IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Reportable

CASE NO: A 132/2015

In the matter between:

SIYABULELA GWARUBANA Appellant

And

THE STATE Respondent

JUDGMENT: 17 August 2015

DAVIS J

Introduction

[1] Appellant was convicted of housebreaking with the intent to commit rape and rape by the Regional Court on 28 November 2001. The trial was thereafter transferred to the High Court for the purposes of sentence in terms of s 52 (1) (b) of the Criminal Law Amendment Act 105 of 1997 ('the Act'). On 20 June 2002 appellant was sentenced to life imprisonment by Erasmus J.

[2] The appellant notified the High Court in February 2003 that he wished to appeal against conviction and sentence. On 15 May 2014 he was granted leave to appeal against sentence only.

Factual Matrix

[3] Although this appeal is against sentence only, it is relevant to examine the evidence which gave rise to the conviction. On 13 October 1999 the victim's mother and her two daughters had retired for the night. At 02h00 am on 14 October 1999 they were awoken by a knock on the window in the bedroom. Complainant's mother heard a man asking her to open the door. After asking the reason for this request as she did not recognise the man, the man broke the window and entered the house. When she switched on a light, she saw that the man who had entered the house, was the appellant. Without more, the appellant cut the house's telephone wire. Her one daughter then hit the panic button to trigger the alarm. This act afforded the victim's mother the opportunity to run out of the house to her neighbours in order to phone the police.

[4] When the police arrived they found the accused in the act of raping the complainant. Sergeant Folding testified that when he entered the house, he saw the appellant lying on top of a young woman who was in bed. He then said:

> 'Ek het beskuldigde voor die Hof bo-op die dame aangetref waar hy besig was on op-en-af bewegings op haar the maak. Ek het die beskuldigde gevra om af te klim van die dame af waarop hy geweier het. Ek kon ook sien, Edelagbare dat die beskuldigde se penis in die slagoffer se vagina was. Toe hy nie wil afklim nie, Edelagbare het ek hom self afgetrek van die dame af.'

[5] Shortly before the state closed its case, a report from the clinical psychologist Ms Susan Manson was handed into court. On the basis of this report, the prosecutor considered that it revealed 'basically that the complainant is unable to testify. She is not a competent witness and she is also unable to consent to sexual

intercourse due to her mental impairment.' From the record it appeared that page 2 of the report had not been included in and accordingly was not accessible to the legal representative of the appellant. The final page however of the report which was available reads thus:

> 'Ms Ayanda Somi, aged 24, is a young woman with a history of development delay and training centre placement who was allegedly raped by Mr Siyabulela Gwarubana. On interview she was found to be functioning predominantly in the range of severe mental handicap.
>
> Ayanda showed no understanding of sexual matters and was found to be unable to consent to sexual intercourse. Her inability to provide an account of the alleged rape and her lack of understanding of the difference between truth and falsehood as well as the purpose and proceedings of a trial suggest that she will not be competent to act as a witness.'

[6] The appellant's version was in the form of an alibi, namely that he was at work when the crime was committed. Hence, he denied any involvement in the housebreaking or rape.

[7] The court rejected the appellant's version and held, beyond a reasonable doubt, that it was the appellant who had illegally entered into the house and committed the rape. Upon conviction the court determined that the crime of which the appellant had been convicted fell without the minimum sentence legislation. The matter was transferred to the High Court for sentence. In sentencing the appellant to a term of life imprisonment, Erasmus J highlighted a number of aggravating circumstances: the victims were women, the mother was a 57 year old woman, her one daughter was a minor and the complainant was mentally

handicap. The attack had been launched in the middle of the night in their own home. Finally, there was no evidence of any form of remorse on the part of the appellant.

Appellant's case on appeal

[8] Mr Calitz, who appeared on behalf of the appellant, submitted that there were two central grounds which justified the appeal. In the first place, the charge sheet did not contain any reference to the Act and, in particular, to the fact that the mental disability of the complainant triggered the minimum sentence regime in terms of s 51 (1) read with Part one of Schedule 2 of the Act. Secondly, to the extent that a psychologist's report had been handed in prior to the commencement of the appellant's case to the effect that the complainant was mentally disabled is defined in terms of s 1 of the Criminal Law (Sexual Offences Related Matters) Amendment Act 32 of 2007, the initial report had been incomplete in that the second of the three pages was absent from the report which was placed into evidence. The full report was only handed in prior to the respondent presenting argument before the court.

