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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 no: A 109/2019

T M	1st Appellant
T O	2nd Appellant
and	
THE STATE	Respondent

HEARD ON: **14 October 2019**

CORAM: **MHLAMBI, J et MURRAY AJ**

JUDGMENT BY: **MURRAY AJ**

- [1] On 28 February 2017 Regional Court Magistrate B.B. Mahlatsi in Bethlehem convicted the Appellants of one count of Rape and sentenced them to 15 (FIFTEEN) years' imprisonment each. Their appeal lies against both conviction and sentence.
- [2] The court *a quo* dismissed their Applications for Leave to Appeal. However, on 11 October 2017 Jordaan ADJP, as he then was, and Chesiwe AJ, as she then was, granted the Appellants leave to appeal against their convictions and sentences on Petition.
- [3] The grounds of appeal against their conviction are that the court *a quo* erred
- 3.1 in finding that the State had proved its case, and
 - 3.2 in rejecting the Appellants' version of consensual sex with the Complainant.
- [4] The grounds of appeal against their sentences are that the Court *a quo* erred
- 4.1 in underestimating the mitigating factors;
 - 4.2 in overemphasising the aggravating factors; and
 - 4.3 in not taking into account the prospect of rehabilitation for first offenders.

- [5] Mr J D Reyneke of Legal Aid South Africa appeared for the Appellants and Adv K E Lesie-Shale of the Office of the Director of Public Prosecutions for the State.
- [6] The Complainant's version is that around 2:00 in the morning in question she was walking home from a tavern when the Appellants approached her from behind and grabbed her by the hands. Second Appellant is a former boyfriend of hers. They promised to walk her to her brother's house. They took a different route, however, and refused to let her go. When she attempted to pull away, they only grabbed her hands more tightly and started pulling her. When she tried to scream, Second Appellant blocked her mouth with his hands and told her not to wake the elders.
- [7] The Appellants then walked her, still holding onto her hands, to a house that appeared to be known to First Appellant and threw her into a dark shack in the backyard of the house. They threw her down on a bed and one of them grabbed her by one leg and held onto her leg while the other one pulled her shorts and panty off the other leg. The one then held onto both her legs while the other one raped her vaginally. It was too dark to see his face. When he had finished, he left and the second one raped her. By that time it was getting light and she saw that the one raping her at that stage was the Second Appellant. When he got up to look for his trousers, she saw a mentally ill person lying on another bed in the shack.

- [8] While the Second Appellant was at the back of the shack, she escaped, got dressed at the gate of the house and ran away. When she reached her brother's house, she was crying and reported to one Mapaseka Cele that she had been raped. In the morning they reported the rapes to the Police and she was examined by a doctor. The DNA results were not disputed by the Appellants. It confirmed the presence of a mixture of the DNA of both Appellants on a swab taken from the Complainant's underwear.
- [9] Each of the two Appellants was originally, in terms of Count 1, charged with "an act of sexual penetration", in other words, with one count of rape. The Prosecutor informed the Court just before the Appellants were asked to plead, that he had added a second count of Rape by way of Count 2, pertaining to the same Complainant and the same incident. In Count 2, as well, the Appellants were charged with "an act of sexual penetration"¹, in other words with a single count of rape.
- [10] The two charge sheets were patently defective. The relevant part of Count 1 reads as follows: "*Rape ... read with the provisions of Section 51 of the Criminal Procedure Amendment Act 105 of 1977*"² and the relevant part of Count 2 determined as follows "*RAPE (read with the provisions of Section 51* and Schedule 2 of the Criminal Law 105 of 1997, as amended)*". Neither of the written charges therefore specified which subsection of Section 51 and which Part of Schedule 2 of Act 105 of 1997 ("the Act") were applicable. Neither of the charge sheets in the

¹ "n handling van seksuele penetrasie"

² "Verkragting ... en gelees met die bepalinge van Artikel 51 van die Strafreghwysigingswet 105 van 1977, soos vervang deur artikel 1, Wet 38 van 2007."

description of the crime mentioned that the Complainant had been raped twice, either.

