29/8/2017

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: A508/2016

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

29/08/17
DATE

SIGNATURE

In the matter between:

ORAPELENG LEHIHI Applicant

and

THE STATE Respondent

JUDGMENT

Baqwa J

[1] The appellant was arraigned before the Regional Magistrate's Court sitting in Wolmaranstad on a charge of rape.

[2] He pleaded not guilty but was subsequently convicted and sentenced to life imprisonment on 7 August 2008.

[3] He had an automatic right of appeal in terms of section 309(1) of the Criminal Procedure Act 51 of 1977.

[4] A brief background to this case is that on the night in question the complainant, Dorah Matsogo went to a nearby shop at about 22h00 to purchase some groceries. On the way to the shop she observed two individuals who were in the company of one Collins whom she knew. She did not know the other two.

[5] When she was on the way home she was confronted by the two individuals. Collins was no longer with them. They apprehended her, assaulted her and dragged her to a nearby railway line where she was pinned down, undressed and raped by the appellant and his accomplice. The police arrived and the perpetrators fled the scene.

[6] The DNA was positive in respect of the appellant and was admitted in terms of section 220 of the Criminal Procedure Act 51 of 1977 by the appellant.

[7] He testified before the court **a quo** and in his testimony he stated that he did grab the complainant and she fell down. He also stated that they had agreed to have sexual intercourse but that she subsequently changed her mind. Thereafter he and his accomplice grabbed and dragged her to the railway line. He admitted that they were disturbed by the arrival of the police and they ran away.

[8] He further testified that even though they wanted to rape the complainant they did not do so. He then added that he had had consensual sexual intercourse with her five days prior to the rape incident.

[9] The appellant seeks to challenge the judgment of the court **a quo** and submits that it misdirected itself in not properly taking into account his denial of assault and rape of the complainant. He also submits that he does not believe the correctness of the DNA result and that his admission of the J88 report does not mean that he admits assaulting the complainant.

[10] In the appellant's heads of argument the correctness of the DNA result is conceded and nothing more need be said in that regard. He further concedes in the heads that the court **a quo** was correct in finding the improbability of the DNA result being a consequence of sexual intercourse which had taken place five days prior to the date of the rape incident. The misdirection challenge regarding conviction also falls away as a result of that concession.

[11] The appellant also challenges the sentence on several traditional grounds such as the fact that at the time of the offence he was about 20 years old and that he was a first offender.

[12] He also challenges sentence on the basis that whilst he was charged of rape read with section 51(2) of Minimum Sentencing Act 105 of 1997, he appears to have been sentenced in terms of section 51(1) thereof.

[13] Similar facts were dealt with in the Constitutional Court, in the matter of **Ndlovu v The State** [2017] ZACC 19 in a judgment by Khampepe, J. I can do no better than quoting from paragraph 10 to 18 of that judgment which read as follows:

"Litigation history

In the High Court

[10] Mr Ndlovu appealed against both his conviction and sentence to the High Court of South Africa, Gauteng Division, Pretoria (High Court). He appealed against the sentence on the basis that his right to a fair trial had been infringed by the reference to an incorrect provision of the Minimum Sentencing Act in the charge sheet.

[11] Considering the fair trial question, the Court noted that Mr Ndlovu had been incorrectly advised of the provisions of the law applicable to his case. The Court held that "[t]he provisions of the Act are, however, quite clear and he falls within provisions where the imposition of a life sentence [is] appropriate and had to be imposed". The Court held that Mr Ndlovu was represented and that the case was conducted in a way that it could not be said that any other information would have changed the outcome. It concluded:

"It cannot be said that the mere fact that the wrong section of the Act was initially and repeatedly used in any way prejudiced the appellant as far as the sentence is concerned."

[12] Bearing in mind the seriousness of, and violence involved in, the rape, the High Court was not convinced that the Magistrate erred in any way by imposing the sentence of life imprisonment. It did not deal with the threshold issue whether, in the prevailing circumstances, the Regional Court had jurisdiction to impose a life sentence on Mr Ndlovu.

[13] On 4 October 2011, the High Court dismissed the appeal, but on 31 July 2012 granted Mr Ndlovu leave to appeal to the Supreme Court of Appeal.

