

SOUTH AFRICA / JUDGMENT

Diseko v S (A600/2017) [2019] ZAGPPHC 1010 (12 December 2019) [2019] ZAGPPHC 1010

COURT

North Gauteng High Court, Pretoria

BEFORE

Makhubele, N.V Khumalo

CASE / FILE NUMBER

A600/2017

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE

NO: A600/2017

12/12/2019

In

the matter between:

MOKGETHI
KENNY
DISEKO
Appellant
and
THE
STATE
Respondent

JUDGMENT

MAKHUBELE J

Introduction

- [1] The appellant, Mokgethi Kenny Oiseko, then a 23-year-old male, was arraigned for trial at the Regional Magistrate Court, Klerksdorp, on one count of rape and one of robbery with aggravating circumstances.
- [2] In Count 1, it was alleged that the appellant contravened "the provisions of Section 3 read with Sections 1, 56, 57, 58, 59, , 60 and 61 of the Sexual Offences (Act 32 I 2007) (read with sections 92(2). 256, 257 and 281 of the Criminal Procedure Act 51/ 1977 and the provisions of Sections 51(1) or
- (2) and Schedule 2 Act 105 of 1997, as amended by the Criminal Law Amendment Act 38 of 2007 in that on or about 04/09/2011 and at or near Jourberton in the District Regional Division of North West, the said accused did unlawfully and intentionally commit an act of sexual penetration with the complainant to wit, M[....] T[....] by having sexual intercourse without the consent of the said complainant."
- [2.1] The charge sheet also stated that 'section 51(1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended is applicable in that : complainant was raped by more than one person'.
- [3] In count 2, it was alleged that the appellant 'is guilty of the crime of Robbery with aggravating circumstances (read with the provisions of Section 51(2) of the Criminal Law Amendment Act 105 of 1997)' in that on the same date and place as in Count 1, he "did unlawfully and intentionally assault M[....] T[....] and did then and with force take the following items from him/her, to wit 1 x cellular phone his/her lawful possession, aggravating circumstances being accused used knives'.
- [4] The appellant was found guilty on both counts on 30 May 2017. He was sentenced to life imprisonment and fifteen (15) years in respect of count 1 and count 2 respectively. In terms of section 280(2) of the Act both sentences were ordered to run concurrently. He was also declared unfit to possess a firearm.
- [5] It appears from the record that the appellant was legally represented throughout the trial. It is also evident that he had a fair trial in that he was advised of the consequences of the prescribed minimum sentencing regime at the time when the charges were put to him.
- [6] This is an automatic appeal in respect of both conviction and sentence.

The plea, admissions and documentary evidence

- [7] With regard to count 1, the appellant admitted that he did have sexual intercourse with the complainant, but not on the date and place mentioned in the charge sheet. According to him, the correct date is 03 September 2011 and it took place at his parental place.
- [8] He maintained that the sexual intercourse was consensual and that they were the only parties who participated in the act.
- [9] He denied the allegations with regard to count 2.
- [10] He admitted that he was linked to the alleged rape by DNA evidence. He also admitted the chain evidence with regard to the taking of DNA samples, its preservation and investigations. He also admitted the forensic analysis report as contained in the affidavit in terms of Section 212 of the Act.
- [11] The findings of the DNA investigations were read into the record and the affidavit was handed in as an exhibit.

[11.1] The results of the examination are reflected in Table 1, which indicate that an analysis was done on the samples of 'Cervical and vaginal vault swabs (10D1AC6407XX Tsholohelo MJ and the reference sample (10DBAB8141XX Diseko Mokgethi)').

[11.2] The findings are indicated as follows:

'4.1 The DNA result of the Cervical and Vaginal Vault swabs (10D1AC6407XX Tsholohelo MJ matches the DNA result of the reference sample (10DBAB8141XX Diseko Mokgethi)'; and

4.1.1 The most conservative occurrence for the DNA result from the Cervical and Vaginal Vault swabs (10D1AC6407XX Tsholohelo M") is 1 in 210 billion people'

[12] The photo album depicting the classroom was also admitted and handed in as an exhibit.

[13] The J88 form was also accepted into the record as an exhibit. The findings noted by the examining doctor were read into the record. Some of the findings included red, tender and bruised clitoris, urethral orifice and labia majora. The posterior fourchette had tears and was bleeding. The hymen was a swollen and fresh tear. The vagina could admit one finger, was bleeding and had tears. She also had 'semen-like' discharge.

The conclusions are recorded as follows;

"clinical evidence in keeping with recent forceful vaginal penetration by penis (due to pressure of semen like discharge in vaginal vault) against resistance"

The relevant facts

[14] The appellant was convicted on the following factual matrix:

[14.1] At about 17:00 on 04 September 2011, the complainant, and her friend, one Maletsebele, left their parental homes to attend a street festival in Klerksdorp town. It is an annual entertainment event.

[14.2] They were refused entry because they were carrying bags.

[14.3] They left and went to a local pub called 'Good Fellows' where they enjoyed themselves and consumed Hunters Extreme, an alcoholic beverage.

[14.4] The pair lost contact with each other at the pub. The complainant described it as a 'disappearance' of her friend. Maletetebele telephoned the complainant and informed her that she was already at home.

