THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 205/2017

In the matter between:

KENNEDY NTSAKO SHIBURI **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Shiburi v The State* (205/2017) [2018] ZASCA 107 (29 August 2018)

Coram: Shongwe ADP, Saldulker JA and Pillay, Makgoka and Hughes AJJA

Heard: 29 May 2018

Delivered: 29 August 2018

Summary: Criminal Procedure – section 112(1)(*b*) of the Criminal Procedure Act 51 of 1977 – Nature, ambit and purpose of the section explained – proper approach to questioning in terms thereof – section must be considered as part of the constitutional right to a fair trial – when a plea of guilty should be altered to one of not guilty. Rape – sufficiency of evidence – proper approach to the evaluation of evidence restated.

ORDER

On appeal from: Limpopo Division, Polokwane (Mokgohloa DJP and Sikhwari AJ) sitting as court of appeal):

1 The appeal is upheld.

2 In respect of counts 1 and 2, the order of the high court is set aside and substituted with the following:

> 'The appellant's appeal is upheld and the convictions and sentences are set aside subject to the following:
>
> 'The case is remitted to the regional magistrate, Mrs C Honwana, who is directed to record pleas of not guilty to counts 1 and 2 and to require the prosecutor to proceed with the prosecution.'

3 In respect of count 3, the order of the high court is set aside and substituted with the following:

> 'The appeal is upheld and the appellant's conviction and sentence are set aside and substituted with the following:
>
> "The accused is acquitted on count 3."

JUDGMENT

Makgoka AJA (Shongwe ADP, Saldulker JA and Hughes AJA concurring)

[1] This appeal concerns, in the main, the proper application of s 112 of the Criminal Procedure Act 51 of 1977 (the CPA). The ancillary issue is whether the evidence was sufficient to sustain a charge of rape. These arise against the following factual background. On 19 August 2005, mid-day, a young woman aged 18 and a 15 year old girl were accosted by two men who subsequently raped them in the nearby bush. Later those men swopped places with their victims, and raped the one who had earlier been raped by the other. On 23 February 2006, a young woman, 18 years of age, was allegedly raped.

In the regional court

[2] The appellant was subsequently arrested and charged with three counts of rape, following the above complaints. Counts 1 and 2 were in respect of the rapes of the two girls on 19 August 2005, while count 3 concerned the rape which allegedly occurred on 23 February 2006. All three counts were stated to be 'read with the provisions of section 51 and schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended.'

[3] The appellant, who was not legally represented, appeared in the regional court, Ritavi. He pleaded guilty to all three counts. The regional magistrate proceeded to question him in terms of s 112(1)(*b*) of the CPA to satisfy herself that the appellant admitted all the elements of the offences. In respect of counts 1 and 2

the appellant explained that on 19 August 2005, the day of the incident, he was in the company of one Walter Ngobeni when they came across the complainants. Ngobeni produced a knife and told him that he was going to grab one of the complainants, and told him to also grab the other. He obliged, and both grabbed the two complainants and dragged them to a nearby bush. Ngobeni instructed him to rape the one complainant, which he did, whilst he, Ngobeni, raped the other. Thereafter they swopped – the appellant raped the complainant who had just been raped by Ngobeni, while the latter raped the one just raped by the appellant.

[4] The appellant explained to the court that he was afraid that Ngobeni, who was older than him and wielding a knife, would harm him if he did not commit the rapes as directed by him. Thus, the gravamen of the appellant's explanation was that he was compelled by fear to rape the complainants. At the end of the questioning in terms of s 112(1)(*b*) of the CPA, the regional magistrate enquired from the prosecutor whether the State accepted the appellant's plea of guilty on each of counts 1 and 2, to which the prosecutor answered in the affirmative. The court convicted the appellant of both counts. In respect of count 3, the court was not satisfied that the appellant admitted all the elements of the offence, and in terms of s 113 of the CPA, altered the appellant's plea of guilty to one of not guilty. Evidence was led on this count, after which the appellant was also convicted on count 3. He was sentenced to 15 years' imprisonment for counts 1 and 3 each, and imprisonment for life on count 2.

