IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CA&R 15/2021

Date heard: 17 November 2021
Date delivered: 25 November 2021

In the matter between:

ANELE MOYAKHE **Appellant**

and

THE STATE **Respondent**

JUDGMENT

BENEKE, A.J.:

1 On 16 November 2020 and before the Regional Court held at Port Elizabeth the appellant pleaded guilty and was convicted of rape in contravention of section 3 read with various other sections of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and various sections of the Criminal Procedure Act 51 of 1977 as well as section 51(1) of the Criminal Law Amendment Act 105 of 1997. On the same day the appellant was sentenced to the discretionary minimum sentence of life imprisonment in respect of that count. The appellant appeals against the imposition of the discretionary minimum sentences of life imprisonment in respect of the count of rape.

2 The appellant had been charged with the count of rape on the basis that on or about 16 March 2019 and at or near Unifound, Queenstown, he unlawfully and intentionally committed an act of sexual penetration with the complainant, one Lindelwa Skoti, a 69-year-old, by having sexual intercourse with her without her consent. The appellant hit the complainant all over her body with his fists and kicked her with booted feet causing grievous bodily harm. As a result, the discretionary minimum sentence of life imprisonment was applicable in the absence of substantial and compelling circumstances.

3 I may point out that the first ground of appeal related to the charge. It was contended that the magistrate failed to warn the appellant that he was facing a minimum sentence of life imprisonment if he is convicted and that this is a misdirection.

3.1 Where the State intends to rely upon the sentencing regime created by Act 105 of 1997, a fair trial will generally demand that its intention be pertinently brought to the attention of the accused at the outset of the trial. *If this is not done in the charge sheet, then it must be done in some other form*, so that the accused is placed in a position to appreciate properly and in good time the charge that she or he faces as well as the possible consequences. What is at least required is that the accused be given sufficient notice of the State's intention to enable the accused to conduct his or her defence properly (*S v Ndlovu* 2003 (1) SACR 331 (SCA)).

3.2 Where an accused has legal representation and the charge sheet makes clear reference to the fact that the prosecution will rely on the minimum sentence provisions in the Criminal Law Amendment Act 105 of 1997, there is no duty on the trial court to ensure that the accused is aware of the gravity of a conviction on a charge carrying the minimum sentence (*S v Nkadimeng* 2008 (1) SACR 538 (T)).

3.3 Given that:

3.3.1 the appellant was at all times legally represented;

3.3.2 the charge-sheet set out that the minimum sentence was applicable; and

3.3.3 the appellant confirmed in his plea that he understands the nature and the content of the charge against him,

I, accordingly, find that this ground of appeal holds no merit.

4 The appellant pleaded guilty and made a statement in terms of section 112(2) of Act 51 of 1977. The statement reads as follows:

"I, the undersigned, Anele Moyakhe, hereby state as follows:

1. *I am 31 years old and was working at Cashbuild as a drivers assistant before I was arrested on 30 March 2019.*

2. *I confirm that this statement is true and correct.*

3. *I make this statement freely and voluntarily and without any undue influence being imposed on me.*

4. *I understand the nature and content of the charge against me.*

5. *I plead guilty to the charge of rape as set out in the charge sheet against me in that:*

   5.1 *On the 16th of March 2019 I was coming back from Bejula's tavern to my shack when I saw the Complainant, Lindelwa Skoti, going into her house.*

   5.2 *I followed her because I decided I was going to have sex with her.*

   5.3 *When she got into her house I went inside and pushed her and assaulted her with fists and booted feet to subdue her.*

   5.4 *Then I had sex with her without her consent by pulling off her clothes and inserting my penis into her vagina.*

6. *I then ran away because I knew what I had done was wrong and I was only arrested 2 weeks later.*

7. *I admit that this incident happened in Unifound in Queenstown in the Regional Division of the Eastern Cape.*

8. *I admit that I unlawfully and intentionally committed an act of sexual penetration of the Complainant without her consent.*

9. *Although I had imbibed alcohol that evening I was in control of my actions, knew what I was doing and could act in accordance with that knowledge.*

