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FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

CASE NO. A66/2011

In the matter between:

DIAOU MAHLABA

Appellant

and

THE STATE

Respondent

HEARD ON: 11 JUNE 2012

CORAM: MOCUMIE, J *et* MURRAY, AJ

JUDGEMENT BY: MURRAY, AJ

DELIVERED ON: 28 JUNE 2012

- [1] The appellant was charged with and convicted of rape of a 14-year old girl, read with section 51 of the Criminal Law Amendment Act, Act 105 of 1997 (“Act 105 of 1997”), on 29

December 2006. He was sentenced to twenty years' imprisonment.

[2] The offence resorts under Part I, Schedule 2 of Act 105 of 1997, namely rape where the victim is under the age of 16 years. The prescribed minimum sentence applicable to the said offence is life imprisonment. The Court *a quo* found that substantial and compelling circumstances existed to justify imposing a lesser sentence than the mandatory life imprisonment.

[3] On 1 December 2010 the court *a quo* granted the appellant leave to appeal against the sentence only. The only argument raised on his behalf on appeal was that the charge against him should have specified that he was being charged with rape read with the provisions of section 51(1) and that the trial Court should have informed him that a sentence of life imprisonment could be imposed.

[4] The question in issue, therefore, is whether the charge was too vague and whether, consequently, the court *a quo* should have warned the appellant before the start of the trial that he could

be facing life imprisonment despite the fact that he had a legal representative during the trial and the fact that the charge sheet had the provision included in the charge.

[5] Counsel for the appellant averred in his Heads of Argument that since the charge sheet only referred to s51, the court *a quo* had misdirected itself by taking the view that the appellant had to be sentenced in terms of s51(1) which carries the life sentence, rather than in terms of s51(2) read with Part III of Schedule 2 which provides for a minimum sentence of 10 years imprisonment for first offenders in the absence of substantial and compelling circumstances.

[6] He submitted that, that might have infringed the appellant's right to a fair trial in terms of s35(3) of the Constitution and the right not to be ambushed. For the appellant's right to have the charge set out so clearly that he is able to respond thereto and to defend himself, he relied on **STATE v NDLOVU**, 2003 (1) SACR 331 (SCA). But in that case the Court merely held that at some stage of the trial, "*whether in the charge sheet, whether in Court*", the accused had to be informed of the State's intention to rely on the prescribed minimum sentencing regime created by

Act 105 of 1997 so that he knew timeously not only the charge he faced but also the possible consequences.

[7] Appellant's Counsel also referred in his Heads of Argument to **S v MAKATO**, 2006 (2) SA CR 582 (SCA) in which it was stated that, if the charge resorts under s51(1), the charge sheet should pertinently say so. But, what he seems to overlook, is that s51(1) read with Part I of Schedule 2 is the only provision applicable when the victim is under the age of 16. Part II and III apply only to rape in various circumstances when the victim is older than 16. Neither these provisions, nor s51(2) are therefore applicable in the instant case.

[8] Any reference to s51 of Act 105 of 1997 read with the statement of facts in the instant charge sheet, namely rape of a 14 year old girl, can therefore only be a reference to s51(1). The court *a quo* therefore did not misdirect itself by taking life imprisonment as the point of departure in determining an appropriate sentence for the appellant after finding substantial and compelling circumstances to exist.

[9] Furthermore, in **S v MAKATO**, *supra*, the Court clearly stated

that the rule that s51(1) should be stated in the indictment is “*neither absolute nor inflexible*”. That case is distinguishable from this one anyway since the crime there was murder, an offence for which the minimum regime does make provision for different forms of murder carrying different sentences depending on whether it fell under Part I read with s51(1) (lifelong imprisonment) or under Part II, read with s51(2) (15 to 25 years’ imprisonment) depending on whether the accused is a first, second or third offender, regardless of the age of the victim.

- [10] In **MASHININI & ANOTHER v S**, 2012 (1) SACR 604 (SCA) the reason why the Court found the court *a quo* to have misdirected itself and imposed a lesser sentence than life imprisonment was that in the indictment the accused was charged with and convicted of rape as in terms of s51(2). The accused was then referred to the High Court for sentencing, however, and was given a life sentence in terms of s51(1) instead of the prescribed sentence applicable to the offence of which he was convicted in terms of s51(2), i.e. between 15 and 25 years’ imprisonment. The Supreme Court of Appeal found that to be a misdirection and therefore set aside the sentence and sentenced the appellant in accordance with the offence of

which he was convicted. The Supreme Court of Appeal at para [17] explained that

“In this matter the State decided to restrict itself to s51(2) ... It was not thereafter open to the Court to invoke a completely different section which provides for a more severe sentence.”

[11] Whether the State should have referred specifically to s51(1) and whether the appellant was sufficiently warned of the nature and consequences of the offence he was charged with, is to be determined from all the circumstances of the specific case to determine whether he did receive a fair trial or not. This would be in accordance with **S v LEGOA** 2003 (1) SACR 13 (SCA) at para [21] where it was stated that whether a right to a fair trial had been impaired will depend on a vigilant examination of the relevant circumstances.

