CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 120/11
[2012] ZACC 23

In the matter between:

JACOBUS BOGAARDS Applicant

and

THE STATE Respondent

Heard on : 3 May 2012

Decided on : 28 September 2012

JUDGMENT

KHAMPEPE J (Yacoob ADCJ, Cameron J, Froneman J, Skweyiya J and Van der Westhuizen J concurring):

Introduction

[1] This is an application for leave to appeal against a decision of the Supreme Court of Appeal.[1] The applicant was convicted and sentenced to an effective three years' imprisonment under the Protection of Constitutional Democracy Against Terrorist and Related Activities Act (Terrorism Act)[2] in the Modimolle Regional Magistrates' Court (trial court). The conviction and sentence were confirmed by the North Gauteng High Court, Pretoria (High Court). The Supreme Court of Appeal set aside the conviction and sentence under the Terrorism Act and instead convicted the applicant on the alternative charge, under the Correctional Services Act (CSA),[3] and imposed a heavier sentence of five years' imprisonment. This case raises important questions about the proper interpretation of the CSA, the right to a fair trial in terms of section 35(3) of the Constitution and the procedure that should be adopted by appellate courts when imposing sentences heavier than those imposed by trial courts.

Background

[2] During 2002, a number of people – including Mr Herman Van Rooyen (Mr Van Rooyen) and Mr Jan Rudolph Gouws (Mr Gouws) (the escapees) – were arrested on several charges. These charges included terrorism, murder and sabotage under

[1] *Bogaards v S* [2011] ZASCA 196; [2012] 1 All SA 376 (SCA) (Supreme Court of Appeal judgment).

[2] 33 of 2004.

[3] 111 of 1998.

section 54(1) of the Internal Security Act.[4] They were tried in what became known as the "Boeremag trial". During the course of the trial, the escapees were detained at the Central Prison, Pretoria.

[3] On 3 May 2006, the trial adjourned at 12h45, at which time the escapees were present in the courtroom. However, when the trial resumed at 14h00, it was discovered that they were missing and despite a search of the court building and the setting up of road blocks, they could not be found.

[4] A countrywide search was conducted. Media statements were issued, photographs of the escapees were released to the media, a helpline was set up, Interpol was contacted for assistance, and the escapees' bank accounts were monitored.

[5] The applicant and his wife live on a farm in the Modimolle area. On 22 October 2006, police officers searched their property for the escapees. Despite conducting a thorough search of the house and surrounding buildings, the police could neither find them nor detect any trace of their presence. Before departing, the police warned the applicant that he should not allow the escapees to stay on his farm and the applicant denied any knowledge of them.

[4] 74 of 1982.

[6] On 13 January 2007, the police searched the applicant's farm. They found a number of items that indicated that the escapees had been present on the farm, including a motorbike registered to Mr Van Rooyen and a tent site, 500 metres from the farmhouse, containing clothes, a firearm and other equipment belonging to the escapees. The applicant and his wife were arrested.[5]

[7] On 12 July 2007, the applicant and his wife appeared in the trial court. They were charged with contravening sections 11 (count 1) and 12(1)(b) (count 2) of the Terrorism Act.[6] In the alternative, they were charged with contravening section 115(e)

[5] On 20 January 2007, the escapees were arrested in Centurion. They were found in possession of two R1 assault rifles, ammunition, cell phones, maps and GPS equipment.

[6] Sections 11 and 12 of the Terrorism Act provide:

> "**Offences relating to harbouring or concealment of persons committing specified offences**
>
> 11 Any person who harbours or conceals any person, whom he or she knows, or ought reasonably to have known or suspected, to be a person who has committed a specified offence, as referred to in paragraph (a) of the definition of 'specified offence', or who is likely to commit such an offence, is guilty of an offence.
>
> **Duty to report presence of person suspected of intending to commit or having committed an offence and failure to so report**
>
> 12(1) Any person who—
>
> (a) has reason to suspect that any other person intends to commit or has committed an offence referred to in this Chapter; or
>
> (b) is aware of the presence at any place of any other person who is so suspected of intending to commit or having committed such an offence,
>
> must report as soon as reasonably possible such suspicion or presence, as the case may be, or cause such suspicion or presence to be reported to any police official.
>
> (2) Any person who fails to comply with the provisions of subsection (1)(a) or (b), is guilty of an offence."

In the case of a conviction under section 11, section 18(1)(b)(i) of the Terrorism Act provides that a High Court or a Regional Court may impose a fine or imprisonment for a period not exceeding 15 years. If an accused is convicted under section 12(2), section 18(1)(e)(i) provides that the sentence to be imposed by a High Court or a Regional Court is a fine or imprisonment for a period not exceeding 5 years.

of the CSA.[7]

[8] The trial court convicted the applicant and his wife on counts 1 and 2. On count 1, the applicant was sentenced to five years' imprisonment, two years of which were suspended on certain conditions. On count 2, the applicant was sentenced to one year imprisonment, which was ordered to run concurrently with the sentence imposed in respect of count 1.[8] In other words, the applicant was sentenced to an effective custodial sentence of three years.

[9] On appeal, the High Court set aside the conviction and sentence of the applicant's wife, but dismissed the applicant's appeal and confirmed the conviction and sentence imposed by the trial court.[9] Aggrieved by this decision, the applicant applied for, and was granted, leave to appeal to the Supreme Court of Appeal. The State did not cross-appeal against the sentence.

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[7] Section 115 of the CSA provided, in relevant part:

> "Any person who—
>
> (e) harbours or conceals or assists in harbouring or concealing an escaped prisoner,
>
> is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding ten years or to such imprisonment without the option of a fine or both."

On 13 January 2007, when the applicant's farm was searched, section 1 of the CSA defined "prisoner" as "any person, whether convicted or not, who is detained in custody in any prison or who is being transferred in custody or is en route from one prison to another prison". The CSA has subsequently been amended by way of the Correctional Services Amendment Act 25 of 2008 and the Correctional Matters Amendment Act 5 of 2011 which substitute "inmates" for "prisoners". For the purposes of deciding this case, I will only refer to the unamended CSA.

[8] Supreme Court of Appeal judgment above n 1 at para 28.

[9] *Bogaards & Another v S* [2010] Case No A 531/09, 11 February 2010 (unreported) (High Court judgment).

[10] The Supreme Court of Appeal handed down four judgments. Seriti JA would have dismissed the appeal in its entirety. The remainder of the Court, in separate judgments by Maya JA, Leach JA and Mthiyane JA, upheld the appeal against the conviction and sentence under the Terrorism Act because they found that the Terrorism Act could not be deemed to operate retrospectively.[10] However, they disagreed on whether the applicant could be convicted on the alternative charge, under the CSA. Leach JA held that he could not and would have upheld the appeal in its entirety, acquitting the applicant of all charges. The majority, Mthiyane JA, Maya JA and Mhlantla JA, convicted the applicant, instead, under the alternative charge of contravening the CSA in two separate judgments: one by Maya JA, concurred in by Mhlantla JA, and the other by Mthiyane JA.

