CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 19/05

DONALD VELDMAN Applicant

versus

THE DIRECTOR OF PUBLIC PROSECUTIONS:
(WITWATERSRAND LOCAL DIVISION) Respondent

Heard on : 18 August 2005

Decided on : 5 December 2005

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JUDGMENT

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MOKGORO J:

*Background*

[1] Mr Donald Veldman (the applicant) was convicted for a number of offences including murder and was sentenced by the regional magistrate's court (regional court) to 15 years' imprisonment for the murder.[1] At the time he committed the offences, and when he entered his plea of not guilty, the maximum penal jurisdiction of the regional court for murder under section 92(1)(a) of the Magistrates' Courts Act

[1] The applicant and two other accused were convicted by the regional magistrate's court (Southern Transvaal District sitting in Soweto) on one charge of murder, two charges of kidnapping, one charge of assault, and one charge of being in unlawful possession of ammunition. The applicant was sentenced to 15 years' imprisonment for murder and additional terms corresponding to the other charges which he did not appeal; thus he is currently serving a total of 22 years' imprisonment.

32 of 1944 (the Act) was 10 years' imprisonment. On 7 October 1998, after he had pleaded, but before he was sentenced, legislation was passed increasing the regional court's maximum penal jurisdiction for murder from 10 years' imprisonment to that of 15 years.[2]

[2] Prior to the amendment, the relevant parts of section 92(1)(a) provided:

> "(1) Save as otherwise in this Act or in any other law specially provided, the court, whenever it may punish a person for an offence−
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> (a) by imprisonment, may impose a sentence of imprisonment for a period not exceeding twelve months, where the court is not the court of a regional division, or not exceeding ten years, where the court is the court of a regional division".

The amended section 92(1)(a) provides:

> "(1) Save as otherwise in this Act or in any other law specially provided, the court, whenever it may punish a person for an offence−
>
> (a) by imprisonment, may impose a sentence of imprisonment for a period not exceeding three years, where the court is not the court of a regional division, or not exceeding 15 years, where the court is the court of a regional division".

[3] Another relevant legislative change which occurred after the applicant had pleaded was the promulgation of section 51 of the Criminal Law Amendment Act 105 of 1997 (often referred to as the Minimum Sentences Act),[3] which prescribes a minimum sentence for murder.

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[2] Section 6 of the Magistrates Amendment Act 66 of 1998.

[3] The relevant parts of section 51 read as follows:

[4] The applicant appealed to the Johannesburg High Court (High Court) against his conviction and sentence. Citing the horrific nature of the offence, the High Court held that "the personal circumstances of the accused become of less importance"[4] and accordingly found that the sentence was not disproportionate to the offences. The High Court further held that sentencing was a matter within the discretion of the trial court, and absent any misdirection or gross disproportionality, it would not intervene.

[5] The applicant applied for leave to appeal to the Supreme Court of Appeal (SCA), which dismissed the application without providing any reasons. The applicant now applies for leave to appeal to this Court for an order setting aside the decision of the SCA, more specifically, an order setting aside the 15-year term of imprisonment and replacing it with a 10-year custodial sentence on the basis that the more severe sentence of 15 years' imprisonment is an infringement of his constitutional right to a fair trial, as set forth in section 35(3)(n) of the Constitution.

*Application for condonation*

[6] In this Court, the applicant applies for condonation for the late filing of his application on the basis that he was not aware of the dismissal of his application in the

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"(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court, including a High Court to which a matter has been referred under section 52(1) for sentence, shall in respect of a person who has been convicted of an offence referred to in−

(a) Part II of Schedule 2, sentence the person, in the case of−

(i) a first offender, to imprisonment for a period not less than 15 years".

Subsections 3 and 6 are not relevant for the current discussion.

[4] Unreported judgment of the Witwatersrand Local Division Case No A1184/99 delivered on 11 April 2003 at para 23.

SCA in 2003 due to the failure of his attorneys to inform him of progress in the matter. He avers that the dismissal only came to light on enquiring about the case from the Registrar of the SCA. The respondent does not oppose the application.

[7] The question whether to condone the late filing of an application is within the discretion of the Court,[5] after having considered a number of relevant factors including: the degree of non-compliance with the rules; the explanation for the lateness tendered by the applicant; the importance of the issue in the matter; the prospects of success; the respondent's interest in the finality of the matter; the convenience of the Court; and the avoidance of unnecessary delay in the administration of justice.[6]

[8] In the present matter, the applicant failed to comply with the time limits set out in the rules regarding appeals from the SCA to this Court. He has tendered an explanation which, if viewed in isolation, might not seem sufficient. However, the prospects of success in this matter and the fact that the respondent does not oppose the application for condonation tilt the scales in the applicant's favour. Moreover, the matter is of particular importance to the applicant in circumstances in which, overall, it has not been shown that the delay caused any prejudice. For these reasons, the application for condonation is granted.

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[5] See *S v Basson 2* CCT 30/03, 9 September 2005, at paras 154-5 as yet unreported, *Mabaso v Law Society, Northern Provinces and Another* 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC) at paras 19-20, *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 11.

[6] See *Federated Employers Fire & General Insurance Co Ltd and Another v McKenzie* 1969 (3) SA 360 (A) at 362F-363A.

*Nature of the application*

[9] The applicant applies for special leave to appeal under Rule 19[7] against what he terms the judgment and order of the SCA which had dismissed his appeal from the High Court. What the SCA actually dismissed was the application for an appeal against the order of the High Court, which had dismissed the applicant's appeal against his conviction and sentence by the regional court. The applicant did not raise a constitutional issue before any of the earlier courts, nor was any constitutional issue considered or decided. The constitutional question emerges for the first time before this Court. Against this background, the respondent argues that this application should have been one for direct access under Rule 18 rather than for leave to appeal. During oral argument, the applicant's counsel indeed applied for direct access from the bar.

[10] The decision to grant leave to appeal is a matter of the discretion of this Court. Important considerations are whether the applicant raises a constitutional issue and whether it is in the interests of justice to grant leave to appeal.[8] Factors to be considered in determining the interests of justice include: whether there exist reasonable prospects of success;[9] the time it would take for the appeal to be remitted

[7] The applicant in his founding affidavit erroneously referred to Rule 20 of the old Constitutional Court Rules but it is clear that the applicable rule is Rule 19.

[8] *Phillips and Others v National Director of Public Prosecutions* CCT 55/04, 7 October 2005 at para 30 as yet unreported, *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa, and Another* 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC) at para 19.

[9] *S v Pennington and Another* 1997 (4) SA 1076 (CC); 1997 (10) BCLR 1413 (CC) at para 26.

to and be heard by the SCA before reverting to this Court; the costs of that prolonged procedure;[10] and the nature of the issue which is the subject of the appeal.[11]

[11] Although the constitutional issue in the present case was raised here for the first time, this Court is nevertheless inclined, in the interests of justice, to grant the application for leave to appeal directly from the High Court. Legal questions similar to the present have been dealt with previously in earlier cases before other courts and views in that regard have been divergent.[12] It is thus incumbent upon this Court to provide guidance and bring some certainty to these issues.[13] Furthermore, this is not a matter that involves the development of the common law and is well within the jurisdiction of this Court to determine. Although the constitutional issue was not raised in the earlier courts, the right to a fair trial is sufficiently connected to the question of the competence of the sentence imposed, which forms the basis of the appeal brought before this Court.[14] It is therefore more appropriate, for the reasons set out above, to grant the applicant leave to appeal directly from the decision of the High Court rather than direct access.[15]

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[10] *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para 31.

