THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 502/11

In the matter between

JACOB MASHININI **1st Appellant**
SIMON MFANAFUTHI ABOLISI **2nd Appellant**

and

THE STATE **Respondent**

Neutral citation: *Mashinini v The State* (502/11) [2012] ZASCA 1 (21 February 2012)

Coram: PONNAN, MHLANTLA and BOSIELO JJA

Heard: 22 November 2011

Delivered: 21 February 2012

Summary: Appeal – sentence – Criminal Law Amendment Act 105 of 1997 – s 51 – appellants convicted of rape read with the provisions of s 51(2) – applicable minimum sentence – 10 years' imprisonment – high court imposed sentence of life imprisonment in terms of s 51(1) – material misdirection entitling this court to interfere.

ORDER

On appeal from: South Gauteng High Court (Johannesburg) (Prinsloo J sitting as court of first instance):

1 The appeal is upheld.

2 The sentence imposed by the court below is set aside and replaced with a sentence of ten years' imprisonment. The sentence is antedated in terms of s 282 of the Criminal Procedure Act 51 of 1977 to 27 February 2008, this being the date when the appellants were originally sentenced.

JUDGMENT

MHLANTLA JA (BOSIELO JA concurring):

[1] The appellants, who were legally represented by one legal representative, were charged in the Regional Court, Nigel with one count of rape read with the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997 (the Act). On 28 June 2007 the appellants pleaded guilty to the charge and in amplification of their pleas, their counsel read out a statement in terms of s 112 of the Criminal Procedure Act 51 of 1977, which read:

'Ek, Jacob Mashinini, verklaar as volg: Ek erken dat ek op 1 Mei 2000 teenwoordig was te Blue Gun View, Duduza, in die Streeksafdeling van Gauteng. Ek erken dat ek daar en dan opsetlik en wederregtelik geslagtelike gemeenskap gehad het met Inzi Mabena teen haar sin en wil. Ek erken dat ek geen reg of toestemming gehad het om so op te tree nie. Ten tyde van die pleging van die misdryf het ek geweet ek doen verkeerd en dat my optrede volgens reg strafbaar is. Ek pleit skuldig uit my eie vrye wil en sonder enige beinvloeding daartoe. Op die betrokke dag was ek saam met Simon Abolisi, beskuldige 3, Kennith Shezi, en Moizafane. Die klaagster is 'n familielid van my. Toe ek aan die deur klop en sê wie ek is het die klaagster die deur oopgemaak. Ons alvier het ingegaan en ons het die klaagster verkrag.'

The contents of the statements of both appellants are similar save the fact that the first appellant is a family member of the complainant.

[2] Before conviction the regional magistrate addressed the appellants and their legal representative and enquired whether they were aware that the minimum sentence legislation was applicable. He, however, did not explain what that legislation entailed nor specify the prescribed sentence applicable to the offence with which they were charged. Following their pleas of guilty, the appellants were convicted as charged. The regional magistrate thereafter stopped the proceedings and committed the appellants for sentence by a high court in terms of s 52(1)(*a*) of the Act. There was no objection by the defence when the magistrate stopped the proceedings and referred the matter to the high court.

[3] The appellants were indicted in the High Court (Circuit Local Division of the Eastern Circuit Division, Delmas). The indictment served on the appellants stated that they were convicted of an offence referred to in Schedule 2 of the Act. At the commencement of the proceedings Prinsloo J confirmed the convictions of the appellants in terms of s 52(2)(*b*) of the Act. No evidence was adduced in mitigation and

aggravation of sentence. On 27 February 2008, the appellants were sentenced to imprisonment for life. The appellants now appeal against that sentence with the leave of the court below.

[4] The appeal turns on whether the judge in the court below acted correctly in sentencing the appellants to imprisonment for life in terms of s 51(1) read with Part I of Schedule 2 when the appellants had been convicted of rape read with the provisions of s 51(2) of the Act, which upon conviction carries a penalty of ten years' imprisonment. Allied to this question is whether the imposition of such a sentence rendered the trial unfair.

[5] In my view the starting point in an enquiry of this nature is s 51 of the Act. Section 51(1), (2) and (3) provide:

'(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.

(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in ─

(*a*) Part II of Schedule 2, in the case of ─

(i) a first offender, to imprisonment for a period not less than 15 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;

(*b*) Part III of Schedule 2, in the case of ─

(i) a first offender, to imprisonment for a period not less than 10 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years; and

(*c*) Part IV of Schedule 2, in the case of—

(i) a first offender, to imprisonment for a period not less than 5 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 7 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 10 years;

Provided that the maximum term of imprisonment that a regional court may impose in terms of this subsection shall not exceed the minimum term of imprisonment that it must impose in terms of this subsection by more than five years.

(3)(*a*) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.'

Part III of Schedule 2 provides: 'Rape in circumstances other than those referred to in Part I'.

[6] The main argument for the appellants was that the court below erred in imposing a sentence of life imprisonment when the penalty stipulated in s 51(2) for a rape falling in this category is ten years' imprisonment. Counsel submitted that, as this was the charge which was put to the appellants, to which they pleaded guilty and, importantly, on which they were convicted, that it is irregular for them to be sentenced for a more serious offence for which they were neither charged nor convicted. Counsel submitted that the irregularity is so gross that it

rendered the proceedings subsequent to conviction unfair. I must mention that this issue was raised for the first time on appeal.

[7] Counsel for the respondent correctly conceded that the learned judge erred when he failed to take notice of the fact that the charge for which the appellants were convicted was rape read with s 51(2) of the Act and not rape as envisaged by s 51(1) of the Act. Counsel conceded that this fundamental error was caused by the State officials' mistaken reference to s 51(2) instead of s 51(1) in the charge sheet. She however countered the appellants' submissions by contending that, notwithstanding this patent error, the appellants, who were legally represented, were aware of the evidence to the effect that this was a gang rape which merited a more severe sentence and that the said failure did not render the trial unfair. She thus argued that the sentence imposed was appropriate regardless of the admitted irregularity.

