REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A100/2016

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED

27/3/17

Date: **WHG VAN DER LINDE**

In the matter between:

Bogatsu, Molefe Steven **Appellant**

and

The State **Respondent**

Summary – Appeal against two life sentences imposed on two counts of rape – charge sheet erroneously referring to s.51(2)(a) and sch 2 part II of the Criminal Law Amendment Act 105 of 1997 – neither s.51(2)(a) nor part II of schedule 2 referring to rape – appellant submitting that accordingly rape as envisaged in s.51(2)(b) and sch 2 part III, with minimum sentence of ten years, applicable.

Magistrate examining complainant as to whether rape involved repetition as envisaged in paragraph (a)(i) of rape description in part I of sch 2 – complainant alleging rape repeated six times – Magistrate not inviting appellant's representative to cross-examine on this issue.

Held – However, since Magistrate warned appellant at outset that life sentence also implicated if rape accompanied by bodily injuries, and since appellant failed to cross-examine complainant on

evidence of assault, and admitted J88 signifying serious bodily injuries, paragraph (c) of rape description in part I of sch 2 properly engaged - appellant sufficiently forewarned – trial fair as envisaged in s.35(3) of Constitution – appeal dismissed.

Judgment

Van der Linde, J:

[1] The appellant was charged in the Soweto, Protea Regional Court with kidnapping, two counts of rape, and attempted murder. Although not initially, he eventually pled guilty to all four counts, and after the complainant testified as the only witness in the case, was found guilty of all four. He was sentenced to direct terms of imprisonment, all four to run concurrently, of respectively four years, life, life, and four years. His appeal against his sentence is against the life sentences imposed on him and is, by virtue of the proviso to s.309 (1)(a) of the Criminal Procedure Act 51 of 1977, automatic.

[2] Although it may be accepted that such an automatic appeal is against both conviction and sentence, in this case the appellant, since he pled guilty to rape, is not appealing against the conviction of rape. Rather, he is appealing against the life sentence imposed on him for the rape in respect of which he had pled guilty.

[3] The charge sheet contained an error. It referred to s.51 (2)(a) and part II of sch 2 of the Criminal Law Amendment Act 105 of 1997 ("the Act"), which as it happens does not refer to rape. That error forms the central attack on appeal against the sentence. The argument is that the appellant was in fact found guilty of an offence which carried a particular sentence, life imprisonment, of which he was not warned, at least not in the charge sheet, at the commencement of his trial.

[4] The appellant submitted that it flows from this that the sentencing regime that should have been applied to the appellant, was that under s.51 (2)(b)(i) of the Act, which refers to part III of sch 2; and that being so, the prescribed minimum sentence on counts two and three was a period of not less than ten years, and not life imprisonment.

[5] Section.51(2)(b)(i) of the Act refers, as I have said, to part III of sch 2 of the Act, which in turn refers to s.3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, which defines rape simply as the unlawful and intentional act of sexual penetration without consent. The appellant's submission was thus that the sentencing on the two rape counts ought to have been within the context of ten years, or even multiples of that period; but at all events not in the context of life imprisonment.

[6] A potential difficulty with this submission, is that if an accused was found guilty of an offence that carried with it, whether statutorily or otherwise, a particular sentencing regime of which s/he was not fairly appraised when the trial set out, that potentially offends s.35 (3)(a) of the Constitution, which may found an attack on conviction, and not only on sentence.

[7] And ordinarily this court would have no jurisdiction to consider an appeal against conviction, unless leave to appeal against the conviction will have been granted.[1] But as already pointed out, leave to appeal against both conviction and sentence in this case is automatic, and so that issue does not arise.

[8] A second potential difficulty is, given that the charge sheet refers to s.51 (2)(a) of and part II of sch 2 to the Act, neither of which references rape in any form, why is it valid to argue that the appellant was in fact tried on the basis of rape as referenced in s.51(2)(b) and part III of sch 2, rather than s.51(1) and part I of sch2? After all, the charge sheet refers as little to s.51 (2)(b) as it does to s.51(1)?

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[1] S v Sefatsa, 1989 (1) SA 821 (AD) at pp 832E – 834E; S v Langa 1981 (3) SA 186 (AD); S v Zulu (186/2002) [2003] ZASCA 21 (26 March 2003).

