Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

In the matter between: Case number: A206/09

CHRISTOPHER JONES Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED: 30 APRIL 2010

INTRODUCTION

[1] The facts of this matter underscore the fundamental right of a female person to say "no" to an invitation to engage in sexual intercourse even in circumstances where she has allowed her paramour the liberty of intimate kissing and/or passionate embracing, actions that may generally be viewed, by some, as signifying tacit consent to sexual intercourse.

[2] The "no" of a woman under such circumstances, whether expressly or otherwise conveyed to her paramour, should be construed and acknowledged as a final and definitive response, and not be interpreted as an invitation to employ more persuasive and more amorous measures to melt away the

feigned resistance of a woman who, in truth, desires sexual intercourse, but fears to be labeled as "easy" if she without further ado succumbs to the overtures of her paramour.

BACKGROUND

[3] The appellant was convicted in the Parow Regional Court on charges of rape and indecent assault, inflicted upon the same complainant. He pleaded not guilty to both charges.

[4] The charge of rape was set out in the charge sheet as one that had to be read with "... *die bepalings van Artikel 51(2) van die Strafregwysigingswet 105 van 1997*" ("the Act"). Section 51(2) provides for certain minimum sentences to be imposed where an accused is convicted of any of the offences contemplated by the relevant schedules and paragraphs thereof.

[5] None of the subsections of section 51(2) however prescribes a mandatory sentence of life imprisonment (in the absence of substantial and compelling circumstances that may justify the imposition of a lesser sentence). In fact a proviso to section 51 (2) of the Act reads as follows: "*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 five years.*" Following upon what was set out in the charge sheet, the maximum sentence that could be imposed upon the appellant was accordingly 15 years.

[6] It is evident from the provisions of the Act that a mandatory life sentence in the absence of substantial and compelling circumstances is only prescribed by the provisions of section 51(1).

[7] The Magistrate found that the appellant raped the complainant through "*drie verskillende seksuele penetrasies ..., naamlik twee keer vaginaal en een keer anaal*", and that each of such "*penetrations*" constituted a separate event of rape.

[8] The appellant was also found guilty of indecent assault, in that he had fondled the private parts and breasts of the complainant during the course of the same evening when the rape was committed.

[9] The Magistrate held that, since the appellant was convicted of rape as contemplated by Part 1 of Schedule 2 of the Act, "*where the victim was raped more than once*", she was enjoined by the provisions of section 51(1) to impose a term of life imprisonment, unless substantial and compelling circumstances existed which justified a lesser sentence.

[10] The Magistrate found that, on the charge of rape, substantial and compelling circumstances as contemplated above did prevail, and appellant was sentenced to 20 years imprisonment, instead of the prescribed minimum life imprisonment.

[11] In respect of the conviction on the charge of indecent assault the Magistrate sentenced the appellant to 18 months imprisonment, but ordered

that the sentences on the charges of rape and indecent assault were to run concurrently. The observations that motivated such order were significant: "*Hoewel u ook aan onsedelike aanranding skuldig bevind is en u haar drie keer verkrag het, het dit alles direk na mekaar op dieselfde tyd en plek plaasgevind*" (my emphasis). The significance of this finding would be elaborated upon later hereinbelow.

[12] The appellant noted an appeal against both his conviction and sentence upon, seemingly, only the rape charge. The notice of appeal did not expressly specify the charge(s) underpinning the conviction(s) to which the appeal related. It however confined the "*grounds of appeal*" relating to conviction to ones only bearing upon the rape charge. When counsel for appellant addressed the Magistrate on the merits of the application for leave to appeal, he submitted "*dat die geskilpunt in hierdie saak toestemming was*", and further whether the complainant had been "*'n vrywillige party tot hierdie seksdaad*", suggesting that the appeal was confined to exclusively the rape charge. The judgment of the Magistrate on the application for leave to appeal thereupon only dealt with the conviction on the rape charge, and the sentence imposed relating to such conviction. In the heads of argument of the appellant in this Court it was however submitted that "... *the critical question ... is whether in relation to both charges the State has proved the elements of the crime of rape and indecent assault beyond a reasonable doubt.*"

[13] I am not convinced that the appeal against either the conviction, or the sentence imposed arising from the charge of indecent assault is properly before the Court. On the generous assumption that it is, and I specifically

refrain from making any finding in such regard, I shall nonetheless deal with the submissions on behalf of the appellant relating to the conviction and sentence upon the charge of indecent assault. I shall do so after my findings relating to the conviction and sentence on the charge of rape, and upon the basis that the State did not object to the appeal proceeding also against the conviction and sentence arising from the indecent assault charge. To the extent that certain formalities relating to the presentation of the latter portion of the appeal were not complied with, I am prepared to condone such non-compliance(s) in the interests of justice.

THE CONVICTION ON THE RAPE CHARGE

[14] Appellant admitted in his plea that he had had sexual intercourse with the complainant, and that he had fondled her vagina and breasts, on 9 December 2007 in Epping, near Cape Town. He alleged that he did so with her consent.