[11] *Mabaso* above n 5 at para 27, *De Freitas and Another v Society of Advocates of Natal (Natal Law Society Intervening)* 1998 (11) BCLR 1345 (CC) at para 21.

[12] See for example *S v John* 2003 (2) SACR 499 (C), *S v Mnisi en Ander* 1999 (1) SACR 189 (T), *S v Willemse* 1999 (1) SACR 450 (C), *S v Arendse and Another* 1999 (1) SACR 454 (C), *S v Mbuyane; S v Nkitle* 1999 (1) SACR 458 (T); 1999 (6) BCLR 699 (T) discussed below.

[13] See for example *Du Toit v Minister of Transport* CCT 22/04, 8 September 2005 as yet unreported, *Phillips* above n 8.

[14] See also section 167(3)(c) of the Constitution where it is stated that the Constitutional Court may make a final decision whether a matter is constitutional or is connected with a decision on a constitutional matter.

[15] See also *Mabaso* above n 5 at para 34.

*The central issues raised before this Court*

[12] The first question raised in this matter is whether the regional court in imposing a 15-year term of imprisonment did so in terms of section 51 of the Minimum Sentences Act or under its increased penal jurisdiction provided for in the amended section 92(1)(a) of the Act. Secondly, whether the regional court's retrospective application of the relevant legislation, resulting in the imposition of the 15-year sentence, violated the applicant's right to a fair trial protected under section 35(3)(n) of the Constitution, regardless of the provision under which sentence was imposed.

[13] In his written submissions, the applicant argued that the regional court had applied section 51 of the Minimum Sentences Act. He argued that at the time he committed the offences and at the time he tendered his plea, the penal jurisdiction of the regional court for murder was limited to 10 years. At the time of sentencing, however, the jurisdiction of the court had been increased to 15 years under the Minimum Sentences Act. He argued that in sentencing him, the regional court retrospectively applied the Minimum Sentences Act, thereby infringing his right to a fair trial. The infringement, he submitted, arose as a result of the retrospective imposition of the increased sentence, introduced during the course of his trial, a sentence which was more severe than that to which he had been exposed at the time of the offence and at the time of plea. The applicant contended that section 51 of the Minimum Sentences Act should not have been applied retrospectively.

[14] In oral argument, the applicant's contentions were expanded to include an alternative argument based on section 92(1)(a) of the Act. He stated that the mid-stream increase in the regional court's penal competence, applied retrospectively, adversely affected his substantive rights to a fair trial under section 35(3)(n) and his freedom of movement under section 12(1) of the Constitution. According to the general rule developed in *Cape Town Municipality v F. Robb & Co. Ltd.*,[16] and confirmed in *S v Mhlungu and Others*,[17] he argued, the amended penal competence of the regional court should have been applied prospectively and not retrospectively. Thus, the imposition of the new maximum penal competence of 15 years for murder rather than the previous maximum penal competence of 10 years violated his rights. He now urges this Court to reduce the 15-year term of imprisonment imposed by the regional court to the earlier maximum sentence of 10 years' imprisonment.

*Was section 51 of the Minimum Sentences Act or section 92(1)(a) of the Act applied by the regional court?*

[15] No specific mention was made by the regional court as to whether section 51 of the Minimum Sentences Act or section 92(1)(a) of the Act was applied in sentencing the applicant. The applicant conceded that the court may indeed not have applied section 51. He averred, however, that section 51 could have informed the court's decision.

[16] 1966 (4) SA 345 (C) at 351E-G.

[17] 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 at para 65.

[16] Regardless of whether section 51 or section 92(1)(a) had been applied, counsel for the applicant submitted, section 35(3) would be implicated to some degree, as once the applicant had pleaded, it would have been unfair for him to have been sentenced in a manner that amounted to "moving the goalposts". At the time of plea, he further averred, neither the applicant nor his legal representatives nor the magistrate for that matter, were under the impression that the applicant could have been sentenced to more than 10 years.

[17] There is indeed nothing on the record indicating that section 51 of the Minimum Sentences Act was applied. Nor was there any specific indication pointing to the fact that sentencing was in terms of section 92(1)(a) of the Act. As it turned out, both pieces of legislation were passed after the commission of the offence, during the course of the proceedings in the regional court.[18] The construction of section 51 is such that in circumstances like the present, a court is obliged to impose a minimum sentence unless the court is satisfied that there are "substantial and compelling circumstances" to justify a lesser sentence.[19] There is no mention at all in the judgment of "substantial and compelling circumstances". Furthermore, if the court had applied section 51, it would be expected that the applicant would have been warned of the effect on him of this drastic mid-stream legislative change. It is therefore unlikely that section 51 was applied. Considering that the application of section 92(1)(a) also exposed the applicant to a sentence more severe than that which

[18] The Minimum Sentences Act came into effect on 1 May 1998 and the applicant pleaded in the regional court on 27 May 1998. The increase in the regional court's penal jurisdiction under the amendment to the Act came into effect on 7 October 1998.

[19] Section 51(3)(a) of the Minimum Sentences Act. The constitutional validity of section 51 was discussed and confirmed in *S v Dodo* 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC).

had been applicable at the time of plea, it is also expected that the applicant would have been accordingly informed. Thus, the logical explanation for the silence of the regional court in this regard could be due to the fact that the application of section 92(1)(a) is generally regarded as routine procedure. It therefore seems more plausible, and I so hold, that in sentencing the applicant, the provisions of section 92(1)(a) rather than those of section 51 were applied. As will appear later in this judgment, I determine that this interpretation and application of section 92(1)(a) is flawed.

*Whether section 35(3)(n) of the Constitution is applicable*

[18] Section 35(3)(n) of the Constitution provides:

> "Every accused person has a right to a fair trial, which includes the right to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing".

When a punishment is prescribed by legislation for specific crimes, an increase in that punishment entitles an accused person to the benefit of the prescribed punishment applicable before the increase took effect if the change occurred after the commission of the crime but before sentencing. Therefore, the application of that increase can only be prospective.

[19] The applicant submitted that section 35(3)(n) of the Constitution was sufficiently broad to apply to the retrospective application of section 92(1)(a) of the Act. The respondent, however, argued that the wording of section 35(3)(n) of the

Constitution, by its use of the phrase "prescribed punishment for the offence", indicated that its application was limited to prescribed punishments and was not so broad as to extend its protection to increases in a court's penal jurisdiction. Section 35(3)(n), respondent averred, was aimed at ensuring that accused persons who committed the same offences on the same date but were convicted and sentenced on different dates, received equal treatment under the law.

[20] Unlike section 51 of the Minimum Sentences Act, the respondent stated, section 92(1)(a) did not prescribe sentences that a regional court must impose but merely delineated the bounds within which a regional court may impose a sentence it deemed to be appropriate. In the circumstances, it was competent for the regional court to impose a 15-year jail term, as the applicant's sentence was attributable only to the court's exercise of its discretion, not to an increase in the prescribed punishment for the offence.

[21] Section 35(3)(n) protects an accused person against the retrospective application of increased prescribed punishment, as in section 51 of the Minimum Sentences Act.[20] Whereas prescribed punishment is a peremptory measure relating to the applicable punishment for specific crimes, penal jurisdiction under section 92(1)(a) is a discretionary power with upper limits.[21] Penal jurisdiction is therefore not peremptory in nature and does not create a prescribed sentence as alleged by the

[20] See for example *Willemse* above n 12 at 452-4 where the retrospective application of section 51 was discussed.

