

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



Case number: A580/2014

Date: 19 February 2015

DELETE WHICHEVER IS NOT APPLICABLE

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

19/2/2015 *Pretorius*
DATE SIGNATURE

In the matter between:

EPHRAIM MOHALALELWA

Appellant

And

THE STATE

Respondent

JUDGMENT

PRETORIUS J.

[1] The appellant and a co-accused were charged with one count of rape

read with the provisions of section 51(2) of the Criminal Law Amendment Act in the Regional Court held at Schweizer Reneke. He was legally represented during the trial and pleaded not guilty. He was convicted on 11 July 2007 as charged, whilst his co-accused was found not guilty and discharged.

Thereafter the matter was referred to the High Court in terms of section 52 of Act 105 of 1997 for purpose of sentence.

[2] On 22 April 2008 the conviction was confirmed in the North Gauteng High Court and the appellant was sentenced to life imprisonment on 23 April 2008. An application for leave to appeal was launched on 6 May 2008. Due to the length of time it took to have the record of proceedings typed, the leave to appeal was only heard on 3 December 2012. Webster J granted leave to appeal against sentence only to the full court of this division.

[3] The provisions of section 51(2) of the Criminal Law Amendment Act provides:

“(2) Notwithstanding any other law but subject to subsection (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) Part II of Schedule 2, in the case of—
 - i) a first offender, to imprisonment for a period not less than 15 years;
 - ii) a second offender of any such offence, to imprisonment

for a period not less than 20 years;...”

- [4] After having studied the record of proceedings carefully, it is clear that at no stage of the proceedings was the appellant advised that the ultimate sentence of life imprisonment could be imposed, due to the fact that he and another person raped the complainant repeatedly.
- [5] The appellant was never warned in terms of section 51(1) which provides:
- “(1) Notwithstanding any other law, but subject to subsection (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.”
- [6] The magistrate’s inquiry was:
- “COURT: before I ask them if they understand how to plea Mr Strydom do you confirm that you have appraised your clients about the provisions of the minimum sentence regulation.”
- [7] Counsel for the appellants confirmed that he had. At that stage the appellant pleaded not guilty to the crime of rape (read with the provisions of the Criminal Law Amendment Act 105 of 1997). No indication was given to the appellant that the minimum sentence was life imprisonment. The conclusion is that he was only warned in terms of section 51(2) of Act 105 of 1997.

[8] During judgment the magistrate placed on record:

"I must place this also on record that the reason for committal of the accused as stated in the Minimum Sentence Legislation there are to. He with other person raped the complainant. He raped the complainant more than once. For that reason in terms of Section 52 Act 105 of 1997 the proceedings are stopped and the matter is committed to the High Court for sentence."

[9] The appellant's counsel agreed that the matter should be referred to the High Court. The first time mention is made of conviction in terms of Part one Schedule 2 of the Act 105 of 1997 is by the state's counsel when he addresses the court on sentence. He argued:

"it is my submission that in view of the circumstances of the accused person here, there are no compelling and substantial factors which would warrant the court to deviate from the sentence that is supposed to be imposed when one is convicted of part one, schedule 2 of the minimum sentences act."

[10] Thereafter it was accepted by the court that the appellant had to be sentenced in terms of Part one of Schedule 2 of Act 105 of 1997. Nowhere, on record, is the appellant warned that he may be facing life imprisonment and not the 15 years or 20 years, which would have been the case, had he been sentenced as charged.

[11] The facts found proven at the trial established that the appellant

admitted having had intercourse with the complainant, but according to him it was with her consent. Accused 2 in the Regional Court denied having had intercourse with her and was subsequently found not guilty and discharged, due to lack of evidence.

[12] The complainant and her friend had been walking when five young men attacked them. She ran away and passed a certain tavern where the appellant and another man grabbed her and dragged her to some premises close to a school. There they took turns in raping her repeatedly. They ultimately released her and walked off.

[13] After sleeping she went to the police station and reported the incident against the appellant whom she had known for a period of time.

[14] The doctor's report, in the J88 form, was submitted to court by consent. The doctor recorded:

"Open wound, left lower leg, bruises elsewhere, where she states she has been hit. No vulva injury. Vaginal discharge. ? Semen with used condom in vagina."

He also indicated that the complainant had "open bleeding wound on the left leg." The medical report corroborated the complainant's version.

[15] In **S v Ndlovu 2003(1) SACR 331 (SCA)** Mpati JA held at paragraph 12:

"And I think it is implicit in these observations that where the State intends

to rely on 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.”

(Court’s emphasis).

[16] In the present case the indictment did not mention the section which would have alerted the appellant that he was facing a life sentence. The details in the indictment do not indicate the aggravating features which would bring it in the ambit of the minimum sentencing regime. The indictment set out:

“THAT the accused is/are guilty of the crime of Rape (read with the provisions of Sections 51(2) of the Criminal Law Amendment Act 105 of 1997)

IN THAT upon or about 15/02/03 and at or near Ipelegeng in the Regional Division North West, the accused did unlawfully and intentionally have sexual intercourse with a female person, to wit Evelyn van Koller without her consent.”

[17] Nowhere is any mention made that due to the fact that she was raped by 2 persons, that section 51(1) of Act 105 of 1997 would apply.