- [11] The Appellants could therefore not know what potential prescribed minimum sentences they were facing, which could potentially vary from life imprisonment for s 51(1) read with Part I of Schedule 2, to 10 years' imprisonment for s 51(2) read with Part III of Schedule 2 for first offenders.
- [12] Whereas the original written charge sheet on Count 1 only referred to "s 51", the Prosecutor orally inserted "*read with Section 51(1) or 51(2)(b) and Schedule 2*" when he read Count 1 into the record. When he read Count 2 into the record, he orally replaced the asterisk in "s 51*" with "*read with Section 51(1), read with section 51(2)(b) and read with Schedule 2*" [my underlining]. The two charges pertaining to the same incident are therefore not only ambiguous but also contradictory in that the first charge referred to either s 51(1) or s 51(2), and Schedule 2 was not even mentioned, while the second referred to both s 51(1) and s 51(2), and the applicable Part of Schedule 2 was not specified.
- [13] In **S v Ndlovu**³ Khampepe J stressed the Constitutional duty of prosecutors to ensure that the correct charge was preferred against the accused. From the evidence it is clear that the Appellants should have been charged with and convicted of Rape in terms of s 51(1) read with Part 1 of Schedule 2 of Act 105 of 1997, which provides in subsection (a)(i) for rape "*committed in circumstances where the victim was raped*

³ 2017 (2) SACR 305 (CC) at para [57]

more than once whether by the accused or by any co-perpetrator or accomplice” and for which the applicable minimum sentence is life imprisonment.

[14] While the Appellants were charged with separate counts of rape, and while there is no indication in the charge sheet that they were acting together or that the Complainant was raped twice, and that they would therefore face life imprisonment if so convicted, the court *a quo* held that the evidence is *“proof of an incident of rape, where both the accused took part ... The Court is of the opinion that BOTH THE ACCUSED are GUILTY of rape, which is one count and not rape on two counts”*.

[15] From the formulation of the conviction and the way the charges were formulated in the charge sheets, that the court in attempting to convict the Appellants in terms of s 51(1), misdirected itself by convicting them of only *one count of rape*. To compound the misdirection, the court then during sentencing held that *“the Minimum Sentences Act says life imprisonment unless if there are substantial and compelling circumstances.”*

[16] Life imprisonment would indeed have been applicable if he had found the Appellants guilty of rape in terms of s 51(1) read with Part I of Schedule 2 as he should have. But, since he explicitly convicted each of them of only one count of rape, s 51(2) read with Part III of Schedule 2 would have been the applicable provision and 10 years’ imprisonment would have been the relevant prescribed minimum sentence since for all intents and purposes the Appellants were both first offenders.

[17] I respectfully align myself with Khampepe J when she, in **S v Ndlovu**⁴, in addressing the Constitutional responsibilities of the judiciary⁵ regarding the implementation of the Criminal Law Amendment Act 105 of 1996, held that:

“The [courts] are the gatekeepers of justice... In this case the magistrate could have and should have taken steps to ensure that Mr Ndlovu was prosecuted and convicted in terms of the correct provision of the Minimum Sentencing Act. Courts are expressly empowered in terms of s 86 of the Criminal Procedure Act to order that a charge be amended...”

[18] Mr Reyneke submitted, correctly so, that an accused person must know from the onset, and certainly before he pleads, exactly what he is charged with and, if the minimum sentence regime is involved, what possible sentence he faces. It is clear from the case law dealing with defective charge sheets that it is indeed desirable that the charge sheet should alert the accused to the sentence that is likely to be imposed on him in terms of the Minimum Sentences Act.

[19] The material question in such a case is whether the accused had a fair trial despite the imperfection in the charge sheet. In **S v Kolea**⁶ the court determined that the question that the trial court has to pose, should be:

“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.”

⁴ *Supra*, at para [56]

⁵ See also: Tshepang Jack Nkgashu v State (Unreported judgment of the Free State Division, Appeal no A88/2019 (Delivered 12 September 2019)

⁶ 2013 (1) SACR 409 (SCA) at para [9]

[20] In **S v Ndlovu**⁷ Mpati JA held that if the State intends to rely upon the sentencing regime created by Act 105 of 1997, a fair trial will generally demand that the State's intention explicitly 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.

[21] Van der Merwe JA confirmed this in **S v Khoza and Another**⁸ when he held that:

“As a general rule, fair-trial rights require that an accused person should be informed at the outset of the trial of the provisions of the Minimum Sentence Act (or other provisions relating to an increased sentencing regime) that the State intends to rely upon or which are applicable. The accused person should generally be so informed in the indictment or charge sheet; by notification by the presiding officer or in any other manner that effectively conveys the applicable provisions to the accused person before or at the commencement of the trial.”

[22] In the present case there is no indication in the record that the court *quo* ascertained at the beginning of the trial that the Appellants had been informed that the charges they were facing fell under the minimum sentence regime. Even when the prosecutor added and read into the record the second charge, no reference was made to the minimum sentence regime. It was only during sentencing, after the

⁷ 2003 (1) SACR 331 (SCA) at para [12]

⁸ 2019 (1) SACR 251 (SCA) at para [10]

court had convicted both Appellants, that life imprisonment was mentioned for the first time during argument for sentence.