[21] Section 276 of the Criminal Procedure Act 51 of 1977 provides a range of sentences that the regional court is competent to impose in the exercise of its discretion subject to the Criminal Procedure Act, other legislation, the common law and the Constitution.

applicant. To read "prescribed punishment" in section 35(3)(n) as inclusive of penal jurisdiction under section 92(1)(a) is to give it an unduly strained meaning. Section 35(3)(n) of the Constitution, for these reasons, does not provide protection against the retrospective application of section 92(1)(a) as the applicant has averred.

*Protection under a general fair trial right*

[22] As recognised by this Court in *S v Zuma and Others*,[22] the idea of a fair trial right extends beyond the specific grounds listed in section 35(3) of the Constitution. The Court stated:

> "The right to a fair trial conferred by [section 25(3) of the Interim Constitution] is broader than the list of specific rights set out in paras (a) to (j) of the subsection. It embraces 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."[23]

This is so in view of the open-ended nature of the list of rights protected in section 35(3).

[23] In *S v Dzukuda and Others; S v Tshilo*[24] Ackermann J, citing *Zuma* with approval held:

> "Elements of this comprehensive right are specified in paras (a) to (o) of [section 35(3)]. The words 'which include the right' preceding this listing indicate that such specification is not exhaustive of what the right to a fair trial comprises. It also does

[22] 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC).

[23] Id at para 16.

[24] 2000 (4) SA 1078 (CC); 2000 (11) BCLR 1252 (CC).

> not warrant the conclusion that the right to a fair trial consists merely of a number of discrete subrights, some of which have been specified in the subsection and others not. The right to a fair trial is a comprehensive and integrated right, the content of which will be established, on a case by case basis, as our constitutional jurisprudence on [section] 35(3) develops."[25]

With regard to sentencing, he further commented:

> ". . . a fair trial would also have to ensure that, in the process of the sentencing court being put in possession of the factors relevant to sentencing, the accused is not compelled to suffer the infringement of any other element of the fair trial right."[26]

[24] Although in a different context, Kriegler J, in *Sanderson v Attorney-General, Eastern Cape*,[27] also emphasised that in our constitutional democracy criminal trials had to be conducted in accordance with open-ended notions of fairness and justice and to avoid narrow approaches to legal interpretation.[28] In *S v Jaipal*,[29] Van der Westhuizen J furthermore stated:

> "The basic requirement that a trial must be fair is central to any civilised criminal justice system. It is essential in a society which recognises the rights to human dignity and to the freedom and security of the person, and is based on values such as the advancement of human rights and freedoms, the rule of law, democracy and openness."[30] (Footnotes omitted.)

[25] Id at para 9.

[26] Id at para 12.

[27] 1998 (2) SA 38 (CC); 1997 (12) BCLR 1675 (CC).

[28] Id at para 22.

[29] 2005 (4) SA 581 (CC); 2005 (5) BCLR 423 (CC).

[30] Id at para 26.

[25] The Constitution endorses this holistic approach to criminal justice in section 39(2), urging the promotion of the spirit, purport and objects of the Bill of Rights by courts when interpreting or developing law. Thus, having decided that the right against the retrospective application of section 92(1)(a) is not protected under section 35(3)(n) of the Constitution, I hold that the comprehensive or general right to a fair trial under section 35(3) is nevertheless applicable.

*The general presumption against retrospectivity*

[26] Generally, legislation is not to be interpreted to extinguish existing rights and obligations. This is so unless the statute provides otherwise or its language clearly shows such a meaning.[31] That legislation will affect only future matters and not take away existing rights is basic to notions of fairness and justice which are integral to the rule of law, a foundational principle of our Constitution. Also central to the rule of law is the principle of legality which requires that law must be certain, clear and stable.[32] Legislative enactments are intended to "give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed."[33]

[27] As Innes CJ reasoned in *Curtis*:[34]

[31] See for example *Curtis v Johannesburg Municipality* 1906 TS 308 at 311, *Katzenellenbogen Ltd v Mullin* 1977 (4) SA 855 (AD) at 884A.

[32] See Currie et al *The New Constitutional and Administrative Law* Vol 1 (Juta, Lansdowne 2001) 76.

[33] *Calder v Bull* 3 US 386 (1798) at 388 and 396; see also *Weaver v Graham, Governor of Florida* 450 US 24 (1981) at 30 where it was held (although in the context of prescribed punishment) that the critical issue was not an individual's right to less severe punishment but the lack of fair notice.

[34] Above n 31.

> "The general rule is that, in the absence of express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that they should if possible be so interpreted as not to take away rights actually vested at the time of their promulgation".[35]

The respondent acknowledged the presumption but urged that an increase in sentencing jurisdiction was merely a procedural change which did not trigger the presumption against retrospectivity, therefore, it did not apply to legislation that is procedural in nature. In support of this contention, the respondent cited *Curtis* where it was held:

> "Every law regulating legal procedure must, in the absence of express provision to the contrary, necessarily govern, so far as it is applicable, the procedure in every suit which comes to trial after the date of its promulgation . . . it must regulate all such procedure even though the cause of action arose before the date of promulgation, and even though the suit may have been then pending."[36]

Accordingly, the respondent argued, the presumption against retrospectivity in this case would be applicable only if the relevant legislation was substantive in nature, either creating a new form of punishment or imposing a new prescribed minimum sentence after the commission of the offence.

[28] The distinction between procedural and substantive provisions cannot always be decisive in the operation of the presumption against retrospectivity. As Marais JA recognised in *Minister of Public Works v Haffejee NO*:[37]

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[35] Id at 311.

[36] Id at 312.

[37] 1996 (3) SA 745 (A).

> "[I]t does not follow that once an amending statute is characterised as regulating procedure it will always be interpreted as having retrospective effect. It will depend upon its impact upon existing substantive rights and obligations. If those substantive rights and obligations remain unimpaired and capable of enforcement by the invocation of the newly prescribed procedure, there is no reason to conclude that the new procedure was not intended to apply. Aliter if they are not."[38]

[29] Although courts have recognised that section 92(1)(a) regulates procedure, decisions have diverged on the issue of whether the section falls within the presumption against retrospectivity.

[30] In *S v Ndevu*,[39] albeit dealing with other legislation, it was held that a statute pertaining to the penal jurisdiction of a magistrate's court is procedural and applies retrospectively. The court distinguished the legislation from that concerning prescribed sentences for specific crimes, which, it held, was substantive and therefore only prospectively applicable.

[31] In its examination of section 92(1)(a), the court in *Mnisi*[40] disagreed with *Ndevu*. Relying on *R v Sillas*,[41] the court in *Mnisi* held that a magistrate in a district court could not sentence accused persons under the increased penal jurisdiction where the offences had been committed before the legislation increasing the penal jurisdiction had come into force. A majority of the full bench of the Transvaal High

[38] Id at 753B–C.

[39] 1975 (3) SA 519 (O) at 520D–E; see also *S v Qualinga en Ander Sake* 1978 (4) SA 556 (NC) at 559A–B.

[40] Above n 12.

[41] 1959 (4) SA 305 (A).

