



## CONSTITUTIONAL COURT OF SOUTH AFRICA

**Brendan Solly Ndlovu v The State**

**CCT 174/16**

**Date of hearing: 23 February 2017**

**Date of judgment: 15 June 2017**

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### MEDIA SUMMARY

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*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

Today, the Constitutional Court handed down judgment in an application for leave to appeal against a sentence of life imprisonment imposed on the applicant, Mr Brendan Solly Ndlovu, by the Phalaborwa Regional Magistrate's Court (Regional Court) following his conviction of rape. Mr Ndlovu also sought condonation for the late filing of his application for leave to appeal.

Mr Ndlovu was charged with rape, read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997 (Minimum Sentencing Act). Early one morning in October 2007, Mr Ndlovu accosted the complainant while she was on her way home. He assaulted her with fists, stones and bricks. He then raped her. She sustained wounds to her head and mouth, resulting in scarring. The Regional Court convicted Mr Ndlovu "as charged", but proceeded to sentence him to life imprisonment in terms of section 51(1) of the Minimum Sentencing Act.

Mr Ndlovu appealed the sentence to the High Court of South Africa, Gauteng Division, Pretoria (High Court). The key issue in the High Court was whether Mr Ndlovu's right to a fair trial under section 35(3) of the Constitution had been infringed because, although he had been charged of rape read with one minimum sentencing provision (section 51(2) of the Minimum Sentencing Act), he had been sentenced pursuant to a different, harsher minimum sentencing provision (section 51(1) of that Act).

Section 51(1) of the Minimum Sentencing Act provides that a Court must sentence a person convicted of an offence referred to in Part I of Schedule 2 (which includes rape

involving the infliction of grievous bodily harm) to life imprisonment. In respect of a first offender, section 51(2) stipulates a minimum sentence of 10 years imprisonment for rape in circumstances other than those referred to in Part I.

The High Court dismissed Mr Ndlovu's appeal, finding that Mr Ndlovu's trial had been fair. Mr Ndlovu then appealed further to the Supreme Court of Appeal. The Supreme Court of Appeal dismissed his appeal for the same reason.

In the Constitutional Court, Mr Ndlovu contended that he suffered irreparable trial-related prejudice as a result of the Regional Court's failure to advise him of the correct minimum sentence. In addition, he argued that, outside of the realm of section 51(1) of the Minimum Sentencing Act, the Regional Court was limited to its ordinary penal jurisdiction, which was way less than life imprisonment. Thus, as he had not been charged in terms of section 51(1) of the Minimum Sentencing Act, life imprisonment was an incompetent sentence. Mr Ndlovu sought to have the sentence set aside and replaced with a sentence within the jurisdiction of the Regional Court in terms of section 51(2).

The state argued that the complainant's evidence undoubtedly showed that she had sustained grievous bodily harm. This evidence had, therefore, cured the mistake in the charge sheet and life imprisonment under section 51(1) was thus competent. The state submitted that Mr Ndlovu's trial was fair and that he suffered no prejudice for a number of reasons, including that he was informed that the Minimum Sentencing Act was applicable; he pleaded not guilty to the charge; and he was legally represented throughout the trial.

In a unanimous judgment penned by Khampepe J, the Constitutional Court granted condonation and upheld Mr Ndlovu's appeal. It condoned the 20-month delay in the filing of Mr Ndlovu's application, despite Mr Ndlovu's unsatisfactory explanation for the delay, because of the importance of the right in issue (right to a fair trial) and the absence of prejudice to the state.

The Constitutional Court held that the Regional Court did not have jurisdiction to sentence Mr Ndlovu in terms of section 51(1) of the Minimum Sentencing Act. The Regional Court would only have had jurisdiction to impose a sentence of life imprisonment under section 51(1) if it had found Mr Ndlovu guilty of an offence referred to in that subsection. The Magistrate's statement that Mr Ndlovu was found "guilty as charged" was unambiguous: Mr Ndlovu was convicted of rape read with the provisions of section 51(2). Accordingly, the Regional Court's jurisdiction was limited in terms of section 51(2) to imposing a maximum sentence of 15 years' imprisonment. Mr Ndlovu's sentence of life imprisonment was therefore set aside and substituted with a sentence of 15 years' imprisonment.

The Constitutional Court commented that there was nothing to indicate that Mr Ndlovu's blameworthiness for this deplorable crime was in any way diminished: the state's remissness had failed the complainant and society in this case. The evidence of the injuries sustained by the complainant should have alerted both the Magistrate and the

prosecutor that the appropriate charge should have been rape read with section 51(1) of the Minimum Sentencing Act - rape involving the infliction of grievous bodily harm. And the charge should have been amended once the evidence came to light.