THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 20730/2014

In the matter between:

GODFREY ALFRED NTULI **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Godfrey Alfred Ntuli v The State* (20730/14) [2025] ZASCA 53 (09 May 2025)

Coram: HUGHES, BAARTMAN and COPPIN JJA, and MUSI and BLOEM AJJA

Heard: 10 March 2025

Delivered: 09 May 2025

Summary: Criminal law – hearsay evidence – cannot be admitted after the close of the state's case – the trial court must rule on it before close of the state's case – sentence in terms of s 51(2) of the Criminal Law Amendment Act 105 of 1997 – whether accused's fair trial rights compromised due to error in the charge sheet.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mavundla J sitting as court of appeal):

1 The appeal against the conviction and sentence on count 2 is upheld.

2 The order of the high court on count 2 is set aside and replaced with the following:

'1 The accused is convicted of rape in terms of s 51(2) of the Criminal Law Amendment Act 105 of 1997.

2 The accused is sentenced to 15 years' imprisonment for rape.'

JUDGMENT

Baartman JA (Hughes JA concurring)

Introduction

[1] The Regional Court held in Benoni (the regional court) convicted the appellant on one count of kidnapping and four counts of rape and sentenced him to terms of imprisonment in respect of each count. On count 2, rape of a female aged 14 years[1], the regional court imposed life imprisonment and gave leave to appeal only in respect of that sentence. The Gauteng Division of the High Court, Pretoria (the high court), Ismail J and Hassim AJ, held that the regional court had exceeded its sentencing jurisdiction,[2] it set aside the sentence and referred the

[1] Contravention of s 51(1) of the Criminal Law Amendment Act 105 of 1997 read with s 94 of the Criminal Procedure Act 51 of 1977.
[2] Hassim J held:

matter to a single judge for sentence only in respect of count 2. Mavundla J sentenced the appellant to life imprisonment and granted leave to appeal to this Court, in respect of both conviction and sentence on all counts.

[2] The appellant, correctly, limited his appeal to the conviction and sentence on count 2 and abandoned the appeal in respect of all other convictions and sentences. This judgment is limited to the appeal on count 2, in respect of which, the appellant's case is that the state relied on hearsay evidence to prove the complainant's age. This, so the submission went, was insufficient to meet the burden of proof upon the state, as the complainant's age was an element of the offence with which he had been charged. In respect of sentence, the appellant's case was that he had been charged with rape in terms of s 51(2) of the Criminal Law Amendment Act 105 of 1997 and could therefore only be sentenced to a minimum of 10 years' imprisonment or 15 years' imprisonment, which is the maximum sentence that the regional court could impose.

[3] The state conceded the above as correct and submitted that it was in the interest of justice to allow the hearsay evidence as the accused's rights to a fair trial had not been compromised. The appellant pleaded not guilty to the count of rape and exercised his right to remain silent. The state was called upon to prove all the elements of the offence. I deal with the proceedings in the lower courts to the extent necessary to address the two issues in this appeal.

[4] The complainant was 20 years old when she testified that she had been 14 years old at the time of the offence. She testified that at approximately 17h00 on 28 January 2006, she was on her way home accompanied by her two cousins. The

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'1. In respect of count 2 the sentence is set aside as being *ultra vires* because the trial court did not have the jurisdiction to impose the sentence of life.
2. The matter is remitted to a single judge of this division in order to determine an appropriate sentence in respect of count 2 . . .'.

appellant accosted them and dragged her off at gunpoint to a house where he raped her in the backyard. Thereafter, he took her to a church in the same street, raped her again and left her on the church premises. She sought help at the church house where the occupants contacted her family. The latter took her to the police station where officers advised them to return the next day and for her not to bath in the interim. The appellant was a stranger to her and she had not consented to intercourse with him.

[5] The complainant's cousin, Menzi Maphakisa (Mr Maphakisa) testified that he was 17 years old at the time of the offence. The complainant and he had waited outside a tavern for their older cousin while someone older went in to call him. Mr Maphakisa said that he and the complainant were under age and could not enter the tavern. Their older cousin joined them and on their way home, the appellant accosted them and dragged the complainant off at gunpoint.

[6] Anna Martha Mabunda (Ms Mabunda), a registered nurse, by profession a midwife, a sexual offences care practitioner and a clinician, testified that she had 23 years' experience as a nurse. On 29 January 2006, she examined the complainant and completed the J88 form on which she recorded that the complainant was 14 years old at the time, with date of birth 4 February 1991. Further, that she had started menstruating at age 14.