[9] These arguments necessitate an examination of the applicable law relating to the requirements for the compilation of the charge sheet pursuant to the Act. In *S v Legoa* 2003 (1) SACR 13 (SCA) Cameron JA (as he then was) examined the question of whether the charge sheet should include reference to the elements of the specific form of the offence with which the accused is charged; in particular, whether reference should be made expressly to the Act. Cameron JA found that, in

developing an enhanced jurisdiction for sentencing in respect of particular offences, the legislature had not created new offences. However this enhanced penalty jurisdiction can only be applied if the evidence regarding all the elements of the form of the scheduled offence contained in the Act is led before conviction. A trial court must then determine whether all the elements are present as specified in the applicable legislation.

[10] Turning to criminal law under the shadow of the Constitution of Republic of South Africa Act 108 of 1996, Cameron JA found that an accused person has the right to be informed of the charge against him or her with sufficient detail to answer it, albeit that the test in this case is one of substance and not form. See para 21 of *Legoa*, *supra*. Although he was reluctant to set out a general rule that a charge must in every case must recite either the specific form of the scheduled defence of which the accused is charged or the facts which the State intends to prove, Cameron JA went on to say:

> '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.' (para 21)

[11] Writing for a full bench of this Division, Henney J in *Matthys v S* (unreported decision of the Western Cape High Court: Case No. A 607/11) developed upon the dicta contained in *Legoa.* In this case, the appellant was convicted of rape. The relevant charge was that he and two other accused unlawfully and intentionally had sexual intercourse with the complainant without her consent. After conviction, the

magistrate referred the matter to the High Court for sentence due to the fact that he considered himself obliged to do so in terms of the Act. On appeal against conviction and the sentence of life imprisonment, the appellant argued, inter alia, that he had been charged on one count of rape and that the charge sheet did not specifically indicate the prescribed sentence in terms of the Act. Only after conviction was he informed that the matter was to be referred to the High Court for sentence.

[12] Henney J formulated the critical question as 'whether upon a vigilant examination of the circumstances of the particular case such an omission or failure (to inform the accused of the scheduled offences in the charge sheet or indictment) resulted in the fair trial rights of the accused being impaired'. (para 64) In answering these questions, the learned judge noted that effective and competent legal representation is a weighty factor which has to be considered in the determination of whether the accused had the benefit of a fair trial.

[13] Henney J at para 69 then set out a number of further circumstances which could result in a trial being substantially unfair to an accused:

a. if the accused is undefended and has not been informed by the presiding officer of the relevant minimum sentence legislation.

b. the accused is misled into believing that the penalty provisions referred in the charge sheet will apply.

c. where reference is made to certain penalty provisions of a specific act in the charge sheet and where such reference was "calculated to

convey the impression that the State would seek the penalty provided for in the Act.

d. where there is no other information, circumstances or indication given to an accused which would lead him to believe that the only sentencing provisions could be applicable are those prescribed in terms of the minimum sentence legislation.

Applying these considerations to the facts of *Matthys, supra,* the court concluded that the appellant had been legally represented, there had been no question raised as to the competence of his legal representative, the appellant and his legal representative had been given copies of the statement of the complainant wherein she had described in detail how she had been raped by the appellant and his co-accused, together with how many times she had been raped. All this information was therefore at the disposal of appellant's legal representative.

[14] Accordingly the appellant and his co-accused and attorney must have been aware that, when the magistrate warned one of the co-accused after the attorney had withdrawn due to a conflict of interest, that there was a possibility that, upon conviction, a prescribed minimum sentence could be imposed. There had been no protest emanating from the appellant or his attorney nor did either inform the court that they were not aware of the applicability of the provisions of the Act. Even after conviction there had been a failure to raise any concern in this regard. These findings have significant resemblance to the facts in the present case, to which I shall turn shortly. However there is further applicable case law to consider.

[15] In *S v Kolea* 2013 (1) SACR 409 SCA this question received further consideration from the Supreme Court of Appeal. The main question in this appeal was whether, on a charge of rape, a sentencing court is precluded from imposing a life sentence solely on the basis that the charge sheet referred to s 51 (2) instead of s 51 (1) of the Act.

