IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

Case No : AR439/10

In the matter between :

LINDOKUHLE XABA Appellant

and

THE STATE Respondent

Judgment

Lopes J

[1] The appellant was convicted on the 17th October, 2002 of four counts of rape and one of murder of the deceased, Thobelani Audrey Mkhize. He had been charged with two others, who, together with an accomplice, had perpetrated three of the counts of rape.

[2] The appellant was sentenced to life imprisonment on each count. On the 8th November, 2007, Theron J granted leave to appeal against sentence only.

[3] In her judgment on sentence, Theron J regarded herself as bound by

the provisions of the Criminal Law Amendment Act, 1997 which she viewed as obliging her to pass the minimum prescribed sentence unless compelling and substantial circumstances existed entitling her to deviate from them.

[4] The minimum sentencing provisions were not referred to in the indictment nor in the State's summary of substantial facts. The first reference in the Court record to those provisions is by the prosecutor in his address to the court on sentence.

[5] Judicial opinion is divided on the issue of whether it is necessary for a presiding officer to draw to the attention of an accused person who is represented, the applicability of the minimum sentencing provisions where they are not contained in the indictment. In this regard see the remarks of Borchers J in S v Mvelase 2004(2) SACR 531 at 535 i – 536 b who, although expressing the view that a court should act on the presumption that lawyers appearing for accused persons are competent, cautioned that there may be cases where it is clear that the performance of a legal representative is incompetent, and then in the interest of ensuring a fair trial, the presiding officer should bring certain aspects of the law to the attention of the accused.

[6] In S v Mseleku 2006(2) SACR 574, Pillay J considered the comments of Borchers, J and dissented from the proposition that one can safely generalise about the competence of counsel, and pointed out that it is a simple matter for the State to point out the minimum sentencing provisions in the indictment.

[7] I agree with the approach of Pillay, J particularly where the possible prejudice to an accused can be grave indeed. In addition, it is clear from a reading of the record that the whole approach of the appellant's representative to the aspect of sentencing showed little or no application, nor an understanding of what was required of her to protect the interests of the appellant. The concession made by her that no substantial and compelling circumstances existed to enable the court to avoid imposing a minimum sentence stands in stark contrast to the age and personal circumstances of the appellant.

[8] For the reasons set out below the sentence imposed upon the appellant was inappropriate and it is not necessary for me to decide whether the appellant was prejudiced in the conduct of his defence by the failure to apprise him of the minimum sentencing provisions.

[9] At the time the matter was heard the provisions of the Criminal Law Amendment Act, 1977 ("the Act") provided *inter alia* that :-

> "*(3)(b) If any court referred to in ss (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.*
> *…*
> *6) the provisions of this section shall not be applicable in respect of a child who was under the age of 16 years at the time of the commission of the act which constituted the offence in question."*

[10] In S v B 2006(1) SACR 311 (SCA) the Supreme Court of Appeal held that, in respect of offenders aged between 16 and 18 years at the time of the

offence, the sentencing court was free to depart from the prescribed minimum sentence without the need for an accused to establish substantial and compelling circumstances.

[11] On the 3rd December, 2007 the Act was amended with the apparently express object of reversing the decision in S v B and to make the minimum sentencing regime applicable to children aged 16 or 17 years at the time of the offence.

[12] S 51(3)(b) was removed, and s 51(6) now reads :-

> "*(6) This section does not apply in respect of an accused person who was under the age of 16 years at the time of the commission of an offence as contemplated in subsection (1) or (2).*"

[13] At the time of the commission of the offence in this matter (on the 26th September, 2001) the appellant was 17 years and two months old (having been born on the 1st July, 1984). He was a scholar in Standard 7 and had no previous convictions.

[14] The appellant was accordingly entitled to have proper consideration given to the provisions of s 28(1)(g) of the Constitution insofar as they were applicable to him.

[15] In Centre for Child Law v Minister of Justice and Constitutional Development and others (National Institute for Crime Prevention and the Re-integration of Offenders, as *amicus curiae*) 2009(2) SACR 477 (CC), the Constitutional Court ruled that the amended Act (by s 1 of the Criminal Law

(Sentencing) Amendment Act 2007), was unconstitutional because it sought injustifiably to limit the protection afforded to children under s 28(1)(g) of the Constitution.

[16] In addition it provided that sub-s 51(6) is to be read to provide that s 51 shall not apply to an accused person under the age of 18 years at the time of the commission of the offence.

[17] The imposition of life imprisonment on the appellant, based upon the minimum sentencing provisions, was accordingly a misdirection entitling this court to set aside the five counts of life imprisonment and consider the question of sentence afresh. It remains then for this court to consider an appropriate punishment.

[18] I agree with Mr du Plessis for the appellant and Mr Paver for the State that the obtaining of a probation officer's report would serve little purpose at this stage as the appellant has already been incarcerated for eight years.

[19] The crime was a dreadful one, and the deceased was an entirely innocent young person caught up in a senseless and savage attack by four men, who, having raped her, then killed her to ensure her silence.

[20] As the learned Judge said in her judgment on sentence they descended upon her like a pack of wolves, behaved like animals, and do not deserve to be among society. Even after she was raped by all of them, she

begged them not to kill her. They all then participated in brutally stabbing her to death.

[21] What is aggravating in the case of the appellant is that he initiated the attack upon the deceased's boyfriend, enabling his co-perpetrators to drag the deceased away from him. In addition, the appellant suggested the murder of the deceased after the deceased had been raped. He persisted with this attitude even after the accomplice Jakeya cautioned him that to murder the deceased would increase the offences with which they could be charged.

[22] This conduct of the appellant shows a degree of leadership beyond his years and a callous disregard for human life.

[23] Taking into account everything that has been said on behalf of the appellant, a sentence of 20 years imprisonment on each count remains an appropriate one. The rehabilitation of the appellant and his attitude to imprisonment will be within his own hands and will no doubt play a role in determining exactly how long he remains in custody.

[24] In all the circumstances I would make the following order:-

(1) the appeal succeeds;

(2) the sentences of life imprisonment imposed on the appellant on each count are set aside;

(3) the sentences on Counts 1 - 5 are replaced with a sentence of 20 years imprisonment, on each count;

(4) the sentences on Counts 2 – 5 are to run concurrently with the sentence on Count 1.

Balton J : I agree.

D Pillay J : I agree.

It is so ordered.

Date of hearing : 24th January 2011

Date of judgment : 2nd February 2011

Counsel for the Appellant : J H du Plessis (instructed by Legal Aid South Africa)

Counsel for the Respondent : D Paver (instructed by the Director of Public Prosecutions