Reportable:	**NO**
Circulate to Judges:	**NO**
Circulate to Magistrates:	**NO**
Circulate to Regional Magistrates	**NO**

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

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

CASE NUMBER: CA 35/2019

In the matter between:-

LEVY SERA Appellant

and

THE STATE Respondent

Coram: Mfenyana J et Joubert AJ

This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date for hand-down is deemed to be **10 July 2024.**

ORDER

1) The appeal against sentence is upheld.
2) The sentence in respect of count 2 is set aside and replaced with the following:

"(i) The accused is sentenced to 15 years imprisonment in respect of count 2, to run concurrently with the sentence in count 1".

3) The sentence is ante-dated to 30 October 2018.

JUDGMENT

MFENYANA J

[1] The appellant was sentenced by the Regional Court, Klerksdorp on 30 October 2018 following his conviction on charges of housebreaking with intent to commit a crime unknown to the state (count 1), and of rape (read with section 51(2) of the Criminal Law Amendment Act) (CLAA)[1] (count 2). He has an automatic right of appeal. This appeal lies only against his sentence of imprisonment for life in respect of count 2.

[2] The grounds of appeal are that the court *a quo* did not warn the appellant that upon conviction, he would be sentenced to life imprisonment as the charge sheet referred to section 51(2) of the CLAA. It is further contended that the sentence of life imprisonment on the charge of rape, is shockingly inappropriate in the prevailing circumstances of the offences committed, and out of proportion to the totality of the accepted facts. Lastly, the appellant contends that the

[1] Act 105 of 1997.

trial court misdirected itself in failing to find that the appellant's personal circumstances are substantial and compelling enough to justify a departure from the prescribed minimum sentence of life imprisonment.

[3] The appellant contends that he was charged with the offence of rape in terms of section 51(2) of the CLAA which calls for a minimum sentence of 10 years imprisonment upon conviction, unless the court found that substantial and compelling circumstances exist which justify the imposition of a lesser sentence. This charge against the appellant is set out in the charge sheet which forms part of the record before this court.

[4] The appellant contends that there was no mention of this requirement, warning and element of the charge, either in the charge sheet, or during the plea proceedings, or in the entire trial. The issue of life imprisonment was only raised at sentencing stage, so contends the appellant.

[5] It is further the appellant's averment that when the State put the charges to him, it was stated that this was in terms of section 51(2) of the CLAA as reflected in the charge sheet and failed to make an application for the amendment of the charge sheet. Consequently, the court *a quo* failed to warn the appellant of the possibility of life imprisonment being imposed.

[6] According to the appellant, this is exacerbated by the fact that the trial

court stated that the appellant is found guilty *"as charged on count 2"* and did not read out the empowering provision for life imprisonment. This, the appellant avers justifies interference by this Court for purposes of imposing a sentence which is appropriate in the circumstances.

[7] Regarding the personal circumstances of the appellant, it is contended that when taken cumulatively, these amount to substantial and compelling circumstances. These are that the appellant was 26 years old at the time of the commission of the offence; had completed Grade 11 and was working at Harries Mining Company repairing air and water pipes; that he was married and had one child who was seven years old at the time; that at the time of his arrest, his wife moved to her parental home, and that he had admitted his previous convictions, all of which were committed ten years ago, and was therefore for all purposes treated as a first offender.

[8] The appellant thus contends that a sentence of five years imprisonment in respect of count 1; and eight years' imprisonment in respect of count 2, would be appropriate in the circumstances. Finally, the appellant avers that the sentences should be ordered to run concurrently and ante-dated to 30 October 2018 in accordance with section 282 of the Criminal Procedure Act (CPA)[2].

[9] The appeal is not opposed by the State.

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[2] Act 51 of 1977 as amended.

[10] In the written submissions filed on behalf of the State, it is conceded that the trial court erred in convicting the appellant having failed to warn him that upon conviction he would be sentenced to life imprisonment. It was further conceded that the trial court did not make an order in terms of section 86 of the CPA for the State to amend the charge sheet.

[11] Consequently, the State submits that a sentence of 15 years imprisonment would be appropriate in the circumstances, which term of imprisonment should be ordered to run concurrently with the sentence of five years in respect of count 1.

[12] At the outset it must be stated that sentencing is pre-eminently within the discretion of the sentencing court. A court of appeal will not interfere lightly with the trial court's exercise of its discretion unless there is a material misdirection by the trial court.[3]

[13] In *S v Bogaards*[4] the Constitutional Court noted that a court of appeal can only interfere with the sentence imposed by a trial court:

> "…where there has been an irregularity that results in the failure of justice; the court below misdirected itself to such an extent that its

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3 *S v Livanje* 2020 (2) SACR 451 (SCA).

