



THE SUPREME COURT OF APPEAL  
REPUBLIC OF SOUTH AFRICA

**MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL**

From: The Registrar, Supreme Court of Appeal  
Date: 30 November 2012  
Status: Immediate

*Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.*

**JAN OOMPIE KOLEA v THE STATE**

The Supreme Court of Appeal (SCA) today held that the sentencing of Mr Jan Oompie Kolea on a conviction of rape read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Act) when he was originally charged with rape read with the provisions of section 51(2) of the Act did not constitute an irregularity vitiating the sentencing proceedings. The SCA dismissed Mr Kolea's appeal against both conviction and sentence.

Mr Kolea was charged with one count of rape read with the provisions of section 51(2) of the Act in the Kroonstad Regional Court. During the trial the complainant testified that she had been repeatedly raped by Mr Kolea and a co-perpetrator who had evaded arrest. The regional court accepted the complainant's evidence that she had been repeatedly raped by more than one person. Section 51(1) of the Act prescribes a sentence of life imprisonment for a rape which was committed more than once by one or more than one perpetrator. Being

of the view that the sentence that should be imposed exceeded its sentencing jurisdiction, the regional court referred the matter to the Free State High Court, Bloemfontein, in terms of section 52 for sentencing.

The matter came before Moloi J who confirmed the conviction, found that there were substantial and compelling circumstances which justified a deviation from the prescribed sentence of life imprisonment and sentenced Mr Kolea to 15 years' imprisonment. Mr Kolea's appeal to the Full Bench of the high court against the both conviction and sentence was dismissed. The Full Bench, upholding the State's cross-appeal against the sentence imposed by Moloi J, found that there were no substantial and compelling circumstances and substituted the sentence with one of life imprisonment. Mr Kolea then appealed to the SCA again against both the conviction and sentence.

Before the SCA counsel for Mr Kolea argued that the referral of the matter to the high court and the sentencing in terms of section 51(1) of the Act when the original charge sheet referred to section 51(2) constituted an irregularity which was so gross and so unfair that it vitiated the proceedings, with the consequence that the sentence of life imprisonment should be set aside and substituted with a sentence of 10 years' imprisonment which is prescribed by section 51(2). Counsel relied on the majority judgment in *S v Mashinini & another* 2012 (1) SACR 604 (SCA) in support of this argument.

The SCA rejected the argument. It held that there was no irregularity as the State's intention to rely on and invoke the minimum sentencing provisions was made clear to Mr Kolea, who was legally represented throughout the trial, from the outset. Mr Kolea, the SCA held, knew the charge that he had to face as required by section 35(3)(a) of the Constitution. The prescription of a penalty for the rape of the nature involved in the case did not mean that the Legislature had created a new offence as implied by the majority in *S v Mashinini*. The SCA, overruling the decision, held that *S v Mashinini* had been wrongly decided. In dismissing Mr Kolea's appeal, the SCA held that he had been correctly convicted and that the Full Bench had correctly concluded that there were no substantial and compelling circumstances.