

SOUTH AFRICA / JUDGMENT

Majikijela v S (AR199/2015) [2020] ZAKZPHC 64 (6 November 2020)

[2020] ZAKZPHC 64

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Vahed, Olsen

CASE / FILE NUMBER

AR199/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

Case

No: AR199/2015

In

the matter between:

LUBABALO GIFT

MAJIKIJELA

Appellant

and

THE

STATE

Respondent

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 06 November 2020.

Vahed and Olsen JJ:

- [1] The appellant was charged in the Pinetown regional court and, upon being found guilty, was sentenced to life imprisonment. He faced a charge in terms of the Sexual Offences Act, 2007 read with certain provisions of the Criminal Law Amendment Act, 1997. His appeal serves before us as of right in terms of s 10 of the Judicial Matters Amendment Act, 2013. The appeal is against both conviction and sentence.
- [2] The essence of the charge that confronted the appellant was that he was guilty of the crime of rape (read with the provisions of sections 51(2), 52(2), 52A and 528 of the Criminal Law Amendment Act 105 of 1997) in that he was alleged to have had sexual intercourse with the complainant, 14 years old at the time, without her consent. We will deal with the finer details of the charge that was put to the appellant when dealing with the question of sentence later in this

judgment.

- [3] When she testified the complainant was 15 years old and her evidence was received through the medium of an intermediary. Upon being assessed by the learned magistrate the complainant was found to be able to distinguish between truth and falsehood but, without being assessed as to whether she understood the import of the oath, she was simply admonished to speak the truth.
- [4] In his heads of argument Mr Marimuthu, who appeared for the appellant, contended in limine that the admonishing of the complainant was irregular and that the complainant's evidence was thus tainted and therefore, on that ground alone, ought to be rejected, resulting in the success of the appeal. At the hearing Mr Marimuthu wisely abandoned that point.
- [5] The complainant testified that she resided at her homestead with her father and minor and elder siblings and aunts. Her elder siblings, were adults. The appellant was her uncle and he and his younger brother also resided at the homestead. The sleeping arrangements were that some of the complainant's siblings slept in a bedroom while the complainant and the one or two of the other youngsters and an older sister slept in what was described as the kitchen where there was a bed. The males at the premises, that is the complainant's father, the appellant and the appellant's younger brother slept in a different structure at the same premises.

- [6] On the night of the incident the complainant's elder siblings and aunts went out for the evening and the complainant's father requested the appellant's brother to sleep in the kitchen with the young children so as to keep watch over them. The complainant was one of the younger children who was to sleep in the kitchen that evening. Apparently the appellant's younger brother was not able to comply with that request because he too went out for the evening and the evidence suggests that he requested the appellant to perform that duty.
- [7] Being that as it may the complainant testified that she and the young children went off to sleep in the kitchen. The young children slept on mattresses that were on the floor and she slept on the bed that was in that kitchen. Sometime during the night the appellant entered and got onto the bed with her and proceeded to rape her. It is not necessary to go into the graphic detail of her recount of what happened.
- [8] The complainant testified that she waited until an elder female was present at the premises, a day or so later, before reporting the incident. The details of the incident were then immediately reported to the complainant's father. The police were informed and she was taken off to be examined by a doctor. She was found to have injuries consistent with her report. She directly and pertinently implicated the appellant as her abuser.
- [9] The others involved in the complainant's telling of the incident also testified and their evidence was largely consistent with what she told the court.
- [10] The appellant testified in his defence. He admitted going into the kitchen that night but said that it was at the request of the complainant's father. He denied the incident. He admitted that after the incident had become known the complainant's father convened a family meeting and that he was accused of having sexually assaulted the complainant, which he denied. He went on to suggest that he was being falsely implicated because of certain disagreements over money that he had with the complainant's father. It is significant that when called to corroborate the appellant's version, his brother confirmed that notwithstanding having been requested to spend the night with the young children he went out and that it was he who had requested the appellant to perform that duty.
- [11] The most significant and telling piece of evidence in the whole case is the evidence of the medical practitioner who examined the complainant a day or so after the assault. His examination of the complainant and of her injuries was that they were consistent with penetration having occurred.
- [12] The only male person on the premises who had contact with the complainant that evening was the appellant.
- [13] Mindful of the fact that the complainant was a single witness with regard to the assault itself the learned magistrate examined her evidence closely and concluded that her evidence was satisfactory in all material respects. We are unable to disturb that finding because it is wholly consistent with the evidence that unfolded in the court a quo .

[14] During argument Mr Marimuthu did not specifically abandon the appeal against conviction, but experienced difficulty suggesting that the appellant was not correctly convicted.

