



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Appeal number: A117/2021

In the matter between:

MJ MOTHOKGO

Appellant

and

THE STATE

Respondent

HEARD ON: 07 FEBRUARY 2022

CORAM: OPPERMAN, J et LITHEKO, AJ

JUDGMENT BY: LITHEKO, AJ

DELIVERED ON: 24 FEBRUARY 2022

INTRODUCTION

[1] This is an appeal against sentence. The appellant, who was legally represented, was charged with and convicted in the Regional Court, Thaba Nchu of rape in contravention of section 3 read with sections 1, 56(1), 57, 58, 59, 60 and 61 of Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, also read with sections 94, 256 and 261 of the Criminal Procedure Act 51 of 1977,(the CPA) and further read with section 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997,(the CLAA). The appellant was sentenced in terms of section 51(1) of the CLAA

to life imprisonment as the court *a quo* was not satisfied that substantial and compelling circumstances which justify the imposition of a lesser sentence exist as contemplated in Section 51(3)(a).

FACTUAL BACKGROUND

- [2] Before turning to consider the merits of the appeal, a brief outline of the background facts is necessary. The complainant, a 15-year-old girl, is the biological daughter of the appellant and when the appellant raped her, she was staying at her grandmother's place with her grandmother and her mother. Her mother was pregnant and found it convenient to stay there as it was near the clinic. On Friday, the 13th February 2015, after Valentine's Day celebrations at her school, the complainant went to her parental home and along the way, she met with the appellant who informed her that she would find the house keys at the appellant's friend's place. Upon arrival she changed her clothing and sat in the lounge. The appellant arrived with his 2 friends, sat and drank liquor. A while thereafter the appellant left with the friends and returned alone later, sitting with the complainant in the lounge. The appellant then enquired from the complainant whether she knew of a cultural practice according to which she had to "sleep with him before she goes to the street". The complainant did not know this practice. Upon asking whether she could verify that with either her mother or her aunt, the appellant would not allow her to do so, but explained that her aunt knows the culture as she slept with her father. As she was tired, the complainant went to her bedroom to sleep despite the appellant's demand that she must not go to bed. After she got into bed, the appellant came and slept thereon and he remained silent when the complainant said he must not enter into her blankets. He touched her with something and she became dizzy whereupon he fondled her breasts and body. Scared and dizzy, she got out of her blankets and crawled to the appellant's bedroom and slept there, avoiding the appellant. The next moment the appellant was in the bedroom into which she had crawled and was naked. He undressed her trouser and panty, opened her thighs and had sexual intercourse with her. It was painful. When she screamed and cried, he held her hands and mouth and admonished her not to make noise. After the rape she fell asleep. When she woke up and

bathed, she noticed blood and a whitish substance in her vagina, which she washed off. He said she must not leave when she wanted to go away. Later he allowed her to leave and on her way to her grandmother's place, she met her mother at the clinic. Her mother enquired as to what was going on with her and she reported that the appellant raped her. They went to report the rape at the police station and she was taken to the doctor, who examined her on the same day.

[3] The other witnesses who were called for the state are the complainant's mother and the doctor, whose evidence need not be dealt with for purposes of this judgement, owing to the turn of events set out below. The J88 was admitted into evidence as exhibit A.

[4] After the testimony of the doctor, the DNA test result was admitted into evidence as exhibit B with the consent of the accused's legal representative. The DNA test result identified the appellant as the donor of the DNA that was found on the "vaginal vault" swab which formed part of the evidence kit. The appellant thereupon changed his plea to that of guilty and made the following admissions in terms of section 220 of the CPA:

- 4.1. The evidence of the complainant as given in Court is a true reflection of what happened on the date of the incident.
- 4.2. On the date of the incident, he had sexual intercourse with the complainant without her consent and raped her.
- 4.3. The complainant was 15 years old at the time of the rape.
- 4.4. He knew that his actions were wrongful and punishable by law.

[5] The court *a quo* then convicted him on the strength of the admissions that he made and the evidence led and, having found no substantial and compelling circumstances justifying a lesser sentence, imposed a sentence of life imprisonment in terms of section 51(1) of the CLAA. The appeal is against this sentence.

[6] The grounds of appeal as stated in the notice of appeal are the following:

- 6.1. In sentencing the appellant, the court over-emphasised the aggravating factors over the mitigating factors.
- 6.2. In sentencing the appellant, the court erred by not applying weight to the personal circumstances of the appellant.
- 6.3. In sentencing the appellant, the court erred by not regarding the appellant's traditional mitigating factors as substantial and compelling circumstances and deviate from imposing the minimum sentence as held in **S v Sikipha 2006 (2) SACR 439 (SCA)**.
- 6.4. In sentencing the appellant, the court erred in not considering other sentencing options.

