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

CASE NUMBER: CA29/2022

In the matter between:-

ARMSTRONG MONGEZI WITBOOI Appellant

and

THE STATE Respondent

***Quoram*: Samkelo Gura J et FMM Reid J (was Snyman)**

DATE OF HEARING: 05 AUGUST 2022

DATE OF JUDGMENT: 30 MAY 2023

FOR THE APPELLANT: ADV TG GONYANE

FOR THE RESPONDENT: ADV MF RASAKANYA

INTRODUCTION

[1] The appellant, who was accused number 1, was convicted in the Regional Court together with his co-accused (accused 2) of rape and each of them was sentenced to life imprisonment. The appeal by accused 2 has already been finalized. The appellant now also appeals against his sentence of life imprisonment on the

ground that the charge sheet did not refer to section 51 (1) of the ***Minimum Sentences Act***[1] .

[2] The evidence before the Regional Court was that the appellant and his co-accused had raped a fellow inmate whilst they were all in detention in prison. The trial court convinced him "as charged". In the course of judgment on sentence the Regional Court found that there were no "compelling and exceptional circumstances" which justified a lesser sentence and it accordingly imposed imprisonment for life.

[3] It is trite law that where the state relies on section 51 of the Minimum Sentences Act, specific reference thereof must be made in the charge sheet. In *casu* there is no reference to section 51 (1) part 1 of schedule 2 of Act 105 of 1997 in the charge sheet. The legal position in this regard has been emphasised in a number of decisions. In **S v Makatu**[2] the court said:

"[7] As a general rule, where the State charges an accused with the offence governed by 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. Such knowledge inevitably dictates decisions made by an accused, such as whether to conduct his or her own defence; whether to apply for legal aid; whether to testify; what witness to call and any other factor that may affect his or her right to a fair trial. If during the course of trial the State wishes to amend the indictment it may apply to do so, subject to the usual rule in relation to prejudice".

[4] In **S v Ndlovu**[3] the Court held that where the State intends to rely upon the sentencing regime created by section 51 of Act 105 of 1997, a fair trial will generally demand that its intention be pertinently brought to the attention of the accused at the outset of the trial. If this is not done in the charge sheet, then it must be done in some other form, so that the accused is placed in a position to appreciate and in

[1] ACT 105 OF 1997
[2] 2006 (2) SACR 582 (SCA) at para 7
[3] 2003 (1) SACR 331 (SCA)

good time the charge that she or he faces as well as the possible consequences. What is at least required is that the accused be given sufficient notice of the State's intention to enable the accused to conduct his or her defence properly. The least that is required is that the prosecution should give the accused sufficient notice of its intention to rely on the minimum sentence requirements.

[5] The charge sheet set out the rape count against the appellant as follows:

"THAT the accused is/are guilty of the crime of contravening the provisions of Section 3 read with Sections 1, 56(1), 57, 58, 59, 60 and 61 of Act 32 of 2007. Also read with sections 256 and 261 of the Criminal Procedure Act 51 of 1977-

RAPE (**read with the provisions of Sections 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended**)

IN THAT on or about the 10 February 2010 and at or near Rustenburg Prison in the Regional Division of North West the said accused did unlawfully and intentionally commit an act of sexual penetration with the complainant to wit, A[...] K[...] by having anal intercourse with him without the consent of the said complainant".

[6] In the current case the charge sheet has no reference to section 51 (1) of the Minimum Sentence Act. Secondly, the appellant, who was not legally represented at the trial, was not warned in terms of the said Act. In my view the imposition of life imprisonment by the Regional Court constituted a gross irregularity[4]. The sentence has to be set aside and this Court is at large to consider sentence *de novo.*

[7] The appellant is not a first offender as appears from the SAP 69 which formed part of the record before the Regional Court. On 27 November 2008 he was convicted on two charges: murder and theft. On the former he got twenty years whilst on theft he was sentenced to five years imprisonment. The latter sentence (of five years) was to run concurrently with the sentence of twenty years. On 23 April 2009 he was convicted of escaping from lawful custody for which he was sentenced

[4] See in this regard Machongo vs S
(20344/14) (2014) ZASCA 179(21 November 2014).

to three years' imprisonment. During that very same year (2009) in September he was convicted of robbery and sentenced to fifteen years imprisonment.

[8] In mitigation of sentence, the appellant who conducted his own defence stated that he was already serving an imprisonment term of 38 years. He had been doing a course in Marketing Management. His view was that a further period of imprisonment would really destroy him. He was 21 years old on the day of sentence in November 2010 at the Court *a quo*. As regards his education career he has gone as far as matric.

[9] The appeal against sentence in accompanied by an application for condonation. The appellant has made out a case which justifies condonation for the lateness in noting the appeal. Accordingly, condonation is granted.

[10] In summary, the appellant has previous convictions of murder, theft, escaping from custody and robbery. These convictions relate to the years 2008 and 2009. These convictions are more than ten years old but what is important is that the current appeal deals with an offence of rape which was committed on 10 February 2010, hardly five months after he was sentenced to fifteen years imprisonment for robbery. The appellant has a violent propensity. He commits crime outside and inside prison. Under the circumstances, he deserves the longest sentence which a Regional Court is competent to impose.

[11] Consequently, the following order is made:

11 .1 The appeal against sentence is upheld;

11.2 The sentence of life imprisonment set aside and substituted with the following: "Fifteen years imprisonment".

11.3 The sentence is antidated to 8 November 2010.

SAMKELO GURA
JUDGE OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG

I concur

FMM REID [WAS SYMAN]
JUDGE OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG

Appearances:

Counsel for the Plaintiff:	Mr Gonyane
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