Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

(Coram: Traverso DJP, et Zondi J, et Henney J)

CASE NO: A607/11

In the matter between:

JAN JOHANNES JAKOBUS MATTHYS **Appellant**

And

THE STATE **Respondent**

JUDGMENT: 5 SEPTEMBER 2012

HENNEY, J:

INTRODUCTION

[1] The Appellant, together with two other accused persons, was convicted of rape of the complainant, [M.....] [S.....] (S.....)in the Regional Court sitting at Calvinia on 21 February 2002. The third accused was also convicted on a second charge of rape of another person by the name of Lorraine De Wee ("De Wee").

[2] The relevant charge relating to the Appellant is that on 26 December 1998 he and the two other accused in or near Rebunie Street, Calvinia unlawfully and intentionally had sexual intercourse with [M……] [S.....] (without her consent. All three of the accused pleaded not guilty to the charge. All of them admitted having sexual intercourse with the complainant, but with her consent.

[3] After the conviction, the Regional Magistrate decided to refer the matter to the High Court for sentencing due to the fact that he was obliged to do so in terms of the applicable provisions of the Criminal Law (Sentencing) Amendment Act 105 of 1997 (Minimum Sentences).

[4] On 21 October 2003, *Nel J* in the Western Cape High Court, Cape Town, found the convictions to be in accordance with justice and sentenced the appellant on the first charge of rape to life imprisonment, the second accused to fifteen (15) years imprisonment and the third accused also to life imprisonment. Accused no. 3 was also sentenced to a further twenty years imprisonment on the second charge.

[5] Appellant applied for leave to appeal to the court a quo against both sentence and conviction, which leave was granted.

GROUNDS OF APPEAL

[6] The grounds of appeal against the conviction are the following:

6.1 The Appellant contends that the court *a quo* erred in accepting the evidence of [S.....] (for various reasons.

6.2 These are:

6.2.1 It failed to properly apply the cautionary rule in respect of [S.....] (' single evidence;

6.2.2 Swarts' evidence is unreliable because it is contradicted by the evidence of De Wee, the other complainant, and the witness, Mervyn Oranje;

6.2.3 There were inconsistencies both in the versions of events [S.....] (presented in court and in the statement she made to the police;

6.2.4 Her evidence is not consistent with the probabilities, especially in her testimony that she had given the Appellant love bites, and that she did not call out for help when she had sexual intercourse with the Appellant in the shack, whilst other people were present.

[7] The grounds of appeal against sentence are as follows:

7.1 The court did not have the necessary jurisdiction to impose the prescribed sentence in terms of the provisions of Section 51 of the Criminal Law (Sentencing) Amendment Act 105 of 1977 ("the Act").

7.2 The provisions of the Act were not applicable in this case because the Appellant was not charged with an offence which would justify the imposition of life imprisonment.

7.3 That the Appellant was charged on one count of rape and the charge sheet did not specify or indicate that the prescribed sentence in terms of the Act was applicable.

7.4 Furthermore, he was not properly informed at the commencement of the trial of the charge against him, any competent verdict thereto and what sentence would be applicable should he be convicted. And it was argued that such omissions violated the Appellant's right in terms of Section 35 of the Constitution, Act 108 of 1996 to a fair trial

7.5 The trial court only informed the appellant after his conviction that the matter would be referred to the High Court for sentence.

7.6 During the sentencing procedure the court did not properly consider the fact

that the appellant was only 19 years of age when he committed the offence. Further, the court *a quo* did not have regard to his personal circumstances as set out in the Social Worker's report.

7.7 The Appellant was only sentenced a year after he had been convicted.

THE EVIDENCE

[8] Maureen [S.....] (, Lorraine De Wee, Mervyn Oranje and Pedro Tromp testified for the State as witnesses. The Appellant, in so far as his charge is concerned, testified himself and called no other witnesses.

[9] Where relevant for the purposes of this appeal, the court will refer to the evidence of the other accused and De Wee, the complainant in the second charge.

EVIDENCE OF MAUREEN [S.....] (

[10] The evidence of [S.....] (briefly stated is as follows. On 26 December 1998, which was a public holiday, at about quarter past midnight, she and De Wee, went out dancing. The place where they were going was about five minutes walk away from [S.....] (' house. The streets were deserted and it was quiet at that time.

[11] At the corner of Lander Street and Plain Street in Calvinia they heard voices of people and when they turned around they saw three male persons approaching them from behind. These three male persons were later identified as the Appellant and his two co-accused. The Appellant approached and grabbed her with his arm around her neck. She told him not to touch her. Whereupon, he replied, *"meisie, bly net stil, want ek het 'n mes"*.

