

SOUTH AFRICA / JUDGMENT

Mokgele v S (A205/2018) [2018] ZAFSHC 207 (22 November 2018) [2018] ZAFSHC 207

COURT

Free State High Court, Bloemfontein

BEFORE

P.E. Molitsoane, A.F. Jordaan

CASE / FILE NUMBER

A205/2018

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FREE

STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC

OF SOUTH AFRICA

Case

No. : A205/2018

In

the matter between:-

MOTSIE

MOKGELE Appellant

and

THE

STATE Respondent

CORAM:

JORDAAN, J et
MOLITSOANE,
J

HEARD:

22 OCTOBER 2018

JUDGMENT

BY MOLITSOANE, J

DELIVERED: 22 NOVEMBER 2018

- [1] The appellant was arraigned in the Regional Court sitting in Botshabelo on a charge of housebreaking with intent to rape and rape in contravention of s3 of Act 32 of 2007. He was convicted pursuant to his plea of guilty and was sentenced to twenty years imprisonment. He appeals against his sentence with leave of the court a quo.
- [2] The grounds of appeal and consequently the issues for adjudication of the appellant may in a nutshell be crystallised as follows:
1. Whether the Appellant was informed of the applicability of the Criminal Law Amendment Act 105 of 1997(the Act) at the beginning of the trial to enable him to make an informed choice.
 2. Whether the offence for which the appellant was convicted was read with the provisions of s51(1) or s51(2) of the Act.
 3. Whether the sentence of 20 years imprisonment imposed by the Court a quo is shockingly inappropriate and harsh.
- [3] Mr Modise, appearing for the Appellant submitted that the appellant had a right to a fair trial in terms of s35(3)(a) of the

Constitution, which included, inter alia, the right to be informed of the charge with sufficient detail to answer it. He submitted that the charge sheet did not allege that the State was relying upon s51(1) read with Part 1 of Schedule 2 of the Act. He conceded that the Magistrate did enquire from the legal representative of Appellant whether the provisions of the Act were explained to the appellant. It is his contention that the Court a quo should not have imposed a sentence as prescribed in terms of s51(1) of the Act but a sentence as envisaged in s51(2) of the Act. In the premises, it is his contention that the sentence imposed is inappropriate and should be substituted with a lesser sentence.

- [4] On the other hand, Adv. Van der Merwe for the respondent, submitted that the parties in this case including the Regional Magistrate at all material times laboured under the impression that s51(1) of the Act was applicable as a result of the serious injuries the complainant sustained. He concedes that the charge sheet made no reference to the Act. He submitted that although it is advisable that the State should indicate whether it relies on s51(1) or 51(2) of the Act, failure to so indicate, should not necessarily mean that a minimum sentence as prescribed by the Act cannot be imposed. It is his submission that from the onset the appellant was aware that life imprisonment was a possibility. He is of the view that the sentence imposed cannot be regarded as shockingly inappropriate.

- [5] The court exercising appellate jurisdiction will not lightly interfere with the discretion of the trial court with regard to

sentence unless such a discretion is vitiated by an irregularity or is disturbingly inappropriate.

- [6] The court in *S v Kolea* 2013(1) SACR 409 (SCA) at par [7] said that if the state intends to rely on the minimum sentencing regime created in the Act, that should be brought to the attention of the accused at the outset of trial. In the subsequent case of *Moses Tshoga v The State* (635/2016) 2016 ZASCA 205 (15 December 2016) the same court clarified what the effect of this pronouncement in *Kolea* (supra) meant. The court in the case of *Moses Tshoga* (supra) indicated that the pronouncement that the Act had to be mentioned in a charge sheet at the outset of the trial was obiter dictum as it was not necessary for the decision of that Court in determining prejudice. The court further went on to say:

“It is also clear that the discussion in Kolea as to the possibility of prejudice considered that substance was of paramount importance and that form was secondary. I am of the view that a pronouncement that the Act had to be mentioned in the charge sheet or at the outset of the trial would be elevating form above substance. Every case must be approached on its own facts and it is only after a diligent examination of all the facts that it can be decided whether and accused had a fair trial or not.”

The fact that the appellant was not informed at the outset of the trial that the State intended to rely on the Act does not necessarily imply that his right to a fair trial was infringed upon. In this case no evidence or submissions were made indicating that the appellant was prejudiced by this.

