"IN THE HIGH COURT OF SOUTH AFRICA"
NORTH WEST DIVISION, MAHIKENG

CASE NO. CAF18/2016

In the matter between:

JACOB MOKGELE APPELLANT

and

THE STATE RESPONDENT

GURA J, KGOELE J AND GUTTA J

CRIMINAL APPEAL

GUTTA J.

A. INTRODUCTION

[1] On the 15 September 2000, the appellant was arraigned at the Regional Division at North West held at Mmabatho on a charge of Rape of a 9 year old girl. The appellant initially pleaded guilty in terms of section 112 but the plea was altered to not guilty in terms of section 113 of Act 51 of 1977. On the 21 September 2000, the court found the appellant guilty as charged.

[2] Pursuant thereto the appellant was transferred to the North West High Court for sentencing. Mogoeng J (as he then was) confirmed the conviction and sentenced the appellant to life imprisonment.

[3] The appellant applied for leave to appeal his sentence which application was granted on the 11 November 2016.

B. FACTS

[4] The facts briefly are that the complainant who was 9 years old at the time was sent on an errand by her mother to the shops. Along the way she met the appellant who took her to a place where he blocked her mouth and forcefully raped her three times. The complainant bled profusely and walked to the police headquarters where she was found lying in a pool of blood.

C. GROUND OF APPEAL

[5] The ground of appeal relied upon by the appellant is that the court misdirected itself in sentencing the appellant to life imprisonment under the minimum sentence legislation, namely Section 51(1) of Act 105 of 1997 (the Act) as the appellant was neither warned nor advised at the commencement of his trial that the minimum sentence was applicable.

[6] Counsel for the appellant relied on the decision of *S v Chowe*[1], *S v Ndlovu*[2] and *S v Makatu*[3] to submit that the failure by the court to warn or advise the appellant of

1 2010 (1) SACR 141 (GNP)
2 2004(1) SACR (W)
3 2006(2) SACR 582 (SCA)

the provisions of the Act constitutes an irregularity and renders the sentence unfair and that this court should in the circumstances set the sentence aside and consider the sentence afresh[4].

[7] Counsel for the respondent submitted that there was no misdirection and that the appellant was not prejudiced by the fact that he was not informed of the minimum sentence legislation and submitted further that the minimum sentence imposed, namely life imprisonment was the only suitable sentence given the circumstances of the case.

D. COMMON CAUSE

[8] The following facts are common cause:

8.1 The appellant was unrepresented at the Regional court during his trial on conviction.

8.2 The charge sheet was silent regarding the applicability of the minimum sentence legislation.

8.3 The appellant was neither warned nor appraised at the beginning of the trial or during the course of the trial that the provisions of section 51(1) of the Act would be invoked.

8.4 The appellant initially pleaded guilty in terms of section 112 of Act 51 of 1977 and made certain admissions which were recorded.

4 S v Machongo 2014 JDR 2472 SCA

8.5 The Magistrate who was not satisfied that the appellant admitted all the elements of the offence of rape, altered the plea to not guilty in terms of section 113 of Act 51 of 1977.

8.6 The appellant was represented during sentencing at the High Court.

E. EVALUATION

[9] The full bench of this division in the matter of *Nico Mannuel Khoza et Simon Bennet Mhlongo v The State*[5] recently considered the issue whether the appellants were prejudiced to the extent that they were not afforded a fair trial because the appellants were not warned of the applicability of section 51 of the Act from the onset of the trial or during the course of the trial. The court at paragraph 27 held *inter alia* that failure to inform the accused person of the minimum sentence provisions did not vitiate the sentencing proceedings and to decide otherwise would amount to the court over emphasizing form over substance. The full bench concluded that the appellant was afforded a fair trial. Several authorities were cited some of which are referred to *infra*.

