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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

Case number: A100/2019

In the matter between:

J.M.MNGUNI

Appellant

and

THE STATE

Respondent

HEARD ON: 28 October 2019

CORAM: Reinders J, et Matthews AJ

JUDGMENT BY: Matthews. AJ

DELIVERED ON: 31 October 2019

- [1] This is an appeal against a sentence of life imprisonment imposed by the Regional Court in Kroonstad in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997 (“Act 105 of 1997”). The grounds of appeal relied upon by the Appellant can be summarised as follows: the sentence of life imprisonment is shockingly inappropriate in relation to the facts in mitigation (especially the lack of evidence indicating serious and lasting injuries to the complainant), and the lack of sentencing jurisdiction of the trial court to have imposed life imprisonment due to the omission of subsection one (1) in the charge sheet which refers merely to section 51 of the Criminal Law Amendment Act 105 of 1997.

Background

- [2] The salient facts of the case are that two young girls were walking with their elder cousin. Appellant offered the complainant (who was 13 years old at that time) some alcohol, which she refused. Hereafter he led the girls to some trees and told the complainant that he wants to teach her something. He told the other young girl to hide herself and she subsequently ran away. He proceeded to forcefully rape the complainant until he was interrupted by her uncle who arrived at the scene. The medical report (J88) indicates that the complainant had never had sex before and that her hymen was torn. The social worker’s report states that the complainant’s school work has not been affected but she did suffer from nightmares soon after the incident and had

complained of stomach pains. Her eating habits were also adversely affected and she is still scared of men, except her father. The Appellant conceded having had sexual intercourse with the complainant and based his defence on consent.

- [3] The trial court found the Appellant guilty of having contravened section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ("Act 32 of 2007") read with the provisions of section 51 of Act 105 of 1997, and sentenced the Appellant to life imprisonment in terms of section 276 (1)(b) of the Criminal Procedure Act 51 of 1977.
- [4] In sentencing the Appellant, the trial court took into consideration that he was a first offender at the age of 25 years; married and the father of a 4 year old son, who is cared for by the parents of the accused as his wife is still attending school; and at the time of his arrest he was employed at a construction company, earning a salary of R2500 per month.
- [5] In aggravation the court held that the offence was a serious one, committed upon a child, and a crime which occurred frequently in the court's jurisdiction.
- [6] The court found that there were no substantial and compelling circumstances to deviate from the minimum sentence and imposed the prescribed period of life imprisonment in terms of section 276(1)(b) of act 51 of 1977. In terms of section 103 Act

60 of 2000 the Appellant was declared unfit to obtain a licence for a fire arm, his name was entered into the register for Sexual Offenders and he was declared a person considered to be unfit to work with children in terms of section 120(4) of the Children's Act 38 of 2005

- [7] It is trite law that a court on appeal may only interfere with a sentence on appeal, if the sentencing court materially misdirected itself or the disparity between its sentence and the one which this court would have imposed had it been the trial court, is 'shocking', 'startling' or 'disturbingly inappropriate'¹. A good example would be where the court placed too much weight on the seriousness of the offence and too little on the personal circumstances of the accused².

The omission in the charge sheet:

- [8] Ms Kruger, appearing on behalf of the Appellant, argued that the failure to include the specific subsection of section 51 of Act 105 of 1997 was a fatal flaw in the charge sheet, which rendered it sufficiently vague and unfair to the accused. It was submitted that the charge sheet could have been interpreted in more than one way with reference to section 51 of Act 105 of 1997. It was averred that the state erred in not distinguishing between its reliance on either section 51(1) or section 51(2) of the Act and that if the charge sheet is not clear in that life imprisonment is the minimum applicable sentence, it creates uncertainty and it is

¹ S v Pieters 1987 (3) SA 717 (A); S v L 1998(1) SACR 464

² S v Zinn 1969 (2) SA 537 (A)

unclear if the legal representative of Appellant even discussed the minimum sentence with his client.

- [9] It was further argued that the trial court had found the Appellant guilty as charged, on a charge that was read with section 51 of Act 105 of 1997. In such case a sentence in terms of the provisions of section 51(2) of the Act becomes equally applicable and that a lesser minimum sentence of sentence of 10 years imprisonment, provided for by the section 51(2) of the Act, could have been the guiding standard for a just sentence.
- [10] We were referred *The State v Ndlovu* 2017 (2) SACR 305 (CC). In the said case Mr Ndlovu had been charged with Rape read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997 and was found guilty as charged by the Regional Court. In consequence to the sentence of life imprisonment and after the appeal proceedings were exhausted. The Constitutional Court found that the sentencing court was bound by fairness to the sentencing jurisdiction extended by section 51(2) of Act 105 of 1997. Mr Ndlovu's sentence was reduced from life imprisonment to 15 years imprisonment.
- [11] In *S v Kolea* 2013 (1) SACR 409 (SCA), a full bench of the Supreme Court of Appeal court confirmed the principles pertaining to a penalty clause in a charge sheet as laid down in *S v Seleke en Andere* 1976 (1) SA 675 (T) as follows:

“...that although it was desirable for a charge to contain a reference to a penalty, in order to insure that the accused had a fair trial. The reference to the penalty clause was to ensure that the accused is

informed of the charge he was facing and the magnitude of the sanction that may follow upon conviction.”

The question of the omission of the subsection cannot be isolated from the inquiry of whether the whether an accused had a fair trial or not. The indicator a fair trial is whether any prejudice was suffered by the omission of the state to differentiate between relying on the use of section 51(1) or 51(2) of Act 105 of 1997. This entails a fact based inquiry based on a diligent examination of the trial and all other relevant circumstances³.

