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THE PRESIDENCY

No. 1257

31 December 2007

It is hereby notified that the President has assented to the following Act, which is hereby published for general information:–

No. 38 of 2007: Criminal Law (Sentencing) Amendment Act, 2007



AIDS HELPLINE: 0800-123-22 Prevention is the cure

Act No. 38, 2007 CRIMINAL LAW (SENTENCING) AMENDMENT ACT, 2007

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

 Words underlined with a solid line indicate insertions in existing enactments.

(English text signed by the President.)
(Assented to 21 December 2007.)

ACT

To amend the Criminal Law Amendment Act, 1997, so as to further regulate the imposition of discretionary minimum sentences for certain serious offences; to give a regional court jurisdiction to convict and sentence a person found guilty of an offence referred to in Part I of Schedule 2 to imprisonment for life; to provide that certain circumstances shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence when a sentence must be imposed in respect of the offence of rape; to repeal all sections dealing with the committal of an accused for the purposes of sentencing by a High Court after conviction in a regional court of an offence referred to in Schedule 2; to amend Schedule 2 in order to further regulate the offences in respect of which discretionary minimum sentences are prescribed; to amend the Criminal Procedure Act, 1977, so as to provide for an automatic right of appeal if a person is sentenced to life imprisonment by a regional court; to amend the National Prosecuting Authority Act, 1998, so as to provide for policy directives indicating in which instances prosecutions in respect of offences referred to in Schedule 2 to the Criminal Law Amendment Act, 1997, must be instituted in the High Court as a court of first instance; to amend the Prevention of Organised Crime Act, 1998, so as to effect a consequential amendment; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Substitution of section 51 of Act 105 of 1997, as amended by section 33 of Act 62 of 2000 and section 36 of Act 12 of 2004

1. The following section is hereby substituted for section 51 of the Criminal Law Amendment Act, 1997: 5

“[Minimum] Discretionary minimum sentences for certain serious offences

51. (1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person[— 10
 (a) if] it has convicted [a person] of an offence referred to in Part I of Schedule 2]; or

(b) if the matter has been referred to it under section 52(1) for sentence after the person concerned has been convicted of an offence referred to in Part I of Schedule 2, sentence the person] to imprisonment for life.

(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court[, including a High Court to which a matter has been referred under section 52(1) for sentence,] shall [in respect of] sentence a person who has been convicted of an offence referred to in—

(a) Part II of Schedule 2, [sentence the person,] in the case of—

- (i) a first offender, to imprisonment for a period not less than 15 years;
- (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and
- (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;

(b) Part III of Schedule 2, [sentence the person,] in the case of—

- (i) a first offender, to imprisonment for a period not less than 10 years;
- (ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and
- (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years; and

(c) Part IV of Schedule 2, [sentence the person,] in the case of—

- (i) a first offender, to imprisonment for a period not less than 5 years;
- (ii) a second offender of any such offence, to imprisonment for a period not less than 7 years; and
- (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 10 years;

Provided that the maximum [sentence] term of imprisonment that a regional court may impose in terms of this subsection shall not [be more than five years longer than] exceed the minimum [sentence] term of imprisonment that it [may] must impose in terms of this subsection by more than five years.

(3) (a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and [may] must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part I of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.

(aA) When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

- (i) The complainant's previous sexual history;
- (ii) an apparent lack of physical injury to the complainant;
- (iii) an accused person's cultural or religious beliefs about rape; or
- (iv) any relationship between the accused person and the complainant prior to the offence being committed.

[(b) If any court referred to in subsection (1) or (2) decides to impose a sentence prescribed in those subsections upon a child who was 16 years of age or older, but under the age of 18 years, at the time of the commission of the act which constituted the offence in question, it shall enter the reasons for its decision on the record of the proceedings.

(4) Any sentence contemplated in this section shall be calculated from the date of sentence.]

(5) (a) [The] Subject to paragraph (b), the operation of a minimum sentence imposed in terms of this section shall not be suspended as contemplated in section 297(4) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

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(b) Not more than half of a minimum sentence imposed in terms of subsection (2) may be suspended as contemplated in section 297(4) of the Criminal Procedure Act, 1977, if the accused person was 16 years of age or older, but under the age of 18 years, at the time of the commission of the offence in question.

(6) **[The provisions of this] This section [shall] does not [be applicable] apply** in respect of **[a child] an accused person** who was under the age of 16 years at the time of the commission of **[the act which constituted the offence in question] an offence contemplated in subsection (1) or (2).**

(7) If in the application of this section the age of **[a child] an accused person** is placed in issue, the onus shall be on the State to prove the age of **[the child] that person** beyond reasonable doubt.

(8) For the purposes of this section and Schedule 2, 'law enforcement officer' includes—

(a) a member of the National Intelligence Agency or the South African Secret Service **[established under] referred to in section 3 of the Intelligence Services Act, [1994 (Act No. 38 of 1994)] 2002 (Act No. 65 of 2002); and**

(b) a correctional official of the Department of Correctional Services or a person authorised under the Correctional Services Act, 1998 (Act No. 111 of 1998).