- [6] Section 35(3)(a) of the Constitution provides that every accused person has a right to a fair trial. The right to fair trial includes the right of an accused to be informed of the charge(s) he is facing with such particularity and detail as to enable him to answer it. This is clearly understandable as it will enable an accused person to prepare adequately, to interrogate the issues and to decide on the cause of action to take, be it to plead guilty, to raise procedural issues or to contest the charges. It will also allow an accused person to decide on the question of legal representation. This inevitably implies that where the State intends to rely on the Act the accused should ideally be informed of such. The issue in this case is what the effect of the failure of the State to so inform the accused that it intends to rely on the Act in sentencing.

- [7] In the case of *S v Legoa* 2003 (1) SACR 13 at par [13] the court indicated its reluctance to lay down a general rule that the charge must in every case recite either the specific form of the Scheduled offence with which the accused was charged, or the facts the State intended to prove to establish it. The court went further and said the following in the same paragraph:

“A general requirement to this effect, if applied with due formalism, may create intolerable complexities in the administration of justice and may be insufficiently heedful of the practical realities under which charge sheets are frequently drawn up. The accused might in any event acquire the requisite knowledge from particulars furnished to the charge or, in a Superior Court, from the summary of substantial facts the State is obliged to furnish. Whether the accused’s substantive fair trial right, including his ability to answer to answer the charge, has been impaired, will therefore depend on a vigilant examination of the

relevant circumstances.”

- [8] In the case of *S v Ndlovu* 2003(1) SACR 331(SCA) the accused was charged with the offences of unlawful possession of a firearm in contravention of s2 read with s39(2) of the Arms and Ammunition Act 75 of 1969 and unlawful possession of ammunition in contravention of s36 of the same Act. He was convicted on both charges. The court during judgment made a finding that the firearm in question was a semi-automatic. This brought the appellant within the ambit of the sentencing regime of the Act. Section 39(2) of the Arms and Ammunition Act provided a penal jurisdiction for contravention of s2 to R12 000 or three years imprisonment or both. On the other hand the sentencing provisions of the Act prescribed a minimum sentence of 15 years imprisonment. The Court in this case held that where an accused is convicted in the Magistrate Court of an offence under an incorrect section of an Act, that Court will only have jurisdiction to sentence under that section. After discussing other cases relating to the right to a fair trial the court said the following:

“[12].....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 its intention pertinently be brought to 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.”

- [9] It has to be borne in mind that in the case of *Ndlovu* (supra) the State made its intention known from the beginning that it intended to rely on ,inter alia, the provisions of s39(2) of the Arms and Ammunition Act. A conviction on an enhanced penal jurisdiction in that case was, therefore, prejudicial to the accused.

In *Moses Tshoga* (supra) it was held that the failure to refer to the Act in the charge sheet or at the commencement of a trial did not necessarily vitiate a sentence of life imprisonment.

- [10] In this case, the appellant was convicted on his plea of guilty. He was legally represented. To put this matter in proper perspective it is apposite to reproduce the following parts of the record:

“PROSECUTOR PUTS CHARGES TO THE ACCUSED:

.....

‘Mr MM is facing a charge of housebreaking with the intent to contravene section 3 of Act 32 of 2007, and did contravene Section 3 of Act 32 of 2007, further read with the provisions of Section 1,56,57,58,59,60 and 61 of the Criminal Law Amendment Act 32 of 2007, read further with the provisions of Section 51 of the Criminal Law Amendment Act 105 of 1997 as amended,’

The above excerpt is part of the charge that was put to the appellant. It is not in dispute that the annexure to the charge sheet did not allege that the state intended to rely on the provisions of s51 (1) of the Act. The charge which was, however, put to the accused in the open court explicitly

indicated that it was read with the provisions of s51 of the Act. It is clear that the Prosecutor read into the record that which the charge sheet did not contain, namely, the applicability of the Act. The appellant or his legal representative did not object to the charge being put in the manner that was done in spite of the fact that reference to section 51 of the Act was not specifically alleged in the charge sheet. It is my view that when the appellant was asked to plead to the charge, he pleaded to the charge that was put to him in an open court and the charge that was put to him included reference to s51 (1) of the Act.