[11] The debate on whether the applicant could be convicted under the CSA revolved around whether he was a prisoner who had escaped from a prison as defined in the CSA.[11] All the judges, except for Seriti JA, rejected the applicant's argument that the escapees could not be considered "prisoners" under the CSA because they were unlawfully detained by virtue of the warrants for their detention being invalid. They agreed that the lawfulness of the detention flowed from the court order rather than the warrants.

[10] Supreme Court of Appeal judgment above n 1 at paras 5-9.

[11] As already noted, above n 7, I will only be referring to the unamended CSA.

[12] There was, however, disagreement over whether the escapees could otherwise be considered "prisoners" under the CSA due to the uncertainty regarding how the escapees fled. It was held that a person's detention is lawful by virtue of a court order, and the warrants, in this context, were no more than an administrative means of proving to the correctional services authorities that the person they are asked to receive is lawfully in custody.[12]

[13] Maya JA, in whose judgment Mhlantla JA concurred, held further, unlike Leach JA, that the uncertainty regarding how the escapees fled was not fatal to the State's case. She found that the escapees could either have escaped (i) from the detention cells or (ii) between the court room and the detention cells. In her analysis, under either of these scenarios, the escapees remained "prisoners" who had escaped from a "prison" as defined in the CSA.[13] The ordinary meaning of "prison" in the Act is expansive and would necessarily include detention cells within a court building which would mean that the escapees were "prisoners" under scenario (i).[14] She found, further, that the portion of the definition of "prisoner" which referred to "any person . . . who is being transferred in

[12] Supreme Court of Appeal judgment above n 1 at para 15.

[13] See above n 11.

[14] The CSA defined "prison" as:

> "any place established under this Act as a place for the reception, detention, confinement, training or treatment of persons liable to detention in custody or to detention in placement under protective custody, and all land, outbuildings and premises adjacent to any such place and used in connection therewith and all land, branches, outstations, camps, buildings, premises or places to which any such persons have been sent for the purpose of imprisonment, detention, protection, labour, treatment or otherwise, and all quarters of correctional officials used in connection with any such prison, and for the purposes of sections 115 and 117 of this Act includes every place used as a police cell or lock-up".

custody" would necessarily cover scenario (ii). She accordingly held that the applicant was guilty under the alternative charge.[15]

[14] Mthiyane JA concurred in the order of the majority, but found that the sole issue for determination on appeal was whether the warrants, under which the escapees were held at the time of the escape, were invalid. He held that the issue on which Maya and Leach JJA disagreed, whether or not the escapees were "prisoners" under the CSA at the time of their escape, was never raised by either of the parties and was not the basis on which the case was conducted at the trial.[16] The State may have conducted its case differently had it been alerted to this issue earlier and an appellate court should not therefore have proceeded on this basis because it may have resulted in unfairness to one side.

[15] Leach JA held that the State had failed to prove that the escapees were "prisoners" who had escaped from a "prison" and therefore found that the applicant could not be convicted on the alternative charge under the CSA. The offence under section 115(e) of the CSA, he reasoned, applies only to the harbouring of "prisoners" which under that Act, are (i) persons in custody (ii) who are "detained . . . in any prison or who [have] been transferred in custody or [are] en route from one prison to another prison". While the escapees were persons in custody, the State had failed to prove that they satisfied the

[15] Supreme Court of Appeal judgment above n 1 at para 17.

[16] Mthiyane JA stated, however, that if he were called on to consider the matter, he would have considered the escapees to be "prisoners" held in a "prison" at the time of their escape.

second of these requirements. Because the escapees had absconded from court, the State had to fall back on the provision in the definition of prison that, for the purposes of section 115, every place used as a police cell or lock-up is to be regarded as a prison. The State had not shown that the escape had been effected from a cell or a lock-up. Leach JA, further, read the "transferred in custody" and "en route" requirements as both being qualified by the "from one prison to another prison" clause. The State had not shown that the escapees were on their way from one prison to another prison while in court or on their way to their cells as the court is, in his understanding, clearly not a prison.[17]

[16] The majority took several factors into account in considering an appropriate sentence, including: the applicant's personal circumstances; the gravity of the transgressions; the applicant's defiance of police warnings not to provide the escapees with shelter; the resources expended in the search for the escapees; and the applicant's lack of remorse. The Court found that "a substantial custodial sentence [was] the only appropriate punishment" and imposed a five-year prison term.[18]

Leave to Appeal

[17] Before I can address the substantive issues, I must first determine whether leave to appeal should be granted. Leave should be granted when an application raises a

[17] Supreme Court of Appeal judgment above n 1 at paras 108-11.

[18] Id at para 18.

constitutional matter or an issue connected with decisions on constitutional matters and when it is in the interests of justice to do so.[19]

[18] The application before us raises a number of constitutional issues of significance. First, we are called upon to determine the proper interpretation of section 115(e) of the CSA, in particular, whether the term "prisoner" can only refer to a person detained under a valid warrant of detention and whether the definition of "prisoner" includes a person in or on the way to or from a court holding cell. This question implicates the section 12(1)(a) constitutional right of detained persons and prospective detainees.[20] Second, we must determine whether the procedure adopted by the Supreme Court of Appeal in effectively increasing[21] the applicant's sentence was fair – more specifically, whether the applicant's right to a fair trial under section 35(3) was infringed by that Court's failure to notify him that it was considering an increase in sentence. In stating that there was an effective increase in sentence, I mean an increase in the number of years an applicant will spend in prison.[22]

[19] Section 167(3)(b) of the Constitution; *S v Basson* [2004] ZACC 13; 2005 (1) SA 171 (CC); 2004 (6) BCLR 620 (CC) (*Basson*) at para 17; and *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 10.

[20] Section 12 of the Constitution provides:

> "(1) Everyone has the right to freedom and security of the person, which includes the right—
>
> (a) not to be deprived of freedom arbitrarily or without just cause".

[21] See below at [74] for the discussion of effective increase in sentence.

[22] This is to be distinguished from a sentence imposed where part of that sentence may be suspended, thereby resulting in fewer years actually spent in prison.

[19] In deciding whether it is in the interests of justice to grant leave, we must consider: the right to a fair trial of accused persons under section 35(3) of the Constitution; the importance of the issues raised; and the application's prospects of success.[23]

[20] The interpretation given by this Court to the CSA raises vital constitutional issues, as discussed above. First, the applicant's argument that the lawfulness of detention is dependent on the validity of the warrants has serious consequences for the administration of criminal justice in our courts, particularly how and when warrants must be issued. It is apparent that in order to ensure the protection of the section 12(1) rights of detainees, the law must be clear on what requirements must be satisfied for a person's detention to be lawful.

