



**IN THE HIGH COURT OF SOUTH AFRICA  
NORTH WEST PROVINCIAL DIVISION, MAHIKENG**

**CASE NO: CAF 23/2015**

**In the matter between:**

**BILLY KAU**

**APPELLANT**

**And**

**THE STATE**

**RESPONDENT**

**LANDMAN J; GURA J & DJAJE AJ**

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**JUDGMENT**

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**Landman J:**

**Introduction**

[1] Billy Kau, the appellant was charged in the Regional Magistrate's Court sitting at Mogwase with the rape of an eight year old girl. He conducted his own defence. He was convicted and the proceedings were referred to this High Court to impose sentence in terms of section 52 of the Criminal Law Amendment Act 105 of 1997. The case came before Hendler J who sentenced the appellant to life imprisonment. Leave to appeal was given by another judge of this Division.

[2] The appellant appeals against both conviction and sentence.

**Appeal against conviction**

[3] For the reasons that appear below it is inadvisable to consider the appeal against conviction.

**Appeal against sentence**

[4] I have already mentioned that the learned Regional Magistrate stopped the proceedings after conviction and referred the matter to the High Court for sentencing as he was obliged to do at the time.

[5] The sentencing judge did not comply with the *audi alteram partem* rule implicit in the provisions of section 52(3)(b) of the Criminal Law Amendment Act of 1997. He did not formally record that in his opinion the proceedings were in accordance with justice nor did he formally confirm the conviction before proceeding to consider the imposition of sentence. The Supreme Court of Appeal has ruled that it is irregular not to do so. See **S v Tshimbudzi** 2013 (1) SACR 528 (SCA) at para 4 where it was said that:

‘The failure by the court below to confirm that the proceedings were in accordance with justice means that the conviction cannot stand subject to the possibility of a remittal to the high court which will be considered below.’

[6] Although the passage seems to indicate that this failure by a sentencing court has the legal effect that the conviction cannot stand, it may be that a breach does not have such an effect if other facts point to the accused having received a fair trial and this includes the sentencing process. The proceedings in **S v Tshimbudzi** were so riddled with irregularities that it was probably unnecessary for the Supreme Court of Appeal to ask the question whether, in spite of the sentencing court’s failure to adhere to section 52(3)(b), the sentencing process was fair.

[7] But it is more probable that the decision in **S v Tshimbudzi** is based rather on substantive grounds than procedural grounds. It would be an anathema for a judge to sentence an accused should the judge not be satisfied that the

conviction, whether arrived at by the judge or a Regional Court Magistrate, as in the now defunct referral system, is in accordance with justice. The legislature recognized and gave effect to this in section 52(3)(b) by permitting the court to inquire whether the conviction was in accordance with justice; and, if not, make the necessary inquiries and, if still not satisfied, the court would not confirm the conviction but make an appropriate order in terms of section 52(3)(e)(ii) to (vi). If, after making the inquiries, the court was so satisfied, the court was enjoined to place this on record by confirming the conviction. However, the injunction to confirm the sentence does not appear in section 52(3)(b) (where the court is satisfied that the conviction is in accordance with justice and makes no inquiries) but clearly this is what the court must do.

[8] In the appeal before this court, the sentencing court did not advise the appellant, who had declined legal representation, about the seriousness of the matter and the benefits to be derived from competent legal representation. Importantly, the sentencing court did not inform him that he was permitted to advance reasons why his conviction was not in accordance with justice. When he raised a query, the sentencing court, did not take the opportunity to advise him, but said, *inter alia*:

‘You can apply to the Legal Aid Board to lodge an appeal against your conviction if you so wish. I can assure you that your chances of success are negligible because I read the record.’

[9] These omissions constitute a grave irregularity which means that the appellant was not afforded a fair sentencing process.

[10] The irregularity is compounded because the sentencing court proceeded to sentence him in accordance with section 51(1) of the Criminal Law Amendment Act of 1997 even though this Act was not referred to in the charge sheet and was only mentioned at the end of the trial in the Regional Court. It was therefore not competent for the sentencing court to apply this Act. See **S v Legoa** 2003 (1) SACR 13 (SCA); **S v Ndlovu** 2003 (1) SACR 331 (SCA) and **S v Makatu** 2006 (2) SACR 582 (SCA).

### **The relief**

[11] This raises the issue what is to be done to rectify the matter. Strictly speaking the sentence should be set aside and remitted to a single judge to impose sentence afresh, as the sentencing judge has long since retired. But the sentence was imposed in March 2003 and although a sentence may be antedated this could result in the appellant being detained in custody although this could be avoided. On the other hand this court could possibly decide the appeal against his conviction and impose the sentence that the sentencing court should have done. The drawback to this procedure is that the appellant would be denied a first opportunity to convince a single judge that the conviction is not in accordance with justice.

[12] It seems to me that the proper way to decide this appeal is to do so conventionally. This requires this court to desist from deciding the appeal against conviction; to remit the case to a single judge to decide whether the conviction is in accordance with justice and, if so, impose sentence afresh, bearing in mind the time served and applying all the measure that may be taken to curtail any further injustice.

[13] I would be obliged if Mr Skibi would explain the purport of this judgment to the appellant and advise him to retain the services of a legal representative to represent him at the sentence hearing.

### **Order**

[14] In the result I make the following order:

1. The appeal against conviction is removed from the roll.
2. The appeal against sentence is upheld.
3. The matter is remitted for a single judge of this Division to consider whether the conviction is in accordance with justice and, if the conviction is confirmed, to sentence the appellant afresh bearing in mind all the considerations that apply to this matter.
4. The appellant is to be liberated immediately and he is to be informed that he may be warned to appear in the High Court on a day and time fixed by the office of the Judge President for sentence.

**A A Landman**  
**Judge of the High Court**

**I agree**

**Samkelo Gura**  
**Judge of the High Court**

**I agree**

**T J Djaje**  
**Acting judge of the High Court**

**APPEARANCES:**

Date of Hearing: 20 November 2015

Date of Judgment: 10 March 2016

For the Appellant: Adv Skibi instructed by the Mafikeng Justice Centre

For the Respondent: Adv T Moetaesi instructed by the  
Director of public Prosecutions