SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 142/18

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS:
GAUTENG DIVISION, PRETORIA **APPELLANT**

and

LUCKY ANTHONY BUTHELEZI **RESPONDENT**

Neutral citation: *The Director of Public Prosecutions: Gauteng Division, Pretoria v Buthelezi* (142/18) [2019] ZASCA 170 (29 November 2019)

Coram: Leach, Saldulker, Mokgohloa and Plasket JJA and Dolamo AJA

Heard: 1 November 2019

Delivered: 29 November 2019

Summary: Appeal in terms of s 311(1) of the Criminal Procedure Act 51 of 1977 – s 311(1) provides for an appeal as of right, without leave – the high court's findings that s 51(1) of the Criminal Law Amendment Act 105 of 1997 is not applicable, that the regional court did not have jurisdiction to impose a sentence of life imprisonment, are questions of law – appeal upheld - sentence imposed by the regional court reinstated.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Hughes J and Rangata AJ sitting as court of appeal):

1 The appeal is upheld.

2 The order of the high court is set aside and substituted with the following order:

'(a) The appeal is dismissed.

(b) The conviction and sentence of the trial court are confirmed.'

JUDGMENT

Mokgohloa JA (Leach, Saldulker and Plasket JJA and Dolamo AJA concurring):

[1] This is an appeal by the Director of Public Prosecutions, Pretoria (the DPP). The appeal is brought in terms of s 311(1) of the Criminal Procedure Act 51 of 1977 (the CPA), arising from what the DPP submits is a question of law in relation to sentence decided in favour of the respondent.

[2] The respondent, Mr Lucky Anthony Buthelezi, was arraigned in the Regional Court Vereeniging, Gauteng on a charge of raping a 13 year old girl. He pleaded guilty and was convicted as charged and sentenced to life imprisonment.

[3] The facts upon which the conviction and sentence are based are as follows. The complainant is the respondent's aunt's child. On the evening of 28 March 2011, the complainant who was thirteen years old at the time, was playing along the street in Sharpville. The respondent asked her to accompany him to the local Pick n Pay store. She agreed and they both walked to the store. Along the way, the respondent grabbed her and pushed her into the nearby bush where he raped her. She suffered multiple genital injuries compatible with forceful penetration of the vagina.

[4] Aggrieved by his sentence, the respondent, who had an automatic right of appeal in terms of s 10 of the Judicial Matters Amendment Act 42 of 2013, lodged an appeal against his sentence in the Gauteng Division of the High Court, Pretoria. The high court (Hughes J and Rangata AJ) set aside the sentence of life imprisonment and substituted it with the sentence of 15 years' imprisonment. They did so on the basis that the provisions of s 51(1) of the CLAA were not applicable because the charge sheet referred to s 51 and schedule 2 of the Criminal Law (Sentencing) Amendment Act 38 of 2007 instead of Act 105 of 1997.

[5] Dissatisfied with this outcome the DPP brought this appeal. As already mentioned, the DPP appeals on the basis that questions of law were decided in favour of the respondent which formed the foundation for the sentence imposed by the high court on appeal to it.

[6] Section 311 of the CPA provides:

'(1) Where the provincial or local division on appeal, whether brought by the attorney-general or the prosecutor or the person convicted, gives a decision in favour of the person convicted on a question of law, the attorney-general or the prosecutor against whom the decision is given may appeal to the Appellate Division of the Supreme Court, which shall, if it

decides the matter in issue in favour of the appellant, set aside or vary the decision appealed from and, if the matter was brought before the provincial or local division in terms of-

> (a) section 309(1), re-instate the conviction, sentence or order of the lower court appealed from, either in its original form or in such a modified form as the Appellate Division may consider desirable,'

[7] Whilst conceding that the DPP has an automatic right of appeal to this court in terms of s 311 of the CPA, counsel for the respondent argued that the section creates unjust consequences, unfair procedure and builds inequity before the law between the accused person and the DPP; that this creates an infringement of the accused's right to equal protection of the law as envisaged in s 9 of the Constitution; and that to curb this inequality and create fairness this court should interpret s 311 to mean that even if the DPP has an automatic right of appeal to this court, special leave has to be sought in terms of s 16(1) of the Superior Courts Act 10 of 2013.

[8] This argument cannot be accepted. First, it merely echoes an argument rejected by this court recently in *DPP, Gauteng v Grobler*[1] and *DPP, Gauteng v Moabi*.[2] In both these cases, this court found that the right of the state to appeal under s 311 is expressly regulated by the CPA, that the Superior Courts Act provisions requiring special leave to appeal are of no application, and that s 311 gives jurisdiction to this court when a high court on appeal gives a decision in favour of the person convicted on a question of law.