Court held in *Mbuyane*[42] that the reliance in *Mnisi* on *Sillas* was mistaken in that *Sillas* dealt with prescribed punishments and not sentencing jurisdiction.[43]

[32] The Cape High Court in *Arendse*[44] agreed with *Ndevu* and held that the provisions of section 92(1)(a) could be applied by a district magistrate to sentence an accused even though the accused person had pleaded before the provisions came into force.[45] To reach this conclusion, the court relied on section 116 of the Criminal Procedure Act 51 of 1977 (CPA).[46] The section permits a district court, on conviction of an accused, to refer the accused for sentencing in the regional court which has a higher penal jurisdiction when the seriousness of the offence requires a sentence beyond the penal jurisdiction of the district court.[47] Accordingly, the court in *Arendse* found that there was no prejudice flowing from the application of the amended section 92(1)(a) of the Act because the accused had always been exposed to the maximum penal jurisdiction of the regional court due to the existence of section 116.[48]

[33] The same court in *John*[49] held, however, that in that case the accused did suffer prejudice and therefore section 92(1)(a) could not be applied retrospectively. Since

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[42] Above n 12.

[43] The minority judgment per Prinsloo AJ held that the decision in *Mnisi* was correct on the grounds that the constitutional prohibition on the retrospective application of prescribed punishments in section 35(3)(n) included the increase of sentencing jurisdiction, and that section 92(1)(a), properly construed, did not constitute a purely procedural provision.

[44] Above n 12.

[45] Id at 456E–G.

[46] Id at 456D.

[47] See also the provisions of section 114 of the CPA, which permit a similar referral mechanism for cases tried in magistrate's courts.

[48] *Arendse* above n 12 at 456D.

[49] Above n 12.

the regional court was not equipped with a procedural mechanism similar to section 116 of the CPA, the accused suffered substantive harm despite the procedural nature of section 92(1)(a). This substantive harm flowed from the absence of a referral mechanism similar to section 116. Such mechanisms are significant because they forewarn accused persons that they may be remitted to a higher court where a more severe sentence may be imposed on them.[50] There is, therefore, no element of surprise, causing uncertainty, which may be prejudicial to an accused person.

[34] This contradictory line of case law demonstrates the illusory distinction between substance and procedure insofar as the retrospective application of legislation is concerned. The fact that section 92(1)(a) regulates a court's procedure is not determinative of its retrospective application. The correct approach to this question was properly constructed in *John* where it was concluded that a procedural law may apply retrospectively unless the application would adversely affect an applicant's substantive rights.[51] In the words of Comrie J:

> "To hold that the *procedural* nature of the general increase in the trial court's penal jurisdiction *in res medias* afforded a valid basis to enable the trial magistrate to impose a higher sentence than she could competently have done when the appellant pleaded, would be to ignore the very material *substantive* consequence of the procedural amendment . . . . It would at the very least be unfair to the appellant."[52]

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[50] See id at para 26.

[51] Id at para 29. See also *Weaver* above n 33 at 30 where the United States Supreme Court also takes an approach that examines the effect, not just the form of law, to determine whether the law can be retrospectively applied. According to this approach, a legislative provision need not impair a vested right as such to fall foul of the prohibition on retrospective application; if the law assigns more disadvantageous penal consequences to an act than the law that was in place when the act occurred, the Supreme Court considers it irrelevant whether the legislative change affects any vested rights.

[52] *John* above n 12 at para 28.

In a constitutional democracy, if new legislation affects a person in a manner that is detrimental to his or her substantive rights, the application of that law will not escape scrutiny simply on the grounds that it is procedural in nature.[53]

*The effect of the retrospective application of section 92(1)(a)*

[35] Based on *Arendse*, the respondent submitted that even though section 92(1)(a) was applied retrospectively, the applicant did not suffer any prejudice in that in any event a sentence in excess of 15 years, including life imprisonment, could have been imposed if he had been arraigned in the High Court. The respondent further contended that section 123 of the CPA[54] which permits the prosecution to convert a part-heard matter in a regional court into a preparatory examination, with a view to having the matter tried in the High Court, could have been invoked. The circumstances of this case are, however, different from those in *Arendse*, as here, the prosecution did not adopt the referral strategy. For that reason the penal competence of the regional court was confined to the maximum penal jurisdiction at the time of plea.

[53] *Transnet Ltd v Ngcezula* 1995 (3) SA 538 (A) at 550B–C.

[54] Section 123(b) of the CPA provides:

> "If an attorney-general is of the opinion that it is necessary for the more effective administration of justice–
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> . . . .
>
> (b) that a trial in a magistrate's court or a regional court be converted into a preparatory examination, he may at any stage of the proceedings, but before sentence is passed, instruct that the trial be converted into a preparatory examination."

[36] The penal jurisdiction of a court is prescribed by legislation, the purpose of which is to enable courts to impose appropriate sentences for offences that fall within the jurisdiction of those courts. In this case, the respondent did not proffer any explanation why the applicant was not arraigned in the High Court. Therefore, the respondent cannot be heard to say that the seriousness of the crime had, from the beginning, exposed the applicant to a more severe sentence than that which could have been imposed had the applicant been arraigned before a court of higher penal jurisdiction. If available legislation is not invoked, and consequently, an accused person is not so referred where he or she could have been tried before a court with higher penal jurisdiction, the boundaries of the trial court's discretionary sentencing powers are clearly delineated. Failing to prosecute an offence in a court with appropriate penal jurisdiction that allows for a sentence proportionate to the offence limits the discretion of the trial court to impose the most competent sentence, thereby prohibiting the effective prosecution of crimes.

[37] This should not be understood to imply that an accused person has a vested right to a particular sentence. However, he or she does have a legally valid interest in the certainty that his or her sentence will not exceed the maximum penal jurisdiction of the trial court in terms of the applicable law at the time of plea. An accused could possibly plead guilty to expedite the trial, or for other reasons, based on the court's maximum penal jurisdiction, in which case it would be unfair, after conviction, to expose him or her to a higher sentence. Once an accused has pleaded, the constitutionally enshrined principle of the rule of law requires that certainty as to the

boundaries of the prosecution and the penal risk should be upheld consistently throughout the trial, for it is at the time of plea that the state and the accused join issue and the parameters of the trial are defined. To retrospectively apply a new law, such as section 92(1)(a), during the course of the trial, and thereby to expose an accused person to a more severe sentence, undermines the rule of law and violates an accused person's right to a fair trial under section 35(3) of the Constitution.

*Conclusion*

[38] It is important to emphasise that the unfairness to the applicant does not arise from his inability to devise trial strategies to escape moral blameworthiness. That is not the purpose of section 35(3). The unfairness derives from the uncertainty created by the retrospective application of the amended section 92(1)(a) during the course of the trial, which exposes the applicant to a sentence more severe than that which was competent when he tendered his plea. Whether the applicant deserved a lighter or heavier sentence is also not at issue in this matter. The crime committed is heinous, no doubt, and a conviction could have carried a life sentence had the applicant been arraigned before the High Court. The seriousness of the offence itself should have served as an indicator that the applicant should have been arraigned before the High Court. It may be that from the perspective of the community and in view of the facts of this case, the applicant's sentence of 15 years was too lenient and for that reason *not* unfair. However, the guarantee of the right to a fair trial applies in all criminal trials, notwithstanding the heinous nature of the offence.

[39] The unfairness of the trial is furthermore not assessed with regard to the proportionality between the seriousness of the offence and the severity of the sentence imposed. The unfairness is founded in the retrospective application of legislation, rendering the sentence imposed by the regional court unauthorised and a violation of the rule of law. That, in turn, violates the applicant's right to a fair trial under section 35(3) of the Constitution.

