Editorial note: Certain information has been redacted from this judgment in compliance with the law.

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

NOT REPORTABLE

Case No: 20079/14

In the matter between:

TSHIFHIWA LEROY RAVELE **APPELLANT**

and

-

THE STATE **RESPONDENT**

Neutral citation: *Ravele v S* (20079/14) [2014] ZASC 118 (19 September 2014)

Coram: Cachalia and Bosielo JJA and Mocumie AJA

Heard: **20 August 2014**

Delivered: **19 September 2014**

Summary: Appeal against both convictions and sentences – rape read with s 51(1) of the Criminal Law Amendment Act 105 of 1997 and s 3 of the Criminal Law Amendment Act 32 of 2007– right to a fair trial – attention of the appellant that he could be sentenced to life imprisonment not drawn at the outset – duplication of convictions – kidnapping committed as part of rape – proper approach to formulating charges under s 51 of the Criminal Law

Amendment Act 105 of 1997 ─ whether sentence imposed is appropriate ─ no rehabilitative element infused in previous sentences.

ORDER

On appeal from Limpopo High Court, Thohoyandou (Booi AJ sitting as court of first instance):

1 The appeal in respect of the conviction on counts 1 and 3 is upheld.

2 The appeal in respect of the conviction on count 2 is dismissed.

3 The appeal in respect of the sentence on count 2 succeeds.

4 The order of the trial court is set aside and the following order is substituted in its place:

'(a) The accused is found not guilty on counts 1 and 3.

(b) The accused is found guilty on count 2.

(c) The accused is sentenced to 8 years' imprisonment'.

5 The sentence referred to in para 4(c) above is antedated to 9 June 2010.

JUDGMENT

Mocumie AJA (Cachalia and Bosielo JJA concurring):

[1] The appellant, who was 20 years old at the time of the commission of the offences discussed below, was convicted on 4 June 2010 by the Limpopo High Court, Thohoyandou (Booi AJ sitting as court of first instance) on two counts of rape read with s 3 of the Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007 (the Criminal and Sexual Offences Amendment Act) and s 51(1) and Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (the Act), as amended, and one count of kidnapping. The appellant was sentenced to life imprisonment on both counts of rape and five years' imprisonment for kidnapping, the latter being ordered to run concurrently with the sentence imposed on count 2.

[2] The appellant was initially granted leave to appeal against the sentence only by the court a quo, on 8 December 2011. However, upon reading the record, it became apparent that the appellant may have been

improperly convicted on all counts. Accordingly, at the request of the presiding judge, as the Supreme Court of Appeal has no jurisdiction to entertain an appeal on the convictions in the absence of leave having been granted by the high court, the registrar of this court directed a letter to the legal representatives of both the appellant and the state to:

(a) confirm an instruction from the appellant that he wished to appeal the convictions; and

(b) approach the high court promptly to obtain the necessary leave; and

(c) to bring the contents of the letter ─ which included a discussion on the difficulties with each of the convictions, including the failure of the trial judge to properly explain the nature of the charges to the appellant – to the attention of the court.

The court a quo duly granted leave to appeal on conviction on all counts, on 7 August 2014.

[3] In view of what will be discussed hereafter under s 51(1) of the Act, it is well to remind oneself at the outset that, in invoking the minimum sentencing regime contained in the Act, compliance with fair trial requirements is essential. Thus an accused person must be informed of the charges he is facing with sufficient detail to enable him or her to answer properly to such charge. Section 35(3) of the Constitution[1] provides for a fair trial for an accused person, while s 84(1) of the Criminal Procedure Act 51 of 1977 (the CPA) stipulates that the charge must contain the essential particulars of the offence.[2] This court has also in numerous judgments stated that a failure to inform an accused person that he or she is facing a serious charge under the Act and the sentence which may be imposed, may, depending on the facts and circumstances of the case, result in a finding that it would be unfair to sentence the accused in terms of the Act.[3]

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[1]The Constitution of South Africa, 108 of 1996.