[9] I suggest the answer, one that favours the appellant, is that when the case against the accused is rape *"in circumstances other than those referred to in Part I"*, as the wording of part III of sch 2 reads, that is to where the sentencing of a rape conviction defaults. Put differently, if the rape is not such that s.51(1) applies to it, then the rape defaults, as it were, to part III of sch 2 and s.51(2)(b) of the Act; and in the case of a first offender such as the appellant, specifically to s.51(2)(b)(i) of the Act

[10] What these preliminary remarks inevitably lead to is this. The departure point must be to ask whether the appellant had a fair trial as s.35 (3) of the Constitution exacts. Considering the issue that arises in this case, that question is answered by examining whether the appellant was fairly appraised at the outset of the proceedings that the minimum sentencing regime was implicated in his case.[2]

[11] In setting out on that examination, it is as well that one keeps in mind that the differing minima statutory sentences attaching to the various permutations of the crime of rape has not established a variety of new, differing, offences: rape remains rape. In Kolea, Mbha, AJA (as he then was) put it plainly (emphasis supplied):[3]

"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."

[12] Next, fairly appraising the accused that the minimum sentencing regime could be implicated in his case does not mean that it is necessarily the charge sheet that should contain the relevant information; the record as a whole must be considered. In this context Mbha, AJA quoted from S v Ndlovu for the following proposition (emphasis supplied):[4]

"[10] Mpati JA, in S v Ndlovu, endorsed this approach, stating:
'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

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[2] S v Kolea, 2013 (1) SACR 409 (SCA).
[3] At [17].
[4] S v Ndlovu 2003 (1) SACR 331 (SCA) ([2003] 1 All SA 66) para 12.

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.'"

[13] Finally, the requirement of fairness of the trial implies also fairness to the public as represented by the State (emphasis supplied):[5]

"[20] Finally, it must always be borne in mind that the concept of fairness connotes fairness to both the accused and the complainant or the public as represented by the state. As the Constitutional Court pointedly remarked in S v Jaipal:
'The right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the State. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime.'"

[14] In this case the record reflects that the Magistrate made it clear to the appellant, right at the outset of the trial and before he had pled that where a rape was accompanied by bodily injuries, or where it involved repetition, a life sentence was implicated. This was necessarily an implied reference to s.51(1) of and part I of sch 2 to the Act (emphasis supplied):[6]

"I need to inform you that this offence is a very serious one. Which is visited by life imprisonment in the absence of compelling and substantial factors. If the following factors do exist in your matter, if the complainant was under the age of 16 years, if this rape was accompanied by bodily injuries, is she was mentally ill and you were aware of that, if you were HIV+ and you were aware about that, if it was a repeated sexual intercourse meaning more than one sexual round, if it is gang rape meaning she has been raped by more than one person, if she was physically retarded and as a result she was vulnerable, if you have been found guilty of rape before you are sentenced you are found guilty of rape in this court. Then if those factors do exist in your case then there is a possibility of life imprisonment being imposed."

[15] It must also be observed that the Magistrate conveyed to the appellant, then accused, that all these factors might yet emerge in the then impending trial, and that this was all recorded before the appellant had been asked to plead.

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[5] Kolea at [20].
[6] Transcript, p13.

[16] Apart from what the Magistrate said at the outset, there is this added consideration: the appellant was charged in count one with kidnapping on the same date (2 November 2010) as the count two rape charge; and with attempted murder on the same dates (02/3 November 2010) as the count two and count three rape charges. The charges sheet thus already foreshadowed the events of which the appellant himself later spoke in his s.220 (of the Criminal Procedure Act 51 of 1977) statement[7] when he changed his plea from not guilty to guilty.

[17] The appellant was thus forewarned from the outset, before he pled, that where the rape involved bodily harm, as here; and where the rape involved repeated sexual intercourse, as here; a life sentence was implicated.

[18] In these circumstances I do not see how the error in the charge sheet, referring as it did to a statutory provision that did not reference rape at all, could have obliterated the Magistrate's explicit caution from the appellant's mind. To the contrary, I would suggest that in the context of this case the charge sheet meant, and was understood by the appellant to have meant, no more than that the accused was being charged with rape. The issue of minimum sentencing was not expressly referenced in the charge sheet.

[19] But the Magistrate's caution made it clear that the issue of minimum sentencing might be implicated in the case, depending on the facts that come out. In the result I do not believe that it can be said that his trial was unfair.

[20] Moving on then to consider whether an appeal lies against the Magistrate's finding that no substantial and compelling circumstances justified the imposition of a lesser sentence than life imprisonment in terms of s.51(1) of the Act,[8] one starts by stating the obvious: that sentencing is a matter for the discretion of the trial court.

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[7] P75 ff of the record.

[8] Judgment on sentence, transcript p62 lines 3 – 10.