[8] As already alluded to in para 4, the legal issue remains whether the judge below erred in imposing a sentence of life imprisonment on the appellants in terms of s 51(1) whereas in fact they had been convicted of rape read with the provisions of s 51(2) which prescribes a sentence of ten years' imprisonment and not life imprisonment.

[9] It is common cause that the appellants in this matter were charged with rape which falls under s 51(2). Part III of Schedule 2, which is the only schedule other than Part I of Schedule 2 that provides for rape, provides that, upon conviction on such an offence, an accused who is a first offender, like the appellants, shall be sentenced to imprisonment for ten years unless the court finds substantial and compelling circumstances justifying a lesser sentence. They were convicted as charged but were

erroneously sentenced to imprisonment for life on the basis of a conviction of a gang rape, where the complainant had been raped more than once by more than one person.

[10] Counsel for the State submitted that the appellants and their legal representatives should have raised an objection when the magistrate stopped the proceedings and committed the appellants to the high court for sentence. It was further submitted that their failure to object and their actions to further participate in the high court proceedings precluded them from raising the issue. The argument seems to be that they acquiesced to the further conduct of the trial. I disagree. The failure by the accused or their legal representative to object to what is a patently irregular procedure can never turn such an irregular act into a lawful or regular one. I find these submissions to be fallacious.

[11] 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(s) 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.

[12] In *S v Legoa,*[1] Cameron JA stated with regard to the constitutional right to a fair trial:

'Under the common law it was therefore "desirable" that the charge-sheet should set out the facts the State intended to prove in order to bring the accused within an enhanced sentencing jurisdiction. It was not, however, essential. The Constitutional Court has emphasised that under the new constitutional dispensation, the criterion for a just criminal trial is "a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution of the Republic of South Africa Act 108 of 1996 came into force". The Bill of Rights specifies that every accused has a right to a fair trial. This right, the Constitutional Court has said, is broader than the specific rights set out in the sub-sections of the Bill of Rights' criminal trial provision. One of those specific rights is "to be informed of the charge with sufficient detail to answer it". What the ability to "answer" a charge encompasses this case does not require us to determine. But under the constitutional dispensation it can certainly be no less desirable than under the common law that the facts the State intends to prove to increase sentencing jurisdiction under the 1997 statute should be clearly set out in the charge-sheet.

The matter is, however, one of substance and nor form, and I would be reluctant 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 is charged, or the facts the State intends to prove to establish it.'

[13] In *S v Ndlovu,*[2] Mpati JA had occasion to deal with the same issue. He said:

'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 that its intention pertinently be brought to the attention of the accused at the outset of the trial, if not in 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

[1] *S v Legoa* 2003 (1) SACR 13 (SCA) paras 20 and 21.
[2] *S v Ndlovu* 2003 (1) SACR 331 (SCA) para 12.

consequences. Whether, or in what circumstances, it might suffice if it is brought to the attention of the accused only during the course of the trial is not necessary to decide in the present case. It is sufficient to say that what will at least be required is that the accused be given notice of the State's intention to enable him to conduct his defence properly.'

[14] In *S v Makatu*,[3] Lewis JA stated:

'The appellant argues that the imposition of a sentence in terms of s 51(1), when the indictment refers to s 51(2), is a blatant misdirection. Even if the murder had indeed been premeditated – a question to which I shall turn – an accused has the right to know at the outset what charge he has to meet. The State properly conceded this point. Since the enactment of the Act this Court has held that it is incumbent on the State to specify the case to be met in such a way that an accused appreciates properly not only what the charges are but also the consequences.

…..

As a general rule, where the State charges an accused with an offence governed by s 51(1) of the Act, such as premeditated murder, it should state this in the indictment. This rule is clearly neither absolute nor inflexible. However, an accused faced with life imprisonment – the most serious sentence that can be imposed – must from the outset know what the implications and consequences of the charge are. Such knowledge inevitably dictates decisions made by an accused, such as whether to conduct his or her own defence; whether to apply for legal aid; whether to testify; what witnesses to call; and any other factor that may affect his or her right to a fair trial. If during the course of a trial the State wishes to amend the indictment it may apply to do so, subject to the usual rules in relation to prejudice.'

In my view the principles enunciated in these cases are applicable in this case.

[15] It is a well-known fact that the State is *dominis litis*. After the police have concluded their investigations, the docket is given to the

[3] *S v Makatu* 2006 (2) SACR 582 (SCA) paras 3 and 7.

prosecutor. He or she gains access to all documents and statements in the docket. Based on this, he or she decides on which charge(s) to prefer against an accused person. The latter plays no role in this critical choice by the prosecutor. It follows that any wrong decision regarding the choice of an appropriate charge(s) cannot be put at the accused person's door.

[16] In my judgment, there is nothing that precluded the State, after having studied the docket as the officials are required to, to decide on the appropriate charge. The information was available. Even counsel for the respondent was unable to offer any plausible explanation for this serious mistake. This failure, unexplained, speaks of some disturbing flippant attitude on the part of the prosecution. The State must bear the consequences.

[17] In this matter, the State decided to restrict itself to s 51(2), where Part III of Schedule 2 prescribes a sentence of ten years' imprisonment. This is what was put to the appellants and to which they pleaded guilty. It was not thereafter open to the court to invoke a completely different section which provides for a more severe sentence unless the State had sought and been granted an amendment of the charge sheet in terms of s 86 of the Criminal Procedure Act prior to conviction.[4] The State did not launch such an application. The magistrate was therefore bound to impose a sentence in terms of s 51(2) read with Part III of Schedule 2.

[4] Section 86(1) provides: 'Where a charge is defective for the want of any essential averment therein, or where there appears to be any variance between any averment in a charge and the evidence adduced in proof of such averment, or where it appears that words or particulars that ought to have been inserted in the charge have been omitted therefrom, or where any words or particulars that ought to have been omitted from the charge have been inserted therein, or where there is any other error in the charge, the court may, at any time before judgment, if it considers that the making of the relevant amendment will not prejudice the accused in his defence, order that the charge, whether it discloses and offence or not, be amended, so far as it is necessary, both in that part thereof where the defect, variance, omission, insertion or error occurs and in any other part thereof which it may become necessary to amend.'