[40] Having decided this matter on the basis of the violation of the right to a fair trial under section 35(3) of the Constitution, it is not necessary to decide the question of the infringement of the applicant's right to freedom of movement under section 12(1).

*Remedy*

[41] In his submissions, the applicant urged this Court to exercise its discretion substituting the 15-year sentence of imprisonment imposed by the regional court with that of 10 years' imprisonment, being the applicable maximum penal jurisdiction of the regional court before the Act was amended. Ordinarily, this Court would have preferred to remit the matter to the trial court to give effect to this judgment. However, even if this Court did remit the matter for sentencing, in view of this judgment, the maximum sentence that the regional court would be competent to impose is 10 years' imprisonment. That said, considering the nature of the offence and the fact that the applicant has already served almost seven years of his sentence, it is unlikely that the regional court will impose a sentence of less than 10 years'

imprisonment. Furthermore, even if the respondent sought to invoke section 52 of the Minimum Sentences Act to remit the matter to the High Court for sentencing, that would be precisely the kind of retrospective application of legislation proscribed by this judgment. Moreover, replacing the 15-year sentence of imprisonment with that of 10 years' imprisonment, merely entails substituting one maximum sentence with another. As a result, the 15-year sentence of imprisonment imposed by the regional court is substituted with that of 10 years' imprisonment, being the equivalent of the applicable maximum penal jurisdiction of the regional court prior to 7 October 1998 when section 92(1)(a) came into operation. Therefore, under the circumstances of this case and in the interests of justice, it is necessary for this Court to be practical and itself effect the replacement of sentence.

[42] Counsel for the applicant, Mr Bava, appointed by the Society of Advocates (Witwatersrand Local Division) acted pro bono on behalf of the applicant. This Court is indebted to him and the Society.

*Order*

[43] Central to considerations of the interests of justice in a particular case is that a successful applicant should obtain the relief she or he seeks.[55] There will have been others in a similar situation to Mr Veldman. Yet it would not be just and equitable in this judgment to seek to deal with the sentence of any other person, particularly as we have not made any finding of constitutional invalidity which can be applied to those

[55] *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at para 32.

similarly situated. The only order that could apply the reasoning of this judgment to others similarly situated would be a general substitution of sentences. Sentencing is an important and subtle task that requires a consideration of the circumstances of an accused and his or her offence. Accordingly it will be rare that a general substitution of sentences of imprisonment will be just and equitable. The case differs from the case where the execution of the sentence itself has become unconstitutional as in the death penalty case[56] and the corporal punishment case.[57] There is another consideration which renders it inappropriate to make an order which would substitute the sentences of those similarly situated to Mr Veldman. We do not know the number or whereabouts of those people who would be affected by a general order and such an order might cause great dislocation and uncertainty to the administration of prisons, and in particular to the parole system.[58] In my view, for this reason too it should be avoided. These factors make it plain that those who wish to rely on the reasoning in this judgment to have their sentences diminished will have to approach a competent court for relief.

[44] In the result, the following order is made:

1. The application for condonation is granted.
2. The application for leave to appeal is granted and the appeal succeeds.

[56] *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC).

[57] *Christian Education of SA v Minister of Education* 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC).

[58] *Bhulwana* above n 55.

3. The sentence of 15 years' imprisonment imposed by the regional court on the applicant for murder is set aside and replaced with that of 10 years' imprisonment.
4. There is no order as to costs.

Moseneke DCJ, Sachs J, Skweyiya J and Van der Westhuizen J concur in the judgment of Mokgoro J.

O'REGAN J:

[45] I have had the opportunity of reading the judgment written in this matter by my colleague, Mokgoro J. I also reach the same conclusion as she does, but consider that the matter needs to be approached in a manner different from that which she adopts. I commence by observing that I agree with her that in this case the regional magistrate sentenced the applicant on the basis of the penal jurisdiction conferred on regional courts by section 92(1)(a) of the Magistrates' Courts Act, 32 of 1944, as amended by the Magistrates Amendment Act, 66 of 1998, and not on the basis of section 51 of the

Criminal Law Amendment Act, 105 of 1997.[1] My reason for this conclusion is

[1] Section 51 of the Criminal Law Amendment Act:

"Minimum sentences for certain serious offences.–(1) Notwithstanding any other law but subject to subsections (3) and (6), a High Court shall–

(a) if it has convicted a person of an offence referred to in Part I of Schedule 2; or

(b) if the matter has been referred to it under section 52(1) for sentence after the person concerned has been convicted of an offence referred to in Part I of Schedule 2,

sentence the person to imprisonment for life.

(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court, including a High Court to which a matter has been referred under section 52(1) for sentence, shall in respect of a person who has been convicted of an offence referred to in–

(a) Part II of Schedule 2, sentence the person, in the case of–
  (i) a first offender, to imprisonment for a period not less than 15 years;
  (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and
  (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;

(b) Part III of Schedule 2, sentence the person, 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; and
  (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years; and

(c) Part IV of Schedule 2, sentence the person, in the case of–
  (i) a first offender, to imprisonment for a period not less than 5 years;
  (ii) a second offender of any such offence, to imprisonment for a period not less than 7 years; and
  (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 10 years:

Provided that the maximum sentence that a regional court may impose in terms of this subsection shall not be more than five years longer than the minimum sentence that it may impose in terms of this subsection.

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

(b) If any court referred to in subsection (1) or (2) decides to impose a sentence prescribed in those subsections upon a child who was 16 years of age or older, but under the age of 18 years, at the time of the commission of the act which constituted the offence in question, it shall enter the reasons for its decision on the record of the proceedings.

(4) Any sentence contemplated in this section shall be calculated from the date of sentence.

(5) The operation of a sentence imposed in terms of this section shall not be suspended as contemplated in section 297(4) of the Criminal Procedure Act, 1977 (Act 51 of 1977).

(6) The provisions of this section shall not be applicable in respect of a child who was under the age of 16 years at the time of the commission of the act which constituted the offence in question.

(7) If in the application of this section the age of a child is placed in issue, the onus shall be on the State to prove the age of the child beyond reasonable doubt.

(8) For the purposes of this section and Schedule 2, 'law enforcement officer' includes–

(a) a member of the National Intelligence Agency or the South African Secret Service established under the Intelligence Services Act, 1994 (Act 38 of 1994); and

simple. Section 51 of the Criminal Law Amendment Act requires a judicial officer to consider before imposing a minimum sentence, whether substantial and compelling reasons exist to impose a different sentence. It is quite clear from reading the judgment of the regional magistrate in this matter that he did not consider the question whether substantial and compelling reasons existed to impose a sentence different from the prescribed minimum sentence. Nor does the regional magistrate anywhere mention that he is imposing a minimum sentence. Accordingly, it must be concluded from the terms of his judgment that the sentence was not imposed in terms of section 51 of the Criminal Law Amendment Act but rather in terms of section 92(1)(a) of the Magistrates' Courts Act.

[46] In my view, the question that needs to be answered in this case is whether, properly and constitutionally interpreted, section 92(1)(a) of the Magistrates' Courts Act authorised the regional magistrate to impose a sentence of 15 years in this case given that the crime had been committed, and the accused had pleaded, before the legislation introducing section 92(1)(a) came into force. The proper interpretation of the section needs to be undertaken in the light of the provisions of the Constitution and particularly section 35(3) – the right of accused persons to a fair trial. This question however is not to be answered by considering whether Mr Veldman had an unfair trial in this case. It is in this respect that this judgment differs from that of my colleague.