[21] A court of appeal does not interfere with it unless the discretion was not judicially and properly exercised.[9] The test is whether the sentence imposed by the lower court is vitiated by irregularities or misdirection, or whether it is disturbingly inappropriate. Concerning the imposition of minimum sentences in terms of the Act, passed under the position is thus:[10]

> *"[20] What then is the correct approach by a court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court's exercising its discretion properly, simply because it is not the sentence which it would have imposed or that it finds shocking? The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not."*

[22] The brief facts are that the appellant fetched his girlfriend of six weeks at a tavern where she had been drinking. He too had had liquor. The appellant says he saw the complainant kiss another man, but she disputed this. The appellant and the complainant went back to his room. There he assaulted her, causing her to bleed profusely, and he raped her.

[23] He assaulted her with a steel vase and a steel pipe, he stabbed her with a knife, and he cut her with a broken mirror. He kept her locked up in his room for three days without giving her food, medical attention, or access to the toilet. Upon questioning by the Magistrate, the complainant said that the appellant had raped her more than six times during this period. In his written statement in terms of s.220 of the Criminal Procedure Act 51 of 1977, he admitted that he intentionally attempted to kill the complainant; this admission was clearly supported by the evidence *aliunde*.

[24] Her medical injuries included an injury to the right eye, an injury under the right eye, a laceration around her neck, an injury to the left eye, multiple bruising on her arm, front and back, bruising of the left lateral chest underneath her breast, and abrasions of the knees.

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[9] S v Rabie, 1975 (4) SA 885 (A) at 855 D; S v Pieterse, 1987 (3) SA 717 (A) at 737 F – H; S v Kgosimore, 1999 (2) SACR 238 SCA.

[10] S v PB, 2013(2) SACR 533 (SCA) at [20], per Bosielo, JA.

[25] Two features of the two rapes potentially qualified them for treatment under par I of sch 2, read with s.51(1), of the Act. The first paragraph (a)(i) of the description of rape, and the second is paragraph (c).

[26] Paragraph (a)(i) of the description reads as follows:

"in circumstances where the victim was raped more than once ...".

Paragraph (c) reads: *"involving the infliction of grievous bodily harm."*

[27] The appellant was of course charged with two rapes committed, according to the charge sheet, on two consecutive days, being 2nd and 3rd November 2010. The appellant pled guilty to these two counts. In his s.220 statement he admitted depriving the complainant of her freedom during those two days, and he admitted that he raped her on each of those two days.[11] These admissions in his s.220 statement follow on an earlier admission there, that he contravened s.51 and sch 2 of the Act.[12]

[28] The potential problem for the State here , however, is that there is no explicit admission of a rape more than once as envisaged in para (a)(i) of the description of rape in part I of sch 2. The s.220 admissions were drawn up in response, one must accept, to the charges sheet; and they did not explicitly reference the repetition element of rape.

[29] One may of course argue that two rapes on two consecutive dates, both committed while the complainant was being kidnapped and tied down, amount to exactly the same thing. But I will accept, in favour of the appellant, that the charge sheet did not envisage that potential dimension of the counts.

[30] When the complainant was called to testify, the prosecutor did not elicit the repetition aspect of the rapes, nor did the cross-examination on behalf of the appellant that followed. The Magistrate however then put questions to the complainant, and elicited from her that in fact she was rapes six times during the period of her kidnapping.

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[11] Record, p76, para 7; p78, para 17.
[12] Record, p75, para 5 to p76.

[31] After that evidence was given by her, the Magistrate did not, regrettably, afford the appellant's representative an opportunity to cross-examine further on this aspect; nor did the appellant's representative ask for an opportunity to do so. And in the judgment on sentence, the Magistrate relied expressly on the repetitive aspect of the rapes.[13]

[32] In these circumstances I do not believe that the appellant had been given a proper opportunity to challenge the evidence about the complainant having been raped six times, and the provisions of paragraph (a)(i) of the description of rape in part I of sch 2 have not, as a fact, been proved.

[33] Concerning the provisions of paragraph (c) of part I of sch 2 to the Act, however, the position is different. The aspect of the consequences, including a life sentence, should the appellant be found having inflicted serious bodily harm on the complainant featured from before the appellant was asked to plead,[14] and he therefore knew about this then. Thereafter he pleaded guilty, and in his s.220 statement admitted intending to kill the complainant by hitting her with an iron object and stabbing her with a piece of glass.[15]

[34] When the complainant testified, she was led about the assault on her,[16]and this was not challenged in cross-examination. The form J88, proving the injuries, was read into the record, and was admitted by the appellant.[17] In the judgment on sentence, the Magistrate expressly referred to this aspect of the rapes, in the context of the life sentence.[18]

[35] It follows that, to my mind, the rapes were proved as having involved the infliction of grievous bodily harm as envisaged in paragraph (c) of the description of rape in part I of sch 2. Accordingly s.51 (1) of the Act was properly engaged.

