HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

(1)	REPORTABLE: **YES**
(2)	OF INTEREST TO OTHER JUDGES: **YES**
(3)	REVISED.

2014.07.23
DATE

SIGNATURE

23/7/14

CASE NO: **A748/2013**

In the matter between:

FIDUS BONGANI MTHEMBU Appellant

and

THE STATE Respondent

JUDGMENT

MAKGOKA, J:

[1] This judgment concerns, among others, the effect on sentencing, of an erroneous reference in a charge-sheet to s 51(2), instead of s 51(1), of the Criminal Law Amendment Act 105 of 1997 (the Act). In particular, whether such erroneous reference precludes a court from sentencing an accused in terms of s 51(1) of the Act. The appellant, a serial rapist, appeals with leave of the trial court, against sentence only. He was convicted in the regional court, Benoni, of 15 counts of rape and one count of robbery with aggravating circumstances.

[2] One of the rapes (count 9) involved an 11 year old girl, for which he was sentenced to imprisonment for life. On the other 14 counts of rape he was sentenced to 10 years' imprisonment each. He was sentenced to 15 years' imprisonment for the robbery. Five years each of counts 1,2,3,5,6,8,11,12,13,15,16 and 17 were ordered to run concurrently with the life sentence imposed in respect of count 9, resulting in an effective period of life imprisonment plus a further 70 years' imprisonment.

[3] In terms of the Act, the regional court was enjoined to impose the sentences referred to above, unless it found that substantial and compelling circumstances were present, which entitled it to impose lesser sentences. It found none, and accordingly imposed the prescribed sentences. The appellant takes no issue with the sentences imposed in respect of the other rapes and the robbery. The appellant's complaint concerns the sentence of life imprisonment imposed in respect of the rape of the 11 year old girl. It is argued that the trial court misdirected itself in not finding that substantial and compelling circumstances were present, which would have entitled it to deviate from the prescribed sentence of life imprisonment. During argument, the appellant's attorney raised, for the first time, a contention that the appellant had not been apprised of the applicability of the minimum sentences, and therefore, the prescribed sentences were incompetently imposed. Counsel for the state agreed with this supposition.

[4] Before I consider the merits of the appeal and the arguments proffered above, it is necessary to briefly refer to the circumstances in which the crimes were committed. The rape incidents and the robbery occurred in Daveyton, Ekhuruleni, Gauteng Province, between 11 June 2009 and 22 January 2011. The *modus operandi* of the appellant was the following: He waylaid women and their male partners in the evenings at gun point. He forced them into the bushes, where he would tie their male partners with a piece of their own clothing. He would then blindfold the women and rape them while their male partners looked on helplessly. In all instances he had worn a balaclava or some form of mask. Some of the victims were raped in front of their own children, and some in the presence of their friends, who would be tied for the duration of the ordeal. After that he would either run away and disappear into the bushes or instruct his victims to run, after which he would disappear.

[5] In respect of the 11 year-old girl, the following are the brief facts. On Sunday 15 August 2010 at approximately 18h30 the child was walking along a street when she came across the appellant. His face was covered with a scarf or a balaclava, which showed only his eyes. He stopped her and pointed her with a firearm, instructing her not to scream. He forced her towards to a local stadium. Along the way they walked past other people, but he instructed her not to alert them of her ordeal, otherwise he would kill her. Once inside the darkness of the stadium, he instructed her to undress, which she refused. He threatened to shoot her. She relented, after which he raped her, in the process instructing her not to scream. After he finished, he got up and ran away. On her way home she met a certain boy, to whom she made a report of her ordeal. She was medically examined the same day, 15 August 2010 at 23h45 at a rape and trauma centre. The gynaecological examination revealed the following injuries: the urethral orithis was swollen and red. The urethral fold, the labia majora and minora were all red.

[6] With this factual background, I turn now to the appellant's contentions. I commence with the one raised for the first time in argument before us – that the appellant was not apprised of the applicability of the applicable minimum sentences. As stated earlier, the upshot of this argument is that the prescribed sentences could not be imposed under those circumstances. There is simply no merit in this argument, for the following reasons. First, the diary of the charge-sheet indicates that at his first appearance on 4 March 2011, a full range of explanations were made to the appellant, with regard to legal representation; bail rights; that the offences fell under schedule 6, which placed the onus on him to justify his release on bail; and that the record of bail proceedings could be used against him during the trial. With regard to the prescribed sentences, the following inscription appears:

'3. Part ...of Act 105/1997 – Prescribed sentences
3.1 15 years (1st offender), 20 years (2nd offender), 25 years (3rd offender)
3.2 Imprisonment for Life'

Second, the charge-sheet clearly indicated that all the rapes were read with the provisions of section 51(2) of the Act. I shall revert to this reference later.

