IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

In the review of V52/102/2005

6/2/2006

THE STATE Applicant

and

MOJAFELA PAULOS SELEPE Accused

REVIEW JUDGMENT

HARTZENBERG J:

[1] The accused was found guilty of rape in the regional court at Sebokeng. The magistrate stopped the proceedings and referred the matter to this court for sentence in terms of the provisions of section 52(1) of Act 105 of 1997[1], the Criminal Law Amendment Act ("the Act"), which provides for certain minimum sentences for specified offences. The matter has now been referred to this court by the Director of Public Prosecutions as a special review, in terms of the provisions of section 304(4) of Act 51 of 1977, the Criminal Procedure Act (the CPA) with a request that it be remitted to the regional court for imposition of sentence. This court is also requested to consider the question, whether a magistrate who has referred a matter to the high court for sentence, and thereafter learns that he/she should have sentenced the accused, is entitled, without the matter being remitted by the high court to that court, to sentence the accused.

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[1] The relevant portion of the section reads:

"(1) If a regional court, following on -

(a) a plea of guilty; or

(b) a plea of not guilty

has convicted an accused of an offence referred to in -

(i) Part I of Schedule 2; or

(ii) ……

the court shall stop the proceedings and commit the accused for sentence as contemplated in section 51(1) or (2), as the case may be, by a High Court having jurisdiction."

[2] The accused was 17 years old when he committed the offence. The complainant was 10 years old at the time. Rape of a woman under the age of 16 years is one of the offences contained in Part I of Schedule 2 to the Act. The relevant provisions of section 51 of the Act are:

> *"(1) Notwithstanding any other law but subject to subsections (3) and (6) , a High Court shall –*
>
> *(a) if it has convicted a person of an offence referred to in Part I of Schedule 2; or*
>
> (b) *if the matter has been referred to it under section 52(1) for sentence after the person concerned has been convicted of an offence referred to in Part I of Schedule 2,*
>
> *sentence the person to imprisonment for life.*
>
> ……
>
> *(3) (a) 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 may thereupon impose such lesser sentence.*
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> *(b) If any court referred to in subsections (1) or (2) decides to impose a sentence prescribed in those subsections upon a child who was 16 years of age or older, but under the age of 18 years, at the time of the commission of the act which constituted the offence in question, it shall enter the reasons of its decision on the record of the proceedings.*
>
> ……
>
> *(6) The provisions of this section shall not be applicable in respect of a child who was under the age of 16 years at the time of the commission of the act which constituted the offence in question."*

[3] It is clear that the section provides that the minimum sentence for rape of a girl under the age of 16 years is life imprisonment which is to be imposed by a high

court, unless subsections 3 or 6 are applicable. In terms of subsection 6 the minimum sentence is not applicable to a child younger than 16 years. The minimum sentence need also not be imposed, in terms of subsection 3(a) when the court is satisfied that substantial and compelling circumstances exist which justifies the imposition of a lesser sentence[2].

[4] The problem to be addressed is what the import of subsection 3(b) is in matters heard in regional courts where the accused persons were between 16 and 18 years at the time when they committed the offences. There were conflicting views: In *S v Nkosi*, 2002 (1) SACR 135 (W) Cachalia J, expressing the views of the full bench, distinguished between subsections 3(a) and 3(b) on the basis that in order to impose a lesser than the minimum sentence in terms of 3(a) a court must find substantial and compelling circumstances to do so whereas in the case of a person between 16 and 18 years of age the court can impose a lesser sentence in terms of 3(b) without finding substantial and compelling circumstances. If it imposes a minimum sentence on a person between 16 and 18 years of age it has to justify its decision by entering its reasons on the record. In *S v Blaauw*, 2002 (1) SACR 255(C) van Heerden J held that a court was not obliged to impose a minimum sentence on a child of 16 or 17 unless the State satisfied the court that the circumstances justified the imposition of such a sentence. In *Direkteur van Openbare Vervolgings, Transvaal v Makwetsja,* 2004 (2) SACR 1 (T), Bertelsmann J, expressing the judgment of the full bench, said that minimum sentences are also applicable in the case of children of 16 and 17 years, but that a court will readily find that youthfulness *per se* is a substantial and compelling circumstance. In extreme cases though the minimum sentences are to be imposed. The court is just to make doubly sure that that is the correct sentence. In paragraph 49 of the judgment it is stated that in all cases of a conviction of an offence contained in Part I of Schedule 2 the regional court is obliged to refer the matters to the high court for sentence, also in the case of children of 16 or 17 years of age.