[12] S…… turned around and saw a knife whose blade she estimated to have been between 12 – 13cm long. The Appellant held the knife in his right hand, whilst he held [S.....] (with his left arm around her neck. The Appellant was at that stage not known to her. The other two accused approached De Wee. At that stage, the Appellant wanted to know where they were going to which [S.....] (replied that they were on their way to a dance. The Appellant and his co-accused walked with them.

[13] On their way they approached the house of a friend of [S.....] (by the name of Margie and wanted to go into the house. The Appellant did not want her to go to Margie's house. A struggle between [S.....] (and the Appellant ensued and she held onto the fence of Margie's house. The Appellant then threatened to stab her with the knife. One of his co-accused managed to calm him down. [S.....] (was then forced to walk with the Appellant towards an open piece of land near a toilet.

[14] De Wee and accused no.3 then left them and went to an adjacent yard. The Appellant and accused no.2 remained behind with [S.....] (. The Appellant

then demanded that she have sexual intercourse with him. She refused, whereupon the Appellant once again told her "*do you see this knife*". He further told her she would first have to do it whilst he had the knife in his hand. He thereafter ordered her to lie on the ground and to pull down her jeans and panties. He also undressed himself, climbed on top of her and had sexual intercourse with her. He had sexual intercourse with her for about 5 –7 minutes but thereafter he stopped as he could not achieve orgasm.

[15] While this was happening, accused no. 2 was in their presence and he observed what was happening. While [S.....] (remained lying on the ground, accused no.2 climbed on top of her and he also had sexual intercourse with her. This also lasted between 5 – 7 minutes. He was also unable to reach climax, stopped and got off her.

[16] The Appellant thereafter said he again wanted to have sexual intercourse with her. Whilst having sexual intercourse with her for the second time, accused no.3 and De Wee returned. The Appellant at that stage asked De Wee why she was looking at them and then intimated to her that he was also going to have sexual intercourse with her. De Wee expressed her unwillingness to do so and accused no.3 remarked to the Appellant that he should wait because he was not done with De Wee. Accused no.3 and Lorraine De Wee thereafter left them again.

[17] Two minutes thereafter Accused no.3 came back and reported that De Wee had managed to run away. The Appellant then got up and wanted to go and look for De Wee. Accused no.3 remarked that De Wee ran away because the

Appellant had a knife.

[18] After the Appellant had finished having sexual intercourse with [S.....] (, she was further forced to walk with him whilst he held the knife towards her. Throughout he also held her with his arm around her neck. They walked to a different location where there was a shack. She was unable to run away.

[19] She was forced into the shack, ordered once again to lie down. In this shack, there were two other persons, a male and a female. The shack was situated in the backyard of the house of Appellant's mother. [S.....] (' house was on the opposite side of the road. Accused no.2 and Accused no.3 were also with them in the shack.

[20] She was once again forced by the Appellant to lie down. Accused no.2 and Accused no.3 sat at her feet. The Appellant once again had sexual intercourse with her for about 5 minutes. Once again he could not reach climax.

[21] Thereafter, they left the shack and walked to a nearby veld. At this place [S.....] (was once again forced to have sexual intercourse with the Appellant for a fourth time, which lasted about two to three minutes. Once again the Appellant could not reach climax.

[22] The Appellant thereafter told accused no.2 to have sexual intercourse with [S.....] (. The second accused thereafter had sexual intercourse with her. He also had difficulty in reaching climax and then he requested her to bend over,

whereafter he had sexual intercourse with her from behind. He reached climax. Accused no.3 thereafter had sexual intercourse with her, also from behind. He also reached climax.

[23] Thereafter the Appellant wanted to go back to the shack. On their way back, [S.....] (removed her high heel shoes. She walked in front of the Appellant and his co-accused. They came to a fence which had an opening and they climbed through. At that stage, she also heard the voices of people approaching. She then took a chance and ran away.

[24] While running, she saw M……. O…… ("O….."") and P…… T……. ("T……..""). She was shouting and was upset. The Appellant ran after her and was grabbed by O……. She immediately told Oranje about her ordeal. The Appellant then told Oranje that she was his girlfriend.

[25] Whilst Oranje and Tromp held onto the Appellant, accused no.2 and accused no.3 ran away. Before the police arrived, the Appellant managed to escape. [S.....] (Laid a charge and went for a medical examination on the same day.