[21] Second, the right of accused persons to a fair procedure on appeal is implicated in this matter. The failure of the Supreme Court of Appeal to afford the applicant notice of a possible increase in sentence calls into consideration what our constitutional right to a fair trial demands, in terms of procedure, from our appellate courts. This is an issue of importance and one in which the application shows prospects of success.

[22] In the result leave to appeal must be granted.

[23] *Basson* above n 19 at para 39.

Substantive Issues

[23] This case raises the following substantive issues—

(i) whether a conviction under the CSA for harbouring escaped "prisoners"[24] is competent in this case, more specifically, whether a valid warrant is necessary for a person to be considered a "prisoner" under the CSA; and whether the definition of "prisoner" includes a person in or on the way to or from a court holding cell; and

(ii) whether, in the circumstances of this case, the Supreme Court of Appeal's consideration of an effective increase in sentence, without notice to the applicant, infringed his right to a fair trial; and if so,

(iii) whether the common law ought to be developed in order to be aligned with the rights in the Constitution by giving formal recognition to the practice of giving notice when an appellate court considers an increase in sentence.

Were the escapees "prisoners" under the CSA?

[24] Section 115 of the CSA provided in relevant part:[25]

> "Any person who—
>
> (e) harbours or conceals or assists in harbouring or concealing an escaped prisoner,

[24] Section 115(e) of the CSA.

[25] See above n 11.

> is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding ten years or to such imprisonment without the option of a fine or both."

[25] The CSA defined a "prisoner" as—

> "any person, whether convicted or not, who is detained in custody in any prison or who is being transferred in custody or is en route from one prison to another prison".

[26] There are two objections to finding that the escapees were "prisoners" under the CSA, and therefore that the applicant could be convicted under section 115(e) of harbouring an escaped "prisoner". The first, which was the point of disagreement between Maya and Leach JJA in the Supreme Court of Appeal, is that the lack of evidence regarding how the escapees fled means that it cannot be said that they were "detained in custody" or "being transferred in custody or [were] en route from one prison to another prison" at the time of the escape. The second is that the escapees could not be considered "prisoners" because their detention was unlawful by virtue of the warrants for their detention being invalid.

[27] I will deal with the first of these objections only briefly – this is because at the hearing, counsel for the applicant conceded that he agreed with paragraph 17 of Maya JA's judgment in which she said—

> "Given its general, ordinary meaning, the wording of the expansive definition of 'prison' [in the CSA] leaves no doubt that a detention cell within a court building falls within its purview. Thus if the escape was launched from the detention cells, the fugitives would

> obviously be covered by the part of the definition of 'prisoner' that refers to 'any person . . . who is detained in custody in any prison'. It further seems to me clear from the latter portion of the definition of 'prisoner' that a person in lawful custody, including an awaiting-trial prisoner, retains that status even when in transit between different locations. Of particular relevance for present purposes are the words '"prisoner" means any person . . . who is being transferred in custody'. Some of the common definitions of the word 'transfer' are 'to convey or take from one place, person, etc to another . . . to give or hand over from one to another'. To my mind, this portion of the definition of 'prisoner' would necessarily apply if the fugitives escaped whilst en route from the courtroom to the detention cells to which they were dispatched until the court session resumed at 14h00."[26] (Citations omitted.)

[28] It is clear, therefore, that this objection has been abandoned by the applicant. I will say no more than to endorse the opinions expressed and the interpretation adopted by Maya JA.

[29] In relation to the second objection, Maya, Mhlantla, Leach and Mthiyane JJA in the Supreme Court of Appeal were all in agreement that the argument regarding the validity of the warrants should fail.

[30] The applicant argues that section 6(1)(a) makes a valid warrant of detention a pre-requisite for a person to be considered a "prisoner" under the CSA. Section 6(1)(a) provides that a person "may not be committed to a prison without a valid warrant for his or her detention." The applicant disputes that the escapees were held in terms of valid

[26] Supreme Court of Appeal judgment above n 1 at para 17. The last sentence, to which counsel's concession did not apply, reads "[f]or these reasons, it is competent to convict Mr Bogaards for contravening the provisions of s 115(e) of the Correctional Services Act."

warrants. These warrants were issued by the police and not by a properly authorised official as required by section 34(1) of the Supreme Court Act.[27] As a valid warrant is a requirement for lawful custody, the applicant contends that the escapees do not fall within the definition of "prisoner" under the CSA.

[31] The State argues that a valid court order is sufficient for lawful detention as incarcerated people are defined as "prisoners" by virtue of the court order, not the detention warrants. Therefore, the court order issued by the High Court on 26 July 2004, which denied the escapees bail, was superior to the warrants.[28] Neither the definition of "prisoner" nor "prison" in the CSA requires detention to be in terms of a valid warrant. Thus, section 6 is not a restriction on the general definition of "prisoner", but contains a set of procedures that should be followed once a prisoner has been admitted to a prison to prevent unlawful detention. The State submits that the validity of the detention warrants is irrelevant as they ceases to operate once a prisoner has been delivered to court. From that moment, prisoners are detained in terms of the court order only, until new warrants of detention are issued.

[32] Assuming, without deciding, that the warrants were invalid, I cannot agree with the applicant and am of the opinion that the escapees were lawfully detained and therefore

[27] 59 of 1959 (Supreme Court Act).

[28] The State contended that the superiority of the court order over the warrant can be seen when a prisoner wishes to challenge her detention – the relevant document in this instance is the court order and not the warrant of detention. The warrant is used to demonstrate that the detaining authority was aware of the conditions attached to the detention order.

should be considered "prisoners" under the CSA. This conclusion is informed by several considerations.

[33] First, an order of court, rather than a detention warrant, is the legal basis for a person's incarceration. I agree with Maya JA's conclusion that the warrant, in this context, is merely "an administrative means of proving to the correctional services authorities that the person they are requested to receive is lawfully in custody and may therefore be detained in their facility".[29]

[34] Second, the roles played by the court order and the warrant are not altered when regard is had to section 6(1)(a) of the CSA.[30] Section 6(1)(a) is merely an instruction to the head of a prison – not a qualifier as to who should be considered a "prisoner" under the Act.

[35] This conclusion is strengthened when section 6 is read in context. It is part of the Chapter entitled "Custody of all prisoners under conditions of human dignity", in a sub-section called "General requirements". This Chapter sets out the conditions under which prisoners must be kept, including the proper approach to safe custody, accommodation, nutrition, hygiene and health care. Section 6 instructs the authorities as to what actions to

[29] Supreme Court of Appeal judgment above n 1 at para 15.

[30] Section 6(1)(a) of the CSA provided:

> "A person may not be committed to a prison without a valid warrant for his or her detention."

take during, and immediately subsequent to, admitting a person into a prison.[31] While these instructions are important requirements to safeguard prisoners' rights, the suggestion that non-compliance with any of these would result in an incarcerated person no longer being considered a "prisoner" under the CSA cannot be correct.

