THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

Reportable

CASE NO. 519/2004

In the matter between

SITHEMBISO XOLANI KIMBERLEY
AND ANOTHER **Appellants**

and

THE STATE **Respondent**

CORAM: ZULMAN, MTHIYANE, BRAND and MLAMBO JJA et MAYA AJA

HEARD: 26 AUGUST 2005

DELIVERED: 19 SEPTEMBER 2005

On a proper interpretation of s 51 (1)(a) read with Part 1 of Schedule 2 paras (a)(i) and (ii) of the Criminal Law Amendment Act No 105 of 1997, a High Court lacks jurisdiction to impose a sentence of life imprisonment in respect of a single act of rape.

JUDGMENT

ZULMAN JA

[1] The appellants were convicted in the Alexandria Regional Court, of rape. The Regional Magistrate referred the matter to the High Court of the Eastern Cape Provincial Division for the imposition of sentence in terms of s 52 of the Criminal Law Amendment Act no 105 of 1997 (the Act). The High Court (Erasmus J) sentenced the appellants to life imprisonment but granted leave to appeal to this court. The essential question which arises for determination in this appeal is whether the High Court was correct in finding that s 51 (1)(a) read with Part 1 of Schedule 2 para (a) (ii) of the Act was applicable.

[2] Both the appellants pleaded not guilty to the charge of rape on which they were arraigned. The complainant was the key witness for the prosecution. She testified that the two appellants entered her home and proceeded to attack her. Appellant number 1 then held her down while appellant number 2 raped her. The appellants denied the whole of the version of the complainant. The regional magistrate nevertheless accepted

the complainant's evidence and rejected that of the two appellants. She thereupon convicted both the accused of rape, without however indicating the basis for the conviction. Thereafter, the matter was postponed in order to obtain a probation officer's report in respect of appellant number 2. A number of postponements followed. The record indicates that on 17 July 2003 the case was postponed to the High Court for trial. There is however no record of the referral proceedings.

[3] When the matter came before the High Court on 21 August 2003 it appeared to that Court that certain information was required for the Court to properly deal with the matter in terms of the Act. The proceedings were postponed. The Court directed that the following inquiry be sent to the magistrate:

> '1. The record does not contain the proceedings and the judgment of the magistrate in regard to the referral of the accused for sentence in terms of s 52 of Act 105 of 1997. The magistrate is requested to furnish same.
>
> 2. The magistrate is requested to furnish reasons for the referral, indicating therein the section of the relevant schedule on which the Court relied. It would seem that the Court convicted accused no 1 on the basis that he aided accused no 2 in raping the complainant. Can it be said that on such basis accused no 1 committed rape, as contemplated in the schedule? The magistrate is referred to the judgment of this court in S v JONAS SAFFIER a copy of which is attached (CC 4/03); which judgment might have a bearing on the question.

3. The magistrate is further requested to comment whether it was competent, alternatively appropriate, in the circumstances of the case for a Court to invoke provisions of the Act in view of the apparent failure on the part of the State to alert the defence to the fact that it intended to rely on the provisions of the Act in the event of a conviction. See S v Ndlovu 2003(1) (SACR) 331 (SCA).'

[4] The magistrate replied simply that she had found that appellant number 1 was 'an accomplice'. She stated further that she had erred in referring the matter to the High Court, as she had interpreted s 52 incorrectly. She was now of the view that she had lacked the jurisdiction to refer the matter to the High Court. She requested that the referral therefore be set aside and that the matter be referred back to her in terms of s 52 (3) (e) (v) of the Act.

[5] Notwithstanding the magistrate's request and the attitude of counsel for both the appellants and the State in support of the magistrate, Erasmus J ruled that the matter should not be referred back but that the trial of the accused should proceed before him in terms of the provisions of s 52(3) of the Act (the first judgment). The court *a quo* accepted that the schedule in paragraph (a)(i) contemplates the position where the accused has been convicted of rape committed in circumstances involving multiple rapes. Although Erasmus J considered that there was some uncertainty as to what the 'lawmaker intended' and that the language was not clear, he nevertheless considered that he did not need to 'search for that meaning, for

whichever way one looks at the provision it contemplates more than one act of rape; and the present complainant was only raped once' (first judgment paragraph 17).