[18] In my view, the fact that the proceedings had been stopped and referred to the high court for sentencing cannot be regarded as a ground to deprive the accused of his constitutional right to fair trial. This is akin to allowing the State to benefit from its own mistakes. In the result, I find there was a misdirection which vitiates the sentence. The misdirection lies in the fact that the appellants were sentenced for an offence different to the one for which they were convicted. There was therefore no need for this matter to be referred to the high court as the regional magistrate had the competence to sentence the appellants. Undoubtedly, the judge below erred in sentencing the appellants in terms of s 51(1) instead of s 51(2) read with Part III of Schedule 2 of the Act. The appeal against sentence has to succeed.

[19] I am of the considered view that it will not serve any useful purpose to refer the matter back to the regional magistrate to impose sentence, given the misdirection, the lapse of time and the fact that all the evidence is before us. It will accordingly be appropriate that this court considers sentence afresh having regard to the provisions of s 51(2) of the Act.

[20] Section 51(2) read with Part III of Schedule 2 of the Act prescribes a period of ten years' imprisonment. This court can deviate from such sentence only if substantial and compelling circumstances are found to exist which justify the imposition of a lesser sentence. The approach to the enquiry is enunciated in *S v Malgas*,[5] where Marais JA held that courts should not deviate from the minimum sentence for flimsy reasons. In order to determine the existence of substantial and compelling

[5] *S v Malgas* 2001 (1) SACR 469 (SCA) para 25

circumstances, the court has to evaluate all the evidence including the mitigating and aggravating factors.

[21] The mitigating factors submitted on behalf of the appellants are the following: Both appellants were first offenders and have the capacity to be rehabilitated. They were relatively young as at least one of them was 26 years of age when the offence was committed. They pleaded guilty and did not waste the court's time. Their plea of guilty should be regarded as sign of remorse for their deeds. The complainant did not suffer severe physical injuries albeit the incident would have traumatised her. Both appellants had spent 18 months in custody pending the finalisation of the trial.

[22] Regarding the relative youthfulness of the offender it is apposite to refer to the judgment of this court in *S v Matyityi*,[6] where Ponnan JA stated:

'It is well established that, the younger the offender, the clearer the evidence needs to be about his or her background, education, level of intelligence and mental capacity, in order to enable a court to determine the level of maturity and therefore moral blameworthiness . . . Thus, whilst someone under the age of 18 years is to be regarded as naturally immature, the same does not hold true for an adult. In my view a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor. At the age of 27 the respondent could hardly be described as a callow youth.'

[23] In this matter the appellants elected not to testify. There is no evidence relating to the level of their maturity. However, the principle enunciated in *Matyityi* applies to them as well.

[6] *S v Matyityi* 2011 (1) SACR 40 (SCA) para 14.

[24] The appellants did not verbalise any remorse. It was submitted on their behalf that their plea of guilty may be an indication of remorse. This submission cannot prevail. It must be borne in mind that the complainant knew the first appellant therefore the issue of identification of him as one of the rapists was not in dispute. The second appellant was linked to the commission of the offence by DNA evidence. It is therefore clear that there was overwhelming evidence against the appellants. They had no choice but to plead guilty. Their plea under such circumstances can never be interpreted as remorse. In *S v Matyityi*,[7] Ponnan JA stated in regard to remorse:

'There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined.'

[25] Against that background the aggravating factors are as follows: The complainant, who was 54 years old at the time, was raped by four men; one of whom was a family member. This rape is commonly referred to as a gang rape. The first appellant watched whilst the complainant was raped thrice by his friends. He did nothing to stop this injustice. The complainant's mouth was closed during the ordeal to prevent her from screaming or shouting for help. The complainant did not sustain severe

[7] Ibid para 13.

physical injuries, however she was tender on her chest. The complainant was raped in the sanctity of her home. In my view, this must have been a very traumatic experience for her. Rape in this country has reached pandemic proportions and it has become a cancer in our society. In *S v Chapman*,[8] Mohamed CJ described rape as follows:

'Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim . . . Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.'

[26] The appellants had admitted in their plea explanation that they had gone to the house of the complainant with the intention to rape her. They did not verbalise any remorse. I have already dealt with the issue of remorse in para 24 above and found that their plea of guilty can never be interpreted as remorse.

[27] In the result having regard to all the evidence, there are no substantial and compelling circumstances justifying the imposition of a lesser sentence. On the contrary, there are more aggravating features in the evidence than mitigating circumstances.

[28] There is one aspect that I am constrained to address. In my view this is a type of case where imprisonment for life would have been appropriate but for the careless manner in which the staff in the office of the National Director of Public Prosecutions handled the matter. The relevant officials did not approach the matter with the requisite degree of

[8] *S v Chapman* 1997 (2) SACR 3 (SCA) at 5B.

diligence and seriousness. They were aware of the facts - having obtained a statement from the complainant and had DNA evidence. The four suspects had been arrested – clearly indicating that this was an allegation of a gang rape. Had they applied their minds properly, it would have been clear to them that the accused persons ought to be charged either in terms of s 51 or s 51(1) of the Act if they desired to be specific. The outcome of the case is unjust to the complainant and society at large but that is as a result of the State failing to perform its duties properly. This is made even more reprehensible by the fact that starting from *Legoa* and ending with *Makatu*, this court has sounded a salutary warning that care be exercised in drafting and preparing charge-sheet(s) and indictment(s) to ensure that they correctly and adequately reflect all the necessary averments. A situation of this nature cannot be countenanced.

[29] Having regard to all circumstances, I am compelled to impose a sentence of ten years' imprisonment as set out in s 51(2) of the Act.