[36] Third, the applicant's construction would result in several absurd consequences.[32] It leads to, at least, the following conclusions: that warrants would need to be reissued during all court adjournments, including tea and lunch, and, as claimed by the applicant, the head of a prison could ignore a court order remanding a person to detention if there were no accompanying valid detention warrant. Ineluctably, the efficacy of the administration of the criminal justice system requires that the lawfulness of detention depends on the order of a court rather than the validity of a warrant.

[37] A warrant serves an important protective purpose in that it guards against unlawful detention. However, it is the court order, not the warrant, that is the legal basis for a person's detention and it cannot be that where the warrant is defective, detention necessarily becomes unlawful. The applicant's appeal in respect of his conviction under section 115(e) of the CSA must, therefore, fail. The Supreme Court of Appeal rightfully

[31] Sections 6(3)-(5) of the CSA provided that prisoners must: be informed promptly of their right to choose and consult with a legal practitioner; be provided with written information in a language they understand concerning the rules governing the treatment of prisoners in their category; and undergo a health status examination.

[32] *S v Mhlungu and Others* [1995] ZACC 4; 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) at para 117 and *Klein NO and Another v Minister of Trade and Industry and Another* 2007 (1) SA 218 (TPD) at para 34.

considered the escapees to be "prisoners" under that Act. I will now consider the issue of sentence.

Sentence

[38] As already stated,[33] when the Supreme Court of Appeal set aside the convictions under the Terrorism Act, it also set aside the sentence imposed by the trial court of effectively three years' imprisonment – which was appurtenant to those convictions[34] – and imposed a longer effective custodial sentence of five years.

[39] The applicant correctly acknowledges that the Supreme Court of Appeal is empowered to set aside a sentence and impose a new sentence, even a more severe one.[35] His complaint, simply put, is that the Supreme Court of Appeal imposed a heavier sentence than that imposed by the trial court without giving notice of the possible increase. He argues that a "salutary rule" has developed that where a court is prima facie of the view that a sentence should be increased on appeal, it will notify the appellant in

[33] Above at [16] where I discuss the factors the Supreme Court of Appeal took into account in sentencing.

[34] See for example *S v Andhee* 1996 (1) SACR 419 (A) (*Andhee*) at 421g-i where the Appellate Division said "[h]aving set aside the convictions on counts 3 and 4. . . the Court *a quo* was obliged to reconsider the sentence."

[35] Section 22 of the Supreme Court Act provides, in relevant part:

> "22 The appellate division or a provincial division, or a local division having appeal jurisdiction, shall have power—
>
> (b) to confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require."

See also *S v E* 1979 (3) SA 973 (AD) and *R v Abdullah* 1956 (2) SA 295 (AD) for examples of cases where appellate courts have considered imposing a higher sentence on appeal.

advance. The applicant further contends that the right to a fair trial includes the right of appeal and that the appeal must also be subject to considerations of fairness. My understanding of the nub of the applicant's argument is that the Supreme Court of Appeal infringed his right to a fair trial and, in particular, his right of appeal as envisaged by section 35(3)(o) of the Constitution[36] when that Court imposed a heavier sentence of five years, without affording him adequate notice that it was considering doing so.

[40] The State submits that the Supreme Court of Appeal did not increase a previously imposed sentence and that it was entitled to impose the sentence that it did, since it was sentencing afresh. Furthermore, the State posits that while there exists a certain practice of notifying the parties if a court is considering an increase in sentence, this is not a rule. In addition, it cannot be argued that the applicant did not have a fair trial before the Supreme Court of Appeal because the question of an appropriate sentence was fully argued before that Court. Absent any other constitutional principle, so it argues, the question of sentence is not a constitutional matter and this Court has no jurisdiction to decide on the appropriateness of the sentence.

[41] Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by courts below is circumscribed.[37] It

[36] See [49] below where section 35(3) is set out in full.

[37] *S v Anderson* 1964 (3) SA 494 (AD) (*Anderson*) at 495C-H. See also *S v Salzwedel and Others* 1999 (2) SACR 586 (SCA) at para 10.

can only do so where there has been an irregularity that results in a failure of justice;[38] the court below misdirected itself to such an extent that its decision on sentence is vitiated;[39] or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.[40] A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another.

[42] The State is correct that, absent any other constitutional issue, the question of sentence will generally not be a constitutional matter. It follows that this Court will not ordinarily entertain an appeal on sentence merely because there was an irregularity; there must also be a failure of justice.[41] Furthermore, this Court does not ordinarily hear appeals against sentences based on a trial court's alleged incorrect evaluation of facts.[42] For instance, this Court will not, in the ordinary course, hear matters in relation to sentence merely because the sentence was disproportionate in the circumstances. Something more is required. It is evident that this matter involves important constitutional questions in relation to whether the Supreme Court of Appeal failed to

[38] *S v Jaipal* [2005] ZACC 1; 2005 (4) SA 581 (CC); 2005 (5) BCLR 423 (CC) (*Jaipal*) at para 39 and *R v Solomons* 1959 (2) SA 352 (AD) at 366C.

[39] *Anderson* above n 37 at 495D and Kruger *Hiemstra's Criminal Procedure* Service Issue 5 (LexisNexis, Cape Town, 2012) (Hiemstra) at 30-49 to 30-50 for a full discussion on misdirection.

[40] This standard has been articulated differently in several cases, including whether the sentence was "startlingly" or "disturbingly" inappropriate or whether it "creates a sense of shock". Ultimately, however, the question at which all of these formulations are aimed is whether the court could reasonably have imposed the sentence that it did. See for example *S v Sadler* 2000 (1) SACR 331 (SCA) at para 8 and *S v Bolus and Another* 1966 (4) SA 575 (AD) at 581E-G.

[41] Some irregularities are considered per se failures of justice. These are irregularities which are so gross a departure "from established rules of procedure that it can be said that the appellant was not properly tried." *The State v Moodie* 1961 (4) SA 752 (AD) at 759C.

[42] *S v Shaik and Others* [2007] ZACC 19; 2008 (2) SA 208 (CC); 2007 (12) BCLR 1360 (CC) (*Shaik*) at para 71.

meet the requirements of the substantive notion of fairness encapsulated in section 35(3) of the Constitution by effectively increasing the applicant's sentence without giving him prior notice that it was considering an increase in sentence,[43] and whether the common law ought to be developed in order to give formal recognition to the practice of giving notice when considering an increase in sentence. It is these constitutional issues which seize this Court with the requisite jurisdiction.

[43] In *Jaipal* irregularities were neatly described as deviations from "what one would regularly expect in a properly conducted criminal trial. They deviate from the norm and ought not to happen."[44] But not all irregularities amount to a failure of justice. The term failure of justice must be understood in the constitutional era as an unfair trial.[45] Therefore, what needs to be determined is whether the failure to inform the appellant of the possibility of an increase in sentence on the alternative charge is an irregularity that resulted in an unfair trial.