[5] In the matter of *Brandt v The State*, No.513/03, the SCA compared the judgments. Ponnan AJA, who gave the unanimous judgment of that court, said that the Act envisages two categories of child offenders, those under 16, to whom the Act

[2] What constitutes substantial and compelling circumstances is not relevant for the purposes of this judgment. See however S v Malgas, 2001 (1) SACR 469 (SCA).

does not apply because of the provisions of section 51(6), and those between 16 and 18 years of age[3]. The Act applies to adults and children between 16 and 18. In the case of adult offenders the minimum sentence, a standardized severe sentence, of life imprisonment is to be imposed unless substantial and compelling circumstances exist to impose a lesser sentence[4]. For offenders between the ages of 16 and 18 years of age the court starts with a clean slate. The court must bear in mind that the legislature regards the offence as particularly serious but is at large to impose the sentence that it ordinarily would have imposed. Although it may impose life imprisonment it is not obliged to do so[5]. He proceeded in paragraph 12 to say:

> *"The effect of the provision is thus that s51(3)(b) automatically gives the sentencing court the discretion that it acquires under s51(3)(a) only where it finds substantial and compelling circumstances. It follows that the 'substantial and compelling' formula finds no application to offenders between 16 and 18. A court is therefore generally free to apply the usual sentencing criteria in deciding on an appropriate sentence for a child between the ages of 16 and 18."*

[6] *Brandt* was tried in a high court and not in a regional court. The interpretation of the Act applies equally to matters heard in high courts and matters heard in magistrate's courts. It follows that when a regional magistrate convicts an offender of between 16 and 18 he/she is entitled and obliged to consider what an appropriate sentence is. Only when in his/her view the appropriate sentence exceeds the court's jurisdiction will it be necessary to invoke the provisions of section 52(1). Otherwise the court must finalise the matter and sentence the accused. In the present matter the magistrate let the accused out on warning pending the sentence by the high court. It is highly unlikely that she regarded a sentence beyond her jurisdiction as appropriate. She has indeed requested the Director of Public Prosecutions to have the matter referred back to her for sentence.

[7] As to the question whether a magistrate may unilaterally set aside his/her referral to the high court and deal with the matter as if no such referral had been made

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[3] Paragraph 9.
[4] Paragraph 10.
[5] Paragraph 11.

I can understand the eagerness of Ms. Wait of the Director of Public Prosecutions' office to have a high court say that that is in order. If that is the position no order need to be made. The record of the proceedings in the regional court is approximately 120 pages. It had to be typed. There is a delay as a result of this review. In matters where it transpires shortly after the magistrate has referred the matter to the high court that the matter should have been finalised in the magistrate's court the compilation of a record may be avoided. Unnecessary court time in both courts may be avoided.

[8] Ms. Wait has referred to *S v Snell*, 2002 (2) SACR 368 (EDC), *S v Mokoena*, 2005(2) SACR 280 (O), *S v Stoffels*, 2004(1) SACR 176 (C) and *Firestone South Africa (Pty) Ltd. v Genturico A.G.*, 1977 (4) SA 298 (A) as authority for her contention. In the *Genturico* matter Trollip J A stated at 306 F-G:

> *"The general principle, now well established in our law, is that, once a court has duly pronounced a final judgment* ***or order*** *it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes* ***functus officio****: its jurisdiction in the case having been fully and finally exercised, its authority over the subject-matter has ceased."*
>
> (My emphasis)

The learned judge went on to explain that there are a number of exceptions to the rule and that it is possible that the number may be increased. It is not necessary to discuss the exceptions because they are not relevant in this particular matter. I may indicate that in the *Snell* matter, *supra* the court relied on the first exception mentioned i.e. that the principal judgment or order may be supplemented in respect of accessory or consequential matters.

[9] Section 52(1) provides that the court "shall stop the proceedings and commit the accused for sentence". To do that the court must make an order. By that order the court has finally exercised its jurisdiction. There is nothing more that it can do. It is *functus officio*. The case is no longer in the jurisdiction of the magistrate's court. It is in the jurisdiction of the high court. The high court can remit it to the court *a quo.* It follows that in my view the magistrate was correct to insist upon a remittal of the matter to her.

The following order is made:

1. The referral of the matter in terms of section 52(1) of Act 105 of 1997, to the high court, is set aside.
2. The matter is sent back to the court *a quo* to sentence the accused.

……..
W J HARTZENBERG
JUDGE OF THE HIGH COURT

I agree.

…….
W J VAN DER MERWE
JUDGE OF THE HIGH COURT