[6] The learned judge then turned to consider parapraph (a)(ii) of the schedule. At the outset he commented that 'The provision contemplates a single rape committed by more than one person'. He then stated that:

'A layman reading para (a)(ii) could understand it to relate to the so-called gang rape situation, where one or more persons hold down the victim with the 'common purpose' that another of their number has sexual intercourse with her. A court could conclude that Parliament here uses the words in such loose sense. This could explain some of the perplexities in para (a)(i) set out above in para [17], which would lend support to the loose or non-legal interpretation of the schedule as a whole. As no more acceptable interpretation suggests itself, I must conclude that such was the intention of the legislator and therefore give effect to that intention, even though it will give rise to anomaly. It would mean that the concepts 'common purpose' and 'co-perpetrator' have one meaning (a legal one) for purposes of conviction and another (non-legal) for purposes of sentence. Be that as it may, on the above interpretation, the factual findings of the magistrate mean that the two accused committed the rape 'in the execution of a common purpose' which brings them both within the ambit of the schedule.'

(first judgment paragraph 21).

In my view and for the reasons which will appear presently the court *a quo* erred in this interpretation of para (a)(ii).

[7] The court thereupon proceeded to consider the question of sentence and as previously stated imposed a sentence of life imprisonment on both

the appellants, (the second judgment). In so doing Erasmus J considered that he was by law obliged to impose a sentence of life imprisonment unless he was satisfied that substantial and compelling circumstances existed which justified the imposition of a lesser sentence. He found that no such circumstances existed.

[8] Section 51(1) of the Act is prefaced by the words: 'minimum sentences for certain serious offences'. In section 51(1)(a) the Act provides that the High Court shall have jurisdiction:

> '(1) Notwithstanding any other law but subject to subsections (3) and (6) [the subsections are not here relevant], a High Court shall –
>
> (a) if it has convicted a person of an offence referred to in Part 1 of schedule 2; …
>
> sentence the person to imprisonment for life.'

Rape is one such offence. Part 1 of Schedule 2 of the Act provides, inter alia, that a High Court shall have jurisdiction to impose life imprisonment on an offender who is convicted of:

> 'Rape - (a) when committed -
>
> (i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;
>
> (ii) by more than one person where such persons acted in the execution or furtherance of a common purpose or conspiracy.'
>
> (my emphasis).

In the present case, as previously stated, the evidence disclosed that Appellant number 1 held the complainant down whilst Appellant number 2 actually raped her.

[9] The Act is concerned in s 51(1) to deal with what it terms the imposition of 'minimum sentences for certain serious offences'. In the case of what may be described as 'ordinary' rapes not falling within the ambit of Part 1 of Schedule 2, these attract a minimum sentence of ten years imprisonment for a first offender (Part 3 of Schedule 2). (Both appellants are first offenders). Accordingly the rapes referred to in Part 1 of Schedule 2 which attract a minimum sentence of life imprisonment are obviously of a more serious nature. The 'mischief' which the legislature sought to deal with, in my view, was the situation where a woman is subjected to multiple rapes either by one person or by any 'co-perpetrator or accomplice'. Paragraph (a) (i) of Schedule 2 covers the situation where 'the victim was raped more than once'. Paragraph (a) (ii) also deals with the situation where the victim is raped by more that one person in the 'execution or furtherance of a common purpose or conspiracy'. Both paragraphs require that the victim be raped more than once.

[10] It is not necessary to go into the degrees of participation in the rapes for the purposes of interpreting paragraphs (a)(i) and (ii). Nor is the fact that an accomplice, may in an appropriate case, receive the same sentence as the actual perpetrator/s of a rape, of assistance in interpreting the

paragraphs in question.

