THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 635/2016

In the matter between:

MOSES TSHOGA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Moses Tshoga v The State* (635/2016) 2016 ZASCA 205 (15 DECEMBER 2016)

Coram: Bosielo, Tshiqi and Dambuza JJA, Schoeman and Nicholls AJJA

Heard: 11 November 2016

Delivered: 15 December 2016

Summary: Criminal law: rape of a ten-year-old girl : failure to refer to the Criminal Law Amendment Act 105 of 1997 in the charge sheet or at the commencement of a trial does not necessarily vitiate a sentence of life imprisonment imposed in terms of the Act : the appellant was sentenced to life imprisonment in terms of subsecs 52(1) and 51(1) of the Act : no substantial and compelling reasons to deviate from the minimum sentence of life imprisonment.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Van Oosten, Kathree-Setiloane, Labuschagne JJ sitting as a full court):

The appeal is dismissed.

JUDGMENT

Schoeman AJA (Dambuza JA and Nicholls AJA concurring):

[1] This is an appeal against a sentence of life imprisonment that was imposed after the appellant was convicted of the rape of a ten-year-old girl. This court granted the appellant special leave to appeal against the sentence imposed after the Gauteng Local Division of the High Court, Johannesburg (Van Oosten, Kathree-Setiloane, Labuschagne JJ) dismissed his appeal.

Background

[2] On the Saturday of 9 January 1999 the appellant, who is related to the complainant, raped her in a veld. The complainant was ten years old at the time. The incident occurred after her father, on the appellant's suggestion, instructed her to accompany the appellant. The appellant and the complainant's father had been drinking and when the liquor was finished, the appellant said that he would go with the complainant to fetch money from a friend. They set off on their errand by foot, using a shorter route through the veld. Whilst they were on their way and near a clinic, the appellant tripped the complainant and when she fell, he throttled her. She attempted to run away, but the appellant grabbed her, threw her to the ground, took off some of her clothes and raped her. In the process she was injured as she struck her head against a rock. After he had raped her he threatened to kill her, if she told her parents.

[3] He compounded her humiliation by walking her back to her home, whilst she was naked from her waist up, as he had torn her t-shirt. At home she immediately informed her parents that the appellant had raped her. The appellant denied this. The complainant's father then instructed her mother and grandmother to examine her, and her grandmother observed that her vagina was 'red and slightly open'. The complainant was taken to the police station and later to hospital. The medical examination revealed that the complainant's hymen was broken and that she was freshly torn alongside the vaginal opening. The appellant was then arrested.

[4] Following a trial in the Regional Court Boksburg, the appellant, having pleaded not guilty, was convicted on 1 December 1999 of the rape of a ten-year-old child. This offence (of raping a child under the age of 16 years) falls under s 51(1) read with Part I of Schedule 2 of the Criminal

Law Amendment Act 105 of 1997 (the Act). And, in terms of the provisions of s 52(1) of the Act, prevailing at the time, the trial magistrate was compelled to transfer the matter to the high court for sentencing purposes.

[5] On 13 March 2000, Labe J, in the Witwatersrand Local Division, confirmed that the conviction was in accordance with justice and sentenced the appellant to life imprisonment in terms of the provisions of s 52(1) read with s 51(1) and Part I of Schedule 2 of the Act. The appellant subsequently sought leave to appal against the conviction and sentence. Labe J granted leave to appeal only against the sentence. On appeal, the full court of the Witwatersrand Local Division, based on *Rammoko v Director of Public Prosecutions*[1], found that the sentencing court should have obtained and considered further evidence regarding the psychological impact the rape had on the victim and remitted the matter to the sentencing court to sentence the appellant afresh.

[6] At the hearing of the second sentencing procedure, the contents of a report compiled by Mr Louw, a counselling psychologist of the Teddy Bear Clinic was accepted by counsel for the appellant and the State and the report was handed in by consent. The court also accepted the report prepared by Mr Maluleka, a probation officer in the employ of the Department of Social Development, who compiled a report regarding the appellant and his personal circumstances. After Mr Maluleka's testimony and cross-examination, the appellant chose not to testify. The appellant was again sentenced to life imprisonment by the high court on 15 March 2007. No order was made that the sentence be ante-dated. The appellant applied for leave to appeal against the conviction and sentence and this

[1] *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA) para 13.

time round, Mojapelo DJP granted leave to appeal to the full court on the basis that the court had previously granted leave to appeal.

[7] On 12 October 2011 the full court dismissed the appeal against sentence, but ante-dated the sentence to 15 March 2000. Almost a year later, this court granted special leave in respect of the sentence imposed.

Grounds of appeal

[8] The appellant's appeal essentially rests on two legs: (a) that the sentence was shockingly inappropriate; and (b) the appellant was never warned that he faced a sentence of life imprisonment in terms of the provisions of s 51(1) of the Act, prior to the commencement of his trial, or during the trial.

[9] I should mention at this stage that the record shows (and it is common cause) that the charge sheet does not refer to the Act and that neither the magistrate nor the prosecutor referred to the Act during the trial, or before conviction. The first time that the magistrate mentioned s 51 of the Act was when he pronounced that he was convicting the appellant of 'the rape of this girl under the age of 16 years'. The magistrate further informed the appellant that the effect of the conviction was that s 51 of the Act which sets life imprisonment as the minimum sentence for rape of a girl of under 16 years, was applicable and that the appellant would have to be referred to the Supreme Court for sentence purposes, as the magistrate could not impose a life sentence. Thereafter the matter was, as mentioned earlier, transferred to the high court for sentencing.

[10] It is apposite to first deal with the failure of the magistrate and the State to warn the appellant of the provisions of s 51 of the Act and the implications of such failure.

