THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGEMENT

Case No: 828/13

In the matter between Not Reportable

P N **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Nekuvule v The State* (828/13) [2014] ZASCA 24 (27 March 2014)

Coram: **Navsa, Leach and Saldulker JJA**

Heard: **14 MARCH 2014**

Delivered: **27 MARCH 2014**

Summary: Rape – Sentence – No reference in the charge sheet to the prescribed minimum sentence in terms of Criminal Law Amendment Act 105 of 1997 – Provisions not brought to the attention of the unrepresented accused – sentences set aside.

ORDER

On appeal from: Limpopo High Court (Lukoto J sitting as court of first instance):

The following order is made:

1 The appeal against the sentence is upheld. The sentence of life imprisonment imposed by the court a quo on each of the two counts of rape is set aside and substituted with the following sentence:

'(a) On count one – the accused is sentenced to 20 years' imprisonment.

(b) On count two – the accused is sentenced to 20 years' imprisonment.

(c) Ten years of the sentence on count two are to run concurrently with the sentence on count one. The accused is sentenced to an effective 30 years' imprisonment.'

2 The sentence is antedated to 29 June 2001, in terms of s 282 of the Criminal Procedure Act 51 of 1977, being the date upon which the sentences were imposed.

JUDGMENT

SALDULKER JA (NAVSA and LEACH JJA concurring):

[1] This is an appeal directed against sentence only. On 26 April 2001, the appellant, Mr P N, was convicted in the regional court, Thohoyandou on two counts of rape of two young girls eight and ten years old, respectively. Following the conviction, the regional magistrate stopped the proceedings and

committed the appellant for sentencing by a high court in terms of s 52(1)(*b*)[1] of the Criminal Law Amendment Act 105 of 1997 (the Act).

[2] In the high court, Lukoto J confirmed the convictions of the appellant in terms of s 52(2)(*b*) of the Act, and sentenced the appellant to life imprisonment on each count, that being the prescribed minimum sentence in terms of the Act. These sentences were ordered to run concurrently. An application for leave to appeals against the conviction and sentences was refused. The appellant appeals against the sentences imposed with the leave of this court.

[3] Before turning to consider the propriety of the sentences imposed, I set out the background in brief. The appellant was charged with the rape of his biological daughter and her young friend, a neighbour. Before the trial commenced, the regional magistrate explained the right to legal representation to the appellant, and he chose to conduct his own defence. The appellant's daughter and her friend testified that the appellant had called them into his room, undressed himself and ordered them to also undress, and then raped them in turn. Thereafter he gave them money to buy sweets and warned them not to tell anyone about the incident. They reported the incident to members of their family, where after they were taken to hospital where a medical examination confirmed that they had been raped.

[4] After convicting the appellant, but before referring the matter to the high court, the regional magistrate recorded that he had omitted to inform the appellant of the minimum sentence provisions. He stated the following:

'It is imperative in terms of the case that an undefended accused be explained accordingly and I realise that I did not tell you at the beginning. AS A RESULT I DECIDED TO REMIT THIS MATTER FOR DIRECTIVES TO AND BY THE HIGH COURT.' (Emphasis in original.)

[1]This section was repealed on 31 December 2007 by section 2 of the Criminal Law (Sentencing) Amendment Act 38 of 2007.

[5] The high court did not consider the magistrate's failure to advise the appellant of the minimum sentence regime to be a problem, and went on to impose the minimum sentence as prescribed in Part I of Schedule 2[2] to the Act for the rape of the two young girls.

[6] In *S v Ndlovu* 2003 (1) SACR 331 (SCA) para 12, Mpati JA said the following:

'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.'(My emphasis.)

[7] The charge sheet did not refer to the minimum sentence provisions mentioned above. Neither the regional magistrate nor the State made any attempt during his trial to bring it to the appellant's attention. In addition, it should be borne in mind that the appellant was unrepresented, requiring greater care on the part of the State and the regional magistrate.

[8] Counsel for the State was constrained to concede that in the circumstances of this case the sentences fall to be set aside in a similar manner to that which occurred in *Ndlovu*.

[9] The appellant raped his own daughter and her little friend, which makes the acts in question all the more heinous. The acts committed by the

[2]Section 51(1) provides: 'Notwithstanding any other law, but subject to subsection (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 includes rape when committed '(*b*) where the victim- (i) is a person under the age of 16 years'.

appellant warrant lengthy terms of imprisonment, as reflected in the substituted order set out hereafter. It is necessary to record that the appellant has already spent about 13 years in prison. Counsel for both the appellant and the state were agreed that justice would be served by imposing a sentence of 20 years' imprisonment on each count, with 10 years' imprisonment on the second count being ordered to run concurrently. That seems to me to be a fair sentence given the circumstances of this case, and will be reflected in the order below.

[10] In the result, the following order is made:

1 The appeal against the sentence is upheld. The sentence of life imprisonment imposed by the court a quo on each of the two counts of rape is set aside and substituted with the following sentence:

'(a) On count one – the accused is sentenced to 20 years' imprisonment.

(b) On count two – the accused is sentenced to 20 years' imprisonment.

(c) Ten years of the sentence on count two are to run concurrently with the sentence on count one. The accused is sentenced to an effective 30 years' imprisonment.'

2 The sentence is antedated to 29 June 2001, in terms of s 282 of the Criminal Procedure Act 51 of 1977, being the date upon which the sentences were imposed.

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HK SALDULKER

JUDGE OF APPEAL

APPEARANCES

For appellant: M J Manwadu

Thohoyandou Justice Centre

For respondent: RJ Makhera
Office of the Director of Public Prosecutions,
Thohoyandou