S v Nyaku 2020 (2) SACR 102 (FB)

KEY CONCEPTS	
Life imprisonment	Multiple rape
Sentencing in gang rape	Trauma
Regret and remorse	Trauma of testifying

FACTS: The complainant was on her way home with her 2-year-old baby on her back. It was about 11 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. While she was fixing the towel around her body that she used to carry the child, two 'boys' accosted her. The one had a panga and the other a knife. They first wanted money and her cell phone. When she could not comply, they took the child, put him on the ground and covered him with the blanket that she carried. They then both proceeded to rape her, the one after the other. They also took her cell phone. A police vehicle drove by and the perpetrators left the scene. She ran back to her friend's place. After hearing her screams, the occupants came out to assist her.

The DNA results revealed that the applicant had had sexual intercourse with the complainant. Initially the applicant pleaded not guilty to the charges and denied it, but at the beginning of his evidence-in-chief he confessed that he had raped the complainant and that his companion had also done so. He said that he had initially lied, because he was ashamed but the prosecutor put it to him that he had changed his evidence because he had become aware of the DNA evidence.

ISSUE: The applicant appealed against the sentence of life imprisonment imposed by the regional court for multiple rape. He was originally charged in terms of s 51(2)(b) of the Criminal Law Amendment Act 105 of 1997 (CPA), but the charge was summarily amended to one in terms of s 51(1) of the Act when the appellant confessed to the rape in his evidence and testified that his companion had also raped the complainant.

The crux of the issue is that in terms of s51(2)(b) the sentence would be one of a minimum of 15 years, while in terms of s51(1) a life sentence could be imposed. The applicant was sentenced to life imprisonment.

DISCUSSION:

Amendment of charge and its implications for sentencing

According to s86 of the CPA, a court can amend a charge at any time before judgement where the accused does not suffer prejudice. In addition, where the State intends to rely upon the sentencing regime created by the Act, a fair trial will generally demand that this 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.

Although under the common law it is desirable that the chargesheet should set out the facts the State intends to prove in order to bring the accused within an enhanced sentencing jurisdiction,. It was not, however, essential. The Constitutional Court has emphasised that under the new it was not essential. The criterion is whether the accused has had a fair trial. In this instance, the magistrate explained the consequences t the accused, it was clear he understood and he was represented by legal aid.

The Mahlase [2011] ZASCA 191 dictum

The prosecutor formulated the charge based on the Mahlase judgment and the appellant argued that he must be sentenced in terms of the Mahlase case and that the court a quo misdirected herself in not following the precedent. They held that this court is also bound as such.

In present appeal, the court came to the conclusion that the Mahlase dictum was wrong and the approach was illogical and artificial because it disregards the requirement that a court must sentence an accused on the basis of the facts found proved. :

> "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."

The court found further that the application of the Mahlase dictum would be bizarre on the facts of this case. The crime and guilt of the appellant are common cause. Apart from the fact that the evidence against the appellant after the close of the state's case was strong, he is also connected by DNA and admitted the multiple rape. The appellant is a self-admitted member of a gang.

Sentencing of applicant

The court took into account the following factors:

- the appellant is a self-admitted member of a gang;
- he is 20 years old and lived with his mother;
- he became involved with gangs in his grade 9 year at school and was forced into gangsterism
- he worked on farms as a seasonal worker
- he has a previous conviction for rape

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 wants 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.

The appeal court found the remorse of the appellant to be 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 box. 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 to his regret, except the insight that a plea of guilty might sway the court to a shorter sentence. In S v Matyityi 2011 (1) SACR 40 (SCA) ([2010] 2 All SA 424; [2010] ZASCA 127) para 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 acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at 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."

The appellant committed an atrocious crime by being a participant in the multiple rape of a young mother in front of her 2-year-old child. The evidence is that not only the complainant, but also the child, suffered severe trauma. The ease and cold-blooded manner in which the perpetrators acted indicates a mentality that rape costs for nothing. They came upon the woman, decided to rape her, raped her and then walked away. They 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 protect each other and it happens often that all the perpetrators cannot be put on trial, and this frustrates justice.

As far as the trauma experienced by the complainant was concerned:

- she was fearful that she may have become HIV positive and had to undergo treatment
- 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.

The court applied the inherent jurisdiction of the court to sentencing. The minimum prescribed was 15 years. The interests of justice and the community of this country, the appellant included, deserved a sentence of life imprisonment. The court referred to the sentencing in the Pickering judgment (S v Cock; S v Manuel13 2015 (2) SACR 115 (ECG)):

> "The prescribed minimum sentence is one of ten 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."

FINDING:

> "The appellant committed an atrocious crime by being a participant in the multiple rape of a young mother in front of her 2-year-old child. The evidence is that not only the complainant, but also the child, suffered severe trauma. The ease and cold-blooded manner in which the perpetrators acted indicates a mentality that rape costs for nothing. They came upon the woman, decided to rape her, raped her and then walked away. They 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 protect each other and it happens often that all the perpetrators cannot be put on trial, and this frustrates justice."

The regional court cannot sentence outside of the section convicted off. The issue is one of jurisdiction. In the matter in casu the court had the jurisdiction, but is tripped up by the Mahlase dictum. The court could only convict in terms of s 51(2)(b) and sentence accordingly.

The court found that the failure of justice lies in the fact that this court and the regional court are bound by the Mahlase dictum that decreed that, if all of the perpetrators do not stand trial at once, s 51(1) cannot be invoked or applied.

The amendment of the charge was proper and effective and cannot be faulted. However, the conviction remains one in terms of s 51(2)(b), in accordance with the doctrine of precedent. But the court applied the inherent jurisdiction of this court to sentencing. The minimum prescribed is 15 years. The interests of justice and the community of this country, the appellant included, deserve a sentence of life imprisonment.