4 2013(1) SACR 1 (CC).

> decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it."[5]

[14] It is common cause that the charge sheet stipulates that the appellant is charged with "contravening the provisions of Section 3 read with Sections 1, 56(1), 57, 58, 59, 60 and 61 of the Sexual Offences Act 32/2007 – Rape (**read with the provisions of Section 51(2) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended**)".

[15] It is further common cause that in putting the charges to the appellant, the state prosecutor stated as follows in respect of Count 2:

> " Charge 2: that the accused is guilty of the crime of rape read with the provisions of the Minimum Sentence Act as amended, in that upon or about the 7 November 2009 and at Khuma in the Regional Division of Northwest, the said accused did unlawfully and intentionally commit an act of sexual penetration with the complainant to wit S[…] F[…] by having sexual intercourse without the consent of the said complainant. The Minimum Sentence Act as amended is applicable in that the complainant was born on […] 1995."

[16] After the charges were put to the appellant, he pleaded not guilty, and the trial proceeded.

[17] In convicting the appellant, the court *a quo* stated that, the *"State*

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5 Para 41.

further contends that this second count of rape is read with the provisions of Section 51(1) of the, and Schedule 2 of the Criminal Law Amendment Act 105/1997 as amended in that the complainant was born on the 7 October 1995." However, this is not what was stated by the state prosecutor. In addition, the charge sheet specifically refers to section 51(2) and not, 51(1) as stated by the court *a quo* in its judgment.

[18] Lastly, in imposing sentence, the court *a quo* stated that in respect of count 2, *"in terms of Section 51 subsection 1 of Act 105 /1997 you are sentenced to undergo life imprisonment."*

[19] The court *a quo* did not forewarn the appellant that in the event of his conviction on count 2, he would be sentenced to a minimum sentence of life imprisonment unless substantial and compelling circumstances are found to exist, which justify the imposition of a lesser sentence.

[20] The question is whether this omission by the court *a quo* amounts to a misdirection of such a nature that it vitiates the sentence.

[21] In *Makatu v S*[6] the Supreme Court of Appeal (SCA) said the following with regard to the charge sheet.

" ...A major problem here is that the indictment never made mention of this section or the Act. It does not even give any details to indicate if

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6 2014 (2) SACR 539 (SCA).

there are any aggravating features which would bring it within the ambit of the minimum sentencing regime.

Secondly, no evidence was led to bring this murder within the purview of the section. Throughout the trial no mention was made of the section except in a cursory manner during the sentencing stage."[7]

[22] In that matter, the trial court, in sentencing the appellant to life imprisonment stated that the murder was committed in circumstances where the offence justified the sentence prescribed under Schedule 2 of Part 1 of the Criminal Law Amendment Act, while the indictment made no mention of this section. This is equally true for the present case. Save for a cursory reference by the state prosecutor while putting the charges to the accused person to the effect that the Minimum Sentence Act (sic) is applicable in that the complainant was born on 7 October 1995, no warning or attention was drawn by the trial court to this requirement. Not only that, but the charge sheet also refers to a different provision of the Act, section 51(2) for which a prescribed minimum sentence applies.

[23] In *Khoza and Another v S*[8] where the accused were only informed of the applicability of Minimum Sentences Act after conviction, the SCA considered whether the appellants' rights to a fair trial had been infringed by the failure to alert them at the outset of the trial, to the applicable provisions of the Criminal Law Amendment Act (Minimum Sentences Act). With reference to the expressions of the Constitutional

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7 Para 23 – 24.

8 2019(1) SACR 251 (SCA).

Court in *Ndlovu v The State*[9], the SCA considered the effect of an incorrect reference to the Minimum Sentences Act in the indictment on fair trial rights. The Court held that:

> "… an accused person should be informed at the outset of the trial of the provisions of the Minimum Sentences Act (or other provisions relating to an increased sentencing regime) that the state intends to rely upon or are applicable. The accused person should generally be so informed in the indictment or charge sheet; by notification by the presiding officer or in any other manner that effectively conveys the applicable provisions to the accused person before or at the commencement of the trial." (emphasis added)

[24] Ultimately, the enquiry lends itself to whether there has been any prejudice to the accused person and an infringement of his fair trial rights. This is dependent on the facts of each case. It has often been said that prejudice would result if there were a reasonable possibility that the accused person would have conducted his defence differently if the indictment or charge sheet had been amended. The starting point appears to be that 'prejudice, actual or potential, will always exist, unless it can be established that the defence or response of the accused person would have remained the same'[10] regardless.