[26] Swarts testified that the Appellant and the two other accused were not known to her. She denied that she had given them consent to have sexual intercourse with her. She further stated that if the Appellant was not armed with a knife, she would definitely have fought back. She further stated that the Appellant took a leading role and instructed the other accused to do as he said. She also testified that the Appellant told her to remain lying down, so that the others could

have intercourse with her. She further denied that she had given the third accused R50,00.

DE WEE'S EVIDENCE

[27] De Wee's evidence of the events up until she was first separated from [S.....] (is similar to the latter's version of events. She confirmed that [S.....] (was threatened with a knife by the Appellant and that she cried. She further stated that accused no.3 admonished the Appellant about the way he treated [S.....] (. De Wee testified as follows. She stated that they had walked to an open piece of land after having been threatened by the Appellant and his co-accused.

[28] Thereafter, accused no.3 forced her to accompany him to an adjacent plot of land away from the Appellant and [S.....] (. Accused no.3 had sexual intercourse with her without her consent.

[29] Thereafter, they returned to the location where they had left Appellant and [S.....] (. When they arrived there the Appellant was having sexual intercourse with [S.....] (. Whilst doing this the Appellant asked her why she was looking at him and told her that he wanted to have sexual intercourse with her. Then Accused no.3 replied that he was not yet finished with her and then he took her to a toilet not far from there and had sexual intercourse with her for the second time. After accused no.3 was finished, he said he would help her get away. He then left her next to the toilet and he went back to the Appellant.

[30] Later he returned and he took her to an open piece of land and left her there. He said that he was going back to help [S.....] (. He came back later and said [S.....] (had managed to run away. Thereafter D…. W….. and accused no. 3 walked in the direction of D…. W….'s house. As they approached the house they saw people standing next to it. Accused no.3 then turned around and walked away. De Wee proceeded to walk to her house. There she told the people about the incident and was informed that [S.....] (was already at home.

[31] She further stated in cross-examination that the Appellant only took out the knife when they reached Margie's home. She could not remember how it looked like. She also confirmed that the Appellant was the only person who had a knife.

[32] Although she does not explicitly refer to accused no.2 in her evidence-in-chief, she emphatically stated during cross-examination that accused no.2 also had sexual intercourse with [S.....] (. She said in evidence in chief ... *"toe is Jan besig met Maureen – Ja ... wel, toe laterhand toe staan hy op van Maureen af. Toe begin die een met Maureen".* During cross-examination she went into more detail and said that after the Appellant had sexual intercourse with Maureen [S.....] (, accused no.2 ordered [S.....] (to remain lying down and had sexual intercourse with her.

OTHER EVIDENCE

[33] Tromp testified that on the morning in question, at about 2'o clock a report

was made to him by one Johannes Matthys that females were being raped at a place opposite his house. It was further reported to him that the perpetrators were armed. He then went to call Oranje to accompany him, and to go and investigate. On his way to Oranje, he heard a female shouting "*help me please*". This noise came from the house on the other side of the road. Tromp and Oranje then went to a shack that was at the back of the house to enquire what was happening and at that stage [S.....] (came running out. She was holding onto the front of her pants, which were loose, and which she was trying to fasten.

[34] The Appellant and two other persons were behind [S.....] (and the Appellant wanted to grab hold of her. Tromp testified further that he then shoved her aside towards Oranje because the Appellant at that stage wanted to grab and get hold of [S.....] (again.

[35] He did not get the impression that the Appellant and [S.....] (had a relationship because it seemed to him as if he wanted to attack her. The Appellant did not want to leave [S.....] (alone and the witness says he punched him in order to subdue him. The Appellant was also later hit by some unknown person with a rake before he ran away.

[36] Swarts was crying and hysterical. She reported that she was raped by three men. Some few minutes later De Wee also arrived at the scene. She appeared unkempt and reported that she was also raped.

[37] In cross-examination Tromp said that [S.....] (was in the shack when she

shouted for help. He further testified that the appellant did not retaliate after hitting with him with the fist because he was very drunk. Oranje confirmed the version of Tromp. He says further that when they went to the place across road, he heard someone calling his name.

[38] Anna Miller who was with Tromp and Oranje also testified. Her evidence was similar to theirs. She added that [S.....] (' clothes were dusty. She also observed that [S.....] (had abrasions on her back. The rest of her evidence does not take the case further.

