Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO: CAF 17/2016

In the matter between:

DAVID SIPHO MODISE APPELLANT

AND

THE STATE RESPONDENT

FULL BENCH CRIMINAL APPEAL

DATE OF HEARING : 10 MARCH 2017

DATE OF JUDGMENT : 22 JUNE 2017

COUNSEL FOR THE APPELLANT : Mr M.E SETUMU

COUNSEL FOR RESPONDENT : ADV. NONTENJWA

JUDGMENT

KGOELE J

Introduction

[1] The appellant stood trial at the Regional Court of Tlhabane on a charge of Rape. The allegations against him were that he had sexual intercourse with a female child who was eight (8) years old without her consent.

[2] The appellant conducted his own defence throughout the trial in the Court a quo. He was found guilty as charged. The matter was referred to the High Court for sentencing in terms of Section 52 (1)(b) of the Criminal Law Amendment Act 105 of 1977**(the Minimum Sentence Act).**

[4] He was legally represented during the sentencing stage at the High Court after he successfully applied for Legal Aid. The High Court as per **Hendler J** sentenced him to life imprisonment. The appellant now appeals against sentence only.

[5] The evidence that was led during the trial revealed that complainant was at the time of the incident at the appellant's place as she is a friend to his daughter. The appellant raped the complainant in full view of his child who was ordered to close her

eyes when the sexual intercourse took place. His daughter is one of the witnesses that testified on behalf of the State.

[6] The evidence reveals further that it was a usual practice that the complainant goes to the appellant's place to play with his daughter. On the day of the incident, the complainant's mother became worried when she realised that it was becoming late and the complainant was not yet home. She eventually went to the appellant's place with the aim of fetching the complainant, but appellant refused to open the door. She then sent the complainant's brother to go and fetch her, and he came back with the complaint.

[7] The complainant and her brother did not report what happened to the complainant to their mother although her brother alleges that he found the complainant crying when he fetched her from the appellant's place. A report was made to the complainant's mother after she asked the complainant what was wrong with her when she saw her not walking properly on the third day after she was fetched from the appellant's place. The other thing that made her to be curious was the fact that complainant was repeatedly scratching herself on the area near her private parts.

[8] The complainant was taken to the hospital for medical attention and examination. The medical report compiled by the Doctor confirmed that penetration took place.

[9] The Appeal revolves around the failure by the Court *a quo* to warn the appellant about the applicability of the Minimum Sentence Act

at the beginning of the trial. Mr Setumu appearing on behalf of the appellant submitted that the State did not refer to the applicable section of the provisions of the Minimum Sentence Act when the charges were put to the appellant. Furthermore, the Court also failed to warn the appellant about same at the beginning of the trial. According to him both the failure by the State and the Court *a quo* to warn the appellant of the provisions of the Minimum Sentence Act constitutes an irregularity which warrants this Court to set aside the sentence of life imprisonment imposed and to consider the sentence afresh. He referred this Court to the following authorities in support of his submissions:

S V Chowe 2010 (1) SACR 141 (GNP)

S V Ndlovu 2010(1) SACR (W)

S V Malatu 2006 (2) SACR 582 (SCA)

S V Machongo 2014 JDR 2472 (SCA)

[10] Mr Setumu also urged this Court to take into consideration the appellant's personal circumstances when imposing a fresh sentence and submitted that a sentence of 20-25 years can be appropriate in the circumstances of this matter.

[11] Advocate Nontenjwa representing the State submitted that the fact that the appellant was not warned of the effect of section 51(1) of the Minimum Sentence Act at the commencement of the trial does not necessarily vitiate the sentence of life imprisonment that was imposed. According to him the appellant did not suffer any prejudice as the failure can only be attributed to a procedural irregularity. He argued that the inquiry in such matters is always whether the appellant had a fair trial or not. He submitted that the

appellant had a fair trial as he was able to successfully answer to the charge and cross-examine witnesses, therefore this Court should not interfere with the sentence imposed.

[12] Should this Court find that there is a need to interfere, so argued Advocate Notenjwa, a sentence of life imposed can still be imposed when one takes into consideration the aggravating circumstances of this matter. He enumerated the following as aggravating:

- The complainant was still relatively young;
- The appellant was 26 years older than the complainant;
- The appellant was her […] and held a position of trust;
- The complainant was a friend to appellant's daughter;
- The complainant was injured as she could not walk properly even on the third day subsequent to the incident. The Doctor also said that the examination was not easy as complainant was feeling pain during examination;
- The *labia majora* and *labia minora* were both swollen;
- There was also a tear on the complaint's hymen.
- The complainant was raped in the presence of her friend.

[13] A perusal of the record of proceedings reveals that the Court *a quo* and the State did not warn the appellant of the applicability of section 51(1) of the Minimum Sentence Act at the beginning of the

trial. The only time when the applicability of this section was mentioned was during the sentencing stage.