[11] It is apposite also to mention that before the accused pleaded to the charge, the Court enquired from his legal representative if the said legal representative explained the provisions of what the court referred to as Minimum Sentence legislation as well as the competent verdicts to which the legal representative answered in the affirmative. The appellant also confirmed that his legal representative did explain the said legislation to him. The record is, however, silent as to what exactly was explained to the appellant pertaining to the applicability of the Act. I am, however, satisfied that the appellant being legally represented was apprised of the applicable provisions of the Act.

[12] During the address on sentence the legal representative of the appellant said the following:

“As the charge sheet clearly states and as the facts that I put before this Court indicate Your Worship, this falls within the ambit of the Minimum Sentence legislation, and a life imprisonment in this instance.”

Proper reading of the record indicates that the court, the prosecution and the defence were *ad idem* that the offence for which the accused was charged fell under Schedule 2 Part 1 for which life imprisonment was ordained upon conviction.

[13] While it is advisable that charge sheets and indictments should ideally refer to the provisions of the Act, failure to make such averments in the charge sheet should not mean that a minimum sentence cannot be imposed. The court in *MT v The State*; *ASB v The State*; *Johannes September v The State* 2018 ZACC 27 at par [40] also said the following:

“It is indeed desirable that the charge sheet refers to the relevant penal provision of the Minimum Sentences Act. This should not, however, be understood as an absolute rule. Each case must be judged on its particular facts. Where there is no mention of the applicability of the Minimum Sentences Act in the charge sheet or in the record of the proceedings, a diligent examination of the circumstances of the case must be undertaken in order to determine whether that omission amounts to unfairness in trial. This is so because even though there may be no such mention, examination of the individual circumstances of a matter may very well reveal sufficient indications that the accused’s section 35(3) right to a fair trial was not in fact infringed.”

[14] The mere fact that the charge sheet made no reference to the Act does not necessarily imply that the right of an accused to a fair trial has been compromised. No submissions were made on behalf of the appellant that the failure to allege in the charge sheet of the applicability of the Act, in any way prejudiced the appellant. No submissions were made that

had such allegations relating the Act been made the appellant would have acted differently. I am satisfied in this case that the appellant was apprised of the applicability of the prescribed minimum sentence and its concomitant sentence should he be convicted. It is my view that failure to allege the applicability of the Act in the charge sheet, did not infringe on the right of the appellant to a fair trial.

[15] Both the state and the defence argued that substantial and compelling circumstances were present warranting the trial court from imposing a prescribed sentence of life imprisonment. The court a quo agreed with those submissions and recorded the following as constituting substantial and compelling circumstances, that the appellant was a first offender who pleaded guilty and thus shown remorse for his deed. That the appellant maintained his minor child and siblings.

[16] The court a quo found the following factors to be aggravating:

That the age gap between the complainant and the appellant was 21 years. That the appellant knew the complainant at the time of this incident. The complainant was raped in her own home. She sustained serious injuries to her body and private parts. She also sustained fractured ribs. As a result of this incident the complainant relocated to Thaba Nchu from Botshabelo. According to her testimony, not only was she hurt, but this incident also hurt her two children. Rape is a heinous crime which does not only affect the complainant but also those around the complainant. I can find no reason to interfere with the sentence imposed by the trial court and I cannot find that same to be shockingly inappropriate. I accordingly propose the following order:

[17] ORDER

1. The appeal against the sentence is dismissed and the sentence imposed is confirmed.
2. The order in terms of s103(1) of the Fire Arms Control Act 60 of 2000 is confirmed.

P.E. MOLITSOANE, J

I agree and it is so ordered:

A. F. JORDAAN, J

On behalf of the appellant: Mr T.J. Modise

Instructed by:

Bloemfontein Justice Centre

BLOEMFONTEIN

On behalf of the respondent: Adv C.A. Van der Merwe

Director of Public Prosecutions

ORDERS

1. The appeal against the sentence is dismissed.
2. An order made in terms of s103 (1) of the Firearms Control Act 60 of 2000 is confirmed.

I agree and it is so ordered.

J.F JORDAAN, J

On behalf of appellant: Ms S Kruger

Legal Aid, South Africa

Bloemfontein

On behalf of the respondent: Adv. Van der Merwe

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