[15] The common cause facts relating to these allegations are set out below.

[16] The appellant was a 38 year old taxi driver at the time of the incident. He had befriended the complainant shortly (a week or two) before. The nature of this "friendship" can at best be described as superficial.

[17] The complainant was an 18 year old girl who worked as a waitress at a restaurant at Cape Town International Airport. She worked shifts that

required her presence at the restaurant until late in the evenings, sometimes until the early hours of the morning.

[18] On the evening of the incident she arranged that the appellant would provide transport to take her home. The vehicle of the appellant, a minibus, that was supposed to take the complainant home, was driven to another destination where the rape took place. The journey to this destination included various detours and stopovers in between.

[19] The fondling of the complainant eventuated during one of these stopovers, and at the time when the appellant was driving his minibus to the destination where the sexual intercourse took place.

[20] The following facts were not common cause. The exculpatory version of the appellant was that he had made a "*date*" with the complainant that entailed that she would accompany him to a "*bachelors' party*" of a friend (of the appellant) after she had completed her work at the restaurant on the night of the rape. According to the appellant, the complainant knew full well that she was lined up to be involved in "*sex, drugs and liquor*" at the bachelors' party.

[21] Later that evening, but after the appellant had already picked up the complainant at the airport, he learnt that the bachelors' party had been cancelled, and that some of the male friends of the friend who was to get married planned to go to a strip club. The various detours in the journey to complainant's home occurred after the appellant had learnt of this new development.

[22] In essence, the appellant's case was that the complainant, through her prior consent to go to a party where she would be involved in liquor, drugs and sex, partaking in the latter activities as partner of the complainant, signaled to him some kind of general consent to sexual intercourse, which was later that night confirmed by her "going along" with his amorous overtures. According to the evidence of the appellant and the argument presented on his behalf, the "resistance" on the part of the complainant, in respect of the rape charge, amounted to no more than a *reservatio mentalis* which had never been expressly conveyed to him.

[23] The complainant's version was that she had sought transport from the appellant on the night in question, as she had no other means to travel to her home. She lived alone with her mother, at the home of the latter. It was common cause that she had a "*strict*" mother, who could sometimes be "*over protective*". She therefore had every reason not to unduly delay her journey home.

[24] According to her, when the appellant picked her up at the airport, he asked her whether she wanted to accompany him to a bachelors' party at a "*strip club*". She declined this invitation. He thereupon enquired whether he could drive to and stop in Bishop Lavis to pick up certain "*goods*". She had no objection to this, and appellant drove to Bishop Lavis where he picked up some keys and a parcel. Appellant thereupon enquired from the complainant whether he could first drop off the parcel at a friend in Cape Town, to which request she agreed. He thereupon drove to the Grand Parade in Cape Town,

where he said he had to wait for a phone call. At this juncture, appellant started kissing the complainant. She allowed this and kissed him back.

[25] Appellant proceeded to fondle the complainant. She objected. He then enquired from her whether she wanted to sit in the back of the minibus, presumably a location more comfortable for what he had in mind. At this stage complainant's mother sent her a "*please call me*" text message (referred to as a "*sms*"), and she returned the message by notifying her mother that she would be at home "*20 minutes later*". She thereupon insisted that appellant had to take her home. Appellant then left the Grand Parade with complainant in his vehicle, ostensibly on his way to complainant's home.

[26] The complainant was exhausted and fell asleep. Due to the position of the front seats of the minibus, her head rested on appellant's leg during the journey (whilst she was asleep). From time to time the appellant fondled her vagina, on each such occasion whereupon she woke up and insisted that he should desist from doing so, whereafter she again fell asleep. She finally woke up when the vehicle stopped and she enquired from appellant where they were. He said that they were in Epping. He started kissing her again. Again the complainant did not resist this, did not object to the kissing, and responded "positively" by in turn actively kissing the appellant. The appellant then also fondled her vagina and breasts. She removed his hands from her body and again told him that he had to desist from doing so. He then turned her on her back and placed himself on top of her. When he unfastened the button and zip of her trousers, she protested and asked him what he was doing.

[27] He told her to shut up, pulled her trousers and panty down to below her knees, lifted her legs so that her upper legs rested against her chest, and penetrated her vagina with his penis. She complained that the seatbelt connection device between the front seats of the minibus was hurting her back, and tried to move her lower body away from him, and her back away from the seatbelt connection device, whereupon appellant simply forcibly pulled her back ("*hy het my afgeruk*") down into a position where he could continue having intercourse with her. Appellant then removed his penis from her vagina, and penetrated her anally. Complainant repeatedly asked him why he was doing what he was doing and unsuccessfully tried to resist his actions. There was however no clear evidence to indicate that she had expressly told him not to have sexual intercourse with her.