[7] The appellant testified that he had known the complainant as 'She was a child who liked to go jiving. . . I did not know as to what her age was, because she was a person you would find at drinking places and as the case was she was present at Mohweni on that day'. He confirmed that the intercourse took place outside and that he knew the complainant was a child but insisted that he did not know her actual age.

[8] It was common cause that the appellant was charged with the rape of a 14 year old female read with the provisions of s 51(2) instead of s 51(1) of the Criminal Law Amendment Act. It was further common cause that s 51(2) provides for a prescribed minimum sentence of 10 years' imprisonment.

[9] The regional magistrate found no substantial and compelling circumstances present and sentenced the appellant to life imprisonment. Mavundla J imposed the same sentence but, as indicated above, gave leave to appeal to this Court.

Discussion

[10] The appellant placed all the elements of the offence in dispute. The state was called upon to adduce evidence of the complainant's age. It sought to meet that burden by leading the complainant who testified when she was 20 years old and said that she was '14 years old going 15' when the incident had occurred. Although that was hearsay evidence the state did not make application for its admission in terms of s 3(1) of the Law of Evidence Amendment Act, 45 of 1988[3]. It is in issue whether the regional court erred by relying on the hearsay evidence.

[11] The appellant, who was legally represented, did not object to the hearsay

[3] 'Section 3(1) hearsay evidence
(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-
(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
(c) the court, having regard to-
(i) the nature of the proceedings;
(ii) the nature of the evidence;
(iii) the purpose for which the evidence is tendered;
(iv) the probative value of the evidence;
(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
(vi) any prejudice to a party which the admission of such evidence might entail; and
(vii) any other factor which should in the opinion of the court be taken into account,
is of the opinion that such evidence should be admitted in the interests of justice.'

evidence or to the mistake in the charge sheet before the regional court. Instead, his legal representative indicated that he had been warned about the applicability of a minimum sentence of life imprisonment. In the high court, the appellant raised the defences for the first time. In *R v Hepworth*[4], this Court held:

'. . . A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side . . .'.[5]

[12] In *S v Ndlovu and Others*[6], this Court held that the state must apply for the admission of hearsay evidence before closure of its case and the court must make a ruling before the end of the state's case to afford the accused the opportunity to consider properly whether to testify. This Court also referred with approval to *S v Ramavhale*[7] where hearsay evidence had been led despite the prosecutor warning the witness not to testify about the hearsay evidence. The state unequivocally indicated that it did not want to rely on the hearsay evidence. The accused closed his case. However, in argument, the state sought to rely on the hearsay evidence. This Court concluded as follows '. . . *Ramavhale* makes clear that unless the State obtains a ruling on the admissibility of the hearsay evidence before closing its case, so that the accused knows what the State case is, he or she cannot thereafter be criticised on the basis of the hearsay averments for failing to testify. It also suggests, rightly, that unless the court rules the hearsay admissible before the State closes its case, *fairness to the accused may dictate that the evidence not be received at all*. (This does not preclude the State in an appropriate case from applying to re-open its case.)'[8] (My emphasis.)

[13] Nevertheless, this Court in *S v Ndlovu and Others* accepted that no impropriety had arisen where hearsay evidence from a co-accused had been admitted against two other accused. Because the trial court had ruled on the

[4] *R v Hepworth* 1928 AD 265.
[5] At 277.
[6] *S v Ndlovu and Others* [2002] 3 All SA 760 (SCA); 2002 (6) SA 305 (SCA); 2002 (2) SACR 325 (SCA) para 18.
[7] *S v Ramavhale* 1996 (1) SACR 639 (A).
[8] *S v Ndlovu and Others* para 19(*b*) at 338.

admissibility of the hearsay evidence before the state closed its case and the accused had elected to testify even though the trial court's reasons and the weight it attached to the hearsay evidence were only given at the end of the case. This Court held further that where the hearsay evidence is provisionally admitted and the declarant upon whose credibility the probative value of such evidence depends does not testify, disavows his statement, or fails to recall making it, the enquiry is whether the interests of justice nevertheless require the admission of the evidence.