[12] Regarding the question of whether it was necessary to refer specifically to s51(1), Cameron, JA, in **S v LEGOA**, *supra*, at paras [20] and [21] stated:

“The matter is, however, one of substance and not form, and I would be reluctant to lay down a general rule that the charge must

in every case recite either the specific form of the scheduled offence with which the accused is charged, or the facts the State intends to prove to establish it.”

- [13] This view was confirmed in **MASHININI et al v S**, *supra*, at para [28] where Ponnann, JA stated with reference to the fact that the circumstances clearly amounted to a gang rape (which resorts under s51(1) read with Part I of Schedule 2 but the accused was charged in the indictment in terms of s51(2)) that

“had they [the prosecution] applied their minds properly, it would have been clear to them that the accused persons ought to have been charged either in terms of s51 or s51(1) of the Act if they desired to be specific.”

In my view the State is left with a choice, in other words, as to whether they wanted to refer to s51 in general or to limit themselves to a specific subsection of s51 in the indictment.

- [14] Regarding the question of a further warning in court that the State intended to rely on the minimum sentence regime, Pillay, J, in **S v MSELEKU** 2006(2) SACR 574 (D) at d-e stated:

“In summary, based on Ndlovu’s case, I came to the conclusion that if any reference is made in the indictment to the State’s reliance on the “minimum sentence Act” a court may well be justified in assuming that Counsel would have drawn that to the accused’s attention.”

[15] It was made clear in **S v NKADIMENG** 2008(1) SACR 538 (T) that where the accused has legal representation and the charge sheet makes it clear that the prosecution intends to rely on the provisions of Act 105 of 1997 there is no duty on the trial court to ensure that the accused is aware of the gravity of a conviction on a charge carrying a minimum sentence.

[16] And as found in **S v TSHABALALA** 2008(1) 486(T) it is only when the charge sheet makes no reference to the Act and neither the accused nor the legal representative had any advance warning that such minimum legislation would be applicable that the prescribed minimum sentence in terms of Act 105 of 1997 cannot be imposed.

[17] In **S v LANGA** 2010(2) SACR 2889 (KZP) at para [55] the majority concluded that there was nothing on record to indicate that either the appellant or her legal representative had made

the connection between the summary of substantial facts and the prosecution's intention to rely on s51(1). It was accordingly held that the trial judge's reliance on s51(1) of Act 105 of 1997 was a material misdirection which rendered the trial substantively unfair.

[18] That is not the case in the instant matter, however. There was a pertinent reference to the provisions of s51 of Act 105 of 1997 in the charge sheet which also clearly stated that the rape victim was a 14 year-old girl. The charge sheet therefore does convey the intention of the State to invoke the provisions of Act 105 of 1997 and the only applicable subsection of s51 in the circumstances is clearly s51(1).

[19] Furthermore, the appellant had a legal representative from whose frequent references to life imprisonment it was clear that he realised that only s51(1) could possibly apply where the offence is rape and the victim younger than 16. In accordance with the finding in **S v MASEKU**, *supra*, the Court *a quo* therefore was justified to assume that his Counsel would have drawn that to the appellant's attention. The assumption would have been strengthened, furthermore, by the appellant's own

testimony which clearly shows that he knew the significance of the cut-off age of 16 by pertinently testifying:

“I knew that she was 16 years, but I was very surprised to hear at the trial that she was 14.”

[20] From the facts set out above, it is clear that in the circumstances of this case it was indeed sufficient for the State to have referred in the charge sheet only to the provisions of s51 of Act 105 of 1997 in view of the specific reference to rape of a 14 year-old victim. Furthermore, in accordance with **S v LEGOA** and **MASHININI et al v S**, the State was not obliged to be more specific and refer to s51(1). In accordance with **S v MSELEKU**, the reference to the Act itself was enough to relieve the Court of any obligation to inform the appellant that the State intended to rely on the minimum sentence Act and to explain to him the gravity of possible consequences since he had a legal representative and since the record shows that the Court could safely assume that his legal representative would have informed him of the mandatory life sentence.

[21] I am therefore satisfied that the appellant in this particular case

did have a fair trial, that the court *a quo* did not misdirect itself and that the charge sheet contained sufficient information for the appellant to have known that the State intended to rely on the minimum sentence regime and to have been able to prepare his defence properly.

[22] The court *a quo* cannot, therefore, be faulted for convicting and sentencing the appellant in terms of the provisions of S51(1) of Act 105 of 1997 read with Part I of Schedule 2 thereof. Nor can it be faulted for finding that substantial and compelling circumstances existed which justified its imposing a sentence of 20 years' imprisonment instead of the applicable sentence of life imprisonment, as the State also conceded.

[23] The sentence is not shockingly inappropriate in view of the victim's youth, the fact that she was a virgin at the time of the rape and the fact that she sustained serious vaginal injuries during the rape by the appellant whom she trusted as a friend of her sister's and who abused that trust by his slyly planned invasion of the home where his victim was alone and defenceless.

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