In the High Court

[5] After he was sentenced, the appellant, who was then legally represented, appealed against the convictions on all counts and the resultant sentences. The appeal came before a full bench of the Limpopo Division of the High Court,

Polokwane (the high court). The appellant attacked the convictions on counts 1 and 2 on the basis that the questioning by the regional magistrate revealed a defence of compulsion. In respect of count 3, the appellant contended that the evidence was insufficient to sustain a conviction. The high court rejected all these contentions and dismissed the appeal against the convictions.

[6] With regard to the sentences, the high court found that the age of the complainant in count 2 (who had been stated in the charge sheet to have been 15 years old) had not been proven in the regional court. The importance of the complainant's age is that if she was under the age of 16 years, life imprisonment is the prescribed minimum sentence in terms of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the CLAA). This is so, unless substantial and compelling circumstances were established. It should be borne in mind that the regional court had imposed life imprisonment in respect of count 2. This was ostensibly on the basis that the complainant was under the age of 16.

[7] Despite finding that the age of the complainant in count 2 had not been proven, the high court concluded that the sentence of life imprisonment should stand. It based its reasoning on s 51(1) of the CLAA, which provides that where a victim is raped more than once by two people, the prescribed minimum sentence is life imprisonment. As the complainants were raped by the appellant and Ngobeni in the circumstances envisaged in the section, so concluded the high court, life imprisonment was the appropriate sentence. It therefore dismissed the appellant's appeal against sentence.

In this court

[8] The appellant's appeal is before us with the special leave of this court. Three key submissions were advanced on behalf of the appellant in this court. First, that the court failed to encourage the appellant to exercise his right to legal representation, in the light of the seriousness of the charges he faced. Second, that the explanation by the appellant during the questioning in terms of s 112(1)(*b*) raised a defence of compulsion, and the court should therefore have altered the plea of guilty to one of not guilty in terms of s 113 of the CPA. Third, that the appellant's right to a fair trial was infringed. This, so was the submission, was because the appellant was sentenced in terms of s 51(1) of the CLAA (life imprisonment) whereas this had not been specifically mentioned in the charge sheet. It was submitted that under the circumstances, the regional court lacked the necessary jurisdiction to sentence the appellant to life imprisonment. I deal with these submissions in turn.

Legal representation

[9] At his first appearance in the regional court on 3 March 2010, the appellant's right to legal representation was explained by the regional magistrate. He elected to apply for legal aid representation. Indeed, on his second appearance, he was represented by an attorney from Legal Aid SA. The matter was remanded for several occasions while the appellant continued to be represented. The trial date was set for 15 October 2010. On that occasion the appellant's attorney was present at court, but due to ill-health, could not proceed with the trial. The appellant indicated to the court that he wished to proceed with the trial, and would conduct his own defence. The attorney sought, and was granted leave to withdraw as the appellant's attorney. Before he pleaded to the charges, the court enquired from the

appellant whether he persisted with conducting his own defence, which he confirmed.

[10] In the heads of argument on behalf of the appellant the contention was that under these circumstances, the court was enjoined to explain to the appellant the consequences of not having legal representation 'by making sure he clearly understood the danger of conducting own defence'. It was further submitted that the court should have encouraged the appellant to seek legal representation, and enquired from him the reason he did not. Failure to encourage the appellant to seek legal representation resulted in the appellant not receiving a fair trial, and has thus suffered prejudice resulting in a miscarriage of justice, so argued on behalf of the appellant. Reliance was placed in this regard on *S v Sikhipha* 2006 (2) SACR 439 (SCA) (*Sikhipha*).

[11] In considering this argument, the peculiar facts of the present case must be borne in mind. They differ from those in *Sikhipha*, where the accused never enjoyed legal representation at all. As stated earlier, the appellant initially exercised his right to legal representation, after the court had explained to him of the right. It is therefore untenable to suggest that he was not aware of his right in this regard. The passage in *Sikhipha* upon which reliance was placed, is in para 10, where the following remarks were made:

'It should be said, however, that where an accused is faced with a charge of rape, and especially where he faces a sentence of life imprisonment, he should not only be advised of his right to a legal representative but should be encouraged to employ one and seek legal aid where necessary. It is not desirable for the trial court in such cases merely to apprise an accused of his rights and to record this in the notes: the court should, at the outset of the trial, ensure that the accused is fully

informed of his rights and that he understands them, and should encourage the accused to appoint a legal representative, explaining that legal aid is available to an indigent accused.'

