IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

Appeal No: A322/14

REPORTABLE JUDGMENT

In the appeal of

RICHARD JACOBS Appellant

And

THE STATE Respondent

JUDGMENT DELIVERED ON 10 DECEMBER 2014

BLIGNAULT J and VAN ROOYEN AJ

Introduction

[1] Appellant, a male aged 49 years at the commencement of the trial in the court *a quo* in 2013, was charged with a contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007, in the regional court for the regional division of the Cape held at Blue Downs. According to the charge sheet he had sexual intercourse with the complainant (a female aged 44 years) without her consent on 17 November 2012 at or near Kalkfontein.

[2] Appellant, who was represented by a legal representative throughout, pleaded not guilty to the charge and stated that he had consensual sexual intercourse with the complainant. He was convicted on 21 August 2013 and on 23 August 2013 he was sentenced to 15 years imprisonment.

[3] Leave to appeal against the conviction and sentence was granted by the regional court.

[4] The following facts are common cause: On Saturday 17 November 2012 at approximately 17h00 the complainant was at a shebeen when appellant arrived. They knew each other from drinking together in groups at shebeens before. They went to another tavern where appellant bought two bottles of wine. They then went to the complainant's house where she lived with her husband. The door was locked and they drank the wine outside. They had intercourse outside the house.

The complainant's version

[5] On 17 November 2012 the complainant and a friend shared a 750ml bottle of wine at a shebeen. When appellant arrived at the shebeen the complainant requested him to buy her a drink or to give her R5, 00. He told her that he did not have change and that they had to buy liquor at another tavern. They accompanied each other to the other tavern where appellant bought two bottles of wine. From there they went to the complainant's house. It was dusk.

[6] They sat next to each other on a wooden bench outside the complainant's house and the appellant had just poured each of them a glass of wine when he grabbed the complainant by her neck. She resisted but he

was too strong and she could not scream because the appellant's grip on her neck was too tight. He dragged her behind the house and threw her on the ground. He pulled down her pants and raped her.

[7] Appellant left with his wine and the complainant ran, crying, to the house of her sister-in-law, D….. A….. She informed her sister-in-law that she had been raped by the appellant. Her sister-in-law tidied her hair and called the police. The police took her to Karl Bremer Hospital where she was examined. She was not intoxicated at the time of the incident.

The evidence of Delicia August

[8] At about dusk on 17 November 2012 the complainant (her sister-in-law) arrived at her house crying and told her that she had been raped by appellant. The complainant told her that she and appellant had been drinking outside the complainant's house when the appellant grabbed her by her neck, threw her on the ground, pulled down her pants and raped her.

[9] The complainant's hair was untidy and full of sand. The outside back of her pants was covered in faeces. There were marks on her neck. She smelled of wine but was not intoxicated. Ms A….. telephoned the police who fetched the complainant.

The medical report

[10] The complainant was examined at Karl Bremer Hospital and the report of the medical practitioner who examined her was handed in as an exhibit. The contents thereof were admitted by the appellant.

[11] The report reflects the following: The complainant reported that a man had grabbed her by her neck and raped her. There was sand on her clothes. Her pants were stained with faeces. There was a faint reddish bruise on her neck which was fresh and consistent with throttling. She was tearful and very upset. Her vagina and anus were covered with sand. She smelt lightly of liquor but was not intoxicated.

Appellant's version

[12] According to appellant the complainant asked him for R5,00 at the shebeen but he did not have change. He and the complainant shared two beers that he had bought. They accompanied each other to another shebeen where he bought two bottles of wine which they took to the complainant's house. They drank one bottle of wine.

[13] The complainant asked him for R50,00 which he gave to her in exchange for intercourse. She approached him as to kiss him and touched his penis. They then had intercourse on a plank which was lying on sand. The complainant consented to intercourse and he did not throttle her. Afterwards she asked him for a further R20,00 to have her hair done and he gave it to her. He left with his wine.

