his legal representative which satisfies me that the appellant was aware of the State's intention to invoke the provisions of the Act. However, not every misdirection warrants interference with the sentence imposed by the trial court; it has to be material i.e. which "according to the dictates of fairness and justice" engenders a clear conviction that an error of such a nature, degree or seriousness has been committed that it shows directly or indirectly that the trial court failed to properly exercise its discretion as regards sentence. (See **S v Kibido** 1998 (2) SACR 213 (SCA) at 216 h-j).

[11] The application of the provisions of the Act at sentencing stage by the trial court, in my view, constitutes a misdirection warranting the setting aside of the sentence and requiring the appeal court to

consider the sentencing process *de novo*. Clearly, in considering the sentence afresh, this court cannot invoke the provisions of the Act. It is therefore not necessary to consider whether there are substantial and compelling circumstances justifying a departure from the ordained sentence of life imprisonment.

[12] I now proceed to determine what an appropriate sentence is in this case. Although the appellant did not physically violate the complainant, and even if one accepts that every person must be sentenced for what he/she has done, his conduct and attitude towards the complainant must be considered in order to determine a proper sentence. The complainant was visiting the appellant and rightfully expected him to protect her in the impending attack. Not only did he trip her, causing her to fall, he lay on a mattress wielding a knife whilst his co-accused took turns in subjecting the complainant to the ultimate humiliating and degrading experience. In addition, whilst the complainant, the mother of the appellant's child, was being raped by Daniel, he impressed upon him to stab her, referring to her as a *'thing'*. His conduct is morally abominable and repulsive.

[13] In addition to these aggravating factors is the gravity of the offence itself. The Supreme Court of Appeal in **S v Chapman** 1997 (2) SACR 3 (SCA) described rape as follows:

"Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation.

Women in this country are entitled to the protection of these rights... The courts are under a duty to send a clear message to the accused, to other potential rapists and to the community. We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights."

Nugent JA, in **S v Swart** 2004 (2) SACR 370 (SCA) at paragraph 17 qualified the above comments by stating that the court did not intend to suggest that the quality of mercy, an intrinsic element of civilised justice, should be altogether overlooked, but rather meant to emphasize that retribution and deterrence will come to the fore in relation to such crimes.

[14] Having said all of the above, it must be emphasized that justice is always blended with a measure of mercy. The appellant was at the time of conviction 31 years old and although he has a previous conviction, more than 10 years had since passed since such conviction.

He was incarcerated for more than three years before serving the actual sentence.

[15] I am satisfied, having had regard to all the relevant considerations, that an effective sentence of 16 years imprisonment is appropriate in the circumstances of this case.

[16] With regard to Daniel Fortuin, the record reflects that he was born on 2 May 1980 and was therefore 21 years old at the time of conviction for rape. No previous convictions are recorded against him. It must be stated that Daniel was the youngest of the group. He also was incarcerated for more than 3 years before being sentenced. I am of the firm view that a sentence of 16 years is appropriate when all the above circumstances are considered.

[17] In the result, I propose the following order.

The appeal against sentence is upheld and the sentence imposed by the trial court is set aside and is substituted with the following:

"The appeal against sentence is hereby upheld. The appellant and Daniel Fortuin are sentenced to undergo a period of imprisonment of sixteen (16) years."

NDITA: J

I agree.

YEKISO: J

I agree and it is so ordered.

LOUW: J