THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM	The Registrar, Supreme Court of Appeal
DATE	27 May 2013
STATUS	Immediate

Please note that the media summary is for the benefit of the media and does not form part of the judgment.

***Nedzamba v S (911/2012*) [2013] ZASCA 69 (27 May 2013)**

The Supreme Court of Appeal (SCA) today upheld an appeal to set aside the appellant's convictions on two counts of rape and related sentences imposed by the High Court in Thohoyandou. The appellant had been charged with the rape of a 13-year old girl, it being alleged in the indictment that the appellant, a Zion Christian Church pastor had acted in the manner complained of under the pretext of performing church rituals.

In the High Court the appellant had denied the charges and had pleaded not guilty. He was convicted and two life sentences were imposed. Leave to appeal against the convictions and related sentences was granted by this Court.

There had been no objection to the charge sheet in the High Court. In heads of argument in this Court, the appellant's primary challenge to the conviction was that the indictment had made no reference to the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. It was submitted that the appellant had been charged with the common law offence of rape at a time when it had been abolished by the Act and that consequently the

convictions and related sentences ought to be set aside. Put simply, it was contended that the appellant had been tried ‘on [the] non-existent common law crime of rape’. There were also other grounds of appeal.

The State, in its heads of argument, conceded that the convictions and related sentences were liable to be set aside on the primary basis relied on by the appellant. Before the hearing of the appeal, this Court, through the Registrar’s office, sent a note to the parties referring to authorities and indicating that the parties would be required to address the court on the correctness of the concession by the State.

In this Court, the parties agreed that the concession had been wrongly made. The SCA thought it necessary to avoid similar concessions and confusion which might arise in the future to set out detailed reasons indicating the fallacy underlying the concession. It stated the following:

‘It is true that in the present case the indictment made no reference to s 3 of the Act under which the appellant should rightly have been charged. However, it undoubtedly asserted that the appellant was guilty of the offence of rape and the summary of substantial facts set out the details. Is this deficiency fatal? The short answer, for the reasons that follow, is no.’

The SCA stated that this was a case in which an amendment should be allowed, even on appeal, because there was no resulting prejudice to the appellant. It stated the following:

‘In the present case the appellant had legal representation and his case was conducted on the basis that he had been fully aware that he faced a charge of rape. He was adamant in his defence that he had not committed the offence.’

And went on to say:

‘It was accepted before us that allowing an amendment would not result in any prejudice to the accused and that it was clear that his defence would have remained the same. South Africans would rightly be aghast if the view initially taken by the state, referred to earlier in this judgment, was to prevail. It would elevate form above substance, would have grave consequences for victims of sexual abuse and would bring the administration of justice into disrepute.’

Regrettably, the conduct of the trial was tainted by several fundamental irregularities, compelling the SCA to set aside the convictions and related sentences. First, no care was taken in relation to the taking of evidence from the complainant, a child witness. Second, the trial court had evinced a predisposition at an early stage of the trial, which was repeated. It had also unjustifiably restricted or prevented cross-examination at critical times. Leading questions by the prosecutor on critical issues were permitted without any intervention by the court.

In dealing with the irregularities, the SCA said the following:

‘The irregularities referred to above, singularly or cumulatively are of such a nature that they have resulted in justice not having been done. Put differently, the appellant did not have a fair trial. . . . The irregularities render the convictions and sentence liable to be set aside. The consequence is that the appellant has already been in prison for more than four years without a fair trial to finality. Equally, for the child complainant there has been no closure. In this instance the administration of justice appears to have failed them both.’

The SCA criticised the police investigation of the case and referred to an earlier judgement in which the following was stated:

‘There are disturbing features of this case that we are constrained to address. In addition to the flagrant disregard of the rules relating to the identification of suspects, no crime kits were available at the hospital to enable Dr Theron to take a sample for DNA analysis. It is imperative in sexual assault cases, especially those involving children, that DNA tests be conducted. Such tests cannot be performed if crime kits are not provided. The failure to provide such kits will no doubt impact negatively on our criminal justice system. Fortunately in this matter such negative outcome has been avoided by the brave and satisfactory evidence of A as corroborated by other witnesses.’

On this aspect it concluded as follows:

‘Every effort should be made by the relevant authorities to ensure proper testing with appropriate sensitivity.’

Because of the irregularities, the convictions and related sentences were quashed and set aside.