[14] A number of similar cases where the applicability of the Minimum Sentence Act were omitted has been a subject of scrutiny by our Courts on a constant basis. To name a few the following can be cited:

- **S v Mthembu [2011] ZASCA 179, 2012 (1) SACR 517 (SCA)**
- **S v Ndlovu 2003 (1) SACR 33, (SCA)**
- **S v Mashinini and Another [2012] ZASCA 1; 2012 (1) SACR 604 (SCA)**
- **S v Kolea [2012] ZASCA 199; 2013 (1) SACR 409 (SCA)**
- **S v Jaipal 2005 (1) SACR 215 (CC)**

[15] Recently the cases of **Moses Tshoga v The State (635/2016) 2016 ZASCA 205** delivered on the **15 December 2016**; **Nico Manuel Khoza and another v The State,** a full Bench Court decision of this Division, **case No: CAF 11/2016** delivered on the **9 February 2017** and others that followed in our Division thoroughly interrogated this issue. The gist of these decisions is to effect that every case must be approached on its own facts and it is only after a diligent examination of all the facts that it can be decided whether an accused had a fair trial or not.

[16] It is therefore clear that a failure to warn the accused of the applicability of the Minimum Sentence Act does not necessarily

vitiate the sentence imposed. In some sentences it will, in others it will not. A fact-based inquiry is needed.

[17] The appellant in this matter was not legally represented when the trial started. It appears that he only realised the seriousness of the offence he was facing after he was convicted because it was at that particular time that he insisted on his own accord without being prompted to, to have a legal representative. I am saying this because he applied for Legal Aid and was subsequently represented by a legal representative during the sentencing stage in the High Court. The record further reveals that during the High Court proceedings **Hendler J** did explain to him the applicability of the Minimum Sentence Act.

[18] In my view, this belated explanation cannot salvage the apparent prejudice the appellant had already suffered from the beginning of the trial. It is quite apparent that the failure by the State including the Court *a quo* to appraise the appellant of the applicability of the Minimum Sentence Act especially in circumstances where the appellant was conducting his own defence prejudiced him. A possibility exists that once properly warned, he might have opted for legal representation and or even conducted his case differently. The fact that he required legal representation later in the trial lends credence to this fact. Section 35(3)(a) of the Constitution of South Africa requires that an accused be informed of the charge with sufficient details to answer to it. This was not done by the State as it did not indicate that the provision of section 51(1) will be relied on for the purposes of sentence. The Court in this matter also aggravated the situation by not warning the appellant that the type

of a charge he faced might attract the Minimum Sentence Act more especially because appellant was not legally represented. There is a duty placed upon the Courts to play an active role when dealing with cases involving unrepresented accused.

[19] I am of the view that even though the evidence that was led encompasses all the elements that bring the offence the appellant was convicted of within the purview of section 51(1) of the Minimum Sentence Act, he did not receive a fair trial. The fact that he was able to successfully answer to the charge cannot detract from the question whether he made an informed decision in the preparation and the conduct of his defence. The facts must speak for its -self that appellant had a fair trial and if there is doubt, the appellant must benefit. This Court is therefore entitled to set aside the sentence of life imprisonment imposed on the appellant and to consider the sentence afresh.

[20] The appellant was 35 years of age when he was sentenced. He is not married. He has four minor children. He was dependent on odd jobs before his arrest and supporting his children with the money he was earning. The mother of the children has passed away.

[21] The offence the appellant was convicted of remains serious. It remains a heinous crime of the kind which the legislature has singled out for severe punishment. The aggravating factors which Advocate Nontenjwa enumerated in paragraph 12 of this judgement say it all. One should also bear in mind that a sentence does not merely deal with a particular offender in respect of the crime of which he has been convicted, but it also conveys a

message to the society in which the offence was committed. Therefore, the interest of the society must also be taken into consideration in coming to an appropriate sentence. Sexual Violence is so endemic in our country and there are hardly any signs of it abating.

[22] Despite all of the above, I am of the view that the circumstances of this case are such that the sentence of life imprisonment Advocate Nontenjwa recommended if imposed will be unjust. The following are extenuating circumstances that are in favour of the appellant:

- The appellant is the first offender;
- His age indicates that he can be a candidate for rehabilitation;
- He had already served the sentence for almost 17 years now.

[23] A proper balance of the objects of sentencing informs me that the following sentence will be appropriate in the circumstances of this matter.

ORDER

1. The appeal is upheld;
2. The sentence of life Imprisonment which was imposed on the 28 August 2001 is hereby set aside and substituted with the following:

"**25 (Twenty-Five) years imprisonment** ".

3. The sentence is antedated to the 28 August 2001.

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KGOELE A.M

JUDGE OF THE HIGH COURT

I agree

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SAMKELO GURA

JUDGE OF THE HIGH COURT

I agree

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GUTTA N

JUDGE OF THE HIGH COURT

ATTORNEYS:

FOR THE APPELLANT	:	Mr M.E SETUMU LEGAL AID SOUTH AFRICA MAHIKENG JUSTICE CENTRE
FOR THE RESPONDENT	:	ADV.NONTENJWA DIRECTOR OF PUBLIC PROSECUTIONS MAHIKENG