Appellant's conviction

[14] The regional magistrate delivered a balanced and considered judgment. He remarked that the complainant had made a good impression as a witness. Her version was corroborated by the contents of the medical report. He was satisfied that she was speaking the truth and that her evidence was reliable. The evidence of Ms A……., he said, was also reliable and

acceptable. The evidence of appellant, on the other hand, was open to severe criticism. He held that appellant's version was so improbable that it could simply not be accepted as reasonably possibly true.

[15] It is settled law that the assessment of the evidence ought to be informed by the approach adopted by the Supreme Court of Appeal in *Stevens v The State* [2005] 1 All SA 1 (SCA) at 2 para [1]:

> '*Courts in civil or criminal cases faced with the legitimate complaints of persons who are victims of sexually inappropriate behaviour are obliged in terms of the Constitution to respond in a manner that affords the appropriate redress and protection. Vulnerable sections of the community, who often fall prey to such behaviour, are entitled to expect no less from the judiciary. However, in considering whether or not claims are justified, care should be taken to ensure that evidentiary rules and procedural safeguards are properly applied and adhered to.*'

[16] In respect of their conflicting versions relating to the alleged rape, the complainant and the appellant were single witnesses. In *Stevens v The State, supra*, para [17], the Supreme Court of Appeal emphasised that '*the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility.*'

[17] The following principle enunciated in *S v Jackson* 1998 (1) SACR 470 (SCA) at 476 e – f also applies:

> '*… the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of an accused beyond reasonable doubt – no more and no*

less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.'

[18] In *Stevens v The State*, *supra*, para [18] the Supreme Court of Appeal cautioned against a '*compartmentalised approach*' to the assessment of evidence, '*namely an approach which separates the evidence before the court into compartments by examining the 'defence's case' in isolation from the 'state's case' and vice versa.*' The court proceeded to refer with approval to the matter of *S v Van der Meyden* 1999 (1) SACR 447 (W) at 449 C – 450 B and in particular the necessity that '*the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence.'*

[19] The trial court was evidently impressed by the complainant as a witness. The transcript of her evidence reflects no reason to question this impression. She was consistent in her version of events. Support for the credibility of the complainant's version may be found in the fact that her reports to her sister-in-law and the medical practitioner who examined her were in accordance with her version of events. The reports are not corroboration for her version but show that she acted in a manner consistent with her evidence that she had been raped. It goes to her credibility. *See S v Hammond* 2004 (2) SA 303 (SCA) at 311.

[20] Moreover, the following considerations support the version of the complainant:

(a) She was upset and crying when she reported the incident to her sister-in-law and the medical practitioner who examined her.

(b) Her hair was untidy and full of sand. Her anus and vagina were covered with sand. The outside back of her pants was covered with faeces.

(c) There were marks on her neck "*consistent with throttling*" according to the report of the medical practitioner.

[21] The trial court criticised the evidence of appellant in several respects. The record shows that this criticism of appellant's evidence is justified. Reference is made to the following:

(a) The court below correctly criticised appellant's inconsistent and garbled version of the alleged payment that he made to the complainant for intercourse.

(b) The same can be said for appellant's inconsistent and vague versions of discussions that he and the complainant allegedly had about intercourse.

(c) Appellant contradicted himself by first testifying that they had intercourse on a plank that was lying on the sand. However, in cross-examination he testified that the plank was resting on poles.

(d) Appellant had no explanation for the marks on the complainant's neck, the faeces on her pants and the fact that she was covered in sand.

[22] We agree with the regional magistrate's conclusion that appellant's guilt had been established beyond reasonable doubt. He was therefore correctly convicted.