[14] This Court further said the following about the interest of justice:

'The suggestion that the prejudice in question might include the disadvantage ensuing from the hearsay being accorded its just evidential weight once admitted must however be discountenanced. A just verdict, based on evidence admitted because the interest of justice require it, cannot constitute 'prejudice'. In the present case, …Where the interest of justice require the admission of hearsay, the resultant strengthening of the opposing case cannot count as prejudice for statutory purposes, since in weighing the interest of justice the court must already have concluded that the reliability of the evidence is such that its admission is necessary and justified. If these requisites are fulfilled, the very fact that the hearsay justifiably strengthens the proponent's case warrants its admission, since its omission would run counter to the interest of justice.'[9]

[15] In *S v Litako and Others*[10] Navsa and Ponnan JJA reconsidered the applicable legal principles in *S v Ndhlovu and Others* with specific reference to extra–curial admission of one accused not admissible against another. This Court considered the rationale at common law for excluding the use of extra-curial admissions by one accused against another and found that it appears that the interest of justice is best served by not invoking the Act for that purpose. This

[9] Para 50.
[10] *S v Litako and Others* [2014] ZASCA 54; [2014] 3 All SA 138 (SCA); 2014 (2) SACR 431 (SCA); 2015 (3) SA 287 (SCA). See also the most recent Constitutional Court case confirming the principles in respect of the interest of justice: *Kapa v S* [2023] ZACC 1; 2023 (4) BCLR 370 (CC); 2023 (1) SACR 583 (CC).

Court concluded that our system of criminal justice, underpinned by the constitutional values and principles that have, as their objective, a fair trial for accused persons, the extra-curial admission of one accused does not constitute evidence against a co-accused and is therefore inadmissible against such co-accused. However, this Court reaffirmed the approach in relation to the reception of hearsay evidence in general.[11]

[16] In the circumstances of this matter, the following is relevant to the enquiry into whether it is in the interest of justice to allow the hearsay evidence: These are criminal proceedings. The nature of the proceedings militates against the admission of the hearsay evidence. The accused was legally represented at the trial by the same representative. He was informed in the charge sheet that the state had alleged that the complainant was 14 years old at the time of the commission of the offence.

[17] The complainant testified about her age without any objection from the defence. The day after the incident, Ms Mabunda who conducted the medical examination, recorded the date of birth as 4 February 1991 and that the complainant had started to menstruate at age 14 years old. I accept that the complainant had an interest in the outcome of the criminal proceedings. In the circumstances of this matter the risk of insincerity on her part is greatly reduced. It is incomprehensible that the complainant knew the significance of her age in relation to the minimum sentence regime the day after she was raped.

[18] The regional court made favourable credibility findings in favour of the complainant, the record bears out the correctness of those findings and points to

[11] See *Litako* paras 70 -71.

the reliability of her evidence.[12] The state could have proved the complainant's age by leading the evidence of her mother or someone who was present at her birth or by the production of her birth certificate. There is no explanation why the state did not employ any of these mundane routes. Instead, the state displayed unfortunate ineptitude in the presentation of the complainant's case. However, this case is distinguishable from *Lubando v S*[13] where the complainant was 11 years old when she testified and was contradicted by her mother about the circumstances of the alleged rape.

[19] In this matter sexual intercourse was common cause, and the appellant admitted that he knew it was unlawful for him to have had intercourse with her as she was a minor. The state relied on the complainant's age to bring the offence within the ambit of the minimum sentence regime, but inexplicably failed to comply with the ordinary rules of evidence. However, the accused knew the import of the complainant's age and directed his defence to it. He testified with a clear understanding of the case against him as is evident from the following cross-examination exchange between him and the prosecutor:

'**Prosecutor**: Why would you refer to her as a child?
Accused: If you can go at Mabaso's Place you will see that at the end of the day, I am not saying this because I am in court. You will find the little ones that are there at these places and 03h:00 will strike they are still there.

Prosecutor: Alright, the little ones that just confirmed what am I thinking. You knew she was a child did you not Sir?
Accused: Yes, but I did not know as to what her age was.

[12] 'As far as the complainant of the first count is concerned, I experienced her evidence to be given in a logical, chronological manner. At this point going through her evidence meticulously, I could not find any material contradictions where she contradicted herself. She also did not contradict the witness that was called to support her evidence, Mr Maphakisa. I furthermore could also not find any improbabilities in her version.' (vol 1 pg 168 -169.)
[13] *Lubando v S* (347/2015) [2016] ZASCA 4; 2016 (2) SACR 160 (SCA) (1 March 2016).

Prosecutor: But if you refer to ‘’little ones’’ and ‘’child’’ what do you expect us to think?
Accused: A person if even that person could be 20 in relation to me I am an adult, I am 40 that person will remain a child. Even though we drink together, even though we sleep together’.

[20] In addition, in cross-examination of the complainant, the appellant’s counsel put the following to her:

‘The accused will say, and these are my instructions, that although he knows it is against the law to have sex with a minor, that he and you did have sex and that it was consensual. He never forced you at gunpoint or in any other manner to have sex with him.’

It follows that it was common cause that the appellant had sexual intercourse with the complainant to whom he referred as a minor. It is opportunistic for the appellant to complain about hearsay evidence in these circumstances.