10. *I admit that I caused grievous bodily harm to the Complainant by hitting and kicking her and that I intended to cause grievous bodily harm."*

5 The appellant was thereupon convicted on *"the charge of rape as stated in the charge sheet"*.

6 After conviction, and without objection, the State handed in the affidavit of Dr Jeneto, who had examined the complainant. The affidavit covered the Report by Authorised Medical Practitioner of the Completion of a Medico-legal Examination. This report reflects that, besides injuries associated with penetration, the complainant sustained the following injuries during the rape:

> *"Face: Abrasion (1cm x 3 cm long) on the left side of the face close to the left eye. Swelling of Right side of face and right ear[,] left eye has eyelid oedema. can't open eye spontaneously. Nose had dry blood – not actively bleeding[,] mouth also has dry blood tracking to the rightside of the face – not actively bleeding. Swelling on the right above the upper lip[,] mouth deviated to the left. Back – bruises on left side, below scapula x 2 about (2cm x 2 cm) each. bruise on the left leg above the knee[,] palpable emphysema on the right side of back from shoulder to last rib. emphysema on the right chest."*.

7 I was initially concerned that the factual basis for the admission of "grievous bodily harm" had not been set out in the plea. Had this been an element of the crime, this omission would have resulted in the plea failing to admit to the crime charged and would have required questioning in terms of section 112(1)(b) and 112(2) (*S v Shiburi* 2018 (2) SACR 485 (SCA) at [18]; *S v Negondeni* [2015] ZASCA 132 (unreported, SCA case no 00093/2015, 29 September 2015) [10]; *S v Kondo* 2012 (2) NR 415 (NLD) [14]).

8 However, in *S v Kekana* 2019 (1) SACR 1 (SCA) at [22], it was pointed out that there is no such charge as 'murder in terms of s 51(1) or 51(2)'. The minimum sentence provisions also do not create new or separate crimes, but merely enhance or compel an increase in sentence or penal jurisdiction if certain criteria or situations arise (at [23] – [24]). This also obtains to charges of rape as they might fall under the different subsections of s 51 of Act 105 of 1997.

9 This is the issue foreshadowed in the second ground of appeal – that the State led no medical evidence to prove the seriousness of the injuries sustained by the complainant, save only the "*J88*". The medical report was, however, only submitted after conviction.

10 Facts activating the minimum sentence provisions must be proved by the State beyond a reasonable doubt; and this requirement must be addressed by the trial court at the conviction stage, that is, in its judgment on the merits and not for the first time during the sentencing stage (*S v Taunyane* 2018 (1) SACR 163 (GJ) [13]). The Constitutional Court also held that the minimum sentence provisions could only have been activated upon proof by the prosecution *prior* to conviction (*S v Klaas* 2018 (1) SACR 643 (CC) [31]).

11 From the procedure apparent from the record, and summarised above, it is apparent that:

11.1 No reference was made either in the plea or in the statement in terms of section 112(2) of Act 51 of 1977 regarding the nature and extent of the injuries suffered by the complainant;

11.2 Only the conclusion, that the complainant suffered "*grievous bodily harm*", is admitted;

11.3 There is no evidence that, at the time of either the plea or the conviction, the appellant knew of the nature and extent of the injuries suffered by the complainant;

11.4 There is no evidence that, at the time of either the plea or the conviction, the appellant admitted each of the separate injuries suffered by the complainant, which might have brought the charge under the ambit of section 51(1) of Act 105 of 1997; and

11.5 The magistrate failed to question the appellant on the nature and extent of the injuries sustained by the complainant in order to determine whether or not the appellant admitted each of the separate injuries suffered by the complainant, which might have brought the charge under the ambit of section 51(1) of Act 105 of 1997.

12 Accordingly, the State did not prove beyond a reasonable doubt nor prior to conviction any *facts* activating the minimum sentence provisions relevant to section 51(1) of Act 105 of 1997.

