

SOUTH AFRICA / JUDGMENT

Mletshe v S (CA&R77/2013) [2014] ZAECMHC 8; 2015 (1) SACR 422 (ECG) (27 February 2014)

[2014] ZAECMHC 8

COURT

Eastern Cape High Court, Mthatha

BEFORE

P.W. Tshiki, I.T. Stretch

CASE / FILE NUMBER

CA&R77/2013

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE LOCAL DIVISION, MTHATHA

Case

no: CA&R 77/2013

Date

heard: 21.2.2014

Date

delivered: 27.2.2014

In

the matter between:

Luyanda
Mletshe Appellant
vs
THE
STATE Respondent
APPEAL

JUDGMENT

TSHIKI J:

- [1] The appellant herein was charged with one count of rape of his [.....] to which he pleaded guilty and was subsequently convicted as charged. He was sentenced to undergo imprisonment for a period of twenty four years. The case was heard in Butterworth Circuit Court Local Division held in Centane.
- [2] During argument of this appeal, Mr T.S. Kekana appeared for the appellant and Mrs L.S. Van Zyl represented the respondent.
- [3] During the sentence stage of the proceedings the prosecutor called the evidence of a social worker employed by the Correctional Services Department, who had compiled a report on the appropriate sentence to be imposed on the appellant. The report was compiled in terms of section 276(a)(1)(a) of the Criminal Procedure Act 51 of 1977 (the CPA). That report which in the record is referred to as the pre-sentence report was received as exhibit "B". After the evidence of the social worker, Mr Mtiki who represented the appellant proceeded to address the Court in mitigation of sentence. It seems as if this was the beginning of rather unfortunate irregularities in the trial following one after the other.
- [4] What next followed was the leading of evidence of the complainant by the public prosecutor. She described her name as Ms T.M. and proceeded to give a detailed account of how the appellant raped her. From her evidence it transpired that after the appellant had ejaculated for the first time he did not withdraw his penis from her vagina but continued penetrating her until he ejaculated again. The magistrate interpreted this continued act of intercourse as constituting and amounting to multiple counts of rape by the appellant. The magistrate, therefore, having considered that the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 were applicable, sentenced the appellant to undergo imprisonment for twenty four (24) years, accepting that there were substantial and compelling circumstances which justified his deviation from imposing life imprisonment.
- [5] The appellant has appealed against the magistrate's sentence on the grounds that there was only one act of sexual intercourse and that the Court a quo should never have considered that the provisions of section 51(1) of the Criminal Law Amendment Act are applicable. Therefore, the appellant should have been sentenced in terms of section 51(2)(b)(i) of the Criminal Law Amendment Act 105 of 1997. In terms of part III of Schedule 2 of that Act, a first offender may be sentenced to imprisonment for a period not less than ten (10) years.
- [6] There are two irregularities which were committed by the magistrate during the trial of the appellant. The first one is that the magistrate did not seem to have appreciated that even at the sentence stage there is a stage of leading evidence by both the state and the accused, doing so in an orderly manner. When both parties had led evidence in mitigation and aggravation of sentence they can then proceed to address the Court on the appropriate

sentence which the Court may impose on the accused person. In this case, the Court a quo proceeded to allow the legal representative of the appellant to proceed to address the Court on sentence, yet the state as it intended to do so, had not called its evidence before the accused's legal representative was allowed to address the Court.

- [7] Before I deal with the appropriate sentence, I wish to comment on the procedure adopted by the magistrate during the sentence stage. As I have alluded to above, where the state and/or defence elect to do so, they should be allowed to lead evidence in both mitigation and aggravation of sentence before any party is allowed to address the Court on the appropriate sentence to be imposed. Once both parties have finished leading evidence on sentence the Court can at that stage allow both parties to argue on the appropriate sentence. The only appropriate stage to address the Court on sentence is after all the evidence on the appropriate sentence has been led by the parties. (Du Toit et al on Commentary on the Criminal Procedure Act – Service 51, 2013 – p 282).
- [8] A situation where another party addresses the Court and thereafter the other proceeds to lead evidence on sentence should not be countenanced. It is undesirable and should be discouraged.
- [9] The second irregularity which to me amounts to a misdirection was to regard the so called continued act of intercourse after the first pause as a second act of intercourse which according to the Court a quo triggered the application of the provisions of section 51(1) of Act 105 of 1997. In the first place, the appellant had not been charged and convicted of two counts of rape but only one count to which he pleaded guilty and was convicted. An accused person cannot be sentenced for an offence for which he was neither charged nor convicted. The conduct by the presiding officer in following such procedure amounts to an irregularity which justifies the setting aside of the sentence imposed. In *S v Mashinini* 2012(1) SACR 604 (SCA) where at para [11] Mhlantla JA writing for the majority on similar facts as in casu held:

“To my mind the solution to this legal question lies in s 35(3) of the Constitution. Section 35(3)(a) of the Constitution provides that every accused person has a right to a fair trial which, inter alia, includes the right to be informed of the charge with sufficient detail to answer it. This section appears to me to be central to the notion of a fair trial. It requires in clear terms that, before a trial can start, every accused person must be fully and clearly informed of the specific charge(s) which he or she faces. Evidently, this would also include all competent verdicts. The clear objective is to ensure that the charge is sufficiently detailed and clear to an extent where an accused person is able to respond and, importantly, to defend himself or herself. In my view, this is intended to avoid trials by ambush.”

- [10] It follows, therefore, that the Court a quo should not have considered the irrelevant evidence led during the stage of sentence which amounted to influencing the Court to sentence the appellant as if he was convicted of two counts of rape and in circumstances where the provisions of section 51(1) of the Criminal Law Amendment Act were applicable.

- [11] Once an accused person pleads to the charge and is subsequently convicted on his plea, no further charges can be considered against that accused person no matter whether strong evidence had surfaced after conviction which led to the conclusion that the accused should have been convicted of more serious offences than those of which the accused had been convicted.
- [12] Mrs Van Zyl for the respondent has referred us to the decision in *S v Mponda* 2007(2) SACR 245 (C). In my view, the difference between the Mponda case and the case in issue is that in the Mponda case the accused was charged with one count of rape but when the trial Court returned its verdict it considered the evidence led and returned a verdict of guilty to more than one count of rape, although the accused was not charged with those additional rape offences. In the present case, the appellant pleaded guilty to one count of rape and was subsequently convicted on his plea which was accompanied by a statement in terms of section 112(2) of the CPA the contents of which were accepted by the prosecutor and subsequently by the Court. It was only during the sentence stage that the trial magistrate considered evidence which was led by the prosecutor for the purposes of aggravation of sentence which effect the magistrate thought was sufficient to trigger the application of the provisions of section 51(1) of Act 105 of 1997. This should never have happened because the appellant was only charged with and was convicted of one count of rape and in circumstances where only the provisions of section 51(2)(b)(i) of Act 105 of 1997 were applicable. Therefore, the trial Court could not sentence the appellant in terms of the provisions of an Act with which he was never charged and convicted. In any event, the conduct of the appellant in this case could not have amounted to proof of more than one act of sexual intercourse. The appellant inserted his penis once and removed it thereafter. It matters not that he ejaculated more than once before removing his penis during the intercourse. (*S v Mavundla* 2012(1) SACR 548 (GNP); see also *S v Blaaw* 1999(2) SACR 295 (W) and *S v Willemse* 2011(2) SACR 531 (EC)).
- [13] It follows from what I have said that the trial Court should never have imposed the sentence of 24 years imprisonment when in fact the provisions of section 51(2)(b)(i) of Act 105 of 1997 provides for a minimum sentence of ten (10) years imprisonment for the offence committed by the appellant. In any event, the circumstances of the case did not justify the imposition of the sentence imposed by the trial Court. Appellant had pleaded guilty to the charge and his statement confirming the basis of his plea was accepted by the state and by the Court. He was under the influence of liquor when he committed the offence of rape against his mother. The circumstances of the case do not, in my view, warrant a sentence in excess of twelve (12) years imprisonment everything having been taken into consideration inclusive of the aggravating feature of raping his mother.
- [14] For the above reasons, I am of the view that the appeal against sentence should succeed.
- [15] In the result, I make the following order:
- [15.1] The appeal is upheld.

[15.2] The sentence imposed by the trial Court is set aside and is replaced with a sentence of twelve (12) years imprisonment.

[15.3] The sentence is antedated to 29th October 2012.

P.W. TSHIKI

JUDGE OF THE HIGH COURT

Stretch J:

I agree.

I.T. STRETCH

Counsel for the appellant : Adv TS Kekana

Instructed by :

Legal Aid South Africa

Mthatha Justice Centre

MTHATHA

Counsel for the respondent : Adv LS van Zyl

Instructed by

: Director of Public Prosecutions

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