IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO.: AR353/11

In the matter between

**MBONGWA PETROS SITHOLE** **APPELLANT**

And

**THE STATE** **RESPONDENT**

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**APPEAL JUDGMENT**

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**MOKGOHLOA J**

[1] The appellant appeared in the Regional Court Camperdown, on a charge of rape read with section 51 of the Criminal Law Amendment Act 105 of 1997 ('the Act'). He was legally represented.

[2] The facts of this case can be summarised as follows: The complainant was at a certain Janca's place consuming liquor. It was in the afternoon. The appellant arrived there and joined the other people who were there consuming liquor. The complainant went towards the side of the house to relieve herself. While still on her haunches relieving herself, the appellant approached her and dragged her towards the back of the house where he raped her. The complainant was saved by Ms Janca who came and found the appellant raping her. Ms Janca hit the appellant with a stick and the appellant ran away.

[3] The appellant denied having raped the complainant. He stated that it was the complainant who made sexual moves to him. According to him, he played along with her moves and took her towards the back of the house where they started to romance each other. He denied having had sexual intercourse with the complainant. It emerged under cross examination that the appellant was HIV positive.

[4] The appellant was convicted as charged. The Regional Magistrate felt obliged upon convicting the appellant, to refer the matter for sentencing to the High Court in terms of Section 52(1) (b) of the Act. The matter came before **Badal AJ**, who confirmed the conviction and sentenced the appellant to 15 years' imprisonment. The appellant now appeals against the sentence having been granted leave by **Wallis J**, (as he then was).

[5] The issue to be determined is whether **Badal AJ**, was correct to sentence the appellant to 15 years' imprisonment in circumstances where the prescribed minimum sentence was 10 years' imprisonment without first notifying the appellant of his intention to impose a sentence greater than the prescribed one.

[6] The starting point in an inquiry such as the present is in Section 51 of the Act which provides:

" (1) . . .

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

(b) Part 111 of Schedule 2, in the case of –

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

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

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

Provided that the maximum term of imprisonment that a regional court may impose in terms of this subsection shall not exceed the minimum term of imprisonment that it must impose in terms of this subsection by more than 5 years.

(3) (a) if any Court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence."

[7] In *S v Mbatha 2009 (2) SACR 623 (KZN)* **Wallis J** stated at para 14:

"I am also alive to the fact that the legislation contains no provision corresponding to s51 (3) (*a*) when the departure from the prescribed minimum sentence is upwards rather than downwards. Nonetheless it seems to me that this must remain the correct approach when the court is contemplating imposing a greater sentence than the prescribed minimum, in the same way as where it is contemplating imposing a lesser sentence. Otherwise the process of determining an appropriate sentence will be bifurcated in a most undesirable way. If the approach is different from that which I have indicated it will lead to the following situation."

**Wallis J**, continued at para 26 and stated:

"..., I think that the failure to apprise the defence of the fact that a higher sentence than the minimum was in contemplation was a defect in the proceedings."

[8] This issue was considered later in *S v Mthembu 2011 (1) SACR 272 (KZP)* where the full court declined to follow **Wallis J**'s approach. The full court held that *Mbatha* had been wrongly decided. The *Mthembu's* decision was confirmed by the SCA in *Mthembu v The State 206/11 2011 ZASCA 179* delivered on 29 September 2011, where the Court held at para 13 that:

"While it may be notionally axiomatic that the State should forewarn an accused person of its intention to invoke the minimum sentencing provision the same can hardly hold true for a court. For, surely, a court only arrives at its conclusion as to what a proper sentence is, after having received all of the evidence and hearing argument. Often it is the very act of consideration after the hearing of argument that properly concentrates the judicial mind to the task at hand. Until then such view as may be held by a court may well be no more than tentative."

The Court continued at para 18:

"In particular **Wallis J**'s approach, that the failure to apprise the defence of the fact that a higher sentence than the minimum was in contemplation constitutes, without more, a defect in the proceedings, cannot be endorsed. In our view such failure in and of itself will not result in a failure of justice, which vitiates the sentence. After all, any sentence imposed, like any other conclusion, should be properly motivated."

[9] In *casu,* the appellant was represented. The charge sheet was explicit. It stated: "RAPE R/W S 51 of Act 105/1997". Furthermore at the commencement of the trial the magistrate warned the appellant of the applicability and consequences of Act 105 of 1997. I am therefore satisfied that the appellant was well aware of the sentence/s he may have to face. Ms Franke, for the appellant, conceded that in the light of Mthembu's decision, the sentence imposed is appropriate in the circumstances.

Order

1. The appeal against sentence is dismissed.
2. The sentence is confirmed.

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MOKGOHLOA J

_____ I agree;

PLOOS VAN AMSTEL J

_____I agree, and it is so ordered.

KOEN J

## COUNSEL

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| Date of hearing | : | 01 February 2012 |
| Date of Judgment | : | 08 February 2012 |