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

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case number : 416/04

In the matter between :

S.G. **FIRST APPELLANT**
Z.M. **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

CORAM : **NAVSA, BRAND *et* VAN HEERDEN JJA**

HEARD : **21 FEBRUARY 2006**

DELIVERED : **9 MARCH 2006**

Summary: Minimum sentences – Act 105 of 1997 – rape – whether Part I or Part III of Schedule 2 applicable – accused under 18 – court's discretion – sentencing court's duty to establish relevant facts and circumstances – matter referred back to trial court for

sentencing after proper investigation.

Neutral citation: ***This judgment may be referred to as S G v The State [2006] SCA 5 (RSA)***

JUDGMENT

BRAND JA/

BRAND JA:

[1] This is an appeal from the Grahamstown High Court. It stems from the imposition of a sentence of 15 years imprisonment upon each of the two appellants by the Regional Court, East London for the crimes of housebreaking with intent to rape and rape. Though the background facts were fairly straightforward, they somehow gave rise to a great deal of procedural confusion. I therefore find it convenient to set out the procedural history in chronological form before identifying the issues involved.

[2] At the commencement of proceedings in the Regional Court, the appellants pleaded guilty to the charges against them and their legal representative handed in statements in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 on their behalf. According to the two statements, which were for all intents and purposes in identical terms, each appellant admitted that:

'Upon or about the 22nd of August 1999 and at or near Kidd's Beach in the district of East London, in the regional division of the Eastern Cape, I did wrongfully and unlawfully break into and enter the house of C.N. with the intent to rape and did there and then unlawfully assault and have sexual intercourse with C.N., a female person, against her will. I entered the house by opening the front door which was closed but not locked. The said N. did not give her consent to sexual intercourse. It was my intention when breaking into the premises to rape the said N.. I am aware that my actions were both wrongful and unlawful, and accordingly I plead guilty to the crime of housebreaking with intent to rape and rape.'

[3] In the light of these statements, the trial court was rightly satisfied that the appellants were guilty as charged and convicted them accordingly. During the sentencing proceedings that followed, it was recorded that, at the time of the trial, ie 1 November 2000, the first and second appellants were 18 and 19 years of age, respectively, and that neither of them had any previous convictions. No further evidence was led, either by the state or on behalf of the two appellants. From the

trial court's judgment it appears that the only addition to these scant facts was the information conveyed by the appellants' attorney that they acted under the influence of intoxicating liquor when they committed the offences and that they were remorseful for what they had done. That was in essence the sum total of the facts on which the appellants were each sentenced to 15 years imprisonment.

[4] In his judgment on sentence, the magistrate made mention of 'minimum penalties' prescribed by 'the legislature'. Though he did not refer to any specific statute, it seems fair to assume that he had the provisions of s 51 of the Criminal Law Amendment Act 105 of 1997 ('the Act') in mind. It also appears from the judgment that the magistrate was under the impression that the minimum sentence prescribed by the Act for the offences of which the appellants had been convicted, was 15 years imprisonment. Because, so the magistrate said, he could find no circumstances contemplated by the Act to justify any lesser sentence, he considered himself bound to impose what he thought to be the prescribed minimum sentence, which he then proceeded to do.

[5] Against these sentences the appellants went on appeal to the Grahamstown High Court. There it was held (by Quinn AJ, with Chetty J concurring) that, by virtue of s 52(1)(a)(i) of the Act, the Regional Court had no jurisdiction to sentence the appellants at all. That section provides, in essence, that if a regional court has convicted an accused person of an offence referred to in Part 1 of Schedule 2 to the Act, for which the minimum sentence of life imprisonment is prescribed, 'the court shall stop the proceedings and commit the accused for sentence . . . by a High Court having jurisdiction'. For his conclusion that the offences of which the appellants had been convicted fell within the ambit of Part 1 of Schedule 2 to the Act, Quinn AJ relied on the reference in this part of the schedule, to 'Rape – when committed ... by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy'. A question which obviously escaped the court's attention was whether on the established facts the elements of this definition had been satisfied. The court then proceeded to set aside the sentences imposed by the Regional Court and referred the matter to the High Court 'to be dealt with in terms of ss 51 and 52 of Act 105 of 1997'.