[10] In *S v Kolea*[6], the issue raised was that the appellants were charged with rape read with the provisions of section 51(2) instead of section 51(1) of the Act but were sentenced to life imprisonment in terms of section 51(1) of the Act. Mbha AJA referred to *S v Mashinini*[7], and held that the majority in Mashinini misread the

5 Case number CAF11/2016, delivered on the 9 February 2017, unreported
6 2013(1)SACR 409 (SCA)
7 2012(1) SACR 604 SCA

provisions of section 51(2) and stated the following in paragraphs [17], [18] and [19]

"[17] In my view the majority, with respect, misread the provision of section 51(2). The term of 10 years imprisonment referred to therein is the minimum sentence that can be imposed. This means that any sentence in excess of 10 years imprisonment, and possibly even life imprisonment, could be imposed by a court having jurisdiction to do so. Furthermore, the fact that a statute provides for an increased sentence with reference to a particular type of offence when committed under particular circumstance, does not mean that a different offence has been created thereby. In *S v Moloto,* Rumpff CJ held that, where an accused is charged with robbery committed with aggravating circumstances, this did not create a new category of robbery, but simply meant that the court had a discretion, where such aggravating circumstances existed, to impose the increased sentence in terms of section 277(1)(c) of the Criminal Procedure Act, in that case the death penalty. The fact that the Act specifies penalties in respect of certain offences (in this case rape, where more than one person raped the victim), does not in any way mean that a new type of offence has been created. Rape remains rape, but the Act provides for a more severe sanction where, for an example, the victim has been raped more than once or by more than one person.

[18] Section 86(4) of the Criminal Procedure Act provides that the fact that a charge is not amended as provided in this section, shall not, unless the court refuses to allow the amendment, affect the validity of the proceedings. A reading of this section establishes that a formal application to amend a charge-sheet is not always required. The fact that a charge-sheet had a defect which was never rectified in terms of section 81(1), as was the case both in *Mashinini* and in this case, did not of its own render the proceedings invalid. The test is always whether or not the accused suffered any prejudice.

[19] A close investigation of the circumstances in *Mashinini* reveals that section 51(2) of the Act was erroneously typed instead of section 51(1) of the Act, that the appellants were correctly apprised of the applicability of the increased penalty of the provisions of the Act, that they pleaded guilty to a charge involving multiple rape which, in any event, is not even applicable to section 51(2); that they never complained of, nor showed that they had suffered, any prejudice; and that they participated fully in the trial. In view of what I have said above, I believe that the appellants in that case were not in any way prejudiced by the erroneous reference to section 51(2) instead of section 51(1) in the charge-sheet. I am therefore satisfied that the conclusion at which the majority arrived in *Mashinini* was clearly wrong."

[11] The court in *S v Kolea supra*, reiterated and endorsed the principles enunciated in *S v Legoa*[8] that it is crucial for the court to establish whether an accused person was afforded a fair trial by considering substance and not form and at paragraph [10] referred to *S v Ndlovu*[9] and held:

"The court, however, left open the question whether, or in what circumstances, it might suffice if the charge and its possible consequences where brought to the attention of the accused during the course of the trial. What is clear, however, is that the court never expressly ruled as improper or irregular the fact that possible consequences of an offence were never spelt out to the accused at the commencement of the trial. As Ponnan JA recently said in his minority judgment in *S v Mashinini and Another"*

"I have been pains to stress, as enjoined by the authorities to which I have referred, that a fair trial enquiry does not occur in vacuo, but that it is first and foremost a fact-based

8 2003 (1) SACR 13 (SCA)
9 2003 (1) SACR 331 (SCA)

> enquiry. And, as I have already stated any conclusion as may be arrived at requires a vigilant examination of all the relevant circumstances."

The court concluded that the appellant did not suffer any prejudice and confirmed the sentence of life imprisonment.

[12] In *Ndlovu v The State*[10], the court endorsed the principle in *Kolea supra* and remarked in paragraph [14] that:

> "….No factual foundation has been laid by the appellant to support a finding that his right to a fair trial was prejudiced by the error on the charge sheet. This court has held that such mistakes must be approached in the context of fairness as it applies both to the accused and the public represented by the state".