[14.5] The complainant took a taxi to Maletetebele's home. There were people in the taxi but she did not know anyone of them.

[14.6] She alighted near Mafathlhusi Secondary School and walked through a pathway (passage) and when she was halfway, four young men that she recognized as passengers in the taxi that she alighted from came and grabbed her. Before she could scream, they placed knives on her neck. Two of them held both her arms. Two walked in front. They made her to jump a fallen fence and they entered the school premises, and took her into one of the classrooms.

[14.7] One of the men tore the buttons of her blouse and undressed her. She remained with her bra only.

[14.8] They placed her on the floor, on her back. One of them opened her thighs and tried to penetrate her vagina with his penis. He succeeded in penetrating her and made up and down movements. She gave up because she was scared of them and there was no one to help her.

[14.9] The second, and third man also had forceful sexual intercourse with her whilst she was still on her back. Thereafter, the fourth man took her and placed her on top of the table and tried to penetrate her from behind, but his penis could not go inside her vagina. He finally succeeded and proceeded to have intercourse with her.

[14.10] She had a phone inside the pocket of her trousers (a jean). The four men searched her and took it. It was a LG KS 63 valued at R600.00.

[14.11] She does not know the appellant or anyone of his companions and will not be able to identify them.

[14.12] The appellant and his companions left her at the school. She then put her clothes on and proceeded to her friend's house. She knocked but there was no one. The friend's sister who was at the next house came and gave her the key. She opened the house and slept.

[14.13] She reported the rape to her friend's sister, who then took her to her house and reported to her mother. Her mother took her to the police station. She was taken to the doctor for examination. Vaginal swabs were also taken.

[14.14] She denied prior knowledge of the appellant or being with him at a block party near his house on 03 September 2011 or going with him to his parents' house and ta have had sexual intercourse with him. She denied that she stayed overnight after she fell asleep or that he accompanied her to her house the next morning and left her in a nearby street.

[14.15] Her mother's testimony was restricted to confirmation of the state of her clothing when the friend's sister brought her home and that she slept at home on 03 September 2011.

[14.16] She also denied the appellant's contentions that they had agreed to meet later that evening at the street festival or that she knew his parents' house.

[15] The evidence of Seipati Molefe (the sister of the complainant's friend) differed with the complainant's with regard to what transpired when she came to their house. According to Seipati, the following transpired:

[15.1] Complainant and her sister left for the street festival at 17:00 on 04 September 2011, but neither one of them came back that night until at about 06:00 when she heard a knock at the door and when she enquired as to who it was, the complainant answered that it was her.

[15.2] When she opened, she saw that the complainant was crying and her cheekbones had turned pink which is according to her a sign that she was angry.

[15.3] She also noticed that the complainant had worn her trousers inside out and there were some blood spots. She was walking normally though.

[15.4] She let her inside the house and asked what was happening. The complainant did not answer but tears were streaming down her cheeks. She told her that four unknown young men raped her at Mafathlhusi School. She also told her that she and her friend separated at the street festival.

[15.5] She took a taxi with the complainant to her home. Her sister arrived at that point and she also travelled with them. The complainant cried the whole time as they were traveling to her home. When they arrived at complainant's home they found her mother and grandmother. She then made a report to them about what she had been told by the complainant .

[15.6] Under cross-examination Seipati denied the complainant's version that she was not at home but at the neighbor's house. She has a boyfriend at the next house but she was sleeping at her own home where she stays with her younger sister when the complainant knocked at 06:00.

[16] The appellant's version came out after much prodding during his evidence in chief as he gave vague information about what actually happened. Pieced together, his evidence was that;

[16.1] He met the complainant for the first time at the block party (street bash) that preceded the street festival. There were many people and the complainant was seated with two girls from his neighborhood that he knew.

[16.2] They had brief introductions and went back to sit with the people they were with.

[16.3] The complainant wanted a jersey and he offered to get her one from his parental place but when they got there , the jersey issue was abandoned. They switched on the television, had a conversation and they decided to sleep. The other version is that after the party they proceeded to his parental place to sleep. They got in the blankets and had sexual intercourse. The

idea of sleeping over and having sexual intercourse came from him. The complainant's reaction was 'Just fine', she 'appeared just normal, there was no problem'.

[16.4] He was already inside his blankets when he suggested that she sleeps over and sexual intercourse . The complainant was still watching television. She ended up joining him. They had a long conversation and ended up having sexual intercourse.

[16.5] In the morning she told him that she wanted to go to 'Down Section', but changed her mind about it and went to her friend's place at section 14. He accompanied her there and turned back at the corner house.

[16.6] She gave him her telephone numbers and they agreed that she was going to call him to meet up again.

[16.7] He denied raping her or being part of the four young men that she alleged raped her. The reason his DNA was found in her private parts is because he had sex with her and she consented to it.

[17] Under cross examination, the appellant testified that he told the complainant that he loved her when they met at the street bash, and she told him that she loved him too. He maintained that there was nothing odd with them continuing to sit with their friends separately after this love declaration. They agreed to continue the conversation after the party. They met as they moved around and that is when the complainant told him that she was cold and needed a jersey. Then they went to his place. His parents were asleep in a separate RDP house. He slept with the complainant in the shack.