[21] The appellant acquiesced in the admission of the hearsay evidence. In addition, it is in the interest of justice to allow the hearsay evidence of the complainant that she was 14 years old at the time of the offence, incidentally, also when she started menstruating according to the medical report, J88 form.

[22] I turn to the second issue in this appeal, whether the reference in the charge sheet to s 51(2) instead of s 51(1) limited the minimum sentence that could be imposed to 10 years’ imprisonment. An accused has the right to be informed of the charge he is facing with sufficient particularity to enable him or her to answer it. That accords with an accused person’s Constitutional right to a fair trial.[14] Errors or omissions in the charge sheet may impact on the accused’s fair trial right. However, no error or omission in the charge sheet, per se, impacts the accused’s right to a fair trial. The court is required to make a fact-based enquiry considering the entire trial record before concluding whether the accused’s fair

[14] Section 35(3)(*a*) of the Constitution of the Republic of South Africa 108 of 1996.

trial rights have been compromised. Ponnan JA, writing for the minority in *S v Mashinini and Another*[15], said the following:

'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. . .'.[16]

[23] The above minority view relied on *S v Ndlovu*[17], where this Court held that:

'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 onset 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 consequences . . .'.[18]

[24] In *S v Kolea*[19], this Court unanimously endorsed the minority position as follows:

'A close investigation of the circumstances in *Mashinini* reveals that s 51(2) of the Act was erroneously typed instead of s 51(1) of the Act; that the appellants were correctly apprised of the applicability of the increase penalty provisions of the Act; that they pleaded guilty to a charge involving multiple rape which, in any event, is not even applicable to s 51(2); that they never complained of, nor showed that they had suffered, any prejudice; and that they participated fully in the trial. In view of what I have said above, I believe that the appellants in that case were not in any way prejudiced by the erroneous reference to s 51(2) instead of s 51(1) in the charge-sheet. I am therefore satisfied that the conclusion at which the majority arrived in *Mashinini* was clearly wrong.Finally, it must always be borne in mind that the

[15] *S v Mashinini* and Another 2012 (1) SACR 604 (SCA).
[16] Para 51.
[17] *S v Ndlovu* 2003 (1) SACR 331 (SCA); [2003] 1 All SA 66 (SCA).
[18] Para 12.
[19] *S v Kolea* 2013 (1) SACR 409 (SCA).

concept of fairness connotes fairness to both the accused and the complainant, or the public as represented by the state…'[20]

[25] This Court relied on *S v Jaipal*[21] where the Constitutional Court held that:

'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 distress by the audacity and horror of crime.'[22]

[26] Applying the above test to the trial proceedings in this matter, the following is apparent: The appellant was charged with rape of a 14 year old female and made aware that the state intended to rely on the minimum sentence regime. On 29 November 2010, when he was still unrepresented, his rights to legal representation were explained as well as 'Act 105/97' the minimum sentence regime. He was legally represented when he pleaded not guilty and chose not to disclose the basis of his defence. However, the appellant's version put to the state witnesses was that he had consensual sex with a minor while not knowing how old she was. He referred to the complainant as a child. Thus, his defence was directed at the allegations in the charge sheet that attracted life imprisonment.

[27] Despite the shortcomings in the charge sheet and the regional court referring to s 51(2) in convicting the appellant, the appellant's counsel unequivocally stated that he was aware that the charge attracted life imprisonment and that he had been so 'notified', it bears repeating:

'…it is submitted and it is agreed that all the offences of which the accused person was convicted are very serious offences such that the legislator imposed minimum sentences . . . I mean the accused was notified and it is common cause that as far as count 2 is concerned that

[20] Paras 19 and 20.
[21] *S v Jaipal* 2005 (1) SACR 215 (CC); 2005 (4) SA 581 (CC); 2005 (5) BCLR 423 (CC).
[22] Para 29.

there is in fact a minimum sentence of life to be imposed by this court, unless there are substantial and compelling circumstances to show . . . why this court should deviate from the minimum sentence in this matter.'

[28] The appellant is content to rely on the mistake in the charge sheet and the allegation that the charge sheet does not indicate when he became aware that he faced life imprisonment without saying when he became aware. I have indicated above that the appellant, correctly in my view, abandoned his appeal in respect of the other four convictions and sentences against him. Count 1 was kidnapping of the 14 year old complainant in count 2. By implication, the consensual sex defence was abandoned. The mistake in the charge sheet with reference to s 51(2) instead of s 51(1) was the only remaining straw to clutch at. That opportunist stance cannot assist him; a criminal trial is not a game.

