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**

Appeal number: A262/17

In the Appeal between:

HANS JONAS MAKAE Appellant

and

THE STATE Respondent

CORAM: DAFFUE J, *et* CHESIWE J, *et* DANISO AJ

HEARD ON: 19 NOVEMBER 2018

JUDGMENT BY: DANISO, AJ

DELIVERED ON: 29 NOVEMBER 2018

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[1] The appellant was convicted of rape and murder in this court by Lombard J. He was subsequently sentenced to life imprisonment in respect of the charge of rape and 15 years imprisonment for the murder. The sentences were imposed under the provisions of **s 51 (1) of the Criminal Law Amendment Act 105 of 1997** ("*The Act*").

[2] The appellant is aggrieved by the sentence of life imprisonment. He appeals to this court with leave from the Supreme Court of Appeal (per Swain JA and Schippers AJA).

[3] The conviction of the appellant arises from the incident of the night of the 07th April 2002 which began as a lover's outing but ended tragically. The deceased, Nthabiseng Jeannette Sefafe and her partner were walking home from the tavern when they were accosted by four men brandishing knives. Her partner managed to flee. The deceased was not so lucky. She was raped and murdered. Her naked body was discovered on the soccer field the next day.

[4] The appellant was one of the perpetrators. He challenges the sentence on the ground that it is shockingly inappropriate for the reason that it was imposed under the Act whereas no mention was

made in the indictment to inform him of the applicability of the Act and the court a quo also did not warn him accordingly.

[5] The trial record is inadequate. Inexplicably, it was agreed between counsel that it was not necessary to file the entire record and this is despite the fact that the appeal turns on the failure of the court and/or the respondent to appraise the appellant of the applicability of the Act at the trial. The respondent's counsel who had also appeared for the state at the trial confirmed that the applicability of the Act was indeed alluded to at the sentencing stage.

[6] The examination of the indictment reveals that there was no reference made to ***s 51(1)***; it merely states thus:-

> *"…VERKRAGTING (AANKLAG 1)*
> *DEURDAT die beskuldigde op of omtrent 7 April 2002 en te of naby te Seeisoville in die distrik van Kroonstad wederregtelik en opsetlik vir Nthabiseng Jeannette Sefafe aangerand en teen haar wil met haar vleeslike gemeenskap gehad en haar aldus verkrag het."*

[7] There was indeed an omission in informing the appellant of the applicability of the Act. The general test for this apparent constitutional inadequacy is that the omission on its own does not automatically render the trial unfair. Each case must be judged on its own facts as the diligent examination of the circumstances of the case may reveal that in spite of the omission the appellant's

right to a fair hearing was in fact not infringed. See *MT v S; ASB v S; September v S* 2018 (11) BCLR 1397 (CC) para 40.

[8] The onus is on the appellant to show that this omission has prejudiced him in the conduct of his case. On the facts of this matter it is difficult to understand how the appellant was prejudiced.

[9] Except to argue that as the result of the life sentence he may not be released on parole until he has served 25 years of his sentence, the appellant has not even attempted to explain what is it that he could have done differently if he had been made aware that he was facing a life sentence. On the facts germane to this matter there is virtually no reasonable possibility that he would have pleaded differently. He maintained his innocence throughout the trial.

[10] The reference to the applicability of the provisions of the Act in the indictment is intended to afford an accused an opportunity to formulate and place before court facts on which the court can rely to deviate from the prescribed sentence. In this matter the appellant's counsel not only confirmed to the court a *quo* that the Act was applicable, but went further and presented arguments in that regard during mitigation. Evidence from a probation officer was also tendered.

[11] I can therefore discern no prejudice to the appellant as a result of this omission.

[12] The appellant also contends that the court should have found that there were substantial and compelling circumstances warranting a deviation from the minimum sentence and should have accordingly imposed a lighter sentence.

[13] Sentencing is within the discretion of the trial court and an appeal court can only interfere with sentence where there has been an irregularity that results in a failure of justice; or where the trial court misdirected itself to such an extent that its decision on sentence is vitiated, or if the sentence is shockingly inappropriate. See *Director of Public Prosecutions, KwaZulu-Natal v P* *2006* (1) SACR 243 (SCA) and *S v Bogaards [2012] ZACC 23; 2013* (1) SACR 1 (CC).

[14] In the instant case it was conceded at the trial that except for the appellant's generic personal circumstances (*his age, that he was a first offender, spent about 6 months in custody awaiting trial*..) there were no other factors which qualified as substantial and

compelling circumstances justifying a sentence less severe than the prescribed sentence.

[15] It is trite that the traditional mitigating factors such as an accused's personal circumstances cumulatively can be taken into account as factors to be considered as substantial and compelling circumstances; however, they must be weighed together with the aggravating factors. The personal circumstances alone cannot be elevated to the status of substantial and compelling circumstances.

[16] There was a number of aggravating factors in this matter. The appellant was unremorseful. The attack on the deceased was brutal, according to the post-mortem report (Exhibit "A") she had bruises all over her body, face, neck, abdomen, ribs and knees but the brutality did not end there. The appellant and his accomplices were not satisfied by violating her body and dignity they also took her life. She was strangled and left sprawled naked at the stadium.

[17] The violence perpetrated on the deceased and the total disregard of her human rights is extremely aggravating. The features of this rape as well as its consequences for the victim herein places the rape in the category of what Mpati JA referred to in *S v Mahomotsa* *2002 (2) SACR 435* (SCA), at paragraph 17, as '*the worst category of rape*' – and thus the type of rape for which life imprisonment would ordinarily be the appropriate sentence.

[18] The personal circumstances of the appellant pale into insignificance when measured against the brutality of this rape.

[19] Rape is a very serious and prevalent offence in this country. The scourge of rape and its effect on the interests of the society was enunciated in *S v Chapman* 1997 (3) SA 341 (SCA) 345B-D and repeated in *S v Vilakazi* 2012 (6) SA 353 (SCA) para 1 where the court held that:-

> *'rape is a . . . humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. Women in this country . . . have a legitimate claim to walk peacefully on 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 fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives'*.

[20] The society looks to the courts for protection from people who roam around the streets at night to terrorize and prey on defenceless women. It is for this reason that the sentences that the courts impose must have an element that speaks to the plight of society, the society expects no less.

[21] In the absence of factors which seriously mitigated against the imposition of the maximum sentence possible, the court a *quo* cannot be faulted for not imposing a sentence less than imprisonment for life.

[22] For the above reasons, the trial judge correctly concluded that there were no substantial and compelling circumstances that warranted a deviation from the prescribed minimum sentence.

[23] There are no reasons to interfere with the imposed sentence, wherefore the appeal must therefore fail in this regard.

[24] Wherefore the following order is made;-

1. The appeal is dismissed and the sentence of life imprisonment is confirmed.

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NS DANISO, AJ

I concur

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J DAFFUE, J

I concur

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S CHESIWE, J

On behalf of appellant:	Mr P. Peyper
Instructed by:	Peyper Buitendag Inc. Attorneys
	BLOEMFONTEIN

On behalf of respondent:	Advocate M Strauss
Instructed by:	The Director of Public Prosecutions
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