[12] This paragraph must be read in its context. Importantly, *Sikhipha* concerned an unrepresented accused who never had legal representation at any stage of the proceedings in the trial court. He had elected to conduct his own defence from the outset, unlike the appellant who had initially been legally represented. The complaint in *Sikhipha* was that the right to legal representation was not explained to the appellant properly. In para 9, Lewis JA had rejected that complaint on the basis that the record revealed that the rights to legal representation and legal aid had been explained to him, and he elected to conduct his own defence.

[13] It must be emphasized that the application of the rule regarding legal representation is context sensitive. In any given situation, the enquiry is always whether an accused's fair trial right has been infringed. See *S v May* 2005 (2) SACR 331 (SCA) para 7.

[14] Thus, from a comparative perspective, the appellant in *Sikhipha* was in a far more unfavourable position compared to the appellant in the present case. The latter who had undoubtedly been apprised of his right, and had in fact exercised it. Short of compelling the appellant to seek further legal representation, it is difficult to see what else the regional court could have done. Therefore there is no merit in the argument on legal representation, and reliance on *Sikhipha* is misplaced.

Questioning in terms of s 112(1)(b)

[15] Section 112(1)(*a*) of the CPA provides for the conviction of an accused on his or her plea of guilty if the prosecutor accepts that plea. On the other hand,

s 112(1)(*b*) provides a mechanism for a court to satisfy itself that a plea of guilty is informed and the accused admits all the elements of the offence to which a plea of guilty has been entered. The questioning, which is restricted to the facts, is mandatory if the court is of the opinion that a custodial sentence is merited, or if the prosecutor requests the court to so question the accused.

[16] As stated already, it was contended that during the appellant's questioning in terms of the above section, a defence of compulsion became apparent from the appellant's answers. It should be recalled that the appellant explained that Ngobeni told him to grab and rape the complainant in count 1, and later did the same in respect of the complainant in count 2. To consider whether the provisions of s 112(1)(*b*) were properly applied, it is necessary to quote from the record on how the questioning was conducted. After the appellant had admitted to having had sexual intercourse with the complainants without their consent, the following exchange followed:

'COURT: Were you aware that it was an offence to have sexual intercourse with a person without his or her consent?

ACCUSED: Yes I was aware but I was under pressure your worship because of the person with whom I was walking.

COURT: Did the person who was walking with you also force you to have sexual intercourse with this complainant? Or you only saw him having sexual intercourse with the other one then you joined?

ACCUSED: He told me to grab the other one and have sex with her.

COURT: So you grabbed?

ACCUSED: Yes.

COURT: Did he push you, grab you or just went there on your own?

ACCUSED: I just grabbed her I was next to her your worship.

COURT: So you were not forced? He just told you to grab her you were not forced to grab her?

ACCUSED: He just told me to have sex with that other one.

COURT: So he did not force you?

ACCUSED: He just told me your worship.

COURT: Was the companion standing next to you when you were having sexual intercourse with the two complainants to make sure that you were having sexual intercourse with them?

ACCUSED: I was at a distance like here I am standing and he was at the distance like the corner of this dock.

COURT: The question is was he standing right next to you to make sure that you were complying with his instructions or not?

ACCUSED: No but he was looking at me to see if I was complying with what he told me.'

[17] From the above exchange between the court and the appellant, the explanation was clear: he committed the rapes out of fear of Ngobeni, who, as stated earlier, was older than the appellant and was wielding a knife. He thus feared that if he did not comply with Ngobeni's instruction, the latter could harm him. Given this explanation, it was submitted on his behalf that the plea of guilty should have been altered to one of not guilty in terms of s 113(1) of the CPA. The latter section provides, among others, for the correction of a plea of guilty to one of not guilty under certain circumstances. It reads:

'If the court at any stage of the proceedings under section 112(1) (a) or (b) or 112(2) and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he or she has pleaded guilty or if it is alleged or appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that

the accused has a valid defence to the charge or if the court is of the opinion for any other reason that the accused's plea of guilty should not stand, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: Provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation.'