[29] In the circumstances of this matter, the reference to the wrong section of the Act did not prejudice the appellant so that his right to a fair trial was compromised. The appellant's personal circumstances were placed before Mavundla J and duly considered. However, the aggravating circumstances far outweighed the mitigating circumstances. The complainant was a child, abducted at gunpoint, raped twice and left at night to find her way home. That was her first sexual experience. Despite the high incidence of these offences and the harsh sentences imposed, the tide is not being turned. The enhanced penalty introduced in the minimum sentence regime did not change the offence of rape nor did it limit the trial court's jurisdiction.[23] A court of appeal has limited scope to interfere in the sentencing court's exercise of its discretion when imposing sentence. I am unable to fault Mavundla J's exercise of his discretion, therefore, this Court cannot interfere.

[23] *S v Kekana* [2018] ZASCA 148; 2019 (1) SACR 1 (SCA); 2019 1 ALL SA 67 (SCA) paras 23-24.

[30] However, it remains lamentable that these errors still sneak into charge sheets. Complainants in gender-based violent offences are routinely being let down by inattentive drafting. I would dismiss the appeal against conviction and sentence in respect of count 2.

The order

[31] The appeal against conviction and sentence is dismissed.

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BAARTMAN
JUDGE OF APPEAL

Bloem AJA (Coppin JA and Musi AJ concurring)

[32] I have had the benefit of reading the judgment of my colleague, Baartman JA (the first judgment). For the reasons set out hereunder, I cannot agree that the conviction and sentence in respect of count 2 should be confirmed.

[33] The appellant faced four charges in the regional court sitting at Benoni (the trial court). On count 1, he was charged with kidnapping. On count 2, he was charged with rape in that upon or about 29 January 2006 he unlawfully, intentionally and without her consent had sexual intercourse with the complainant 'aged 14 years old at the time'. The complainants in counts 1 and 2 is the same person. The incidents were alleged to have occurred on the same date. On count 3, it was alleged that on 12 July 2009 he raped another woman. On count 4, it was alleged that on 7 December 2007 he raped another woman. On count 5, it was alleged that on 29 March 2010 he raped another woman. All the offences were alleged to have been committed at Daveyton, Gauteng.

[34] Despite his plea of not guilty, the regional magistrate convicted the appellant on all the counts, as charged. In respect of count 1, being kidnapping, he was sentenced to five years' imprisonment. In respect of count 2, being the rape of a girl who was allegedly 14 years old, he was sentenced to imprisonment for life. He was sentenced to ten years' imprisonment on each of counts three, four and five, being rape.

[35] The appellant applied for leave to appeal against those convictions and sentences. He was granted leave to appeal to the high court only against the sentences. On 5 December 2013 the high court set aside the sentence of imprisonment for life (count 2) and remitted the matter to a single judge for sentencing in respect of that count. On 27 October 2014 Mavundla J confirmed the appellant's conviction and imposed a sentence of imprisonment for life on the appellant in respect of count two. The circumstances under which the high court heard the matter are set out in paragraph one of the first judgment.

[36] Before Mavundla J dealt with the limited issue of the appellant's conviction and sentence of imprisonment for life in respect of count 2, he was called upon to determine two issues. The first issue was whether the state could rely on the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (read with s 94 of the Criminal Procedure Act 51 of 1977), when reference was made in the charge sheet to s 51(2), to which the appellant pleaded and under which he was convicted. The second issue was whether the state proved beyond reasonable doubt that the complainant was under the age of 16 years[24] when she

[24] Prior to the amendment of the Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007, an accused who was convicted of rape 'where the victim was under 16 years' was, in terms of Part 1 of Schedule 2, as read with s 51(1) of the Criminal Law Amendment Act 105 of 1997, mandated to be sentenced to imprisonment for life, absent a finding of the existence of substantial and compelling circumstances justifying a lesser sentence. In so far as it is relevant to this case, on 16 December 2007, s 68 of the Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007 amended Schedule 2 of the Criminal Law Amendment Act by making the prescribed minimum sentence of imprisonment for life a possibility where the victim is under the age of 18 years. It means that, to make the prescribed minimum sentencing regime applicable to the facts of this case, the state was required

was raped. Mavundla J decided both issues in favour of the state. The appeal against the sentence of imprisonment for life was thereafter dismissed. On 27 October 2014, Mavundla J granted the appellant leave to appeal to this Court in respect of his convictions and sentences on all counts.