[44] When evaluating whether the proceedings in the Supreme Court of Appeal were unfair, this Court must not merely examine the law as it stands, in other words, that there is a practice of giving notice rather than a rule. This is because, as will be demonstrated below, the right to a fair trial under the Constitution has a normative component which

[43] See above [18]-[21]. See also *S v Zuma and Others* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (SA) (*Zuma*) at para 16.

[44] *Jaipal* above n 38 at para 44.

[45] *Shaik* above n 42 at para 44.

requires courts not merely to follow existing rules of procedure but to conduct proceedings in a substantively fair manner. Thus, the fact that at common law there was no notice requirement does not necessarily excuse an appeal court from failing to give the accused person notice of its intention to increase sentence. In addition, it is incumbent on this Court to determine whether the common law as it stands is deficient, and if so whether it should be developed.

[45] As will be demonstrated below,[46] at common law there is today no formal requirement for an appeal court to give an accused person notice where that court is considering an increased sentence on appeal. This lack of any formal notice requirement falls short of what is required in the constitutional era. Given the importance of the notice practice in giving effect to the right to a fair trial, and in particular the right of appeal in section 35(3)(o),[47] this Court is obliged to develop the common law and elevate the notice practice to a requirement.

[46] It will be instructive to begin with a brief outline of the general principles relating to the development of the common law. Then I examine the nature of the right to a fair trial as provided for in section 35(3) of the Constitution. I then set out the common law practice of giving notice, paying particular attention to the underlying right that the practice aims to protect. Finally, I examine the relationship between the right of appeal,

[46] See below [55]-[58].

[47] For the discussion on the important purposes of the notice practice see below [59]-[67].

one of the components of the right to a fair trial enumerated in section 35(3)(o), and the practice of giving notice in light of the principle of substantive fairness.

Developing the common law

[47] Section 8(1) of the Constitution provides that the Bill of Rights applies to *all law* in South Africa, which includes the common law.[48] It binds all branches of the State, including the judiciary. There is no law or conduct that is exempt from being tested against the Constitution. Any law that is inconsistent with a right in the Bill of Rights must be declared invalid.[49] Hence, all conduct of the judiciary, including the manner in which the common law is interpreted by judges, must be harmonious with the Constitution. Section 173 of the Constitution grants inherent power to the Constitutional Court, the Supreme Court of Appeal and the High Courts "to develop the common law, taking into account the interests of justice." Taken together, these provisions oblige the courts to develop the common law where it is inconsistent with the Constitution. Once these provisions have been engaged, section 39(2) then gives the court guidance on how the common law should be developed in order best to give effect to the right that has been infringed.[50] That is to say, section 39(2) makes it plain that, when developing the

[48] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 9; 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC) at para 28.

[49] Section 2 read with section 172(1)(a) of the Constitution.

[50] 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."

common law, a court is obliged to "promote the spirit, purport and objects of the Bill of Rights."

[48] When developing the common law, a court needs first to ascertain that the right relied upon is applicable to the law or conduct that has given rise to the dispute. Then the court must determine whether the common law is deficient in failing adequately to protect the right.[51] If there is no legislation or common law rule giving effect to the right, a court is enjoined to develop the common law in order to do so. I begin by examining the right to a fair trial.

The right to a fair trial

[49] In this case, the right relied upon is the right to a fair trial as articulated in section 35(3) of the Constitution. Section 35(3) sets out, in a non-exhaustive list, the components of the right to a fair trial. It provides:

> "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;

[51] *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 33.

(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."

[50] The importance of the right to a fair trial cannot be overstated. In *Jaipal*[52] this Court 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. The importance and universality of the right to a fair trial is evident from the fact that it is recognised in key international human rights instruments."[53] (Footnotes omitted.)

[52] *Jaipal* above n 38.

[53] Id at para 26.

[51] In our law, the understanding of what constitutes a fair trial is flexible, its constitutive components being informed by the values that underlie our Constitution.[54] It is trite that the right to a fair trial embraces substantive fairness[55] and one need not emphasise that trials are required to be conducted in accordance with general open-ended notions of justice.[56] Furthermore, all courts are enjoined to ensure that an appellant's right to a fair trial is protected.[57]

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[54] In *S v Dzukuda and Others; S v Tshilo* [2000] ZACC 16; 2000 (4) SA 1078 (CC); 2000 (11) BCLR 1252 (CC) (*Dzukuda*) at para 11, this Court said that "[i]n considering what, for purposes of this case, lies at the heart of a fair trial in the field of criminal justice, one should bear in mind that dignity, freedom and equality are the foundational values of our Constitution."

[55] In *Zuma* above n 43 at para 16, Kentridge AJ put it thus:

> "The right to a fair trial conferred by that provision 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. In *S v Rudman and Another; S v Mthwana* 1992 (1) SA 343 (A), the Appellate Division, while not decrying the importance of fairness in criminal proceedings, held that the function of a Court of criminal appeal in South Africa was to enquire:
>
> > 'whether there has been an irregularity or illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted'.
>
> A Court of appeal, it was said (at 377),
>
> > 'does not enquire whether the trial was fair in accordance with "notions of basic fairness and justice", or with the "ideas underlying the concept of justice which are the basis of all civilised systems of criminal administration".'
>
> That was an authoritative statement of the law before 27th April 1994. Since that date s 25(3) has required criminal trials to be conducted in accordance with just those 'notions of basic fairness and justice'. It is now for all courts hearing criminal trials or criminal appeals to give content to those notions."

Note that Kentridge AJ, in the above passage, refers to section 25(3) of the interim Constitution, which is substantially the same as section 35(3) of the Constitution. Therefore, his analysis is equally applicable to section 35(3) of the Constitution.

[56] Id and *Sanderson v Attorney-General, Eastern Cape* [1997] ZACC 18; 1998 (2) SA 38 (CC); 1997 (12) BCLR 1675 (CC) at para 22.

[57] Section 7(2) of the Constitution mandates the State, of which the courts are a constituent part, to "respect, protect, promote and fulfil the rights in the Bill of Rights." See, for example, the observations made in *Dzukuda* above n 54 at para 49:

> "It is for the High Court, in each case committed to it under s 52 for sentence, to ensure that the accused receives a fair trial and nothing in the section prevents the High Court from doing so. It is, in the first instance, the duty of the High Courts to flesh out the procedures enacted in s 52 in a manner consistent with the accused's right to a fair trial."

[52] The requirement of fairness that underpins the right to a fair trial under section 35(3) demands that an accused person must be informed if an appellate court contemplates imposing a higher sentence than the one appealed against. In this case, failure to do so constituted an infringement of the right of appeal under section 35(3)(o) of the Constitution.

[53] Our jurisprudence indicates that an irregularity is "an irregular or wrongful deviation from the formalities and rules of procedure aimed at ensuring a fair trial."[58] There is no exhaustive list of what constitutes an irregularity.[59] This is because of the open-ended notions of fairness and justice that underlie our conception of the right to a fair trial – what we understand to be a procedural rule aimed at ensuring fairness will necessarily change over time.