[18] Before I consider whether the provisions of s 112(1)(*b*) were properly applied, the following broad observations about the section are apt. The procedure set out in s 112 is designed to avoid the necessity for calling evidence in cases where it is clear that the accused both understands all the elements of the charge against him or her and admits them all. As observed by this court in *S v Naidoo* 1989 (2) SA 114 (A) at 121E-G, the section was designed to protect an accused from the consequences of an unjustified plea of guilty. In the constitutional era, the procedure in s 112 must be considered within the context of a right to a fair trial enshrined in s 35(3) of the Constitution. The constitutional right to a fair trial should guide the court in its determination of the ambit of the questions which should be put. See *Commentary on the Criminal Procedure Act*, Service 54, 17-15.

[19] When questioning the accused in terms of s 112(1)(*b*) the court's duty is to determine whether an accused's factual statements and answers in his or her plea of guilty adequately support the conviction on the charge. It is not the courts' function to evaluate the plausibility of the answers, or to determine their truthfulness at this stage of the proceedings. Instead, for the purposes of the section, the accused's explanation must be accepted as true. On that premise, the court should consider whether the explanation discloses a possible defence in law to the charge he or she pleaded guilty to. As is plain from the text of the section, the presence of doubt is a jurisdictional factor to trigger the application of the

procedure laid down in s 113. Thus, once a basis for doubt exists, objectively considered, the court has no residual discretion but to apply the procedure set out in s 113.

[20] I return to the facts of the present case. It is clear from the quoted excerpt of the record that the regional magistrate was at pains to extract a concession from the appellant that he was under no compulsion from Ngobeni to rape the complainants. That is beyond the ambit of s 112(1)(*b*). What is more, the very fact that the questioning reached that far, in itself suggests that the regional magistrate should have been left in doubt as to whether the appellant admitted the element of intent. It could well be that the appellant's explanation as to the pressure he supposedly was under, was of a dubious nature. But that is irrelevant for the purpose of s 112(1)(*b*). The truthfulness of his explanation played no role at that stage. That explanation could only be tested by evidence, and not by questioning in terms of s 112(1)(*b*), as the regional magistrate sought to do.

[21] In rejecting the appellant's argument on compulsion, the high court reasoned that compulsion did not arise in the circumstances because there was no sufficient evidence of the threat to the appellant's life from Ngobeni. Effectively, it rejected the appellant's explanation. As stated earlier, this is not the proper approach in the application of s 112(1)(*b*). It was impermissible for the court to embark on a critical analysis of the probity and plausibility of the appellant's explanation. Thus, both the regional court and the high court erred in this regard. The convictions and sentences should thus be set aside.

[22] The proper course to take under the circumstances is prescribed in s 312 of the CPA. It provides, among others, that where a conviction and sentence under

s 112 are set aside on appeal on the ground that s 113 should have been applied, the matter shall be remitted to the trial court for it to act in terms of s 113. In *S v Mshengu* 2009 (2) SACR 316 (SCA) para 17 it was held that the course prescribed by s 312 has to be followed, unless the court of appeal was of the view that it would lead to an injustice or would be a futile exercise. In the present case, I can perceive no injustice nor futility. On the contrary, it is in the interests of justice and the appellant that there should be a remittal.

Sufficiency of the evidence in count 3

[23] I turn now to count 3. As stated earlier, the appellant initially pleaded guilty to count 3, but the court altered the plea in terms of s 113 to one of not guilty. The State led the evidence of the complainant, an 18 year old young woman. Briefly, she testified as follows. In the afternoon of 23 February 2006 she met the appellant at a taxi rank. She was hungry. The appellant offered to provide her with food at his homestead. When they arrived there, instead of providing food for her, the appellant assaulted her in front of his mother. He produced a knife and dragged her inside a house where he raped her. She remained at the appellant's house the rest of that day. During the night, which she spent with the appellant, he further raped her. The following morning the appellant accompanied her to the taxi rank. Along the way they met a lady, to whom she conveyed her ordeal. At that stage the appellant turned back and no longer accompanied her to the taxi rank. She later laid a charge of rape against the appellant the same day.

[24] It was common cause that sexual intercourse took place between the complainant and the appellant. The only dispute is whether there was consent on the part of the complainant. According to the appellant, there was. On the appellant's version, trouble started when he failed to give the complainant money

for transport in the morning, as he had promised her. He did not have the money, and when they approached at the taxi rank, he fled from the complainant.

