



**IN THE HIGH COURT OF SOUTH AFRICA**  
**(GAUTENG DIVISION, PRETORIA DIVISION)**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

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DATE

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SIGNATURE

**Case No. 582/17**

In the matter between:

**SITHEMBELE JOYISI**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

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**JUDGMENT**

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**MILLAR, A J**

1. On 24 February 2017, the appellant, a 31-year-old man was convicted in the Regional Court Klerksdorp of the rape of a 6-year-old child. He was sentenced to life imprisonment for the rape. He was also declared unfit to possess a firearm and an order was made in terms of the Firearms Control Act<sup>1</sup> declaring him unfit to possess a firearm<sup>2</sup>. The court *a quo* also ordered that his particulars be entered into the National Register of Sex Offenders<sup>3</sup>.
2. The appeal before this court is against conviction and sentence, such appeal being automatic in terms of section 309B read together with the proviso to section 309(1) of the Criminal Procedure Act 1977, by virtue of the imposition of the sentence of life imprisonment.
3. It bears mentioning that the offence of which the appellant was convicted occurred on 22 November 2008. The appellant was arrested and released on bail. He absconded and the trial that was supposed to have commenced on 17 February 2010 did not proceed. He subsequently appeared on 6 May 2010 when he was convicted of contempt and given a R1000,00 fine with 20 days imprisonment in the event the fine was not paid. The matter was remanded for trial on 29 July 2010 and his bail extended. After further remands the trial commenced on 29 October 2010. The trial was postponed on that date to 17 November 2010. The appellant again absconded and was not seen in court again until the trial resumed on 21 July 2016. The appellant being in custody, the trial was completed, and judgment handed down on 24 February 2017 - 7 years after the offence was committed.
4. Notwithstanding that the appeal was noted against both conviction and sentence, both the appellant and respondent delivered heads of argument dealing only with a single issue – that is whether the imposition of the life sentence was a misdirection on the part of the

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<sup>1</sup> 60 of 2000

<sup>2</sup> In terms of section 103(1)

<sup>3</sup> In terms of section 50(2) of Act 32 of 2007

court a quo given that the possibility of the imposition of such sentence was not explained to the appellant by the court. No argument was presented in respect of the conviction and there is in the circumstances, no reason to interfere with the factual findings of the court a quo in respect of the conviction on count 1

5. The single charge faced by the accused on the charge sheet referred to “*Section 51 of Act 105/1997 is applicable because the complainant was born 28/07/2002*”, the relevant statutory provision in terms of which the minimum life sentence was imposed.
6. The appellant was legally represented throughout the proceedings. Nevertheless, it is apparent from the record, that the minimum sentence provisions referred to in the charge sheet were never explained to him by the court – either when the charge was put to him or when he pleaded.
7. The waters in the present appeal are muddled by the fact that the attorney who had represented the appellant when the charge was put to him and he pleaded, had passed away before the trial was concluded. However, by the time that the trial resumed in 2016, his representative at that stage knew what the minimum sentence being faced by the appellant was, placing this on record during the argument in mitigation and must have at least by then informed the appellant of the minimum sentence he faced if he had not been advised before by the first representative.
8. It is well established that in regard to the imposition of minimum sentences:

*“Under constitutional dispensation it is certainly no less desirable than under common law that facts State intends to prove to increase sentencing jurisdiction under the Act should be clearly set out in the charge-sheet - Matter is, however, one of substance and not form, and general rule cannot be laid down that charge in every case has to recite either in specific form of scheduled offence with which accused charged or facts State intends to prove to establish it – Whether accused’s substantive fair trial right, including her or his*

*ability to answer charge, has been impaired depends on vigilant examination of relevant circumstances.*<sup>14</sup>

9. The enquiry is in two stages. Firstly, whether the appellant was advised of the charges he was to face and the sentence that may be imposed and secondly whether the appellants right to a fair trial had been impaired.
10. In the present matter, since the charge sheet did indeed refer to the minimum sentence provisions - section 51 of Act 105 of 1997 and the facts which would be relied upon – because *the complainant was born on 28/07/2002*, the appellant cannot be said to have been unaware of the charge he faced and the sentence that could be imposed were he convicted.
11. He was furthermore represented and must have taken advice and given instructions to his representative in preparation for the trial. This was confirmed by the representative when she informed the court that the plea of “not guilty” was in accordance with her instructions. That the appellant understood the seriousness of the charge he faced and the consequences of a conviction can to my mind be inferred from his having absconded while on bail, on more than one occasion, in order to avoid those consequences.
12. The enquiry in the present matter seems to me to be in regard to whether the appellant enjoyed a “*substantive fair right trial*”. The appellant was represented throughout the trial – after the passing of the first representative, a second was appointed. The evidence relied upon by the respondent was tested in cross-examination and the version of the appellant put to the respondent’s witnesses. The appellant was not prejudiced in any way in the conduct of his defence. He pleaded “not guilty” and thus was not prejudiced by

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<sup>4</sup> S v Legoa 2003 (1) SACR 13 (SCA); see also S v Makatu 2006 (2) SACR 587 (SCA); S v Ndlovu 2017 (2) 305 (CC); S v Mabaso 2014 (1) SACR 299 (KZP)

pleading “guilty” to an offence, the sentence for which a conviction was harsher than that which he understood he was pleading to.

13. The appellant was convicted, on Count 1 of a crime referred to in **Part 1 of Schedule 2 of The Criminal Law Amendment Act 105 of 1997** and the court a quo was obliged to impose the prescribed minimum sentence of life imprisonment in terms of Section 51(1) of that Act, absent substantial and compelling circumstances<sup>5</sup>.
14. Were there were substantial and compelling circumstances justifying the imposition of a lesser sentence?
15. Neither the appellant nor the respondent placed any pre-sentence reports before the court for its consideration. The appellants personal circumstances were considered. He is a married man with 5 children aged between 7 and 17 years of age. The children live with their mother in the Eastern Cape Province while the appellant lived and worked in the North West Province. He attended school to standard 2, the equivalent of grade 4. The trial court did not overemphasize the interests of the community and was not dismissive of the personal circumstances of the appellant.
16. The court *a quo* found, and indeed there are no substantial and compelling reasons to depart from the minimum sentence in respect of count 1.
17. In the circumstances, I propose the following order:
  - 17.1 The appeal against the conviction on count 1 is dismissed.
  - 17.2 The appeal against sentence on count 1 is dismissed.

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**A MILLAR**

**ACTING JUDGE OF THE HIGH COURT**

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<sup>5</sup> S v Malgas 2001 (1) SACR 469 (SCA) at paragraph 8

**I AGREE AND IT IS SO ORDERED**

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**J MAUMELA**

**JUDGE OF THE HIGH COURT**

HEARD ON: 12 MARCH 2019

JUDGMENT DELIVERED ON: 12 MARCH 2019

COUNSEL FOR THE APPELLANT: ADV A THOMPSON

INSTRUCTED BY: LEGAL AID SA

PRETORIA JUSTICE CENTRE

COUNSEL FOR THE RESPONDENT: ADV N MAPHALALA

INSTRUCTED BY: THE STATE ATTORNEY