[30] In the result I make the following order:

1 The appeal is upheld.

2 The sentence imposed by the court below is set aside and replaced with a sentence of ten years' imprisonment. The sentence is antedated in terms of s 282 of the Criminal Procedure Act to 27 February 2008, this being the date when the appellants were originally sentenced.

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N Z MHLANTLA
JUDGE OF APPEAL

PONNAN JA:

[31] I have read the judgment of my colleague Mhlantla JA with which I regret I am unable to agree. Like my colleague I would also commence the present enquiry with s 51 of the Criminal Law Amendment Act 105 of 1997. That section, which is set out fully in her judgment,[9] must be read together with s 52 of the Act.

[32] Section 52 headed: 'Committal of accused for sentence by High Court after plea of guilty or trial in regional court' provides:

'(1) If a regional court, after it has convicted an accused of an offence referred to in Schedule 2 following on—

(*a*) a plea of guilty; or

(*b*) a plea of not guilty,

but before sentence, is of the opinion that the offence in respect of which the accused has been convicted merits punishment in excess of the jurisdiction of a regional court in terms of section 51, the court shall stop the proceedings and commit the accused for sentence by a High Court having jurisdiction.

(2) (*a*) Where an accused is committed under subsection (1) (*a*) for sentence by a High Court, the record of the proceedings in the regional court shall upon proof thereof in the High Court be received by the High Court and form part of the record of that Court, and the plea of guilty and any admission by the accused shall stand unless the accused satisfies the Court that such plea or such admission was incorrectly recorded.

(*b*) Unless the High Court in question—

(i) is satisfied that a plea of guilty or an admission by the accused which is material to his or her guilt was incorrectly recorded; or

(ii) is not satisfied that the accused is guilty of the offence of which he or she has been convicted and in respect of which he or she has been committed for sentence,

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[9] Para 5.

the Court shall make a formal finding of guilty and sentence the accused as contemplated in section 51.

(*c*) If the Court is satisfied that a plea of guilty or any admission by the accused which is material to his or her guilt was incorrectly recorded; or is not satisfied that the accused is guilty of the offence of which he or she has been convicted and in respect of which he or she has been committed for sentence or that he or she has no valid defence to the charge, the Court shall enter a plea of not guilty and proceed with the trial as a summary trial in that Court: Provided that any admission by the accused the recording of which is not disputed by the accused, shall stand as proof of the fact thus admitted.

(*d*) The provisions of section 112 (3) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), shall apply with reference to the proceedings under this subsection.

(3) (*a*) Where an accused is committed under subsection (1) (*b*) for sentence by a High Court, the record of the proceedings in the regional court shall upon proof thereof in the High Court be received by the High Court and form part of the record of that Court.

(*b*) The High Court shall, after considering the record of the proceedings in the regional court, sentence the accused, and the judgment of the regional court shall stand for this purpose and be sufficient for the High Court to pass sentence as contemplated in section 51: Provided that if the judge is of the opinion that the proceedings are not in accordance with justice, he or she shall, without sentencing the accused, obtain from the regional magistrate who presided at the trial a statement setting forth his or her reasons for convicting the accused.

(*c*) If a judge acts under the proviso to paragraph (*b*), he or she shall inform the accused accordingly and postpone the case for judgment, and, if the accused is in custody, the judge may make such order with regard to the detention or release of the accused as he or she may deem fit.

(*d*) The Court in question may at any sitting thereof hear any evidence and for that purpose summon any person to appear to give evidence or to produce any document or other article.

(*e*) Such Court, whether or not it has heard evidence and after it has obtained and considered a statement referred to in paragraph (*b*), may—

(i) confirm the conviction and thereupon impose a sentence as contemplated in section 51;

(ii) alter the conviction to a conviction of another offence referred to in Schedule 2 and thereupon impose a sentence as contemplated in section 51;
(iii) alter the conviction to a conviction of an offence other than an offence referred to in Schedule 2 and thereupon impose the sentence the Court may deem fit;
(iv) set aside the conviction;
(v) remit the case to the regional court with instruction to deal with any matter in such manner as the High Court may deem fit; or
(vi) make any such order in regard to any matter or thing connected with such person or the proceedings in regard to such person as the High Court deems likely to promote the ends of justice.'

[33] Part I of Schedule 2 to the extent here relevant provides:

'Rape -
(*a*) When committed—
(i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;
(ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy.'

Whilst Part III of Schedule 2 provides:

'Rape in circumstances other than those referred to in Part I.'

[34] Recently in *Mthembu v The State* (206/11) [2011] ZASCA 17 paras 16 and 17, this court stated:

'It may be advisable to retrace our steps. That an accused person should be informed that the minimum sentence is applicable to his or her case owes its genesis to *S v Legoa* 2003 (1) SACR 13 (SCA). There Cameron JA, after an examination of the earlier judgments of this court, expressed the conclusion that under the common law it was 'desirable' that the charge-sheet should set out the facts the State intended to prove to bring the accused within an enhanced sentencing jurisdiction. Cameron JA continued (para 20 and 21):

"But under the constitutional dispensation it can certainly be no less desirable than under the common law that the facts the State intends to prove to increase sentencing jurisdiction under the 1997 statute should be clearly set out in the charge-sheet.

The matter is, however, one of substance and not form, and I would be reluctant 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 is charged, or the facts the State intends to prove to establish it. A general requirement to this effect, if applied with undue 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 the charge, has been impaired, will therefore depend on a vigilant examination of the relevant circumstances."

It is noteworthy that Cameron JA declined to lay down any general rule in *Legoa*. *Legoa* was followed shortly thereafter by *S v Ndlovu* 2003 (1) SACR 331 (SCA). In *Ndlovu,* Mpati JA stated (para 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 that its intention pertinently be brought to the attention of the accused at the outset of the trial, if not in the charge-sheet then 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. Whether, or in what circumstances, it might suffice if it is brought to the attention of the accused only during the course of the trial is not necessary to decide in the present case. It is sufficient to say that what will at least be required is that the accused be given sufficient notice of the State's intention to enable him to conduct his defence properly."

