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

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

Appeal No: A33/2019

In the matter between:

M N

and

THE STATE

CORAM: OPPERMAN, J *et* MOENG, AJ

JUDGMENT BY: MOENG, AJ

HEARD ON: 29 JULY 2019

DELIVERED ON: 15 AUGUST 2019

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- [1] On 27 July 2018 the appellant was convicted in the Regional Court Bultfontein on two separate counts of Rape in contravention of the provisions of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997.
- [2] Having concluded that substantial and compelling circumstances were present to deviate from the prescribed minimum sentences of life imprisonment, the trial court sentenced the appellant to 15 years imprisonment in respect of count 1 and 20 years imprisonment in respect of count 4. The sentences were not ordered to run concurrently. An effective term of 35 years imprisonment was therefore imposed. It is with the leave of the court *a quo* that the appellant is now before us on appeal of his sentence.
- [3] The evidence upon which the conviction in respect of count 1 rested was that on the 1st of January 2015 at around 1:30 a.m. the complainant, NN, a 15 year old girl at the time, was on her way home accompanied by her friends when they came across an unknown man. The unknown man produced a knife and they ran off. He gave chase and caught up with her. He placed a knife against her neck and ordered her not to scream. He dragged her to a nearby bush

where he raped her. She could not identify him at that stage but the appellant was later linked to the rape by DNA evidence.

- [4] The evidence in respect of count 4 was that on 1 February 2015, the complainant, JM, a 31 year old female, and her friend, DV were from a tavern. They came across a group of around 10 men who accosted them. The men were in possession of knives. They attempted to take flight but the men grabbed both of them. She landed on the ground whilst DV was a few meters away from her. The men thereafter took turns in raping both of them. She reckons that 7 men raped her. One of the men stepped on her face with his foot and held a knife against her throat to prevent her from screaming. She could not identify any of her assailants but the appellant was positively connected to the rape by DNA evidence.
- [5] The appellant contended in his notice of appeal that the court *a quo* correctly found substantial and compelling circumstances in respect of count 1 and that a term of 15 years imprisonment is appropriate under the circumstances. Ms. Kruger appearing for the appellant, relying on **Alex Dikeledi Mahlase and The State** (255/2013) [2011] ZASCA 191 (29 May 2013) at paragraph 9, contended in the main that the rape in count 4 does not fall within the purview of section 51(1) but that of section 51(2) Part III of Schedule 2 of the Criminal Law Amendment Act.

- [6] She argued that the prescribed sentence in count 4 was therefore 10 years imprisonment and not life imprisonment as the trial court concluded. She however conceded that we may not deviate from the sentence prescribed by section 51(2)(b)(i) based on the nature and seriousness of the offence. She further asserted that the court *a quo* erred in not ordering the sentences to run concurrently. Adv. Strauss, counsel for the respondent did not support the sentences imposed by the trial court.
- [7] Section 51(1) read with Part I of Schedule 2 prescribes a minimum sentence of life imprisonment where the victim was raped by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy. The trial court can in my view not be criticised for having concluded that the complainant in respect of count 4 was raped by more than one person and that the perpetrators were acting in the furtherance of a common purpose. Her approach that such common purpose triggered the provisions of section 51(1) read with Part I of Schedule 2 has however been held to be incorrect in the **Mahlase** matter.
- [8] The jurisdictional facts that the prosecution has to prove before the provisions of section 51(1) read with Part I of Schedule 2 are triggered, are that the victim should have been raped by more than

one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy.

[9] As was stated in **S v Legoa** 2003 (1) SACR 13 (SCA) at 20E, the wording of the section clearly indicates that for the minimum sentencing jurisdiction to exist in respect of an offence, the accused's conviction must encompass all the elements of the offence set out in the Schedule. The court emphasised that the jurisdiction to impose the enhanced sentences is acquired only if all the elements of the offence, as described, are proved before conviction and the trial court finds them to be present. A further jurisdictional fact, that all the co-perpetrators should have been before court and convicted, appears to have therefore been introduced by Mahlase.

[10] The practical implication of Mahlase is therefore that even if the trial court finds that the complainant was raped by more than one person, it must, for purposes of section 51(1) read with Part I of Schedule 2, disregard that finding because the co-perpetrators were not before court or convicted. The anomaly will be that even if it was proven that the complainant was raped by more than one person the court will proceed to sentence the accused on the basis that it was not so proven.

- [11] We are bound by **Mahlase** and it therefore follows that the trial court erred in finding that the provisions of section 51(1) read with Part I of Schedule 2 were applicable. Life imprisonment was therefore not competent and the sentence thus falls under the ambit of section 51(2) (b) Part III of Schedule 2. The appellant was a first offender and the prescribed sentence is therefore imprisonment for a period not less than 10 years unless substantial and compelling circumstances are present.
- [12] Section 51(2) provides that the minimum term of imprisonment that a regional court may impose may be increased, provided that the maximum term of imprisonment does not exceed the minimum term by more than five years. Ms. Kruger contended in her heads of argument and readily conceded during the deliberations that such upward escalation would be proper having regard to the nature and seriousness of count 4. She in essence conceded that there were no substantial and compelling circumstances warranting a lesser sentence. Her argument cannot be faulted.
- [13] The appellant was 21 years old at the time of the commission of the offence and was 24 years old at the time of sentencing. He was in custody for approximately 2 years and 4 months awaiting trial and he was a first offender. He is single and has a 5 year old daughter who is in the care of her biological mother. His highest scholastic standard

passed is Grade 8 and he left school due to financial constraints. He was unemployed and did odd jobs.

[14] Despite the anomalous position created by Mahlase, we cannot lose sight of the fact that the complainant was subjected to a humiliating and terrifying ordeal of a gang rape. A group of around ten men, the appellant having been one of them, accosted the complainant and DV. The men were in possession of knives and took turns in raping both of them. She reckons that 7 men raped her. One of the men stepped on her face and held a knife against her throat to prevent her from screaming.

[15] She could not recognise any of her assailants. Had it not been for the DNA evidence, the appellant would not have been positively identified. The appellant had committed a similar offence within a month of the latter offence. The regional magistrate correctly took the emotional impact that this offence had on the complainant and the palpable emotional state that she suffered from when she testified, three years after the ordeal.

[16] We are of the view that no substantial and compelling circumstances are present for us to deviate from the minimum sentence of 10 years imprisonment in respect of count 4. Having had regard to the nature and seriousness of this count, we are satisfied that it would be just to

increase the applicable minimum sentence by 5 years to 15 years imprisonment.

[17] The appellant conceded in the notice of appeal that a term of 15 years imprisonment for count 1 is justified. We are satisfied that the regional magistrate cannot be faulted for having sentenced him as such. The appellant would therefore have to serve an effective term of 30 years imprisonment. We have a duty to take the cumulative effect of the two sentences into account. We are therefore of the view that an effective term of 30 years imprisonment will be unjustifiably severe under the circumstances. We will therefore order that part of the sentences run concurrent.

[18] In the result I propose to make the following order:

1. The sentence of 15 years imprisonment in count 1 stands;
 2. The sentence of 20 years imprisonment in count 4 is set aside and is substituted with a sentence of 15 years imprisonment;
 3. 5 years imprisonment of the sentence imposed on count 1 is to run concurrent with the sentence imposed in count 4;
 4. The sentences are antedated to 27 July 2018.
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L.B.J. MOENG, AJ

I concur and it is so ordered.

M. OPPERMAN, J

On behalf of the appellant: Attorney S. Kruger
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of the respondent: Adv. M. Strauss
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN