



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Case no. 210/2011

In the matter between

MDUDUZI NELSON MTHIMKHULU

Appellant

and

THE STATE

Respondent

Neutral citation: *Mthimkhulu v S* (210/11) [2011] ZASCA 178
(29 September 2011)

Coram: **MTHIYANE, VAN HEERDEN and SHONGWE JJA**

Heard: **6 September 2011**

Delivered: **29 September 2011**

Summary: Criminal Law Amendment Act 105 of 1997 – appellant charged with and convicted of a single count of rape – applicable minimum sentence 10 years’ imprisonment – regional court applied incorrect section of Act in sentencing appellant to 15 years’ imprisonment – high court on appeal compounded error by replacing sentence imposed by regional court with sentence of life imprisonment – material misdirections entitling this court to interfere.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (De Villiers and Bosielo JJ sitting as court of appeal):

The appeal succeeds. The sentence imposed by the high court is set aside and replaced with the following:

1. The accused is sentenced to 10 years' imprisonment, antedated to 29 February 2000.
2. The order made by the regional court on 29 February 2000 declaring the accused unfit to possess a firearm is confirmed.

JUDGMENT

SHONGWE JA (MTHIYANE, VAN HEERDEN JJA concurring)

[1] On 6 September 2011 this court, having heard both counsel for the appellant and for the state, made the following order:

'The appeal succeeds. The sentence imposed by the high court is set aside and replaced with the following:

1. The accused is sentenced to 10 years' imprisonment, antedated to 29 February 2000.
2. The order made by the regional court on 29 February 2000 declaring the accused unfit to possess a firearm is confirmed:

This court indicated that reasons for the order would follow in due course. These are the reasons.

[2] The appeal before us originates from the conviction of the appellant on one count of rape by a regional court in Piet Retief. The appellant was sentenced to 15 years' imprisonment. Leave to appeal against both the conviction and sentence was refused by the regional court. However, upon petition to the Judge President (North Gauteng High Court, Pretoria), leave to appeal was granted in respect of sentence only. The order read:

1. 'Verlof tot appel teen skuldigbevinding word geweier.
2. 'Verlof tot appel teen vonnis word toegestaan op die volgende basis: die vonnis van vyftien jaar is nie 'n bevoegde vonnis met inagneming van die bepalings van die Strafwysigingswet (sic) 105 van 1997 nie. Ingevolge artikel 51(1) daarvan word, op enkele unitsonderings na, 'n minimum vonnis van lewenslange gevangenisstraf voorgeskryf en moes die verhoorhof die saak na skuldigingbevinding na die hooggeregshof gestuur het vir vonnisoplegging.'

[3] On appeal, the North Gauteng High Court, Pretoria (De Villiers and Bosielo JJ) set aside the sentence imposed by the regional court and replaced it with a sentence of life imprisonment. The further appeal against sentence before us is with the leave of the court below.

[4] This case was visited by a series of errors on questions of law and procedure from its inception up to the stage it reached the court below. So much so that, at the hearing of this appeal, both counsel for the appellant and for the state agreed that the appeal should succeed and that the order made by the court below should be set aside.

[5] The first of these errors is manifest from the charge sheet which refers to one

count of rape only, in contrast to the evidence from which it appears that the complainant was raped more than once by the appellant and his two companions, who were unfortunately not apprehended. The appellant was convicted 'as charged', viz of a single count of rape. This being so, the imposition of sentence fell within s 51(2)(b)(i) of the Criminal Law Amendment Act 105 of 1997 (the Act), read together with the provisions of Part III of Schedule 2. This section provides that a person who has been convicted of rape referred to in Part III of Schedule 2, in the case of a first offender, shall be sentenced to not less than 10 years' imprisonment, unless in terms of s 51 (3) of the Act, the sentencing court is satisfied that there are substantial and compelling circumstances justifying the imposition of a lesser sentence. However, had the appellant been charged with and convicted of raping the complainant more than once, as the evidence showed, the minimum sentence applicable to him would have been life imprisonment in terms of s 51(1) of the Act, read together with the provisions of Part 1 of Schedule 2.

[6] The sloppiness with which the charge sheet was drawn is unacceptable. In the words of Binns-Ward AJ in the similar case of *S v Mponda* 2007 (2) SACR 245 (C) paras 11 and 14-15:

'[11] The slovenly formulation of the charge sheet is potentially prejudicial not only to the accused, but also to the administration of justice.