[37] It is unnecessary to decide whether it was permissible for Mavundla J to grant leave to appeal in respect of conviction and sentence in respect of all the counts, when he was required to only determine an appropriate sentence in respect of the appellant's conviction on count 2. This is because, at the hearing in this Court, the appellant confined his appeal to his conviction and sentence on count 2, having abandoned his appeal against the convictions and sentences in respect of the other counts.

[38] In terms of s 51(1) a court 'shall sentence a person it has convicted of an offence referred to in Part 1 of Schedule 2 to imprisonment for life', subject to ss 51(3) and (6). Those subsections read as follows:

'(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.

*(a*A*)* When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

(i) the complainant's previous sexual history;

(ii) an apparent lack of physical injury to the complainant;

(iii) an accused person's cultural or religious beliefs about rape; or

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to prove that the complainant was under the age of 16 years when the appellant raped her on 29 January 2006.

(iv) any relationship between the accused person and the complainant prior to the offence being committed."

(4) . . .

(5) . . .

(6) This section does not apply in respect of an accused person who was under the age of 18 years at the time of the commission of an offence contemplated in subsection (1) or (2).'

[39] Rape, where the victim is a person under the age of 16 years, is an offence referred to in Part 1 of Schedule 2. Section 51(2) makes provision for the imposition of sentences of imprisonment between three and 25 years for persons who have been convicted of offences referred in Parts II to V of Schedule 2. The Criminal Law Amendment Act ordains that, where an accused has been convicted of an offence referred to in Part 1 of Schedule 2, he shall be sentenced to imprisonment for life, subject to ss 51(3) and (6). On the other hand, a sentence of imprisonment for life is impermissible where an accused has been convicted of an offence referred to in Parts II to V in Schedule 2. It is accordingly important for the state to correctly inform an accused whether it would rely on s 51(1) or (2) of the Criminal Law Amendment Act. The difference between the subsections is imprisonment up to 30 years, as against imprisonment for life.

[40] In terms of s 51(1), in the absence of substantial and compelling circumstances, a court shall sentence 'a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life'. The appellant was not convicted of an offence referred to in Part I of Schedule 2. He was charged under the provisions of s 51(2), pleaded not guilty to that charge and was convicted under the provisions of s 51(2). Rape, where the victim is under the age of 16 years, is an offence referred to in Part I of Schedule 2. For the appellant to have been convicted under s 51(1), his conviction should have encompassed all the elements of the offence referred to in Part I of Schedule 2. As pointed out more fully hereunder, the state failed to prove one essential element in that regard,

namely, that the complainant was under the age of 16 years when she was raped. Since the appellant was convicted under the provisions of s 51(2), it would be unfair to sentence him under the provisions of s 51(1).[25] In the circumstances, the appellant cannot be sentenced as if he committed an offence under s 51(1). He must be sentenced because he was convicted of having committed an offence under s 51(2).

[41] The remaining issue is whether the state proved beyond reasonable doubt that the complainant was under the age of 16 years when she was raped. A finding in that regard has significant consequences for the appellant. If the state proved that the complainant was indeed under the age of 16 years when the appellant raped her and if the trial court and the high court were not satisfied that substantial and compelling circumstances existed which justified the imposition of a lesser sentence, he was correctly sentenced to imprisonment for life. If she was over the age of 16 years when the appellant raped her, a sentence of imprisonment for life would have been inappropriate in the regional court.

[42] It was submitted on behalf of the appellant that the state failed to prove that the complainant was under the age of 16 years when the appellant raped her. The state submitted that it adduced sufficient evidence to prove that the complainant was 14 years of age when the appellant raped her. For that submission, the state relied on the complainant's evidence. She testified on 12 July 2011 that she was 20 years old and that during 2006, she 'was 14 [and] about to turn 15'. The state also relied on the evidence of Anna Mabunda, a registered professional nurse, midwife and sexual assault care practitioner. She examined the complainant on 29 January 2006. During or after the examination she completed a medical report of her examination on the complainant. Of

[25] *S v Legoa* 2003 (1) SACR 13 (SCA) paras 13, 14 and 27.

importance for present purposes is that she noted the name of the complainant and 4 February 1991 as the date when she was allegedly born. Ms Mabunda did not testify from where she obtained the information regarding the complainant's date of birth. The only reasonable explanation is that she obtained that information from the complainant.

[43] Ms Mabunda testified that her physical examination of the complainant revealed inter alia that there were no physical injuries, that she started menstruating at the age of 14 years, that she has not been pregnant before, and that her tanner stage was three. Based on the history that the complainant had provided and her examination of the complainant, Ms Mabunda concluded 'that the injuries sustained gynaecologically were consistent with penetration. The anal examination excluded any injuries.' The medical report deals with the gynaecological and anal examination, obviously to determine whether there were any signs that the complainant had been penetrated. Ms Mabunda did not testify that she examined the complainant to establish or estimate her age. Based on the evidence of the complainant and Ms Mabunda, the state contended that it had proved beyond reasonable doubt that the complainant was born on the date as she testified, and that she was 14 years old when she was raped.