[17.1] They were kissing when he stopped to ask her if they could have sexual intercourse. He could see that she wanted to, but he wanted to be certain.

[18] He never saw the complainant again. He tried to call her number but it was always off. He knew her name to be N[....] and only heard in court that her real name is M[....].

[19] He could not explain why it took long for the police to arrest him if complainant knew him and his house because according to him, police officers went to his parental house looking for him a year later, on 05 October 2012 and left a message that he should come to the police station. When he arrived, they told him that there is a lady who alleged that he had slept with her. They requested to take his blood samples, which they did. They did not arrest him on that day, but months later after they had obtained DNA tests results.

[20] He denied the allegations with regard to count 2.

Reasons for conviction and sentence

[21] The conviction on the rape charge was preceded by the following remarks:

'Exhibit C which is the form JBB which was compiled by Dr Lala indicates massive injuries, the genital injuries, massive vaginal injuries and she concluded that they are in keeping with forceful vaginal penetration. Clearly it shows as the complainant indicated or testified that she was raped by more than one person if you look at the injuries there.

Therefore I am satisfied that based on the totality of the evidence tendered the person who raped the complainant on that day and the fourth was you together with other persons who are not in court today.

Furthermore the injuries sustained exclude that she consented. THEREFORE WITH REGARD TO COUNT 1 I FIND YOU GUILTY AS CHARGED

[22] The Magistrate did not analyze the evidence or give reasons for the conviction on the robbery charge. All he said was the following:

'COUNT 2 AS WELL I FIND YOU GUILTY AS CHARGED. YOU AND YOUR FRIENDS IN CRIME YOU DID THE SAME THING TO RAPE AND SHE TESTIFIED THAT ONE OF THOSE PERSONS REMOVE HER CELL PHONE. I AM SATISFIED OR WHAT HAPPENED IF IT IS NOT YOU WHO REMOVED THE CELLPHONE ONE OF YOUR FRIENDS DID IT AND YOU HAD THE COMMON PURPOSE. YOU ARE ACCORDINGLY ALSO FOUND GUILTY AS CHARGED COUNT 2'

[23] The reasons for the sentence imposed in respect of both charges appear from a reading of the following paragraphs in the record:

'What is worrying here, we believe the complainant, he was raped by four men, thanks to the DNA at least you are year (sic) before the Court. Where are those? Are they still busy raping members of the community? So the sentence the Court must impose(d) must be such that it sends a clear message even to your friends wherever they are hiding that raping woman would not be tolerated.

However having considered your personal circumstances, the interest of the society, the seriousness of the offense I find that there are no substantial and compelling circumstances to deviate from the prescribed minimum sentence with regard to both counts.

THEREFORE IN TERMS OF SECTION 51 IT IS COUNT 1, 51 SUBSECTION 1 OF ACT 105/1997 YOU ARE SENTENCED TO UNDERGO LIFE IMPRISONMENT. SECONDLY COUNT 2 IN TERMS OF SECTION 51 SUBSECTION 2 OF ACT 105/1997 YOU ARE SENTENCED TO UNDERGO FIFTEEN YEARS IMPRISONMENT'

Grounds of appeal

[24] On the rape conviction, the appellant contends that the State did not prove beyond reasonable doubt that the complainant was gang-raped in order to invoke the provisions of Section 51(1) of Criminal Law Amendment Act 105 of 1997 which attracts a minimum term of life imprisonment.

[24.1] The DNA report does not corroborate the complaint's version that four men raped her because there is no indication of evidence of the other foreign DNA in her vaginal specimen. The evidence of a DNA expert, who was not called to testify, should have addressed this issue.

[25] There are contradictions in the evidence of the State with regard to the events of the morning after the rape, which coupled her conduct after cast a serious doubt as to whether she was raped. On her own version, she did not go home but to her friend's place where she obtained a key and slept. She only reported the rape in the morning.

[26] The appellant's version that the sexual intercourse was consensual should have been accepted.

[27] The conviction on the robbery charge is attacked on the following basis:

[27.1] The complainant did not explain how she was robbed of her cellphone. It was in her pocket but she did not see how it was taken.

[27.2] It is possible that the phone fell whilst she was being dragged to the school and one of the four men took it.

[27.3] The State did not prove common purpose on the part of the four men to rob the complainant of her phone.

[27.4] The Magistrate convicted the appellant on the robbery charge on the basis of circumstantial evidence (DNA link)

relating to the rape charge.

[28] The sentence imposed is attacked on the following grounds:

[28.1] The Magistrate approached the sentence with vengeance, over-emphasized the seriousness of the offence and

sacrificed the appellants for the other suspects who were not arrested.

[28.2] The life imprisonment is harsh and induces a sense of shock. The Magistrate did not properly evaluate the appellant's

personal circumstances.

[28.3] The Magistrate did not consider rehabilitation of the appellant.