[13] In the recent decision of *Moses Tshoga v The State*[11], the appellant was sentenced to life imprisonment for the rape of a 10 year old girl. As with the other cases referred to above, the appellant was only informed about the provisions of section 51(1) of the Act during the sentencing stage, when the Regional Court Magistrate referred the matter to the High Court for sentencing. The facts are similar to the facts in *casu* in that there was no reference to the minimum sentence legislation either in the charge sheet or at the hearing. The court reiterated that a fair trial enquiry does not occur in a *vacuo* and that it is necessary to conduct a vigilant examination of the relevant circumstances in finding that the accused had a fair trial and was not prejudiced and at paragraph [22] held that: "it is also clear that the discussion in *Kolea* as to the possibility of prejudice considered that substance was of paramount importance and that form was secondary. I am of the view that a pronouncement that the act had

10 (204/2014). [2014] ZASCA 149 (26 September 2014) unreported
11 (635/2016) 2016 ZASCA 205 (15 December 2016)

to be mentioned in the charge sheet or at the outset of the trial would be elevating form over substance. Every case must be approached on its own facts and it is only after a diligent examination of all the facts that it can be decided whether an accused has a fair trial or not"

[14] In *Khoza et Mhlongo v The State supra,* the full bench of this division in arriving at its finding that the appellants were not prejudiced by the court's failure to warn them of the minimum sentence legislation, considered *inter alia* the following factors:

1) The appellants were legally represented throughout the trial until the appellants terminated their counsels' mandate before the close of the state case. The appellants were afforded an opportunity to obtain legal aid and they once again terminated their counsels' mandate despite being warned extensively of their right to legal representation.

2) The appellants, notwithstanding the fact that they were warned of the seriousness of their charges remained inactive and silent during the trial and also elected not to give evidence in their defence. They also failed to present evidence in mitigation of their sentence.

[15] The facts in *Khoza et Mhlongo v The State supra*, are distinguishable to the facts in *casu* in that:

15.1 In *casu*, the appellant was unrepresented and initially pleaded guilty and made certain admissions which include *inter alia*:

a) He admitted to having sexual intercourse with the complainant once;
b) He said the complainant told him that she was 14 years old.

15.2 The magistrate on questioning the appellant altered the plea of guilty to not guilty in terms of section 113.

15.3 The admissions remained admissible against the appellant.

[16] After conducting a diligent examination of the facts in *casu*, I am of the view that the appellant was not afforded a fair trial in that he was prejudiced by the failure to warn him of the provisions of the minimum sentence legislation at the onset of the trial or during the trial. Had the appellant been appraised of the fact that the minimum sentence legislation was applicable and that he could be sentenced to life imprisonment, there is a possibility that he may not have made the aforestated admissions and may not have pleaded guilty.

[17] The sentence imposed was accordingly vitiated by a misdirection and in the circumstances this court has to set aside the sentence of life imprisonment and consider it afresh.

[18] The appellant's personal circumstances are the following:

19.1 The appellant was 27 years of age and not married.
19.2 He has two minor children.
19.3 He was doing odd jobs before his arrest.
19.4 From the money he was earning, he was supporting his minor children.

[19] The aggravating circumstances are that the complainant was a 9 year old girl and serious injuries were inflicted to her genitals. She was brutally raped thrice which caused her to be badly torn and injured and resulted in excessive bleeding. The police officer testified that she found the complainant lying on the

ground in a pool of blood at the police station. The complainant complained about pain in her stomach and at the back side and she was unable to stand up. While attempting to stand, blood flowed profusely. The complainant was unable to walk.

[20] In the case of *DPP, North Gauteng v Thabethe*[12], the Court held that:

> "[22] . . . Rape of women and young children has become cancerous in our society. It is a crime which threatens the very foundation of our nascent democracy which is founded on protection and promotion of the values of human dignity, equality and the advancement of human rights and freedoms. It is such a serious crime that it evokes strong feelings of revulsion and outrage amongst all right-thinking and self-respecting members of society. Our courts have an obligation in imposing sentences for such a crime, particularly where it involves young, innocent, defenceless and vulnerable girls, to impose the kind of sentences which reflect the natural outrage and revulsion felt by law-abiding members of society. A failure to do so would regrettably have the effect of eroding the public confidence in the criminal justice system."