[44] In *R v C*[26] it was held that a statement by a person as to the date when he or she was born is hearsay evidence. That must be correct because such a person, although present at birth, is unable to testify as to the veracity of the occurrence when he or she was born. The first judgment accepts that the complainant's evidence as to the date of her birth is hearsay evidence.[27] The Constitutional Court had the following to say about hearsay evidence and the circumstances under which such evidence may be admitted:

[26] *R v C* 1955 (1) 380 (CPD) at 381G.
[27] See para 10 of the judgment.

'Hearsay evidence is inadmissible, unless the court is of the opinion that it is in the interests of justice for it to be admitted, taking into account the factors referred to in s 3(1)(*c*)(i)-(vii). The SCA in *Ndhlovu* held that s 3(1)(*c*)'s criteria - which must be ''interpreted in accordance with the values of the Constitution and the norms of the objective value system it embodies'' – protect against the unregulated admission of hearsay evidence and thereby sufficiently guard the rights of accused.'[28]

[45] Section 3 of the Law of Evidence Amendment Act 45 of 1988 has been quoted in footnote 3 of the first judgment and will not be repeated herein. The starting point is that hearsay evidence is inadmissible. Section 3(1) provides that hearsay evidence shall not be admitted as evidence at criminal or civil proceedings unless the provisions of s 3(1)(*a*), (*b*) or (*c*) have been complied with. At the trial, the state did not seek to have the hearsay evidence admitted in terms of the provisions of s 3(1) of the Law of Evidence Amendment Act. That should be the end of the matter as to whether the state proved the complainant's date of birth.

[46] Before us, the state contended that the hearsay evidence should be admitted in the interests of justice. The first judgment found that it is in the interests of justice to allow the hearsay evidence regarding the complainant's age as the appellant had acquiesced in the admission of that hearsay evidence. The concept of 'the interest of justice' is not free standing. A trial court can only come to the opinion whether hearsay evidence should be admitted in the interests of justice after having taken into account the factors referred to in s 3(1)*(c)*(i)-(vii) of the Law of Evidence Amendment Act, lest such admission is unregulated. The trial court had no regard to s 3(1)*(c)*.

[28] *S v Kapa* [2023] ZACC 1; 2023 (4) BCLR 370 (CC); 2023 (1) SACR 583 (CC) para 32.

[47] Where the state seeks the admission of hearsay evidence, the trial court must be asked clearly and timeously to consider and rule on the admissibility of the hearsay evidence. If the hearsay evidence is presented during the state case, the trial court must rule on whether the hearsay evidence should be admitted before the state closes its case. A ruling at that stage will enable the accused to appreciate the full evidentiary ambit he or she faces. In other words, the accused must know before he or she testifies, whether he or she must also deal with the hearsay evidence in his or her own evidence. The trial court cannot be asked for the first time at the end of the trial to admit hearsay evidence. In *S v Ramavhale* the hearsay evidence was admitted by the trial court only in the judgment when the accused was found guilty on a piece of hearsay evidence by a State witness as to what the deceased had said.[29] This Court described the admission of hearsay at that stage 'a particularly serious irregularity, which had the effect, I regret to say, that the appellant had a less than fair trial'.[30] In *S v Ndhlovu and others* it was held that a request for the admission of hearsay evidence cannot be made on appeal.[31]

[48] One of the factors which the first judgment considered when determining whether the trial and high courts correctly admitted the hearsay evidence, was the failure of the appellant, who was throughout the trial legally represented, to object to the fact that the complainant and Ms Mabunda gave hearsay evidence.[32] That situation presented itself in *R v C*. In that case it was an essential element of the offence with which the accused was charged that the complainant should be under the age of 16 years. The state argued that the accused's failure in that case to dispute the complainant's evidence regarding her alleged date of birth must be regarded as a tacit admission by the accused of the complainant's age, as alleged

[29] *Ramavhale* at 651G.
[30] *Ramavhale* at 651H-J
[31] *Ndhlovu and Others* para 18.
[32] See paras 11 and 21 of the judgment.

by the state in the charge sheet and as deposed to by her in evidence. The court did not sustain that argument, as the complainant's evidence as to her age was hearsay and that it was not incumbent upon the accused to challenge hearsay evidence. Reference was made to *R v K*[33] wherein van Blerk AJ stated that it is difficult to comprehend how an accused's failure to challenge inadmissible evidence adduced by the state can, without further ado, become admissible evidence.