Whether there is any misdirection in the convictions

Ad rape charge

- [29] The appellant was linked to the offence by results of DNA tests. He admitted having had sexual intercourse with the complainant a day before the alleged commission of the offence. The main issues that were placed in contention are whether she consented to the sexual intercourse and whether other males participated in the act.
- [30] The State had at its disposal DNA evidence, which should have closed the lid on the appellant's contentions that he was the only one who had sexual intercourse with the complainant.
- [31] The findings relating to rape by four men is the critical issue in this appeal because it automatically triggers the minimum sentencing regime in terms of section 51 (1) read with Part 1 of Schedule 2 of the Act.
- [32] During argument, and in response to a question regarding the presence of other foreign DNA in the complainant's vaginal specimen, Counsel for the State sought to introduce evidence in the form of a letter from the Forensic Laboratory addressed to SAPS, which reads, amongst others as follows:
- "3.1 Mixture DNA was obtained from the exhibits (FSC-1232480).
- 3.2 The laboratory requests that the reference samples of any further suspects be forwarded for comparison as soon as possible".
- [33] The submission in this regard was that this proves that the complainant was not only raped by the appellant whose DNA was analyzed as reference sample.
- [34] The problem with this submission is that this evidence was not presented before the Magistrate and he clearly did not consider it. It is a covering letter transmitting the section 212 affidavit. This affidavit was accepted into the record.
- [35] The letter itself was not accepted as an exhibit. The second problem is that the exhibit number indicated in paragraph 3.1 of this letter does not match any of the DNA exhibits. The complainant's vaginal swabs were taken by the examining doctor and was given a seal number which is the same as the one indicated in the DNA report. The last problem in this regard is that the appellant's admissions relate to the presence of his own DNA. The report itself does not talk about the presence of other foreign DNA.
- This issue should have been properly ventilated in the trial court.
- [36] It is clear though from the evidence that the complainant was consistent about the number of people that raped her. This appears from the evidence of the first report that she made as well as the report to the medical doctor who examined her.

- [37] The appellant's version that the complainant consented to the sexual intercourse is so far-fetched and unbelievable. His explanation on how he ended up having sex with the complainant was not firm as I have stated above. He threw in a bit of information in general terms and only elaborated when he was pressed for specific details. It is clear from the appellant's own version that the complainant did not consent to the sexual intercourse.
- [38] The alleged contradictions in the state's case relate to the circumstances under which the first report of the incident of rape was made. In my view, even if there are contradictions they are immaterial. The principles in this regard established in the instructive case of *S V Mafaladiso and others* 2003 (1) SACR 583 (SCA) that has been followed in many subsequent cases.
- [39] Accordingly, there is no misdirection on the conviction in the rape charge. The only remaining question is whether the State has proved that she was raped by four men. I will address this under the heading of the relevant provisions in the Act.

Ad robbery charge

- [40] The Magistrate did not elaborate on his finding that there was common purpose to rob the complainant of her phone. According to the complainant, her cellphone was inside the pocket of the trousers that she was wearing. The four men searched her and took it. This is all that she testified about on the robbery charge.
- [41] There are many questions arising from her evidence. She was wearing what she referred to as a 'Jean'. There are many possibilities arising from this. It could be that one of the men, particularly the one that undressed her took the phone. It is also possible that it fell and one of them took it.
- [42] Counsel for the appellant referred the court to the requirements for common purpose, particularly the principles laid down in the well known case of *State v Mgedezi and Another* 1989 (1) SA 687 (A). Although the appellant was present, it has not been proven that he was aware that the cellphone was taken from the complainant's pocket by any one of his co-perpetrators, that he shared the common purpose to take that phone, associated himself with the conduct of whoever removed the phone or that he intended to deprive the complainant of her phone.
- [43] Consequently, there has been misdirection with regard to the conviction in count 2 on the basis of common purpose. The conviction in count 2 is set aside.

Whether there are misdirection on the sentence imposed in count 1 (rape)

- [44] As I have indicated above, a finding that the complainant was raped by four men triggers the application of the minimum sentencing regime in terms of section 51 of the Criminal Law Amendment Act 105 of 1997 (the Act) which is titled 'Discretionary minimum sentences for certain serious offences'

[45] Section 51 (1) reads as follows:

"Notwithstanding any other Jaw, 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. "

[46] Section 51(3) reads as follows:

'(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 Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.

(a A) When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

(i) The complainant's previous sexual history;

(ii) an apparent lack of physical injury to the complainant;

(iii) an accused person's cultural or religious beliefs about rape; or

(iv) any relationship between the accused person and the complainant prior to the offence being committed.

[47] Rape is included in Part 1 Schedule 2 and the relevant part reads as follows:

'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;