Failure by the trial court to alert the appellant to the provisions of s 51 of the Act

[11] It is well known that the foundation of a criminal trial is the accused's right to a fair trial as set out in s 35(3) of the Constitution, with specific reference to s 35(3)*(a)* which provides that an accused has the right to be informed of a charge with sufficient detail to answer to it. This court has on several occasions held, with reference to the provisions of s 51 of the Act, that the question whether the accused's constitutional right to a fair trial has been breached at the sentencing phase, can only be answered after 'a vigilant examination of the relevant circumstances'.[2] One of the first cases of this court dealing with an accused's right to a fair trial in relation to the terms of the Act was *S v Legoa.*

[12] In *S v Legoa*[3] the appellant had pleaded guilty and was convicted of dealing in 216,3 kilograms of dagga. After his conviction the State led evidence as to the value of the dagga, despite the defence's objections. The magistrate found the value of the dagga brought it within the ambit of the provisions of s 51(2)*(a)*(i), read with Part II of Schedule 2, of the Act and sentenced the appellant to 15 years' imprisonment.

The court found that:

'. . . [For] the minimum sentencing jurisdiction to exist in respect of an offence, the accused's conviction must encompass all the elements of the offence set out in the Schedule. (This does not apply when the Schedule specifies an attribute not of the offence, but of the accused, such as rape when committed "by a person who has been

[2] *S v Legoa* 2003 (1) SACR 13 (SCA) para 21; *S v Ndlovu* 2003 (1) SACR 331 (SCA) para 12.
[3] Ibid.

convicted of two or more offences of rape, but has not yet been sentenced in respect of such convictions".)'[4]

[13] In dealing with the contents of the charge sheet and what should be contained therein, and comparing the position pre- and post- Constitution, the court found that the salient facts the State intended to prove in order to increase sentencing jurisdiction under the Act ought to be clearly set out in the charge sheet. But, the court continued, the matter was one of substance and not form and as a result concluded that a requirement that every charge must set out 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, if applied with undue formalism may be insufficiently heedful of the practical realities under which charge sheets are frequently drawn up.'[5]

[14] As stated above, a vigilant examination of the relevant circumstances is necessary to determine whether an accused has had a fair trial. Thus, *Legoa* pertinently required that the evidence, before conviction, should encompass all the elements that bring it within the purview of s 51 of the Act and the increased penal regime. It was not a requirement that the provisions of the Act should be set out in the charge sheet, but the enquiry remained whether the accused had a fair trial, which included his ability to answer the charge.

[15] Later in *S v Mthembu*[6] this court (Ponnan JA and Petse AJA writing for a full court) stated, with reference to *Legoa* and *Ndlovu*, that 'a

[4] Para 14.
[5] Para 21.
[6] *S v Mthembu* [2011] ZASCA 179; 2012 (1) SACR 517 (SCA) para 17.

fair trial enquiry does not occur in vacuo, but . . . is first and foremost a fact-based enquiry'.

[16] In *S v Ndlovu*[7] the issue whether a firearm was a semi-automatic weapon was not mentioned in the charge sheet. The prosecutor did not lead evidence in that regard and a policeman, in response to a question by the magistrate, casually mentioned that the firearm in question was a semi-automatic firearm, without providing a basis for this conclusion. In setting aside the compulsory sentence of 15 years' imprisonment and substituting it with three years' imprisonment, Mpati JA 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 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.'

[17] In *S v Mashinini*[8] the appellants were charged with rape and reference was incorrectly made in the charge sheet to s 51(2) of the Act, which carries a compulsory sentence of ten years' imprisonment. However, the evidence that it was a gang rape placed the offence within the ambit of s 51(1) of the Act, with a concomitant sentence of life imprisonment. The matter was transferred to the high court for sentencing

[7] *S v Ndlovu* 2003 (1) SACR 331 (SCA) para 12.
[8] *S v Mashinini & another* [2012] ZASCA 1; 2012 (1) SACR 604 (SCA).

purposes in terms of s 52 of the Act, which court imposed life imprisonment. On appeal to this court, in the minority judgment, Ponnan JA[9] again reiterated that a 'vigilant examination of the relevant circumstances'[10] was required. Ponnan JA went on the say that, the factual circumstances were such that 'right from the outset both appellants were informed in unambiguous terms that the State intended to rely on the minimum sentencing provisions'[11] even though the State had in error referred to the wrong section in the Act. Further, the appellants chose not to testify or to call any witnesses for sentencing purposes, despite the fact that they well knew that the minimum sentencing provision that ordained life imprisonment was being invoked by the State. They also never alleged prejudice during the whole process and only raised the State's error for the first time before this court.[12] Further, Ponnan JA continued, there was nothing of substance indicating that the appellants would have conducted their defence differently or that they had been misled to plead guilty.[13] He thus concluded that he would have dismissed the appeal, as the finding of the majority placed form over substance.

[18] Recently, in *S v Kolea*[14] the appellant had been charged and convicted in the regional court of one count of rape, although the complainant testified that she had been raped more than once.[15] The charge sheet made mention of the provisions of s 51(2) of the Act, which, read with Schedule 2 Part III provided for a minimum sentence of ten

[9] The minority judgment was later followed and approved in *S v Kolea.* [2012] ZASCA 199; 2013 (1) SACR 409 (SCA).
[10] Para 18.
[11] Para 35.
[12] Para 49.
[13] Para 47.
[14] *S v Kolea* Ibid
[15] S 51(1) read with Schedule 2 Part I of the Act determines that if the victim is raped more than once, the prescribed minimum sentence is life imprisonment, unless there are substantial and compelling circumstances not to impose life imprisonment.

years' imprisonment, instead of s 51(1) which prescribes a minimum sentence of life imprisonment. The high courts, acting in terms of s 51(1) of the Act, found that there were substantial and compelling circumstances and imposed a sentence of 15 years' imprisonment. The appellant appealed to the full court and on a cross-appeal by the State, the sentence was increased to life imprisonment.