APPELLANT'S TESTIMONY

[39] The Appellant himself testified and called no witnesses. During evidence the Appellant confirmed that he met up with [S.....] (and De Wee in the still of the night of a day in question. He was accompanied by accused no.2 and accused no.3. Both [S.....] (and De Wee were known to him. [S.....] (and De Wee told them that they were on the way to the dance which had just started. They also told them that they wanted to drink beer.

[40] Whilst on their way to the dance, he and [S.....] (were involved in a discussion which ultimately led to him requesting her to have sexual intercourse with him. She agreed, but said that it should remain secret. Thereafter, they went to have sexual intercourse next to an outside toilet located on an open piece of land.

[41] He also testified that he could not reach climax. He stopped and then she agreed that accused no.2 could have sexual intercourse with her. At that stage, she did not know accused no.2 and accused no.3. According to the Appellant thereafter it seemed that [S.....] (was not interested anymore in drinking beer or going to dance, but instead wanted to be with them so that she could have consensual sexual intercourse with them.

[42] At a later stage, after they left the open piece of land on which the toilet was situated, they proceeded to walk to the shack which [S.....] (testified about. [S.....] (then suggested that they have sexual intercourse once again in the shack since he did not reach a climax earlier. For a second time they had sexual intercourse. He also confirmed that his uncle John Matthys, was sleeping in that shack at that time.

[43] The Appellant further testified he only had sexual intercourse with [S.....] (on two occasions. These were once near a toilet on an open piece of land and then for the second time in the shack.

EVALUATION

[44] On a conspectus of the evidence, I am in agreement with the findings of the Regional Magistrate that Maureen [S.....] (was a reliable and credible witness. She was absolutely clear in her mind as to what role the Appellant, accused no.2 and accused no.3 played. She gave a detailed account of the role each person played and could clearly recall what happened, this notwithstanding the fact that

this incidence occurred almost 4 years earlier, and must have been a traumatic experience for her. She was subjected to lengthy cross-examination and stood her ground. Swart's version is substantially corroborated by that of De Wee, in respect of [S.....] (' allegations that they were forced to accompany the Appellant and the other two accused. Her evidence was also confirmed by the evidence of Tromp and Oranje who testified that [S.....] (ran away from the Appellant towards them and shouted for help. De Wee also corroborates [S.....] (' version in that she testified that she saw the Appellant raping [S.....] (at least once in her presence on the piece of open land near the toilet. This was after she had returned with accused no.3 after they left the company of the complainant and the Appellant.

[45] The discrepancies between [S.....] (' evidence and that of the other witnesses in the light of the totality of her evidence can be regarded as non material and of little significance and which do not affect her credibility at all. There is also no reason to find that the Regional Magistrate was wrong in finding that her version was consistent with probabilities.

[46] Swarts' conduct that specific evening was influenced by the fear she had for the Appellant and the other two accused. The Appellant was also armed with a knife. It is therefore understandable that she feared for her safety. The Appellant was a stranger to her and threatened her. It is therefore not strange that when he requested her to give him love bites she went ahead and did so. She was criticized for not crying out for help when the Appellant raped her in the shack whilst there were other people present. Once again, at that stage the Appellant

was armed and her behaviour was understandable.

[47] What furthermore strengthens her credibility is the fact that the uncle of the Appellant, Johannes Matthys, who the Appellant confirmed was sleeping in the shack, and who had since passed away, went to complain to Tromp and Oranje and made a report that something untoward had happened in the shack.

[48] This gave rise to Oranje and Tromp to go and investigate. The evidence in this regard is not in dispute. In the process, they found the Appellant in the company of [S.....] (. She immediately made a report to them that she was raped. This strengthens the credibility and the plausibility of her version.

[49] The Appellant, on the other hand, was not a good witness. His evidence was riddled with inconsistencies, he contradicted himself and his version was highly improbable. This is clearly borne out by the record. The trial Magistrate correctly rejected his version as false and not reasonably possibly true. For these reasons, I am of the view that the Magistrate was correct in convicting the Appellant. His appeal against the conviction therefore cannot succeed.

THE FAILURE TO REFER TO THE SENTENCING PROVISIONS IN TERMS OF SECTION 51 OF ACT 105 OF 1997 IN THE CHARGE SHEET

[50] The Regional Court characterized the offence for which it convicted the appellant and the other accused persons as *"... rape committed in circumstances where the victim was raped more than once whether by the accused or by any co-*

perpetrator or accomplice". Such offence, as such, fell under Part 1 of Schedule 2 of the Act 105 of 1997. The court, as it was obliged to do in terms of section **52(1)** as it then stood, stopped the proceedings and committed the accused for sentence by a High Court having jurisdiction[1]. The High Court, in terms of section 51(1) (a) of the Act, sentenced the appellant to life imprisonment which is the prescribed minimum sentence for the offence of which the appellant was convicted.

