THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no**:** 204/2014
Not Reportable

In the matter between:

BRENDAN SOLLY NDLOVU **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Ndlovu v The State* (204/2014) [2014] ZASCA 149 (26 September 2014)

Coram: Maya, Bosielo and Theron JJA

Heard: 10 September 2014

Delivered 26 September 2014

Summary: Sentence – Prescribed sentences – Minimum sentence – Imposition of in terms of Criminal Law Amendment Act 105 of 1997 – Error in charge-sheet – Charge-sheet incorrectly stating offence as one of contravening s 51(2) instead of s 51(1) of the Act – Such error, without more, does not result in a failure of justice – Court not precluded from imposing life imprisonment.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Sapire and Bam AJJ sitting as court of appeal):

The appeal against sentence is dismissed.

JUDGMENT

THERON JA (Maya and Bosielo JJA concurring):

[1] This appeal turns on whether an accused, who was charged with rape read with the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997 (the Act), which provides for a minimum sentence of ten years' imprisonment upon conviction, can be sentenced to life imprisonment in terms of s 51(1) of the Act and whether or not this has infringed such accused's right to a fair trial.

[2] The appellant was charged in the regional court, Phalaborwa, with one count of rape read with the provisions of s 51(2) of the Act. During his first appearance in the regional court on 26 February 2008, the magistrate advised him of the seriousness of the offence in respect of which he was charged. He was advised that a conviction in terms of s 51(2) could attract a minimum sentence of 15 years' imprisonment. The appellant was legally represented at the trial. Despite his not-guilty plea, he was convicted and sentenced to life imprisonment. His appeal against both conviction and sentence was dismissed by the North Gauteng High Court (Sapire and Bam AJJ). He appeals to this court against sentence with the leave of the high court.

[3] The incident giving rise to the appellant's conviction occurred during the early hours of the morning of 27 October 2007. The appellant accosted the complainant while she was on her way home. He assaulted and threatened to kill her. She managed to escape but he apprehended and again assaulted her. He assaulted her with his fists, as well as stones and bricks. He forcibly and without her consent, had sexual intercourse with her. Naked, and covered in blood, she managed to escape. She sustained open wounds on her head and mouth and various scars. One of her teeth had to be removed in consequence of the assault and the evidence was that more of her teeth would be removed in the future.

[4] It is apparent from the following extract of the magistrate's judgment on sentence that the applicability of life imprisonment had been addressed during the course of argument on sentence:

'The public prosecutor is of the view that [the] accused was … (indistinct) … on the day in question and he [suggested] that the accused should be [sentenced] to life imprisonment.'

It must be presumed that the magistrate, in sentencing the appellant to life imprisonment, had acted in terms of s 51(1) read with Part I of Schedule 2 to the Act.

[5] Section 51 of the Act provides:

'(1) Notwithstanding any other law, but subject to subsections (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.

(2) Notwithstanding any other law but subject to subsections (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; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;

(b) Part III of Schedule 2, in the case of—

(i) a first offender, to imprisonment for a period not less than 10 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years; and

(c) Part IV of Schedule 2, in the case of—

(i) a first offender, to imprisonment for a period not less than 5 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 7 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 10 years;

Provided that the maximum term of imprisonment that a regional court may impose in terms of this subsection shall not exceed the minimum term of imprisonment that it must impose in terms of this subsection by more than five years.

(3)*(a)* If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.'

Part 1 of Schedule 2 prescribes the imposition of a minimum sentence of life imprisonment in circumstances where, inter alia, the rape involved the infliction of grievous bodily harm.

[6] The right to a fair trial is enshrined in the Constitution. Section 35(3) of the Constitution provides that every accused person has a right to a fair trial and this includes, inter alia, the right to be informed of the charge with sufficient detail to answer it. Lewis JA in *S v Makatu*,[1] and in relation to the details that should be furnished to an accused, said that an accused must 'know what the

[1] *S v Makatu* 2006 (2) SACR 582 (SCA) para 7.

implications and consequences of the charge are'. Cameron JA in *S v Legoa,*[2] stated that, under the common law it was 'desirable', although not 'essential' that the charge-sheet should set out the facts which the state intended to prove in order to bring the accused within an enhanced sentencing jurisdiction.[3] The judge went on to point out that:

' . . . under the new constitutional dispensation, the criterion for a just criminal trial is "a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution of the Republic of South Africa Act 108 of 1996 came into force".'[4]