[15] In our view the conviction in the court a quo was correct and is one that should be left undisturbed.

[16] We turn now to the question of sentence.

[17] The record contains two slightly different versions of the charge sheet. The one reads as follows:-

ANNEXURE / AANHANGSEL

Case no/ Saak nr RC218/08

Count No/ Aanklag nr _

THE STATE versus/ DIE STAAT teen

Lubabalo Gift

Majikijela

(hereinafter referred to as the accused/ Hierna die beskuldigde genome)

RAPE

THAT the accused is/are guilty of the crime of Rape (read with the provisions of Sections 51(2), 52(2), 52A and 528 of the Criminal Law Amendment Act 105 of 1997)

IN THAT upon or about 12/10/2007 and at or near Ekuthuleni in the District/ Regional Division of KwaZulu Natal, the accused did unlawfully and intentionally have sexual intercourse with a female person, to wit Nondumiso Nyathikazi (14 years old), without her consent."

[18] The other version was as follows:-

ANNEXURE/ AANHANGSEL "A"

L G Majikijela

THAT the accused is/are guilty of the crime of Rape (read with the provisions of Sections 51(2), 52(2), 52A and 52B of the Criminal Law Amendment Act 105 of 1997)

IN THAT upon or about 12/10/2007 and at or near Bhekizanga Ekuthuleni in the District/ Regional Division of Pinetown, the accused did unlawfully and intentionally have sexual intercourse with a female person, to wit Nondumiso Nyathikazi , without her consent."

[19] The words appearing in bold and in italics were inserted into the pro-forma printed document in manuscript.

[20] The slightly different versions take the matter no further except for the one document referring to the age of the complainant.

[21] When convicting the appellant the learned magistrate simply indicated that he was "... found guilty as charged". What the magistrate meant by that is apparent from the opening paragraph of her judgment.

'The accused in this matter, Lubabalo Gift Majikijela, male of 24 years faces one count of rape, it being alleged by the State that on 12 October 2007 at Ekuthuleni in this Regional Division, the accused had sexual intercourse with N[....] N[....], a 14 year old female, without her consent.'

The magistrate presumably had the version of the charge sheet which recorded the complainant's age. (Her age was something of which the appellant had to have knowledge. He was her uncle, and lived in the same household.)

[22] On appeal it was contended that because the offence occurred during October 2007 it was not open to the State to pursue a sentence of life imprisonment and it was not open to the magistrate to impose such sentence. That was because the greater sentencing jurisdiction granted to regional courts, and which was introduced by Act 38 of 2007, only came into effect on 31 December

2007. No authority was cited for this proposition. There is no need, however, to examine the question further.

[23] With effect from 31 December 2007 the transitional provision set out in s53A of the Act applied.

"If a regional court has, prior to the date of commencement of the Criminal Law (sentencing) Amendment Act 2007 -

- a) Committed an accused for sentence by a High Court under this Act the High Court must dispose of the matter as if the Criminal Law (sentencing) Amendment Act, 2007, had not been passed; or
- b) Not committed an accused for sentence by High Court under this Act, then the regional court must dispose of the matter in terms of this Act as amended by the Criminal Law (sentencing) Amendment Act, 2007."

[24] Sub-paragraph (b) clearly applied to the instant case.

[25] Mr Marimuthu submitted that the present case is on all fours with what obtained in *S v Ndlovu* 2017 (2) SACR 305 (CC). There the accused faced a charge of rape read with s 51(2) of the Criminal Law Amendment Act, 1997 and was, as in this case, "...found guilty as charged". At the trial evidence of serious injury being sustained by the complainant during the rape was led and this the magistrate felt entitled him to impose life imprisonment in accordance with s 51(1) of the Act. On ultimate appeal to the Constitutional Court it was held that the magistrate was wrong to impose life imprisonment. A finding of "guilty as charged..." there confined the circumstances to those contemplated in s 51(2) and the evidence led at trial was insufficient to implicate s 51(1). For that to happen the charge sheet itself had to refer to and allege the involvement of serious injury.

[26] The aspect of the reasoning followed in Ndlovu which is relevant to the present enquiry is to be found in paragraph 45 of the judgment. In Ndlovu the court was concerned with a charge sheet which was complete and not defective. A finding that Mr Ndlovu was "guilty as charged"

would simply not permit of an interpretation to the effect that Mr Ndlovu had been convicted of rape contemplated in s 51(1). In those circumstances the magistrate lacked jurisdiction to impose a sentence of life imprisonment.