In both *Legoa* and *Ndlovu,* unlike here, this court was concerned with the case where the accused had not been warned that the minimum sentence legislation might be invoked. And, whilst *Ndlovu* went somewhat further than *Legoa,* both emphasised that a fair trial enquiry does not occur *in vacuo* but that it is first and foremost a fact-based enquiry.'

[35] As both *Legoa* and *Ndlovu* make plain a 'vigilant examination of the relevant circumstances' is required (*Mthembu* para 18). Here the charge sheet has not been included in the record. We thus simply do not know what it stated. What the record does reveal though is that the appellants were informed by the prosecutor at the commencement of the proceedings that they were charged with 'the crime of rape read with section 51(2) of the Criminal Law Amendment Act 105 of 1997'. Thus, right from the outset both appellants were informed in unambiguous terms that the State intended to rely on the minimum sentencing provisions. In this case however the State went further. Despite there being no obligation on it to do so, it chose to refer to a specific section of the Act. In doing so it appears to have referred in error to the wrong section – s 51(2), instead of s 51(1).

[36] Both appellants, who were legally represented, tendered pleas of guilty to the offence charged. The record then reads:

'HOF: Mnr. Van Vuuren [the appellants' legal representative] hierdie is een van daardie aspekte wat ek net graag sal wil opgeklaar wil hê voor ek oorgaan tot uitspraak as gevolg van die Wet of Minimum Vonnisse. Dra dit u goedkeuring weg as ek by beskuldigde 2 en by beskuldigde 3 net vra of hulle bewus is van die Wet of Minimum Vonnisse.

MNR. VAN VUUREN: Inderdaad agbare.

HOF: Baie dankie. Dit is, dit is slegs vir doelmatigheidsredes. Dit het geen refleksie op u van enige aard nie.

MNR. VAN VUUREN: Soos dit u behaag agbare.

HOF: Beskuldigde 2 en 3 u pleit skuldig aan verkragting. Hierdie misdryf is gelees in terme van die Wet op Minimum Vonnisse. Indien u skuldig bevind word is daar 'n minimum vonnis wat u kan, opgelê kan word, verstaan u dit?

BEIDE BESKULDIGDES: Ons verstaan edelagbare.

HOF: Baie dankie. En ten spyte daarvan pleit julle skuldig en maak u vooraf vir hulle gaande erkenning soos per Bewysstuk A en B.

BEIDE BESKULDIGDES: Dit is korrek edelagbare.

HOF: Dankie. Mnr. Die Aanklaer stem die erkennings in Bewysstuk A en B, does that correspond, the admissions does that correspond with the evidence at the state's disposal?

PROSECUTOR: That is correct your worship.

COURT: Thank you sir. Goed. Ex-tempore uitspraak.'

[37] The magistrate being satisfied that all of the elements of the offence had been admitted by the appellants then proceeded to convict each on the offences charged, on his plea of guilty. The record then reads:

'COURT: Good. Mr Prosecutor, Mnr. van Vuuren dit is duidelik dat hierdie misdryf in die omskrywing val waar 'n voorgeskrewe minimum vonnis voorgeskryf word. Die voorgeskrewe minimum vonnis is buite die bevoegdheid van hierdie hof en derhalwe staak ek die verrigtinge en word hierdie aangeleentheid verwys vir vonnis na die Hooggeregshof, watter datum gaan almal pas sodat die oorkonde getik kan word en dus saam met die dossier versend kan word en dat 'n datum verkry kan word vanaf die DOV wanneer hierdie verrigtinge in die Hooggeregshof kan dien vir vonnis.

AANKLAER: U edele ons het 'n datum van 26 Junie vir die oorkonde.

HOF: Goed. U moet dan intussentyd vir ons 'n in-diepte "assessment reports" verkry want dit word vereis deur die Hooggeregshof tesame met 'n proefbeampte verslag oor beskuldigde 2 en 3. So dit is die drie verslae wat dan ook verkry moet word, asseblief. "Victim's assessment reports" en die proefbeampte verslag. U sê die, watter datum Mnr. Die Aanklaer?

AANKLAER: 26 Junie.

HOF: 26/06. Mnr. Van Vuuren?

MNR. VAN VUUREN: (Onhoorbaar).

HOF: Goed. Hierdie saak word uitgestel na 26 Junie sodat die oorkonde getik kan word, die bande getranskribeer kan word en dit versend kan word na die Hooggeregshof, die DOV, sodat die DOV 'n datum met die Hooggeregshof kan bepaal wanneer hierdie verrigtinge moet voortgaan vir die voorlegging vir die vonnisverrigtinge. Daar is ook van my kant af 'n versoek dat die staat die nodige verslae, insluitende proefbeampte verslae, so spoedig as moontlik bekom sodat daar nie 'n vertraging in daardie opsig is nie. Beide van u bly in hegtenis.

SAAK UITGESTEL TOT 26 JUNIE 2007

HOF VERDAAG.'

[38] Thereafter the appellants were served with an indictment and a summary of substantial facts. In material part the indictment reads:

'WHEREAS the accused were convicted in the regional court, NIGEL of an offence referred to in Schedule 2 of the Criminal Law Amendment Act 105 of 1997, to wit the offence of

RAPE

the facts being that upon or about 1 May 2000 and at or near Blue Gun View, DUDUZA, in the regional division of GAUTENG, the accused did unlawfully and intentionally have sexual intercourse with

PHINZI ALBINAH MABHENA

a 55 year old female person, without her consent.

--- *as would appear fully from the certified copy of the proceedings, attached hereto in terms of the provisions of section 52(2)(a) of Act 105 of 1997, read with sections 76*[10] *and 235 of Act 51 of 1977.*[11]

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[10] '76 Charge-sheet and proof of record of criminal case

(1) Unless an accused has been summoned to appear before the court, the proceedings at a summary trial in a lower court shall be commenced by lodging a charge-sheet with the clerk of the court, and, in the case of a superior court, by serving an indictment referred to in section 144 on the accused and the lodging thereof with the registrar of the court concerned.