[6] The matter was then enrolled in the East London High Court where it came

before Nepgen J. Unlike Quinn AJ and Chetty J in the court *a quo*, his conclusion was, however, that the offence of which the appellants had been convicted did not fall within the parameters of Part 1 of Schedule 2. This is so, he found, because there was no evidence before the court that the appellants had acted 'in the execution or furtherance of a common purpose or conspiracy' when they committed their individual crimes. He therefore concluded, first, that he had no jurisdiction to impose sentence on the appellants and, second, that the resulting procedural deadlock could only be resolved by this court in an appeal against the judgment of the court *a quo*. Following upon the suggestions by Nepgen J, the appellants then sought and obtained the court *a quo*'s leave for the present appeal.

[7] With regard to these divergent views, I agree with the conclusion by Nepgen J that the appellants were not convicted of an offence referred to in Part 1 of Schedule 2 to the Act. As was pointed out by Cameron JA in *S v Legoa* 2003 (1) SACR 13 (SCA) para 14 it is evident from the wording of s 51(1) of the Act, first, that the elements of the offence of which the accused person had been convicted must be established before conviction and, second, that such conviction must encompass all the elements of the offence set out in the particular part of Schedule 2. It follows that, since the two appellants were convicted exclusively on the basis of their s 112(2) statements, the offence contemplated in s 51(1) of the Act must be determined solely with reference to the contents of these statements. It is evident, in my view, that these statements make no mention of any common purpose or conspiracy between the two of them. While the admitted facts seem to suggest that the appellants did act in concert, it is clear, in my view, that the wording of s 51(1) does not allow for this kind of suggestion.

[8] It follows that I do not agree with the court *a quo*'s conclusion that the regional magistrate lacked jurisdiction to sentence the appellants and that the sentences imposed upon them should for that reason be set aside. At the same time, however, I am of the view that the magistrate's judgment on sentence reveals a number of misdirections as a result of which the sentences cannot be sustained. I do not find it necessary to enumerate all these misdirections. I limit myself to what I consider to be the most serious ones.

[9] The first misdirection in this category was that the magistrate was somehow led to believe that the minimum sentence prescribed for the offence of rape is 15 years imprisonment. That is not so. On a proper reading of Schedule 2 of the Act as a whole, it is plain that offences of rape which are not of the aggravated kind contemplated in Part 1 of the schedule are included under Part III. The minimum sentence for Part III offences is prescribed by s 51(2)(b). It is 10 years imprisonment in the case of a first offender. In terms of s 51(2)(a) the minimum sentence of 15 years (for first offenders) is reserved for offences referred to in Part II, which finds no application in this matter at all.

[10] The second serious misdirection reflected by the trial court's judgment is linked to the age of the first appellant. Though the first appellant was 18 years old at the time of his conviction and sentence, it is common cause that he was only 17 when he committed the crime. In consequence, he qualified for the special dispensation created by s 51(3)(b) of the Act for accused persons who were between 16 and 18 years 'at the time of the commission of the act which constituted the offence in question'. The import of this special dispensation appears from the following *dictum* by Ponnan AJA in para 12 of his judgment in *Brandt v S* [2005] 2 All SA 1 (SCA) (delivered on 30 November 2004):

'The effect of the provision is thus that s 51(3)(b) automatically gives the sentencing court the discretion that it acquires under s 51(3)(a) only where it finds substantial and compelling circumstances. It follows that the "substantial and compelling" formula finds no application to offenders between 16 and 18. A court is therefore generally free to apply the usual sentencing criteria in deciding on an appropriate sentence for a child between the ages of 16 and 18. As in a case where s 51(3)(a) finds application, the court in arriving at an appropriate sentence must, however, not lose sight of the fact that offenders of the kind specified in Schedule 2 of the Act have been singled out by the Legislature for severe sentences.'