(9) The amounts mentioned in respect of the offences referred to in **[PART] Part II** of Schedule 2 to the Act, may be adjusted by the Minister from time to time by notice in the *Gazette*."

Repeal of sections 52, 52A and 52B of Act 105 of 1997

2. Sections 52, 52A and 52B of the Criminal Law Amendment Act, 1997, are hereby repealed.

Amendment of section 53 of Act 105 of 1997, as substituted by section 36 of Act 62 of 2000 and amended by section 16 of Act 42 of 2001

3. Section 53 of the Criminal Law Amendment Act, 1997, is hereby amended—
 (a) by the deletion of subsections (1) and (2); and
 (b) by the deletion of subsection (2A).

Insertion of section 53A in Act 105 of 1997

4. The following section is inserted in the Criminal Law Amendment Act, 1997:

"Transitional provision

53A. If a regional court has, prior to the date of the commencement of the Criminal Law (Sentencing) Amendment Act, 2007—

- (a) committed an accused for sentence by a High Court under this Act, the High Court must dispose of the matter as if the Criminal Law (Sentencing) Amendment Act, 2007, had not been passed; or
 (b) not committed an accused for sentence by a High Court under this Act, then the regional court must dispose of the matter in terms of this Act, as amended by the Criminal Law (Sentencing) Amendment Act, 2007."

Amendment of Schedule 2 to Act 105 of 1997, as amended by section 37 of Act 62 of 2000 and section 27(1) of Act 33 of 2004

5. Schedule 2 to the Criminal Law Amendment Act, 1997, is amended—

(a) by the addition in Part I after paragraph (d) of the paragraphs setting out the categories of "murder", of the following paragraphs:

"(e) the victim was killed in order to unlawfully remove any body part of the victim, or as a result of such unlawful removal of a body part of the victim;

- (f) the death of the victim resulted from, or is directly related to, any offence contemplated in section 1(a) to (e) of the Witchcraft Suppression Act, 1957 (Act No. 3 of 1957)."; and
- (b) by the substitution for Part IV of the following Part:

"PART IV

Any [**offence referred to in Schedule 1 to the Criminal Procedure Act, 1977 (Act 51 of 1977) other than an offence referred to in Part I, II or III of this Schedule**] of the following offences, if the accused had with him or her at the time a firearm, which was intended for use as such, in the commission of such offence:

Treason;

Sedition;

Public violence;

Robbery, other than a robbery referred to in Part I or II of this Schedule;

Kidnapping;

An offence involving an assault, when a dangerous wound is inflicted with a firearm, other than an offence referred to in Part I, II or III of this Schedule;

Breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence;

Escaping from lawful custody."

Amendment of section 309 of Act 51 of 1977, as amended by section 17 of Act 105 of 1982, section 8 of Act 107 of 1990, section 51 of Act 129 of 1993, section 13 of Act 75 of 1995, section 2 of Act 33 of 1997, section 2 of Act 76 of 1997, section 38 of Act 105 of 1997 and section 2 of Act 42 of 2003

6. Section 309 of the Criminal Procedure Act, 1977, is hereby amended by the substitution in subsection (1) for paragraph (a) of the following paragraph:

"(a) Any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction: Provided that—

(i) if that person was, at the time of the commission of the offence—

[(i)](aa) below the age of [14] 16 years; or

[(ii)](bb) at least [14] 16 years of age but below the age of [16] 18 years and was not assisted by a legal representative at the time of conviction in a regional court; and

[(iii)](cc) [was] sentenced to any form of imprisonment as contemplated in section 276 (1) that was not wholly suspended; or

(ii) if that person was sentenced to imprisonment for life by a regional court under section 51(1) of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997),

he or she may note such an appeal without having to apply for leave in terms of section 309B: Provided further that the provisions of section 302(1)(b) shall apply in respect of a person who duly notes an appeal against a conviction, sentence or order as contemplated in section 302(1)(a): and".

Amendment of section 21 of Act 32 of 1998

7. Section 21 of the National Prosecuting Authority Act, 1998, is hereby amended by the addition of the following subsections:

"(3) The prosecution policy must determine the circumstances under which prosecutions shall be instituted in the High Court as a court of first instance in respect of offences referred to in Schedule 2 to the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997).

(4) The National Director must issue policy directives pursuant to the policy contemplated in subsection (3), regarding the institution of prosecutions in respect of offences referred to in Schedule 2 to the Criminal Law Amendment Act, 1997.

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(5) The prosecution policy and the policy directives contemplated in subsections (3) and (4) above, must be issued within three months of the date of the commencement of the Criminal Law (Sentencing) Amendment Act, 2007.”

Amendment of section 3 of Act 121 of 1998

8. Section 3 of the Prevention of Organised Crime Act, 1998, is amended— 5
- (a) by the deletion of subsection (2)(ii); and
 - (b) by the deletion of subsection (3).

Short title and commencement

9. This Act is called the Criminal Law (Sentencing) Amendment Act, 2007, and comes into operation on 31 December 2007 or an earlier date fixed by the President by 10 proclamation in the *Gazette*.