THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 959/13

Not reportable

In the matter between:

NYELISANI NNDATENI **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Nndateni v The State* (959/13) [2014] ZASCA 122 (19 September 2014)

Coram: Mhlantla, Theron, Willis and Swain JJA and Legodi AJA

Heard: **22 May and 16 September 2014**

Delivered: **19 September 2014**

Summary: Sentence – appeal against - rape – accused not charged in terms of the provisions of Criminal Law Amendment Act 105 of 1997 – high court however sentencing appellant to life imprisonment in terms of Act – such constituting material misdirection – sentence set aside – case remitted to the high court for the reconsideration of sentence.

ORDER

On appeal from the Limpopo High Court, Thohoyandou (Hetisani J) sitting as court of first instance):

1 The appeal is upheld.

2 The sentence imposed by the high court is set aside.

3 The matter is remitted to the high court for the reconsideration of sentence.

JUDGMENT

Legodi AJA (Mhlantla, Theron, Willis and Swain JJA concurring):

[1] This appeal with the leave of the Limpopo High Court, Thohoyandou, is directed against sentence only. The appellant was indicted before Hetisani J on one count of rape.[1] He pleaded not guilty and elected to remain silent. At the end of the trial he was found guilty as charged and sentenced to life imprisonment.

[2] The background facts underlying the conviction may be summarised as follows. The complainant lived with her daughter who is physically disabled. Her son, who was the appellant's friend, had died a few years before the incident. On 20 August 2006 at about 19h00 the appellant arrived at the home of the complainant. He joined the complainant who was inside the lapa. After a while, the complainant went out and on her return, found the appellant standing at the corner of the house. He grabbed the complainant by her throat

[1] Rape in that on or about 20 August 2006 and at or near Ngovhela- Madamalala Location, in the district of Thohoyandou, the accused did unlawfully and intentionally have sexual intercourse with S.S (the complainant), a 66 year old female person without her consent.

causing her to fall. He raped her repeatedly both anally and vaginally until dawn. She soiled herself as a result of the rape. The appellant also assaulted the complainant because she offered some resistance during the incident. She sustained bodily injuries. She also had marks on her throat after being throttled by the appellant. The appellant threatened to kill her by hanging her in the same manner in which her son had died. At dawn, whilst the appellant was raping the complainant, she enquired if he wanted to kill her. He did not respond but stopped raping her and ran away. Throughout this incident, the complainant's daughter was alone inside the house. She could not help her mother owing to her disability.

[3] Immediately after the incident, the complainant could not walk due to her injuries. She crawled to the lapa and entered the house. She slept for a while and thereafter went outside and called for help. Mrs Mogedzi, her neighbour, came. The complainant reported the incident to Mrs Mogedzi, who contacted the complainant's elder sister. The complainant was thereafter taken to the hospital.

[4] The complainant was examined by a doctor, who recorded that she was emotionally upset and appeared to be shocked and anxious. The doctor noted the following bodily injuries: the left side of the face and cheeks was bruised; very swollen, tender and contused lips; swollen and bruised right thigh and abrasion wounds on her neck and both sides of her trachea. The gynaecological examination revealed the following: reddish and bruised urethral orifice, the folds of the labia majora were lacerated, the labia minora was bruised and swollen, the para-urethral folds, posterior fourchette, the fossa navicularis and the introitus were bruised, blood stained and swollen. The doctor recorded that the examination was painful.

[5] The appellant maintained his innocence throughout the trial and raised an alibi defence. After conviction he chose not to testify in mitigation. His legal representative addressed the court from the Bar.

[6] In his judgment on sentence Hetisani J stated:

'The court is well aware of the fact that where there are substantial and compelling circumstances the court may not impose the life sentence. Normally it happens where the victim was of tender age. Here we have it the other way around; the victim was 42 years older than the perpetrator.'

It is therefore apparent that Hetisani J believed that the provisions of s 51 of the Criminal Law Amendment Act 105 of 1997 (the Act) read together with Part 1 of Schedule 2 to that Act applied. A minimum sentence of life imprisonment was provided for where the victim was raped more than once, as occurred in the present appeal. On appeal, it was common cause between the parties that, prior to the judgment on sentence, there was no indication that the State intended relying on the minimum sentencing regime created by the Act.

[7] On 22 May 2014, the appeal was heard in this court. After argument, we considered it to be in the interests of justice to seek submissions from the Womens Legal Centre, Centre for Child Law, Legal Resources Centre and Lawyers for Human Rights (the amicus curiae). The parties and the amici were requested to make submissions on inter alia:

(a) whether the failure to warn an accused person that he faces a prescribed minimum sentence affects his right to a fair trial in respect of sentence; and

(b) whether a court on appeal, when considering a sentence afresh, may impose a sentence equal to the prescribed sentence where the accused was not so warned, having regard to the provisions of s 35(3) of the Constitution.