(iii) by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions; or

(v) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus; “

- [48] It is clear from a reading of the above provisions that although the penal jurisdiction has been increased, the presiding officer is still seized with a discretion in terms of section 51(3) (a) to impose a lesser sentence if he is satisfied that there are substantial and compelling circumstances.
- [49] The controversy with regard to the proper application of section 51(1) read with Schedule 2 arose after the judgment of Tshiqi JA in the Supreme Court of Appeal matter of *Mahlase v State*[1] wherein it was ruled that the section can only be invoked if the alleged co-perpetrators have been convicted.
- [50] In paragraph 9, the learned Judge of Appeal stated the following:
- [9] The second misdirection pertained to the sentence imposed for the rape conviction. The court correctly bemoaned the fact that Ms D M was apparently raped more than once and in front of her colleagues. The learned judge however overlooked the fact that because accused 2 and 6, who were implicated by Mr. Mahlangu, were not before the trial court and had not yet been convicted of the rape, it cannot be held that the rape fell within the provisions of Part 1 Schedule 2 of the Criminal Law Amendment Act (where the victim is raped more than once) as the high court found that it did. It follows that the minimum sentence for rape was not applicable to the rape conviction and the sentence of life imprisonment must be set aside".
- [51] Reading subsequent lower courts judgments, it is clear that this dictum has upset a long standing wealth of authorities on the sentencing of accused persons in the so-called 'gang-rape' offences. It has evoked much controversy and criticisms from lower courts, with some following it begrudgingly and others seeking reasons to deviate from it.
- [52] The following passages from the judgment of Pickering J in the appeals of *Cock v S*, *Manuel v S*[2] illustrate the point I have made above.
15. So-called gang rapes are, regrettably, an all too frequent occurrence in this Division and, judging from reports of cases emanating from other Divisions, throughout South Africa as well. In my experience it also regrettably often happens that only one person accused of having been involved in a gang rape is apprehended and in due course convicted accordingly.
- It has, to the best of my knowledge, never been doubted that an accused convicted of having raped a complainant in such circumstances is liable to be sentenced to the mandatory minimum sentence of life imprisonment in terms of s 51 (1) of the Act despite the fact that at the time of his trial none of the alleged co-perpetrators had yet been apprehended and convicted.
26. A trial court is obliged to sentence an accused who appears before it on the basis of the

facts which it found to have been proven when convicting the accused. The Mahlase dictum, however, 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.

27. I do not understand on what basis the credible and cogent evidence of the complainant that she was raped by two men, one of whom was identified as being the accused, should be disregarded, not only to the prejudice of the victim and of the State, but also, by way of contrast, to the benefit of the accused on the arbitrary basis that he happened to be the first of the gang to have been arrested and convicted.

28. This in itself gives rise to the anomalous situation that, whereas the first accused to be convicted and sentenced (the appellant Cock in this matter) is liable to a minimum prescribed sentence of only ten years imprisonment, any other accused who is thereafter convicted as having been part of the gang which raped the complainant, (the appellant Manuel in this matter) would be liable to the prescribed minimum sentence of life imprisonment, it now having been established in terms of Mahlase supra that complainant had indeed been raped more than once, by two men.

30. Despite what I have said above, we are, however, bound by *S v Mahlase supra*.

[53] The anomaly that Pickering J referred to in his judgment played out in reality because the court had to consider the appeals of two accused persons who were tried and convicted separately for the same rape. The court proceeded to set aside the sentence on the first convicted appellant on the basis of the Mahlase dictum, but held that minimum sentencing regime was applicable on the second convicted appellant. It however exercised its common law discretion with regard to the first convicted appellant and sentenced him to a life imprisonment term.

[54] The full court in the matter of *Khanye V S*[3] acknowledged that it was bound by Mahlase judgment, however, it refused to follow it on the basis that it was equally bound by an earlier decision of the SCA in the matter of *Sv Legoa* on the application of the minimum sentencing regime.

In this regard, Carelse J, writing for the full court stated the following:

'[28] Although Mahlase binds this court, S v Legoa[12] equally binds this court and continues to be referred to with approval by the Supreme Court of Appeal. S v Legoa was never considered by Pickering J in Cock v S, Thompson AJ in S v Nkosinathi Standford Mejeni and the Supreme Court of Appeal in S v Mahlase. I have no doubt that had Legoa been considered, it may have resulted in a different finding'. (footnote omitted)

[55] Further reasons for not following the Mahlase judgment appear from the following passages in Carelse J's judgment:

[31] The appeal at hand is further distinguishable from Mahlase on the basis that the latter dealt only with the issue of sentence whereas the conviction and sentence is challenged in this appeal. An anomaly arises in Mahlase, viz that the appellant was convicted by the court a quo of rape by more than one person in terms of section 51(1) of the Act, but the sentence that was imposed was in terms of section 51(2) of the Act. In the present matter the conviction includes the finding by the court a quo that the complainant was raped more than once by three men, including the appellant which was based on the evidence led at the trial.

[32] The ratio of Legoa is that once the jurisdictional facts have been proved, a court is obliged to impose the prescribed sentence unless substantial and compelling circumstances are found to exist. Once it is proved at the trial that an accused is guilty of an offence in terms of which the complainant was raped more than once whether by the accused or by more than one person, the application of the minimum sentencing provisions is triggered.

[56] The majority judgment in the recent Kwazulu Natal High Court decision in the matter of Ndlovu v S[4] did not consider whether Mahlase was decided wrongly. It was accepted that as a decision of a higher authority, it had binding effect on lower courts. Although the appeal turned on a different point of law, Ploos Van Arnstel J criticized the full court judgment of Carelse J in the Khanye matter.

