s[1]

IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES**
Of Interest to other Judges:	**YES**
Circulate to Magistrates:	**YES**
To NDPP	**YES**

Case number: A212/2018

In the appeal between:

THABO SHADRACK NYAKU Appellant

and

THE STATE Respondent

HEARD ON: 5 NOVEMBER 2018

CORAM: LOUBSER, J *et* OPPERMAN, J

DELIVERED ON: 22 NOVEMBER 2018

JUDGEMENT BY: OPPERMAN, J

THE CONTEXT OF THE APPEAL

[1] The appeal is against a sentence of life imprisonment for multiple-rape. The appellant was charged of rape in terms of section 51(2)(b) of **the Criminal Law Amendment Act, Act 105 of 1997**.[1] The appellant stood as sole accused since his co-perpetrator had not been apprehended at the time the trial commenced. He pleaded not guilty and denied all the allegations against him. He was

[1]CLA. All references will be to the CLA except if otherwise indicated.

convicted of rape in terms of section 51(1) after section 86 of the **Criminal Procedure Act 51 of 1977**[2] was applied before conviction.

[2] The crux of the appeal lies between "that charged of", being section 51(2)(b)[3] and "that convicted of," section 51(1).[4] The difference in sentence on the facts of this case is a minimum of fifteen years as opposed to life imprisonment.

[3] The overarching issue is whether section 86 of the CPA was properly applied in the sense that the accused realised the consequence of a different, harsher, minimum sentence and did not suffer prejudice. It revolves around section 86 of

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[2] CPA.

[3] Section 51(2)(b)

Notwithstanding any other law but subject to subsections (3) and (6), a Regional Court or a High Court shall sentence a person who has been convicted of an offence referred to in—

Part III of Schedule 2, in the case of—

(i) a first offender, to imprisonment for a period not less than 10 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years;

PART III

Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively in circumstances other than those referred to in Part I.

[4] Section 51(1) of the Act provides:

(1) 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 CPA and the dictum that developed in service of section 35[5] read with section 36[6] of the **Constitution of the Republic of South Africa**, **1996**.[7]

[4] The Mahlase-dilemma (See paragraph 5) also came to the fore in the form of the *maxim stare decisis et non quite movere* (Stare decisis-rule)[8] and must be addressed. This court as well as the Regional Court are bound to follow the Mahlase-judgement since it stems from the Supreme Court of Appeal. The question is whether the Regional Court had the requisite jurisdiction to convict and sentence the appellant in terms of section 51(1) to life imprisonment since the appellant stood as sole accused before the court.

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[5]Section 35(3) 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;
(b) to have adequate time and facilities to prepare a defence;
(c) to a public trial before an ordinary court;
(d) to have their trial begin and conclude without unreasonable delay;
(e) to be present when being tried;
(f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
(i) to adduce and challenge evidence;
(j) not to be compelled to give self-incriminating evidence;
(k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
(l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
of appeal to, or review by, a higher court.

[6] Section 36. Limitation of rights.
1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.
(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

[7] The Constitution.

[8]Malcolm Wallis, Judge of the Supreme Court of Appeal: Whose decisis must we stare? 2018 SALJ 1-17.

[5] In **Mahlase v S** (255/13) [2013] ZASCA 191 (29 November 2013) at [9] the Supreme Court of Appeal took the view that an accused convicted of rape in the multiple-rape circumstances as envisaged in Part 2, could not receive the mandatory minimum sentence of life imprisonment if at his trial as sole accused his co-perpetrators or accomplices had as yet not been apprehended and convicted.

THE COMMON CAUSE FACTS OF THE CASE

[6] On the date of the incident the complainant was on her way home with her two-year-old baby on her back. It was about eleven o`clock in the evening. She came from a friend that she helped with preparation of food for a child`s party the next day. She does not consume alcohol and did not that evening. Whilst fixing the towel around her body that she used to carry the child two “boys” accosted her.

[7] The one had a panga and the other a knife. They first wanted money and her cellphone. When she could not comply, they took the child, put him on the ground and covered him with a blanket that she carried. They both proceeded to rape her, the one after the other. They also took her cellphone.

[8] A police vehicle drove by and the perpetrators left the scene. She ran back to her friend’s place. After hearing her screams, they came out to assist her. The record of the evidence of the friend portrays the trauma of the complainant:

Did she tell you what happened to her? --- yes, she told me she was raped.