We received submissions from the parties and the amici. The amici submitted comprehensive heads of argument. We are grateful for their participation and valuable submissions in this matter.

[8] Before us it was accepted that the trial court committed a procedural irregularity by invoking the provisions of the Act when the appellant's attention was not drawn thereto. The issue was, however, whether such irregularity was prejudicial to the appellant which, accordingly, rendered the trial unfair to the extent that the sentence of life imprisonment could not stand.

[9] The provisions of s 35 of the Constitution provide that every accused person has a right to a fair trial. This includes the right to be informed of the charge with sufficient detail to answer. Cameron JA in *S v Legoa* 2003 (1) SACR 13 (SCA) at 22h-23b said the following:

'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 does not require us to determine. But under the constitutional dispensation it 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.'

[10] In *S v Ndlovu* 2003 (1) SACR 331 (SCA) at 337a-c Mpati JA stated:

'The enquiry, therefore, is whether, on a vigilant examination of the relevant circumstances, it can be said that an accused had 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. Whether, or in what circumstances, it might suffice if it is brought to the attention of the accused only during the course of the trial is not necessary to decide in the present case. It is sufficient to say that what will at least be required is that the accused be given sufficient notice of the State's intention to enable him to conduct his defence properly.'

[11] In *Sv Makatu* 2006 (2) SACR 582 (SCA) at para 7, Lewis JA said in relation to details that should be furnished to an accused person charged with an offence in terms of s 51(1) of the Act:

'As a general rule, where the State charges an accused with an offence governed by s 51(1) of the Act, such as premeditated murder, it should state this in the indictment. This rule is clearly neither absolute nor inflexible. However, an accused faced with life imprisonment ─ the most serious sentence that can be imposed ─ must from the outset know what the implications and consequences of the charge are. Such knowledge inevitably dictates decisions made by an accused, such as whether to

conduct his or her own defence; whether to apply for legal aid; whether to testify; what witnesses to call; and any other factor that may affect his or her right to a fair trial. If during the course of a trial the State wishes to amend the indictment it may apply to do so, subject to the usual rules in relation to prejudice.'

[12] In *S v Kolea* 2013 (1) SACR 409 (SCA), the high court in Bloemfontein confirmed the conviction by the regional court and imposed a sentence of 15 years' imprisonment. On appeal against both the conviction and sentence to the full court, the conviction was confirmed but the sentence of 15 years' imprisonment was increased to one of life imprisonment. In a further appeal to this court against both the conviction and sentence, the main issue was whether on a charge of rape a sentencing court is precluded from imposing a life sentence, or from referring the matter to the high court for consideration of that sentence, solely on the basis that the charge sheet refers to s 51(2) instead of s 51(1) of the Act. Mbha AJA at para 11 stated:

'In this case the state's intention to rely on and invoke the minimum sentencing provisions was made clear from the outset. The charge-sheet expressly recorded that the appellant was charged with the offence of rape, read together with the provisions of s 51(2) of the Act. I am accordingly satisfied that the appellant, who was legally represented throughout the trial, well knew of the charge he had to meet and that the state intended to rely on the minimum sentencing regime created in the Act.'

Further at para 12 he stated:

' . . . Significantly, there was no objection to the fact that the matter was now being transferred to the high court and to the prospect of a sentence of life imprisonment being imposed on the appellant, as provided for in s 51(1) and not s 51(2) of the Act.'

It was further held that in both the high court and full court there was no objection to the indictment or summary of substantial facts and that the appellant's counsel conceded in both courts that the appellant had been correctly convicted. He pleaded not guilty to the charge and fully participated in the trial. He was convicted in accordance with the evidence that was led in relation to the charge of rape. It was further held that it had not been demonstrated that the appellant would have acted differently, had the mistake not been made in the charge-sheet.

[13] The present case is distinguishable from the decisions in *Kolea* and *Makatu* as in both these cases, the indictment and the charge-sheet referred to the provisions of the Act. In the present matter the indictment did not refer to s 51 or any other provisions of the Act. Neither the indictment nor the summary of substantial facts referred to the elements of the crime that would if proven, invoke a minimum sentence of life imprisonment in terms of s 51(1) of the Act. There is no mention in the charge-sheet that the complainant was raped more than once. This aspect emerged for the first time from the evidence. The accused was not warned at any stage during the proceedings that he may face a minimum sentence upon conviction. As a result the appellant was not placed in a position to appreciate properly and in good time the seriousness of the charge he faced as well as its possible consequences. This may have affected his faculty to make appropriate decisions on how to conduct his defence. There is no indication in the record that the appellant or his legal representative had any knowledge that the appellant faced the possibility of a minimum sentence upon conviction. It was only during the course of the delivery of the judgment on sentence that the appellant was alerted that he faced a prospect of life in prison.