13 All that was proved beyond reasonable doubt *prior to conviction* was the facts activating the minimum sentence provisions relevant to section 51(2)(b) of Act 105 of 1997, to wit rape in terms of Part III of Schedule 2 of Act 105 of 1997 – *"Rape ... as contemplated in section 3 ... of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, ... in circumstances other than those referred to in Part I"*.

14 I am, therefore, of the view that magistrate misdirected himself in convicting the appellant of rape as stated in the charge sheet.

15 The magistrate should have found the appellant guilty of the crime of contravening the provisions of section 3 read with sections 1, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 37, read with section 51(2)(b) of the Criminal Law Amendment Act 105 of 1997.

16 There is no appeal against conviction and this court has no inherent jurisdiction to assess the conviction *on appeal* (s 19 of Act 10 of 2013; S v Abrahams 1990 (2) SACR 420 (A) 425).

17 However, apart from its statutory powers to review the proceedings in the lower courts, the High Court is vested with an inherent jurisdiction to correct errors occurring in proceedings before the lower courts (cf. *S v Lubisi* 1980 (1) SA 187 (T)).

18 Section 112 provides as follows:

> *"(1) (b) the presiding* [officer] *shall, if he ... is of the opinion that the offence merits punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount guilty, and may,* ***if satisfied that the accused is guilty of the offence to which he ... has pleaded guilty****, convict the accused on his ... plea of guilty of that offence and impose any competent sentence.*
>
> *(2) If an accused or his legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1)(b), convict the accused on the strength of such statement and sentence him as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty:* ***Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement****."*
>
> [My emphasis]

19 Section 112(1)*(b)* was designed to protect an accused from the adverse consequences of an ill-considered plea of guilty (*S v Baron* 1978 (2) SA 510 (C) 512G).

20 The fair trial right guaranteed in section 35 of the Constitution *"includes the right to be treated fairly during plea proceedings in terms of ... s 112(1)(b), when an accused has elected to waive his ... right to remain silent, and the fairness of such proceedings should consequently be safeguarded by the magistrate who presides over them"* (*S v Fransman & another* 2018 (2) SACR 250 (WCC) [12]).

21 The court is required in peremptory language to go behind the plea by asking questions (*S v Mkhize* 1978 (1) SA 264 (N) 267). This is because a court is obliged to ensure that

the accused means to say that, in truth, he really is guilty (*S v Serame* 2019 (2) SACR 407 (GJ) [35]).

22 Section 112(1)*(b)* was designed to avoid the necessity for calling evidence in cases where it is clear that the accused understands all the elements of the charge against him and admits them all (*S v Shiburi* 2018 (2) SACR 485 (SCA) [18]). Accordingly, the questions and answers must at least cover all the essential elements of the offence which the State in the absence of a plea of guilty would have been required to prove (*S v Mkhize* 1978 (1) SA 264 (N)).

23 A further object of s 112(1)(b) is to eliminate evidence on facts which are common cause between the State and the accused (*S v Nyambe* 1978 (1) SA 311 (NC) 312).

24 Section 112(1)*(b)* questioning therefore has a twofold purpose: firstly, to establish the factual basis for the plea of guilty and, secondly, to establish the legal basis for such plea. In the first phase of the enquiry, the admissions made may not be added to by other means such as a process of inferential reasoning. The second phase of the enquiry amounts essentially to a conclusion of law based on the admissions. From the admissions the court must conclude whether the legal requirements for the commission of the offence have been met. They are the questions of unlawfulness, *actus reus* and *mens rea*. These are conclusions of law. If the court is satisfied that the admissions adequately cover all these elements of the offence, the court is entitled to convict the accused on the charge to which he pleaded guilty (*S v Negondeni* [2015] ZASCA 132 (unreported, SCA case no 00093/2015, 29 September 2015) [10] – In *Negondeni* the accused's admissions of fact made in a s 112(2) statement and in response to judicial questioning were, on appeal, considered inadequate to have justified a conviction of murder).