[49] In *Ndhlovu* this court reiterated what was held in *Ramavhale*, namely that an accused cannot be criticised for not testifying and dealing with hearsay evidence, when the state failed to obtain a ruling on the admissibility of hearsay evidence before closing its case.[34] In this case, the trial court allowed the hearsay evidence at the time of the judgment when the appellant was convicted, as if it was admissible, even although there was also no application by the state to re-open its case to lead admissible evidence regarding the complainant's date of birth. In the circumstances, I cannot agree with the first judgment that, by not challenging the hearsay evidence, that evidence became admissible, or that the appellant acquiesced in its admission.

[50] The appellant's attorney put to the complainant that, although the appellant knew that it was against the law to have sex with a minor, he had consensual sexual intercourse with her. The appellant testified that he 'did not know as to what [the complainant's] age was, because she was a person you would find at drinking places and as the case was she was also present at Mohweni [Tavern] on that day'. At a later stage, he testified that although he knew that she was a child, he 'did not know as to what her age was'.

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[33] *Rex v K* 1951 (3) SA 180 (SWA) at 183.
[34] *Ndhlovu and Others para* 19*(b)*.

[51] A child is a person under the age of 18 years in terms of s 28(3) of the Constitution and the Children's Act.[35] In this case, regard being had to the appellant's undisputed evidence that he did not know the complainant's age and that she attended 'drinking places', it is not far-fetched that he might have laboured under the impression that she was over the age of 16 years but under the age of 18 years when the appellant raped her. It means that in either case, she was still a child. In this regard, it must be remembered that the trial court rejected the appellant's version that he was in a relationship with the complainant and accepted the complainant's evidence that he was a stranger to her. The rejection of the appellant's evidence in that regard does not mean that it is not reasonable that he might have believed that the complainant was under the age of 18 years when he raped her.

[52] In all the circumstances, the failure on the part of the state to seek a ruling before the close of its case that the hearsay evidence regarding the complainant's date of birth be admitted, means that the evidence of the complainant and Ms Mabunda remained inadmissible. The state accordingly failed to prove an essential element for its reliance on the provisions of s 51(1) of the Criminal Law Amendment Act. In the result, the trial court and the high court erred when they it imposed a sentence of imprisonment for life on the appellant on the basis that he had raped a girl under the age of 16 years. The sentence of imprisonment for life must accordingly be set aside and replaced with an appropriate sentence.

[53] I have had regard to the fact that the appellant raped the complainant at gunpoint, that she had not indulged in sexual activity before the incident in question, and that he claimed that he had sexual intercourse with her consent. I have also considered how the courts have described rape and its effects on the

[35] See the definition of 'child' in s 1 of the Children's Act 38 of 2005.

victim and his or her family.[36] Members of society expect the courts to treat rapists sternly, in view of the prevalence of that offence. The appellant's personal circumstances must recede to the background, because he faces a long period of imprisonment.[37] The facts of this case show that he is a danger to society, especially women. I am of the view that a sentence of 15 years' imprisonment, which is the maximum term of imprisonment which the regional court could impose at that stage, on count 2 will do justice to the offence, the appellant and the interests of society.

[54] For the sake of clarity and certainty, the appellant has been convicted on all counts. The appeal against sentence on count 2 is successful. The sentences in respect of the other counts remain the same, even the order that the sentence on count 1 run concurrently with the 'new' sentence on count 2. The effect is that the appellant has been sentenced to 45 years' imprisonment.

[55] In the result, it is ordered that:

1 The appeal against the conviction and sentence on count 2 is upheld.

2 The order of the high court on count 2 is set aside and replaced with the following:

'1 The accused is convicted of rape in terms of s 51(2) of the Criminal Law Amendment Act 105 of 1997.

2 The accused is sentenced to 15 years' imprisonment for rape.'

[36] *S v Chapman* 1997 (2) SACR 3 (SCA) at 5b and *S v SMM* 2013 (2) SACR 292 (SCA) at 299a-b.
[37] *S v Matyityi* 2011 (1) SACR 40 (SCA) at para 23.

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G H BLOEM
ACTING JUDGE OF APPEAL

Appearances:

For the appellant:	F Van As
Instructed by:	Legal Aid South Africa, Pretoria
	Legal Aid South Africa, Bloemfontein
For the respondent:	M J Makgwatha
Instructed by:	Director of Public Prosecutions, Pretoria
	Director of Public Prosecutions, Bloemfontein