REPORTABLE:	YES/NO
CIRCULATE TO JUDGES	YES/NO
CIRCULATE TO MAGISTRATES	YES/NO

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGH COURT, KIMBERLEY)

Case no: K/S 3/2015
HEARD ON: 30-10-2017
DELIVERED: 23-02-2018

In the matter between:

SIMON RAMPAGANE **Applicant**

And

THE STATE **Respondent**

CORAM: TLALETSI JP, WILLIAMS J et PAKATI J

JUDGMENT

WILLIAMS J

1. The appellant, Mr Simon Rampagane was convicted of rape and attempted murder in the Gariep Circuit Court held in Upington and was sentenced to 22 years imprisonment on the rape charge and 10 years imprisonment on the charge of attempted murder. The trial court (Olivier J) ordered that 5 years of the sentence on the attempted murder charge run concurrently with the sentence on the rape charge – thus resulting in an effective sentence of 27 years imprisonment.

2. This appeal lies against the sentence imposed after the trial court granted leave to appeal *"against his sentence on both counts, and against the order that 5 years of the sentence on count 2 be served concurrently with the sentence on count 1".*

3. The issue central to this appeal is whether the trial court, by imposing a sentence more than double that of the prescribed minimum sentence for the assault charge, did not commit a misdirection requiring the intervention of this court on appeal.

4. At the origin of the problem is the fact that the state, in what was a particular vicious assault which would have merited the consideration of sentence in terms of sec 51(1) of Act 105 of 1997 (life imprisonment), chose to indict the appellant on the charge within the realm of sec 51(2) of the Act, which prescribes a minimum sentence of not less than 10 years imprisonment for a first offender such as the appellant.

5. It appears from a reading of the record that the trial court was only alerted to this fact during argument on sentence – having assumed, based on the summary of substantial facts attached to the charge sheet and the evidence, that sec 51(1) of the Act would apply. As Ms Mazibukwana who appeared for the appellant in the trial court explained, that absent a formal amendment to the charge sheet she had explained to the appellant that the prescribed minimum sentence for the rape charge was one of 10 years imprisonment, although she

warned the appellant of the trial court's discretion to impose any sentence, even life imprisonment.

6. Mr Kgatwe who appeared for the state both in the court below and on appeal informed the trial court that although he had not asked for an amendment to the charge sheet at the commencement of the proceedings he had, when putting the charge to the appellant, referred to sec 51(1) and not sec 51(2). Mr Kgatwe's reason for not amending the charge sheet formally, quite astoundingly, was that the state was *dominis litis.*

7. Be that as it may. In the absence of a formal amendment to the charge sheet and the appellant not being warned before pleading that a prescribed minimum sentence of life imprisonment would apply (in the absence of substantial and compelling circumstances), the trial court correctly acknowledged that sentencing on the rape charge should be approached on the basis that the prescribed sentence is that of a minimum of 10 years imprisonment.

8. This approach is in accordance with what was said in *S v Ndlovu* 2003(1) SACR 331 (SCA) at para 12 thereof, that *".....where the State intends to rely upon the sentencing regime created by the Act a fair trial will generally demand that its intention pertinently be brought to the attention of the accused at the outset of the trial, if not in the charge sheet then in some other form, so that the accused is placed in a position*

to appreciate properly in good time the charge that he faces as well as its possible consequences." (See also S vs Machaba *2016(1) SACR (1) SCA).*

9. Unfortunately though, the trial court's acknowledgment of the proper approach to be followed and the actual sentence imposed, do not align. Counsel for the appellant correctly contended that while sentencing is pre-eminently a matter for the discretion of the trial court the sentence of 22 years imprisonment imposed for the rape, 12 years more than the prescribed minimum, bears the hallmark of the imposition of sentence where life imprisonment was applicable but where substantial and compelling circumstances were found to exist.

10. In addition, and while I am at pains not to downplay the serious nature of the rape, it would appear as though the trial court in considering sentence on the rape charge took into account the violence inflicted on the complainant in furtherence of the attempted murder, a factor which contributed to the overly harsh sentence imposed on the rape charge.

11. In light of the misdirections alluded to above we are at liberty to consider afresh an appropriate sentence.

12. The relevant facts are as follows:

    12.1 The complainant, a married woman and mother of the two children, was attacked by the appellant in the middle of

the night while she was visiting the outside toilet on her property. The appellant who lived in the same street as the complainant and whom she knew by sight barged into the toilet, punched the complainant in the face with his fist and wrestled with her until she was lying on her back in front of the toilet. While lying there he choked the complainant and raped her. After ejaculating in the sand next to her and trying to cover up his ejaculate, the appellant told the complainant that he was not stupid and proceeded to choke her again. This attempt at killing her not proving to be successful, he picked up a stone and started hitting her on the head. In the process of fending off the attack the complainant obtained injuries to her hands. When she eventually pretended to be dead, the appellant stopped the assault on her and made his getaway over the fence.

12.2 The complainant sustained three lacerations across her head – which according to the forensic examiner who gave evidence, would have been life threatening if not treated in time. She partially lost the use of one hand, cannot drive long distances anymore and had to be taken off driving duties at work. The experience has been highly traumatic for the whole family since it could very well have been the complainant's 13 year old daughter who could have been attacked. The family was so traumatised that they immediately after the incident

moved out of their home to live with relatives until they could acquire another home.

12.3 The appellant was 32 years old at the time of sentencing. He is unmarried but has two children whom he supported. At the time of his arrest he was working as a security guard earning about R4 800, 00 per month. On the night in question he was under the influence of alcohol. He has two previous convictions, but of such a negligible nature that the trial court quite correctly considered him, for purposes of sentence, to be a first offender.

13. There can be no doubt that the offences committed are of a serious nature which have left not only lasting physical scars but have also impacted psychologically on the whole family of the complainant. I can also not fault the trial court for finding, despite the appellant's relatively good personal circumstances and prospects of rehabilitation, that the circumstances surrounding the rape demands a higher sentence than the prescribed minimum of 10 years imprisonment. It is however necessary to give voice to the personal circumstances of the appellant and his ability to rehabilitate, which the sentence imposed by the trial court fails to do.

14. Both counsel for the appellant, Mr Van Tonder and Mr Kgatwe for the state argued that the cumulative effect of the sentence imposed should be tempered by ordering that the whole of the sentence for the attempted murder be ordered to run

concurrently with that of the rape. In my view however such an order would unduly minimise the seriousness of the attempted murder and neglect to address the fact that it was an independent and separate offence for which the intention was formed after the rape had been committed. I do agree however that a portion of the sentences be served concurrently.

In the circumstances the following orders are made:

a) The appeal against sentence succeeds in part.

b) The sentences imposed are set aside and substituted with the following:

"The accused is sentenced to 15 years imprisonment on count 1 (rape) and 10 years imprisonment on count 2 (attempted murder)."

c) It is ordered that 5 years of the sentence on count 2 be served concurrently with the sentence on count 1.

d) The above sentence is ante - dated to 17 April 2015.

CC WILLIAMS
JUDGE

I concur

LP TLALETSI
JUDGE PRESIDENT

I concur

BM PAKATI
JUDGE

For Appellant:	Mr A Van Tonder
	Legal Aid Board
For Respondent:	Adv. K Kgatwe
	Office of the DPP