(2) The charge-sheet shall in addition to the charge against the accused include the name and, where known and where applicable, the address and description of the accused with regard to sex, nationality and age.

(3) *(a)* The court shall keep a record of the proceedings, whether in writing or mechanical, or shall cause such record to be kept, and the charge-sheet, summons or indictment shall form part thereof.

(b) Such record may be proved in a court by the mere production thereof or of a copy thereof in terms of section 235.

(c) Where the correctness of any such record is challenged, the court in which the record is challenged may, in order to satisfy itself whether any matter was correctly recorded or not, either orally or on affidavit hear such evidence as it may deem necessary.'

[11] '235 Proof of judicial proceedings

(1) It shall, at criminal proceedings, be sufficient to prove the original record of judicial proceedings if a copy of such record, certified or purporting to be certified by the registrar or clerk of the court or other officer having the custody of the record of such judicial proceedings or by the deputy of such registrar, clerk or other officer or, in the case where judicial proceedings are taken down in shorthand or by mechanical means, by the person who transcribed such proceedings, as a true copy of such record, is produced in evidence at such criminal proceedings, and such copy shall be *prima facie* proof that any matter purporting to be recorded thereon was correctly recorded.

(2) Any person who, under subsection (1), certifies any copy as true knowing that such copy is false, shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding two years.'

AND WHEREAS the proceedings were stopped and the accused committed for sentence by a High Court in terms of section 52(1)(a) of Act 105 of 1997.'

[39] Before proceeding to sentence the appellants, Prinsloo J first satisfied himself that the record of the proceedings in the magistrates' court was in order. In that regard the record reads:

'PRINSLOO, J: Can I just then say what I wanted to say, I think we should not put the cart before the horses, we must first decide whether the record is in order, not so?

MR D. PHAHLANE [Counsel for the appellants]: That is so M'Lord.

PRINSLOO, J: Otherwise if it is not, we cannot carry on. Mrs Voster, do you have any problem with the record?

MRS P. VOSTER: As the Court pleases. M'Lord, the State will request that the record be accepted as correct and received as part of this record in terms of Section 52(3).

PRINSLOO, J: Is it not Section 52(2), because it was a plea of guilty?

MRS P. VOSTER: Indeed M'Lord, I sincerely apologise, indeed it is Section 52(2) of the Criminal Law Amendment Act 105 of 1997.

PRINSLOO, J: Thank you. Mr Phahlane, do you have a problem with the record, it is not a very lengthy record, the section implores as to accepted as part of the record of these proceedings, if we are happy that the record is in order?

. . .

MR D. PHAHLANE: Yes, as I said earlier on M'Lord, that I agree that the record was in order, except to highlight the very same aspects, that from the record mention is made of accused 1 and 2 previous...[intervenes] [What counsel was alluding to was an apparent mistake in the numbering of the accused in the court below. But nothing turns on that.]

. . .

MR D. PHAHLANE ADDRESSES COURT: M'Lord, in as far as conviction is concerned, my submission is that it was in order, because both accused pleaded guilty in the court *a quo* M'Lord.

. . .

PRINSLOO, J: Yes. Having heard Mr Phahlane and Mrs Vorster, and taking note of the record and the plea explanations, where both the accused pleaded guilty with the

assistance of their legal representative, I make a formal finding of guilty in respect of both accused in terms of Section 52(2)(b) of Act 105 of 1997. Yes?'

[40] In his judgment on sentence the learned Judge states:

'In the result, I made a formal finding of guilty in respect of both the accused as intended by the requirements of Section 52(2)(b) of Act 105 of 1977. The prescribed minimum sentence, which Parliament felt was appropriate for a multiple rape of this nature, is life imprisonment. The type of offence which we deal with here is described as follows by the Legislator in Part 1 of Schedule 2, where the following is said in Subsection (a)(ii), dealing with rape:

"Rape,

[a] When committed;

[ii] by more than one person, where such persons acted in the execution, or furtherance of a common purpose, or conspiracy."

This incident is also covered by another subsection in the schedule to which I have referred, namely (a)(i), which reads as follows:

"Rape, when committed:

[i] In circumstances where the victim was raped more than once, whether by the accused, or by any co-perpetrator, or accomplice."'

[41] The learned Judge concluded – as does my colleague Mhlantla JA[12] - that there were no substantial and compelling circumstances present. He thus proceeded to sentence each of the appellants to imprisonment for life. My learned colleague agrees – as do I – that that sentence was appropriate. She opines:[13]'In my view this is a type of case where imprisonment for life would have been appropriate but for the careless manner in which the staff in the office of the National Director of Public Prosecutions handled the matter.' On the very day that they were sentenced an oral application for leave to appeal was made on their behalf to the learned Judge. The gist of the application was that the learned

[12] Para 27.
[13] Para 28.

Judge ought to have found that there were substantial and compelling circumstances present and that therefore a sentence less than that ordained by the legislature should have been imposed. The learned Judge dealt with that application in these terms:

'Nevertheless, although I am alive to the fact that a Court of appeal is slow generally to interfere with a sentence imposed by a Trial Court, I am also alive to the fact that there appears to be, and I say this with respect, a tendency in the Supreme Court of Appeal to impose lesser sentences when it comes to matters of this nature.

There is, for example, a recent case of *State versus Nkomo*, 2007 (2) SACR 198 SCA, where the victim was subjected to a particularly cruel multiple rape by the perpetrator. This was referred to me on more than one occasion in the past few weeks during these Circuit Court sessions. I have not studied the Nkomo judgment, but I am told that the sentence imposed under those awkward circumstances was 16 years imprisonment.

In all the circumstances, and without attempting to draw a comparison between other sentences recently imposed, and the present case, I have come to the conclusion that there must be a reasonable prospect that a Court of Appeal may impose a lesser sentence. The order that I will make is that **BOTH ACCUSED ARE GRANTED LEAVE TO APPEAL** to the Supreme Court of Appeal against their sentence, as I imposed it, and they will both remain in custody.'