In the Supreme Court of Appeal

[14] Mr Ndlovu appealed his sentence on the same basis as in the High Court. Considering the fair trial question, the Supreme Court of Appeal, with reference to the judgments in Makatu and Legoa, found that the Court had been reluctant to lay down a general rule as to what the charge sheet must contain. The Court held that "[t]he question to be answered is whether the accused had a fair trial, and this is a fact based enquiry that entails a 'vigilant examination of the relevant circumstances'".

[15] Mr Ndlovu argued that, if he had known he faced the prospect of life imprisonment rather than 15 years' imprisonment, he would not have taken the decision to have his trial continue without DNA results. The Court rejected this submission, and found that there was no factual foundation to support a finding that Mr Ndlovu's right to a fair trial was infringed by the error in the charge sheet. The Court agreed with the High Court that the case was conducted in such a manner that it could not "be said that any other information would have changed [the case]"; and that it could not be said that "the mere fact that the wrong section of the [Minimum Sentencing] Act was initially and repeatedly used in any way prejudiced" Mr Ndlovu.

[16] The Court also considered whether to interfere with the sentence of the Regional Court, and concluded that there were no substantial and compelling circumstances justifying a departure from the prescribed minimum sentence of life imprisonment.

[17] Like the High Court, the Supreme Court of Appeal did not consider the question of the Regional Court's jurisdiction in the prevailing circumstances. On 26 September 2014, the Supreme Court of Appeal dismissed Mr Ndlovu's appeal.

In this Court

[18] Mr Ndlovu now seeks leave to appeal to this Court to set aside his sentence and replace it with a sentence within the jurisdiction of the Regional Court in terms of section 51(2) of the Minimum Sentencing Act. He also seeks an order condoning the late filing of the application."

[14] **In casu**, the explanation given to the appellant was that he was facing a period of 25 years of imprisonment and not life imprisonment. What is evident is that there was no proper explanation to the appellant what the case was in terms of section 51(2) of the Minimum Sentencing Act. Neither was there an application for an amendment of the charge sheet before judgment or sentence was handed down.

[15] The facts as perceived by the court **a quo** may have justified a sentence in terms of section 51(1) of the Act but the court was not at liberty to effect a 'silent' amendment of the charge sheet without informing the appellant as that would constitute an unfair trial.

[16] It is instructive to make reference to Khampepe J's comments at paragraph's 45 to 47 of her judgment in which she said:

"[45] The Magistrate was aware that the charge was "rape read with the provisions of [s]ection 51(2)" and specifically found Mr Ndlovu "guilty as charged". This wording simply does not permit an interpretation that the Magistrate in fact convicted Mr Ndlovu of rape contemplated in section 51(1). Nor does the evidence of the complainant's injuries automatically cure the charge in terms of section 51(1), as posited by the state. A defective, or incomplete, charge may be remedied by evidence in some instances by section 88 of the Criminal Procedure Act. However, this charge was complete and not defective. Quite simply, the charge was not rape involving the infliction of grievous bodily harm and evidence alone could not make it so.

[46] In the light of this, I can do nought but conclude, inexorably, that the Regional Court did not have jurisdiction to impose life imprisonment in terms of section 51(1) of the Minimum Sentencing Act. Mr Ndlovu was convicted of rape, read with section 51(2); accordingly, the Regional Court was required in terms of section 51(2) to impose a minimum sentence of 10 years (as he was treated as a first offender). The Regional Court's jurisdiction was limited in terms of section 51(2) to imposing a maximum sentence of 15 years.

[47] In the result, because the Regional Court did not have jurisdiction to sentence Mr Ndlovu in terms of section 51(1), his application must succeed. In the circumstances, it is unnecessary to consider the fair trial question."

[17] Upon a consideration of the facts and submissions by counsel **in casu**, and more particularly the Ndlovu decision (**supra**) I come to the conclusion that this court ought to interfere with the sentence imposed by the court **a quo**.

[18] In the result, I propose that the following order be made:

ORDER

18.1 The appeal against conviction is dismissed.

18.2 The appeal against sentence is upheld.

18.3 The sentence handed down by the trial court is set aside and the following sentence is substituted:

The appellant is sentenced to fifteen (15) years imprisonment. The sentence is antedated to 7 August 2008 which is the date on which he was sentenced.

It is so ordered.

S. A. M. BAQWA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree.

L. VUMA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Heard on:	29 August 2017
Delivered on:	29 August 2017
For the Applicant:	Advocate L. A. van Wyk
Instructed by:	Legal Aid
For the First Respondent:	Advocate C. P. Harmzen
Instructed by:	The Director of Public Prosecutions, Pretoria