[14] In the result, the process that led to the imposition of sentence was irregular and infringed the appellant's right to a fair trial in respect of sentence. This much was conceded by counsel for the State.

[15] As stated in *S v Langa* 2010 (2) SACR 289 (KZP) at 306D-G:

'If applying the provisions of the Act would give rise to an unfair trial on sentence, the provisions of the Act must be regarded as irrelevant to any consideration of sentence, in order for the trial to be fair. If irrelevant considerations are taken into account on sentence, this amounts to a misdirection, warranting the setting-aside of the sentence and requiring the appeal court to begin the sentencing process *de novo*, if it is in a position to do so. I am therefore of the view that, for a trial court to apply a sentencing regime of which the accused has not had adequate and timeous knowledge, qualifies, *par excellence*, as a material misdirection. In my view, therefore, the consequence of a trial court applying the provisions of the Act, in a situation where the requisite knowledge was lacking, amounts to a misdirection,

warranting the setting-aside of the sentence and fresh adjudication of an appropriate sentence.'

[16] It follows that the reliance by Hetisani J on the provisions of s 51 of the Act constitutes a material misdirection which is sufficient to vitiate the sentence. The sentence is accordingly set aside.

[17] The issue that remains is whether this matter should be remitted to the high court for sentencing or this court on appeal should consider sentence afresh. In considering this issue this court has to consider the following questions: First, how much time has elapsed since conviction and sentence. Second, would the appellant be prejudiced by the further delay occasioned by remitting the case. Third, does the court have sufficient information to exercise its discretion properly. Regarding the aspect relating to the sufficiency of information, Shongwe JA said in *S v EN* 2014 (1) SACR 198 (SCA) at para 14:

'. . . Sentencing is the most difficult stage of a criminal trial, in my view. Courts should take care to elicit the necessary information to put them in a position to exercise their sentencing discretion properly . . . Life imprisonment is the ultimate and most severe sentence that our courts may impose; therefore a sentencing court should be seen to have sufficient information before it to justify that sentence.'

[18] In this matter the relevant information to enable this court to consider sentencing afresh is sparse. The appellant did not testify in mitigation of sentence. From the bar it was placed on record that he was 28 years old at the time of the commission of the offence, illiterate and unemployed. The conduct of the appellant in committing this particular crime was bizarre, but there was no evidence in the form of a pre-sentencing report. Such a report usually sheds light on the appellant's background and upbringing and in some instances may indicate what motivated him to commit the offence and whether he is remorseful. The pre-sentencing report could have covered some of these issues. Counsel for both parties conceded that there was a paucity of information from the record and agreed that a remittal of the matter to the high court for reconsideration would be appropriate under the

circumstances. The amici were of one accord that the information on the record was insufficient for the court to consider sentence afresh.

[19] It is so that the appellant has to date served a period of five years in prison. He was convicted of a very serious offence which justifies the imposition of a severe custodial sentence. A reconsideration of sentence by remitting the matter to the high court for this purpose will not occasion any delays which will prejudice the appellant. On the contrary, it may inure to his benefit.

[20] The matter should therefore be remitted to the high court for the reconsideration of sentence after obtaining a pre-sentencing report. This should not only deal with the appellant's circumstances but in addition the impact the incident has had on the complainant.

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

1 The appeal is upheld.

2 The sentence imposed by the high court is set aside.

3 The matter is remitted to the high court for the reconsideration of sentence.

M F LEGODI

ACTING JUDGE OF APPEAL

APPEARANCES:

For Appellant:	A L Thomu Instructed by: Thohoyandou Justice Centre, Thohoyandou Justice Centre, Bloemfontein
For Respondent:	A Madzhuta Instructed by: The Director of Public Prosecutions, Thohoyandou Director of Public Prosecutions, Bloemfontein
For First Amicus Curiae:	A Du Toit Instructed by: Trustees For the Time Being of the Women's Legal Centre Trust, Cape Town Webbers, Bloemfontein
For Second to Fourth Amicus Curiae:	M Bishop Instructed by: Legal Resources Centre, Cape Town Webbers, Bloemfontein