

S v KHANYE 2020 (2) SACR 399 (GJ)

KEY CONCEPTS	
Multiple rape	Co-perpetrators not before court
Life sentence	Co-perpetrators not found
Must co-perpetrators be convicted in order for life sentence	

FACTS: The complainant had drinks at a tavern with her sisters and, although she consumed alcohol, she was not drunk. They left the tavern. Her sisters were not far ahead of her, but out of sight. She was accosted by appellant and a group of 8 men. She was assaulted, punched choked and kicked and fainted. She woke up, naked, in the appellant's flat with the appellant and 4 unknown men. Two of the men held her legs apart on the bed while two of the unknown men had sex with her. The appellant sat next to her and instructed the other men to have sexual intercourse with her. She tried to escape, but the appellant prevented her. He assaulted her again and raped her anally without using a condom. She was held against her will for about 5 hours and an unknown tall male came to her rescue, opened the door and told her to leave. She ran to another flat where two of her friends lived and told them what happened to her. They took her to the police station. The police took her to a doctor who examined her. The accused was convicted on three counts and sentenced to terms of imprisonment. On the count of rape, a sentence of life imprisonment was imposed.

ISSUE: The appellant contended that the court had misdirected itself in imposing the life sentence, based on the fact that the complainant had been raped more than once, on the grounds that the co-perpetrators were not before the court and had not yet been convicted of rape.

DISCUSSION: The court imposed the life sentence in terms of s51(1) of the Act, which provides:

“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.”

Part I of schedule 2 refers to:

“Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act , 2007 —

(a) when committed —

(i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;

(ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;”

The appellant referred to *S v Mahlase* [2013] ZASCA 191 (2013 JDR 2714) para 9 in support of his submission that the trial court had misdirected itself in imposing the life sentence. In *S v Mahlase* the Supreme Court of Appeal held:

“The learned judge however overlooked the fact that because the [co-perpetrators], who were implicated . . . were not before the trial court and had not yet been convicted of rape, it cannot be held that the rape fell within the provisions of Part 1 Schedule 2 of the Criminal Law Amendment Act (where a victim is raped more than once) as the high court found that it did.”

The present court accepted that they were bound by the decision of the Supreme Court of Appeal in *Mahlase*. However, the court was of the opinion that *Mahlase*, in interpreting part 1 of schedule 2 (*supra*) to the Act, did not take into account previous authority from the Supreme Court of Appeal in the case of *S v Legoa* 2003 (1) SACR 13 (SCA) ([2002] 4 All SA 373; [2002] ZASCA 122) which was a binding authority.

In determining what is meant by the terms used by the legislature (i.e. perpetrator, accomplice, common purpose), a perpetrator is defined as someone who commits a crime. Being a co-perpetrator merely means that there was more than one perpetrator who acted in concert with one another. A perpetrator does not envisage a convicted co-accused. An accomplice is defined as someone who knowingly helps another in a crime. To have an accomplice does not envisage that such accomplice must be a convicted co-accused.

A deviation from a Supreme Court of Appeal decision can only be justified on one of three possible grounds:

- where the facts of the case before the judge is so distinguishable that the rationes decidendi of the Supreme Court of Appeal does not find application
- where the Supreme Court of Appeal overlooked legislation governing the case
- where the decision of the Supreme Court of Appeal is rendered nugatory or obsolete due [to] subsequent legislative development.

The doctrine of stare decisis not only binds lower courts, but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. Stare decisis is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution.

The court found that, although *Mahlase* was binding on the court, *Legoa* was equally binding upon the court and continued to be referred to with approval by the Supreme Court of Appeal. *Legoa* was never considered by the Supreme Court of Appeal in *Mahlase* and the court was of the opinion that, had *Legoa* been considered, it may have resulted in a different finding.

When the Legislature specifies enhanced penal jurisdiction for particular forms of an existing offence, the Legislature does not create a new type of offence.. The offences scheduled in the minimum sentencing legislation are, therefore, not new offences. They are but specific forms of existing offences, and when their commission is proved in the form specified in the Schedule, the sentencing court acquires an enhanced penalty jurisdiction.

FINDING: In the present matter the conviction includes the finding by the court a quo that the complainant was raped more than once by three men, including the appellant, which was based on the evidence led at the trial. Therefore, once the jurisdictional facts have been proved, a court is obliged to impose the prescribed sentence, unless substantial and compelling circumstances are found to exist. Once it is proved at the trial that an accused is guilty of an offence in terms of which the complainant was raped more than once, whether by the accused or by more than one person, the application of the minimum-sentencing provisions is triggered.

The trial court found that no substantial and compelling circumstances exist warranting a reduced sentence. The appeal court found that the trial court had correctly held that “the aggravating factors relating to the serious nature of the offence, and the prevalence of the offence as well as the effect of the crime on the victim, far outweigh the mitigating factors

HELD: Held, that, properly construed, s 51(1) read with part 1 of schedule 2 did not mean that more than one person had to be convicted to trigger its provisions. Further, the circumstances of the commission of the rape in the instant case were so ghastly that they would in any event justify a life sentence. The appeal against the sentence for rape accordingly had to be dismissed.