[7] Third, the appellant was legally represented throughout the trial. During the address in mitigation of sentence, his legal representative made the following submission:

'It is indeed so that in fact a minimum sentence (sic) is applicable in this matter with regard to the many counts, be it rape counts again the differentiation between the adult victims as well as the minor victims (sic). Coupled with that ... it is mentioned the minimum sentence applicable to the robberies in this respective counts (sic)... I submit that (the) court be lenient when imposing a sentence, the court find substantial and compelling circumstances exists (sic) in respect of all the counts.'

The legal representative proceeded to address the court with reference to the majority decision of the Supreme Court of Appeal in *S v Nkomo* 2007 (2) SACR 198 (SCA)[1] in his endeavour to persuade the court from imposing the prescribed sentences. What is more, in the pre-sentencing report compiled by a probation officer after she interviewed the appellant, it is recommended that a sentence of imprisonment for life be imposed on the appellant. From this it can be inferred that the applicability of the minimum sentences must have been discussed between the appellant and his legal representative in preparation for the sentencing proceedings. If this was an issue with the appellant, it surely would have been raised when the sentencing proceedings commenced. It was not raised, and he participated in the sentencing process without murmur.

[8] The sum total of all of the above is that the appellant was aware of the applicable minimum sentences. Not only was he informed thereof in the charge-sheet, but he was expressly made aware of such sentences at his first appearance. His legal representative pertinently addressed the court on such sentences. The fact that he drew a distinction between the rapes of the 'adult victims' and of the 'minor victims', is, in my view, the strongest indication that he had in mind the prescribed sentences in terms of s 51(1) and (2). He must have discussed those with the appellant in advance. There is therefore no merit in this contention, and the concession by the state on this point was not well made.

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[1] The Supreme Court of Appeal set aside a sentence of life imprisonment and substituted it with 16 years' imprisonment for multiple rapes, after having found that there were substantial and compelling circumstances.

[9] That brings me to the next enquiry, as to whether the regional court was competent to impose life sentence in respect of the rape of the 11 year-old girl. Earlier, I mentioned that in the charge-sheet, all the rapes of which the appellant was subsequently convicted, including the one involving an 11-year old girl, were read with the provisions of s 51(2) of the Act. This was erroneous in respect of the latter count, as the rape should have been read with the provisions of s 51(1), which decrees imprisonment for life, unless substantial and compelling circumstances are present. This is in terms of part I of schedule 2 (b) (i) of the Act, which refers to rape where the victim is a person under the age of 16 years.

[10] What immediately arises from this is whether this error in the charge-sheet precluded the regional court from imposing the prescribed sentence of imprisonment for life. Put differently, the question is whether the regional court acted correctly in sentencing the appellant to imprisonment for life in terms of s 51(1) read with part I of schedule 2, when the appellant had been charged with, and convicted of, rape read with s 51(2) of the Act, which upon conviction carries a penalty of 10 years' imprisonment. This, in essence, is an enquiry whether the appellant has received a fair trial.

[11] The jurisprudential foundation of the principle that an accused person should be informed that the minimum sentence is applicable to his or her case was laid by the Supreme Court of Appeal in *S v Legoa* 2003 (1) SACR 13 (SCA) where the court, after an examination of its earlier judgments, concluded that under the common law it was 'desirable' that the charge-sheet should set out the facts the state intended to prove to bring the accused within the enhanced sentencing jurisdiction. At paras 20 and 21 the following is stated:

'[20] Under the common law it was therefore 'desirable' that the charge-sheet should set out the facts the State intended to prove in order to bring the accused within an enhanced sentencing jurisdiction. It was not, however, essential. The Constitutional Court has emphasized that under the new constitutional dispensation, the criterion for a just criminal trial is 'a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution of the Republic of South Africa Act 108 of 1996 came into force'. The Bill of Rights specifies that every accused has a right to a fair trial. This right, the Constitutional Court has said, is broader than the specific rights set out in the sub-sections of the Bill of Rights' criminal trial provision. One of those specific rights is 'to be informed of the charge with sufficient detail to answer it'. What the ability to 'answer' a charge encompasses this case not require us to determine. But under the constitutional dispensation is can certainly be no less desirable than under the common law

that the facts the State intends to prove to increase sentencing jurisdiction under the 1997 statute should be clearly set out in the charge-sheet.