[25] As stated already, the issue is whether there was consent. This aspect is dependent on the evidence of the complainant, who was a single witness. In terms of s 208 of the CPA, an accused may be convicted of any offence on the single evidence of any competent witness. The court can base its findings on the evidence of a single witness, as long as such evidence is substantially satisfactory in every material respect (see *R v Mokoena* 1956 (3) SA 81 (A) at 85G-H). See also *S v Sauls and others* 1981 (3) SA 172 (A) at 180E-G; and *S v Banana* 2000 (2) SACR 1 (ZSC) at 7*g-i*.

[26] As to the proper approach for dealing with the factual findings of a trial court, the lodestar remains *R v Dhlumayo* 1948 (2) SA 677 (A). There, this court expressed the approach in the following collective principles. A court of appeal will not disturb the factual finding of a trial court unless the latter had committed a misdirection. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct. The appeal court will only reverse it where it is convinced that it is wrong. In such a case, if the appeal court is merely left in doubt as to the correctness of the conclusion, then it will uphold it.

[27] However, there is an important *caveat* to these salutary principles. It is this: where the trial court's impressive description of witnesses is not borne out by the record, an appeal court will more readily interfere with the findings of the trial court as to the weight to be attached to the witnesses' evidence and its ultimate conclusion based on such findings. See *S v Heslop* [2006] ZASCA 127; 2007 (4) SA 38; [2007] 4 All SA 955 (SCA) para 15.

[28] The regional magistrate's approach to the evidence is encapsulated in the following passage in the judgment:

'Therefore the court has to determine whether the complainant's version is reliable and whether there were any contradictions in her testimony. The complainant gave a detailed account of the events on the day in question. She did not contradict herself during evidence in chief or under cross-examination by the defence. She was a very reliable witness and if she was not honest she would have indicated that she volunteered to go with the accused because she was hungry. Nothing could have stopped her to say that accused just grabbed her or threatened her with a knife then she was scared and she went with the accused.'

[29] The difficulty with this approach is glaring. The regional court considered the evidence of the complainant in isolation and concluded that it was to be believed. On that basis, it assumed that the evidence of the appellant must *a fortiori*, be rejected. That is plainly a wrong approach. The evidence must be considered as a whole before deciding on which version is preferred to the other. The regional court did not embark on this exercise. It failed to evaluate and critically analyse the evidence as a whole, including the evidence of the appellant.

[30] As observed in *S v Van der Meyden* 1999 (2) 79 (W) at 82C-E the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence - good or bad. None of such evidence may simply be ignored. *Van der Meyden* received the imprimatur of this court in *S v Van Aswegen* 2001 (2) SACR 97 (SCA) para 8. See also *S v Shilakwe* [2011] ZASCA 104; 2012 (1) SACR 16 (SCA) para 11. In the latter case, it was held that it is not impermissible, as an aid to a proper evaluation and understanding of it, to break down the evidence in its component parts, as long as in assessing the evidence, the court in the ultimate analysis considers the totality of the evidence in order to determine whether the guilt of the accused is proved beyond reasonable doubt.

[31] To my mind, the regional court led itself astray by breaking down the evidence in its component parts, and failed to assess the mosaic of the evidence. It also failed to apply the proper approach to the evaluation of the evidence laid down by this court in *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15. Had it done so, it would have considered, among others, the inherent probabilities from the common cause facts. I consider just two, both which arise from the conduct of the complainant over the two days. First, after being allegedly assaulted and raped by the appellant in the afternoon, it was improbable that she would stay on for the rest of the day at the appellant's homestead.

[32] I accept that she did not have money for transport. At the very least, she could have sought refuge for the rest of the day and the night, with the appellant's mother. From her own version, she was sympathetic to her when the appellant assaulted her. There is no evidence that she sought help from her. In the absence of the evidence, it must be accepted that the appellant voluntarily stayed on for the night. Second, it appears that the following morning the two were at peace with each other. It seems to be common cause that the agreement was that the appellant would accompany the complainant to the taxi rank and make means to get her a taxi. This is inconsistent with a person who had been assaulted and raped multiple times.

[33] What is more, the complainant's report to her mother about her ordeal did not include the assault. The mother testified that the complainant reported to her that upon arrival at the appellant's homestead, he let her enter the house after which he locked the door. It should be recalled that the complainant testified that the appellant had assaulted and dragged her into the house.

