THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 157/12
Reportable

In the matter between:

JAN OOMPIE KOLEA **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Jan Oompie Kolea v The State* (157/12) [2010] ZASCA 199 (30 November 2012)

Coram: MPATI P, MTHIYANE DP, BRAND and SHONGWE JJA and MBHA AJA

Heard: 07 November 2012

Delivered: 30 November 2012

Summary: Criminal Procedure – appeal – conviction and sentence – charge of rape with reference to the Criminal Law Amendment Act 105 of 1997 – s 51(2) erroneously referred to instead of s 51(1) – whether this was an irregularity which vitiated the sentence proceedings.

ORDER

On appeal from: Free State High Court, Bloemfontein (Musi JP, Jordaan J and Murray AJ sitting as Full Court):

The appeal against both conviction and sentence is dismissed.

JUDGMENT

MBHA AJA (MPATI P, MTHIYANE DP, BRAND and SHONGWE JJA concurring):

[1] The appellant was convicted by the regional court Kroonstad, on one count of rape. Thereafter the matter was referred to the Free State High Court, Bloemfontein, where Moloi J confirmed the conviction and imposed a sentence of 15 years' imprisonment. On appeal against both conviction and sentence to the Full Court, the matter came before Musi JP, Jordaan J and Murray AJ, who confirmed the conviction and increased the appellant's sentence to one of life imprisonment. The further appeal against both conviction and sentence, is with the special leave of this court.

[2] The main issue in this appeal is whether, on a charge of rape, a sentencing court is precluded from imposing a life sentence – or from referring the matter to a higher court for consideration of that sentence – solely on the basis that the charge sheet refers to s 51(2) instead of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Act). The issue arises in circumstances where the evidence established that the victim was raped more than once by more than one person. It arises because s 51(2) of

the Act provides for the imposition of a minimum sentence of 10 year's imprisonment in respect of a first offender while s 51(1) prescribes a minimum sentence of life imprisonment.

[3] The appellant was originally charged in the regional court, Kroonstad with one count of rape, read with the provisions of s 51(2) of the Act. He pleaded not guilty but after hearing evidence, the magistrate convicted him as charged. In convicting the appellant, the magistrate accepted the complainant's evidence that she was raped more than once by both the appellant and a co-perpetrator who managed to evade arrest.

[4] After convicting the appellant, the magistrate informed him that as he was liable to be sentenced to life imprisonment, which sentence was beyond the jurisdiction of the court, he was accordingly transferring the matter to the high court in terms of s 52 of the Act. Hence the matter came before Moloi J who, having found that there were substantial and compelling circumstances present justifying a departure from the sentence of life imprisonment prescribed by s 51(1) of the Act, sentenced the appellant to 15 years' imprisonment. He subsequently granted the appellant leave to appeal to the Full Court against the conviction and the sentence. The Full Court dismissed the appellant's appeal against conviction, and upheld the respondent's cross appeal which was based on the contention that there were no substantial and compelling circumstances, present. It accordingly sentenced the appellant to life imprisonment in terms of s 51(1) of the Act.

[5] Section 51(1), (2) and (3) of the Act provide that:

'(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.

(2) 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–

(a) Part II of Schedule 2, in the case of–

(i) a first offender, to imprisonment for a period not less than 15 years;

. . .

(b) Part III of Schedule 2, in the case of–

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

. . .

(c) Part IV of Schedule 2, in the case of–

(i) a first offender, to imprisonment for a period not less than 5 years;

. . .

(3)*(a)* If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to in Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.'

Part I of Schedule 2 includes:

'Rape . . .–

(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;

. . .'

Part III of Schedule 2 provides: 'Rape. . . in circumstances other than those referred to in Part I'.

[6] In this court it was contended on behalf of the appellant that as he was charged and convicted under s 51(2) of the Act, it was not thereafter open to the respondent to invoke a completely different sub-section, ie s 51(1), which provides for a more severe sentence. It was contended further that the regional court was competent to impose a sentence in terms of s 51(2) of the Act, read with Part III of Schedule 2, and had no authority to refer the matter to the high court for sentencing. Counsel for the appellant

submitted that the referral and the invocation of the provisions of s 51(1) constituted an irregularity which was so gross and so unfair that it vitiated the proceedings, with the consequence that the sentence should be set aside and substituted with a sentence under s 51(2), which is 10 years' imprisonment.