[11] Erasmus J considered that para (a)(ii) and not para (a)(i) applied to the case before him. In my view, in doing so he in effect erroneously equated the position of an ‘accomplice’ proper with that of a person or persons acting in the execution or furtherance of a common purpose or conspiracy. He erred in doing so. Where the legislature wishes to deal with an ‘accomplice’, a well known term in law, which it is clearly cognizant of, it does so in express terms in para (a)(i). It makes no mention of an ‘accomplice’ in para (a)(ii) but refers to other equally well known concepts in law such as ‘common purpose’ and ‘conspiracy’. I do not accept the validity of the reasoning of the court *a quo* that the concepts ‘common purpose’ and ‘co-perpetrator’ have one meaning for the purposes of conviction (a legal one) and another for the purposes of sentence (a non-legal one). The concepts have only one consistent and clear meaning.

[12] As previously pointed out Appellant number 1 was found to be simply an ‘accomplice’ and not a co-perpetrator nor was it found that he acted in the execution of a common purpose or conspiracy. An ‘accomplice’ (medepligtige) is one who takes part in the commission of the crime other than as a perpetrator (dader) and other than as an accessory after the fact (begunstige) (Burchell - *South African Criminal Law and Procedure* - Vol 1 p 322). The matter is put succinctly by Joubert JA in *S v Williams* 1980(1)SA 60(A) at 63 A-B in these terms:

> ‘’n Medepligtige se aanspreeklikheid is aksessories van aard sodat daar geen sprake van ‘n medepligtige kan wees sonder ‘n dader of mededaders wat die misdaad pleeg nie. ‘n Dader voldoen aan al die vereistes van die betrokke misdaadomskrywing. Waar mededaders saam die misdaad pleeg, voldoen elke mededader aan al die vereistes van die betrokke misdaadomskrywing. Daarenteen is ‘n medepligtige nie ‘n dader of mededader nie aangesien die dader se *actus reus* by hom ontbreek. ‘n Medepligtige vereenselwig hom bewustelik met die pleging van die misdaad deur die dader of mededaders deurdat hy bewustelik behulpsaam is by die pleging van die misdaad of deurdat hy bewustelik die dader of mededaders die geleentheid, die middele of die inligting verskaf wat die pleging van die misdaad bevorder.’

(see also LAWSA First Re-Issue Vol 6 paras 129/132,pp 1138/146, Snyman- *Strafreg* (Vierde Uitgawe) 254/257 and De Wet en Swanepoel – *Strafreg* (Vierde Uitgawe) Chapter 7 pp 175/208)

So for example a woman who assists a man to rape another woman or who makes it possible for him to do so, cannot be held to have committed the act of rape (*S v Jonathan en Andere* 1987 (1) SA 633 (A) at 643 H-I).

Simply put it is of fundamental importance to vest a High Court with jurisdiction, to impose a sentence of life imprisonment that there be more than one act of rape.

[13] In any event, in so far as the wording of paras (a)(i) and (a)(ii) may not be clear it is trite that a court will interpret the paragraphs so as to render an interpretation least harsh to the affected person (see for

example, *Principal Immigration Officer v Bhula* 1931 AD 323 at 336/7). Similarly a statutory provision which is not clear which changes the common law will also be restrictively interpreted (See for example *Casserley v Stubbs* 1916 TPD 310 at 312) More particularly statutes which prescribe minimum sentences, such as the statute here under consideration, thus eliminating the usual discretion of a court to impose a sentence which befits the peculiar circumstances of each individual case, will usually be construed in such a way that the penal discretion remains in tact as far as possible (Du Plessis - *The Interpretation of Statutes* para 23.3 p75).

[14] Both counsel for the Appellant and for the Respondent agreed, perhaps for different reasons, that Erasmus J had erred in finding that the provisions of Part 1 (a)(ii) of Schedule 2 were applicable to the appellants, the court having lacked the necessary jurisdictional capacity to impose the sentence of life imprisonment. They were also both agreed that the matter should be referred back to the magistrate for the imposition of an appropriate sentence.

[15] Accordingly :

15.1 The appeal is allowed.

15.2 The sentences imposed by the High Court are set aside.

15.3 The matter is referred back to the Alexandria Regional Court, for the purposes of imposing sentence on the appellants.

R H ZULMAN

JUDGE OF APPEAL

MTHIYANE JA)

BRAND JA) CONCUR

MLAMBO JA)

MAYA AJA)