THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 817/11

In the matter between:

Phithela Mapule Appellant

and

The State Respondent

Neutral citation:	*Mapule v The State* (817/11) [2012] ZASCA 80 (30 May 2012)
Coram:	BRAND, SNYDERS, MHLANTLA JJA AND SOUTHWOOD AND PETSE AJJA
Heard:	**18 May 2012**
Delivered:	**30 May 2012**
Summary:	Sentence – imposition of minimum sentence in terms of Criminal Law Amendment Act 105 of 1997 – sentenced for a crime not convicted of – right to a fair trial.

ORDER

On appeal from: Venda Provincial Division of the High Court (Makgoba AJ sitting as court of first instance):

1 The appeal on conviction is dismissed.

2 The appeal on sentence is upheld.

3 The sentence imposed by the court below is set aside and replaced by the following:

'The accused is sentenced to 10 (TEN) years' imprisonment.'

4 In terms of s 282 of the Criminal Procedure Act 51 of 1977 the sentence is ante-dated to 26 October 2001.

JUDGMENT

SNYDERS JA: (BRAND and MHLANTLA JJA and SOUTHWOOD and PETSE AJJA concurring)

[1] On 5 September 2001 the appellant was convicted in a regional court of rape and on 26 October 2001 he was sentenced by the Venda Provincial Division of the High Court (Makgoba AJ sitting as court of first instance) to life imprisonment, the matter having been referred to that court in terms of the provisions of the Criminal Law Amendment Act 105 of 1997 (the minimum sentence legislation). Seven years later the appellant applied for leave to appeal from the court below. Leave to appeal was granted to this Court only on conviction and refused on sentence. After an enquiry by this Court an obviously meritorious application for leave to appeal against the sentence was brought and granted.

[2] The appeal was heard on 18 May 2012 and an order was made at the conclusion of the hearing, with an indication that reasons would follow. This is the order that was made:

'1 The appeal on conviction is dismissed.

2 The appeal on sentence is upheld.

3 The sentence imposed by the court below is set aside and replaced by the following:

'The accused is sentenced to 10 (TEN) years' imprisonment.'

4 In terms of s 282 of the Criminal Procedure Act 51 of 1977 the sentence is ante-dated to 26 October 2001.'

What follows are the reasons for the order.

[3] The complainant recounted the following events. In the early hours of 1 January 1999 the complainant was celebrating New Year with friends when she was approached by the appellant. They knew each other. He was romantically interested in her, but she did not have a similar inclination towards him. When he asked her about her feelings for him she expressed her lack of interest. In response he threatened to stab her with a bottle he had in his hand, he slapped her and ordered her to walk with him. He took her to the grounds of a nearby primary school where he again threatened to stab her, this time with a knife he said he had in his pocket and ordered her to undress. When she refused, he slapped her. Because she was scared that he might stab her, she then obeyed his instructions to undress and lie down. He proceeded to have sexual intercourse with her against her wishes. She experienced pain as a result of the intercourse and cried. He let her go and walked her to her home, telling her that from then on they were lovers.

[4] The complainant was examined by a doctor later the same day. He found that her hymen was freshly torn, the vestibule was a bit swollen and that there was a fresh abrasion on the faucet. He concluded that her genitalia 'showed evidence of recent penetration by an object that might be a penis'. This evidence corroborated the complainant's allegation that she was raped.

[5] According to the appellant he wanted to have sexual intercourse with the complainant that night. Together they walked to the school where he asked her to have intercourse, but she refused. Nevertheless, she proceeded to take off her clothes, but he then declined her. He denied that he had intercourse with her at any stage. His

version suggests that when he wanted intercourse, she did not, but moments later when she wanted intercourse, he did not, however, later the same night someone had intercourse with her and she decided to falsely accuse him of rape whilst willingly letting the real culprit go free. His version is inherently so improbable that it could not be accepted as being reasonably possibly true. The magistrate and the court below, rightly, came to the conclusion that the complainant's version was reliable and was corroborated by the medical evidence and therefore that the appellant's version was to be rejected.

[6] The magistrate convicted the appellant of rape, 'as charged'. The charge-sheet reads:

'The accused is guilty of the offence of rape in that upon or about the 1st day of January 1999 and at or near Madodonga Village in the Tshilwavhusiku district in the Regional Division of Northern Province the said accused did unlawfully and intentionally have sexual intercourse with . . . a female person, without her consent.'

No mention is made of the complainant's age or the provisions of the minimum sentence legislation. The obviously hearsay and unreliable evidence by the complainant that she was 12 years old at the time of the incident, was gainsaid by the doctor who examined her. His impression from her physical development was that she might well have been older. The State failed to tender reliable evidence to resolve the uncertainty regarding the complainant's age.

[7] Therefore, when, subsequent to conviction, the magistrate advised the appellant of his rights and said that because the complainant was 12 years old at the time of the incident, the provisions of the minimum sentence legislation compelling the imposition of life imprisonment had to be applied, he erred in two respects. First, the complainant was not proved beyond reasonable doubt to have been under the age of 16 years at the time of the incident. Second, the State did not prosecute the appellant for the rape of a girl under the age of 16 years in terms of s 51(1) read with Part I Schedule 2 of the minimum sentence legislation. When the court below sentenced the appellant, it erred in the same respects.[1]

[8] The wording of the minimum sentence legislation makes it clear that it applies to

1 Prior to the replacement of s 51 by Act 38 of 2007, regional courts had no jurisdiction to sentence offenders convicted of such a crime.

persons *convicted* of the offences listed in the schedules. The particular crime a person is convicted of is therefore a jurisdictional fact essential to the application of the various sentences prescribed in the minimum sentence legislation. The rape of a child under the age of 16 years resorts under Part I Schedule 2 and in terms of s 51(1) attracts a minimum sentence of life imprisonment, unless substantial and compelling circumstances are shown to exist that justify the imposition of a lesser sentence.[2]