25 In *S v Bam* 2019 (2) SACR 662 (FB) at [7], the court observed that a general question to the accused whether he was satisfied with *"all procedures that* [were] *followed"*, is insufficient to satisfy the court *"that the accused admits all the elements of the offence including the competency of the traffic officer"*. In *S v Khambule* (unreported, FB case

no R07/2020, 13 March 2020) at [3], one of the reasons for setting aside the conviction of the accused, who had pleaded guilty to a charge of contravening s 59(4)*(c)* of Act 96 of 1996, was that the questions asked by the magistrate did not indicate "*that the calibration certificate of the device was shown to the accused*".

26 In *S v Funani* (unreported, ECB case no 4/2015, 17 April 2015) at [12], the court pointed out that, if the accused should for sentencing purposes "co-incidentally" disclose information that could possibly constitute the admission that should in the first place have been present for purposes of the conviction after s 112(1)(b) questioning, "*the situation is not alleviated at all*" because the magistrate "*ought in the first place to have elicited [the relevant admission] during his questioning of the accused in terms of s 112(1)(b)...*" (at [12]). The authors Du Toit *et al*, *Commentary on the Criminal Procedure Act*, RS 62, 2019 ch17-p11, support this approach, stating that the incorrect conviction because of inadequate judicial questioning cannot *ex post facto* be justified on the basis of factual matters that emerged for purposes of sentencing. To put the matter differently: an accused's conviction can only be based on factual admissions made prior to conviction and in response to judicial questioning in terms of s 112(1)(b).

27 When an accused is questioned in terms of s 112(1)*(b)*, it is the duty of the court to establish whether an accused's *factual* statements and answers in his plea of guilty adequately support the conviction on the charge (*S v Shiburi* 2018 (2) SACR 485 (SCA) [19].

28 In *S v Lebokeng* 1978 (2) SA 674 (O) 676A it was stated that:

> *"Deur skuldig te pleit, gee die beskuldigde reeds te kenne dat hy die bewerings in die aanklag erken. Die Wetgewer kon dus nouliks beoog het dat dit altyd voldoende vir die vereistes van art 112(1)(b) sal wees om ten aansien van elke skeibare bewering in die aanklag 'n afsonderlike erkenning van die beskuldigde te verkry. Dit sal veral nie die geval wees indien 'n bewering in die klagstaat nie 'n suiwer feitlike bewering is nie maar die vorm van 'n konklusie aanneem. So, bv. sou 'n erkenning deur die beskuldigde dat hy onregmatiglik opgetree het 'n hof in die reël nie tevrede kon stel dat hy wel aldus opgetree het nie, aangesien dit nie sou blyk welke feite deur hom erken word of sy eie interpretasie*

van sy optrede korrek is nie. Daarom moet 'n hof oortuig wees nie net dat 'n beskuldigde 'n bewering in die aanklag erken nie, maar ook dat hy begryp wat die erkenning behels."

29 The matter was tersely and accurately put by Wallis J in *S v Zerky* 2010 (1) SACR 460 (KZP) at 469*d–e*: "*Questions put to an accused under s 112(1)(b) are questions about the factual elements of a criminal offence, not questions about conclusions of law to be drawn from facts.*"

30 By example, the object of s 112(1)*(b)* is defeated if admissions of 'unlawfulness' and 'intent' are obtained in the absence of admissions of *facts* which support a finding of unlawfulness and intent (*S v Witbooi* 1978 (3) SA 590 (T) 595B–C).

31 The defence may submit a written statement as provided for in s 112(2). But here, too, it should be borne in mind that the primary purpose of such a statement is not only to set out the admissions of the accused. The written statement should also set out the *factual* basis supporting a plea of guilty (*Director of Public Prosecutions, Gauteng Division, Pretoria v Hamisi* 2018 (2) SACR 230 (SCA) [8]).

32 The abovementioned principles are therefore apposite to section 112(2) statements: In *S v Mshengu* 2009 (2) SACR 316 (SCA) the court said (at [7]) that: "*Section 112(2) requires that the statement must set out the facts which he admits and on which he has pleaded guilty. Legal conclusions will not suffice*". Further, in *S v Hlangothe* 1979 (4) SA 199 (B) 201B, the court took the view that the primary purpose of the written statement in terms of s 112(2) is to set out the admissions of the accused and the factual basis supporting his plea of guilty.