[54] By contrast, in the pre-constitutional era, our understanding of what constituted an irregularity was particularly narrow because a court was not called upon to consider whether the trial was conducted in accordance with "notions of basic fairness and justice".[60] Rather, it had to consider solely whether there had been a "departure from the formalities, rules and principles of procedure according to which our law requires a

[58] *Jaipal* above n 38 at para 38.

[59] Hiemstra above n 39 at 30-11.

[60] *S v Rudman and Another; S v Mthwana* 1992 (1) SA 343 (A) (*Rudman*) at 377B-D.

criminal trial to be . . . conducted."[61] This resulted in a more rigid understanding of what deviations would be considered irregularities. Under our Constitution, the approach to the fair trial right, and consequently our understanding of what constitutes an irregularity, has been broadened.

The deficiency in the common law

[55] At common law, the salutary practice of providing notice of a possible increase in sentence can occur in two scenarios: (1) where the court of its own accord (mero motu) is contemplating an increase in sentence or (2) where the State wishes to apply for an increase in sentence.[62] At common law, the State had no formal right to cross-appeal and, therefore, to ensure that the accused person was not caught by surprise, a practice developed of providing notice from the Attorney-General (now the National Director of Public Prosecutions) to the accused person regarding the potential increase in sentence.[63] In cases where the court mero motu was contemplating an increase, the practice was to provide notice by an "intimation" from the court.[64]

[61] Id.

[62] *Rex v Swanepoel* 1945 AD 444 (*Swanepoel*) at 451. See also *R v Jurgens* 1953 (2) SA 383 (TPD) (*Jurgens*) at 388F-H.

[63] *Swanepoel* id.

[64] *R v Grundlingh* 1955 (2) SA 269 (A) (*Grundlingh*) at 278A.

[56] In 1990, the Criminal Procedure Act (CPA)[65] was amended to include section 310A which provides the State with the right to cross-appeal. Section 310A(3) requires the Attorney-General to provide notice to the accused person and this notice under section 310A(2)(b) must include the grounds for the cross-appeal. Therefore, the CPA has effectively formalised the practice of providing notice in cases where an increase in sentence is being sought by the State. By contrast, where an increase is being contemplated by the court mero motu, there is at present no formal notice requirement.

[57] An important corollary of the notice practice at common law is the limitation of an accused person's right to withdraw an appeal once notice of an increased sentence has been given. Courts have repeatedly found that after an accused person is given notice of a contemplated increase in sentence, by either the court or the prosecuting authority, she is barred from withdrawing her appeal without leave from the court.[66] To do otherwise would frustrate the court's right to increase a sentence under section 309(3) or the Attorney-General's right to cross-appeal under section 310A of the CPA.[67] Indeed, as noted by Du Toit—

> "[t]he power of a court of appeal to increase a sentence would be completely ineffective if an appellant had an unfettered right to withdraw his appeal. If the appellant were to

[65] 51 of 1977.

[66] *S v Kirsten* 1988 (1) SA 415 (A) at 420C-J; *S v Du Toit* 1979 (3) SA 846 (A) at 855A-E; *Grundlingh* above n 64 at 272A-B; *Jurgens* above n 62 at 388.

[67] *Grundlingh* above n 64 at 272A ("It seems to me that it would be convenient, just and consistent with the existing practice if this rule [to require leave to withdraw an appeal after notice] were observed") and *Jurgens* above n 62 at 387-9 ("once he has availed himself of this right [to be given notice], the appellant cannot frustrate the exercise of it by withdrawing at his own discretion").

> have such a right he would always be able to prevent the court of appeal from exercising its discretion to increase sentence."[68]

This rule taken together with the notice requirement creates a balance between the right of the appellant to a fair trial and the duty of the court to ensure that the sentence is appropriate and to increase the sentence when necessary.[69]

[58] Since, at common law, there is no obligation on a court to notify an appellant if it is considering, mero motu, an increase in sentence, it follows that non-compliance with the notice practice has not been considered an irregularity. In this regard, the proceedings in the Supreme Court of Appeal would not at common law have constituted an irregularity and this Court would not, therefore, be entitled to set aside the sentence imposed by that Court. However, I am of the opinion that: (a) given that the right to a fair trial demands court proceedings to be carried out in a substantively fair manner; and (b) given the purposes the notice practice seeks to achieve, this Court is obligated to elevate this practice to a requirement in order to enable an accused person to exercise properly the right of appeal to a higher court under section 35(3)(o) of the Constitution.

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[68] Du Toit et al *Commentary on the Criminal Procedure Act* Service 47 (Juta & Co Ltd, Cape Town 2011) at 30-40 to 30-40A.

[69] In *S v M* 1990 (1) SACR 451 (N), Didcott J criticised the rule preventing withdrawal without leave of the court once notice of a potential increase in sentence is given. He argued that the rule essentially penalises the appellant for poor timing and should be extended to all appellants; in other words, the appellant will be unable to withdraw if his application is received after notice has already been given, even where his decision to withdraw is completely unrelated to the potential increase in sentence. The simple response to Didcott J's concern is to acknowledge that the court still maintains discretion in deciding whether to allow an applicant to withdraw an appeal after notice has been given. For instance, in *Jurgens* above n 62, the Court granted leave to withdraw under circumstances where the accused intended to withdraw before he received notice. The Court found that the purpose behind the rule made it inappropriate under the particular circumstances to prevent withdrawal of the appeal. The discretion by the court prevents the rule from being arbitrary and unfair.

The purposes underlying the notice practice and substantive fairness

[59] In my view, the notification practice ensures substantive fairness in two ways. First, by facilitating the informed exercise of the right of appeal and, second, by ensuring that the requirements of natural justice, more specifically, the *audi alteram partem* principle, are observed.

Facilitation of informed exercise of the right of appeal

[60] When accused persons exercise their constitutional right of appeal and appeal against their conviction and/or sentence, they are necessarily attempting to improve their legal fate.[70] The exercise of the right of appeal should, therefore, not be hindered by fear of the possibility of a more severe sentence being imposed without having an opportunity to give pointed submissions on the potential increase. Otherwise, prospective appellants may not exercise the right at all. Therefore, an appellant's legal position should not be worsened without proper notice, either in the form of a cross-appeal, or notice from the appellate court that it is considering an increase in sentence or that it proposes to impose a higher sentence than that imposed by a trial court consequent upon convicting the appellant of a different offence.

[70] See, for example, *Parker v Director of Public Prosecutions* (1992) 28 NSWLR 282; 65 A Crim R 209 (*Parker*) at 221.