[21] The matter is, however, one of substance and not form, and I would be reluctant to lay down a general rule that the charge must in every case recite either the specific form of the scheduled offence with which the accused is charged, or the facts the state intends to prove to establish it. A general requirement to this effect, if applied with undue formalism, may create intolerable complexities in the administration of justice and maybe insufficiently heedful of the practical realities under which charge-sheets are frequently drawn up. The accused might in any event acquire the requisite knowledge from particulars furnished to the charge or, in a Superior Court, from the summary of substantial facts the state is obliged to furnish. Whether the accused's substantive fair trial right, including his ability to answer the charge, has been impaired, will therefore depend on a vigilant examination of the relevant circumstances'.

(footnotes omitted)

[12] In *S v Ndlovu* 2003 (1) SACR 331 para 12 Mpati JA, endorsing the approach laid down in *Legoa*, stated the following:

'The enquiry, therefore, is whether, on a vigilant examination of the relevant circumstances, it can be said that an accused had a fair trial. And I think it is implicit in these observations 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.'

[13] In *S v Mashinini* 2012 (1) SACR 604 (SCA), like in the present case, the appellants were charged in the regional court with rape, erroneously read with the provisions of s 51(2) of the Act. After being convicted, the appellants were committed to the High Court for sentencing, where they were sentenced to imprisonment for life, the prescribed sentence under s 51(1). On appeal they contended that the sentence of life imprisonment was incompetent where they had been convicted of an offence which carried a sentence of 10 years' imprisonment (in terms of s 51(2)). This argument found favour with the majority of the court, who concluded that that the High Court had erred in sentencing the appellants in in terms of s 51(1), instead of s 51(2), and accordingly set aside the sentence of imprisonment for life, and imposed a sentence of 10 years' imprisonment.

[14] The Supreme Court of Appeal had occasion again to consider the issue in *S v Kolea* 2013 (1) SACR 409 (SCA). There, after consideration of both *Legoa* and *Ndlovu* the court held, at para [19], that the judgment of the majority in *Mashinini* was

'clearly wrong' as the appellants in that case were in no way prejudiced by the erroneous reference to s 51(2) instead of s 51(1). They were correctly apprised of the applicability of the increased penalty provisions of the Act; they had pleaded guilty to a charge involving multiple rapes which, in any event, is not applicable to s 51(2); they never complained of, nor showed that they had suffered, any prejudice; and they participated fully in the trial. In essence, the Supreme Court of Appeal held that a sentencing court is not precluded from imposing a life sentence solely on the basis that the charge-sheet erroneously refers to s 51(2) instead of s 51(1) of the Act.

[15] Therefore, the cumulative essence of *Legoa*, *Ndlovu* and *Kolea* is this: The mere fact of an erroneous reference to s 51(2), instead of s 51(1) of the Act, is not of itself, sufficient to translate into an unfairness of the trial. What is more, it does not preclude a court from sentencing an accused in terms of s 51(1). The onus is upon the accused to demonstrate how that error had prejudiced him or her. Where prejudice is alleged, the court must determine that aspect, and whether there has been an unfair trial, upon a 'vigilant examination' of all the relevant facts. This is a question of fact, and each case would be decided on its own merits.

[16] In the present case, the error referred to above, occurred. On 'a vigilant examination' of all the relevant facts, as impelled by both *Legoa* and *Ndlovu*, I can discern no prejudice to the appellant as a result of the erroneous reference. None has been alleged. Consequently, this does not assist the appellant. The regional court was not precluded from sentencing the appellant to imprisonment for life in terms of s 51(1) notwithstanding that the charge-sheet erroneously made reference to s 51(2) of the Act.

[17] Having disposed of that aspect, I turn now to consider the appellant's main argument. It is that the regional court ought to have found that there were substantial and compelling circumstances present and that therefore a sentence less than that ordained by the legislature should have been imposed.

[18] The proper approach where minimum sentences are applicable, was established by the Supreme Court of Appeal in the path-finding and seminal judgment of *S v Malgas* 2001 (1) SACR 469 (SCA) (2001 (2) SA 1222; [2001] 3 All

SA 220). The summary of the approach is conveniently set out in para [25] of that judgment, the effect of which is that the prescribed minimum sentences should ordinarily, and in the absence of weighty justification, be imposed. In para I of the summary, it is stated that the court may impose a lesser sentence if, on consideration of circumstances of the particular case, it is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence.