[2]Section 35(3)(*a*) of the Constitution provides: '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 a 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.'

[3]See *S v Legoa* 2003 (1) SACR 13 (SCA)*; S v Ndlovu* 2003 (1) SACR 331 (SCA)*; S v Makatu*

[4] In this case, in respect of count 1, the State properly conceded that the appellant had not been properly informed of the nature of the charges against him. This issue need not be considered further because it is also clear from the evidence that the appellant was wrongly convicted.

[5] The incident giving rise to count 1 occurred on 8 November 2009. The issue was whether or not the appellant had consensual sexual intercourse with the complainant Ms K[…] G[…]. It is common cause that she was with her friends, L[…] T[…] N[…] (L[…]), N[…] and C[…] M[…] (C[…]), at L[…]'s home where the appellant found them around 19h00. She testified that the appellant had in their presence and at knifepoint dragged her to his home where he raped her on two or three occasions. She left his home the following morning and reported the incident.

[6] The appellant's version was that the complainant accompanied him voluntarily from L[…]'s home, had sexual intercourse with him and slept over before departing in the morning. In response to a question why she would falsely have implicated him, he explained that this was probably because she wanted to conceal the fact that she had accompanied him voluntarily, from her current boyfriend, H[…].

[7] There were several inconsistencies in her version. I mention four which I think are significant. First, some of the state witnesses contradicted the complainant's version that she had been dragged away from L[…]'s home against her will. They therefore confirmed the appellant's version on this aspect. Secondly, L[…] confirmed that the complainant was in a relationship with M[…], which also corroborated the appellant's version and contradicted her denial. Thirdly, the evidence of H[…], the complainant's current boyfriend as to what transpired at the appellant's house directly contradicted her version as to what had happened. He testified that he went to look for her at the appellant's home, but when he knocked on the window nobody responded. He then left. In contrast she testified that H[…] saw the appellant dragging her

2006 (2) SACR 582 (SCA)*; S v Kolea* 2013 (1) SACR 409 (SCA).

away and remonstrated with him, which he flatly denied. Finally, she testified that the appellant raped her several times throughout night. At the end of her evidence it was not clear how many times ─ on her version ─ she had been raped. At one point during her testimony she said that it had happened on three occasions; at another, she said that it had happened twice.

[8] I should add that the medical evidence, on which the court a quo relied heavily to support the conviction, showed no more than that sexual intercourse had taken place. There were, as in similar circumstances in most cases of this nature, no obvious injuries to corroborate the alleged rape. It follows that the court a quo misdirected itself in finding that the medical evidence provided corroboration for the rape.

[9] In the circumstances the appellant ought to have been found not guilty on this count. The state quite properly conceded before us that the conviction could not be sustained.

[10] In respect of count 2, it does not appear what charge was put to the appellant. There was no indictment or summary of substantial facts in the court record. As in count 1, it appears that the appellant was made to plead to a charge of rape in terms of s 51(1) of the Act without any reference to the circumstances sought to be proved in Part 1 of Schedule 2; the relevant provision for rape, namely para (b)(i) where the victim is alleged to be under 16 years of age. The judgment is silent on why a sentence of life imprisonment was imposed, but it is clear that this sentence was imposed because the judge assumed that the Act was applicable. The State conceded that a proper charge had not been put to the appellant, and the judge had misunderstood which provisions of the Act were applicable. In the circumstances we must approach the matter on the basis that the Act did not apply. I turn to consider the evidence.

[11] The complainant, who was almost 16 at the time of this incident, testified that she met the appellant at about 19h00 on 29 November 2008. It was not dark yet and she recognised him as someone she knew. She testified that the appellant grabbed her and took her to a nearby church where he

raped her. Thereafter he took her to his house where he raped her again. The appellant kept her in his house from 19h00 until the next morning, around 5h00.