[23] In my view, then, due to the inadequacy of the charge sheets and the putting of the charges at the beginning of the trial, the Appellants were not sufficiently apprised of the charges they were facing and were not timeously informed of the prospect of enhanced punishment, in this instance life imprisonment, to be able to find that they would have had a fair trial if they were indeed to be convicted in terms of the provisions of s 51(1) read with Part I of Schedule 2 and convicted to life imprisonment.

[24] Despite the court *a quo*'s misdirection as to the exact provision the conviction should fall under, however, there is no doubt on the accepted evidence that the Appellants indeed raped the Complainant twice. They were thus correctly convicted of rape, although not in terms of the correct provision. As Mr Reyneke submitted, the conviction should therefore merely be corrected and, in view of their conviction of rape "*which is one count and not rape on two counts*" be held to have been made in terms of s 51(2) read with Part III of Schedule 2 of Act 105 of 1997. Ms Lesie-Shale conceded the misdirection.

[25] I have no reason to question the court *a quo*'s credibility finding and acceptance of the evidence of the Complainant regarding her having been raped by both Appellants. Her version was corroborated by the evidence of Ms Cele and the DNA report, the contents and results of which the Appellants did not dispute, and which confirmed a mixture of the DNA of the two Appellants, T O and T M, on the sperm swab. Their

defence of consensual sex was contradicted by the evidence led in court and the court *a quo*'s rejection of their version as false beyond a reasonable doubt is unassailable.

[26] The appeal against conviction therefore cannot succeed and the conviction is merely held to have been done in terms of s 51(2) read with Part III of Schedule 2 of Act 105 of 1997.

[27] This Court is also entitled to interfere in the sentences since the court *a quo* misdirected itself in finding that 15 years' imprisonment would be an appropriate sentence without finding any substantial and compelling circumstances to deviate from the applicable one of life imprisonment if the court *a quo* indeed convicted them in terms of s 51(1) as it thought it had.

[28] The two Appellants had been charged with two separate counts of rape. The applicable sentences fall under the ambit of s 51(2)(b) read with Part III of Schedule 2. Neither life imprisonment, nor 15 years' imprisonment would therefore be competent sentences. Since the Appellants are both first offenders, the applicable sentence would be one of 10 years' imprisonment. The State conceded as much.

[29] The First Appellant's relevant personal factors are that he is 26 years old, that he only completed standard 4 in school, that he is unmarried and childless, that both his parents are alive, that he is unemployed and that he is a first offender. The personal circumstances of the Second Appellant are that he is 23 years old, that he passed standard 10, that he

is also unmarried and childless, that both his parents are dead and that he is unemployed. Both had consumed alcohol before committing the rape.

[30] Even though they are relatively young, there is no indication that the Appellants' relative youthfulness in any way impacted on their moral blameworthiness, and their age can therefore at most be a neutral factor. The fact that they are first offenders is already accounted for in the applicable minimum sentence of 10 years' imprisonment. In my view the personal circumstances of the Appellants are not weighty enough, even cumulatively, to outweigh the aggravating factors and so to constitute substantial and compelling circumstances which would justify lesser sentences.

[31] Aggravating factors are that the two Appellants showed no remorse for their deeds. Without owning up to their misdeeds their prospect of rehabilitation is minimal and need not be taken into account. Instead of taking responsibility for their deeds, they lied about the Complainant having consented to intercourse. They also betrayed the Complainant's trust by undertaking to accompany her to her brother's house, but then forcefully throwing her into a dark shack where they assisted each other to take turns to rape her.

[32] Furthermore, rape is an abhorrent crime, the cruellest invasion of the victim's privacy, often leaving such person psychologically scarred for life. It is so prevalent in this country today that it has been referred to as a scourge and a pandemic. In my view, therefore, the aggravating

factors, taken together with the interests of the community in seeing that such crimes are appropriately punished, outweigh the mitigating ones.

[33] I therefore cannot find substantial and compelling circumstances to justify a lesser sentence than 10 (ten) years' imprisonment. Nor can I find that the aggravating circumstances are so horrendous that an escalation of 5 years above the applicable prescribed minimum one would be justified, either.

[34] Due to the court *a quo's* misdirection, the appeal against sentence therefore has to succeed and the Appellants' sentences of 15 years' imprisonment need to be set aside and replaced with sentences of 10 (ten) years' imprisonment each.

WHEREFORE I make the following order:

1. The appeal against conviction is dismissed. The Appellants are held to be convicted of Rape in terms of the provisions of section 51(2) read with Part III of Schedule 2 of the Criminal Procedure Amendment Act 105 of 1997.
2. The appeal against sentence succeeds. The Appellants' sentences are set aside and replaced with ones of 10 (TEN) years' imprisonment each.

MURRAY AJ

I concur and it is so ordered.

MHLAMBI J

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