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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

- (1) REPORTABLE: ~~YES~~/NO
- (2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
- (3) REVISED

Case number: A 498/2017

Date of hearing: 6 June 2019

Date delivered: 12 June 2019

In the matter between:

**JOHANNES BONGANI BILA
GIVEN MODIBA**

1st Appellant

2nd Appellant

and

THE STATE

Respondent

JUDGMENT

SWANEPOEL AJ

THE CHARGE

[1] The appellants, together with one Fanie Ngake, were charged in the Regional Court sitting at Bronkhorstspuit with one count of contravention of section 3 of the Criminal Law Amendment (Sexual Offences and Related Matters), Act, Act 32 of 2007, in that on or about 29 September 2012, and at or near Ext 5 Zithobeni, Bronkhorstspuit they unlawfully and intentionally committed an act of sexual penetration with a female person, J[....] M[....] ("the complainant"), by forcing their penises separately into her vagina without her

consent.

[2] The appellants pleaded not guilty. In their plea explanation they admitted to having had sexual intercourse with the complainant, but stated that it was with her consent and that the complainant was a prostitute.

[3] The appellants and their co-accused were all convicted as charged. All were sentenced to life imprisonment. The appellants initially appealed against both conviction and sentence. Leave to appeal as granted by this Court on sentence only.

THE FACTS

[4] The facts were briefly the following:

4.1 At 19h00 on the evening of 29 September 2012 the complainant was walking to her sister-in-law's place when she was grabbed by two men. The first appellant was one of them and he placed a hand over the complainant's mouth to stop her from crying out for help.

4.2 The complainant was dragged to first appellant's house where he strangled and undressed her and then proceeded to rape her. During the rape he held her throat so that she could not scream. He had intercourse with her a number of times, but she could not say how many times.

4.3 During the night the second appellant and Ngake came into the house and also raped her. The following morning, before sunrise, she was released. She went straight to the police station to report the incident.

[5] The court *a quo* found that because the complainant had endured multiple rapes, the offence fell within the provisions of section 51 (1) of the Criminal Law Amendment, Act 105 of 1997 ("the Act"), read with Part I of Schedule 2 to the Act, and that the applicable minimum sentence was therefore life in prison.

MINIMUM SENTENCE

[6] Section 51 of the Criminal Law Amendment Act, 1997 reads as follows:

"51 Discretionary minimum sentences for certain serious offences

- (1) *Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.*
- (2) *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-*
 - (a).... ..
 - (b) *Part III of Schedule 2, in the case of*
 - (i) *a first offender, to imprisonment for a period of not less than 10 years;*
 - (ii)
- (3)(a) *If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances into the record of the proceedings and must thereupon enter such lesser sentence...."*

[7] Part I of Schedule 2 includes the offence of rape committed in circumstances where the victim was raped more than once, whether by the accused or a co-perpetrator. The circumstances set out in the charge sheet, as well as the evidence, put the offence squarely within the ambit of Part I of Schedule 2.

[8] The sentencing jurisdiction of the regional court is ordinarily a maximum of 15 years' imprisonment. The Act increases its sentencing powers to life imprisonment for specific offences. The Supreme Court of Appeal has held that a

fair trial requires that an accused should be made aware of the fact that a conviction on the offence with which he is charged might result in a minimum sentence being imposed. In **S v Ndlovu 2003 (1) SACR 331 (SCA)** (at 337 8) the following principle was laid down:

"[w]here 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." .

[9] Cameron JA held in **S v Legoa 2003 (1) SACR 13 (SCA) (at 23 B to D)**:

"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.

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 either 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 and may be insufficiently heedful of the practical realities under which charge-sheets are frequently drawn up. The accused might in any event acquire the requisite knowledge from particulars furnished to the charge sheet 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."

[10] In **S v Kolea 2013 (1) SACR 409 (SCA)** the Court emphasized that the

test was simply whether the accused had a fair trial:

"Thus the question that should be posed should be the following: 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 an enhanced punishment in terms of the applicable legislation."

[11] The test can therefore be summarized as follows:

- 11.1 The accused must be advised that the State is seeking to rely on the provisions of a statute that might, if the accused is convicted, result in the court having an enhanced sentencing jurisdiction;
- 11.2 The accused must be advised of the facts that the State will seek to prove, in order to bring the offence within the provisions of the statute;
- 11.3 In considering whether the accused was apprised of the aforesaid one must not be formalistic. The test is simply whether the accused received sufficient and timely notice so that his/her trial can be said to have been fair.

[12] In ***S v ZW 2015 (2) SACR 483 (ECG)*** the accused was convicted in the regional court on two counts of rape and sentenced to life imprisonment. The charge sheet set out the facts of the offence and stated that the provisions of section 51 (2) of the Act were applicable. There was no mention made during the trial of what period of minimum sentence was applicable, and at no stage was the accused advised that a conviction on the charge put to him might result in a sentence of life imprisonment. In sentencing the accused the court *quo* relied upon the provisions of section 51 (1) and found that unless it found substantial and compelling circumstances, it was obliged to impose life imprisonment.

[13] On appeal the court found that it was improper to warn the accused that the provisions of section 51 (2) of the Act were applicable, and then to impose life imprisonment as provided for in section 51 (1).

[14] In **S v Makatu 2006 (2) SACR 582 (SCA)** the accused was charged with murder subject to the provisions of section 51 (2), which, upon conviction would have required the imposition of a minimum of 15 years' imprisonment. The accused was convicted of pre-meditated murder under section 51 (1), and sentenced to life imprisonment.