Appellant's sentence

[23] Appellant's sentencing was subject to the provisions of the Criminal Law Amendment Act 105 of 1997 ('Act 105 of 1997'). Section 51(2)(b)(i) of Act 105 of 1997 provides that a court shall sentence a person who is a first offender of an offence referred to in Part III of Schedule 2 to imprisonment for a period not less than 10 years. Section 51(2)(b)(ii) provides that a second offender of such an offence shall be sentenced to imprisonment for a period of not less than 15 years. The offence of which appellant had been convicted, rape as contemplated in section 3 of Act 32 of 2007, is listed in Part III of Schedule 2 to Act 105 of 1997. It reads as follows:

> *'3 Rape*
>
> *Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape.'*

The concept *'sexual penetration'* is defined as follows in s 1 of Act 32 of 2007:

> *'sexual penetration' includes any act which causes penetration to any extent whatsoever by-*
>
> *(a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;*
>
> *(b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or*
>
> *(c) the genital organs of an animal, into or beyond the mouth of another person'*

[24] Section 51(3)(a) of Act 105 of 1997 provides that, if a court is satisfied that substantial and compelling circumstances exist which justify the

imposition of a lesser sentence than the sentences prescribed in section 51(2), the court shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.

[25] Appellant did not testify in mitigation of sentence but his legal representative placed his personal circumstances on record. He was aged 49 years at the time, had no school education, was single, had no children and lived with his mother. Before his arrest he earned R700 per week as a cleaner. His legal representative also raised the fact that, at the time of sentencing, appellant had been in custody for 10 months.

[26] The State proved previous convictions against appellant. On 20 March 1980 he was convicted of rape and sentenced to corporal punishment (he was 16 years old at the time). On 2 May 1983 he was convicted of housebreaking and attempted rape and sentenced to corporal punishment on both convictions together. On 24 June 1985 he was convicted of attempted theft and sentenced to 6 months' imprisonment. On 10 May 1989 he was convicted of attempted rape and sentenced to 8 years' imprisonment.

[27] The regional magistrate considered appellant's personal circumstances, the circumstances under which the offence was committed and his previous convictions before concluding that there were no substantial and compelling circumstances justifying a lesser sentence than that prescribed by Act 105 of 1997. He regarded appellant's conviction on 20 March 1980 as his first offence of rape and his conviction in the present case as a second offence of rape. He accordingly applied s 51(2)(b)(ii) of Act 105 of 1997 and sentenced appellant to a period of 15 years' imprisonment.

[28] Appellant's previous convictions are of a serious nature. It is our view, however, as we propose to show hereunder, that the regional magistrate erred in his approach to the effect of appellant's previous convictions.

[29] The judgment of the Appellate Division of the Supreme Court (as it was known then) in *S v Zondi* 1995(1) SACR 18 (A) is particularly relevant to the present enquiry. It is necessary to consider it in some detail.

[30] Mr Zondi was convicted in the regional court of possessing a 7,5 mm pistol and five rounds of ammunition in contravention of ss 2 and 36 respectively of the Arms and Ammunition Act 75 of 1969 ('the 1969 Arms and Ammunition Act'). Section 2 of the 1969 Arms and Ammunition Act provided that no person shall have any firearm in his possession unless he holds a licence to possess such firearm. Section 36 of the 1969 Act provided that no person shall be in possession of any ammunition unless he is in lawful possession of a firearm capable of firing that ammunition.

[31] Mr Zondi's previous convictions comprised the following:

(1) On 13 December 1965 he was convicted of (i) theft of a firearm in contravention of s 4(1) of the Arms and Ammunition Act 28 of 1937 ('the 1937 Arms and Ammunition Act'), (ii) unlawful possession of a firearm in contravention of s 23(2) of the 1937 Arms and Ammunition Act and (iii) unlawful possession of ammunition. He was sentenced to 18 months' imprisonment on the three counts taken as one for purposes of sentence.

(2) On 7 May 1973 he was convicted of assault with intent to do grievous bodily harm with a stick. He was sentenced to R40 or 20 days' imprisonment.

(3) On 15 July 1986 Mr Zondi was convicted of the possession of ammunition. He was sentenced to 9 months' imprisonment conditionally suspended for 5 years.