[61] Where the State lodges a cross-appeal against sentence, this alerts an accused person to the possibility of an increase in sentence and provides her with a meaningful opportunity to make pointed argument in regard thereto. In instances where a court is mero motu considering an increase, the constitutional right to a fair trial demands that the accused person should have the benefit of knowing what risk she may run into in her quest to ease a pinching shoe by invoking the appeal process. The accused should be allowed to choose whether to run the risk of a sentence increase, attempt to convince the court to reach the opposite conclusion by making adequate representations on why the sentence should not be increased, or apply to the court for leave to withdraw her appeal.[71]

[62] An examination of foreign law lends support to the proposition that the informed exercise of the right of appeal is an important consideration. In *Parker*, the New South Wales Court of Appeal discussed what it described as an "established practice or convention"[72] of informing an appellant when the court has reached a tentative conclusion that it may impose a punishment more severe than that earlier imposed, and therefore of the risk that she faces by invoking the appellate process.[73] In this regard, I defer to the sentiments expressed by Kirby P:

[71] Id at 222-3.

[72] Id at 221.

[73] Kirby P held, id at 221-2, that notifying an appellant when an appellate court is considering a sentence increase was an "established practice", rather than a "rule of law". However, he held that it "should rarely, if ever, be departed from." Indeed, Kirby P found that when serious increases of sentence are contemplated, the high desirability of notification may amount to an obligation, and found that it did on the facts of that particular case.

> "Where an accused person has exercised an entitlement provided by law to have a re-adjudication of a criminal conviction and sentence, it must be contemplated that Parliament provided that facility to the intent that normally it would result in the appellant's being in no worse a position than had he or she accepted a conviction and sentence of the Local Court. Although, necessarily, such a risk is run by a procedure which amounts to a complete rehearing, with fresh (and possibly different) evidence and a new decision-maker, the purpose of the appeal is one to afford the accused person a second opportunity for the consideration of his case by a judicial officer more senior in the court's hierarchy. If the second judicial officer knows of the penalty imposed by the first and contemplates a higher penalty, it is proper to indicate this fact so that the appellant can consider whether or not to apply for leave to withdraw the appeal".[74]

[63] The objectives served by the practice of notification apply with even greater force in the South African context where, unlike Australia, the right to a fair trial is expressly entrenched in our Constitution.

[64] The need for the appellant to be aware of her possible jeopardy, and also to be given a meaningful and adequate opportunity to make submissions to the court on the appropriateness of a sentence increase or the imposition of a higher sentence upon conviction of another offence, are the true bases of the notice practice. This speaks directly to the notion of natural justice.

[74] Id at 221.

Natural justice

[65] Notifying an appellant that the court is considering an increase in sentence or the imposition of a higher sentence on conviction of a different offence is primarily for the benefit of that appellant.[75] It ensures that the appellant is not taken by surprise at the hearing and, importantly, gives her a meaningful and adequate opportunity to make full representations on sentencing and, specifically, on why the sentence should not be increased or a higher sentence should not be imposed after conviction on another offence.[76] This, in turn, ensures that all the relevant information is before the court in order for a fully informed decision to be made.

[66] Notification encapsulates the concept of *audi alteram partem*, which, as a principle of natural justice, forms a foundational part of any fair procedure. The *audi alteram partem* principle requires that each party be given a meaningful opportunity to present their case.[77] Kirby J indicated in the High Court of Australia in *R H McL v The Queen*[78]

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[75] *S v Sonday and Another* 1995 (1) SA 497 (CPD) at 503B.

[76] See *S v Du Toit* above n 66 at 855A, where the Appellate Division noted that it had been the practice in that Court that when considering an increase in sentence, notice was given to the appellant and the Attorney-General *to file heads of argument in regard to such consideration*. See also *Jurgens* above n 62 at 388F-G, where the Court held:

> "The Court, for the purpose of the exercise of its powers under this sub-section, clearly has the implied power to *require an appellant to show cause why the sentence should not be increased or varied*. This is usually done by an intimation to the appellant that the Court, if the appeal is dismissed, will consider the question whether or not the sentence should be increased or varied." (Emphasis added.)

It is clear therefore that the appellant should be allowed to make representations expressly on the point of why the sentence should not be increased. These may differ in nature from submissions otherwise made in the ordinary course.

[77] Hoexter *Administrative Law in South Africa* (Juta & Co, Ltd, Cape Town 2007) at 326-7. Translated, the maxim requires the court literally to "hear the other side". See also *S v Malindi and Others* 1990 (1) SA 962 (A) at 976C-E.

[78] [2000] HCA 46; (2000) 203 CLR 452 (*R H McL*).

that in exercising the power to substitute sentences on appeal, appellate courts are obliged to accord appellants the basic requirements of a fair procedure. One of the protections guaranteed by the principle of procedural fairness is the "need to afford a person involved an effective opportunity to be heard before any substituted sentence is passed . . . particularly where such sentence might carry the possibility of increasing that person's punishment."[79] Another crucial consideration is that this would avail the State of a valuable opportunity to make pointed submissions on the possible increase in sentence, which may assist the court in arriving at an informed decision.

[67] Ordinarily, the nature of submissions that would be made, on the specific point of whether a sentence should not be increased or whether a higher sentence should not be imposed on conviction for another offence, differ in nature from those that the appellant would otherwise be making in mitigation of her sentence. This point is well-illustrated in *Oliver v The Queen*,[80] where the Privy Council indicated that because specific considerations relating to a possible increase in sentence are distinct from those relating to the imposition of the original sentence, it is crucial that the appellant, or her counsel, be given an adequate and meaningful opportunity to address the appellate court on point.[81] Further, notice aims to afford the appellant a chance to make submissions on the

[79] Id at para 124. Although in the particular Australian statutory setting of the case Kirby J dissented, it seems to me that his statement of principle is entirely correct.

[80] [2007] UKPC 9.

[81] Id at para 16.

specific basis on which a court is considering an increase in sentence or the imposition of a higher sentence upon conviction of a different offence.

The lacuna in the common law

[68] Where an increase is being contemplated by the court of its own accord, there is at present no formal notice requirement. The result is a lacuna in the common law by which an accused person will only be guaranteed to receive notice where a potential increase in sentence originates with the State. In my view, the purposes sought to be achieved by a notice requirement[82] apply regardless of whether the court or the State is proposing an increase in sentence either because of conviction for a substituted offence or because the sentence is considered to be too low. Therefore, notice ought to be required in both instances. Indeed, where the court mero motu chooses to increase sentence or to impose a higher sentence than the sentence that had been originally imposed consequent upon conviction for a substituted offence, the accused person is less likely to expect an increase and therefore to prepare adequately than where the accused person is aware of the State's intention to oppose the sentence by virtue of the cross-appeal. This gap in criminal procedure justifies this Court's development of the common law to ensure adequate protection of the right of appeal under section 35(3)(o).[83]

[82] The purposes are: first, to afford the accused person an opportunity to prepare adequately; and second, to ensure an opportunity to apply for withdrawal.