[19] On appeal to this court the appellant contended that, as he had been charged and convicted in terms of s 51(2) of the Act, it was irregular for the State thereafter to rely on s 51(1) which provides for a more severe sentence. It was argued that the regional court was competent to impose a sentence of ten years' imprisonment in terms of s 51(2) and therefore the regional court had no authority to refer the matter to the high court for sentencing purposes. Mbha JA, writing for the court, said the following:[16]

'The accused's right to be informed of the charge he is facing, and which must contain sufficient detail to enable him or her to answer it, is underpinned by s 35(3)*(a)* of the Constitution, which provides that every accused person has a right to a fair trial. The objective is not only to avoid a trial by ambush, but also to enable the accused to prepare adequately for the trial and to decide, inter alia, whether or not to engage legal representation, how to plead to the charge and which witnesses to call. *It follows that, if the State intends to rely on the minimum sentencing regime created in the Act, this should be brought to the attention of the accused at the outset of the trial.* The question which must be answered, though, is what does sufficient detail in the charge entail.' (My emphasis.)

[20] This court in *Kolea* thus digressed from the other cases that said that there had to be a vigilant examination (*Legoa* and *Mashinini*); 'a fair trial enquiry does not occur in vacuo, but . . . is first and foremost a fact-based enquiry' (*Mthembu*); that '[T]he enquiry, therefore, is whether, on a

[16] Para 7.

vigilant examination of the relevant circumstances, it can be said that an accused had had a fair trial'; and '. . . at least be required that the accused be given sufficient notice of the State's intention to enable him to conduct his defence properly (*Ndlovu*). The court however found, in *Kolea*, that the appellant had not been prejudiced. The court considered the fact the appellant did not raise any prejudice in the conduct of his trial due to the failure to refer to s 51(1) of the Act in the charge sheet in the regional court. Nor was this an issue on two occasions in the high court on sentencing and appeal. It was raised for the first time in this court. The court also had regard to the fact that the State had, at the outset, made it clear that it intended to rely on the Act in the charge sheet. It is this latter factor that distinguishes *Kolea* from the instant matter: no reference to the Act was made in the charge sheet.

[21] What then is the effect of the pronouncement in *Kolea* that the Act must be brought to the attention of the accused at the outset of the trial? The difference between the ratio decidendi and obiter dictum of a judgment was described as follows in *Turnbull-Jackson v Hibiscus Coast Municipality & others*[17]:

'Literally, obiter dicta are things said by the way or in passing by a court. They are not pivotal to the determination of the issue or issues at hand and are not binding precedent. They are to be contrasted with the ratio decidendi of a judgment, which is binding.

And (para 56):

'Only that which is truly obiter may not be followed. But depending on the source, even obiter dicta may be of potent persuasive force and only departed from after due and careful consideration.'

[17] *Turnbull-Jackson v Hibiscus Coast Municipality & others* [2014] ZACC 24; 2014 (6) SA 592 (CC) para 61

[22] In *Kolea* the court was not saddled with, and it did not pronounce upon, what the position would have been had the Act not been mentioned, as it had been mentioned. Therefore the pronouncement that the Act had to be mentioned in a charge sheet at the outset of a trial was *obiter dictum* for it was not necessary for the decision of this Court in determining whether or not there had been prejudice. Since it decided that there was a reference to the Act any discussion as to what the position would have been had there been no reference to the Act, 'could not advance the reasoning by which the decision was reached.'[18] It is also clear that the discussion in *Kolea* as to the possibility of prejudice considered that substance was of paramount importance and that form was secondary. I am of the view that a pronouncement that the Act had to be mentioned in the charge sheet or at the outset of the trial would be elevating form above substance. Every case must be approached on its own facts and it is only after a diligent examination of all the facts that it can be decided whether and accused had a fair trial or not.

[23] The appellant in this matter had opportunities in five separate proceedings to raise a complaint of possible prejudice in the proceedings: in the regional court after conviction, during two sentencing procedures in the high court and during two appeals to the full court. He failed to do so and only belatedly raised it in this court. He was not ambushed as the charge sheet set out that he was charged with the rape of a ten-year-old girl, which brought the offence within the ambit of s 51(1) of the Act as was required in *Legoa*. He was convicted of the rape of a girl under 16 years, which is a conviction that attracts the minimum sentencing regime in terms of the Act. He had effective legal representation throughout the

[18] *R v Crause* 1959 (1) SA 272 (A) at 281C-D;.*Pretoria City Council v Levinson* 1949 (3) SA 305 (A) at 317.

trial until his conviction and the transfer to the high court. Furthermore, he was legally represented during both sentencing proceedings in the high court and in both appeals to the full court. There was no objection in the regional court after his conviction to the fact that the matter was being transferred to the high court and to the prospect of life imprisonment being imposed.[19] He participated fully in the trial and pleaded not guilty. He did not raise any prejudice prior to either of the two sentencing procedures in the high court or raised it in either of the two appeals to the full court. In both sentencing proceedings he knew the consequences of his conviction, as the magistrate informed him that he faced life imprisonment, but he chose not to testify during the sentencing procedures.

[24] On appeal in this court counsel for the appellant could not point to any prejudice the appellant had suffered due to the failure to mention the Act in the charge sheet or at the outset of the trial, except that there might have been the possibility that the appellant could have pleaded guilty. However, that possibility is remote, as the appellant, eight years after the incident and after his application for leave to appeal against his conviction had been dismissed, still professed his innocence to Mr Maluleka, who compiled the presentencing report.