[9] Surprisingly, counsel for the respondent did not refer us to any of the cases dealing with the circumstances in which this court will depart from its previous decisions on a matter of law. The basic principle is *stare decisis*, that is, the court stands by its previous decisions, subject to an exception where the

[1] *Director of Public Prosecutions, Gauteng v Grobler* [2017] ZASCA 82; 2017 (2) SACR 132 (SCA).
[2] *Director of Public Prosecutions, Gauteng v Moabi* [2017] ZASCA 85; 2017 (2) SACR 384 (SCA).

earlier decision is held to be clearly wrong or the reasoning upon which the decision rested was clearly erroneous.[3] The object of the doctrine of *stare decisis* is to avoid uncertainty and confusion and ensure uniformity in the treatment of cases raising similar factual and legal issues.[4] It serves to lend certainty to the law. Therefore the decisions in *Grobler* and *Moabi* are binding unless we are satisfied that they were incorrectly decided or that the reasoning upon which the decisions rested were clearly erroneous. We are not so satisfied.

[10] Second, the wording of s 311 of the CPA is clear. Unlike convicted persons, the DPP's right of appeal in terms of s 311 of the CPA relating to a sentence imposed by a high court sitting as a court of appeal, arises only where the high court has given a decision in favour of the convicted person on a question of law. Accordingly, this court can only enter into the merits of the appeal if it is satisfied that the ground of appeal relied upon by the DPP involves a question of law.

[11] In its heads of argument, the DPP relied on six grounds of appeal which it contended constituted questions of law, although at the hearing before us, this number was reduced to four. In this regard it contended that the court a quo had erred in holding:

11.1 first, that the provisions of s 51(1) of Act 105 of 1997 were of no application merely because the charge sheet erroneously referred to s 51 and schedule 2 of Act 38 of 2007 instead of Act 105 of 1977, despite the fact that the charge sheet clearly stated that the respondent raped a 13 year old girl and the respondent was fully aware at the pleading stage that a minimum sentence of life imprisonment could be imposed;

11.2 secondly, that the respondent's right to a fair trial provided for by s 35(3)

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[3] *Bloemfontein Town Council v Richter* 1938 AD 195 at 232; *Brisley v Drotsky* 2002 (4) SA 1 (SCA) para 58.
[4] *Van der Walt v Metcash Trading Ltd 2002* (4) SA 317 (CC) para 39.

of the Constitution was infringed when the trial court sentenced him to life imprisonment due to the error in the charge sheet;

11.3 thirdly, that in terms of s 51 of Act 105 of 1997, only the high court could impose life imprisonment unless the case is referred to the high court in terms of s 52(1) for sentencing after the accused has been convicted, in a regional court; and

11.4 fourthly, that the dictum in *S v Ndlovu*[5] applied in this matter despite the clear differences in circumstances of the two cases.

The DPP further contended that the court a quo misdirected itself in concluding that the sentence of life imprisonment was not an appropriate sentence in the circumstances.

[12] Section 51(1) of the CLAA provides that a regional court or a high court shall sentence a person it has convicted of an offence referred to in Part 1 of Schedule 2 to life imprisonment unless there exists substantial and compelling circumstances which justify the imposition of a lesser sentence than the prescribed one. Rape of a child under the age of 16 years falls under Part 1 of Schedule 2.

[13] The rule that the accused person should be informed of the minimum sentence that is applicable in the case, owes its genesis to *S v Legoa*[6] where this court held that it was desirable that the facts the state intended to prove to increase the sentencing jurisdiction under the Act (CLAA) should be clearly set out in the charge sheet. The court concluded by stating that the matter is one of substance and not form, and a general rule could not be laid down that the charge sheet in every case had to recite either the specific form of the scheduled offence with which the accused was charged, or the facts the state intended to

[5] *S v Ndlovu* 2017 (2) SACR 305 (CC).
[6] *S v Legoa* 2003 (1) SACR 13 SCA [2002] ZASCA 122 para 21.

prove to establish it. Recently in *S v Khoza & another*[7] this court stated:

'As a general rule, fair-trial rights require that an accused person should be informed at the outset of the trial of the provisions of the Minimum Sentence Act . . . that the state intends to rely upon or which 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 before or at the commencement of the trial.'