[28] Complainant testified that, when she realised that she was being raped, she just prayed and hoped that it would be over soon. When she repeatedly asked the appellant what he was doing, and why he was doing it, he told her "*Hou net jou mond voor ek jou moer*". She also testified: "*Ek het probeer, ek het gestruggle om te probeer om op te kom want ek het gelê, ek het gestruggle om te probeer om op te kom, ek het getry om my phone te voel êrens maar my phone was nêrens te vinde nie, ek het niks gevoel nie en hy het net heeltyd my hande gekeer as ek vir hom wil weggedruk het en my net vasgehou en vir my gesê – en ek het net my oë toegemaak*". It is clear that such evidence was intended to convey that she was searching for her mobile phone for purposes of making some call for help.

[29] After this event the appellant took complainant to her home. The next morning she phoned a friend, who to her knowledge had been raped before, and confided in her about the events of the night before. The complainant did not immediately inform her mother of the ordeal to which she had been subjected. On a proper interpretation of her evidence, she was too embarrassed, and of the view that her trauma might cause her mother to believe that her daughter had failed her.

[30] Complainant and her friend went to the Karl Bremer Hospital in Bellville the next day, where she was medically examined. The medical examination confirmed the complainant's version that she had been raped, and revealed that she had lacerations to her vagina and anus most likely caused by non-consensual sex.

THE FINDINGS OF THE MAGISTRATE

[31] The purported exculpatory evidence of the appellant was found by the Magistrate, for good reasons and on good grounds, not to be persuasive or credible. The Magistrate also found the complainant to be a reliable and credible witness, despite being a single witness. Without enumerating all the relevant aspects that supported the magistrate's findings, the following considerations cumulatively pointed to the credibility and reliability of the complainant's evidence, notwithstanding the fact that she was a single witness:

(a) She came from a conservative hom where an "*overprotective*" mother seemed to have done everything within her means to ensure the wellbeing of

her daughter, and to ensure that her daughter adhere to good moral principles. For such reason, the suggestion by the appellant that the complainant had agreed to line herself up for an evening of sex, drugs and liquor, seems farfetched;

(b) The appellant did not deny that the complainant rejected his proposal to have sex at the Grand Parade in Cape Town. It seems incongruous that complainant would make herself available for a night of "*sex, drugs and liquor*", as partner of the appellant, but that she would decline a proposal to act similarly, at the Grand Parade;

(c) It is also most unlikely that the complainant would have declined (at the Grand Parade) the invitation to move to the more comfortable backseats of the minibus (the evidence in such regard was not in dispute) where the sexual intercourse that she allegedly was willing to partake of would have been infinitely more comfortable. In such context, the appellant testified that the *complainant* had asked him, at the Grand Parade "*...dat ons maar nou die paar minute hier kan sit en vry en as ons nog verder gaan om seks te hê kan ons sommer daar klaar maak as wat ons nou op 'n ander plek moet gaan staan*" (my emphasis).

(d) Such evidence was totally irreconcilable with the admitted rejection of the appellant's amorous overtures and approaches at the Grand Parade;

(e) When questioned about this by the Magistrate, appellant unceremoniously changed his evidence to say that the above suggestion *had emanated from him, and not from the complainant*, and that the

complainant's response was: "*Toe sê sy nee, maar ek moet eerste vir haar huis toe vat*" (my emphasis). I find that the attitude of the complainant as described above would have been fully irreconcilable with the evidence of appellant that the complainant was amenable to his sexual overtures. The further suggestion inherent in appellant's above statement to the effect that he had to *first* take her home, and that presumably they had to meet again, later the same night, bordered on being ludicrous;

(f) The appellant's evidence in this regard was: "*Sy vra u moet haar huis toe vat? ... Ja, want sy het vir haar ma gesê sy is binne 'n half uur se tyd by die huis*". Such evidence did not remotely suggest any agreement on the part of the complainant to engage in sexual intercourse, and indicated that she wished to get back to her home without further ado. Complainant's own evidence was, as pointed out hereinbefore, that she would be home "*20 minutes later*";

(g) The fact that complainant insisted on going home and that she notified her mother that she would be arriving in "*20 minutes*", and that the appellant had agreed to take home *without any objection*, made nonsense of the earlier evidence of the appellant that the complainant had agreed to accompany him to a party that, by the features thereof suggested by the appellant, would have absented the appellant from her home until, at least, the early hours of the morning. One would have expected, if the appellant's evidence were to be true, that the complainant would have made prior seemingly acceptable arrangements to justify her absence from home for a considerable part of the entire night in question, to placate her "*over-protective*" mother. In such

event, the *sms*-messages between complainant and her mother would have been totally misplaced;

(h) It was common cause that the sexual intercourse between appellant and complainant had taken place on the front seats of the minibus, whilst the complainant was prostrate over and hurt by the seatbelt devices between the front seats. There is no reason why, if she had been a party to consensual sex, she would not have requested to perform the act on the more comfortable back seats of the minibus;

(j) The location where the intercourse took place, i.e. across the uncomfortable front seats of the minibus, and the bodily position of the complainant during the course thereof, i.e. with her trousers and panty only partially pulled down and with her upper legs against her chest, further strongly suggested that complainant was subjected to non-consensual sex, and that she did not willingly expose herself to the extreme discomfort and pain occasioned by the manner in which the intercourse took place;