[25] I am of the view that the appellant suffered no prejudice, in the circumstances of this case, by the fact that the provisions of the Act had not been mentioned in the charge sheet and that he had been referred to the provisions of the Act by the trial court only after conviction and prior to the commencement of the sentencing proceedings.

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[19] *S v Kolea* ibid, para 12.

[26] Furthermore, the principle of fairness connotes fairness to the appellant, society at large and to the victim of the crime. The Constitutional Court, in *S v Jaipal*[20] said the following:

'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.'

Accordingly, the provisions of the Act are applicable and the appellant did have a fair trial.

Were there substantial and compelling circumstances present not to impose life imprisonment?

[27] The sentencing court took the appellant's personal circumstances, the impact the crime had on the victim and the appellant's chances of rehabilitation into account when determining that there were no substantial and compelling circumstances. It was not argued that there were substantial and compelling circumstances, but that the sentence was shockingly inappropriate – in other words that the sentence was unjust in the circumstances of the case.

[28] It is important when sentencing, to bear in mind the chief objectives of criminal punishment, namely retribution, the prevention of crime, the deterrence of criminals, and the reformation of the offender. At the same time none of the elements of proper punishment must be over or under emphasised when considering an appellant's personal circumstances, the crime and the interest of society. Majiedt JA said in *S v Mudau*:[21]

[20] *S v Jaipal* 2005 (1) SACR 215 (CC) para 29.
[21] *S v Mudau* 2013 JDR 0938 (SCA) para 13.

'I hasten to add that it is trite that each case must be decided on its own merits. It is also self-evident that sentence must always be individualised, for punishment must always fit the crime, the criminal and the circumstances of the case. It is equally important to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration of all relevant factors. Public sentiment cannot be ignored, but it can never be permitted to displace the careful judgment and fine balancing that is involved at arriving at an appropriate sentence. Courts must therefore always strive to arrive at a sentence which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society. Sentencing involves a very high degree of responsibility which should be carried out with equanimity. . .'

[29] In *S v Malgas*[22] it was found that the usual mitigating factors are taken into account to determine whether there are substantial and compelling circumstances present, but that the prescribed sentences should not be deviated from for flimsy reasons. As mentioned earlier, prior to passing sentence the second time, a victim impact report was obtained as well as a report regarding the personal circumstances of the appellant. Mr Maluleka, the probation officer who testified at the sentencing proceedings, compiled a pre-sentencing report in respect of the appellant. From this report it transpired that the appellant was 28 years old, employed and engaged to the complainant's aunt. They had one child. He was employed and he had passed matric in 1988. While he was awaiting trial, the appellant was incarcerated for 12 months as an awaiting trial prisoner. Between the initial sentence in 2000 and the resentencing after the first appeal, while in prison, the appellant had completed a Higher Certificate in Adult Basic Education and Training through UNISA. He had further completed various life skills programmes and completed various certificates in bible studies.

[22] *S v Malgas* 2001 (1) SACR 469 (SCA).

[30] Mr Maluleka testified, as previously mentioned, that the appellant still maintained his innocence despite then having spent nearly eight years in prison. According to Mr Maluleka, this lack of remorse and failure to accept responsibility for his crime impacted negatively on his possible rehabilitation, in spite of the programmes he had attended. His opinion was that without the appellant accepting responsibility, no course he might attend would result in his rehabilitation, and he may rape someone else, once released. This is a significant factor as the appellant had previously been convicted of rape and was sentenced to lashes, nearly ten years prior to the commission of this offence.

[31] Mr Louw, the counselling psychologist of the Teddy Bear Clinic compiled a victim impact report. This report reflects the impact the rape had on the complainant approximately eight years after the rape. As mentioned, the appellant and the State accepted the facts contained in the report to be correct as well as Mr Louw's conclusions. From this victim impact report the following emerged with regard to the tests conducted and the conclusions reached by Mr Louw.

'Results of CITES-R assessment:

- On the PTSD Sub scale of Intrusive Thoughts (IT) [the complainant] scored 11 out of a maximum of 14 points, which indicates a percentage of 71. *This indicates that [complainant] re-experiences the traumatic event at a clinically significant level, as related to symptoms, nightmares, intrusive thoughts, memories and images.*
- On the PTSD Sub scale of Avoidance (AV) [the complainant] scored nine out of a maximum of 16 points, which indicates a percentage of 56. *This is an indication that [the complainant] does sometimes attempt to avoid being reminded about the traumatic event.*

- On the PTSD Sub scale of Hyperarousal (HYP-AR) [the complainant] scored nine out of a maximum of 12 points which indicates a percentage of 75. *This high percentage indicates that [the complainant] is exposed to feelings of hyperarousal, and that she feels irritable, struggles to concentrate, has an exaggerated startle response and feels restless and jumpy as a result.*
- On the PTSD Sub scale of Sexual Anxiety (SX-A) [the complainant] scored 10 out of a maximum of ten points, which indicates a percentage of 100. *The high percentage indicates a pathological high level of anxiety that [complainant] associates with sexual issues, as a result of the sexual assault. She becomes upset when thinking about sexual issues, and wishes that there were no such thing as sex. She also struggles to see herself ever having a normal, mature sexual relationship.*
- On the Social Reactions Sub Scale of Negative Reactions by Others (NRO) [the complainant] scored two out of a maximum of 18 points, which indicates a percentage of 11. This score indicates that [the complainant] did not experience negative reactions by other people following her disclosure, and that she feels that her family reacted appropriately to the situation.
- On the Social Reactions Sub Scale of Social Support (SS) [the complainant] scored eight out of a maximum of 12 points, which indicates a percentage of 67. This indicates that [the complainant] did feel believed and supported by the people closest to her that she disclosed to. She feels that her family is trying to help and assist her, and is appreciative of their support.
- On the Attributions about Abuse Sub Scale of Self Blame/Guilt (SB-GU) [the complainant] scored nine out of a maximum of 24 points, which indicates a percentage of 38. This indicates that [the complainant] does not relate to clinically significant levels of self-blame, and does not take undue responsibility for what occurred.
- On the Attributions about Abuse Sub scale of Personal Vulnerability (PV) [the complainant] scored 14 out of a maximum of 18 points, which indicates a percentage of 78. *Based on this it can be assumed that [the complainant] does suffer from … believe that sexual assault happens to a lot of children, and that it may occur to her again.*