. . . .

[14] The prejudice to an accused person in the circumstances described is illustrated by the magistrate's remarks during sentencing from which it is apparent that notwithstanding the content of the charge sheet the appellant was treated for sentence purposes as having "recurrent(ly)" raped the complainant. This was a material misdirection

[15] The administration of justice is potentially prejudiced because the allegation of only a

single count of rape in a charge-sheet, where the evidence supports a multiplicity of counts, means that the properly convicted accused can be sentenced only as a single count offender. As mentioned, this is cause for particular concern in matters where the Legislature has determined that offenders convicted on multiple counts should receive higher minimum sentences. It is liable to obstruct the achievement of legislative objects in the fight against crime and to bring the criminal-justice system into public disrepute.'

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[7] The second error is manifest from the following remarks of the trial judge at the sentencing stage, from which it appears that the court considered itself bound to impose a 15 – year sentence or even to refer the appellant to the high court for the imposition of life imprisonment:

'Die hof het nie 'n keuse nie, meneer, die hof moet vandag vir u 15 jaar gevangenisstraf oplê. Trouens die hof kan u eintlik na die Hooggeregshof verwys vir 'n lewenslange vonnis. En dit is die vonnis wat die hof gaan oplê. Die hof vind geen dwingende omstandighede om 'n ander vonnis op te lê nie.'

Life imprisonment is not appropriate in the circumstances of this case because the appellant was charged with and convicted of a single act of rape. The trial court was erroneously under the impression that the applicable minimum sentence was 15 years' imprisonment, whereas it was ten years as we have indicated above. This offends against the principles of a fair trial and constitutes a material misdirection on the part of the trial court.

[8] The trial court's error had a domino effect on the court below. That court also totally failed to appreciate that the appellant had been charged with and convicted of a single count of rape only. It correctly recognized that the trial court had made an error in finding that the minimum sentence prescribed by law was 15 years.

However, it grievously erred in finding that, in the present case, the minimum sentence was life imprisonment and in replacing the sentence imposed by the trial court with a sentence of life imprisonment. The series of errors was compounded by counsel for the appellant during the hearing in the court below, when he conceded, mistakenly so, that in the present case life imprisonment was the applicable minimum sentence. Strangely enough, counsel for the state in the court below argued that the trial court had exercised its discretion properly and that the court should confirm the sentence imposed by it.

[9] It is also important to note that the appellant was not warned timeously or at all that the state would be relying on the provisions of the minimum sentence legislation. The provisions of the minimum sentence legislation and the applicability thereof were brought to the attention of the appellant, for the very first time, after conviction and only when the sentencing proceedings were underway. This too constituted a material irregularity. In *S v Ndlovu* 2003 (1) SACR 331 (SCA), Mpati JA confirmed that where the state intends to rely on the sentencing regime created by the Act, a fair trial will generally require that its intention be brought pertinently 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 he or she faces as well as its possible consequences. What is at least required is that the accused be given sufficient notice of the state's intention to enable him to conduct his defence properly. (See also *S v Legoa* 2003 (1) SACR 13 (SCA) and *S v Makatu* 2006 (2) SACR 582 (SCA)). This certainly did not happen in this case. In *S v Chowe* 2010 (1) SACR 141 (GNP), the court (Mavundla J with Legodi J concurring) went to the extent of saying that the fact that the accused was

legally represented did not take away the need to promptly inform him of the applicability of the minimum sentence legislation and its implications.

[10] In summary, the trial court erred in believing that the minimum sentence was 15 years' imprisonment and the high court also erroneously believed that the minimum sentence was life imprisonment. As set out above, the appellant was charged with and convicted of a single count of rape and therefore, as a first offender, 10 years was the applicable minimum sentence. As stated above, the proceedings in both the trial court and the high court were marked by material irregularities which make it imperative for this court to interfere.

[11] In the result this court made the order set out in para 1 above.

J B Z SHONGWE
JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANT: L A Van Wyk
Instructed by: Legal Aid Board, Pretoria;
Legal Aid Board, Bloemfontein.

FOR RESPONDENT: L Pienaar

Instructed by:

Director of Public Prosecutions, Pretoria;
Director of Public Prosecutions, Bloemfontein.