(k) The complainant testified that, on the way back to her home after she had been raped, she had asked the appellant (I pause to say that this was clearly meant as a rhetoric question, and not one evidencing uncertainty about the nature of the event) whether he knew that he had raped her, and that she asked him "... *sal hy dit "like" as sy dogtertjie verkrag word*". The appellant's attorney never suggested to the complainant that she had never said this, nor did the appellant deny such evidence;

(l) On the basis that the complainant's questions *had* been posed to the appellant (which conclusion cannot be avoided) one would have expected the appellant to strenuously object to the allegation that he had raped the complainant, if he truly believed that the sexual intercourse had been with her consent. The absence of any evidence to suggest that the appellant had disagreed with the complainant's accusations, in any manner, or that he had protested his innocence, is significant and crucial, if not conclusively damning of the appellant. The question arises why the complainant would have asked such questions if she had *not* been raped;

(m) The medical evidence confirmed that the lacerations sustained by the complainant was most likely caused by non-consensual sex, or put otherwise, an incident of rape;

(n) Her actions during the course of the next morning, with her friend and at the Karl Bremer hospital, had every appearance of being genuine, and not "staged" for purposes of later supporting a contrived charge of rape.

[32] In view of the above considerations the appellant was, in my view, correctly convicted of rape. The question is however if such conviction could have attracted the sentence imposed by the Magistrate.

[33] As stated at the outset in this judgment, the Magistrate was of the view that the conviction of the appellant resorted under the provisions of section 51(1) of the Act that enjoined her to impose a term of life imprisonment, unless substantial and compelling circumstances justified a lesser sentence. Such finding postulated a conviction upon a charge of more

than one rape. The charge sheet however specifically directed the attention of the appellant to the fact that the charge had to be read with the provisions of section 51(2), that did not postulate a conviction upon a charge of more than one rape, and that did not provide for a minimum sentence of the above kind. The charge sheet also gave no other indication that the charges against the appellant may involve one of a multiple rape.

[34] I am of the view that it is not desirable, to say the least, to make an accused believe that he is to stand trial on a charge of a single rape, and that the minimum sentence that he faces in terms of section 51(2)(b) of the Act is a period of 10 years, only to ultimate convict him of a multiple rape and then to apply the provisions of section 51(1) by approaching the question of sentence from the starting point that the minimum sentence is life imprisonment, unless substantial and compelling circumstances justify a lesser sentence.

[35] An accused should be apprised what the case is that he has to meet, and what any minimum sentence is that the Court may impose. An accused may for example wish to be represented by senior counsel, as opposed to only an attorney, if the sentence that he faces is a minimum term of life imprisonment. He in such case may wish to procure the evidence of additional witnesses, or additional medical experts to consider and gainsay the medical evidence presented by the State. In short, his whole approach to conducting both the cross-examination of state witnesses and conducting his defence may differ dramatically if he knows he faces a possible term of life imprisonment, as opposed to a minimum sentence of 10 years.

[36] In *S v Blaauw 1999 (2) SACR 295* at 301h to 302b the Court listed a variety of reasons why it cannot be expected from the State in all cases to *upfront* alert an accused that he faces a term of life imprisonment, by an explicit reference to section 51(1) in the charge sheet. The essence of all such considerations seemed to converge upon the so-called "*reality*" of a shoddy approach to the preparation of cases on the part of investigating officers or prosecutors, or both. In such context the learned Judge said: "*As a result of these and other factors, the full seriousness of a particular offence may not be appreciated by a prosecutor until the evidence has been led and tested in cross-examination. This may be regrettable, but it has been the reality of the criminal courts for decades past and there is little sign that matters will improve soon or significantly. Reference to the provisions of Act 105 of 1997 could not be made in the charge sheet for the simple reason that the State was unaware of the applicability of the Act when it formulated the charge sheet*".

[37] I do not interpret the above *dicta* to mean that the considerations enumerated in such excerpt will in all circumstances and without further ado excuse the fact that an accused had not been fully informed of the specific charges that he faces, or the sentence that may be imposed before the commencement of the proceedings. Tardiness or sloppiness in the presentation of a case, or ignorance of the law on the part of the institutions who have to enforce the law, can never be a justification for violating an accused person's entitlement to a fair trial. Especially in rape cases where the dividing line between truth and fabrication in the evidence of a complainant may easily become blurred by motives not apparent to the prosecutor, the defence or the magistrate or judge, more care should be taken

to adhere to higher standards or norms of jurisprudence. (See, as examples of the *plethora* of motives that may give rise to the fabrication of a rape charge: *S v Zuma 2006 (2) SACR 191 WLD* at 222h – 223g).