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(b) a correctional official of the Department of Correctional Services or a person authorised under the Correctional Services Act, 1998 (Act 111 of 1998).

(9) The amounts mentioned in respect of the offences referred to in PART II of Schedule 2 to the Act, may be adjusted by the Minister from time to time by notice in the Gazette."

[47] Section 92(1)(a) reads as follows:

> "Save as otherwise in this Act or in any other law specially provided, the court, whenever it may punish a person for an offence–
>
> (a) by imprisonment, may impose a sentence of imprisonment for a period not exceeding three years, where the court is not the court of a regional division, or not exceeding 15 years, where the court is the court of a regional division".

This provision was introduced into the Act by the Magistrates Amendment Act and was brought into operation by proclamation on 7 October 1998.

[48] The ordinary rule of our law is that statutes operate prospectively only, as Innes CJ reasoned in *Curtis v Johannesburg Municipality* 1906 TS 308 at 311:

> "The general rule is that, in the absence of express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that they should if possible be so interpreted as not to take away rights actually vested at the time of their promulgation. The legislature is virtually omnipotent, but the courts will not find that it intended so inequitable a result as the destruction of existing rights unless forced to do so by language so clear as to admit of no other conclusion."

Courts have often relied on a distinction between substance and procedure and stated that only rules which affect procedural matters will operate retrospectively, but rules which affect substantive issues will operate prospectively only.[2]

[2] See for example *Curtis* at 312 (per Innes CJ); at 318 (per Smith J) and at 324 (per Mason J).

[49] The distinction between substance and procedure, however, is not always easy to draw, as courts have often observed.[3] Some procedural provisions can have a fatal effect on the ability to launch a cause of action or to raise a defence and so have a material substantive effect. In these circumstances, courts have been slow to take the view that the statute should operate with immediate effect on all pending claims. As Marais JA commented in *Minister of Public Works v Haffejee NO* 1996 (3) SA 745 (A) at 753:

> "In other words, it does not follow that once an amending statute is characterised as regulating procedure it will always be interpreted as having retrospective effect. It will depend upon its impact upon existing substantive rights and obligations. If those substantive rights and obligations remain unimpaired and capable of enforcement by the invocation of the newly prescribed procedure, there is no reason to conclude that the new procedure was not intended to apply."[4]

[50] The issue of retrospectivity must therefore not be determined by sole regard to whether the provision in question is procedural or not. All the more so in our constitutional order. The Constitution, and the Bill of Rights in particular, provides a framework in terms of which legislative provisions must be interpreted. Section 92 must now be construed in the light of them. In each case, the question is a matter of interpretation. And that is the question we have to consider in relation to section 92(1)(a) – does it, properly construed, have application to proceedings that were

[3] See for example *Yew Bon Tew v Kenderaan Bas Mara* [1982] 3 All ER 833 (PC) at 836b–d.

[4] See also *Minister of Safety and Security v Molutsi and Another* 1996 (4) SA 72 (A) at 91A–D.

pending at the time that it came into force? This exercise of construction must, of course, seek to "promote the spirit, purport and object of the Bill of Rights."[5]

[51] Before the Constitution came into force, there were at least two dicta from our courts asserting that the increase in the penal jurisdiction of a magistrate's court was purely procedural and came into force immediately.[6] In both cases, this was contrasted with provisions that affected the prescribed sentences applicable to particular offences and which were held not to affect crimes that had been committed before these provisions had come into force.

[52] There can be no doubt that there is a constitutionally significant difference between provisions which regulate prescribed sentences, and provisions which establish the general sentencing jurisdiction of a particular court. Under our constitutional order, retrospective operation of the former is prohibited by section 35(3)(n).[7] The question that arises in this case is whether a provision of the latter sort, properly construed in the light of the Constitution, can operate in proceedings that have already commenced when the provisions had come into force.

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[5] Section 39(2) of the Constitution:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[6] See *S v Ndevu* 1975 (3) SA 519 (O) at 520D–E, *S v Qualinga en Ander Sake* 1978 (4) SA 556 (NC) at 559A–B.

[7] Section 35(3)(n):

> "Every accused person has a right to a fair trial, which includes the right to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing".

[53] Since the Constitution came into force, this question has been considered with specific reference to section 92(1)(a) in several decisions of the High Court. The section has been considered in two judgments of the Pretoria High Court. In the first such decision, *S v Mnisi en Ander* 1999 (1) SACR 189 (T), the court relying on *R v Sillas* 1959 (4) SA 305 (A), held that a magistrate in a district court could not sentence accused persons under the increased penal jurisdiction where the offences had been committed before the legislation increasing the penal jurisdiction had come into force.

[54] In a subsequent full bench decision of the Pretoria High Court, *S v Mbuyane; S v Nkitle* 1999 (1) SACR 458 (T), a majority of the court held that the decision in *Mnisi* was wrong.[8] In particular, the majority correctly held that the reliance upon the decision of *R v Sillas* was mistaken because that decision dealt with prescribed punishments rather than the question of sentencing jurisdiction.[9] A minority held that the decision in *Mnisi* was correct but for reasons different to those given in *Mnisi*. Prinsloo AJ held that the constitutional prohibition on the retrospective application of prescribed punishments in section 35(3)(n) included the increase of sentencing jurisdiction[10] and that section 92(1)(a), properly construed in the light of section 35 of the Constitution, did not constitute a purely procedural provision capable of retrospective application.[11]

[8] At 467e.

[9] At 462j–463b.

[10] At 468i.

[11] At 470h–471g.

[55] In the Cape, too, there have been two decisions dealing with the question. In *S v Arendse and Another* 1999 (1) SACR 454 (C), the court held that the provisions of section 92(1)(a) could be used by a district magistrate to sentence an accused even where the accused had committed the offence and pleaded before the provisions came into operation.

[56] On the other hand, in *S v John* 2003 (2) SACR 499 (C), the court held that the section could not be used by a regional court magistrate to impose a higher sentence on an accused where the accused had pleaded before the new section came into operation. In that case, the court distinguished the decision in *Arendse*'s case on the basis that *Arendse*'s case dealt with the district court whereas *John*'s case, as does this one, dealt with the regional court. The court observed that section 116 of the Criminal Procedure Act permits a district magistrate who has convicted an accused, and considers the offence to merit a punishment in excess of the district court's sentencing jurisdiction, to commit the accused to the regional court for sentence.[12] There is no

[12] Section 116:

> "(1) If a magistrate's court, after conviction following on a plea of not guilty but before sentence, is of the opinion–
>
> (a) that the offence in respect of which the accused has been convicted is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of a magistrate's court;
>
> (b) that the previous convictions of the accused are such that the offence in respect of which the accused has been convicted merits punishment in excess of the jurisdiction of a magistrate's court; or
>
> (c) that the accused is a person referred to in section 286A(1),
>
> the court shall stop the proceedings and commit the accused for sentence by a regional court having jurisdiction.
>
> (2) The record of the proceedings in the magistrate's court shall upon proof thereof in the regional court be received by the regional court and form part of the record of that court.
>
> (3) (a) The regional court shall, after considering the record of the proceedings in the magistrate's court, sentence the accused, and the judgment of the magistrate's court shall stand for this purpose and be sufficient for the regional court to pass any competent sentence: Provided that if the regional magistrate is of the opinion that the proceedings are not in accordance with

directly equivalent provision which permits the regional court to commit an accused for sentence to the High Court.[13] This distinction, the court held, meant that a regional court was not entitled to rely on section 92(1)(a) in matters in which an accused had pleaded before the section came into force.