What else did she tell you? --- she said to me in this day we have so many diseases and then I indicated to her that in the name of Jesus she would not get infected or she would not get sick.

She did receive treatment and it was later revealed that she was not HIV-positive. She also moved to another town to be close to her family because she does not want to live alone anymore. Her marriage suffered later and she was severely traumatised. She did not sustain any injuries apart from the rape.

[9] The appellant amazed when he started his evidence in chief with a confession to the rape of the complainant in terms of section 51(1). It went, amongst others, as follows:

> She also testified that she alleges that you are one of the people that raped her. --- That is true. That is true that you raped her? Or she made those allegations? --- That is true that I have raped her.
>
> Further:
>
> Sir, do you agree with the complainant that on that day you were not alone when you raped her? You were with a friend or a companion who also raped her? --- Yes, I agree with that.[9]

[10] During cross examination the prosecutor confronted the appellant with DNA results that connected him without any doubt as a person that had sexual intercourse with the complainant. He explained that he denied the rape initially because he was ashamed. The prosecutor contributed the change of heart to the fact that the appellant saw the DNA results.[10]

[11] The charge was summarily amended after no objection raised by the legal representative of the appellant on invitation of the magistrate. The conduct of the legal representative during the proceedings convinced the court that she was satisfied that the appellant understood the consequences.

[12] The appellant was convicted in terms of section 51(1). The presiding officer found that:

> In light of the developments in this case that the accused had noted on the evidence that they were two when the complainant was raped, and in terms of, now the charges are amended to read that he is charged in terms of section 51(1).

[13] The record of the proceedings in the court *a quo* refers to a “gang rape” on the first appearance. Page iv of the record shows that: “The charge and minimum sentence applicable explained to him & he understands.” Page iii of the record refers to “a minimum sentence of life.” It is not clear from the record in the

[9] Record on page 51, line 13 to page 52 line 15.

[10] The DNA results that were handed in during cross-examination of the appellant is dated 9 March 2018. It can be safely assumed that the prosecutor did not have it available before the end of the State`s case. See page 121 of the record.

District Court whether the implications of sections 51(1) and 51(2)(b) were explained to the appellant. The charge sheet did however make specific mention of the sections and the Act and it explained the minimum sentences. The appellant was represented by Legal Aid since 26 June 2017; his second appearance in the Distrct Court already.[11]

[14] Copies of the content of the docket were supplied to the defence. They did know the facts of the case against the appellant well before trial commenced. The defence used the statement of the complainant to cross examine her.[12]

[15] The facts as the case evolved show that the appellant did take proper cognisance of the impact of section 51(1). The law of section 86 and the regime of minimum sentencing related thereto, needs elaboration.

SECTION 86 OF THE CPA AND MINIMUM SENTENCING

[16] Section 86 of the CPA speaks for itself:

> 86(1) Where a charge is defective for the want of any essential averment therein, or where there appears to be any variance between the averment in a charge and the evidence adduced in proof of such averment, or where it appears that words or particulars that ought to have been inserted in the charge have been omitted therefrom, or where any words or particulars that ought to have been omitted from the charge have been inserted therein, or where there is any other error in the charge, the court may, at any time before judgment, if it considers that the making of the relevant amendment will not prejudice the accused in his defence, order that the charge, whether it discloses an offence or not, be amended, so far as it is necessary, both in that part thereof where the defect, variance, omission, insertion or error occurs and in any other part thereof which it may become necessary to amend.
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> (2) The amendment may be made on such terms as to an adjournment of the proceedings as the court may deem fit.
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> (3) Upon the amendment of the charge in accordance with the order of the court, the trial shall proceed at the appointed time upon the amended charge in the same manner and with the same consequences as if it had been originally in its amended form.
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> (4) The fact that a charge is not amended as provided in this section, shall not, unless the court refuses to allow the amendment, affect the validity of the proceedings thereunder.

[11] Pages 102-103 of the record.
[12] See page 29 of the record.