[7] The accused's right to be informed of the charge he is facing, and which must contain sufficient detail to enable him or her to answer it, is underpinned by s 35(3)*(a)* of the Constitution, which provides that every accused person has a right to a fair trial. The objective is not only to avoid a trial by ambush, but also to enable the accused to prepare adequately for the trial and to decide, inter alia, whether or not to engage legal representation, how to plead to the charge and which witnesses to call. It follows that if the State intends to rely on the minimum sentencing regime created in the Act, this should be brought to the attention of the accused at the outset of the trial. The question which must be answered though, is what does sufficient detail in the charge entail.

[8] In *S v Legoa*,[1] Cameron JA held that under the common law it was desirable, but not essential, that the charge sheet should set out the facts the State intended to prove in order to bring the accused within a minimum sentencing jurisdiction. Referring to the Bill of Rights, he said that one of the specific rights referred to therein is to be informed of the charge with sufficient detail so as to enable an accused to answer to it. Although Cameron JA did not elaborate on what this exactly meant, he emphasised that, under the current constitutional dispensation it could be no less desirable than under the common law that the facts which the State intended to rely on for an increased sentence under the Act, should be clearly set out in the charge sheet. Significantly, his expressed view was that the matter was one of substance and not form. He was therefore reluctant to lay down a general rule that the charge sheet must

[1] *S v Legoa* 2003 (1) SACR 13 (SCA).

in every case recite either the specific form of the scheduled offence, or the facts the State intended to prove to invoke a particular provision of the Act.

[9] In *S v Seleke*[2] (referred to by Cameron JA) it was held that although it was desirable for a charge to contain a reference to a penalty, this was not essential, and that the ultimate test was whether the accused had had a fair trial. And the presence of prejudice to the accused will point to an unfair trial. 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. This of necessity, entails a fact based enquiry into the entire proceedings of the trial.

[10] Mpati JA, in *S v Ndlovu*[3] endorsed this approach, stating:

'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'.

The court, however, left open the question whether, or in what circumstances, it might suffice if the charge and its possible consequences were brought to the attention of the accused during the course of the trial. What is clear, however, is that the court never expressly ruled as improper or irregular the fact that possible consequences of an offence were never spelt out to the accused at the commencement of the trial. As Ponnan JA recently said in his minority judgment in *S v Mashinini*:[4]

'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

[2] *S v Seleke* 1976 (1) SA 675 (T).
[3] *S v Ndlovu* 2003 (1) SACR 331 (SCA) para 12.
[4] *S v Mashinini* 2012 (1) SACR 604 (SCA) para 51.

already stated any conclusion as may be arrived at requires a vigilant examination of all the relevant circumstances.'

[11] In this case, the State's intention to rely on and invoke the minimum sentencing provisions was made clear from the outset. The charge sheet expressly recorded that the appellant was charged with the offence of rape, read together with the provisions of s 51(2) of the Act. I am accordingly satisfied that the appellant, who was legally represented throughout the trial, well knew of the charge he had to meet and that the State intended to rely on the minimum sentencing regime created in the Act.

[12] On advising the appellant that his case was being referred to the high court for sentencing, the magistrate stated:

'In die lig daarvan dat die klaagster deur meer as een persoon verkrag is, is die hof van oordeel dat die hof nie oor die regsbevoegdheid beskik om die beskuldigde te vonnis nie, aangesien'n vonnis van lewenslank oorweeg moet word. In terme van artikel 52, Wet 105 van 1997 word die saak dan oorgeplaas vir vonnisdoeleindes na die hooggeregshof.'

Significantly, there was no objection to the fact that the matter was now being transferred to the high court and to the prospect of a sentence of life imprisonment being imposed on the appellant as provided for in s 51(1) – and not s 51(2) – of the Act.

[13] Before Moloi J, and subsequently before the Full Court, there was no objection to the indictment or the summary of substantial facts. On the contrary, the appellant's counsel readily conceded, in both courts and without demur, that the appellant had been properly convicted.