[12] The appellant's version was, the complainant wrongly identified him as the perpetrator. He claimed to have been elsewhere at the time of the incident. The complainant and her brother were resolute in their identification of the appellant as the person who kidnapped and raped her that night. They both testified that they knew the appellant as they reside in the same area. The appellant did not dispute this. To my mind, this prior knowledge excludes every possibility of a mistaken identity.[4] It follows that the appellant's version was palpably false. He was therefore properly convicted on this count.

[13] The circumstances of the alleged rape resulted in the appellant being charged with two offences: rape and kidnapping. The state accepted that the conviction on the kidnapping count constituted a duplication of convictions. The concession was properly made and nothing further need be said about this count.

[14] Having come to the conclusion that the court a quo erred in sentencing the appellant to life imprisonment under the Act, it is now open to this court to consider sentence afresh. The appellant was 20 years of age at the time of the commission of the offence. He was an orphan. He was married in terms of customary law. He was temporarily employed at a carpentry workshop earning a salary of R1600 per month. To his discredit, he had a relatively long

[4]See *R v Dladla & others* 1962 (1) SA 307 (A) at 310B-E. Unlike in *S v Mthetwa* 1972 (3) SA 766 (A) and *S v Charzen & another* 2006 (2) SACR 143 (SCA), this case is not a case of total strangers in which one would have expected the witnesses to explain in detail the peculiar features with which they identified the appellant.

list of previous convictions ranging from assault to indecent assault.[5] He had attended school until grade 11. It was submitted on his behalf that he showed remorse. Based on his youthfulness, it was submitted that he was a good candidate for rehabilitation.

[15] It is trite that rape is not only a very serious offence but it is prevalent in this country. It is a humiliating, degrading and brutal invasion of the privacy, dignity and the person of the victim.[6] In this case the victim was a young girl of 15 years. She was raped twice by someone she knew and who lives in the same community.

[16] Regrettably, a Victim Impact Report was not obtained to assist the trial court in understanding the impact of the rape on the complainant. It is incumbent on the prosecution to secure such evidence to assist the court to assess the seriousness and impact of the offence on the victim. We can however, assume that the complainant suffered some trauma.

[17] The same holds true regarding the failure of the trial court to obtain a pre-sentencing report on the accused. No court should proceed to sentence a youthful person unless it has all the facts relevant to sentencing before it to enable it to decide on an appropriate sentence. The proper judicial approach to sentencing was enunciated as follows in *S v Siebert*:[7]

'Sentencing is a judicial function *sui generis*. It should not be governed by considerations based on notions akin to onus of proof. In this field of law, public interest requires the court to play a more active, inquisitorial role. The accused should not be sentenced unless and until all the facts and circumstances necessary for the responsible exercise of such discretion have been placed before the court.'

[18] However, it remains the court's primary duty to dispense justice, through imposing well balanced and appropriate sentences which will not only

[5] 2001-10-05, Assault, 30 days IMP; 2002-08-08, Assault, AOG R20.00; 2003-10-13, Indecent Assault, AOG R100.00; 2003-12-12, Robbery, 4 months' imprisonment;2004-07-21, Robbery, 6 months' imprisonment; 2005-06-17, Abuse of drugs, R1000,00 or 3 months' imprisonment; 2005-08-03, Assault, 6 months' imprisonment; 2006-12-14, Assault, 6 months' imprisonment.
[6] *S v Chapman* 1997 (3) SA 341 (SCA) at 344I-J.
[7] *S v Siebert* 1998 (1) SACR 554 (A) at 558i-559a; *S v Matyityi* 2011 (1) SACR 40 (SCA) para 15-17.

address the accused's favourable personal circumstances but will address the seriousness of the offence and take into consideration the interests of society which include the victim of the offence committed. Sexual assaults especially on the most vulnerable of our society, young children, have become endemic in our society. Our courts have a duty to send a clear message to society that the courts view such offences seriously and that they are willing and prepared to impose the kind of sentence which whilst serving as a deterrent both individual and general, will also serve to protect society against people who pose a serious threat to their well-being in society. As this court remarked in *S v N*:[8] 'Bearing in mind that a sentence does more than deal with a particular offender in respect of the crime of which he has been convicted – it constitutes a message to the society in which the offence occurred. The interests of society must thus also be taken into account. The sense of outrage justifiably roused by the offence of rape in the right thinking members of a South African society in which sexual violence is so endemic and shows no sign of abating, must . . . be a critical factor in the imposition of a suitable sentence . . ..'