[57] The court in *John* concluded that even though an increase in sentencing jurisdiction did not fall within the constitutional prohibition contained in section 35(3)(n), it would nevertheless be unfair to interpret the section to permit an accused

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> justice or that doubt exists whether the proceedings are in accordance with justice he or she may request the presiding officer in the magistrate's court to provide him or her with the reasons for the conviction and if, after considering such reasons, the regional magistrate is satisfied that the proceedings are in accordance with justice he or she may sentence the accused, but if he or she remains of the opinion that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice he or she shall, without sentencing the accused, record the reasons for his or her opinion and transmit such reasons and the reasons of the presiding officer of the magistrate's court, together with the record of the proceedings in the magistrate's court, to the registrar of the provincial division having jurisdiction, and such registrar shall, as soon as possible, lay the same in chambers before a judge who shall have the same powers in respect of such proceedings as if the record thereof had been laid before him or her under section 303.
>
> (b) If a regional magistrate acts under the proviso to paragraph (a), he shall inform the accused accordingly and postpone the case to some future date pending the outcome of the review proceedings, and, if the accused is in custody, the regional magistrate may make such order with regard to the detention or release of the accused as he may deem fit."

See also the provisions of section 114 of the Criminal Procedure Act.

[13] But see sections 50 and 51 of the Criminal Law Amendment Act. See also section 123 of the Criminal Procedure Act:

> "If an attorney-general is of the opinion that it is necessary for the more effective administration of justice–
>
> (a) that a trial in a superior court be preceded by a preparatory examination in a magistrate's court into the allegations against the accused, he may, where he does not follow the procedure under section 119, or, where he does follow it and the proceedings are adjourned under section 121 (3) or 122 (1) pending the decision of the attorney-general, instruct that a preparatory examination be instituted against the accused;
>
> (b) that a trial in a magistrate's court or a regional court be converted into a preparatory examination, he may at any stage of the proceedings, but before sentence is passed, instruct that the trial be converted into a preparatory examination."

to be subjected to a higher sentence than could have been imposed by that court at the time of plea.

[58] An increase in sentencing jurisdiction does not fall within the prohibition contained in section 35(3)(n) of the Constitution because it does not constitute a "prescribed punishment". In this case, for example, the accused could clearly have been arraigned in the High Court which would have been able to sentence him to life imprisonment for the murder that he had committed. At the time that the accused committed the crime, therefore, the sentence that could have been imposed for the crime was any period of imprisonment up to life imprisonment. There can be no question that section 92(1)(a) increased the prescribed punishment that could be imposed for the crime concerned.

[59] On the other hand, if section 92(1)(a) is interpreted to permit a court to use its extended sentencing jurisdiction to sentence an accused who had pleaded before the legislation came into effect, it might result in some cases in procedural unfairness to the accused. In particular, an accused who pleads guilty on the basis of the maximum sentencing jurisdiction of the regional court and in the absence of any legal provision permitting the regional court to commit that accused to the High Court for sentencing, could have found that he or she was subjected to a considerably higher sentence than expected given the increase in the court's sentencing jurisdiction.

[60] It is true that an accused does not have a vested right to a sentence no higher than the maximum sentencing jurisdiction of the court at plea, as Comrie J held in the case of *John* at paragraph 30. Nevertheless, there is an element of fairness which should prevent the rules upon which the trial proceeds being varied once the accused has pleaded, particularly where the effect of that variation is to the substantive disadvantage of the accused to the extent that he or she becomes liable for a period of imprisonment half as long again.

[61] There is a heightened expectation of procedural fairness in criminal trials. Our Constitution recognises this by entrenching the right of an accused to a fair trial and provides a non-exhaustive list of the requirements of a fair trial.[14] An important aspect of that right, it seems to me, is that the process to be followed should be

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[14] Section 35(3):

> "Every accused person has a right to a fair trial, which includes the right–
>
> (a) to be informed of the charge with sufficient detail to answer it;
> (b) to have adequate time and facilities to prepare a defence;
> (c) to a public trial before an ordinary court;
> (d) to have their trial begin and conclude without unreasonable delay;
> (e) to be present when being tried;
> (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
> (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
> (h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
> (i) to adduce and challenge evidence;
> (j) not to be compelled to give self-incriminating evidence;
> (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
> (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
> (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
> (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
> (o) of appeal to, or review by, a higher court."

regulated by law and should not be changed to the detriment of the accused during the course of the trial. The accused has an expectation that the law will not alter and that decisions he or she makes concerning the conduct of the trial may be made on the reliance that the law will not alter in a manner which will be disadvantageous to the accused during the course of the trial.

[62] This principle, of course, is based on the rule of law, which is a foundational value of our Constitution.[15] Law should be certain and accessible. Changing the rules midway through a criminal trial defeats that certainty and accessibility in a manner which may be unfair to an accused.

[63] For similar reasons, English courts have regularly held that it is an abuse of process for a judge to make a statement promising an accused a non-custodial sentence, and then, to retract and impose a custodial sentence. They have held that to do so constitutes an abuse of process.[16]

[64] If one applies these constitutional considerations to an interpretation of section 92(1)(a), it becomes clear that the section should not be interpreted to affect criminal

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[15] See section 1 of the Constitution:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
> (b) Non-racialism and non-sexism.
> (c) Supremacy of the constitution and the rule of law.
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

[16] See for example *R v Gillam* (1980) 2 Cr App R (S) 267 at 269.

trials that commenced before it came into force. Once accused persons have pleaded, they are entitled to know that the rules of the trial will not be altered to prejudice them materially either in the conduct of their case or in some other substantive manner. Were section 92(1)(a) to be read to permit an accused who had pleaded to be subjected to the greater sentencing jurisdiction of the court, that may well wreak unfairness in individual cases. It accordingly can and should be interpreted to avoid such a result.

[65] I conclude therefore that section 92(1)(a) of the Act properly interpreted did not authorise the magistrate in this case to impose a sentence of more than ten years upon the accused because the accused had pleaded before 7 October 1998 when the Act came into force. I emphasise that the individual conduct of the trial of this accused, however, cannot affect the interpretation of section 92(1)(a). Its meaning must be established for all trials on an objective basis in the light of the normative principles of our Constitution. In my view, as appears from the discussion above, an objective and principled interpretation of section 92(1)(a) does not permit the extended penal jurisdiction to be employed in cases where an accused pleaded before the law extending the court's penal jurisdiction came into force.

Langa CJ, Ngcobo J and Yacoob J concur in the judgment of O'Regan J.

NGCOBO J:

[66] I concur in the judgment prepared by O'Regan J. I do so for substantially the reasons she advances. However, I write separately to emphasise the proper approach to constitutional interpretation.

[67] This case concerns the proper interpretation of section 92(1)(a) of the Magistrates' Courts Act, 32 of 1944 as amended by the Magistrates Amendment Act, 66 of 1998. In particular, the question presented is whether the provisions of section 92(1)(a) should be construed to apply to criminal trials which commenced prior to its coming into operation. The statute itself is silent on the matter. For convenience, section 92(1)(a) provides:

> "(1) Save as otherwise in this Act or in any other law specially provided, the court, whenever it may punish a person for an offence—
>
> (a) by imprisonment, may impose a sentence of imprisonment for a period not exceeding three years, where the court is not the court of a regional division, or not exceeding 15 years, where the court is the court of a regional division."