[51] It was not stated in the charge sheet that the Appellant was charged with the offence of rape as referred to in Part 1 of Schedule 2 of the Act and that the provisions of Section 51 of Act 105 of 1997 were applicable. Only at an advanced stage of the proceedings, after evidence had been led by the State and given by the Appellant and accused no.2, did the Regional Magistrate explain to accused no.3, after he had elected to conduct his own defence, that, given the facts of this case, if he should be convicted he could be referred to the High Court which could sentence him to life imprisonment.

[52] Upon conviction the Regional Magistrate made a finding that he had convicted the Appellant and his co-accused of an offence of rape where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice. It needs to be mentioned that this decision was taken before the decision of **S v Legoa 2003(1) SACR 13 SCA** and **S v Ndlovu 2003(1) SACR 331** SCA to which I will refer at a later stage.

[1] Currently amended. Sec 1 of 38 of 2007 – which came in operation on 31 December 2007. This had the effect to provide the Regional Courts with powers to impose a sentence of life imprisonment for offences committed in Part 1 of Schedule 2 of the Act.

[53] Before the hearing of any evidence, the Regional Magistrate could not have been aware of this fact without it being mentioned explicitly in the charge sheet that there would be a possibility that the Appellant and his co-accused would be convicted of the offence of rape as described in Part 1 of Schedule 2 of the Act 105 of 1997.

[54] It is clear that the charge sheet, as it read at the commencement of the trial did not state that the Appellant was charged with an offence of rape that could result in the imposition of a sentence as prescribed in Section 51 of the Act if he were found guilty. The question arises as to whether the failure to do so results in the Appellant's right to a fair trial being infringed.

[55] The Supreme Court of Appeal had occasion to deal with this very issue in **S v Legoa** *(supra)*. In this matter the accused was convicted of dealing in 276,3kg of dagga and sentenced to the prescribed minimum sentence of 15 years imprisonment. The charge sheet made no mention of the value of the dagga involved. The Minimum sentence provisions would only come into operation if it had been alleged that the value of the dagga was over R50 000,00. The provisions of the Act and their applicability were not mentioned in the charge sheet. There was instead a reference in the charge sheet to the penalty provisions of the Drug and Drug Trafficking Act 140 of 1992.

[56] *Cameron JA* at page 22 paragraph [20] said the following:

"Under the common law it was therefore "desirable" that the charge sheet should set out the facts the State intended to prove in order to bring the accused within an enhanced sentencing jurisdiction. It was not however essential. The Constitutional Court has emphasised that under the new constitutional dispensation, the criterion for a just criminal trial is "a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force". The Bill of Rights specifies that every accused has a right to a fair trial. This right, the Constitutional Court has said, is broader than the specific rights set out in the subsections of the Bill of Rights" criminal trial provision. One of those specific rights is "to be informed of the charge with sufficient detail to answer it". What the ability to "answer" a charge encompasses this case does not require us to determine. But under the constitutional dispensation it can certainly be no less desirable than under the common law that the facts the State intends to prove to increase sentencing jurisdiction under the 1997 statute should be clearly set out in the charge sheet".

After referring to a decision of *Borchers J* in **S v Blaauw 1999 (2) SACR W at 301H – 302B** he went on to hold at 23 para [21]:

"[21] The matter is, however, one <u>of substance</u> and not <u>form</u>, and I would be <u>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. 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. The accused might in any event acquire the requisite knowledge from particulars furnished to the charge or, in a superior court, from the summary of substantial facts the State is obliged to furnish. Whether the accused's substantive fair trial right, including his ability to answer the charge, has been impaired, will therefore depend on a vigilant examination of the relevant circumstances</u>".
("own underlining")

[57] In a later decision of the SCA in *S v Ndlovu 2003 (1) SACR 331 SCA*, the accused was charged with the unlawful possession of a 9mm pistol. In the charge

sheet, there was no allegation that this was a semi-automatic firearm. Reference was only made in the charge sheet to the penalty provisions contained in the Arms and Ammunition Act 75 of 1969. Only after questions were posed by the Magistrate to a witness did it emerge that the firearm was a semi-automatic weapon. The court held at paragraph [10] that the reference in the charge sheet to the penalty provisions of Act 75 of 1969 was "*calculated to convey the impression that the State would seek the penalty provided for in the Act*".