[21] Our courts have repeatedly expressed their outrage at the high incidence of rape in South Africa. As Bosielo JA in *S v Makatu*[13] held that:

> "For some time now this country has witnessed an ever increasing wave in crimes of violence, notably murder and sexual offences. Undoubtedly, these crimes seriously threaten the social and moral fabric of our society. As a result our society is seriously fractured. The majority of our people, particularly the vulnerable and the defenceless, which include women, children, the elderly and infirm, live in constant fear. It is no exaggeration to say that every woman or girl in this country is a potential victim of either murder or rape. This is sad because these heinous crimes occur against the backdrop of our new and fledgling constitutional democracy, which promises a better life for all. These crimes have spread across the length and breadth of our beautiful country like a malignant cancer. They are a

12 2011 (2) SACR 567 (SCA) at 577G–I
13 2014 (2) SACR 539 (SCA)

serious threat to our nascent democracy. They have to be exterminated at their roots.

[31] There is a huge and countrywide outcry by citizens, civic organisations, NGOs, politicians, religious leaders and people across racial, class and cultural divides over these crimes which have become a scourge. There is hardly a day that passes without a report of any of these crimes in the media, be it print or electronic. The legislature responded to the public outcry with, amongst others, the Criminal Law Amendment Act 105 of 1997, which singled out these crimes, that are a threat to our wellbeing, for very severe sentences, the main objective being to punish offenders effectively and, in appropriate cases, to remove those who are a danger to society from its midst, circumstances permitting, either for life or long term imprisonment. In addition the national government declared the period from 25 November to 10 December, popularly known as '16 days of activism', to be a nationwide campaign promoting a culture and ethos of zero violence against women and children. I regret to state that everyday media reports and statistics from the South African Police Service (SAPS) and the National Prosecuting Authority (NPA) seem to suggest that, despite all these valiant efforts by government, we are not winning the war against these crimes.

[32] Faced with this scourge, what role can our courts play to ensure that the rights of all citizens are protected? Our courts which are an important partner in the fight against crime cannot be seen to be supine and unmoved by such crimes. Our courts must accept their enormous responsibility of protecting society by imposing appropriate sentences for such crimes. It is through imposing appropriate sentences that the courts can, without pandering to the whims of the public, send a clear and unequivocal message that there is no room for criminals in our society. This in turn will have the salutary effect of engendering and enhancing the confidence of the public in the judicial system. Inevitably this will serve to bolster respect for the rule of law in the country. See *R v Kara*[14]; S *v Mafu*[15]; and *S v Mlhakaza and Another*[16]."

14 1961 (1) SA 231 (A) at 236A– C
15 1992 (2) SACR 494 (A) at 496g–j
16 1997 (1) SACR 515 (SCA) ([1997 2 All SA 185)

[22] In the cases of *S v Vilakazi*[17] and *S v Mahomotsa*[18], the Courts held that life imprisonment should be reserved for more serious cases of rape. The purpose of sentencing is deterrence, prevention, rehabilitation, retribution and punishment. When considering the mitigating and the aggravating facts mentioned *supra,* I am of the view that the facts in *casu* falls under the category of the more serious case of rape. The complainant has been scarred physically, mentally and emotionally. In the circumstances the only appropriate sentence is life imprisonment.

[23] In the result:

23.1 The sentence of life imprisonment imposed under section 51(1) of Act 105 of 1997 is set aside and substituted with a sentence of:

'Life Imprisonment'

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N GUTTA
JUDGE OF THE HIGH COURT

17 2009 (1) SACR 552 (SCA)
18 2002 (2) SACR 435 (SCA)

I agree

_____
SAMKELO GURA
JUDGE OF THE HIGH COURT

I agree

_____
AM KGOELE
JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING	: 10 MARCH 2017
DATE OF JUDGMENT	: 06 APRIL 2017
COUNSEL FOR APPELLANT	: MR M E SETUMU
COUNSEL FOR RESPONDENT	: ADV NONTHENTJWA
ATTORNEYS FOR APPELLANT	: LEGAL AID BOARD
ATTORNEYS FOR RESPONDENT	: DIRECTOR OF PUBLIC PROSECUTIONS