[14] The charge sheet in this matter stated that 'the said accused did unlawfully and intentionally commit an act of sexual penetration with the complainant . . . a 13 year old by inserting his penis in her vagina . . .' The appellant therefore knew that he was being charged with rape of a girl below the age of 16. Although by reason of a typographical error the charge sheet referred to the Criminal Law (Sentencing) Amendment Act 38 of 2007 – which has neither a s 51 nor a Schedule 2 – both the respondent and his counsel were aware that the intention was to refer to s 51(1) of the CLAA 105 of 1997. This is so because after the respondent had pleaded guilty and his statement in terms of s 112(2) of the CPA was read into the record, but before the state accepted the plea, the trial court posed the following questions to the respondent:

'Court: And Mr Buthelezi the last aspect that I want to verify with you, that the Minimum Sentence Act was fully explained to you by your legal representative? Do you understand the consequences and the sentence that can be imposed in accordance with Section 51 of life imprisonment with the conviction?

Accused: I, fully understood that. Yes, you Worship.'

[15] In the light of this, the reference to the incorrect Act, being a mere typographical error, cannot without more amount to a misdirection in this case. To hold otherwise will be to put form over substance. Accordingly, I agree with

[7] *S v Khoza* 2019 (1) SACR 251 (SCA); [2018] ZASCA 133 para 10.

the DPP that the respondent's right to a fair trial was not infringed in any way. He was fully aware that the charge he was facing and to which he intended to plead guilty carried a minimum sentence of life imprisonment. He confirmed to the trial court that he understood the applicability and the consequences of the minimum sentence and that it had been fully explained to him. The respondent proceeded to plead guilty to the charge knowing fully that if convicted, he may be sentenced to life imprisonment.

[16] Regarding the regional court's jurisdiction to impose a sentence of life imprisonment, s 52 of the CLAA 105 of 1997 provided that once the regional court has convicted a person of an offence referred to in Part 1 of Schedule 2, the regional court shall adjourn the proceedings and refer the matter to the high court for sentencing. However this section was amended by the CLAA 38 of 2007 which came into operation on 31 December 2007. In terms of s 1 of the CLAA 38 of 2007, the regional court was granted jurisdiction to impose a sentence of life imprisonment if it convicts a person of an offence referred to in Part 1 of Schedule 2. Therefore, when the regional magistrate sentenced the respondent to life imprisonment on 31 August 2012, the CLAA 38 of 2007 was already in operation, and the regional court had the jurisdiction to impose the sentence which it did.

[17] I further agree with the DPP that the dictum in *Ndlovu* is not applicable in this matter. The facts in that case are clearly distinguishable from the present matter. There the accused was charged with rape and was warned that s 51(2) was applicable (that when convicted he may be sentenced to ten years' imprisonment). Upon his conviction, the trial court sentenced him to life imprisonment in terms of s 51(1). The Constitutional Court however held that the trial court on finding him guilty as charged had convicted him of an offence for which that sentence was not prescribed. Unlike *Ndlovu*, however, the charge

sheet in this matter referred to s 51 and Schedule 2, albeit of the wrong Act, and the respondent was adequately warned that a sentence of life imprisonment may be imposed if convicted. All the parties: the appellant, his counsel, the prosecutor and the magistrate, laboured under the mistaken assumption that the correct Act had been referred to. The typographical error thus caused no prejudice to the appellant, and the respondent's right to a fair trial was in no way infringed by any of this.

[18] Having stated the above, it is clear that the high court committed an error in law by concluding that the provisions of the CLAA, as amended by the CLAA 38 of 2007, were of no application. It therefore follows that the present case falls within the purview of s 311 of the CPA. In these circumstances, the sentence imposed by the high court must be set aside.

[19] In conclusion, both the regional court and the high court found that there existed no substantial and compelling circumstances justifying the imposition of a lesser sentence than the prescribed one. I cannot find any. The fact that the respondent pleaded guilty to the offence cannot be taken as substantial and compelling circumstance on itself to justify deviation from the prescribed sentence. The evidence against him was overwhelming. DNA evidence linked him to the offence. What I find more aggravating is the fact that the respondent took advantage of the age and vulnerability of the victim. He abused the trust the victim had in him as her cousin. His conduct in my view was sufficiently reprehensible to fall within the category of offences calling for a sentence both reflecting the court's disapproval and hopefully acting as a deterrent to other like minded people who satisfy their carnal desires with helpless children. There is no reason to depart from the prescribed minimum sentence of life imprisonment.

[20] In the result, the following order is made:

1 The appeal is upheld.

2 The order of the high court is set aside and substituted with the following order:

‘(a) The appeal is dismissed.

(b) The conviction and sentence of the trial court are confirmed.’

F E Mokgohloa

Judge of Appeal

APPEARANCES:

For Appellant:	Adv M J Makgwatha
Instructed by:	Director of Public Prosecutions Gauteng Division, Pretoria
	Director of Public Prosecutions Free State High Court, Bloemfontein
For Respondent:	Advocate J M Mojuto
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