Mpati JA (as he then was) held (at para [11]) that: *"Whilst it is desirable that the charge-sheet should set out the facts the State intends to prove in order to bring an accused within an enhanced sentencing jurisdiction, to do so is not essential. R v Zonele and Others 1959 (3) SA 319 (A) at 323A-H; S v Moloi 1969 (4) SA 421 at 424A-C."* However, *Mpati JA* drew attention to the judgment of *Legoa* and *Cameron JA's* reminder that an accused person had a constitutionally guaranteed right to a fair trial that embraced a concept of substantive fairness. However, *Mpati JA* noted that:

> "*Cameron JA, declined however, to lay down a general rule that the charge-sheet must in every case recite either the specific form of the scheduled offence (in that case dealing in dagga with a value of more than R50 000,00) with which an accused is charged, on the facts the State intends to prove to establish it".* He held that: "*Whether the accused's substantive fair trial right, including his ability to answer the charge, has been impaired, will depend on a vigilant examination of the relevant circumstances (in para [21])*."

[58] The matter of **S v Mvelase 2004 (2) SACR 531 (W**), is similar to the present except that the accused in that case had been charged with three counts of rape against the same complainant. He was duly convicted on all three charges. After conviction the matter was committed to the High Court for sentencing in terms of the minimum sentencing legislation. It was contended by the legal representatives of the accused in the High Court that the proceedings in the Regional Court were not in accordance with justice because no reference was made in the charge sheet to the minimum sentencing provisions in the Act.

[59] In her judgment *Borchers J* drew attention to the fact that several Provincial Divisions had held that where an accused person elects to conduct his own defence and he is facing a prescribed minimum sentence the presiding officer should explain this fact to him and indeed encourage him to obtain legal representation. After referring to the relevant authority on this point, *Borchers J* stated that where an accused was legally represented, there was no such duty to inform the accused. She further held the view that the facts that were present in the *Legoa* and *Ndlovu* cases, were distinguishable from the matter which was before her for consideration. In the *Legoa* matter, the accused and by inference his legal representative had been "*misled*" into believing that the penalty provisions of the Drugs and Drug Trafficking Act 140 of 1992 were applicable and not the provisions of the Minimum Sentencing Act. *Borchers J* was further of the view that the facts in *Ndlovu* matter could also be distinguished from the matter before her in that the SCA there held at 335f that the reference in the charge sheet to the penalty provisions in the Arms and Ammunition Act 75 of 1969 was "*calculated to*

convey the impression that the State would seek the penalty provided for in that Act".

[60] She came to the conclusion (at 535 E-G) that ...."*[T]he same cannot be said in the present matter. There was indeed no reference to the provisions of the Act in the three charges of rape, but the fact that all three charges were framed in identical terms can lead a legal representative to no other conclusion that the accused is facing charges defined in Part 1 of Schedule 2 of the Act and that, if convicted, the accused faces the possibility of imprisonment for life. While there might be a failure to state this fact specifically, there can be no question of the accused or his legal representatives being misled by the charge-sheets in regard to the nature of the sentence which the accused faced. As the accused was legally represented it was, in my view, not necessary to explain to the accused himself the nature of the sentence he faced".*

[61] She further went on to say that certain procedural rights need not be explained to an accused with legal representation for the very simple reason that a legal representative is a legally qualified person who is expected to know the law, and it would be a sad day indeed if a presiding officer were to be required to assume the incompetence of legal representatives and thus to treat the accused as if he/she were unrepresented. *Borchers J* further held that there may well be a case where the performance of the legal representative is so clearly incompetent that the presiding officer would be well advised in the interest of ensuring a fair trial to bring certain aspects of the law to the attention of the accused and his legal

representatives. These cases are the exception, rather than the rule.

[62] In **S v Mseleku 2006(2) SACR 574 (D)** *Pillay J* disagreed with the conclusions of *Borchers J*. She said that it is not her experience that an assumption can safely be drawn on the competence of a legal representative and pointed out that in the vast majority of cases, accused are represented by counsel or attorneys appointed by the Legal Aid Board (currently Legal Aid South Africa) and the Justice Centre (at 578H – 579A). The learned Judge noted that in her experience, inexperienced counsel is not an unusual occurrence. The learned Judge went on to say that this is a fact that she is entitled to take judicial notice of. The Judge went further and stated that an accused person may well have conducted his defence differently had he been aware of the gravity of the sentence he faced (at 579 B – C). It would further be difficult for a presiding officer to judge the competency or otherwise of counsel at the pleading stage and such an assessment can only be made in most cases as the trial proceeds (579 B – C).