- On the Attributions about Abuse Sub scale of Dangerous World (DW) [the complainant] scored 9 out of a maximum of 10 points, which indicates a percentage of 90. *[The complainant] perceives the world as a very dangerous place, and does tend to struggle to trust people, following the sexual abuse.*
- On the Attributions about Abuse Sub scale of Empowerment (EMP) [the complainant] scored ten out of a maximum of 14 points, which indicates a percentage of 71. This indicates that [the complainant] feels empowered in terms of having more knowledge relating to abusive situations, which she can use to better protect herself in future.
- On the Eroticism Sub scale Eroticism (ERO) [the complainant] scored 2 out of a maximum of eight points, which indicates a percentage of 25 per cent. This is an indication that [the complainant] does not associate with an increase in sexual feelings, more than other individuals in her peer group do.

CONCLUSION AND RECOMMENDATIONS

Based on the information obtained from the clinical interview, as well as the results of the psychometric testing, the following:

[The complainant] related several changes in her life, which she attributes to the incident in question. She related to severe disruptions in her sexual development, and that the meaning she attaches to sexuality continues to cause problems in her current romantic relationship. She noted that she is still often reminded of what happened, and that she experiences an uncomfortable emotional response when reminded. She tries to avoid being reminded, and also avoids conversations relating to the incident. Her sense of trust in others was affected, and she also feels that her personality was changed, in terms of being more irritable and angry.

According to the results of the CITIES-R, [the complainant] continues to experience elevated symptoms in terms of having intrusive thoughts, hyperarousal, sexual anxiety (very high), feeling personally vulnerable, and seeing the world as a dangerous place (very high).

Based on the results of this assessment, the assessor is of the opinion that the incident in question continues to have a daily and significant impact in [the complainant]'s

life. When it is taken into account that the incident occurred about eight years ago, the profound impact becomes apparent.

The rape was not just a physical act, causing her physical injuries. The psychological impact remains, years after the incident, and continues to have a debilitating effect in her life.

The assessor recommends that the court take the results of this assessment into account when sentencing is considered, in terms of the life-long and continuous harm that was inflicted by a person who was in a trusting and familiar relationship with the victim.' (My emphasis.)

[32] It is clear from the report that the complainant's life has been altered tremendously by the incident. The crime committed was a callous exploitation of the complainant, a young girl with whom the appellant was in a trusting relationship. It was cruel and degrading to the extent that the complainant was compelled to walk back home with her upper body naked, as the appellant had torn her blouse. He throttled her and threatened her with death if she were to report the matter. This court has before said that rape is generally degrading, humiliating and a brutal invasion which is a violent infringement of a person's fundamental right to be free from all forms of violence and not to be treated in a cruel, inhumane or degrading way.[23] Furthermore, it infringed the complainant's fundamental right, as a child, to be protected from maltreatment, degradation and abuse.[24] The rape was very serious with the complainant suffering debilitating, life-long consequences, namely (a) severe disruption of her sexual development which caused problems in her romantic development; (b) a lack of trust in others; (c) personality changes in that she became more irritable and angry; (d) she suffers from

[23] Section 12 *(c)* and *(e)* of the Constitution. See also *S v Chapman* 1997 (3) SA 341 (SCA) at 344J-345B.
[24] Section 28*(d)* of the Constitution.

hyperarousal with an exaggerated startle response; and (e) she feels personally vulnerable and sees the world as a dangerous place.

[33] The conclusion of Mr Louw that the rape has had a long lasting negative effect on the complainant was further confirmed by the fact that the complainant was not called to testify in the second sentencing procedure, eight years later, as it would have upset her severely. The positive aspects apparent from Mr Louw's report are that the complainant felt she had the support of her family who tried to assist her and she does not blame herself for the crime that was committed against her. However these positive aspects pale in comparison to the psychological harm the complainant has suffered and continues to suffer.

[34] There are numerous cases of this court where it has been said that there are different degrees of seriousness of rape. Cases such as *Rammoko v Director of Public Prosecutions*,[25] *S v Abrahams*[26] and *S v Mahomotsa*[27] held that the objective gravity of the offence play an important role in sentencing. However, the rape in this instance can be said to be extremely serious: a young child was raped by a relative, who was trusted by the family with devastating psychological life-long consequences; she suffered humiliation and physical abuse. It is significant that the appellant was not a first time offender and has raped before. His chances of rehabilitation are minimal as he persists with his innocence, despite overwhelming evidence against him.

[35] I am of the view that there are no substantial and compelling circumstances to deviate from the prescribed sentence. Furthermore, the

[25] *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA) para 12.
[26] *S v Abrahams* 2002 (1) SACR 116 (SCA) para 29.
[27] *S v Mahomotsa* 2002 (2) SACR 435 (SCA) para 17.

prescribed sentence would not be unjust, for even if there were no prescribed sentence, life imprisonment, in my view, would have been the appropriate sentence. The appellant's counsel suggested that the sentence should be substituted with a sentence of 25 years' imprisonment. This sentence, however, will not give effect to the gravity of the offence or be fair to the complainant and society at large. I am of the view that a life sentence is the only suitable sentence in the circumstances of this case.