[34] The regional court rejected the appellant's evidence on the following basis. If he and the complainant were in love, and there were no problems between them, and the sex was consensual, it was difficult to imagine why the complainant would lay charges against the appellant. In my view, the answer lies in the evidence of the appellant. He testified that he had promised to give money to the complainant. He was unable to deliver on that promise in the morning. To get himself out of that situation, he ran away from the complainant when they arrived at the taxi rank. According to the appellant, the complainant was aggrieved by this, hence the laying of the charges against him.

[35] In considering the evidence, it must always be borne in mind the nature of the onus resting on the State, which is to prove guilt of the accused beyond a reasonable doubt. A court is not entitled to convict unless it is satisfied, not only that the explanation of the accused is improbable, but that is beyond reasonable doubt, false. See *S v V* 2000 (1) SACR 453 (SCA) para 3; *S v Shackell* 2001 (2) SACR 185 (SCA) para 30; *S v Mafiri* 2003 (2) SACR 121 (SCA) para 9.

[36] The dictates of the above authorities do not seem to have informed the conclusion of the regional court to convict the appellant. To my mind, for all of the reasons stated above, the State's case fell short of the onus resting on it. There is nothing inherently implausible or improbable about the explanation proffered by the appellant. It is reasonably possibly true in substance. Based on the overall impression of the evidence, I am not satisfied that the guilt of the appellant was proved beyond a reasonable doubt. He should have been acquitted. It follows that his appeal in respect of count 3 should succeed.

Conclusion

[37] In summary, the appeal must succeed. In respect of counts 1 and 2, the convictions and sentences should be set aside. The matter has to be remitted to the regional court for it to apply the procedure set out in s 113 of the CPA. In respect of count 3, the conviction and sentence should be set aside without any condition as the appellant ought to have been acquitted.

[38] Two final aspects. With regard to the costs occasioned by the postponement of the matter on 21 May 2018 due to non-appearance by the State, it does not appear that the State was responsible for the non-appearance. The non-appearance seems to have been occasioned by communication breakdown between the registrar's office and the office of the Director of Public Prosecutions. There is therefore no reason to mulct the State in costs. Each party should bear its own costs occasioned by the postponement. On the second aspect, counsel for the State requested us to comment on the patent defects in the charge-sheet, where, instead of s 51(1) of the CLAA, reference was made to s 51(2). This obviously has significant importance when it comes to the sentence. Having reflected carefully on that request, and in the light of the conclusions and the order of remittal I am about to make, comment on that aspect is unwise. I therefore decline the invitation to do so.

Order

[39] In the result the following order is made:

1 The appeal is upheld.

2 In respect of counts 1 and 2, the order of the high court is set aside and substituted with the following:

'The appellant's appeal is upheld and the convictions and sentences are set aside subject to the following:

'The case is remitted to the regional magistrate, Mrs C Honwana, who is directed to record pleas of not guilty to counts 1 and 2 and to require the prosecutor to proceed with the prosecution.'

3 In respect of count 3, the order of the high court is set aside and substituted with the following:

'The appeal is upheld and the appellant's conviction and sentence are set aside and substituted with the following:

"The accused is acquitted on count 3."

T M Makgoka
Acting Judge of Appeal

Pillay AJA (dissenting)

[40] I have read the judgment of my colleague, Makgoka AJA. I agree with him that the appellant's rights to legal representation were adequately explained to him. I also agree that there should not be an order of costs against the State. Respectfully, I disagree with my colleague's conclusion that the convictions and sentences in counts 1 and 2 should be set aside on account of non-compliance with s 113 of the CPA. I also do not agree that the State had failed to prove the guilt of the appellant beyond a reasonable doubt in count 3.

[41] The facts have been sufficiently set out in my colleague's judgment, and it is therefore not necessary to repeat them, save to emphasise the following for the sake of my conclusions. On 19 August 2005 the appellant in the company of another man came upon two young women in Joppe in the Province of Limpopo. The appellant's companion grabbed one of the women and told the appellant to grab the other. Both men had sexual intercourse with both women without their consent. This incident resulted in the rape charges in counts one and two against the appellant.