[17] The court in **Ndlovu v S** (CCT174/16) [2017] ZACC 19; 2017 (10) BCLR 1286 (CC); 2017 (2) SACR 305 (CC) (15 June 2017) provided the following basic principle:

> [w]here the State intends relying 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. (Accentuation added)

[18] In **Kolea v S** 2013 (1) SACR 409 (SCA) the court held as follows:

> Thus, the question that should be posed should be the following: Did the appellant have a fair trial and, more specifically, was the appellant sufficiently apprised of the charge he or she was facing, and was he or she informed, in good time, of any likelihood of his or her being subjected to any enhanced punishment in terms of the applicable legislation.

[19] When a statutory offence is proffered against an accused the charge sheet should mention the heavier sanctions provided for in Act 105 of 1997 (**S v Ndlovu and Another** 1999 (2) SACR 645 (W) at 649f-650b).

[20] The question is whether the accused received a fair trial (**S v Legoa** 2003 (1) SACR 13 (SCA) pars [20]-[22] ; **Kolea v S** 2013 (1) SACR 409 (SCA), where the majority decision in **Mashinini and Another v S** 2012 (1) SACR 604 (SCA) was not approved). There is no rule that failure to warn the accused automatically constitutes substantial and compelling circumstances. The enquiry is whether in the particular circumstances there has been an unfair trial. (**S v Setshedi** 2017 (1) SACR 504 (GP) par [60]).

[21] In **S v Legoa** 2003(1) SACR 13 (SCA) at pars [20]-[22] Cameron JA observed that:

> Under the common law it was '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.

THE MAHLASE-DICTUM

[22] Apparently, the prosecutor formulated the charge based on the Mahlase-judgment. Argument of counsel for the State during the hearing of the appeal confirms this inference. The arguments proffered by counsel for the State and the appellant before us claim that the appellant must be sentenced in terms of the Mahlase-case and the court *a quo* misdirected herself in not following the precedent. They held that this court is also bound as such.

[23] The Mahlase-dictum is, with all due respect, wrong but precedent as was declared in **S v Cock; S v Manuel**[13] 2015 (2) SACR 115 (ECG). Pickering J (Plasket and Smith JJ concurring) found, and we agree, this approach to be illogical and artificial because it disregards the requirement that a court must sentence an accused on the basis of the facts found proved (at [26]):

> The Mahlase dictum . . . gives rise, with respect, to the illogical situation that a trial court, having found beyond reasonable doubt that the complainant was raped more than once by two men and having convicted the accused accordingly, must, for purposes of the Act, disregard that finding and proceed to sentence the accused on the basis that it was not in fact proven that she was raped more than once; that the provisions of the Act relating to the imposition of the prescribed minimum sentence of life imprisonment are therefore not applicable; and that the minimum sentence applicable in terms of the Act is one of only ten years imprisonment.

[24] Application of the Mahlase-dictum will be bizarre on the facts of this case. The crime and guilt of the appellant is common cause. Apart from the fact that the

[13] Pickering-judgement.

evidence against the appellant after the close of the State`s case was strong[14] he is also connected with DNA and admitted the multiple-rape. The appellant is a self-admitted member of a gang.

THE APPELLANT

[25] The appellant held in mitigation that he is 20 years old and live with his mother. During his grade 9 year in school he became involved in gangs. He described how he was forced into gangsterism. He also worked on farms as a seasonal worker. The compelling and substantial factors that he forwarded were that he was young, they did not plan the crime, it happened on the spur of the moment, he is working and want to continue to help his mother. He has been in custody for eight months awaiting trial. He could not explain why he committed the crime but apologised to the complainant. He will assist the police to apprehend the other perpetrator.

[26] The appellant has a previous conviction of rape which was committed on 23 November 2011 and wherefor he was convicted on 7 November 2012. He was sentenced to thirty-six months correctional supervision. The detail of the offence and conviction is not known to this court; whether it was, for instance, in terms of section 51(1) or 51(2)(b) or any other provisions in terms of the CLA.

[27] The remorse of the appellant is doubtful. He could have pleaded guilty from the start. He sat through the evidence of three witnesses for the State. He witnessed the misery of the complainant in the witness doc. He appeared for the first time on 19 June 2017 and only changed his mind on 9 March 2018. He realised the odds were stacked against him and that he had to endeavour to win the sympathy of the court. He cannot explain why he committed the heinous crime. There is no insight whatsoever in his regret except the insight

[14] Record page 77, line 7 – 18.

that a plea of guilty might sway the court to a shorter sentence. In **Matyityi v S** 2011 (1) SACR 40 (SCA) at par 13, Ponnan JA stated as follows:

> There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus, genuine contrition can only come from an appreciation and acknowledgment of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in Court that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined.