[42] In heads of argument filed with this court, appellants' counsel conceded:

'Before accepting the appellants' pleas of guilty to the charges read out in the open court, the Learned Magistrate ensured that they were properly informed and understood the applicability of the minimum sentence regime.'

And for the first time the following was raised:

'It is submitted that the Learned Judge failed to take notice of the fact that the charge against the appellants was to be read with Section 51(2) of the Criminal Law Amendment Act 105 of 1997. Section 51(2) does not make provision for life imprisonment and it is therefore argued that the Learned Judge erroneously concluded that the minimum sentence of life imprisonment should be applied

It is furthermore submitted that the accused persons, if they faced imprisonment for life which is the ultimate penalty available in our justice system, should have been made aware from the outset what the implications and consequences of the charge are to which they were requested to plea. Such knowledge would inevitably impact on the conduct of their defence and might ultimately affect their right to a fair trial.'

[43] In support of that contention, counsel for the appellant called in aid *S v Makatu* 2006 (2) SACR 582 (SCA). In *Makatu* (para 7), Lewis JA stated: '[a]s a general rule where the State charges an accused with an offence governed by s 51(1) of the Act, such as premeditated murder, it should state this in the indictment'. In my view *Makatu* is distinguishable from this case. *Makatu* was not concerned, as here, with a bifurcated procedure. Moreover, as Lewis JA was quick to add the rule that she sought to lay down was 'clearly neither absolute nor inflexible'. In this case before the commencement of the sentencing phase of the trial, the appellants could have been under no illusion that the minimum sentencing provision that the State sought to invoke was that which ordained life imprisonment. That, I daresay, ought to have been patent to the appellants at a much earlier stage when the proceedings had been stopped by the magistrate and the matter had been referred to the high court for sentencing. At that stage as I have already pointed out the appellants had had the benefit of legal representation. Thus the significance of the proceedings being stopped and the matter being referred to the high court could hardly have been lost on them. Indeed the magistrate explained that the matter was being referred to the high court because the applicable sentence for an offence of that kind exceeded his jurisdiction. Had they been misled by what had gone before it was thus open to them at any time after conviction in the magistrates' court and before sentencing in the high court to have raised that. That they did not

do. The appellants, who were represented before the high court by a different legal representative to that in the magistrates' court, participated in the sentencing phase of the proceedings, as they earlier did in the conviction phase, without demur. And as Prinsloo J emphasised in his judgment on sentence: '[b]efore the hearing today both accused were again informed about the implications of the minimum sentences prescribed by Act 105 of 1997.'

[44] Mhlantla JA holds:[14]'The misdirection lies in the fact that the appellant was sentenced for an offence different to the one for which he was convicted.' I cannot agree. The appellants were charged, convicted and sentenced for the offence of rape. The Act does not purport to create any new category of statutory offence. In specifying an enhanced penal jurisdiction for particular forms of an existing offence, the Legislature does not create a new type of offence. In an analogous context Rumpff CJ stated (*S v Moloto* 1982 (1) SA 844 (A) at 850):

'Roof, of poging tot roof, met verswarende omstandighede is nie 'n nuwe soort misdaad wat deur die Wetgewer geskep is nie. Dit bly steeds roof, of poging tot roof, maar volgens art 277 (1) *(c)* verleen die aanwesigheid van verswarende omstandighede aan die Verhoorregter 'n diskresionêre bevoegdheid om by skuldigbevinding die doodvonnis op te lê.'

All that the Legislature has done, in my view, is to define circumstances which, if present, brings the matter within the purview of the Act. The offences specified in the schedule are thus not new offences. They are but specific forms of existing offences, and when their commission is proved in the form specified in the Schedule, the sentencing court acquires an enhanced penal jurisdiction.

[45] Section 52, which I have set out in full, gives to the high court very wide powers in respect of the magistrates' court proceedings. In

[14] Para 18.

particular, it preserved the power of the high court to enter a plea of not guilty if for any reason it deemed it advisable in the interests of justice to do so. It was thus never intended that the high court would simply rubber stamp the magistrates' court proceedings. The appellants never ever raised before the high court, even tangentially, the spectre of their guilty plea or any admission made thereunder having been incorrectly recorded. Nor did either even hint at the possibility that the proceedings may not have accorded with justice. Had the point been taken before the high court - where it ought rightly to have been taken - instead of before this court for the first time, the State would have had the opportunity to counter it. For as Cameron JA observed (*Legoa* para 21): '[t]he 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.'

[46] Mhlantla JA, however, preferred to approach the matter thus:[15] 'Even counsel for the respondent was unable to offer any plausible explanation for this serious mistake. This failure, unexplained, speaks of some disturbing flippant attitude on the part of the prosecution. The State must bear the consequences.' With respect to my learned colleague I have some difficulty with her characterisation of the State's conduct. Given the manner in which the point came to be raised, the State was denied the opportunity of fully investigating the issue and adducing any such evidence as may have been available to it to counter the complaint. Moreover, the manner in which the point came to be raised served to blur the distinction between an appeal and a review. For, in my view, the point in issue was not capable of being resolved solely by recourse to evidence ex facie the record. That had the effect of forcing Counsel for the State to

[15] Para 16.

endeavour, impermissibly I should add, to testify from the bar before this court. There is though a more fundamental difficulty with my learned colleague's conclusion. It is this: if indeed the failure is unexplained – and I have endeavoured to demonstrate why it has not been explained - one can hardly infer that that, in and of itself, is a manifestation of a 'disturbing flippant attitude'. In my view such an inference lacks any factual foundation and therefore ought not to have been drawn. My colleague appears likewise to be critical of the magistrate's conduct. She states that the magistrate: 'did not explain what that legislation entailed nor specify the prescribed sentence applicable to the offence with which they were charged.'[16] But as I have already pointed out counsel for the appellants conceded in heads of argument filed with this court on behalf of the appellants: 'the Learned Magistrate ensured that they were properly informed and understood the applicability of the minimum sentence regime.'