[42] For the incidents of 19 August 2005 the appellant was charged with two counts of rape read with s 51 and Schedule II of the Criminal Law Amendment Act 105 of 1997 as amended. On the second count it was alleged that the complainant was 15 years. The magistrate accepted his pleas of guilty on both counts and convicted him 'as charged'.

[43] On 23 February 2006 the appellant met a young woman waiting for a taxi. She said she was hungry. He persuaded her to accompany him to his home where he promised to give her food. As to what happened thereafter, the regional magistrate accepted the woman's evidence. She testified that on arriving at the appellant's home he assaulted her with his bare hands before dragging her into his house, ignoring his mother's reprimands. He had sexual intercourse with her three times during the night. The next morning he accompanied her towards the taxi stop but, on seeing another woman waiting there, he ran away.

[44] For the incident of 23 February 2006 the appellant was charged with rape. He pleaded guilty. However, in his explanation in terms of s 112(1)(*b*) of the Criminal Procedure Act 51 of 1977 he raised the defence that intercourse with the

complainant had been consensual. The magistrate converted his plea to not guilty. At the end of a trial on the third count the magistrate convicted the appellant 'as charged'.

[45] The appellant testified in mitigation of his sentence. The prosecutor proved his previous convictions. Finding no substantial and compelling circumstances but aggravating factors the magistrate sentenced the appellant to 15 years imprisonment on counts one and three, and life imprisonment on count 2.[1]

[46] By the time the matter was heard before the full bench it had become common cause that the state had failed to prove the age of the complainant in count 2. As there was no proof that she was 15 years as alleged in the charge sheet, life imprisonment was not an appropriate sentence. Finding that the evidence proved that the crimes committed in counts 1 and 2 constituted rape under Schedule II Part 1(a)(i) and (ii)[2] the full bench substituted the magistrate's reason for imposing life imprisonment namely, the age of the complainant in count 2, with

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[1] A conviction of the appellant under Schedule II Part 1 (b)(i) where the victim is a person under the age of 16 years.

[2] Schedule II Part 1 (a)(i) and (ii) reads:

'Rape as contemplated in section 3 of the Criminal Law Sexual Offences Act and Related Matters Amendment Act, 2007-

(a) when committed

(i) in circumstances where the victim was raped more than once whether by the accused or any other co-perpetrator or accomplice;

(ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy'.

a finding that counts 1 and 2 constituted 'a gang rape' and therefore 'the sentence in counts 1 and 2 of life imprisonment should stand'.

[47] This appeal proceeded with the special leave of this court granted on 9 February 2017. I consider grounds of appeal in the following order:

(1) Was the appellant properly informed of the charges and the possible minimum sentences that might ensue if he were convicted?

(2) Did the appellant's plea explanation suggest that he might raise the defence of compulsion and if so, should the court have accepted his plea of guilty on counts 1 and 2?

(3) Was the appellant correctly convicted and sentenced?

[48] Regarding notice of the charges and sentence, the magistrate warned the appellant as follows about the possible sentences for each charge:

'Court: may I advise you that in terms of count one the applicable sentence in terms of section 51 is that of 10 years in respect of a first offender unless there are substantial and compelling circumstances that may warrant the court to impose a lesser sentence. Section 51(2) Act 105 of 1997.

In respect of count 2 the applicable sentence is that of life imprisonment unless if there are substantial and compelling circumstances that may warrant the court to impose a lesser sentence. In count 3 in terms of the same [legislation] the sentence that is applicable is that of 10 years in respect of a first offender unless if there are substantial and compelling circumstances that may warrant the court to deviate from the prescribed minimum sentence. Do you understand sir? Accused: yes I do'

[49] The prosecution had to know what its case was and to draw the charges correctly, by referring to the precise sections of Schedule II. Notifying the appellant precisely of the charges was a fair trial constitutional right to prevent the

risks for the appellant of being ambushed during the trial.[3] To refer in the charge sheet to Schedule II, without specifying which part of the schedule the prosecution relied on, and then splitting the charges into counts 1 and 2, did not inform the appellant precisely of the charges. Neither would the charges have alerted the magistrate of the possibility that the provisions under Part 1 of the schedule would apply. Without seeking clarification from the prosecutor, the magistrate informed the appellant of the sentencing provisions for rape under Part III in terms of which the discretionary minimum sentence graduates from 10, 15 to 20 years depending on whether the appellant was a first, second or third offender. The prosecutor whose task it was to correct the magistrate did nothing of the sort. At no stage did the magistrate or the prosecutor alert the appellant that the age of the complainant and the multiple rapes perpetrated would give the court jurisdiction to impose life sentences on both counts 1 and 2.