[19] The approach established in *Malgas,* which has since been followed in a long line of cases, sets out how the minimum sentencing regime should be approached and in particular how the enquiry into substantial and compelling circumstances is to be conducted by a court. Among the factors to be considered in that enquiry, are the traditional sentencing factors: the triad consisting of the nature of the offence, the personal circumstances of the accused, and the interests of society. The approach in *Malgas* received the imprimatur of the Constitutional Court in *S v Dodo* 2001 (1) SACR 594 (CC), which described it as 'undoubtedly correct' and the summary referred to above, as having laid down 'a determinative test' as to when the prescribed sentence may be departed from.

[20] With regard to the personal circumstances of the appellant, the following are relevant. He is a first offender. He was born in KwaZulu-Natal Province. He was 26 years old at the time of sentencing. He grew up in a family of four children and was raised by both parents until 1996 when his father passed away. According to what the appellant conveyed to the probation officer, the appellant's father was shot and killed by unknown people. As a result of the death of his father, his mother relocated to Gauteng Province, reportedly fearing for her own life. She left the appellant and his siblings in KwaZulu-Natal without any parental care or supervision. The children were later under the care of their uncle, whom the appellant accuses of having abused him physically. The appellant only reached standard 1 at school. He alleges that his uncle never allowed him to attend school, preferring him to look after his livestock. The appellant relocated to Gauteng in 2000 to join his mother. He was employed in the construction industry at the time of his arrest. During consultation with the probation officer, the appellant persisted with his innocence.

[21] It is unfortunate that we do not have a victim impact report in respect of the young girl. In *S v Matyityi* 2011 (1) SACR 40 (SCA) paras 16 and 17, the Supreme Court of Appeal emphasised the importance of accommodating the victim during the sentence process. However, rape is inherently horrific, and I am prepared to accept that the rape should have been a horrifying experience for child victim, with deep and lasting psychological scars for her. With regard to the physical injuries, those have been set out in para [4] above.

[22] In his judgment on sentence, the learned regional magistrate duly considered all the relevant factors and balanced them against each other. He gave due consideration to the fact that the legislature had ordained life imprisonment for the rape of young girls, and that, that sentence had to ordinarily be imposed and not be deviated from, for flimsy reasons. In my view, the cumulative effect of the personal circumstances of the appellant, including that he is first offender, are far outweighed by the gravity and circumstances of the offence. I therefore agree with the conclusion of the regional court that substantial and compelling circumstances are not present to justify a departure from the prescribed minimum sentence. The appeal falls to fail.

[23] I now consider the manner in which the sentence was formulated by the trial court. It ordered some of the sentences in respect of other counts to run concurrently with the sentence of life imprisonment. The result is that should the appellant qualify for parole in respect of the sentence of life imprisonment, he would thereafter commence serving the additional 70 years. This is incompetent. Section 39 of the Correctional Services Act 111 of 1998 deals specifically with the commencement, computation and termination of sentences. In terms of (2)(a)(i) thereof, any determinate sentence of incarceration to be served by any person runs concurrently with a life sentence imposed upon such person. See for example, *S v Leholoane* 2001 (2) SACR 297 (T) where a sentence of imprisonment for life and a further 35 years' imprisonment was held to be illogical and incompetent.

[24] In the result the following order is made:

1. The appeal against the sentence of imprisonment for life imposed in respect of count 9 is dismissed;

2. The portion of the sentence in terms of which a further 70 years' imprisonment was ordered to be served separately and consecutively from the sentence of imprisonment for life imposed in respect of count 9, is set aside and the following is substituted for it:

'It is ordered that the sentences imposed in respect of counts 1, 2, 3, 5, 6, 8, 10, 11, 12, 13, 14, 15, 16 and 17, shall all run concurrently with the sentence of imprisonment for life imposed in respect of count 9.'

TM MAKGOKA
JUDGE OF THE HIGH COURT

I agree

pp

P.D. MOSEAMO
ACTING JUDGE OF THE HIGH COURT

DATE HEARD	**: 3 APRIL 2014**
JUDGMENT DELIVERED	**: 23 JULY 2014**
FOR THE APPELLANT	**: ADV K.P. TLOUANE**
INSTRUCTED BY	**: PRETORIA JUSTICE CENTRE**
FOR THE STATE	**: ADV T.V. CHETTY**
INSTRUCTED BY	**: DIRECTOR OF PUBLIC PROSECUTIONS, PRETORIA**