[14] During the entire process up to the time the Full Court dismissed the appellant's appeal against conviction; upheld the respondent's cross-appeal; and imposed life imprisonment on the appellant in terms of s 51(1) of the Act, there was never any

complaint by the appellant that he was in any way prejudiced in the conduct of the proceedings. Furthermore, he pleaded not guilty to the charge and fully participated in the trial. In the end, he was convicted in accordance with the evidence that was led in relation to the charge of rape. It has not been demonstrated that the appellant would have acted differently, had the mistake not been made in the charge sheet.

[15] In argument before us, the appellant's counsel conceded that the complaint based on the proposition that the appellant was sentenced under the wrong section was raised for the first time in this court. He also conceded that the complaint was inspired by the judgment of the majority in *S v Mashinini* (supra), the rationale of which I now turn to consider. The facts of that case were briefly that the two appellants and their two co-perpetrators were charged in the regional court with rape, read with the provisions of s 51(2) of the Act. They pleaded guilty to the charge but in their separate statements made in terms of s 112(2) of the Criminal Procedure Act 51 of 1977, they admitted that all four of them had raped the complainant. After they were convicted, their case was transferred to the high court which, after confirming the convictions, sentenced each one of them to life imprisonment. On appeal, the majority (per Mhlantla JA, with Bosielo JA concurring), set aside the sentence of life imprisonment imposed on the appellants, and substituted it with a sentence of 10 years' imprisonment.

[16] In upholding the appeal against sentence, the majority found that (a) in terms of s 51(2) read with Part III of Schedule 2 of the Act, which provides for a minimum sentence to be imposed for rape of the aggravated kind provided for in Part I of Schedule 2, the appellants, who were first offenders, were liable to be sentenced to a maximum sentence of 10 years' imprisonment; (b) the appellants were originally charged under s 51(2) but were incorrectly and unfairly sentenced under s 51(1) and for an offence different to the one for which they were convicted, and (c) as the State had decided to restrict itself to s 51(2) when formulating the charge sheet, it was not

thereafter open to it to invoke a different section for the purpose of sentence unless it had sought and obtained an amendment to the charge sheet in terms of section 86 of the Criminal Procedure Act.

[17] In my view the majority, with respect, misread the provisions of s 51(2). The term of 10 years' imprisonment referred to therein is the minimum sentence that can be imposed. This means that any sentence in excess of 10 years' imprisonment, and possibly even life imprisonment, could be imposed by a court having jurisdiction to do so. Furthermore, the fact that a statute provides for an increased sentence with reference to a particular type of offence when committed under particular circumstances does not mean that a different offence has been created thereby. In *S v Moloto,* Rumpff CJ[5] held that, where an accused is charged with robbery committed with aggravating circumstances, this did not create a new category of robbery but simply meant that the court had a discretion, where such aggravating circumstances existed, to impose the increased sentence in terms of s 277(1)*(c)* of the Criminal Procedure Act, in that case the death penalty. The fact that the Act specifies penalties in respect of certain offences (in this case rape, where more than one person raped the victim), does not in any way mean that a new type of offence has been created. Rape remains rape, but the Act provides for a more severe sanction where, for example, the victim has been raped more than once or by more than one person.

[18] Section 86(4) of the Criminal Procedure Act provides that 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. A reading of this section establishes that a formal application to amend a charge sheet is not always required. The fact that the charge sheet had a defect which was never rectified in terms of s 86(1), as was the case both in *Mashinini* and in this case, did not of its own render the

[5] *S v Moloto* 1982 (1) SA 844 (A) at 850.

proceedings invalid.[6] The test is always whether or not the accused suffered any prejudice.

[19] A close investigation of the circumstances in *Mashinini* reveals that s 51(2) of the Act was erroneously typed instead of s 51(1) of the Act; that the appellants were correctly apprised of the applicability of the increased penalty provisions of the Act; that they pleaded guilty to a charge involving multiple rape which, in any event, is not even applicable to s 51(2); that they never complained of, nor showed that they had suffered, any prejudice; and that they participated fully in the trial. In view of what I have said above, I believe that the appellants in that case were not in any way prejudiced by the erroneous reference to s 51(2) instead of s 51(1) in the charge sheet. I am therefore satisfied that the conclusion at which the majority arrived in *Mashinini* was clearly wrong.