[28] The application of section 86 cannot be questioned. The appellant did not suffer prejudice in any way. He was the architect of the road the case took.

[29] The magistrate, in a well-considered judgement,[15] could not find circumstances that will justify imposing a lesser sentence than life imprisonment. Her finding was proper and effective.

[30] As Ponnan JA said in his minority judgment in **S v Mashinini** 2012 (1) SACR 604 (SCA):

> I have been at pains to stress, as enjoined by the authorities to which I have referred, that a fair-trial enquiry does not occur in vacuo, but that it is first and foremost a fact-based enquiry. And, as I have already stated any conclusion as may be arrived at requires a vigilant examination of all the relevant circumstances.

CONCLUSION

[31] In conclusion:

31.1 The appellant committed an atrocious crime by being a participant in the multiple-rape of a young mother in front of her two-year-old child. The evidence is that not only the complainant, but also the child suffered severe trauma. The ease and coldblooded manner in which the perpetrators acted indicates a mentality that rape is for nothing.

[15] Record page 73 – 81.

They came upon the woman, decided to rape her, raped her and then walked away. They did come prepared with a panga and a knife. The appellant put the complainant through the trauma of a trial and cross examination wherein the veracity of her evidence was attacked. She was emotionally violated again. Gang rapes are an institution and definitely part and parcel of gangsterism. Gang members protects each other and it happens often that all the perpetrators cannot be put on trial and this frustrates justice. The Mahlase-dictum plays right into their hands.

31.2 This case is an almost mirror image of **Ndlovu v S** 2017 (10) BCLR1286 (CC), 2017 (2) SACR 305 (CC). Much contributed to the perfect storm that caused a sham of justice. The crime that was perpetrated was heinous and revolting. The appellant “deserves” the sentence of life imprisonment that was imposed but democracy involves more. It decrees a fair trial. In the Ndlovu-matter the complainant was seriously injured but the charge was not in accordance. Further did the magistrate not invoke section 86 of the CPA. The court mentioned that if this was done the picture would have been different and they could have sentenced accordingly. The Regional Court cannot sentence outside of the section convicted off. The issue is jurisdiction. In the matter *in casu* the court had the jurisdiction but is tripped by the Mahlase-dictum. The court could only convict in terms of section 51(2)(b) and sentence accordingly.

31.3 The failure of justice happens in the fact that this court and the Regional Court is bound by the Mahlase-dictum that decreed that if all of the perpetrators do not stand trial at once, section 51(1) cannot be invoked or applied.

31.4 The amendment of the charge was proper and effective and cannot be faulted. However, the conviction must remain to be section 51(2)(b) in accordance with the doctrine of precedent.

31.5 I would apply the inherent jurisdiction of this court to sentencing. The minimum prescribed is 15 years. The interest of justice and the community of this country; the appellant included, deserves a sentence of life imprisonment.

31.6 I am obliged to apply the Pickering-judgment as solution:

> 36. The prescribed minimum sentence is one of 10 years' imprisonment. Such a sentence, in the circumstances of this case, where the complainant was subjected to the utterly humiliating and terrifying ordeal of a gang rape would be wholly inappropriate. In the exercise of our common law jurisdiction, we are free to impose any sentence in excess of that minimum sentence. When we exercise this jurisdiction, we are not bound by Mahlase supra and its interpretation of the Act. Mr. Meyer submitted that a sentence of 20 years imprisonment would be appropriate. I am of the view, however, having regard to all the circumstances, including the fact that the complainant was gang-raped, that the only appropriate sentence is that of life imprisonment.

31.7 We are forced to deem the conviction to be one in terms of section 51(2)(b) but we are not prevented from confirmation of the sentence, albeit for different reasons.

ORDER

[32] I would order that:

1. The appeal against sentence is dismissed.

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M. OPPERMAN, J

I concur, and it is so ordered.

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P.J. LOUBSER, J

On behalf of the appellant:	Adv. Van der Merwe Instructed by: Justice Centre BLOEMFONTEIN
On behalf of the respondent:	Adv. M. Lencoe Instructed by: Office of the Director of Public Prosecutions BLOEMFONTEIN