[16] In this case the evidence established that the victim was raped more than once by more than one person. Section 51 (2) of the Act provided for the imposition of a minimum sentence of 10 years imprisonment in respect of a first offender while s 51 (1) prescribed a minimum sentence of life imprisonment. The appellant, who was charged in the Regional Court on one count of rape read with the provisions of s 51 (2) of the Act, pleaded not guilty. After hearing evidence the magistrate convicted him as charged. In convicting the appellant, the magistrate accepted the complainant's evidence that she was raped more than once by both the appellant and the co-perpetrator who managed to evade arrest.

[17] After conviction the magistrate informed the appellant that, as he was liable for a sentence of life imprisonment, which sentence fell beyond jurisdiction of the court, the case was transferred to the High Court in terms of s 52 of the Act.

[18] When the case eventually went on appeal to the Supreme Court of Appeal Mbha AJA (as he then was) posed the key question thus:

> 'Did the appellant have a fair trial and, more specifically, was the appellant sufficiently apprised of the charge he or she was facing, and was he or she informed, in good time, of any likelihood of his or her being subjected to any

> enhanced punishment in terms of the applicable legislation. This, of necessity, entails a fact-based enquiry into the entire proceedings of the trial.'

[19] The court held that the appellant, who was legally represented throughout the trial, knew well of the case that he was required to meet. Given the nature of the charge he was aware that the State had sought to rely on the minimum sentencing regime which had been created by the Act. On the substance of the case, the fact that the charge sheet referred to s 51 (2) of the Act as opposed to s 51 (1) was not sufficient to justify the conclusion that the appellant's right to a fair trial had been compromised. Of significance, the court referred to a *dictum* of the Constitutional Court in *S v Jaipal* 2005 (4) SA 581 (CC) at para 29:

> 'The right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the State. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime.'

[20] In *Kolea, supra* the essence of the finding was a rejection of technical objections to procedural fairness and an investigation of whether the court could discern any prejudice to the appellant.

[21] In my view, a common sense approach to the determination of prejudice holds the key to the problems raised in these cases and, in particular in the present appeal. In order to determine whether an accused can be said to have a fair trial, where the State intends to rely upon the provisions of the Act, this fact should pertinently be brought to the attention of the accused at the outset of the trial. But failure to do so is in itself not fatal. As Cameron JA noted in *Legoa* the accused

might still acquire the requisite knowledge in a manner which would not impair his rights to a fair trial. Thus the facts of each case require careful attention.

Evaluation

[22] With this background it is now possible to interrogate the key facts in this case. The appellant was legally represented. There is no suggestion, either on the record or in argument, that the legal representation with which he was provided was in any way incompetent. Although the minimum sentence legislation was not referred to in the charge sheet, in her evidence in chief the complainant's mother referred to the fact that the complainant was mentally handicapped.

[23] Before the appellant opened his case, his legal representative had a copy of the psychologist's report. Even if page two had not been available to the legal representative when the report was handed up, the conclusion of the report was available and from this it was clear that the complainant was found to be functioning predominantly in the range of severe mental handicap. While it must be accepted that this report was handed in to justify the absence of testimony by the complainant given her mental handicap, the fact that her condition was revealed to appellant's legal representative during the course of the trial and, certainly before the opening of appellant's case, would have sufficed, absent any plausible explanation to the contrary, to trigger knowledge that the minimum sentence regime was now applicable, in that mental disability of the complainant fell within s 51 read with part 1 of the Schedule 2 of the Act.

[24] The test as to whether in substance the appellant's right to a fair trial was compromised in this case can be located in the counterfactual which was put to Mr Calitz. The question which was asked was what would have occurred if the charge had contained a reference to mental disability. Mr Calitz submitted that the appellant would then have had an opportunity of challenging the mental status of the complainant; that is by producing medical evidence to contest that she suffered from a medical disability. The implausibility of this counterfactual is however revealed in the defence which was offered by the appellant. Bluntly stated, he contended that he was not present on the night of the crime nor that he had entered the home of the complainant and her mother. He persisted with this version throughout.

[25] But even with this denial, aware that the complainant suffered from a medical disability pursuant to the psychological report having been handed into court, the appellant could have chosen to request a postponement in order to procure the necessary psychological evidence to support a different version of the complainant's mental state of mind. (para 64) That, however, on any reasonable inference was never sought because of his persistence that he had not committed the crime. All of these considerations invite a similar application of the considerations laid out by Henney J in *Matthys, supra*.