[7] In this Court, the appellant was represented by Mr. Reyneke, who conceded that the personal circumstances of the appellant did not constitute substantial and compelling circumstances warranting deviation from the prescribed minimum sentence ordained in the CLAA. He however argued that the court *a quo* did not have jurisdiction to impose a sentence of life imprisonment on the grounds that the appellant was not apprised of the provisions of section 51(1) of the CLAA. The consequence of merely mentioning section 51 in the charge-sheet, without a specific reference to subsection (1) thereof, so he argued, is that the court *a quo* could not sentence in terms of the provisions of that subsection. The appellant contended that the court *a quo* misdirected itself in sentencing the appellant in terms of section 51(1) in the light of its failure to inform him that in the event of his conviction the prescribed minimum sentence is life imprisonment, unless he satisfies the court that there are substantial and compelling circumstances justifying a lesser sentence.

[8] As authority for the above submission, Mr. Reyneke, referred us to the case of **Tini Koloi Motaung v State**,¹ wherein the court held, relying on **S v Ndlovu**,² that a mere reference to section 51 of the CLAA in the charge-sheet, without explicitly directing the attention of the accused to the

¹ Case no: A118/2020, FSHC (4 November 2021).

² 2017 (2) SACR 305 (CC).

applicability of either subsection 51(1) and 51(2), is a deficiency which constituted an infringement of his right to a fair trial.³ He argued that, as the charge-sheet *in casu* referred to section 51, and not section 51(1), of the CLAA, the court *a quo* did not have jurisdiction to impose a sentence of life imprisonment.

[9] Mr. Lencoe, for the respondent, arguing in support of the sentence of life imprisonment, submitted that the **Ndlovu** case, on the authority of which the **Motaung** case was decided, was misconstrued and it is distinguishable.

[10] He argued that the distinguishing feature in the **Ndlovu** case is that the legal issue was whether the regional court had jurisdiction to sentence the appellant to life imprisonment in terms of section 51(1) after his conviction of rape in terms of section 51(2). It was there decided that because the appellant was convicted in terms of section 51(2), the regional court's penal jurisdiction was limited to a maximum of 15 years imprisonment⁴ in case of a first offender where no substantial and compelling circumstances are found justifying a lesser sentence.

[11] In this matter the court *a quo*, after convicting the appellant of rape of a 15-year-old complainant, sentenced him to life imprisonment in terms of section 51(1) of the CLAA upon finding that there existed no substantial and compelling circumstances justifying a deviation from that prescribed minimum sentence.

THE LEGAL ISSUE

[12] Counsel for the appellant and the respondent agreed that the issue to be adjudicated in this appeal is whether failure on the part of the court *a quo* to apprise the appellant of the applicability of section 51(1) of the CLAA

³ Section 35 (3) (a) provides that, "Every accused person has a right to a fair trial, which includes the right to be informed of the charge with sufficient details to answer it".

⁴ Section 51 (2) (b) of the CLAA provides that notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in Part III of Schedule 2, in case of a first offender, to imprisonment for a period not less than 10 years, provided that the maximum term of imprisonment that a regional court may impose in terms of this subsection shall not exceed the minimum term of imprisonment that it must impose in terms of this section by more than five years."

rendered his trial unfair in that he was not informed of the charge with sufficient detail to answer it. Put differently, did the Learned Magistrate misdirect herself by sentencing the appellant in terms of section 51(1) when the charge-sheet referred only to section 51 and not to subsection (1) thereof.

THE LEGAL POSITION

[13] A defective, or incomplete charge, may be remedied by evidence in some instances in terms of section 88 of the CPA which provides that:

“Where a charge is defective for want of an averment which is an essential ingredient of the relevant offence, the defect shall, unless brought to the notice of the court before judgement, be cured by evidence at the trial proving the matter which should have been averred”.

[14] Section 35(3)(a) of the Constitution, 1996 provides that an accused has a right to be informed of the charge with sufficient detail to answer it. It has been held, with reference to the provisions of section 51 of the CLAA, that the question whether the accused’s constitutional right to a fair trial has been breached at the sentencing stage, can only be answered after a vigilant examination of the relevant circumstances.⁵

[15] What is required is that the evidence, before conviction, should encompass all the elements that bring it within the purview of section 51 of the CLAA and the increased penal regime. It is not a requirement that the provisions of section 51 of the CLAA should be set out in the charge-sheet, but the enquiry remained whether the accused had a fair trial, which included his ability to answer the charge. Cameron JA remarked as follows in the case of **Legoa**:⁶

“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 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

⁵ *S v Legoa* 2003 (1) SACR 13 (SCA) of paragraph 21.

⁶ At paragraph 21.

and may be insufficiently heedful of the practical realities under which charge-sheets are frequently drafted. 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".