[7] This court has, with good reason, been reluctant to lay down a general rule as to what the charge sheet should contain. Lewis JA in *S v Makatu* put it thus:

'As a general rule, where the State charges an accused with an offence governed by s 51(1) of the Act, such as premeditated murder, it should state this in the indictment. This rule is clearly neither absolute nor inflexible.' [5]

The main reasons for this, as succinctly stated by Cameron JA in *Legoa*, is that the matter is one of substance and not form and a 'general requirement to this effect, if applied with undue formalism, may create intolerable complexities in the administration of justice'.[6] The question to be answered is whether the accused had a fair trial,[7] and this is a fact based enquiry that entails a 'vigilant examination of the relevant circumstances'.[8]

[8] The appellant, in support of the contention that his right to a fair trial has been infringed, relied on the judgment of the majority in *S v Mashinini &*

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[2] *S v Legoa* 2003 (1) SACR 13 (SCA).
[3] Paragraph 20.
[4] *Ibid.*
[5] *Makatu supra* para 7.
[6] *Legoa supra* para21. See also *S v Ndlovu* 2003 (1) SACR 331 (SCA) para 12.
[7] *S v Legoa supra* para 22.
[8] *S v Ndlovu supra* para 12; *S v Mthembu* 2012 (1) SACR 517 (SCA) para 17.

another,[9] where the two appellants and their two co-perpetrators were charged with rape, read with the provisions of s 51(2) of the Act. They pleaded guilty and it emerged from their plea explanations that all four of them had raped the complainant. After conviction, the matter was transferred to the high court, which confirmed their convictions and sentenced them to life imprisonment. On appeal to this court, the majority set aside the sentence of life imprisonment, on the basis that:

'the state decided to restrict itself to s 51(2), where part III of schedule 2 prescribes a sentence of ten years' imprisonment. This is what was put to the appellants and to which they pleaded guilty. It was not thereafter open to the court to invoke a completely different section which provides for a more severe sentence, unless the state had sought and been granted an amendment of the charge-sheet in terms of s 86 of the Criminal Procedure Act prior to conviction. The state did not launch such an application. The magistrate was therefore bound to impose a sentence in terms of s 51(2) read with part III of schedule 2.'[10] (Footnotes omitted.)

[9] This court (Mhlantla JA writing for the majority) found that (i) the appellants were unfairly sentenced for an offence different to the one for which they were convicted; (ii) the magistrate ought to have sentenced the appellants in terms of s 51(2), which prescribed a sentence of ten years' imprisonment and (iii) the high court erred in sentencing the appellants to life imprisonment in terms of s 51(1) of the Act. The court then considered it competent for it to impose sentence afresh 'given the misdirection, the lapse of time and the fact that all the evidence is before us'.[11] Having found no substantial and compelling circumstances justifying a sentence less than the prescribed minimum, the court imposed a sentence of ten years' imprisonment on both appellants.

[9] *S v Mashinini & another* 2012 (1) SACR 604 (SCA).
[10] Paragraph 17.
[11] Paragraph 19.

[10] In *S v Kolea*[12] the issue on appeal was whether a sentencing court was precluded from imposing a life sentence upon conviction of rape where the charge-sheet referred to the incorrect provision of the Act, despite the jurisdictional facts establishing that the rape fell within the ambit of cases for which life imprisonment was the applicable minimum sentence having been proved. This court declined to approve the ruling in *Mashinini*, finding that the majority had misread the provisions of s 51(2) in that a minimum sentence is exactly that; a prescribed minimum, and where the evidence establishes that a more onerous sentence is justified, the imposition of such does not constitute an irregularity that implicates fair trial rights. Mbha AJA, writing for the court, stated:

'The term of 10 years' imprisonment referred to therein is the minimum sentence that can be imposed. This means that any sentence in excess of 10 years' imprisonment, and possibly even life imprisonment, could be imposed by a court having jurisdiction to do so. Furthermore, the fact, that a statute provides for an increased sentence with reference to a particular type of offence when committed under particular circumstances, does not mean that a different offence has been created thereby.

. . .