[26] In summary, if the inquiry is a fact-based investigation into the entire proceedings of the trial and if the ultimate test is whether the appellant enjoyed a fair trial based on this enquiry, which examination is a substantive as opposed to a

formalistic process of reasoning investigation then, in this case, it cannot be said that the trial was unfair.

The merits of the sentence

[27] Relying on *S v SMM* 2013 (2) SACR 292 (SCA), Mr Calitz contended that there are categories of severity of rape and that, viewed objectively, the rape in the present case did not fall within the category as reserved for life sentences. In *S v SMM, supra* Majiedt JA emphasised that, even in the context of minimum sentence legislation the importance of assessing each case on its own particular facts and circumstances and the need for courts to take into account proportionality can never be overlooked. (para 18) Majiedt JA then addressed the imposition of a life sentence:

> 'Whether it is an appropriate sentence, particularly in respect of its proportionality to the particular circumstances of a case, requires careful consideration. A minimum sentence prescribed by law in which, in the circumstances of a particular case, would be unjustly disproportionate to the defence, the offender and the interest of society, would justify the imposition of a lesser sentence than the one prescribed by law.' (para 19)

[28] Majiedt JA found in *SMM, supra* that the crime had not been the most severe form of rape. The appellant had resisted from continuing with the sexual act when he realised that the child was crying. There was no evidence that the child suffered any on going trauma over and above the trauma that she inevitably experienced as a result of what has happened. En passant, it is hard to envisage a case where a child is raped but would not suffer 'on going' trauma. Admittedly, the court In *SMM* had not the benefit of the victim impact report, notwithstanding the

importance thereof. Further, the court found that the examining doctor had not found any serious physical injuries and no further violence in addition to the rape had been committed.

[29] On the basis of this reasoning, Mr Calitz pressed the absence of any evidence of any trauma outside of the immediate trauma of the rape. I am extremely troubled by this submission and the legal authority which appears to support it. Already in 1976 a most significant study by A W Burgess and L Holmstrom "*Coping Behaviour of the Rape Victim*" 1976 American Journal of Psychiatry 133 contained compelling evidence to suggest that the overwhelming majority of rape victims exhibited maladaptive coping mechanisms after rape. Outward adjustment may last for several months to many years after a rape but inevitably this would give way to a range of pathologies which can be captured under the idea of trauma. See also Bessel Van der Kalk, Susan Roth, David Pelcovitz, Susanne Sunday and Joseph Spinazzola "*Disorders of Extreme Stress: The empirical foundation of a complex adaptation to trauma*" 2005 Journal of Traumatic Stress 389, for more recent research.

[30] In this case, the rape was conducted after the appellant broke into a house, in which 3 women were sleeping. Were it not the fact that the complainant's mother was conscious of the need for security and set off an alarm, one can only wonder about the consequences for the mother and her other daughter. The complainant was mentally impaired; hence she was extremely vulnerable. The uncontested evidence of Sergeant Folding was that the appellant did not stop

raping the victim when he entered the bedroom. It required him to forcibly remove the appellant from the bed in order to protect the complainant.

[31] This was a violent and barbaric act perpetrated on a most vulnerable individual. To repeat: the appellant broke into a home where a mother and her two daughters were fast asleep at 02h00 am with the sole purpose of committing rape viewed accordingly. I have no difficulty in concluding that this form of rape justifies the sentence that was imposed by Erasmus J upon the appellant who, I might add, showed no remorse for the crime that he had committed.

[32] Mr Calitz, in seeking to suggest that a term of life imprisonment should only be imposed for the most egregious form of rape, invoked the idea of a counterfactual. In effect what he invited the Court to do was to conceive of the worst possible rape that this court could imagine and then work backwards therefrom in order to test whether the crime which was the subject matter of this case, fell within this category. I do not think that this is the appropriate way to deal with the crime of rape, particularly in a case, such as the present, where the facts are already as extreme as I have described them.

[33] For all of these reasons, the appeal is dismissed and the sentence of life imprisonment imposed by the court *a quo* is hereby confirmed.

_____

DAVIS J

DLODLO J and HENNEY J concurred