[11] It follows that, with reference to the first appellant, the trial court needed no finding of substantial and compelling circumstances, as contemplated in s 51(3)(a), for the establishment of its discretion to impose a sentence other than the prescribed minimum. Without the benefit of the interpretation by this court in *Brandt,* the magistrate's failure to appreciate this was understandable, but nevertheless fatal to the proper exercise of his discretion.

[12] Further misdirections evinced by the trial court's judgment can be collected under the rubric of considerations taken into account for purposes of sentencing that

were simply unwarranted. Examples of these appear from the following two quotations from the judgment:

'[A]ccused persons who are convicted of rape . . . still get away scot-free, in the light of the fact that there is no legislation which provides for them being forced to undergo . . . HIV tests to establish whether or not they are indeed HIV positive. Consenting parties who have both consented to have sexual intercourse are urged by the authorities to seriously consider practising safe sex, but with rapists, they just do it with impunity. It is therefore the view of the court that the fact that a person has raped a complainant and not used a condom should be treated as an aggravating factor.'

And:

'No evidence has been placed before this court that anyone of you ever tried to propose love to the complainant and she refused. Probably if you had followed the normally accepted channels of communication by approaching the lady, proposing love, chances are that she would have agreed, and you would not be standing in the dock today.'

The remarks in the last sentence are not only without foundation, but could well be construed as gender insensitive.

[13] Lastly, the trial court misdirected itself by sentencing these two youthful appellants, essentially, without any enquiry into the facts at all. In reality, the learned magistrate imposed sentence on the basis of little more than the allegations in the charge sheet. Although the court professed to have 'considered the triad, namely your personal factors, the seriousness of the offence and the interest of the community', there were no facts before him, upon which such consideration could have been properly founded. It is a trite principle, well established, inter alia by judgments of this court, that, in the final instance, the responsibility for establishing the facts and circumstances necessary for imposing a proper sentence, is that of the sentencing court. This is particularly so where the offence, as in this case, is serious and where lengthy prison sentences are considered for youthful offenders (see eg *S v Soci* (2) SA 14 (A) at 17H-18A; *S v Peterson* 2001 (1) SACR 16 (SCA) paras 20-23; *S v Brandt* (supra) paras 13-18). In this matter I would have expected, at the very least, an enquiry by the trial court into the availability of any medical report pertaining to the complainant. Moreover, I would, in the circumstances, have expected a request by the court to be provided with reports by probation officers regarding the

personal circumstances of the appellants.

[14] The last mentioned misdirections, in my view, render it impossible for this court to impose sentence itself. We simply do not have sufficient information to do so. Apart from the time-consuming and otherwise wasteful procedural labyrinth that had been traversed, it transpired that the two appellants had already served six years of their sentences. It would therefore be eminently preferable at this stage to dispose of the matter finally. For reasons I have stated, we are, however, unfortunately not in a position to do so. Sentencing has again to be entrusted to the discretion of the trial court. But this time it will obviously have regard to the comments made above when that discretion is exercised. The office of the Director of Public Prosecutions, Eastern Cape, is requested to give effect to the undertaking made by its representative at the hearing in this court, that the matter will be enrolled before the trial court at the earliest available opportunity.

[15] For these reasons:

1. The appeal is upheld and for the order of the court *a quo* there is substituted the following:

'(a) In respect of both appellants, the sentences imposed by the Regional Court for the Eastern Cape region ("the trial court") are set aside.

(b) The matter is referred back to the trial court for imposition of sentence afresh after proper investigation of the pertinent facts and circumstances.'

2. A copy of this judgment is to be sent to the Director of Public Prosecutions, Eastern Cape.

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F D J BRAND
JUDGE OF APPEAL

Concur:

Navsa JA
Van Heerden JA