[15] The Court held as follows (at 587 8 to E):

"The appellant in this matter was charged with murder that, on conviction would render him liable to a sentence of 15 years' imprisonment in terms of the Act. He was convicted on that charge. He was then sentenced on the basis that he had been charged with and convicted of what amounted to a different offence- premeditated murder-that, under section 51 (1) of the Act renders an accused liable to imprisonment for life. The imposition of that sentence is an obvious and grave misdirection. It must be set aside and this Court is to consider the appropriate sentence.

As a general rule, where the State charges an accused with an offence governed by section 51 (1) of the Act, such as premeditated murder, it should state this in the indictment. The 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 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."

[16] It is within the above guidelines that one has to examine the trial proceedings. The record contains two charge sheets. Both were certified as true copies of the original. The first has not been completed, whilst the second, presumably the correct charge sheet, contains the allegations against the appellants. As stated, the latter charge sheet set out facts that would bring the

charge within the ambit of section 51 (1) of the Act, in that it alleged multiple rapes. However, the preamble to the charge sheet refers to section 51 (2) which excludes rapes listed in section 51 (1). The charge sheet is therefore in itself contradictory. The record reveals that in a preliminary appearance on 28 February 2013 the accused were warned as follows:

"Wet op minimum vonnisse reg op prokureur verduidelik"

[17] It is not clear whether the provisions of section 51 (1), section 51 (2), or both sections were explained to the appellants. Given the above, it would appear that the trial court did not properly warn the appellants of the fact that they were liable to be sentenced to life imprisonment upon being convicted of a charge involving multiple rapes. However, during the sentencing phase the presiding officer commented to their legal representative that the charge was one referred to in Part I of Schedule 2. He replied:

"Yes, Your Worship. I am aware of that, Your Worship and this has been explained to the accused prior to this matter proceeding, Your Worship and I explained the seriousness of this matter, Your Worship."

[18] It seems that not only was the appellant's legal representative aware that the charge fell within the confines of section 51 (1) read with Part I of Schedule 2, and that a sentence of life in prison might be imposed, he had also warned the appellants of the possibility of life imprisonment in advance. Given those facts it is clear that, even though the charge sheet was contradictory, and the section of the Act referred to was wrong, the appellants always knew that they were facing a charge involving multiple rapes, and that a conviction might result in life imprisonment being imposed. The appellants testified in their own defence, they called witnesses, and it is difficult to imagine how they could have conducted the trial differently. In our view the appellants received a fair trial. It is therefore our view that the court *a quo* was entitled to impose a sentence of life imprisonment in terms of section 51 (1) of the Act.

[19] In considering whether the sentence was appropriate, the following should

be taken into consideration:

19.1 Sentence is preeminently a matter for the discretion of the trial court. (***The State v Skenjana 1985 (3) SA 51 (A)***)

19.2 A court is only entitled to deviate from the applicable minimum sentence when the court finds that there are substantial and compelling reasons to do so.

[20] The question as to what constitutes substantial and compelling reasons was considered in ***The State v Ma/gas 2001 (2) SA 1222 (SCA)***:

"Moreover, those circumstances had to be substantial and compelling. Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them. But for the rest I can see no warrant for deducing that the legislature intended a court to exclude from consideration, ante omnia as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders.

The use of the epithets "substantial" and "compelling" cannot be interpreted as excluding even from consideration any of those factors. They are neither notionally nor linguistically appropriate to achieve that. What they are apt to convey, is that the ultimate cumulative impact of those circumstances must be such as to justify a departure. It is axiomatic in the normal process of sentencing that, while each of a number of mitigating factors when viewed in isolation may have little persuasive force, their combined impact may be considerable."

[21] To determine whether a deviation from the minimum sentence is appropriate one should consider the relevant facts, which are the following:

- 21.1 The complainant was accosted in the early evening whilst on her way to her sister-in-law. She was forcibly dragged to a house where she was not only raped repeatedly by three men, but also throttled to keep her quiet. She suffered superficial injuries to her throat and to her private parts. She was held for a number of hours, only being freed in the early hours of the morning.
- 21.2 At least two of the men had unprotected intercourse with the complainant, exposing her to the threat of sexually transmitted diseases. She constantly worries that she might be HIV positive.
- 21.3 After the incident the complainant was described as being dirty, stammering, tired and she was crying. There is no doubt that the incident must have had a severe impact on her life, especially given the fact that she was helpless in first appellant's home, and was subjected to hours of abuse. The record does not reveal much about the impact of the offence on the complainant, and it is regrettable that a victim impact report was not obtained.
- 21.4 First Appellant was 22 years old and, like his co-accused, a first offender. He was employed as a machine operator, had a Grade 11 qualification and was unmarried. He has one child. He resided with his family. Second Appellant was 18 years of age, worked as a security guard, and had a Grade 9 qualification. He was unmarried.
- 21.5 The appellants have shown no remorse, but have persisted with their allegation that the complainant **was a** prostitute, which no doubt caused the complainant further embarrassment and secondary trauma.

[22] The facts of the matter justify, in our minds, the imposition of life imprisonment. The personal circumstances of the appellants are completely unremarkable. It was argued that they were relatively young. It is so that a person's character is often only fully developed in later years. However, even a

young person knows that it is wrong to rape a woman. The appellants were both employed, came from good families, and there is no excuse for their inability to control their actions. Similarly, the fact that they are first offenders in itself does not justify a lesser sentence. The circumstances of the appellants, the crime and the interests of the community should be considered holistically to determine whether there are substantial and compelling reasons to deviate from the minimum sentence.

[23] In the circumstances we find that there are no substantial and compelling reasons to deviate from the minimum sentence.

[24] **I therefore propose the following order:**

24.1 The appeal against sentence is dismissed.

Swanepoel AJ

**Acting Judge of the High Court,
Gauteng Division, Pretoria**

I agree and it is so ordered

JANSE VAN NIEWENHUIZEN J

**Judge of the High Court
Gauteng Division, Pretoria**