[32] The regional magistrate had sentenced Mr Zondi, on both counts taken together, to 18 months imprisonment, of which one half was conditionally suspended. He held that his 1965 set of convictions constituted a previous conviction for purposes of the 1969 Arms and Ammunition Act. For that reason, he said, a sentence of imprisonment was obligatory in terms of s 39(2) of the 1969 Arms and Ammunition Act. We shall refer more fully to this provision hereunder.

[33] Van den Heever JA delivered the judgment of the Appellate Division. She considered two main issues. The first was the effect of the provisions of s 271A of the Criminal Procedure Act 51 of 1977 ('the CPA').

[34] As the history of this section is relevant to appellant's sentencing, we propose to quote its various versions in chronological order. Section 271A was introduced into the CPA by s 12 of Act 5 of 1991, with effect from 23 December 1991, The 1991 version read as follows:

'271A. Certain convictions fall away as previous convictions after expiration of 10 years

Where a court has convicted a person of –

(a) an offence specified in Schedule 1, [which included rape] *and –*

(i) has postponed the passing of sentence in terms of section 297(1)(a) and has discharged that person in terms of section 297(2) without passing sentence or has not called upon him to appear before the court in terms of section 297(3); or

(ii) has discharged that person with a caution or reprimand in terms of section 297(1)(c); or

(b) any other offence than that referred to in Schedule 1,

that conviction shall fall away as a previous conviction if a period of 10 years has elapsed after the date of conviction of the said offence, unless during that period such person has been convicted of an offence specified in Schedule 1.'

[35] Section 271A of the CPA was amended by s 6 of Act 4 of 1992 with effect from 11 March 1992. Thus amended it read as follows:

'Section 271A - Certain convictions fall away as previous convictions after expiration of 10 years

Where a court has convicted a person of-

(a) an offence for which the punishment may be a period of imprisonment exceeding six months without the option of a fine, and-

(i) has postponed the passing of sentence in terms of section 297 (1) (a) and has discharged that person in terms of section 297 (2) without passing sentence or has not called upon him to appear before the court in terms of section 297 (3); or

(ii) has discharged that person with a caution or reprimand in terms of section 297 (1) (c); or

(b) any other offence than that for which the punishment may be a period of imprisonment exceeding six months without the option of a fine,

that conviction shall fall away as a previous conviction if a period of 10 years has elapsed after the date of conviction of the said offence, unless during that period such person has been convicted of an offence for which the punishment may be a period of imprisonment exceeding six months without the option of a fine.'

[36] The 1992 version of s 271A of the CPA was, with effect from 6 May 2009, replaced by the present version ('the 2009 version'). It reads as follows:

'271A certain convictions fall away as previous convictions after expiration of 10 years

Where a court has convicted a person of-

(a) Any offence in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine, may be imposed but-

(i) Has postponed the passing of sentence in terms of section 297 (1) (a) and has discharged that person in terms of section 297 (2) without passing sentence or has not called upon him or her to appear before the court in terms of section 297 (3); or

(ii) Has discharged that person with a caution or reprimand in terms of section 297 (1) (c); or

(b) any offence in respect of which a sentence of imprisonment for a period not exceeding six months without the option of a fine, may be imposed,

that conviction shall fall away as a previous conviction if a period of 10 years has elapsed after the date of conviction of the said offence, unless during that period the person has been convicted of an offence

in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine, may be imposed.'

[37] Van den Heever JA held that Mr Zondi's 1973 conviction fell away 10 years after its commission. His offence was not one referred to in Schedule 1 to the CPA. The wording of s 271A, she said, was clear. It did not only mean that a previous conviction was not to be taken into consideration when sentence is imposed. Its effect is that the previous conviction falls away, ie it loses its validity or value, it is undone. The amendment of s 271A in 1992, she held, did not affect Mr Zondi's rights which had accrued by then.