[63] The court in the *Mseleku* matter went on to conclude that the prosecution must make it known in clear terms in the indictment that it relies on the sentencing regime created by Section 51 of Act 105 of 1997, and it must not only alert the legal representative but also an undefended accused. The court held that what is required in terms of *Ndlovu's* case is that the accused be given sufficient notice of the State's reliance on the sentencing regime created by the Act, so as to enable the accused to properly conduct his or her defence. The court finally concluded at 581C - E, relying on *Ndlovu's* case, that if any reference is made in the indictment to the State's reliance on the Minimum Sentence Act, a court may well be justified

in assuming that counsel would have drawn that to the accused's attention. Where no such mention is made, notwithstanding its factual framework, the provisions should be brought to the attention of the accused by the Court whether the accused is legally represented or not.

[64] I respectfully disagree with the approach of *Pillay J*. The approach followed by the learned judge is not in my view consistent with the approach adopted by *Cameron JA* in the *Legoa* case and it is unduly formalistic. The learned judge did not examine or enquire, in line with the approach proposed by *Cameron JA,* whether the omission to inform the accused of the scheduled offence impaired the accused's substantive fair trial rights. The judgment merely focused on the single fact that the charge sheet did not inform the accused of the scheduled offences, without assessing whether this omission may have affected the accused's right to a fair trial in a substantial manner in the particular circumstances of the case. The ultimate issue *Pillay J* failed to consider is that in the case where the State omitted to inform him or her of the scheduled offences in the charge sheet or indictment, the question is not whether an accused was legally represented or not, or whether his legal representative had informed an accused person of the scheduled offences. The question is whether upon a vigilant examination of the circumstances of the particular case such an omission or failure resulted in the fair trial rights of the accused person being impaired.

[65] Effective and competent legal representation is a weighty factor that has to be taken into consideration in assessing whether an accused's substantive fair trial rights had been impaired.

[66] A full bench of this court had occasion to deal with this issue in **S v Steyn 2011 (1) SACR 384** per *Moosa J*. The court followed the *dictum* of *Legoa* and applied the dictum in *Ndlovu.* The court in the Steyn case came to the conclusion that the accused did not have a fair trial, because the Magistrate failed to explain the provisions of the Prescribed Sentencing Legislation to the accused. There was also no other indication from the record that the accused had been informed of the provisions of the Act.

[67] The court followed the *dictum* in **S v Makatu 2006 (2) SACR 582** where at paragraph 5 *Lewis JA*, held ..."*Following Legoa this court in S v Ndlovu held that the relevant sentence provisions of the Act must be brought to the attention of an accused in such a way that the charge can be properly met before conviction*".

[68] The mere absence of an indication either in the charge sheet or at the commencement of the trial that the State will rely on a scheduled offence does not per sé result in substantial unfairness. In deciding whether a trial was substantially unfair the Court should have "*vigilant examination of the relevant circumstances*" of the case. In some cases after a vigilant examination of the relevant circumstances that prevailed in a case, a trial may well be deemed to be unfair if an accused person had not been informed in the charge sheet of a scheduled offence.

[69] A trial may well be substantially unfair to an accused in the following circumstances: a) He or she is undefended, and had not been informed by the presiding officer of the applicable minimum sentencing provisions, (and the charge

sheet makes no mention thereof) (b) He or she is "*misled*"[2] into believing that the penalty provisions referred to in the charge sheet will apply and (c) where reference is made to certain penalty provisions of a specific Act in the charge sheet and where such reference was "*calculated to convey the impression that the State would seek the penalty provided for in the Act*"[3] (d) where there is no other information, circumstances or indication given to an accused which would lead him to believe that the only sentencing provisions that could be applicable is prescribed in terms of Act 105 of 1997. In my view, this approach is consistent with the *dictum* as set out in *Legoa* and *Ndlovu*.

[70] In the present matter I am of the view that the Appellant's fair trial rights were not substantially impaired because of the fact that the applicable scheduled provisions of the Act were not mentioned in the charge sheet.

[71] My conclusion is based on the following reasons:

(a) The Appellant and his co-accused were all legally represented during the trial. There can be no question as to the competence of his legal representative. The manner in which he conducted the defence on behalf of the Appellant does not warrant such a conclusion. **S v Halgryn 2002 (2) SACR 211 at 211 e – f**.