[36] Therefore the following order is made:
'The appeal is dismissed.'

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I SCHOEMAN
ACTING JUDGE OF APPEAL

Bosielo JA (Tshiqi JA concurring):

[37] I have had the benefit of reading a comprehensive judgment penned by my colleague, Schoeman AJA. The salient facts relevant to the issue to be decided have been fully set out in her judgment. There is therefore no need to repeat them. However, for the reasons set out hereunder, I do not agree with both her reasoning and conclusion.

[38] It is common cause as my colleague has recorded in her judgment that, notwithstanding the fact that the appellant was charged with the rape of a 10 year old female, which brings this offence within the purview of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Act), which calls for a minimum sentence of life imprisonment unless the court found that substantial and compelling circumstances existed which justified a

lesser sentence in terms of (s 51(3)), and that there was no mention of this crucial element of the charge either in the charge sheet, during the plea proceedings, or even during the entire trial, the appellant was nonetheless sentenced to life imprisonment purportedly under s51(1). The transcript shows that the issue of life imprisonment was only raised perfunctorily by the trial court after conviction. To be precise this occurred only at the sentencing stage. It was explained to the appellant as follows:

'YOU ARE THEN FOUND GUILTY OF RAPE OF THIS GIRL UNDER THE AGE OF 16 YEARS.

That of course also implies when you come to the sentence aspect that I will have to apply section 51, Act 105 of 1997, minimum sentences for certain serious offences. It says notwithstanding any other law but subject to sub-section (3) and (6) a high court shall, if it has convicted a person of an offence referred to in part 1 of Schedule 2, sentence the person to life imprisonment. Part 1 of Schedule 2 states as regards rape, when the victim is a girl under the age of 16 years.

I will therefore have to refer you to the Supreme Court for sentence. I cannot impose life imprisonment.'

[39] The crisp question to be answered in this appeal is whether the failure to inform the appellant clearly and properly either at the beginning of the trial or during the trial of the exact nature, the details and the consequences of the offence that he faced, has denied him his right to a fair trial. Both counsel conceded, correctly in my view, that the failure to alert the appellant properly of the charge which he was facing and that he faced the peril of life imprisonment is an irregularity. However, they differed on whether this irregularity is so gross as to render the trial unfair.

[40] At the heart of this appeal lies the right to a fair trial to which every accused is entitled. To the extent relevant, s 35(3) of the Constitution provides:

'Every accused person has a right to a fair trial, which includes the right –
(*a*) to be informed of the charge with sufficient detail to answer it.'

[41] Our courts, in particular this Court, have grappled with this subsection on many occasions. In the process they have produced a long list of cases which attempted to define the concept of a fair trial. I think the correct starting point is *S v Zuma* 1995 (1) SACR 568 (CC) para 16 where the Constitutional Court stated the following:

'… The right to a fair trial conferred by that provision [s 25(3) of the interim Constitution] is broader than the list of specific rights set out in paras (*a*) to (*j*) of the subsection. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force.

In *S v Rudman and Another; S v Mthwana* 1992 (1) SA 343 (A), the Appellate Division, while not decrying the importance of fairness in criminal proceedings, held that the function of a Court of criminal appeal in South Africa was to enquire

"whether there has been an irregularity or illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted".

A Court of appeal, it was said (at 377)

"does not enquire whether the trial was fair in accordance with "notions of basic fairness and justice", or with the "ideas underlying the concept of justice which are the basis of all civilized systems of criminal administration".'

That was an authoritative statement of the law before 27 April 1994. Since that date s 25(3) has required criminal trials to be conducted in accordance with just those "notions of basic fairness and justice". It is now for all courts hearing criminal trials or criminal appeals to give content to those notions.' (Own emphasis.)

See also *National Director of Public Prosecutions v King* [2010] ZASCA 8; 2010 (2) SACR 146 (SCA) para 4.

Section 25(3) of the interim Constitution has been replaced by s 35(3) of the final Constitution. Hence I find the dictum in *Zuma* applicable to this case.

[42] As *Zuma* demands the question to be answered is whether it can be said that the appellant's trial was conducted in accordance with those basic notions of fairness and justice. The first case on point is *S v Legoa* 2003 (1) SACR 13 (SCA) where the appellant was charged with dealing in dagga. The appellant pleaded guilty to the charge as read out, which plea the State accepted. Specific mention was made in the charge sheet of the penalty provisions of the Drugs and Drug Trafficking Act 140 of 1992. No reference or mention was made of the Criminal Law Amendment Act (the Act). As a result, the appellant had not been warned that the minimum sentencing provisions would be applicable to him. He was only informed that the penal provisions under the Drugs and Drug Trafficking Act would be applicable. This is the case that he faced and answered to. The issue on appeal was whether, notwithstanding the fact that the appellant was not informed of the offence that he faced was subject to the minimum sentencing legislation, he could nonetheless still be sentenced under that Act. After a consideration of previous cases like *S v Seleke en andere* 1976 (1) SA 675 (T), *R v Zonele & others* 1959 (3) SA 319 (A), this Court held that it was highly unfair to confront the appellant for the first time, after he had pleaded and been convicted of an offence under a different statute with different penal provisions, to thereafter proceed and sentence him under the Minimum Sentence Act. However, this Court refrained from being pedantic and laying down a general and inflexible rule that it is obligatory for the State to set out clearly in the charge sheet the facts which it intends to rely on to bring an accused within the ambit of the minimum sentence regime as well as the

statute under which he or she is charged. But it held that if this was seen to be desirable or important in the pre constitutional era as it was found in *Seleke*, it should be given more importance now as it is an entrenched constitutional right. However, this Court cautioned that this is a matter of substance and not form and that this required that the facts of each case should be analysed scrupulously to determine if there has indeed been a failure of justice - this being a factual enquiry.