[38] Van den Heever JA proceeded to discuss the second main issue, namely whether Mr Zondi had to be sentenced on the basis that he was a second offender in respect of the offence of the unlawful possession of a firearm. She considered Mr Zondi's threefold 1965 conviction. This, she said, did not fall away as it did not qualify for that result in terms of s 271A of the CPA as it read at that time. It should not, however, have been regarded as a previous conviction in terms of the provisions of section 39(2) of the 1969 Arms and Ammunition Act. They read as follows:

'(2) Any person convicted of an offence under this Act shall … … be liable-

(a) … …

(b) In the case of-

(i) A contravention of or failure to comply with any provision of section 2 … 18, 25, 28, 29, 35 or 36 …

… …

to a fine not exceeding R12 000 or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment, or, in the case of a second or subsequent

> *conviction for an offence referred to in this paragraph, to imprisonment for a period not exceeding five years;'*

[39] The 1969 Arms and Ammunition Act repealed and replaced the 1937 Arms and Ammunition Act with effect from 1 February 1972. Sections 4(1) and 23(2) of the latter Act (of which Mr Zondi had been convicted in 1965) created offences which were substantially similar to ss 2 and 36 respectively of the 1969 Arms and Ammunition Act.

[40] Van den Heever JA pointed out, however, that it was only in respect of offences *'referred to in this paragraph'* that the court's discretion to sentence second and subsequent offenders, was restricted to imprisonment. She held that this phrase in s 39(2)(b) of the 1969 Arms and Ammunition Act meant that it did not apply to second and subsequent offenders in respect of offences other than contraventions of the specified provisions of the 1969 Arms and Ammunition Act. Contraventions of the corresponding provisions of the 1937 Arms and Ammunition Act, even if they were of a similar nature, were therefore not offences which triggered the prescribed punishment of three years' imprisonment within the meaning of s 39(2)(b) of the 1969 Act.

[41] Mr Zondi was accordingly sentenced as a first offender in respect of his 1965 set of offences.

Section 271A of the CPA and the present case

[42] It is our view that the reasoning of Van den Heever JA in *S v Zondi supra* is in two respects relevant to the facts of the present case. We first consider the effect of s 271A of the CPA.

[43] Although appellant's 1980 conviction of rape is older than 10 years it did not in terms of the 1991 version of s 271A fall away upon the expiry of a period of 10 years after the date of the conviction. The reasons are first that the offence did not fall within the ambit of s 271A(b), namely *'any other offence than that referred to in Schedule 1'* and secondly that he had in any event during the period of 10 years been *'convicted of an offence specified in Schedule 1',* namely attempted rape. Appellant's 1980 offence of rape also did not fall away in terms of the 1992 or 2009 versions of s 271A of the CPA as he was, before the expiry of the ten year period thereafter, convicted of attempted rape, *'an offence in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine'* could have been imposed. Appellant's 1983 conviction of attempted rape also did not fall away upon the commencement of the 1991, 1992 or 2009 versions of s 271A of the CPA as he was convicted of attempted rape in 1989.

[44] The question whether appellant's 1989 conviction of attempted rape has fallen away is, however, more problematic. It depends upon a proper interpretation of the 2009 version of paragraph (b) of s 271A of the CPA.

[45] The definition of the offences that fall away after 10 years in terms of this paragraph differs in two significant respects from that of the 1992 version. The first is that the introductory words changed from *'any other offence than that'* in the 1992 version to *'any offence'* in the 2009 version. The second is that the words *'exceeding six months'* in the 1992 version were replaced by the words *'not exceeding six months'* in the 2009 version.