[47] Before us there was some suggestion that the appellants might have conducted their defence differently had they known at the outset of the full extent of the risk that awaited them. Mhlantla JA puts paid to that suggestion in these terms:

'The appellants had admitted in their plea explanation that they had gone to the house of the complainant with the intention to rape her.'[17]

. . .

'It must be borne in mind that the complainant knew the first appellant therefore the issue of identification of him as one of the rapists was not in dispute. The second appellant was linked to the commission of the offence by DNA evidence. It is therefore clear that there was overwhelming evidence against the appellants. They had no choice but to plead guilty.'[18]

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[16] Para 2.
[17] Para 26.
[18] Para 24.

Moreover, at no stage was it the appellants' case that they would have conducted their defence any differently or that they had been misled into pleading guilty. On the contrary in applications for leave to appeal filed by each of them, they state:

'The reason why I'm appealing against sentence is that it is too much. And I pleaded guilty to the offence without wasting the Court's time. I'm sick and sometimes I do not get treatment here in prison. So I'm asking the Court to please reduce my sentence.

. . .

The reason why I'm appealing against the sentence is that the sentence is to[o] much. And I didn't waste the court's time. I pleaded guilty. And in 2000 it was dropped and by that time I got a house and wife and a child and employed. And when I was arrested in 2007 again and followed . . . the police without any struggle. I'm asking the honourable Court to please reduce my sentence.'

[48] There is nothing therein contained that even remotely suggests that they had been misled or that they would have conducted their defence differently had they been appraised at the outset that they were at risk of a sentence of life imprisonment. It must be remembered that the appellants pleaded guilty. If their fair trial rights have indeed been impaired, as is sought to be contended, then its genesis must lie in their decision to plead guilty. If they were misled at all, its consequence was that it induced a guilty plea. The decision to plead guilty was thus the logical corollary of them having been misled. But the appellants have never ever sought to challenge their convictions or to recant their guilty pleas. This was pertinently raised with counsel for the appellants during argument, in particular that the conviction had never been assailed, nor for that matter had leave to appeal the conviction ever been sought. Counsel from the bar let it be known that they had no quarrel with the conviction. It follows, by parity of reasoning, that they could likewise have no quarrel with the decision to plead guilty upon which the conviction is founded. Implicit in

that concession is the admission that their decision to plead guilty, even in hindsight, was the correct one. That would explain why there is no attack on the conviction itself or why the appellants have never ever sought to impugn the conviction phase of the proceedings in the magistrates court.

[49] I should perhaps add that the actual proceedings before the magistrate were relatively brief. It consisted of the charge being formally put to each appellant, to which each pleaded guilty. Each in amplification of that plea then adduced a brief statement[19] in terms of s 112(2) of the Criminal Procedure Act 51 of 1977. Both appellants were then duly convicted on their guilty plea. The proceedings were then stopped. But not before the magistrate had first warned the appellants of the need for in-depth probation officers' reports. No such reports were however secured and placed before Prinsloo J. Instead the appellants contented themselves with an address in mitigation by counsel from the bar. Neither chose to testify or to call any evidence. By that stage as I have pointed out they well knew that the minimum sentencing provision that ordained life imprisonment was being invoked by the State. They were free, armed with that knowledge, to have conducted the sentencing phase of the proceedings differently. But chose not to. In those circumstances it is difficult to comprehend how the appellants' fair trial rights could possibly have been imperilled. At no stage in either of the courts below was it pertinently raised by either appellant that they had suffered prejudice in the conduct of their case. Instead the point was raised for the first time before this court. Even then no tangible complaint was pointedly raised. Rather there was resort to vague notions of fairness. But as our courts have pointed out fairness connotes fairness to both sides. The

[19] Para 1.

Constitutional Court has made that plain in *Key v Attorney-General, Cape Provincial Division & another* 1996 (2) SACR 113 (CC) par 13, where Kriegler J said ‘fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision’; and, in *S v Jaipal* 2005 (1) SACR 215 (CC) para 29, which held:

'The right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the State. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime.'

[50] To find in favour of the appellants here would be to put form above substance. And as Cameron JA cautioned that we should not do. Moreover, Cameron JA was astute, when declining to lay down a general rule, to allude to the ‘intolerable complexities’ that may flow from the adoption of a general requirement, particularly were it to be applied with undue formalism. For the reasons stated, I cannot agree with my learned colleague that the appellants' fair trial rights have been infringed in any way. Not only has no factual foundation been laid by the appellants in support of such a finding but, as I have endeavoured to demonstrate, that was never initially their case. Rather the case sought to be advanced on appeal on their behalf amounts, in my view, to little more than a speculative hypothesis. I hesitate to hold that the reference by the State to the incorrect section of the Act, would, without more, amount to a misdirection. Much less one, as here, that would serve to vitiate the sentence. I accordingly decline to endorse any general rule to effect. If it does indeed amount to a misdirection, as my learned colleague has concluded, I have some difficulty in comprehending why such a finding would vitiate the sentence only and not the proceedings in its entirety,

more especially the conviction. I cannot imagine how it is possible for the conviction to emerge unscathed in the face of that finding.

[51] I have been at pains to stress, as enjoined by the authorities to which I have referred, that a fair trial enquiry does not occur *in vacuo* but that it is first and foremost a fact-based enquiry. And as I have already stated any conclusion as may be arrived at requires a vigilant examination of all the relevant circumstances. An examination of those circumstances leads me to a contrary conclusion to that of my learned colleague and in the result I would dismiss the appeal.

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V M PONNAN
JUDGE OF APPEAL

APPEARANCES:

For Appellant	:	F van As Pretoria Justice Centre Pretoria. Bloemfontein Justice Centre Bloemfontein
For Respondent	:	P Vorster Director of Public Prosecutions High Court, Pretoria Director of Public Prosecutions, High Court, Bloemfontein