[11] It seems to me, with respect, that there is a flaw in the reasoning in Khanye. The effect of Mahlase is that it cannot be said that the victim had been raped by more than one person unless both of them have been convicted. Put differently, unless both have been convicted the jurisdictional facts required to trigger the application of Part I have not been proved. It is no answer to say, as Khanye seems to say, that on the basis of Legoa the prescribed minimum sentence has to be imposed when the relevant jurisdictional facts have been proved, and that therefore Mahlase does not have to be followed. This begs the question of what constitutes such proof. According to Mahlase it is the conviction of both.

[12] Counsel for the State submitted before us that the decision in Mahlase is wrong. We are not concerned

with whether or not this is so. It is a judgment of the Supreme Court of Appeal and we are bound by it.[9] The courts in *S v Cock*; *S v Manuel*. and *Nyaku v S*[10] also considered themselves bound by it. In the latter case it appears that the court, as in *Khanye*, overlooked the fact that it was dealing with an appeal from a regional court. When it found that on the basis of *Mahlase* the prescribed minimum sentence of life imprisonment did not apply, it could not impose a sentence in excess of what the regional court could have imposed."

[57] Radebe J wrote a dissenting judgment (on sentence) and had this to say about *Mahlase* dictum:

'[68] It is clear from the submissions on sentence made by the parties in the court a quo that the regional magistrate was not referred to the *Mahlase* judgment and as such he did not consider it in his judgment on sentence. He relied on s 51(1) as it stands in the statute book. I must, with the utmost respect say at this juncture that I find myself puzzled by the reasoning of the Supreme Court of Appeal in *Mahlase*. A consideration of the provisions of s 51(1) do not seem, with respect to provide room for the condition that for this section to find application the perpetrators of a gang rape must all be before the trial court and also be convicted of rape. The section makes the imposition of life imprisonment peremptory pursuant to a conviction of "a person" in the relevant categories of offences dealt with in terms of this section'.

[58] An appeal against conviction means that the appeal court is entitled to consider whether the State has proved the jurisdictional factors that would bring an offence within the meaning of section 51 (1) of the Act before conviction of the accused person. An appeal against sentence means that the appeal court is only entitled to enquire whether the presiding Magistrate or trial court has properly considered the provisions of section 51(3)(a), namely, recording the existence or non-existence of any substantial and compelling circumstances that would entitle him to impose a lesser sentence than the prescribed minimum.

[59] In the matter of *Kekana v The State*[5] , Makgoka JA re-iterated the correct application of the increased penal jurisdiction in terms of section 51(1) of the Act.

[22] There is another reason why the suggestion that the court's power to consider the prescribed minimum

sentence in terms of s 51(1) can be ousted simply by mere reference to s 51(2) in a plea explanation, is untenable. The provisions of the CLAA do not create different or new offences, but are relevant to sentence. Thus, murder remains murder, as a substantive charge, irrespective of whether s 51(1) or s 51(2) applies. Simply put, there is no such charge as 'murder in terms of s 51(1) or s 51(2)' . It follows that there can never be a plea to such a non- existent charge.

[23] As Cameron JA explained in *S v Legoa* 2003 (1) SACR 13 (SCA) para 18, with reference to Rumpff CJ's observations in *S v Moloto* 1982 (1) SA844(A)at850C-D:

'It is correct that, in specifying an enhanced penal jurisdiction for particular forms of an existing offence, the legislature does not create a new type of offence. Thus, "robbery with aggravating circumstances" is not a new offence. The offences scheduled in the minimum sentencing

legislation are likewise not new offences. They are but specific forms of existing offences, and when their commission is proved in the form specified in the Schedule, the sentencing court acquires an enhanced penalty jurisdiction. It acquires that jurisdiction, however, only if the evidence regarding all the elements of the form of the scheduled offence is led before verdict on guilt or innocence, and the trial court finds that all the elements specified in the Schedule are present. (As pointed out earlier, it is different when the element specified in the Schedule relates not to the offence, but to the person of the accused, such as rape when committed "(iii) by a person who has been convicted of two or more offences of rape, but has not yet been sentenced in respect of such convictions".)' (Footnotes omitted.)

[24] When viewed in this light, the purpose of reading a particular charge with the provisions of the CLAA is essentially two-fold. First, to alert the accused of the applicability of the prescribed minimum sentence. Second, to afford the accused an opportunity to place facts before the court on which a deviation from the prescribed sentence would be justified, nothing more. It follows therefore that a plea to a particular charge 'in terms of s 51(2)' without stating the facts why that sub-section, and not s 51 (1), should be applicable, is a misnomer, and a mere surplusage. Its acceptance by the State has no bearing on the courts' power to consider an appropriate sentence on the charge to which an accused has been convicted of.

[25] Although considered in the context of a concession by the State, I consider analogous, the approach of this court in *S v Nedzamba* [2013] ZASCA 69; 2013 (2) SACR 333 (SCA). The appellant had been charged with rape. The indictment made no reference to the provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. It was argued on appeal that the appellant had been charged with the common law offence of rape when it had been abolished by the Act and that consequently the convictions and related sentences had to be set aside. The State conceded the point advanced on behalf of the appellant. Declining to be bound by the State's concession, this court made an observation that the concession was made 'without careful reflection' and pointed out to the obvious 'absurd consequences that would follow'. (Paragraphs 8 and 9).