[43] Then followed *S v Ndlovu* 2003 (1) SACR 331 (SCA) where the appellant was charged and convicted of the unlawful possession of a firearm and ammunition. The charge sheet did not specify that the firearm was a semi-automatic firearm which called for a minimum sentence of not less than 15 years' imprisonment in terms of s 51(2)*(a)* of the Criminal Law Amendment Act. It was not disputed that the appellant had not been alerted of the important fact that he was charged under the minimum sentencing regime and that he faced the peril of a sentence in terms of that Act. Faced with this legal conundrum, this Court endorsed both *Seleke* and *Legoa*, and held at para 14 that 'by invoking the provisions of the Act without it having been brought pertinently to the appellant's attention that this would render the trial in that respect substantially unfair. That, in my view constituted a substantial and compelling reason why the prescribed sentence ought not to have been imposed'.

[44] In upholding the appeal in *Ndlovu*, this Court went further and stated at para 12:

'[W]here 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 consequences . . . 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.'

[45] It is clear from the two cases cited above that without laying an inflexible rule, this Court reiterated and confirmed the principle that every accused is entitled to a fair trial as peremptorily decreed by our Constitution. In the context of the specificity or sufficiency of details in the charge sheet as envisaged by s35(3)*(a)*, this Court held that, depending on the facts of each case, a failure to provide sufficient details in the charge sheet of the offence for which the accused is charged and the relevant legislation particularly where the State would want to rely on an increased penal jurisdiction , or advise an accused fully and properly of the charge he or she is facing, either at the beginning of the trial, or at any stage of the trial, but before its conclusion, might lead to the conclusion that he or she did not receive a fair trial.

[46] In order to appreciate the importance of why s 35(3) of the Constitution guarantees the right of every accused person to a fair trial, it is important to interrogate its underlying rationale. Section 35(3) sets out clearly that every accused person must be informed of the charge which he or she is facing with sufficient detail to answer it. It is axiomatic that an accused person will never be able to defend him or herself effectively unless he or she knows what the charge against him or her is. Evidently, this requires that he or she must fully understand what the charge is, the law under which he or she is charged and what the possible consequences for him or her are upon conviction. It is intended to ensure that an

accused person is put in a position where he or she can put up his or her best defence. Undoubtedly, this is essential as it will enable him or her to consider and decide on the best strategy to adopt, and whether to enlist legal assistance, or not, and if so, what kind of legal assistance. The accused may also decide to plead guilty or to enter into a plea bargaining agreement with the State.

[47] As this Court held in *Ndlovu*, it would be grossly unfair to an accused person not to be told at all, either through the charge sheet or during plea proceedings or at the trial in regard to the applicability of the minimum sentence legislation. To inform him about such a patently serious matter at the end of a trial as it happened in this case, defeats the very purpose envisaged by s 35(3) of the Constitution. The options that he or she can still exercise at such a late stage are severely limited or non-existent as the horse has already bolted. Why charge an accused with a particular statute that calls for a particular sentence and only after he or she is convicted to change and sentence him to a period that does not form of part the charge for which he or she stood trial and for which he or she was convicted. Put simply, such a trial is a trial by ambush which is neither desirable nor permissible in a constitutional democracy underpinned by a Bill of Rights.

[48] Importantly, in terms of the charge sheet to which the appellant pleaded, he was due to be sentenced to a sentence of imprisonment not exceeding 10 years in terms of s 92 of the Magistrates' Courts Act 32 of 1944 upon conviction. In contrast, he was sentenced to imprisonment for life in terms of s 51(1) of the Act after the court had found that there were no substantial and compelling present circumstances to justify a lesser

sentence. Undoubtedly, this is offensive to any notion of fairness and justice to the appellant.

[49] My colleague found that the failure by either the magistrate or the prosecutor to inform the appellant of the applicability of the minimum sentence legislation, and the undisputed fact that even the charge sheet was silent about this crucial element of the charge, did not render the appellant's trial unfair. She bases this on the fact that the appellant went through five separate proceedings during the sentencing stages but never raised this issue as a complaint. Based on this, she concludes that 'he was not ambushed as the charge sheet set out that he was charged with the rape of a ten year old girl which brought the offence within the ambit of s 51(1) of the Act'. This statement assumes that that the appellant knew that he could object or that his legal representative knew that he could object. What is clear is that neither his lawyer nor the appellant were afforded any opportunity to say anything in respect of the decision to refer the matter to the High Court. It was a final and an unequivocal order by the magistrate. Unfortunately, this statement seems to suggest that the appellant had the responsibility to ensure that he received all the necessary details that would make the charge more serious than what the State, armed with all the relevant information contained in the docket, has elected to charge him with. Needless to state that it is the State which elected which charge to prefer against an accused. Public prosecutors who are representatives of the State are legally trained to read the docket and decide which is the appropriate charge against an accused and not the other way round. An accused plays no part in this election. In any event it is clear from the plain reading of s 35(3) that the responsibility is on the State and the presiding officer to observe, respect and protect the right of every accused to a fair trial.

