Not reportable

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

APPEAL NO: 15/06

In the appeal between:-

APRIL NKADIMENG Appellant

and

THE STATE Respondent

JUDGMENT

1. The appellant, 19 years of age at the time of the hearing, was found guilty on a charge of rape on a girl, 17 years of age. He was sentenced to 10 years imprisonment, being the minimum sentence prescribed for such an offence in view of the provisions of sec 51 (2)(b) of Act 105 of 1997. He was furthermore declared unfit to possess a fire-arm by virtue of the provisions of section 103 of Act 60 of 2000.

2. The appellant initially abandoned an application for leave to appeal to the court a *quo.* He subsequently changed his mind and renewed an

application for leave to appeal, coupled with an application for condonation. The court a *quo* refused to grant condonation. An application for leave to appeal to the Judge President of this court, rendered the following orders, quoted *verbatim:*

2.1. Convictions - no prospects of success on appeal;

2.2. Sentence - there are prospects of success on appeal.

3. In our view it is clear that leave had only been granted to appeal against the sentence. Mr Kekana, on behalf of the State, held a similar view and did not address

the issue of the merits of the conviction in his heads of argument or in oral argument. However, Mr Barnard, on behalf of the appellant in these proceedings, fully dealt with the merits. His explanation for this approach was that, due to previous similar experiences, he feared criticism should he not address the merits.

4. In our view we cannot deal with the appeal against the conviction.

5. Mr Barnard, however, raised one issue which is in the nature of a review ground which, if found to exist in law, may vitiate the entire proceedings. The submission is that the appellant was possibly not 8rpralsed . of the-risk of the minimum sentence which was ultimately imposed and the appellant suggested that this court should investigate

whether such risk was conveyed to the appellant. In support of the contention Mr Barnard cited S v *Mnguni* 2002(1) SACR 294(T).

6. One would have expected the appellant, had he been serious about the point, to at least refer thereto in the notice of appeal or filed an affidavit making the allegation that his rights were not explained to him. On a factual basis, only the following is evident from the record before us:

> 6.1. the charge sheet contained a clear reference to the provisions of sec 51 (2) of the Criminal Law Amendment Act 105 of 1997;
>
> 6.2. the appellant was legally represented at every stage of the proceedings except for the application for condonation for leave to appeal;
>
> 6.3. After the court a *quo* found the appellant guilty, the following passed between the court and the appellant's legal representative:
>
> COURT: Thank you Mr Pienaar. I don't know whether you first want to consult with your client. There are minimum sentences involved.
>
> **Defense:** I understand your worship. I have not informed the

accused about the minimum sentence and I do not know if it was told to him at the start of the case.

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COURT: Yes the accused was defended so the court did not inform him as such. I cannot speak on behalf of Mr Matsane. What I do know is in the charge sheet itself it says that the accused is guilty of the crime of rape, rape read with the provisions of Section 51 (2) of the Criminal Law Amendment Act, Act 105 of 1997. So the State referred to it in the charge sheet itself.

Defense: With respect your worship I don't think at this late stage it will make any difference if the accused was (inaudible) or not. ..

7. Mr Pienaar proceeded to address the court on the issue of sentence.

8. The legal position seems to us to be settled, at least insofar as legally represented accused persons in the position of the appellant are concerned. The overriding principle is that an accused must have the benefit of a constitutionally guaranteed fair trial (5 v *Ndlovu* 2003(1) SACR 331 (SCA)). Ordinarily, but not always, a reference to the possibility of a minimum sentence in a charge sheet should suffice for the unrepresented accused (paragraph [11]). The accused must be given sufficient notice of the State's intention to enable the accused to conduct his/her defence properly (paragraph [12].)

9. It is accordingly understandable that a judicial officer has a duty to ensure that an unrepresented accused knows the gravity of a finding of guilty on a charge which may carry "the minimum sentence. It will *inter alia* place the accused in a position whether or not to engage a legal representative whose expertise to cross-examine amongst other things,

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should contribute to a fair trial. See S v *Ndlovu;* S v *Sibisi 2005 (2)* SACR 645 (W); S v *Ndlovu* 2004(2) SACR 70(VV). The judgment relied upon by the

appellant falls in this category and is accordingly not of any assistance to him.

10. However, once the accused is legally represented, a court is relieved of that duty: see S v *Mve/ase* 2004(2) SACR 531(W) 535f-j.

11. We are satisfied that no irregularity occurred in this instance and that the appellant enjoyed a fair trial.

12. It remains to deal with the appeal against sentence.

13. The court a *quo* took into account the relative youthfulness of the appellant, but declined to elevate that singular fact to a substantial and compelling circumstance which would justify the imposition of a lesser sentence than the sentence prescribed by the relevant subsections of sec 51(2) of Act 105 of 1997.

14. The minimum sentence prescribed by sec 52(2)(b) read with Part III of Act 105 of 1997, is 10 years.

15. We are unconvinced that the relative youth of the appellant should be regarded as a substantial and compelling circumstance which would justify the imposition of a sentence of less than the prescribed 10 years. Mr Barnard vaguely raised his unease regarding the merits of the matter as a factor to be taken into account but conceded that such a factor could also not assist the appellant's case on sentence.

16. We are satisfied that the court a *quo* did not err in imposing the sentence which it did. We cannot find on the facts that any circumstance exists as required by sec 51 (3) of Act 105 of 1997 justifying a sentence shorter than 10 years.

Under the circumstances the appeal against the sentence is dismissed.

J I DU TOIT SC
(Acting Judge of the High Court of South Africa)

I agree

P ELLIS SC

(Acting Judge of the High Court of South Africa)