[18] In **S v EN 2014(1) SACR 198(SCA)** Shongwe JA held at para14:

“Life imprisonment is the ultimate and most severe sentence that our

courts may impose; therefore a sentencing court should be seen to have sufficient information before it to justify that sentence.”

In **S v Makutu 2006(2) SACR 582 (SCA)** Lewis JA found at para 7:

“However, an accused faced with life imprisonment –the most serious sentence that can be imposed—must from the outset know what the implications and consequence of the charge are. Such knowledge inevitably dictates decisions made by an accused, such as whether to conduct his or her 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.”

[19] This case is distinguishable from **S v Kolea 2013(1) SACR 409 (SCA)** as the magistrate did not give the reasons for transferring the matter to the High Court and did not indicate, as in Kolea’s case, that a sentence of life imprisonment should be considered.

[20] This court cannot find in the circumstances of the present case that the appellant had a constitutional fair trial and therefor the sentence of life imprisonment should be set aside. The appellant was at no stage advised on which basis it would be concluded that the provisions of the Act would apply and that he could face life imprisonment.

[21] In **Machongo v S (20344/14) [2014] ZASCA179 (21 November 2014)**

Shongwe J A held at paragraph 10:

"It is settled law that failure to forewarn or to mention the applicability of the minimum sentence is a fatal irregularity resulting in an unfair trial in respect of sentence. The question is, having come to the conclusion that a misdirection has been committed, what next should the appeal court do/

The answer is and has always been that the appeal court must consider the sentence afresh."

[22] The court has to consider an appropriate sentence for the appellant afresh, taking into consideration all the mitigating and aggravating facts.

[23] According to the social worker's report the appellant was 27 years old at the time of sentencing. The appellant left school after grade 8 and was employed by a cable installation company. He was not married and lived with his father and mother as the 5th of 6 siblings. The appellant has previous convictions. On 6 September 1991 he was convicted of robbery and sentenced to four strokes with a light cane; on 6 July 1992 he was convicted of theft; on 12 May 1993 he was convicted of rape and sentenced to cuts with a light cane and a suspended sentence; on 5 January 1995 he was convicted of assault with intent to do bodily harm and he was sentenced to 180 days imprisonment. The last conviction was on 3 April 1996 for assault with intent to do grievous bodily harm and he was sentenced to 180 days imprisonment. His last conviction was 7 years before he committed the present crime.

The previous crime of rape was committed when the appellant was 17 years old.

[24] This crime was not planned, but the appellant and his friend had been drinking at a tavern when they grabbed the complainant as she passed the tavern.

[25] In **S v Dodo 2001(1) SACR 594 (CC)** Ackerman J held at paragraph 38:

"To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not deny, that which lies at the heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end"

[26] In **S v Swart 2004(2) SACR 370 (SCA)** Nugent JA found at paragraph 12:

"What appears from those cases is that in our law retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed."

[27] In all the circumstances and having regard to the seriousness of the crime, the interest of society, the interest of the victim and the interest of the appellant the court finds that the prescribed sentenced of twenty (20) years is too harsh in the present circumstances and

disproportionate to the crime committed.

[28] The court finds substantial and compelling circumstances due to the fact that the previous conviction for rape took place when the appellant was still a juvenile. He is middle aged at present and will only be released from prison at an advanced age.

[29] Rape is prevalent in South Africa and a scourge in our society which should be combatted in the interest of society, but the appellant should not be sacrificed on the altar of deterrence. The court is aware that society and the women in our society demand that these perpetrators should be treated harshly, but the court has to balance the crime, the perpetrator's interest, society's interest and the victim's interest when determining a balanced sentence.

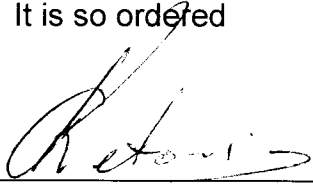
The court has considered all the mitigating and aggravating circumstances and has come to the conclusion that a sentence of 18 years imprisonment is deemed appropriate.

I therefore propose the following order:

1. The sentence imposed on 25 May 2008 is set aside;
2. The appellant is sentenced to eighteen (18) years imprisonment

- 3 The sentence of eighteen (18) years imprisonment is ante-dated to 25 May 2008

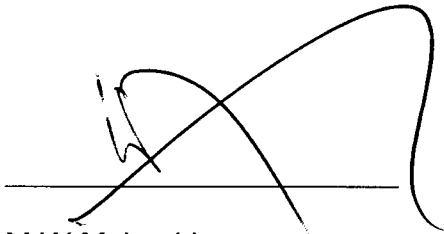
It is so ordered



C Pretorius

Judge of the High Court

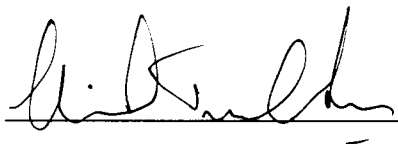
I agree,



M W Msimeki

Judge of the High Court

I agree,



N B Tuchten

Judge of the High Court

Case number	:	A697/2014
Heard on	:	13 February 2015
For the Appellant	:	Adv Augustyn
Instructed by	:	
For the Respondent	:	Adv Mnisi
Instructed by	:	Director of Public Prosecutions
Date of Judgment	:	19 February 2015