



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: A164/2016

LUCKY MALINGA

Appellant

and

THE STATE

Respondent

CORAM:

REINDERS, J *et* LOUBSER, AJ

JUDGMENT BY:

LOUBSER, AJ

HEARD ON:

06 MARCH 2017

DELIVERED ON:

23 MARCH 2017

- [1] The Appellant was found guilty a charge of Rape in the Regional Court sitting at Phuthaditjhaba and sentenced to life imprisonment in terms of the provisions of Section 51(1) of Act 105 of 1997. The sentence was based on the finding of the Court *a quo* that the

Appellant had raped the complainant altogether five times during the course of the night of 25 February 2006.

- [2] Despite the numerous grounds of appeal in respect of the conviction and the sentence in the Notice of Appeal, only two issues were raised before us in support of the contention that the appeal against life imprisonment should succeed. These issues were, firstly, the fact that the Appellant had not been informed of the prescribed minimum sentences provided for in Sections 51(1) and 51(2) of the Act aforesaid, and secondly, that on a proper construction of the evidence presented by the prosecution, the Court *a quo* should have found that the complainant was not raped more than once. Should this argument succeed, then the minimum sentence of life imprisonment would obviously fall away.
- [3] In this respect, Mr Reyneke, appearing for the Appellant, contended that the conduct of the Appellant pointed to only one act of rape despite the evidence of successive instances of penetration. At the same time he conceded, quite correctly in my view, that the evidence precluded him from arguing that the Appellant had not raped the complainant.
- [4] The complainant, 25 years of age, testified in the Court *a quo* that on the evening in question, she left a certain house in the company of her boyfriend at about 8.30pm. Outside, they were confronted by the Appellant who took her by the hand and stabbed her

boyfriend in the neck with a knife to scare him off. The boyfriend ran back to the house to call for help. The Appellant then forced her under threat of *inter alia*, a knife and a broken bottle, to take him to her place of residence, where he undressed her in her bedroom, still threatening her with a knife not to resist.

- [5] What followed thereafter represented a rather bizarre sequence of events. According to the complainant, he raped her about five times, but after each time, he knelt down and lit a match to view her genitals in the light provided by the flame. Thereafter he would again penetrate her, only to repeat the ritual of the matches once again. So it went on through the night until 4.am in the morning, when he fell asleep. She was then able to escape and to report what had happened to her. The police then found the Appellant still asleep in her bed, and arrested him. The complainant sustained no injuries.
- [6] Concerning the fact that the Appellant was never warned in respect of a possible minimum sentence, I should mention that the charge sheet did indeed refer to the Act, although the specific section was not mentioned. In addition, the Appellant was legally represented throughout the trial proceedings, and the probability of any prejudice to the Appellant is therefore regarded as minimal.
- [7] The Supreme Court of Appeal has recently pronounced itself on the failure to refer to Act 105 of 1997 at the commencement of a

trial in an unreported majority judgment in *Moses Tshoga and The State*, case number (635/2016) 2016 ZASCA 205 dated 15 December 2016. In that judgment, Schoeman AJA found that such failure does not necessarily vitiate a sentence of life imprisonment.

“I am of the view that the Appellant suffered no prejudice in the circumstances of this case, by the fact that the provisions of the Act had not been mentioned in the charge sheet and that he had been referred to the provisions of the Act by the trial Court only after conviction and prior to the commencement of the sentencing proceedings.”

[8] In the present case, there was indeed a reference to the Act in the charge sheet, as mentioned earlier, and both the prosecutor and the legal representative of the Appellant have referred to the aspect of minimum sentences prior to the commencement of the sentencing proceedings. I therefore find that there was no prejudice to the Appellant caused by the failure concerned.

[9] As to the question whether the Appellant had raped the complainant only once, the Court *a quo* found beyond reasonable doubt that she was raped at least five times during the course of the night. In *S v Blaauw* 1999 (2) SACR 295 (W) Borchers J remarked as follows:

“Each case must be determined on its own facts. As a general rule, the more closely connected the separate acts of penetration are in terms of

time (that is the intervals between them) and place, the less likely a Court will be to find that a series of separate rapes occurred. Mere and repeated acts of penetration cannot without more, in my mind, be equated with repeated and separate acts of rape. A rapist who in the course of raping his victim withdraws his penis, positions the victim's body differently, and then again penetrates her, will not, in my view, have committed rape twice. But where the accused has ejaculated and withdrawn his penis from the victim, if he penetrates her thereafter, it should, in my view, be inferred that he has formed the intent to rape her again, even if the second rape takes place soon after the first and at the same place." (P. 300 a – d).

See in this regard also *S v Mavundla* 2012 (1) SACR 548 (GNP).

[10] In the present case, the evidence of complainant was sadly lacking in providing the Court *a quo* with any of the information referred to in the authorities mentioned above. We do not know, for instance, whether the Appellant ever ejaculated during the course of the events, nor do we know how long the intervals between the separate acts of penetration were. In my view, the Court *a quo* was therefore wrong in concluding that there were five separate incidents of rape. The evidence of the complainant was glaringly insufficient and inadequate to justify the conclusion so reached.

[11] It is found, in the circumstances, that the Court *a quo* wrongly applied the provisions of Section 51(1) of the Act and sentenced the Appellant as if he had raped the complainant more than once.

Section 51(2)(b) of the Act prescribes a minimum sentence of 10 years imprisonment for a first offender who commits rape. It is noted that the Appellant has been serving his sentence of life imprisonment since the date of sentence, namely **25 May 2010**.

[12] The Appellant was a first offender. We were not urged during argument to find that there were substantial and compelling circumstances justifying the imposition of a sentence less than the prescribed minimum. At the time of his first appearance in Court during **2006** the Appellant was already 34 years of age. We take these facts into consideration in favour of the Appellant, as well as the fact that the complainant sustained no injuries at all during the events in question. There are, however, also aggravating factors, namely that the Appellant used a knife to ensure that the complainant complied with his every need. The intercourse was also not only prolonged, but also humiliating to the complainant. The Appellant held the complainant captive for almost the whole night, while he humiliated her by lighting a match after every act of penetration.

[13] In my view, the aggravating facts justify a sentence heavier than the prescribed minimum sentence. I regard 14 years imprisonment as appropriate in all the circumstances.

ORDER

[14] The following order is therefore made:

1. The appeal against sentence is upheld, and the sentence of life imprisonment is set aside and replaced with a sentence of 14 years imprisonment.
2. The substituted sentence must be deemed to have been imposed on 25 May 2010.

P.J. LOUBSER, AJ

I concur.

C. REINDERS, J

On behalf of the appellant: Adv.
Instructed by:

BLOEMFONTEIN

On behalf of the respondent: Adv.
Instructed by:

BLOEMFONTEIN