[38] In *S v Vilakazi 2009 (1) SACR 552* the Supreme Court of Appeal stated the following with reference to the degree of thoroughness that the prosecution in a rape case should display: *"[21] The prosecution of rape presents peculiar difficulties that always call for the greatest care to be taken, and even more so where the complainant is young. From prosecutors it calls for thoughtful preparation, patient and sensitive preparation of all the evidence, and meticulous attention to details. From judicial officers who try such cases it calls for accurate understanding and careful analysis of all the evidence. For it is in the nature of such cases that the available evidence is often scant and many prosecutions fail for that reason alone. In those circumstances each detail can be vitally important. From those who are called upon to sentence convicted offenders such cases call for considerable reflection. Custodial sentences are not merely numbers. And from familiarity with the sentence of life imprisonment must never blunt one to the fact that its consequences are profound. [22] The case that is before us is characterized by superficiality from beginning to end with the result that it exhibits several disturbing features. Nothing was done to enquire into material matters before the trial commenced. The complainant's evidence was presented with little care for completeness and accuracy. The evidence was subjected to little analysis. And the process of sentencing was perfunctory."* (my emphasis)

[39] The above *dicta* underscore the necessity in our criminal courts not to conform to norms of laxity or shoddiness. Especially where a Court has to deal with legislation such as Act 105 of 1997, which has been the subject of severe criticism for its inconsistency in prescribing minimum sentences (see: *Vilakazi* at 559e to 560b), care should be taken that an accused is as general rule timeously apprised of all the components of the charge upon which he is arraigned, and of any minimum sentence that he faces.

[40] In *S v Legoa 2003 (1) SACR 13 SCA* it was held (at 22g) that although it was "*desirable*" that the charge sheet should set out all the facts that the State intended to prove in order to bring the accused within an enhanced sentencing jurisdiction, the Court was (at 23b) "*...reluctant to lay down a general rule that the charge must in every case recite 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.*" The Court specifically held (*ibid*): "*A general requirement to this effect, if applied with undue formalism, may create intolerable complexities in the administration of justice and may be insufficiently heedful of the practical realities under which charge sheets are frequently drawn up.*" (my emphasis). Although the emphasised portion of the above excerpt relied on the remarks of Borchers, J in *Blaauw*, to which I have referred to above, I do not interpret the judgement in *Legoa* to suggest that the considerations stated in *Blaauw* would without further ado excuse the fact that an accused had not been timeously apprised of all the components of the charge upon which he is arraigned, and of any minimum sentence that he faces. I understand such judgement to simply mean that in appropriate and meritorious circumstances, *that would require a value judgement of the specific facts of the case in question*, the Court may allow a

departure from the desirable approach that a charge sheet should set out all the facts that the State intends to prove in order to bring an accused within an enhanced sentencing jurisdiction.

[41] Demonstrating the significance of knowledge on the part of *witnesses in a civil trial* what exactly the issues are that they are to be confronted with, the Court in the matter of the *President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC)* referred with approval to the rule enunciated by the House of Lords in *Browne v Dunn (1893) 6 R 67 (HL)* which requires that a witness has to be made aware of *all aspects* of his evidence which will be attacked by the counter party, and the basis upon which this will be done. The Constitutional Court elaborated as follows at 37C: *"[62] The rule in Brown v Dunn is not merely one of professional practice but "is essential to fair dealing with witnesses". It is still current in England and has been adopted and followed in substantially the same form in the Commonwealth Jurisdictions. [63] The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain the contradictions on which reliance is to be placed."* (my emphasis)

[42] Although the above principles were laid down in relation to the cross-examination of a witness in a civil matter, there is no reason why similar requirements aimed at facilitating a fair trial, should not apply to an accused person in a criminal trial. After all, an accused person faces, in most cases, a possible jail sentence if his evidence were to be rejected, whereas a witness in a civil trial may only have to live with the fact that he was found to be an unreliable witness if he testifies unpersuasively.

[43] One of the reasons why it may be inappropriate and undesirable for the State to inform the accused of the precise nature of the charges against him and the minimum sentence that he may face *only after the conclusion of the State's case*, is that such approach may deny an accused a vital opportunity to prepare himself to fairly deal with evidence presented as part of the State's case.

[44] I accordingly find that, in accordance with both the judgements in *Legoa* and *Vilakazi*, it would have been *desirable* for the State to, in the charge sheet in the present case, inform the accused of both all the essential elements of the specific offence in respect of which he is arraigned, as well as the minimum sentence to be imposed if he were to convicted. I emphasise that I do not view such approach any higher than *desirable*. It should clearly not be applied with "*undue formalism*", and should, as in the case with the legislated "*rules*" relating to minimum sentences, be permitted to be relaxed under appropriate circumstances. I however find no such circumstances to exist in the present case.

[45] I am aware of the fact that, in this case, the attorney for the appellant had stated, at the commencement of the proceedings, that he had informed the appellant "*met betrekking tot die minimum vonnis van lewenslank wat van toepassing is*". Given the contents of the charge sheet, it is obscure upon what basis the attorney could have made such patently incorrect statement to his client. One cannot rely upon a demonstrably incorrect and erroneous statement relating to the interpretation of the law to hold that the appellant had sufficiently been informed of the ambit of the charges, and possible sentence, that he was facing.