[12] Unlike *Ndlovu supra* where the wrong subsection was relied upon for a conviction, in casu there was a mere omission of the applicable subsection. It is trite that the use of the correct subsection would have been the ideal situation, yet the omission of a subsection in this case is not misleading. The section and the empowering act are stated clearly and must be read with the facts in the charge sheet.

[13] The factual allegations in the charge sheet make it clear that the victim was 13 years old at the time of the offence. The age of a victim is a pivotal consideration which not only influences the sentence but also the possibility of competent verdicts, such as contravening section 15 of Act 32 of 2007(statutory rape). The minimum sentences act was first promulgated in 1997 and has been part of our legal landscape for over 20 years. It is highly unlikely that the possibility of a minimum sentence of life

³ See also *M T v S; ASB v S; September v s* [2018] ZACC 27; 2018(2) SACR 592 CC; 2018 (11) BCLR 1397 (CC) para 40

imprisonment was not discussed by the legal representative of the Appellant.

[14] No prejudice can be gleaned from the record. The defence that the Appellant provided in the trial court is one of consent and having had a relationship with the victim. On page 26 of the record the attorney for the Appellant put it to the complainant that one M[....] M[....] knew about their relationship. This is hardly a spurious defence. The Appellant never complained that he suffered prejudice due to the omission in the charge sheet at any stage during the trial. He participated fully and did not raise the omission of the subsection in the charge sheet in his notice of appeal. This issue was raised for the first time in the Heads of Arguments compiled by Ms Kruger.

[15] In view of what was said above I must find that the Appellant was not prejudiced by the omission of the subsection in the charge sheet and was fully aware before and during the trial that the *court a quo* was empowered to consider imposing Life imprisonment in terms of 51(1) of Act 105 of 1997 and his constitutional right to a fair trial was not infringed upon in any way.

The imposition of life imprisonment

[16] In respect of the appropriateness of the imposed sentence, the Appellant submitted that the rape was not one of the most serious cases of rape and the *court a quo* failed to consider that the complainant did not sustain other visible external bodily injuries.

Moreover, the complainant was coping well at school and no indication that she could not recover from her ordeal in future.

- [17] It was argued that the sentence was disproportionate to the crime and the sentence imposed by the regional court was out of kilter with those imposed in similar cases. We were referred to *S v Vilakazi 2009 (1) SACR (SCA) 552* where the sentence of life imprisonment was reduced to 15 years imprisonment. In my view the matter is not on all fours with the one before us. The Supreme Court of Appeal stated inter alia that "to take account of the fact that she was 11 when in fact she was at least 14 and might have been over 15 was a misdirection" (at para 26) and furthermore "there was also no threat of extraneous violence of any kind. The appellant at least minimized the risk of pregnancy and the transmission of disease by using a condom".

The facts of the case before us reveal that Appellant did not use a condom and accordingly the same mitigation is not applicable to him.

- [18] In addition we were referred to *S v Mahomatsa 2002 (2) SACR 435 (SCA) at 436*, where the court said that even in cases within the categories delineated in the Minimum Sentence Act there are bound to be differences in the degree of their seriousness. Further reference was made to *S v Nkomo 2007(2) SACR 198 (SCA) at 200 a – b* where it was stated that life imprisonment should be reserved for cases devoid of substantial factors that will indicate such a sentence is unjust.

- [19] Indeed, the disturbing level of violence in some rape cases of young children may well be considered more serious than in this case. However, the collateral damage of the rape renders it serious.
- [20] The complainant testified that this incident had divided her family. The breach of trust between the victim and her older adult cousin, whom one would have expected to protect her, is profoundly conspicuous⁴.
- [21] The doctor's medical report states that the victim had never had relations before and for a young girl to force into sexual relations in such a vile and perverse manner is reprehensible⁵.
- [22] The Appellant cunningly first offered the complainant alcohol and with false pretences took her and her younger cousin on a different route that went by the trees, where he to raped the complainant.
- [23] The victim may not have suffered serious bodily harm, but the psychological scars are often deeply hidden away to hide the shameful act and one can foresee the re-emergence of the psychological trauma the victim may suffer in the future. A sign of trauma is stated in the social workers report, which describes the complainant as being distrustful of all men except her father. In *S v Mahomotsa 2002 (2) SACR 435 (SCA)*, Mpati JA held that it is quite unrealistic to suppose that the young girls who were raped, carried no emotional scars.

⁴ *S v Moipolai 2005(1)SACR 580 (B)*

⁵ *See State v Rakhudu 2016 JDR 1115 (GJ)*

[24] The offence had the added result that the complainant no longer stayed with her maternal grandmother as before the incident as the location reminded her too much of the incident. In *S v Chapman* 1997 (3) SA 341 (SCA) at 345A-B the SCA called rape a humiliating, degrading and brutal invasion of the privacy, dignity and the person of the victim' and went on to say that -

'[w]omen in this country have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.'

[25] In my view the trial court did not err in finding that no substantial and compelling circumstances exist causing a deviation from the minimum prescribed sentence of life Imprisonment.

CONCLUSION

[26] It follows therefore that the following order will issue:

The appeal is dismissed.

R MATTHEWS, AJ

I concur.

C. REINDERS, J

On behalf of the appellant:

Adv. S Kruger
Instructed by:
Legal Aid SA
BLOEMFONTEIN

On behalf of the respondent:

Adv. S Chalale
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State Attorney
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