[26] The sum total of the above observations is this. Where an accused is charged with an offence subject to or read with s 51(1) of the CLAA, and he or she wishes that, for purpose of sentence, s 51(2), instead of s 51(1), should be applicable, he or she must place facts before the court, why that should be the position. This is irrespective of whether he pleads guilty or not guilty. If he pleads guilty, and tenders a written statement in terms of s 112(2) of the CPA, those facts must clearly and pertinently appear in that statement.

[60] The Regional Magistrate in the matter before us did not consider the Mahlase dictum. Counsel appearing for the both parties were also not aware of it, although it was submitted on behalf of the appellant as I have stated above that the State had not proved that the rape count fell within the ambit of section 51(1) which attracts a life imprisonment term.

[61] The parties were afforded an opportunity to file supplementary heads of argument and address the question of whether this court should follow Mahlase or deviate from it. Counsel for the State obliged, but no additional heads of argument were received from the counsel for the appellant. After referring to most of the cases that I have addressed above, Counsel for the State argued that this court should not follow Mahlase dictum.

[62] Until the Supreme Court of Appeal clarifies the position, lower courts will continue to criticise one another's decisions to either follow or deviate from the Mahlase dictum.

[63] It is unfortunate that whilst dealing with misdirections committed during sentencing, the learned Judge of Appeal also expressed a view on the merits of the conviction, which was not being challenged. This appears from paragraphs

[6] and [9] which read as follows:

"[6] During sentencing the trial court committed two material misdirections that justify interference by this court."

[9] The second misdirection pertained to the sentence imposed for the

rape conviction. The court correctly bemoaned the fact that Ms D M was apparently raped more than once and in front of her colleagues.

The learned judge however overlooked the fact that because accused 2 and 6, who were implicated by Mr. Mahlangu, were not before the trial court and had not yet been convicted of the rape, it cannot be held that the rape fell within the provisions of Part 1 Schedule 2 of the Criminal Law Amendment Act (where the victim is raped more than once) as the high court found that it did. It follows that the minimum sentence for rape was not applicable to the rape conviction and the sentence of life imprisonment must be set aside.

[64] I agree with the sentiments expressed by the learned Judge of Appeal that for the rape to fall within the ambit of Part 1 of Schedule 2 of the Act, the co-perpetrators must also be convicted. This makes sense because it is possible that any number of persons can stand trial together for the same offence and not all of them be convicted.

[65] In my view, the questions arising from this raise issues of fair trial and constitutionality of section 51 (1). We are not concerned with this, and until the higher courts give clarity, the dictum is binding. It is also necessary to address standard of proof required for the triggering of the courts' increased penal jurisdiction, because the reality, in most cases, is that only one person out of a group of suspects often stand trial for gang rapes

[66] Accordingly, under the circumstances, the finding by the Magistrate that the rape fell within the ambit of section 51(1) was a misdirection. The conviction remains that of rape. The only difference is the prescribed minimum sentence, which is ten (10) years, and not life imprisonment. I will address the sentence hereunder.

Sentence

[67] It is trite that the appeal court can only interfere with the discretion of the lower courts to impose sentences only if :

[67.1] There was an irregularity during the trial or sentencing of an accused person.

[67.2] The lower court misdirected itself in respect of the imposition of the sentence.

[67.3] The sentence imposed court could be described as disturbingly or shockingly inappropriate.¹

[68] In the matter before us, the misdirection relate to the fact that the appellant was sentenced in terms of section 51(1) of the Act under circumstances where this was not applicable as I have stated above. The sentence of life imprisonment in count 1 is set aside and this court is in a position to consider the question of sentence afresh.

[69] In the matter of *S v Siebert*[6] the duty of a sentencing court was described as follows "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"

[70] In *S V Vilakazi* 2012 (6) SA 353 (SCA)[7], the duty of a court before passing sentence was formulated as follows:

"It is clear from the terms in which the test was framed in *Ma/gas* and endorsed in *Dodo* that it is incumbent upon a court in

every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence. The Constitutional Court made it clear that what is meant by the 'offence' in that context (and that is the sense in which I will use the term throughout this judgment unless the context indicates otherwise) consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender. '22 If a court is indeed satisfied that a lesser sentence is called for in a particular case, thus justifying a departure from the prescribed sentence, then it hardly needs saying that the court is bound to impose that lesser sentence. That was also made clear in *Ma/gas*, which said that the relevant provision in the Act 'vests the sentencing court with the power, indeed the obligation, to consider whether the particular circumstances of the case require a different sentence to be imposed . And a different sentence must be imposed if the court is satisfied that substantial and compelling circumstances exist which Justify' ... it"²³

[71] Schoeman AJA[8] re-iterated the principles in this regard in the following paragraphs of his judgment in the matter of *Netshivhodza v S* (962/ 2013)

(2014) ZASCA 145 (26 September 2014)[9]

"[13] In *S v Mabuza & others* [4] Cachalia JA said the following when discussing the position of youthful offenders who have attained the age of 18 years in the light of s 51 (2) of the Act:

'... So while youthfulness is, in the case of juveniles who have attained the age of 18, no longer per se a substantial and compelling factor justifying a departure from the prescribed sentence, it often will be, particularly when other factors are present. A court cannot, therefore, lawfully discharge its sentencing function by disregarding the youthfulness of an offender in deciding on an appropriate sentence, especially when imposing a sentence of life imprisonment, for in doing so it would deny the youthful offender the human dignity to be considered capable of redemption. '

[14] In *S v Matyityi Po,man* JA said the following when dealing with the 'relative youthfulness' of an appellant.