[46] It is in any event not clear that the appellant appreciated what had been conveyed to him. When his subsequent counsel (who was not the same counsel who represented appellant in this Court), after he had terminated the mandate of the attorney who had represented him during the trial, made the (erroneous) submission in argument on sentence that the applicable minimum sentence was 15 years, the appellant (who was present when this submission was made) did not object or try to remind his counsel of the fact that this was not the case. This suggested that the appellant did not appreciate the fact that he faced the minimum sentence contemplated by section 51(2). When the magistrate enquired from the appellant's counsel upon what basis he deemed a minimum sentence of 15 years to be applicable, the counsel stated the following: "*Edelagbare ek is heel deurmekaar Edelagbare*". This regrettably did not portray a picture of sufficient, efficient and informative legal representation.

[47] The appellant also bitterly complained to the Magistrate about the manner in which his attorney had conducted his defence, suggesting that the

communications between the attorney and his client had not always been a model of clarity. It can therefore not be accepted or assumed, without further ado, that the appellant had fully appreciated the exact nature of the charges against him, or the minimum sentence that he faced, when the presentation of the State's case commenced.

[48] For the above reasons, firstly, I am of the opinion that the Magistrate could not have held that appellant committed the kind of rape that brought him within an enhanced sentencing jurisdiction, namely under circumstances where he had raped his victim "*more than once*".

[49] I am in any event of the view that the *facts* of this case do not justify a finding that the complainant had been raped more than once. The various penetrations referred to by the appellant eventuated, as the Magistrate put it, "*direk na mekaar op dieselfde tyd en plek...*". This clearly postulated a finding that the three penetrations eventuated "... *met 'n enkele opset... as voortgesette gebeurtenis*" (compare: *S v Prins & 'n Ander 1977 (3) SA 807 A*, at 814), in which case only one offence is committed.

[50] In *Blaauw* the Court stated the following (at 300a): *"Mere and repeated acts of penetration cannot without more, in my mind, be equated with repeated and separate acts of rape. A rapist who in the course of raping his victim withdraws his penis, positions his victim's body differently and then again penetrates her, will not, in my view, have committed rape twice. ... Each case must be determined on its own facts. As a general rule the more closely connected the separate acts of penetration are in terms of time (i.e. the intervals between them) and place, the less likely a Court will*

be to find that a series of rapes has occurred." Applying the above *dicta* to the facts of this case, and bearing in mind the finding by the Magistrate and the judgment referred to in the aforegoing paragraph, the appellant only committed one offence of rape.

SENTENCE

[51] The Magistrate thus erred in her approach to the sentence that she imposed on the charge of rape, in that she viewed herself to be bound to impose a minimum term of life imprisonment, as point of departure, unless compelling and substantial circumstances justified a lesser sentence. This incorrect approach clearly influenced the extent to which she felt she could depart from the minimum sentence.

[52] In my view she should have approached the sentencing of the appellant from the premise that the minimum applicable sentence was 10 years, as provided for by section 51(2)(b)(i) of the Act. In this context, she should have then considered aggravating and mitigating circumstances, weighed up against one another, for purposes of deciding what an appropriate sentence had to be.

[53] The following factors are, in my view, aggravating circumstances, justifying the imposition of a sentence of more than 10 years:

(a) The appellant was in a position of trust in relation to the complainant, as the latter could expect from him (a person acquainted to her) not to abuse

the fact that she was prepared to place herself under his control in the vehicle with which she was to be conveyed to her home;

(b) The complainant sustained injuries in the rape;

(c) It is significant to note that, according to the evidence of the appellant himself, the complainant was described as "*skraal*" (that is, of slight built), which fact caused her to be virtually in no position to defend herself during the course of the rape;

(d) The appellant was 38 years of age, and the complainant 18 years of age, in effect no more than a child;

(e) The appellant contrived an extensive exculpatory story, and persisted therewith throughout his trial, demonstrating no remorse for the fact that he had subjected a young and slightly built girl to the most abominable and degrading behaviour that a woman can suffer;

(f) His "*exculpatory*" story to the effect that the complainant had agreed to make herself available to a night of "*sex, drugs and liquor*" most likely further insulted the complainant during the course of the proceedings before the Magistrate;

(g) The appellant not only penetrated the appellant vaginally, but also anally, compounding the humiliation that she suffered.

[54] Weighed up against these aggravating factors, are the following mitigating considerations:

(a) Appellant did not use any weapon, or violence that inflicted injuries other than those caused by the penetrations, upon the complainant;

(b) He at least did not leave her behind at the scene of the rape, and gave her a lift home;

(c) He was a first offender, and at the age of 38, did not have any record of any other skirmishes with the law.

[55] Under the circumstances I am of the opinion that a sentence of 12 years imprisonment would be appropriate.

THE CONVICTION ON THE CHARGE OF INDECENT ASSAULT

[56] I accept that the various acts of fondling of the complainant eventuated contrary to her express *verbal* insistences. Her evidence in such regard was credible and reliable. Whether, this fact notwithstanding, such acts of fondling constituted the offence of an "*indecent assault*", requires closer scrutiny. The "*body language*" and general reactions of the complainant to the amorous overtures of the complainant during the acts of fondling may, as reasonably perceived by the appellant, have conveyed to him a message different to her verbal insistences. In such regard I must be satisfied that there could not have been any reasonable basis upon which the appellant could have believed his actions to be permitted by the complainant, before the conviction on this charge could be upheld.