The fact, that the Act specifies penalties in respect of certain offences (in this case rape, where more than one person raped the victim), does not in any way mean that a new type of offence has been created. Rape remains rape, but the Act provides for a more severe sanction where, for example, the victim has been raped more than once or by more than one person.'[13]

[11] This court concluded that the fact that the charge-sheet had a defect which was never rectified, did not of its own render the proceedings invalid. Mbha AJA confirmed that the test is always whether or not the accused had suffered any prejudice.[14] Furthermore, Mbha AJA noted that the appellant had been sufficiently warned of the charge he faced by virtue of the reference to the minimum sentencing legislation in his charge sheet, and thus the required

[12] *S v Kolea* 2013 (1) SACR 409 (SCA).
[13] Paragraph 17.
[14] Paragraph 18.

standard of 'sufficient detail' contained in s 35(3)*(a)* of the Constitution was met, despite the incorrect provision being referred to in the charge-sheet. In addition, the court found that the appellant was convicted on the evidence placed before the court and '[i]t has not been demonstrated that the appellant would have acted differently, had the mistake not been made in the charge-sheet'.[15] This court dismissed the appeal against sentence and the sentence of life imprisonment was confirmed.

[12] In this matter, it was brought to the attention of the appellant at the outset of the trial that the state intended to rely on the minimum sentencing regime created by the Act, albeit that the incorrect section of the Act was referred to. As has already been mentioned, the appellant was advised that if convicted, he faced the possible imposition of a minimum sentence of 15 years' imprisonment. The facts of this matter are closely akin to those of *Mashinini* and *Kolea*. The principle emerging from *Kolea* is that the imposition of a sentence of life imprisonment in these circumstances will not in itself result in a failure of justice which vitiates the sentence.

[13] I turn now to consider whether the appellant's right to a fair trial has been infringed. Counsel for the appellant submitted that the appellant had been prejudiced in that had he known that he faced the prospect of life imprisonment he would not have taken the decision to have his trial continue without the results of the DNA analysis from the samples that were sent to the forensic laboratory for testing. This submission is not borne out by the record. On 9 October 2008, the matter was adjourned at the instance of the defence for 'DNA tests to be conducted on the accused'. On 6 May 2009, the public prosecutor advised the court that the DNA results had not yet been received and that there was a more than six month backlog at the forensic laboratory. The state then

[15] *S v Kolea supra* para 14.

closed its case. The appellant's legal representative addressed the court in the following terms:

'Your worship taking into account the duration of the matter having been pending before the honourable court, the defence feels that it will still be indefinite that we wait for the results your worship. It will be in the [interests] of justice that the matter be proceeded with in the absence of such results.'

[14] The appellant and his legal representative took a conscious decision to proceed without the DNA evidence. This notwithstanding that they were aware of the fact that the state intended invoking the minimum sentencing regime created by the Act, It is speculation to say that the appellant would have decided to wait for the DNA results. No factual foundation has been laid by the appellant to support a finding that his right to a fair trial was prejudiced by the error on the charge-sheet. This court has held that such mistakes must be approached in the context of fairness as it applies both to the accused and the public as represented by the state.[16] The high court, in considering this issue stated that the appellant had been legally represented,

'and the case was conducted in such a way that it cannot be said that any other information would have changed it. As we have seen the offence on the merits was unsustainable and the conviction has to be upheld.

It cannot be said that the mere fact that the wrong section of the Act was initially and repeatedly used in any way prejudiced the appellant as far as the sentence is concerned.'

I agree with this reasoning and therefore conclude that it has not been established that the appellant's right to a fair trial has been infringed.

[15] The final question to be considered is whether this court should interfere with the sentence imposed by the trial court. As pointed out by the high court, the trial court, in determining an appropriate sentence took into account the

[16] *S v Kolea supra* para 20.

appellant's personal circumstances. It noted as an aggravating fact that the complainant was seriously assaulted even before she was raped and stated:

'Bearing in mind the seriousness of the assault I am not convinced that the magistrate erred in any way in imposing the sentence he did. The appellant acted with aggression and his assault was a vicious and dangerous one and one can accept that the victim was highly traumatised in the course of the commission of the offence.'

The reasoning of the high court is unassailable. In my judgment there were no compelling and substantial circumstances in this matter justifying a departure from the prescribed minimum sentence of life imprisonment.

[16] The appeal against sentence is dismissed.

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L V THERON

JUDGE OF APPEAL

APPEARANCES

For Appellant:	H L Alberts Instructed by: Justice Centre, Pretoria Justice Centre, Bloemfontein
For Respondent:	M Jansen van Vuuren Instructed by: The Director of Public Prosecutions, Pretoria The Director of Public Prosecutions, Bloemfontein