'The question, in the final analysis, is whether the offender's immaturity, lack of experience, indiscretion and susceptibility to being influenced by others reduce his blameworthiness. Thus whilst someone under the age of 18 years is to be regarded as naturally

immature the same does not hold true for an adult. In my view a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor.

[15] The aspect of the appellant's youthfulness was not explored to determine the degree of his maturity and the influence, or lack thereof, of his family and home environment and in that way to assess his moral culpability. It was clear however that the appellant did not live the life of an adult: he lived at home, the income from his temporary work of washing cars at a local school was ploughed back into his family and was not used to support himself or any dependants. This sense of obligation might also be indicative that the appellant is a useful member of society that fulfills his obligations to his family and thereby to society as a whole.

[16] The appellant is young and there exists a real possibility of rehabilitation. There has been no other indication that he is a recidivist without hope of becoming a useful member of society. He indicated through his legal representative that he will not place himself in a similar position again.

[17]

....

... .

[18] In *Rammoko v Director of Public Prosecutions* (6). Mpati JA stated:

'Life imprisonment is the heaviest sentence a person can be legally obliged to serve. Accordingly, where s 51(1) applies, an accused must not be subjected to the risk that substantial and compelling circumstances are, on inadequate evidence, held to be absent.'

[19] Furthermore, in *S v Mahomotsa*

[7] it was set out that there are bound to be different degrees of seriousness of rape even in cases where life imprisonment is the prescribed minimum sentence in terms of the Act. It is the duty of the court to consider all those factors before it imposes sentence"

[72] The personal circumstances of the appellant are as follows:

[72.1] He was 23 years at the time of the offence, and 29 years at the time of sentence. He left formal schooling at Grade 11. He was employed as a Petrol Tank renovator and earned about R150.00 per day.

[72.2] He was single, with a two-year-old child that he was supporting.

[72.3] He was residing with his elderly grandparents

[72.4] He had one previous conviction of theft committed about ten years before the rape conviction. He paid a fine of R300.00.

[73] Besides the fact that rape in itself is a humiliating and degrading act, the complainant was seriously injured. The injuries were described in the J88 form that I have already referred to above. She was bleeding from her genitals and she had to walk and even board a taxi with the blood stains on her clothes (trousers). The State did not submit sentencing reports or lead evidence on how she coped with the physical and emotional scars over the years.

[74] The prescribed minimum sentence of ten years is inappropriate under the circumstances. This court is entitled to exercise its common law jurisdiction and impose any sentence in excess of this minimum.

[75] The Appellant deserves a severe punishment, but one that will not confine his normal life to a prison cell. I will take into account the fact that he is still young and there is a chance of rehabilitation.

[75] The offence was committed in September 2011. His DNA specimen was obtained in 2012 according to him , but it appears from the report that the analysis and investigations were only finalized in

2014. The trial commenced during July 2015 and he was sentenced on 30 May 2017.

[76.1] The appeal with regard to conviction in count 1 is upheld only to the extent of applicability of section 51(1) read with Part 1 of Schedule 2 Act 105 of 1997, as amended by the Criminal Law Amendment Act 38 of 2007. The conviction in count 1 is set aside and substituted as follows:

"The accused is guilty of rape".

[76.2] The appeal with regard to both conviction and sentence in count 2 is upheld. The conviction is set aside and

substituted as follows:

"The accused is found not guilty and is discharged".

[76.3] The sentence of the trial court in count 1 is set aside and substituted as follows:

"the Accused is sentenced to 20 years imprisonment"

[76.4] The sentence is ante dated in terms of section 282 of the Criminal Procedure Act to 30 May 2017.

TAN MAKHUBELE J

Judge of the High Court

I agree, and it is so ordered

N.V KHUMALO J

APPEARANCES:

APPELLANT:

MR S MOENG

Instructed by:

Pretoria Justice Centre

PRETORIA

RESPONDENT:

ADVOCATE S SCHEEPERS

On behalf of:

The Director of Public Prosecutions

Date heard:

01 August 2019

Judgment delivered on:

12 December 2019

[1] Mahlase v The State (255/2013) (20111 ZASCA 191 (29 May 2013)

[2] Cock v S, Manuel v S (CA108/2013, CA121/2014) [2015] ZAECGHC 3;

(2015) 2 All SA 178 (ECG); 2015 (2) SACR 115 (ECG) (3 February 2015)

- [3] (A66/2015) [2017] ZAGPJHC 320 (13 March 2017)
 - [4] (AR96/2018) [2019] ZAKZPHC 56 (12 August 2019)
 - [5] 37/2018) [2018] ZASCA 148 {31 October 2018)
 - [6] 1998 (1) SACR 554 (SCA) at 558j-559a.
 - [7] at paragraph 15
 - [8] Cachalia and Willis JJA concurring
 - [9] footnotes were omitted
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