[36] In my view no misdirection or irregularity has been shown in the present matter. Nor is there a basis for holding that the Magistrate erred in not finding the presence of substantial

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[13] Judgment on sentence, transcript, p62, lines 3 to 10.
[14] Transcript, p14, lines 1 to 17.
[15] Record, p76, para 7.
[16] Transcript, p24 lines 13 to 15; lines 20 to 25; p25, lines 2 to 10.
[17] Transcript, p30, line 1 to p32, line 13.
[18] Judgment on sentence, transcript p 62, lines 3 to 10.

and compelling circumstances to impose a lesser sentence. There may have been jealousy involved initially, resulting in this being a crime of passion to start off with. There may even have been liquor influence that served as an initial trigger event to the horrendous crime that followed, but it will have abated.

[37] And so as the period of kidnapping increased, and the appellant deprived the complainant of food, medical attention and even toilet facilities,[19] the gruesome nature of the events became exacerbated exponentially. There is sometimes an argument that only if the rape falls within the *"worst category"* would a life sentence be justified:[20]

"[5] I do not believe that the learned judge overemphasised the gravity of this rape. Rape is a loathsome crime (S v Chapman 1997 (2) SACR 3 (SCA) I (1997 (3) SA 341; [1997] 3 All SA 277); S v Ncheche 2005 (2) SACR 386 (W) para 25). It is also one of the most serious crimes that can be committed. For that reason the legislature has singled it out as one of the crimes for which compulsory sentences must be imposed in terms of the Criminal Law Amendment Act, 1997. The measure of the seriousness of rape in the eyes of the legislature is reflected in the sentences that it has laid down: ten years' imprisonment is the standard minimum sentence for a first offender; 15 years and 20 years are the minimum sentences for repeat offenders; and life imprisonment is prescribed for rapes which fall into specified categories which are listed in Schedule 2 to the Act, and repeated in S v Vilakazi supra (para 12), namely:

- *Where the victim is a girl under the age of 16 years;*
- *where the victim was raped more than once, whether by the accused or by any co-perpetrator or accomplice;*
- *where the rape was committed by more than one person and where such persons acted in the execution or furtherance of a common purpose or conspiracy;*
- *where the crime was committed by a person who had been convicted of two or more offences of rape, but had not yet been sentenced in respect of such convictions;*
- *where the crime was committed by a person knowing that he had Aids or was HIV-positive;*
- *where the victim is a physically disabled woman who, due to her physical disability, is rendered particularly vulnerable;*
- *where the victim is a mentally ill woman as contemplated by the Mental Health Act 18 of 1973; and*
- *where the crime involved the infliction of grievous bodily harm.*

The cases make it clear that, while all rapes are serious, there are gradations of seriousness (S v Mahomotsa 2002 (2) SACR 435 (SCA) ([2002] 3 All SA 534)), and it follows that the most serious are those for which the ultimate sentence is intended. In determining whether a case

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[19] Transcript, p24, line 18 to p25, line 1.

[20] SS Terblanche, A Guide to Sentencing in South Africa, 3rd Ed, p85; S v Mqikela, 2010(2) SACR 589 (ECG) at [5].

falls within the category of the most serious of rape cases, Vilakazi's case illustrates the impropriety of a blind implementation of the categories of rape enumerated above, so that, for example, the rape of a girl under age automatically results in a life sentence. That a case falls within a particular category may aggravate what is already an inherently serious crime, so that it can properly be regarded as among the most serious of rape cases. But it does not necessarily do so. It all depends upon the result of the balancing exercise which the courts are enjoined to conduct."

[38] I am not convinced that this debate will assist the appellant in the present case. The rape here was clearly if not of the worst kind, that at least in that category; and life imprisonment is often imposed for such a violent intrusion as has occurred here.[21] These cases are obviously not perfect matches; they never are. But they serve as appropriate comparators.

[39] I would accordingly dismiss the appeal. Since my colleague Molahlehi, J agrees, it is so ordered.

WHG van der Linde
Judge, High Court
Johannesburg

I agree.

E Molahlehi
Judge, High Court
Johannesburg

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[21] Compare S v Moyo 2014 JDR 1308 (KZD); S v Dlamini 2015 JDR 0257 (KZP); S v Tladi 2015 JDR 0583 (GP); S v Molatlhehi 2015 JDR 0498 (GP); S v Zuba 2014 JDR 0155 (ECG).