[27] The position in this case is quite different. It is apparent that the prosecution employed a standard form for rape charges which applied before 31 December 2007. Putting that aside, the charge sheet was internally contradictory. Reference to s 51(2) in the context of a rape charge amounts to a reference to rape falling within the provisions of Part III of Schedule 2 to the Act. By definition Part III deals with rape "in circumstances other than those referred to in Part I". The gravamen of the charge here was that the appellant raped a 14 year old girl. That puts it within Part I of the Schedule. By definition what the appellant was accused of having done could not in law fall within Part III of the Schedule, and accordingly the reference in the charge sheet to s 51(2) of the Act was erroneous.

[28] Furthermore, as already illustrated, in this case the magistrate convicted the appellant of having raped a 14 year old girl. That is what she meant when he stated that the appellant was found "guilty as charged". No question arises, in those circumstances, as to a lack of jurisdiction on the part of the magistrate to impose the sentence of life imprisonment.

[29] The question which does arise is the more usual one, that is to say whether the appellant's fair trial rights were as a matter of fact infringed as a result of the defective charge sheet which referred to s 51(2) instead of s 51(1) of the Act. The features of such an enquiry are set out in *S v Khoza and Another* 2019 (1) SACR 251 (SCA) at paragraphs 10, 11 and 12. In summary:

- (a) as a general rule an accused person should be informed at the outset of the trial of the minimum sentencing provisions upon which the State intends to rely;
- (b) this is of particular importance when the accused is unrepresented;
- (c) however the rule is not absolute;
- (d) each case depends on its own facts and circumstances, and fairness to the public must not be overlooked;
- (e) substance must prevail over form, and the question is one of prejudice to the accused person;
- (f) prejudice will exist if there is a reasonable possibility that the accused person would have conducted the defence differently.

- [30] It may be assumed that the appellant's legal representative knew that the rape of a 14 year old child carried a potential life sentence. There is no evidence or sign at all that the appellant thought that the erroneous reference to s 51(2) of the Act indicated something different. On the contrary, what appears from the transcript of the argument on sentence is that the first person to raise the prospect of a life sentence was the appellant's own legal representative, who argued that there were substantial and compelling circumstances which justified something less than life imprisonment.
- [31] There was no complaint made by the appellant that he was not forewarned of a potential sentence of life imprisonment, or that the sentence took him by surprise, in any of his affidavit in support of an application for condonation of his late application for leave to appeal, his application for leave to appeal and his petition to this court for leave to appeal.
- [32] The issue under debate was raised for the first time in this court. I have no doubt that the reason for that lies in Mr Marimuthu's laudable attention to detail and careful consideration of the charge sheet, which identified a potential issue which appears to have been overlooked (or perhaps ignored) by the presiding magistrate, prosecutor and the defence lawyer in the court below.
- [33] At his trial the appellant pleaded not guilty and did not make any statement by way of explanation of his plea. He required the State to prove its case. He elected to give evidence in his defence. If we are wrong in concluding that the appellant knew throughout that he faced a potential sentence of life imprisonment, that want of knowledge would not have altered the course of his defence. Indeed, according to the probation officer who reported to the court on sentencing options, even after he was convicted the appellant maintained his innocence. In our view the appellant's fair trial rights were not infringed.
- [34] Technical obstacles having been removed, there remains the question as to whether life imprisonment remains the appropriate sentence for this case.
- [35] We do not have an unfettered discretion to interfere with the sentence imposed by the trial court. It must be remembered that the appellant was, at the time of the offence, considerably older than the complainant (she was 14 and he was 24). He was living at the homestead as an older member of the family and someone to whom the complainant ought to have looked to for protection and moral guidance. Neither was forthcoming from him.
- [36] The other personal circumstances of the appellant are quite unremarkable and need no repetition here. As was adequately emphasised by the State, the approach of the courts today are reflected in the decisions in *S v Ma/gas* 2001 (1) SACR 469 (SCA) and *OPP KZN v Ngcobo* 2009 (2) SACR 361 (SCA) which echo the repeated refrains which apply here as well. It is not business as usual and the court no longer had a clean slate to impose whatever sentence it wished. In addition, it had to approach the question of sentence conscious of the fact that the minimum sentence has been ordained as the sentence it ought ordinarily to impose, and was not to depart from it lightly or for flimsy reasons.

[37] We are unable to discern a misdirection of the part of the learned magistrate and are additionally not persuaded that interference with the sentence imposed by her is warranted.

[38] The appeal against both conviction and sentence is dismissed.

Vahed J

Olsen J

Case Information:

Date of Hearing

: 20 May 2020

Date of

Judgment

: 06 November 2020

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