[46] In terms of a literal interpretation of the 2009 version of paragraph 271A(b), its meaning is found in the *ipsissima verba* used by the legislature. A

sentence of imprisonment for a period not exceeding six months without the option of a fine, may, depending upon the circumstances, be imposed for practically any offence. The 2009 version of paragraph 271A(b) of the CPA, compared to the 1992 version, thus radically enlarged its ambit to include virtually all offences. Hiemstra's *Criminal Procedure* 27-3 expresses this literal meaning of paragraph 271A(b) as follows:

> '*After the amendment by Act 65 of 2008, with effect from 6 May 2009, the category under section 271A(i)(b) - includes practically all offences. Even for a serious offence like murder, imprisonment of less than 6 months without the option of a fine can be imposed'.*

[47] A striking feature of the 2009 version of paragraph 271A(b) of the CPA, however, is that its wording is clumsy and confusing, compared to that of the previous versions. The 1991 and 1992 versions of s 271A of the CPA drew a clear and sensible distinction between serious and less serious offences. Convictions in respect of serious offences did not fall away after 10 years, convictions in respect of less serious offences did. The period of six months effective imprisonment defined the upper limit of less serious offences.

[48] In terms of the 1991 and 1992 versions of paragraph 271A(b), less serious offences were excluded from the wider category of all offences. That made sense. Upon a literal interpretation of the 2009 version, however, the categories of less serious offences and serious offences are now defined in such a way that both comprise all offences. This does not make sense as there is now no longer an exclusive category of serious or less serious offences.

[49] A third feature of the 2009 amendment of paragraph 271A(b) of the CPA is that it rendered paragraph 271A(a) redundant. The 1991 and 1992 versions of paragraph 271A(a) excluded certain offences from the general category of serious offences. The probable reason for this was that the lenient nature of the sentences in question showed that the offender's personal circumstances were such that he/she should be treated as if his/her offence were a less serious one. The 1991 and 1992 versions of paragraph 271A(a) were therefore consistent with the contents of paragraph 271A(b). Paragraph 271A(a) was, however, not amended in 2009. Upon a literal interpretation of paragraph 271A(b) all offences now fall away after 10 years and paragraph 271A(a) thus became redundant.

[51] As to the first feature: The fact that the 2009 version of paragraph 271A(b), upon a literal interpretation thereof, radically widened the scope of previous convictions that fall away after ten years, is in our view not unusual. There is precedent for such an approach in our law. In *S v Mqwathi* 1985 (4) SA 22 (T) at 25A-F Van Dijkhorst J dealt with the legal position as at 1985. He pointed out that in terms of s 303 ter, read with the Fifth Schedule, of the Criminal Procedure Act 56 of 1955, a previous conviction should not be taken into account in the imposition of sentence if it was more than 10 years old. This was the position with respect to all offences. Van Dijkhorst J pointed out that the legislature did not re-enact a similar provision in the Criminal Procedure Act 51 of 1977 with the result that the court then had a discretion and was not bound to the 10 year period. It would nevertheless be a salutary and practical starting point, although not an inflexible yardstick, to apply the ten year period.

[52] The second and third features discussed above, however, raise the question whether the 2009 formulation of paragraph 271A(b) correctly reflect the legislature's intention. Put differently, is it not the result of a legislative mistake? We have accordingly considered whether a purposive interpretation of paragraph 271A(b) might not achieve the result that the previous regime is maintained, namely that serious offences do not fall away after ten years while less serious offences do.

[51] Such a result might in theory be achieved if a suitable term could be implied in paragraph 271A(b) of the CPA. The test for implying a provision into a statute is, however, quite strict. In *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC) the Constitutional Court, at para [192], formulated it as follows:

> *"…words cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands. In addition, such implication must be necessary in order to 'realise the ostensible legislative intention or to make the [legislation] workable."*

[52] It is accepted, furthermore, that the content of a statutory provision which is sought to be implied, must be clear and certain. See *The Firs Investments (Pty) Ltd v Johannesburg City Council* 1967 (3) SA 549 (W) at 557E - G:

> *"Moreover, a strong factor militating against the implication of any such limitation is the difficulty of formulating it. In contract a term will not be implied where considerable uncertainty exists about its nature and scope, for it must be precise and obvious.... I think that the same must apply to implying a term in a statute, for the process is the same...."*

[53] We have considered whether it is feasible to import an implied term in paragraph 271A(b) of the CPA in order to give effect to the assumed intention

of the legislature. It is our view, however, that it is not. The reasons, in short, are first that we are unable to determine what the true intention of the legislature was and secondly that we are unable to formulate the wording of an implied term that would reflect such an intention.