[50] Clearly neither the magistrate nor the prosecutor had contemplated life imprisonment on the basis of multiple rapes arising from counts 1 and 2. As an accused person, and especially as an unrepresented one, the appellant was entitled to be informed of the facts that the State would seek to prove to establish the court's jurisdiction to impose life imprisonment.

[51] The high court attempted to fix the irregularity in the formulation and notice of the charges and possible sentences. Imposing a life sentence for 'gang rape' was a material misdirection. The appellant was convicted and sentenced on a basis for which he had no notice. The high court compounded the misdirection by leaving intact the sentence of ten (10) years imprisonment in count 1. As a result, the facts

[3] Section 35(3)(*a*) of the Constitution of the Republic of South Africa, 1996; *S v Msimango* 2018 (1) SACR 276 (SCA) para 14.

in count 1 which, together with count 2, conduced to the appellant receiving not only a life sentence but also ten years imprisonment.

[52] As for the possible defence of compulsion, the high court correctly pointed out that the magistrate had to satisfy herself that 'the force was of such a nature that it will constitute a defence.' After carefully trawling through the evidence at the hearing, the full bench illustrated convincingly that despite the magistrate repeatedly asking the appellant whether his accomplice had forced him to rape the complainants, he consistently responded: 'he just told me'. She gave him several opportunities to say that he had been forced; but he chose not to. Thereafter by accepting his plea of guilty the magistrate did not exercise any discretion or evaluate his defence but interpret his response at face literally.

[53] The appellant's reference to his accomplice having a knife also did not convince either of the courts below that he was compelled to rape the complainants. His evidence was that his accomplice used the knife to intimidate the complainants.

[54] Regarding count 3, the magistrate correctly converted his plea of guilty to not guilty and allowed evidence to be led to establish whether the complainant consented to having sexual intercourse with the appellant. Having heard the evidence the magistrate preferred the credibility of the complainant. She found the evidence of the complainant to be reliable in all respects. But the same was not said of the appellant's evidence.

[55] The appellant failed to put to the complainant a vital question namely that he had proposed love to her and that she had confessed her love to him. The failure to put a version enabled the magistrate to justify her credibility findings against him. The magistrate's preference for the credibility of the complainant in count 3 is not on appeal before us. Furthermore, once the court rejected the appellant's complaint regarding his fair trial rights being impugned by the absence of legal representation, his conviction on this count was not open to interfere on appeal. In any event credibility findings on questions of fact are usually matters for the trial court. I find no basis for interfering in the magistrate's credibility findings or with the conviction on this count.

[56] In these circumstances I would correct the conviction and sentences imposed by the courts below. Without any reference during the trial to the rapes of the complainants in counts 1 and 2 being 'a gang rape' under Part I of Schedule II and the State's failure to prove the age of the complainant in count 2, the appellant should be convicted of rape on each count under Part III of Schedule II. The minimum prescribed sentence under this part is 10 years for a first offender.

[57] As for the appropriate sentence on each count, the appellant admitted his previous convictions for three counts of assault committed between January and March 2005 and one count of rape committed on 16 April 2006, after he had committed the offences in this case. In the circumstances there were no substantial and compelling circumstances to justify deviating from the minimum sentences. On the contrary, the appellant's previous convictions correctly counted as aggravating factors in the courts below. Even though he was not warned that if he had a previous conviction for rape his sentence of 10 years could escalate to 15 or even 20 years, the magistrate did inform him that the court would deviate from the

minimum sentence if substantial and compelling circumstances were found. As none was found, deviating from the minimum sentence of 10 years on each count is entirely justifiable.

[58] The appropriate sentence I would impose is a term of 15 (fifteen) years imprisonment on each count, 5 (five) years of the sentence in count 2 to run concurrently with the sentence in count 1, and 10 (ten) years of the sentence in count 3 to run concurrently with the sentence in count 1, giving an effective sentence of 30 (thirty) years imprisonment.

D Pillay
Acting Judge of Appeal

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