[19] He has a long list of previous convictions which, on the face of it, shows a propensity for criminality. He had his first clash with the law at the tender age of 13 years. Amongst his previous convictions is one of indecent assault for which he was convicted when he was 14 years old. Nonetheless, it was wrong for the court a quo to look at the appellant's previous convictions and conclude therefrom that there were no prospects for his rehabilitation. There is no evidence to inform the court of his upbringing, his social and cultural background, his family structure and whether his upbringing had any influence on his susceptibility to crime and his anti-social behaviour and whether he would have been receptive to any rehabilitation program. What is clear is that he is still relatively young. He requires correction and rehabilitation, but not destruction,[9] lest he returns to the very society from which he comes more hardened and desensitised to living amongst law abiding citizens. Programs aimed at rehabilitation of young offenders may give him an opportunity to change his behaviour, especially that towards women.

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[8] *S v N* 2008 (2) SACR 135 (SCA) para 30.
[9] See *S v Phulwane & others* 2003 (1) SACR 631 (TPD).

[20] Although a sentence of life imprisonment is clearly inappropriate, a sentence of an exemplary term of imprisonment is nevertheless appropriate, taking into account the following aggravating factors. The complainant was well known to the appellant; he was older than her; he took her against her will and kept her away from the comfort and safety of her home and her parents for one night. Throughout the trial the appellant maintained his innocence and showed no remorse. It was only after his conviction that he claimed to be remorseful. It is in his interest as well as the broader society that he stays long enough in a correctional facility to allow correctional services to take him through all the required programs in a meaningful way to rehabilitate him. Short term imprisonment will have no such desired effect. Having considered all the facts relevant to sentence, I am of the view that a sentence of imprisonment of eight years is the most appropriate.

[21] In conclusion, it will be remiss of me to not refer to what this court stated in *S v Makatu*,[10] namely that regrettably there are many cases which have come to this court from Limpopo High Court with similar problems referred to above, with reference to the failure of the State to set out the provisions of the relevant section and circumstances, ie s 51(1) of the Act. Unfortunately this has resulted in accused persons not being fairly tried and appropriately punished for the crimes which they in fact have committed. This brings the administration of justice into disrepute and erodes public confidence in the criminal justice system. The prosecution must be meticulous in their preparation of charge sheets and indictments to avoid a recurrence of this kind of situation. A copy of this judgment shall be made available to the National Director of Public Prosecutions (NDPP) to deal with this problem through proper and advanced training of prosecutors who deal with these matters.

[22] In the result, the following order is granted:

1 The appeal in respect of the conviction on counts 1 and 3 is upheld.

2 The appeal in respect of the conviction on count 2 is dismissed.

3 The appeal in respect of the sentence on count 2 succeeds.

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[10] *S v Makatu* 2006 (2) SACR 582 (SCA).

4 The order of the trial court is set aside and the following order is substituted in its place:

‘(a) The accused is found not guilty on counts 1 and 3.

(b) The accused is found guilty on count 2.

(c) The accused is sentenced to 8 years’ imprisonment’.

5 The sentence referred to in para 4(c) above is antedated to 9 June 2010.

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B C MOCUMIE

ACTING JUDGE OF APPEAL

Appearances

For the Appellant:	L M Manzini (with him M P Legodi) Instructed by: Justice Centre, Polokwane Justice Centre, Bloemfontein
For the Respondent :	Ms S M Mahada Instructed by: The Director of Public Prosecutions, Thohoyandou The Director of Public Prosecutions, Bloemfontein