[9] In *S v Legoa* 2003 (1) SACR 13 (SCA) the ratio of the decisions in *S v Seleke* 1976 (1) SA 675 (T) at 685A-D and *S v Nziyane* 2000 (1) SACR 605 (T) at 609d were approved. Cameron JA stated:[3]

'These principles [stated in *Seleke*] were illuminatingly applied in regard to the 1997 statute's minimum sentencing provisions in *S v Nziyane*. There the scheduled offence was possession of a semi-automatic weapon, which for a first offender similarly carries a minimum 15-year sentence. The charge-sheet averred possession of a Norinco pistol, and specified that this was a semi-automatic weapon. However, in its verdict the trial court, though observing that it was common cause that a Norinco pistol was in general a semi-automatic weapon, failed to make a specific finding to this effect. Only after the conviction was entered did the State lead expert evidence establishing that the pistol the accused possessed was in fact semi-automatic. The Court correctly laid emphasis on the 1997 Act's requirement that the accused must be *convicted* of the scheduled offence. The minimum sentencing provisions therefore did not apply. Although the Legislature had not created new offences, it had to appear at conviction that elements in question were present.'

[10] As the appellant was not charged with nor convicted of the rape of a girl under the age of 16, the minimum sentence of life imprisonment did not apply.

[11] Even if the evidence that suggested that the complainant was under the age of 16 years old, was acceptable, - which it was not - it should not have resulted in the imposition of a term of life imprisonment. Section 35 of the Constitution 108 of 1996 provides for a fair trial for any accused person. In order to secure a conviction that would involve the minimum sentence legislation compliance with fair trial requirements is essential. To be informed, right at the outset of the trial, of the charge faced, is one of the demands of fairness that is not only expressly mentioned in s 35(3)*(a)* of the Constitution, but also written into s 84(1) of the Criminal Procedure Act 51 of 1977 (the

2 Section 51(3) of the minimum sentence legislation.
3 Para 24.

CPA).[4]

[12] Infringements of the right to a fair trial have formed the subject of many decisions of this court. I intend to refer only to some. In *Legoa* para 20 Cameron JA stated:

'Under the common law it was therefore "desirable" that the charge-sheet should set out the facts the State intended to prove in order to bring the accused within an enhanced sentencing jurisdiction. It was not, however, essential. The Constitutional Court has emphasized 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". The Bill of Rights specifies that every accused has a right to a fair trial. This right, the Constitutional Court has said, is broader than the specific rights set out in the sub-sections of the Bill of Rights' criminal trial provision. One of those specific rights is "to be informed of the charge with sufficient detail to answer it". What the ability to "answer" a charge encompasses this case does not require us to determine. But under the constitutional dispensation it can certainly be no less desirable than under the common law that the facts the State intends to prove to increase sentencing jurisdiction under the 1997 statute should be clearly set out in the charge-sheet.'

[13] In *S v Ndlovu* 2003 (1) SACR 331 (SCA) para 12 Mpati JA concluded:

'The enquiry, therefore, is whether, on a vigilant examination of the relevant circumstances, it can be said that an accused had had a fair trial. And I think it is implicit in these observations that where the State intends to rely 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. Whether, or in what circumstances, it might suffice if it is brought to the attention of the accused only during the course of the trial is not necessary to decide in the present case. It is sufficient to say that what will at least be required is that the accused be given sufficient notice of the State's intention to enable him to conduct his defence properly.'

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4 Section 35(3)(a) of the Constitution: 'Every accused person has a right to a fair trial, which includes the right – (a) to be informed of the charge with sufficient detail to answer it'.
Section 84(1) of the CPA: 'Subject to the provisions of this Act and of any other law relating to any particular offence, a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.'

[14] At no stage prior to his conviction was it brought to the appellant's attention that he could be sentenced by the high court or that he could be sentenced to life imprisonment. These possibilities were relevant to decisions he made during the conduct of his defence, particularly to conduct his case after his legal representative withdrew during the cross examination of the complainant.

[15] In view of the charge-sheet, the evidence and the advice given to the appellant during the trial he could only have been fairly convicted and sentenced of rape. The nature of the unfairness and irregular sentencing procedure are such that it could be effectively excised from the proceedings in a manner that leaves a proper conviction for rape in terms of the charge-sheet that satisfies the demands of a fair trial. Once that is done no failure of justice which demands the setting aside of the conviction has occurred.[5] In terms of s 51(2)*(b)* of the minimum sentence legislation such a conviction attracts a minimum sentence of 10 years' imprisonment in the absence of substantial and compelling circumstances. Even if no regard is had to the minimum sentence legislation a discretionary sentence of 10 years' imprisonment would be appropriate in the circumstances. The appellant has been incarcerated since he was sentenced, almost 11 years ago. If he was not released on bail after his arrest on 2 January 1999, a fact not known to this Court, the period stretches to almost 13 years. To set aside the sentence and refer the matter back for that purpose would compound the unfairness that the appellant has already suffered, as such a process could, at least potentially but probably, take more than a year. These circumstances demand that the procedural injustices not be compounded but that substantial justice be served by setting aside the sentence and imposing a sentence that would have been appropriate if the proceedings were fairly conducted. A similar approach was adopted in *Legoa*.

[16] For these reasons the above stated order was made and conveyed to the relevant prison where the appellant was incarcerated.

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5 *S v Jaipal* 2005 (1) SACR 215 (CC) para 39; *S v Carter* 2007 (2) SACR 415 (SCA).

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S SNYDERS

Judge of Appeal

APPEARANCES:

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