[16] In the case of **S v Ndlovu**⁷ the court emphasised that:

"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".

[17] The test is always whether or not the accused suffered prejudice as a result of the defect in the charge-sheet. A formal application to amend the charge-sheet is not always required.⁸ The Constitutional Court, describing the accused's fair trial right, said the following:

"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".⁹

[18] The charge-sheet was couched in the following terms:

⁷ 2003 (1) SACR 331 (SCA) at paragraph 12.

⁸ S v Koea 2013 (1) SACR 409 (SCA) at paragraph 18.

⁹ S v Jaipal 2005 (1) SACR 215 (CC) at paragraph 29.

“That the accused is guilty of the crime of contravening the provisions of section 3 read with sections 1, 56(1), 57, 59, 60 and 61 of Act 32 of 2007. Also read with sections 94, 256 and 261 of the Criminal Procedure Act 51 of 1977. Rape (read with the provisions of section 51 and schedule 2 of the Criminal Law Amendment Act 105 of 1997 as amended) in that on or about 14 February 2015 and at or near Thaba Nchu in the Regional Division of the Free State, the said accused did unlawfully and intentionally commit an act of sexual penetration with the complainant, to wit, Thebolo Confidence Athibeng, a 15 year old female person by inserting his male genital organ into her female genital organ and having sexual intercourse with her without the consent of the said complainant”.

- [19] Section 51 of CLAA confers jurisdiction in a regional court to impose minimum sentences in respect of serious offences therein specified. A close and vigilant examination of the circumstances of this case reveals that the state made its intentions clear, when charges were put to the appellant in the court *a quo*, that the sentencing provisions contemplated in Section 51 and Schedule 2 of the CLAA would be invoked. The charge-sheet also explicitly states that the victim is a 15-year-old, placing the charge levelled against the appellant within the purview of section 51(1).
- [20] During his address in mitigation of sentence in the court *a quo*, the legal representative of the appellant, after stating the personal circumstances of the appellant on record, proceeded to request the court “*to deviate from the prescribed sentence of life imprisonment. There are compelling and substantial circumstances referring to previous conviction being a long time ago and accused has a family depending on him.*”
- [21] In the case of **Legoa**,¹⁰ Cameron JA explained the offences referred to in section 51 as follows:

“The offences scheduled in the minimum sentencing legislation are likewise not new offences. They are but specific forms of existing offences, and when their commission is proved in the form specified in the Schedule, the sentencing court acquires an enhanced penalty jurisdiction. It acquires that jurisdiction, however, only if the evidence regarding all the elements of the form of the scheduled offence is led before

¹⁰ At paragraph 18.

verdict on guilt or innocence, and the trial court finds that all the elements specified in the Schedule are present”.

- [22] Section 220 of the CPA provides that an accused or his or her legal adviser or the prosecutor may in criminal proceedings admit any fact placed in issue at such proceedings and any such admission shall be sufficient proof of such fact. The appellant, prior to changing his plea, admitted that he had sexual intercourse with the complainant without her consent, thereby raped her and that at the time of the rape, the complainant, who is his daughter, was 15 years old.
- [23] The question that has to be answered is the following: Having been charged with rape read with section 51 and Schedule 2 of the CLAA, and having made the said section 220 admissions, could it be said that there is any doubt as to what was in the contemplation of the State and the defence regarding which subsection of section 51 was applicable, the benefit of which should be given to the accused? In my view, this question should be answered in the negative. The appellant, when instructing the legal representative to change his plea of not guilty to that of guilty and admitting the elements of the scheduled offence, cannot claim that his right to a fair trial has been infringed. Section 51(1) is the only subsection in the CLAA that confers enhanced penalty jurisdiction to the regional court for rape of a person below the age of 16 years and for that reason, the appellant’s submission that he was not apprised of the State’s intention to rely on the provisions of section 51(1) is unsustainable. It is also noteworthy that at no stage during the trial did the appellant complain of any prejudice. He participated fully in the trial and also changed his plea when it became clear that his defence would not stand.
- [24] Sections 51(1) and 51(2) prescribe minimum sentences that should be imposed in specific circumstances and the appellant’s specific admissions of those facts that brought the conviction within the purview of section 51(1) and, following his conviction, the specific submissions by his legal representative that there are substantial and compelling circumstances warranting the court *a quo* not to impose the prescribed minimum sentence of life imprisonment

are a clear indication of the fact that the appellant was aware of the applicability of section 51(1) of the CLAA.