[53] We are accordingly constrained to give effect to a literal interpretation of paragraph 271A(b). Upon that interpretation appellant's 1989 conviction of attempted rape fell away upon the commencement of the 2009 version of s 271A of the CPA on 6 May 2009. Attempted rape is an offence in respect of which a sentence of less than six years' imprisonment may, depending upon the circumstances, be imposed and appellant had not been convicted of any offence after 1989.

[54] We wish to point that if we are wrong in our interpretation of paragraph 271A(b) of the CPA, the same result would be achieved as we are in any event of the view that appellant's 1989 conviction of attempted rape lost its force through the passage of time, a topic to which we turn next.

The passage of time

[55] Apart from the effect of s 271A of the CPA with respect to the present case, it is also necessary to consider the implications of the mere passage of time with regard to the force of previous convictions. Appellant's previous convictions are 33, 30 and 24 years old. Although section 271A provides that certain previous convictions fall away in certain circumstances, this does not mean that a court is bound to continue to take such a conviction into account, whatever its age. The courts have therefore in principle attached less weight to a previous conviction, the longer the period that had elapsed since the date of such conviction. See Terblanche *Guide to Sentencing in South Africa*

second edition 189 and the cases cited in footnote 45, including *S v Mqwathi supra*. The remarks in Hiemstra's *Criminal Procedure* 27-3, with reference to s 271A of the CPA, are to the same effect:

> *'The usefulness of this provision is limited. Judicial officers would in any event attach no weight to such an old conviction'.*

[56] Given the age of each of appellant's previous convictions, we are of the view that all of them, including the 1989 conviction of attempted rape, are so old that they should not have been taken into account at all in the sentencing of appellant.

The interpretation of s 51(2)(b) of Act 105 of 1997

[57] The second relevant aspect of the judgment of Van den Heever JA in *S v Zondi supra,* is her interpretation of the concept *'second offender'* where it appears in s 39(2) of the 1969 Arms and Ammunition Act. It is in our view relevant to the interpretation of s 51(2)(b) of Act 105 of 1997 which reads as follows:

> *'(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in-*
>
> *… …*
>
> *(b) Part III of Schedule 2, in the case of-*
>
> *(i) a first offender, to imprisonment for a period not less than 10 years;*
>
> *(ii) a second offender of any such offence, to imprisonment for a period not less than 15 years;'*

[58] Appellant was convicted in the present case of the offence described in Part III of Schedule 2 as *'Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007..'* In1980, however, appellant was convicted of rape, a common law offence, which is not mentioned in Part III of Schedule 2 to Act 105 of 1997. It is indeed a different offence with different elements and it does not exist anymore. In terms of s 68(1)(b) of *t*he Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, the common law relating to certain crimes including rape was repealed.

[59] On the face of it appellant was therefore a *'first offender'* for purposes of the application of s 51(2)(b) of Act 105 of 1997. We have, however, considered whether it is not possible to imply a suitable term in paragraph 51(2) (b) (ii) of Act 105 of 1997, read with the offence defined in Part III of Schedule 2 as *'Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007',* in order to include an offender such as appellant within the ambit of that paragraph.

[60] We have pointed out above, however, that the test for implying a provision into a statute is strict. We quoted in this regard the test as it was formulated in *Masetlha v President of the Republic of South Africa and Another supra* para [192]. It seems to us that the suggested implied term is not *'a necessary one in the sense that without it effect cannot be given to the statute as it stands'.* In our view there is no necessity to change the plain literal wording of s 51(2)(b) of Act 105 of 1997.