[50] I do not agree with the finding by my colleague as it suggests that the mere mention of a rape of a 10 year old girl is sufficient to alert the appellant that this is not an ordinary rape but rape under s 51(1) of the Act. Even if it did, a reference to rape of a 10 year old girl does not on its own tell an accused that he is facing the real peril of imprisonment for life as opposed to any lengthy term of imprisonment. It is important to remember that our criminal justice system is adversarial. Every accused person must be afforded an opportunity to be able to present an answer to the charge against him or her. This is in line with the fact that until proven guilty an accused is presumed to be innocent. Furthermore, there is no obligation on him or her to assist the State in making or proving a case against him or her. The Constitution provides him or her with certain procedural safeguards. These include the right to remain silent and right against self- incrimination. Even more important is the fact that the duty lies on the State to adduce sufficient and relevant evidence to prove the guilt of an accused beyond reasonable doubt. The corollary hereof is that there is no duty on the part of an accused to assist the State in his or her prosecution. This is so because every criminal trial holds the potential of grave consequences for every accused. It is a truism that life imprisonment has replaced the death penalty as the ultimate sentence. It is a sentence that should not be lightly imposed. Where an accused faces a charge that might attract life imprisonment as an appropriate sentence, it is only fair that such an accused should be fully aware of the charge that he is facing, its details and the probable sentence that might be imposed on him, should he be convicted. This is what the Constitution demands.

[51] This matter is distinguishable from *S v Kolea* [2012] ZASCA 199; 2013 (1) SACR 409 (SCA). In *Kolea* the state's intention to rely on the

minimum sentencing regime was made clear to the appellant from the outset. Unlike in this case, the charge sheet made it clear that the appellant was charged with rape read together with the provisions of s 51(2) of the Act although on the proven facts, it should have been s 51(1). It was on this basis that this Court found that, notwithstanding the fact that the charge sheet referred to a wrong section, the appellant had nonetheless been sufficiently informed of the charge which he faced. As a result this Court found that the mistake about the correct section did not cause him any prejudice that might render the trial unfair.

[52] In this case the charge sheet informed the appellant that he was charged with rape of a 10 years old girl and nothing more. There is no mention of the minimum sentence legislation. At no stage did the prosecutor apply to have the charge sheet duly amended to reflect the correct charge. This is notwithstanding the fact s 86 (1) of the Criminal Procedure Act 51 of 1977 permits him or her. One is driven to conclude that the State was happy to charge him with and convict him on the charge as it stood in the charge sheet. For all intents and purposes this is an ordinary rape which does not call for life imprisonment as a mandatory sentence. At the time the law prescribed a sentence not exceeding 10 years for such an offence. In all likelihood this is the sentence which the appellant expected and not imprisonment for life. The complaint raised by the appellant cannot be described as mere legal technicalities or stratagems as it sits at the heart of a constitutionally protected right to a fair trial. I have no doubt that the imposition of life imprisonment in circumstances where he was never so alerted, caused the appellant grave prejudice. Such has resulted in the appellant being denied his constitutionally protected right to a fair trial. This goes against the spirit and purport of the Bill of Rights, which is the cornerstone of our

democracy which resulted in him not having a fair trial. What this means is that, as the appellant had not been informed of the applicability of the Criminal Law Amendment Act, it was inappropriate and impermissible for the regional magistrate to refer the proceedings to the High Court for sentencing. The regional magistrate should have sentenced the appellant for the rape in line with the penal jurisdiction of the magistrate court in place at the time. This is so because in law the appellant was convicted of ordinary rape and could only be sentenced for ordinary and not rape read with s 51(1) of the Criminal Law Amendment Act. It follows that this sentence cannot stand.

[53] Having set the sentence of life imprisonment aside, what then would be an appropriate sentence? As I said earlier, the appellant was charged and convicted of rape of a 10 year old girl. A Magistrates' Court is a creature of statute. Its powers and penal jurisdiction is as set out in the Magistrates' Courts Act. It cannot impose any sentence in excess of what the Act prescribes. This is in line with the hallowed principle of legality enshrined in our Constitution. Section 9 of the Magistrates' Courts Act as it applied then prescribed a sentence of not more than 10 years. Although this offence calls for life imprisonment in terms of the Criminal Law Amendment Act, this Court cannot as a court of appeal impose any other sentence outside the one statutorily prescribed by s 9 of the Magistrates' Courts Act. This Court is bound to impose a sentence which the regional magistrate was competent to impose. Our task therefore is to determine what an appropriate sentence should be, given all the facts relevant to this case. This should not be misconstrued to imply that this Court fails to appreciate the seriousness and prevalence of this offence. Our courts, but in particular, this Court has spoken in numerous judgements about the horrors of this offence and its deleterious

effect on its victims, family members and the broader society. The nature of this offence, its effect, impact on the complainant and the personal circumstances of the appellant have been fully set out by my colleague. There is no doubt that this is a very serious offence which calls for a severe sentence which will adequately reflect its seriousness and society's legitimate outrage and indignation at the people who commit such crimes. This is so because such crimes bring about pain, heartbreak and destruction of the victims' lives. Our courts have a huge responsibility to protect society against such crimes by imposing appropriate sentences. The appellant's circumstances pale when one reads them against the seriousness of the offence. Ordinarily, as the majority judgement holds, he deserved a more severe sentence. However, as the law stood then, the appellant stood to be sentenced to imprisonment for a period not exceeding 10 years imprisonment for the crime with which he was charged and for which he was convicted.

[54] In the result:

1 The appeal against sentence is upheld.

2 The sentence of life imprisonment imposed on the appellant is set aside and replaced with a sentence of 10 years' imprisonment.

3 The sentence imposed is antedated in terms of s282 of the Criminal Procedure Act 51 of 1997 to 15 March 2000.

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L O BOSIELO
JUDGE OF APPEAL

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