[57] Regrettably for the appellant, his allegations that were intended to be exculpatory in the context of the charge of indecent assault, formed part of an overall patently contrived and untruthful story intended to refute the complainant's evidence against him in the context of the rape charge. The question whether there was any basis for the appellant upon which to believe that his acts of fondling were permitted therefore predominantly falls to be decided upon the basis of the complainant's evidence, and evidence that was not in dispute.

[58] The first question to be clarified is whether the fondling of the complainant formed part of a series of actions done with the one single intent to rape the complainant. If this were to be the case, the conviction on the charge of indecent assault would amount to an impermissible "*splitting*" of charges, given appellant's conviction on the rape charge.

[59] The first fondling of the complainant took place at the Grand Parade. Can such fondling constitute the basis for the conviction upon the charge of indecent assault?

[60] The evidence of the complainant was that the appellant "... *het vir my bevoel en ek het vir hom gesê hy moet dit nie doen nie...*", for the first time at the Grand Parade in Cape Town. The complainant did not offer any particulars of what exactly this fondling entailed. It would accordingly be inappropriate to seek the establishment of the offence of an "*indecent assault*" upon the basis of this vague evidence. It would also be fair to allow the appellant the benefit of the doubt in assessing the question whether this "*bevoel*" at the Grand Parade eventuated against the consent of the

complainant. This was clearly the occasion at which the appellant was informed for the first time, only *after* such act, that the complainant was not amenable to his fondling.

[61] It can be accepted that, in situations where a man and woman are involved in amorous embracing and kissing, the man may seek to establish whether the woman is amenable to intimate fondling, not with a formal verbal question to such effect, but by a tentative and probing act of fondling. Only once this tentative endeavour is rejected by the woman, the absence of consent is established. To hold that a tentative and probing act of fondling during amorous embracing and kissing for the purposes set out above would amount to an indecent assault, would be unrealistic. Such approach might place substantial numbers of single sexually active males at risk of being imprisoned for indecent assault at almost every occasion where their amorous activities take place.

[62] By stating the above I do not suggest that a male participant in amorous embracing and kissing is at liberty to at random fondle his female partner without her consent. One should simply take care in drawing the line between fondling not intended to offend or "*assault*" a female partner and one patently against her consent.

[63] I draw the distinction between the above first act of fondling, and the later subsequent actions of such nature, to demonstrate that the subsequent fondlings cannot enjoy the same charitable approach from this Court, given the indisputable knowledge of the appellant, at such later stages, that the complainant was not amenable to his overtures.

[64] The remainder of the evidence of the complainant that supported the conviction on the charge of indecent assault related to actions of the appellant whilst she had been resting her head on the appellant's leg during the journey that ended up in Epping, where she was raped. It cannot be said, in my view, that such fondlings eventuated whilst the appellant had already formed the intention to rape the complainant, to bring the intention or *animus* associated therewith within the ambit of that of the rape. There was simply not sufficient evidence presented to the court *a quo* to support such a finding.

[65] For the above reasons I am of the view that the actions of the appellant that established the charge of indecent assault were perpetrated with an intent separate to that of the *animus* related to the rape. It follows therefore that the various acts of fondling by the appellant of the complainant, subsequent to those that eventuated at the Grand Parade, properly formed the basis of a separate charge or offence.

[66] It may be argued that the actions and reactions of the complainant herself did not indicate that she had viewed the fondling as an "*assault*" inflicted upon her.

[67] In such context the argument may be that the fact that she had rested her head on the leg of the appellant during the journey that she thought was taking her home suggested that she was quite at ease in his presence, his prior actions of fondling notwithstanding. It may be further argued that the fact that she proceeded to sleep further (in the vehicle of the appellant) after

every occasion when she had been woken up being fondled did not suggest any "*assault*", indecent or otherwise, associated with such fondling.

[68] The fact of the matter remains that, upon the clear evidence of the appellant, she expressly conveyed to the appellant, on every occasion (subsequent to the events at the Grand Parade) when he fondled her, that he should not do so. The complainant had every right to draw a line as to how far the amorous interaction between herself and the appellant could go. She was entitled to kiss the appellant, but to say "no" to his more intimate amorous overtures. I am accordingly satisfied that the conviction on the charge of indecent assault was properly founded.

THE CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT, 32 OF 2007

[69] In conclusion it is necessary to refer to the provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007. The preamble of such Act states the purpose thereof to be the following: "*To comprehensively and extensively review and amend all aspects of the laws and the implementation of the laws relating to sexual offences, and to deal with all legal aspects of or relating to sexual offences in a single statute, by- * repealing the common law offence of rape and replacing it with a new expanded statutory offence of rape, applicable to all forms of sexual penetration without consent, irrespective of gender; * repealing the common law offence of indecent assault and replacing it with a new statutory offence of sexual assault, applicable to all forms of sexual violation without consent*" (my emphasis).