33 The fact that the prosecution indicates that it accepts the contents of a s 112(2) statement does not relieve the trial court of its duty of clearing up or resolving inadequacies in the s 112(2) statement. Where the contents of a s 112(2) statement are inadequate, a court "*should play a more active role to see to it that justice is done—not only to the accused, but also the State*" (*S v Kondo* 2012 (2) NR 415 (NLD) [14]).

34 The duty to see that justice is done to all parties is fundamental, particularly in cases where minimum sentences are alleged to be applicable. Although the facts bringing the offence within a particular sub-section of section 51 of Act 105 of 1997 are not elements of the offence, facts activating the minimum sentence provisions must be proved by the State beyond a reasonable doubt and *prior* to conviction. This is because the s 112(2) statement as accepted by the State embodies the exclusive facts for purposes of sentencing (*S v Thole* 2012 (2) SACR 306 (FB) [8], [10]), except insofar as there may be other facts not inconsistent with the factual matrix provided by the section 112(2) statement (*S v Khumalo* 2013 (1) SACR 96 (KZP) [11]). If it is not apparent that the accused intended to plead guilty to the additional jurisdictional *facts*, it cannot reasonably be said that he accepted responsibility for those *facts*. This must affect the sentence proceedings. It may result in the accused being more harshly sentenced because of conclusions drawn from facts that the accused never admitted; alternatively, it may result in the court refusing to consider a conclusion drawn from fact that the accused was more than happy to admit, had he but been asked.

35 I am of the considered opinion that the failure to question the appellant on the nature and extent of the injuries he admitted to causing to the complainant, *before* he was convicted on his plea, amounts to an irregularity such to result in a failure of justice (For this test, see *S v Seboko* 2009 (2) SACR 573 (NCK)).

36 Where a conviction and sentence under section 112 are set aside on review or appeal on the ground that any provision of subsection (1)(b) or subsection (2) of that section was not complied with, the court in question shall remit the case to the court by which the sentence was imposed and direct that court to comply with the provision in question (Section 312(1) of Act 51 of 1977).

37 Section 312 appears to be peremptory. In *S v Mshengu* 2009 (2) SACR 316 (SCA) at [18], it was held that the course prescribed by the section had to be followed unless the court of review or appeal was of the view that it would lead to an injustice or would be a futile exercise. It could never have been the intention of the legislature that a court should

be obliged to comply with the section irrespective of any injustice or unfairness that such a course might cause, the court held. (*S v Shiburi* 2018 (2) SACR 485 (SCA) at [22]).

38 In the present case, I can perceive no injustice or futility in remitting the matter. On the contrary, it is in the interests of justice and the appellant that there should be a remittal.

39 The remaining ground of appeal (relating to the existence or not of substantial and compelling circumstances to deviate from the discretionary minimum sentence) need, therefore, not be considered.

40 Accordingly, I propose to set aside the conviction and sentence and refer the matter back to the trial court for proper questioning under section 112(2) of Act 55 of 1977.

ORDER

41 I therefore make the following order:

1. The conviction and sentence of the appellant are set aside;

2. The matter is remitted to the trial court;

3. The trial court is directed to question the appellant on his written statement in terms of section 112(2) of the Criminal Procedure Act 51 of 1977, in accordance with the guidelines set out in this judgment, with particular reference to which of the separate injuries suffered by the complainant the appellant admits, which might bring the charge under the ambit of section 51(1) of Act 105 of 1997.

M. BENEKE
JUDGE OF THE HIGH COURT (ACTING)

RUGUNANAN, J:

I concur.

S. RUGUNANAN
JUDGE OF THE HIGH COURT

Appearances:

For the Appellant
Mr Charles
Grahamstown Justice Centre

For the Respondent
Mr SS Mtsila
Director of Public Prosecutions