- [25] I am therefore not persuaded that failure on the part of the State to specifically mention the applicable subsection of section 51 of the CLAA rendered the appellant's trial unfair. The appellant has not shown, in the court *a quo* and in this Court, how differently he would have answered the charge had the charge-sheet specifically stated that section 51(1) of the CLAA was applicable to the rape with which he was charged. There is therefore no prejudice, in the legal sense, that the appellant suffered as a consequence of the omission. The State, with the help of the appellant by admitting the elements of the specific form of rape contemplated in section 51(1), proved beyond a reasonable doubt that the appellant is guilty of rape for which a minimum sentence of life imprisonment is prescribed, subject to the provisions of section 51(3).
- [26] Counsel for the appellant and the respondent both argued that it would not take the appeal any further to seek an explanation from the court *a quo* as to whether there was an inadvertent omission from the reconstructed record that the appellant was specifically apprised of the applicability of section 51(1) of CLAA over and above what is mentioned in the charge-sheet. That exercise would indeed result in unnecessary delay and waste of the scarce State resources.
- [27] It behoves this Court to mark its displeasure at what we consider to be an unsatisfactory state of the reconstructed record. The record of proceedings has not been certified as correct by the clerk of the court. In her reasons for judgement, the Learned Magistrate makes reference to her *ex tempore* judgement but has omitted to state the specific pages to which reference is made. The document, entitled reasons for judgement, appears to be a standard form to which no particular attention is given upon its completion which is unhelpful in the adjudication of an appeal.

[28] I now turn to the issue whether the court *a quo* was correct in finding that there are no substantial and compelling circumstances warranting deviation from the prescribed minimum sentence of life imprisonment.

[29] As indicated earlier in this judgement, Mr. Reyneke conceded, rightly so in my view, that the personal circumstances of the appellant as placed before the court *a quo*, are not sufficiently substantial and compelling to warrant deviation from the prescribed sentence of life imprisonment. His personal circumstances are that he is 36 years old and he has previous convictions, the last of which he was sentenced to 12 years' imprisonment and released on parole in 2008. He is married to the complainant's mother, who is unemployed. He completed grade 10 and is in good health. He has three minor children, one of whom is the complainant.

[30] In *S v Malgas*¹¹ the SCA set out how a court should conduct an enquiry as to whether substantial and compelling circumstances exist as follows:

“Here lies the rub. Somewhere between these two extremes the intention of the legislature is located and must be found. The absence of any pertinent guidance from the legislature by way of definition or otherwise as to what circumstances should rank as substantial and compelling or what should not, does not make the task any easier. That it has refrained from giving such guidance as was done in Minnesota from whence the concept “substantial and compelling circumstances” was derived is significant. It signals that it has deliberately and advisedly left it to the courts to decide in the final analysis whether the circumstances of any particular case call for a departure from the prescribed sentence. In doing so, they are required to regard the prescribed sentence as being *generally appropriate* for crimes of the kind specified and enjoined not to depart from them unless they are satisfied that there is weighty justification for doing so. A departure must be justified by reference to circumstances which may be seen to be substantial and compelling as contrasted with circumstances of little significance or of debatable validity or which reflect a purely personal preference unlikely to be shared by many”.

[31] It is trite that sentencing is a matter within the discretion of the trial court which ought not to be interfered with unless a decision thereon is vitiated by a

¹¹ 2001 (1) SACR 469 (SCA) at paragraph 18.

misdirection or the sentence is so disproportionate that no reasonable court could have imposed it.¹²

[32] Rape has been described as a very serious offence which constitutes a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim.¹³ What is particularly disconcerting is the fact that the complainant is not only a 15-year-old girl, but the appellant's biological child who had to relive this ordeal through her testimony and, together with her mother, subjected to cross-examination which was intended to make them appear as dishonest witnesses who fabricated a falsehood against the appellant. The complainant attempted to avoid the appellant, from whom she was entitled to seek protection, only to be brutalised in a manner she probably could never have imagined.

[33] The court *a quo* was correct in finding that the personal circumstances of the appellant did not qualify as substantial and compelling circumstances justifying the imposition of a lesser sentence. In sentencing the appellant, the court *a quo* properly weighed the appellant's personal circumstances, the nature and seriousness of the offence and the interest of society and its finding cannot be faulted.

[34] In my view, there is no ground whereupon I can find that the sentence imposed by the court *a quo* is shockingly inappropriate and that no other reasonable court could have imposed same. This Court is consequently not entitled to interfere with the sentence imposed by the court *a quo* and the appeal must accordingly fail.

[35] I would therefore make the following order:

1. The appeal against sentence is dismissed.

¹² *Bogaards v S* 2013 (1) SACR 1 (CC) at paragraph 41.

¹³ *S v Chapman* 1997 (2) SACR 3 (SCA) at page 5 a-b.

M.S. LITHEKO, AJ

I concur and it is so ordered

M. OPPERMAN, J

On behalf of appellant:

MR. D. Reyneke

Instructed by:

Legal Aid South Africa

Bloemfontein

On behalf of respondent:

Adv. M. Lencoe

Instructed by:

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