[25] In this case, save for the cursory reference by the state prosecutor when putting the charges to the appellant, the appellant was only

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9 (CCT174/16)[2017] ZACC 19; 2017(10) BCLR 1286 (CC); 2017 (2) SACR 305 (CC) (15 June 2017).

10 *Moloi & others v Minister for Justice & Constitutional Development & others* [2010] ZACC 2; 2010 (2) SACR 78 (CC), para 88a.

informed that he faced life imprisonment when sentence was imposed. In our considered view, the earlier reference by the prosecutor was not only inadequate as it was not made by the presiding officer, but also made no mention of the prescribed sentence of life imprisonment. The fact of the matter is that the Minimum Sentences Act also finds application in section 51(2). In respect of that provision, the prescribed minimum sentence is 10 years in the case of a first offender. It could therefore not be assumed that the mere mention of the Minimum Sentences Act and a glib reference to a prescribed minimum sentence, would suffice in addressing the rights of an accused person as enshrined in section 35(3) of the Constitution.

[26] To our mind, the sentence imposed by the court *a quo* in respect of count 2 falls to be set aside. We must however stress that the consideration 'is not whether the sentence was right or wrong, but whether the court in imposing it exercised its discretion properly and judicially'.[11] In our considered view, it did not, owing to a defect in the proceedings. In so doing, it did not bring its sentencing discretion to bear, as the proceedings were tainted by a material defect.

[27] Section 51(2) states in relevant part:

> "Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall –
>
> (a) …

[11] *S v Pillay* 1977 (4) SA 531 (A), para 553E.

(b) If it has convicted a person of an offence referred to in part III of Schedule 2, sentence the person, in the case of –

(i) a first offender, to imprisonment for a period of not less than 10 years…

(c) ….

Provided that the maximum sentence that a regional court may impose in terms of this subsection shall not be more than five years longer than the minimum sentence that it may impose in terms of this subsection."

[28] The maximum sentence which the court *a quo* could impose in the circumstances, is 15 years. The sentence of life imprisonment imposed by the court *a quo* is a material misdirection. This court is therefore at large to interfere with the sentence imposed by the court *a quo* and consider the sentence afresh. In considering an appropriate sentence, the court must have regard to the specific facts of this case. This court must consider whether there are any substantial and compelling circumstances to justify a departure from the minimum sentence prescribed by the legislator.

[29] In the written submissions filed on behalf of the appellant, it is submitted that the following personal circumstances of the appellant, taken cumulatively, constitute substantial and compelling circumstances, and thus, justify the imposition of a sentence of 8 years imprisonment.

(i) That the appellant was 26 years at the time he committed the offence.

(ii) That he was married, and had a minor child, 7 years old at the time who was staying with the mother at the maternal grandparents' place. In the same breath, it is submitted that the appellant's wife moved to her maternal home at the time of the appellant's arrest. This submission is contradictory.

(iii) That his highest qualification was Grade 9.

(iv) That he was employed and earning a salary of R3 400.00 per month and supporting his minor child.

(v) That although he had previous convictions, they had been committed ten years ago, and was therefore treated as a first offender.

[30] We do no not agree that these personal circumstances, pedestrian as they are, amount to substantial and compelling factors. On the contrary, the aggravating circumstances of this case namely, that the complainant was 14 years at the time of the commission of the offence, raped in the sanctity of her home, and that she was threatened with a knife by the appellant, far outweigh the appellant's personal circumstances. In our view, they aggravate the seriousness of the offence committed by the appellant. In the result, the personal circumstances of the appellant should, 'recede to the background'[12].

ORDER

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[12] See in this regard*: S v Vilakazi* 2009(1) SACR 552 (SCA).

[31] In the result the following order is made:

1) The appeal against sentence is upheld.
2) The sentence in respect of count 2 is set aside and replaced with the following:

"(i) The accused is sentenced to 15 years imprisonment in respect of count 2, to run concurrently with the sentence in count 1".

(ii) The sentence is ante- dated to 30 October 2018.

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S MFENYANA
JUDGE OF THE HIGH COURT
NORTHWEST DIVISION, MAHIKENG

I agree.

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DJ JOUBERT
ACTING JUDGE OF THE HIGH COURT
NORTHWEST DIVISION, MAHIKENG

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Instructed by:	Director of Public Prosecutions, Mmabatho
Date reserved:	29 November 2023
Date of judgment:	10 July 2024