[61] We have also drawn attention above to the requirement that the content of a statutory provision which is sought to be implied must be clear and

certain. We quoted in this regard from See *The Firs Investments (Pty) Ltd v Johannesburg City Council supra* at 557E – G.

[62] In our view '*considerable uncertainty'* would exist with respect the formulation of the suggested implied term. It would not be *'precise and obvious'.*

[63] We conclude therefore that appellant's sentencing was governed by the provisions of s 51(2)(b)(i), read with Part III of Schedule 2 to Act 105 of 1907, for which the prescribed minimum sentence is 10 years imprisonment. It was not governed by the provisions of s 51(2)(b)(ii) of Act 105 of 1997.

[64] We may add that if we were wrong in our interpretation of s 51(2)(b)(ii) of Act 105 of 1997 and appellant was correctly regarded as a *'second offender',* then it seems to us that the age of appellant's 1980 conviction of rape should on its own have been regarded as a substantial and compelling circumstance justifying a lesser sentence than the minimum of 15 years' imprisonment.

Appellant's actual sentence

[65] It is apparent from the regional magistrate's reasoning that he attached much weight to appellant's record of previous convictions. In our view he erred in doing so. Appellant's 1980 conviction of rape should have been disregarded for the alternative reasons discussed above. The first is that his sentencing was governed by the provisions of s 51(2)(b)(i) to Act 105 of 1907, for which the prescribed minimum sentence is 10 years imprisonment. The second is that the age (more than 33 years) of appellant's 1980 conviction of rape should on its own have been regarded as a substantial and compelling circumstance justifying a lesser sentence of not more than 10 years'

imprisonment. In that event the difference of 5 years imprisonment between the periods of 15 and 10 years respectively in the two paragraphs of s 51(2)(b), would, on its own, on logical and practical grounds, justify a reduction of 5 years from the prescribed minimum.

[66] A period of more than 30 years has elapsed since appellant's conviction of attempted rape in 1983. It should have been disregarded by reason of its age. Appellant's 1989 conviction of attempted rape was more than 24 years old at the time when he was sentenced in the present case. If it did not fall away in terms of s 287A of the CPA it should also have been disregarded because of its age.

[67] We are accordingly of the view that appellant's previous convictions should not have played a role in his sentencing. The regional magistrate should have treated him as a *de facto* first offender. On that basis there are in our opinion additional substantial and compelling circumstances which justify a lesser sentence than 10 years imprisonment. The first is the period of 10 months that appellant spent in custody prior to the imposition of his sentence. See *S v Radebe* 2013 (2) SACR 165 (SCA) paragraphs [13] and [14]:

> *'[13] In my view there should be no rule of thumb in respect of the calculation of the weight to be given to the period spent by an accused awaiting trial.*
>
> *… …*
>
> *A better approach, in my view, is that the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed. Such an approach would*

take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention.'

[68] The second factor is that appellant was probably to some extent intoxicated when he committed the offence. It is settled law that intoxication may be regarded as a mitigating factor if it is shown that it impaired the mental faculties of the offender. See *S v M* 1994 (2) SACR 24 (A). It appears from the evidence that a substantial amount of alcohol was consumed by appellant prior to the incident. In these circumstances it seems to me that it is a fair inference that appellant's responsibility was to some extent impaired as a result of his consumption of alcohol.

[69] It is our view that the combination of the period spent by the appellant in custody before he was sentenced and his intoxication constitute substantial and compelling circumstances which justify the imposition of a lesser sentence than 10 years' imprisonment. In our opinion a period of imprisonment of 8 years would be fair and appropriate.

[70] In the result, we grant the following orders:

(1) Appellant's appeal against his conviction is dismissed. His conviction is confirmed.

(2) Appellant's appeal against his sentence is upheld. His sentence of 15 years' imprisonment is set aside and replaced with a sentence of 8 years' imprisonment which is backdated to 23 August 2013 in terms of s 282 of the Criminal Procedure Act 51 of 1977.

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A P BLIGNAULT J

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R F VAN ROOYEN AJ