[20] Finally, it must always be borne in mind that the concept of fairness connotes fairness to both the accused and the complainant or the public as represented by the State. As the Constitutional Court pointedly remarked in *S v Jaipal*:[7] 'The right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the State. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime.'

[21] I now turn to consider the appeal against conviction in this case. Although in the heads of argument it was contended that the identification of the appellant by the complainant was in dispute, this aspect was not seriously pursued during argument. The complainant testified that she was attacked by the appellant, a person well known

[6] E du Toit, F J de Jager, A Paizes, A S Skeen and S van der Merwe *Commentary on the Criminal Procedure Act* at 14-21.
[7] *S v Jaipal* 2005 (1) SACR 215 (CC), para 29

to her, and his co-perpetrator. The area around where the perpetrators attacked and grabbed her was well lit; so she was able to have a good look at the appellant's face. They dragged her to an open veld where they took turns to rape her. After raping her in the veld, the perpetrators forced her to accompany them. When they arrived at a certain shack, which she knew was where the appellant resided, they again took turns to rape her. She testified further that during this ordeal, there was a knock on the door of the main house and later the shack. The appellant went outside to speak to the people who were knocking and they turned out to be her daughter and the latter's friends who had come there to look for her. The appellant lied to them saying that she was not there and they went away. Upon his return to the shack, the appellant told his co-perpetrator that as there were people looking for her, they had to let her go. They then escorted her half way to her home.

[22] In his testimony, the appellant confirmed that during the said evening the complainant's daughter and her friends did arrive at his shack looking for the complainant. However, he denied that the complainant ever came to his shack. In my view, the complainant's version finds corroboration in the appellant's testimony particularly with regard to what transpired when there was a knock at the door of the appellant's shack. This proves that she was indeed with the appellant and his co-perpetrator in his shack during the night in question. In argument, appellant's counsel conceded that the complainant was able to properly identify the appellant while inside the shack as, inter alia, the electric light inside was on.

[23] It being undisputed that the complainant was raped that evening, I do not have the slightest hesitation to find that the appellant was positively identified as the person who, together with a co-perpetrator, took turns to rape her. The Full Court correctly dismissed the appellant's appeal against conviction.

[24] Regarding the sentence, the Full Court correctly found that Moloi J erred in

finding that there were substantial and compelling circumstances in this case without specifically recording the factors relied upon for such a finding as is required by s 51(3) of the Act. That sub-section stipulates that where the court finds that substantial and compelling circumstances are present, these must be entered into the record of the proceedings. Moloi J never indicated in his judgment what those circumstances were.

[25] The Full Court considered the appellant's personal circumstances, namely, that he was 23 years old and still young, that he had been employed and earned R1200 per month, and that although he had previous convictions, they were all more than 10 years old and none involved rape. However, it correctly found that there were aggravating circumstances in the case, namely, that the complainant, a 48 year old woman, was raped by the two men who each raped her more than once; that she was dragged through the night to a veld and later forced to accompany them to the appellant's shack; that she was threatened with death; that she continuously pleaded with her assailants to spare her life as she had young children; and that she was a widow. In addition, when the complainant's daughter and her friends came to the appellant's shack looking for her, the appellant deviously misled them by saying she was not there when he knew that the complainant was inside his shack. The entire ordeal traumatised her and also adversely affected her relationship with men. The Full Court also noted that the appellant had not shown any remorse whatsoever.

[26] I find that the Full Court correctly upheld the respondent's cross-appeal and properly imposed life imprisonment on the appellant, and that the entire appeal falls to be dismissed.

[27] In the circumstances I make the following order:
The appeal against both conviction and sentence is dismissed.

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BH Mbha

Acting Judge of Appeal

APPEARANCES

For Appellant:	PW Nel
	Instructed by:
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For Respondent:	JHS Hiemstra
	Instructed by:
	Director of Public Prosecutions, Bloemfontein