(b) The Appellant and his legal representative were at least given copies of the statement of Maureen [S.....] (, wherein she in detail describes that she

[2] Legoa supra para 26

was raped by the Appellant and the co-accused. She also describes how many times she was raped. This information was at the disposal of the Appellant's attorney. It was used to cross-examine the complainant. In fact, the Appellant's attorney was able to put to the witness [S.....] (that the Appellant indeed had sexual intercourse with her, not four times as she claimed, but only twice. Any competent attorney representing an accused person in the Regional Court on such a serious charge must have known that having regard to the facts of this case, upon conviction there might be a possibility that a sentence as prescribed in Act 105 of 1997 would be imposed.

(c) The Appellant, his co-accused, and his attorney must have been aware of the fact, when the presiding Regional Magistrate warned accused no.3 after the same attorney appearing for all three of them had withdrawn for accused no.3 due to a conflict of interests, that there was a possibility that upon conviction a prescribed sentence of life imprisonment could be imposed[4].

(d) At that stage the Appellant and his attorney did not protest or inform the court that they were not aware of the applicability of the minimum sentencing provisions. Although the explanation was given to accused no.3, the Appellant and his attorney must have been aware of it, even if this happened at a very late stage.

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[3] Ndlovu at 335 e - f
[4] Record page 297

(e) If they only became aware of it at that time, it should have been brought to the notice of the presiding officer so that appropriate action could be taken to prevent the violation of the accused's right to a fair trial. Such action could have included, for example, the recalling of the State witnesses, the re-opening of his case, a request to call further witnesses, a request to start the trial *de novo*. This could all have been done before conviction.

(f) Even after the conviction stage the Appellant or his representative, when the Regional Magistrate informed them of his decision to refer the matter to the High Court for sentencing, could have raised their concern by saying they were not aware of the fact that the prescribed sentences were applicable. In fact, even in the High Court before *Nel J* when they initially appeared, this point was never raised.

[72] I am therefore of the view after having regard to the surrounding facts and circumstances that the Appellant had the requisite knowledge that the scheduled offences are applicable in this case.

[73] The next question to consider is whether the sentence of life imprisonment by *Nel J* is an appropriate one.

Miss **de Jongh** for the Appellant argued that the High Court in sentencing the accused did not consider his personal circumstances, especially his age. I am unable to agree that the sentencing court did not properly consider all the relevant circumstances of this case.

[74] There is no indication that the sentencing court did not properly apply its mind or failed to have regard to the personal circumstances of the Appellant. The Appellant although relatively young, was not an innocent child or naive young adult when he committed the offence. He had previous convictions, one of which is robbery which can be regarded as a violent offence.

[75] The Appellant took the leading role. He was the one who threatened the complainant with a knife. He was the one who, apart from raping [S.....] (himself, no less than four times, encouraged accused no.2 and accused no.3 to rape her to the extent that she was raped 7 times. His age in itself, when he committed the offence, is merely a neutral factor in this specific case and cannot be regarded as substantial and compelling.

[76] The offence that was committed and the surrounding circumstances thereof were without a doubt very serious.

In **S v Chapman 1997 (2) SACR 3 (SCA)** at **5A – E** it was held that ... "*Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution* * *and to any defensible civilisation. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives. The appellant showed no respect for their rights. He prowled the streets and shopping malls and in a short period of one week he raped three young women, who were unknown to him. He deceptively pretended to care for them by giving them lifts and then proceeded to rape them callously and brutally, after*

threatening them with a knife. At no stage, did he show the slightest remorse. The Courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights. We communicate that message in this case by an order that the appeal of the appellant against his convictions and sentences is dismissed".

[77] The complainants Maureen [S.....] (and Lorraine De Wee were abducted and threatened with a knife. Maureen [S.....] (, was treated with utter disrespect and contempt and was further violated and humiliated in the worst possible manner. She was subjected to prolonged and continuous acts of rape by the Appellant who cowardly forced himself on her by threatening her with a knife throughout her hellish ordeal.

[78] There is no doubt that the ordeal she was subjected to, mostly at the hands of the Appellant, would have a long lasting psychological effect on her. It is exactly for these types of reprehensible behaviour that the legislature in its wisdom has prescribed that mandatory sentence should be imposed, so that vulnerable members of society can be protected against people such as the Appellant. I am therefore of the view that given the circumstances of this case the sentence of life imprisonment was appropriate.

In the result therefore, I propose that the following order be made.

ORDER

That the appeal against conviction and sentence be dismissed.

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HENNEY, J

I agree and it is so ordered.

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TRAVERSO, DJP

I agree.

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ZONDI, J