[68] Under common law there is a presumption that statutes apply to future matters only. This presumption was premised on the assumption that the legislature does not intend to take away existing rights, including fundamental rights. This presumption developed into a rule of statutory construction and came to be referred to as the

presumption against statutory retrospectivity. And it became an important tool used by the courts to protect fundamental rights from interference by the legislature. However, this presumption could not be invoked where it is clear from the unambiguous language of the statute that the legislature intended to interfere with the fundamental rights. This general rule was expressed as follows by Innes CJ in *Curtis v Johannesburg Municipality*:

> "The general rule is that, in the absence of express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that they should if possible be so interpreted as not to take away rights actually vested at the time of their promulgation. The legislature is virtually omnipotent, but the courts will not find that it intended so inequitable a result as the destruction of existing rights unless forced to do so by language so clear as to admit of no other conclusion."[1]

[69] However an exception to this general rule was made in the case of purely procedural statutes. These statutes were considered to operate retrospectively. The rationale for this was that "no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed."[2] In this context the distinction between statutes that regulated procedure and those that did not, assumed particular importance in determining whether a particular statute operates prospectively or retrospectively. However, as the Appellate Division case law demonstrates, and

[1] *Curtis v Johannesburg Municipality* 1906 TS 308 at 311.

[2] *Yew Bon Tew v Kenderaan Bas Mara* [1982] 3 All ER 833 (PC) at 836b-d.

O'Regan J observes, the distinction between procedural and non-procedural statutes is not always easy to draw, and the distinction was thus not always helpful.[3]

[70] In construing statutes, courts applied the constitutional principles of the common law, the supremacy of Parliament and the rule of law. And as this Court observed in the *Pharmaceutical* case, the rule of law "had a substantive as well as a procedural content that gave rise to what courts referred to as fundamental rights".[4] The rule of law embraces, among other things, the requirement that laws be "ascertainable in advance so as to be predictable and not retrospective in its operation".[5] In order to protect the existing rights including the fundamental rights, courts developed a rule of interpretation that requires statutes "if possible [to] be so interpreted [so] as not to take away rights actually vested at the time".[6] And this gave rise to the presumption against statutory retrospectivity. But as was observed in the *Pharmaceutical* case, "because of the countervailing constitutional principle of the supremacy of Parliament, the fundamental rights could be, and frequently were, eroded or excluded by legislation."[7]

[71] Under common law therefore statutes were, as a general matter, to be construed consistently with fundamental rights which, among other rights, embraced principles

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[3] *Minister of Public Works v Haffejee NO* 1996 (3) SA 745 (A) at 752B-753C, *Transnet Ltd v Ngcezula* 1995 (3) SA 538 (A) at 549C-D, *Yew Bon Tew* above n 2 at 836b-d and 839d-f.

[4] *Pharmaceutical Manufacturers Association of SA and Another: In re ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 37.

[5] De Smith, Woolf and Jowell *Judicial Review of Administrative Action* 5 ed (Sweet & Maxwell, London 1995) at 14-15, cited with approval in *Pharmaceutical* id at para 39.

[6] *Curtis* above n 1 at 311.

[7] *Pharmaceutical* above n 4 at para 37.

of justice and equity and the "notions of basic fairness and justice."[8] These fundamental rights were part and parcel of the constitutional principles of the common law. And statutes therefore had to be construed consistently with the common law unless there was an express provision to the contrary.

[72] The advent of our constitutional democracy has changed all of that. There has been a fundamental change. The principle of parliamentary supremacy has been replaced by the supremacy of the Constitution.[9] The fundamental rights are now guaranteed and protected in the Bill of Rights.[10] "Courts no longer have to claim space and push boundaries"[11] to find means to protect fundamental rights. That power is vested in them by the Constitution.[12] The Constitution instructs the court on how to construe legislation. It enjoins them to interpret legislation in a manner that will "promote the spirit, purport and objects of the Bill of Rights."[13]

[73] The proper approach to the construction of section 92(1)(a) therefore is to construe it in the light of rights of the Bill of Rights, in particular, the right to a fair trial guaranteed by section 35(3) of the Constitution.

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[8] *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC).

[9] Section 2 of the Constitution.

[10] Chapter 2 of the Constitution.

[11] *Pharmaceutical* above n 4 at para 45.

[12] Sections 165(1) and (2) provide:

> "(1) The judicial authority of the Republic is vested in the courts.
> (2) The courts are independent and subject only to the Constitution and the law; which they must apply impartially and without fear, favour or prejudice."

[13] Section 39(2) of the Constitution.

[74] Section 39(2) of the Constitution enjoins us to construe the provisions of section 92(1)(a) in a manner that will "promote the spirit, purport and objects of the Bill of Rights." Section 39(2) of the Constitution provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."[14]

The "spirit, purport and objects of the Bill of Rights" is to be gleaned from the rights guaranteed in the Bill of Rights which is "the cornerstone" of our constitutional democracy. Among the rights guaranteed in the Bill of Rights is the right to a fair trial which is guaranteed in section 35(3). That subsection provides:

> "(3) Every accused person has a right to a fair trial, which includes the right—
>
> (a) to be informed of the charge with sufficient detail to answer it;
>
> (b) to have adequate time and facilities to prepare a defence;
>
> (c) to a public trial before an ordinary court;
>
> (d) to have their trial begin and conclude without unreasonable delay;
>
> (e) to be present when being tried;
>
> (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
>
> (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
>
> (h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
>
> (i) to adduce and challenge evidence;

[14] *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 4 BCLR 449 (CC) at para 59, *S v Dzukuda and Others; S v Tshilo* 2000 (4) SA 1078 (CC); 2000 (11) BCLR 1252 (CC) at para 37(a), and *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at paras 21-26.

(j) not to be compelled to give self-incriminating evidence;

(k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;

(l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;

(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;

(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(o) of appeal to, or review by, a higher court."

[75] The right to a fair trial guaranteed by section 35(3) is broader than the list of the rights set out in paragraphs (a) to (o).[15] "It embraces a concept of substantive fairness."[16] Section 35(3) requires that criminal trials be conducted in accordance with "the notions of basic fairness and justice."[17] The list of rights set out in paragraphs (a) to (o) in section 35(3) provides a guide as to what is considered to be offensive to the "notions of basic fairness and justice." In relation to a prescribed minimum sentence, section 35(3)(n) provides that an accused person is entitled "to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing".

[15] See *Zuma* above n 8 at para 16.

[16] Id.

[17] Id.

[76] What section 35(3)(n) conveys is that it is offensive to a right to a fair trial to subject an accused person to a more severe punishment that was not in operation at the time when the accused committed the offence. Thus where the prescribed minimum sentence has changed between the date of the commission of the offence and the date of the coming into operation of the new prescribed punishment, basic fairness and justice require that the accused be sentenced in accordance with the less severe of the two punishments.

[77] It seems to me that it must be equally offensive to the "notions of basic fairness and justice" to subject an accused person to a more severe sentence which was not in force at the time when the accused pleaded to a criminal charge. To construe section 92(1)(a) as applying to criminal trials that commenced before it came into operation, does not, in my view, "promote the spirit, purport and objects of the Bill of Rights." It follows therefore that the provisions of section 92(1)(a) must be construed as applying to criminal trials which commenced after section 92(1)(a) came into operation.

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