[70] Section 68 (1)(b) of such Act specifically provides: " *(1) The common law relating to the-... (b) crimes of rape, indecent assault ...is hereby repealed.*"

[71] The date of commencement of the Act was stipulated to be 16 December 2007. As from such date, both the common law offences of rape and indecent assault were repealed and replaced with new statutory offences. The question therefore arises whether the appellant was correctly convicted of the respective common law offences of rape and indecent assault, given the fact that his conviction was pronounced on 26 November 2008, a juncture at which such common law offences no longer existed.

[72] The relevant section of the Act for purposes of answering the above question is section 69, which deals with "*transitional provisions*" relating to such Act:

"*69 Transitional provisions*

(1) All criminal proceedings relating to the common law crimes referred to in section 68 (1) (b) which were instituted prior to the commencement of this Act and which are not concluded before the commencement of this Act must be continued and concluded in all respects as if this Act had not been passed.

(2) An investigation or prosecution or other legal proceedings in respect of conduct which would have constituted one of the common law crimes referred to in section 68 (1) (b) which was initiated before the commencement of this Act may be concluded, instituted and continued as if this Act had not been passed.

(3) Despite the repeal or amendment of any provision of any law by this Act, such provision, for purposes of the disposal of any investigation, prosecution or any criminal or legal proceedings contemplated in subsection (1) or (2), remains in force as if such provision had not been repealed or amended". (my emphasis)

[73] To the extent that sections 69(2) and (3) refer to "*an investigation or prosecution or other legal proceedings*", such phrase should, in my view, be read in two parts, one part applicable to "*an investigation*" and the second applicable to a "*prosecution or other legal proceedings*". Such two parts clearly relate to different phases or steps to be taken by the police or prosecuting authorities in their endeavours to combat crime, and the starting point for each of the phases can clearly, and will in most cases be different dates. For example, the police may investigate the commission of the crime for a substantial period of time, only to decide, at the completion of such investigation, that a prosecution is warranted. It is therefore not necessary that the prosecution itself should have started prior to the commencement of the Act for purposes of allowing such prosecution to be conducted to finality. An investigation that was initiated prior to the commencement of the Act would be sufficient to allow also the prosecution of the repealed crimes, arising from the investigation, at a later stage and *subsequent* to the commencement of the Act, to be conducted to finality.

[74] It is common cause that appellant was charged with the common law offences of rape and indecent assault. Despite the fact that he was convicted on 26 November 2008 of these offences, *at a stage when such common law crimes no longer existed*, the provisions of section 69(2) and (3) of the above

Act created an exception to the principle *nullum crimen sine lege*, given the applicability of the facts set out below. The one charge sheet in the court *a quo* showed that the "*date of first appearance*" in the proceedings against the appellant was 8 December 2007 (exhibit A16), a date prior to the commencement of the Act. Such date must be incorrect, given the common cause fact that the offences were committed on the night of 9 December 2007. A second charge sheet (exhibit A1) however more plausibly indicated that the "*date of first appearance*" was 20 February 2008, a date subsequent to the commencement of the new Act. Both the above charge sheets (it is obscure for what reason two charge sheets existed) were however *ad idem* that the "*date of arrest*" of the appellant was 14 December 2007.

[75] The undisputed evidence of the complainant also was that she had gone to the Karl Bremer hospital the day after she had been raped and indecently assaulted, namely on 10 December 2007, and that she had met the investigating officer (female) constable Samsodien at the hospital on such date. According to the complainant, the investigating officer arrived at the hospital with another complainant in a rape case on such day, and "*toe het sy sommer my saak ook aangevat*".

[76] The above considerations make it clear that the "*investigation*" of the offences commenced on 10 December 2007, pursuant whereto the appellant was arrested on 14 December 2007. Such facts were sufficient to bring the proceedings against the appellant within the ambit of section 69(2) and (3) of the Act so as to have entitled the State to proceed against the appellant "*as if this Act had not been passed*". There was accordingly nothing untoward

about the conviction of the appellant on the common law charges of rape and indecent assault at a juncture subsequent to the commencement of the Act.

CONCLUSION

[77] Under the circumstances I make the following order:

1. The appeal against the conviction on the count 1, the charge of rape, is dismissed. To the extent that the judgment on sentence in the court a quo may be interpreted to convey that the appellant was convicted on three counts of rape this order makes it clear that the appellant is convicted on one count of rape only.

2. The appeal against the conviction and sentence on count two, indecent assault is dismissed and the conviction and sentence on count 2 is confirmed.

3. The appeal against the sentence on count 1 succeeds in part and the sentence imposed by the court a quo is set aside and is substituted with a sentence of 12 years imprisonment which sentence commences on 12 December 2008, the date of sentence in the court a quo.

4. The order by the court a quo that the sentence on count 2 run concurrently with the sentence on count 1 remains in force.

T.A. BARNARD, AJ
Acting Judge of the High Court

I agree. It is so ordered.

W.J LOUW, J
Judge of the High Court