[83] I pause here to emphasise that this judgment should not be misconstrued as pitting the common law against the Constitution. As stated in *Pharmaceutical Manufacturers Association of SA and Another: In re ex parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 44, there is only one system of law over which the Constitution is supreme. Evaluating the common law against the

[69] The elevation of the notice practice to a requirement, which gives effect to the right of appeal, facilitates and maintains the integrity of the appeal process and also ensures that there is parity in the treatment of appellants. Parity, first, between appeals in which the State has cross-appealed and notice is required, and appeals in which the court mero motu is considering an increase in sentence or the imposition of a higher sentence upon conviction for a substituted offence. Second, it will ensure parity between appellants in different cases in which the court is mero motu considering an increase or the imposition of a higher sentence upon conviction for a substituted offence. At present, because the notice practice is merely a practice at common law, it may be followed by some courts and not others. If one is persuaded that an appellant benefits from the notice practice at all, then it is difficult to see how one could endorse an ad hoc system of giving this benefit to some appellants but not to others.

[70] It must be noted that in formalising this notice requirement, this Court is also formalising the corollary practice of limiting an accused person's right to withdraw an appeal once notice of an increased sentence has been given. In my view, this must be so

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Constitution is, thus, precisely what our constitutional enterprise demands, and where the common law falls short of our constitutional scheme it must be developed. Indeed, Chaskalson P held in that judgment, at para 45, that "the Constitution is the supreme law and the common law, insofar as it has any application, must be developed consistently with it and subject to constitutional control."

Section 35(3) of the Constitution, for instance, requires substantive fairness. In the current matter, the common law has been evaluated against the criterion of substantive fairness and has been found to fall short. The common law has, therefore, been developed in order to meet the criterion of substantive fairness encapsulated in section 35(3). After the common law has been developed, in order to bring it in line with the Constitution, the proceedings of the Supreme Court of Appeal are then examined against the common law as developed. This does not create two separate systems of law. It is the result of synthesising the common law with the Constitution.

in order adequately to balance the rights of the accused to have notice with the need for the proper administration of justice.[84] As this Court held in *Shaik*:

> "It is clear also that fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment."[85]

Furthermore, in *Jaipal*, this Court referred to the need for—

> "fairness to the public as represented by the State. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime."[86]

[71] The consequence of elevating the notice practice to a requirement means that if a court does not give notice, this will amount to an infringement of the right of appeal, which is a component of the right to a fair trial. This infringement will constitute an irregularity.[87] The court will then need to determine whether this irregularity amounted to a failure of justice which rendered the trial unfair.

[72] It is worth emphasising that requiring the appellate court to give the accused person notice that it is considering an increase in sentence or imposing a higher sentence upon conviction for a substituted offence, does not fetter that court's discretion to increase the sentence or to impose a substituted conviction with a higher sentence. The

[84] See above [57].

[85] See *Shaik* above n 42 at para 43.

[86] See *Jaipal* above n 38 at para 29.

[87] Id at para 44.

court may clearly do so in terms of section 22(b) of the Supreme Court Act and section 322 of the CPA.[88] Elevating the notice practice to a requirement merely sets out the correct procedure according to which the court must ultimately exercise that discretion. The notice requirement is merely a prerequisite to the appellate court's exercise of its discretion. After notice has been given and the accused person has had an opportunity to give pointed submissions on the potential increase or the imposition of a higher sentence upon conviction of another offence, the appellate court is entitled to increase the sentence or impose a higher sentence if it determines that this is what justice requires.

The proceedings in the Supreme Court of Appeal

[73] The proceedings in the Supreme Court of Appeal must be evaluated according to the common law as developed. The general position in this regard was stated clearly in *Du Plessis and Others v De Klerk and Another*:[89]

> "In our Courts a judgment which brings about a radical alteration in the common law as previously understood proceeds upon the legal fiction that the new rule has not been made by the Court, but merely 'found', as if it had always been inherent in the law. Nor do our Courts distinguish between cases which have arisen before, and those which arise

[88] See above n 35 for the full text of section 22(b) of the Supreme Court Act. Section 322 of the CPA provides, in relevant part:

> "(1) In the case of an appeal against a conviction or of any question of law reserved, the court of appeal may—
>
> (b) give such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial".

[89] [1996] ZACC 10; 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) (*Du Plessis*).

> after, the new rule has been announced. For this reason it is sometimes said that 'Judge-made law' is retrospective in its operation."[90]

[74] While the Supreme Court of Appeal did not increase the applicant's sentence in the technical legal sense in which an increase is generally understood, it nevertheless effected an increase in sentence in substance by imposing a higher sentence upon conviction of another offence.[91] The new rule we have devised covers this situation too.[92]

[75] Accordingly, in effectively increasing the applicant's sentence without giving him proper notice that it was considering an increase, the Supreme Court of Appeal committed an irregularity. This irregularity resulted in a failure of justice that rendered the trial unfair for at least two reasons.

[76] First, from the applicant's point of view, the time he spends in jail is likely to be much more important to him than the particular offence for which he is convicted. The

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[90] Id at 65. But see *Masiya v Director of Public Prosecutions Pretoria and Another (Centre for Applied Legal Studies and Another,* amici curiae*)* [2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827 (CC) where Nkabinde J noted, at paras 49-51 and 56-57, that there are exceptional circumstances which justify a departure from the general position set out in *Du Plessis.* In these rare cases it is appropriate to develop the common law with prospective effect only. This would include circumstances in which applying the development of the common law retrospectively would offend the principle of legality. For instance, in *Masiya*, this Court found that fairness to the accused required that the development would not apply to the accused in that case, but only to those cases which arose after judgment had been handed down. Importantly, in the current matter these considerations do not apply as fairness to the appellant demands that the development be applied retrospectively to the proceedings in the Supreme Court of Appeal.

[91] In *Andhee* above n 34 at 421g-h, the Court had imposed a lesser charge but instructed that the sentences run consecutively rather than concurrently. The Appellate Division held that the court a quo's decision to run the sentences consecutively, rather than concurrently, resulted in "increasing the effective sentence from nine to 18 months' imprisonment."

[92] While particular offences may be substantially different, the sentences imposed for the offences will be commensurable. This is because the criterion according to which the sentences are compared is the term of imprisonment or the severity of the fine.

applicant had succeeded in the Supreme Court of Appeal in appealing against his conviction under sections 11 and 12 of the Terrorism Act, which carry maximum sentences of 15 and 5 years' imprisonment respectively. In its place the applicant was convicted on the alternative charge under section 115(e) of the CSA, which is a less serious offence and for which the maximum sentence is only 10 years.[93] The applicant would have undoubtedly felt a sense of relief upon receiving the favourable news in the Supreme Court of Appeal that his appeal on conviction had partially succeeded because he had been convicted of a less serious offence. He must have been perplexed when the Court surprised him with the news that instead he would spend more time in jail than if his appeal had been unsuccessful.[94] Under these circumstances, by any standard of elemental fairness, it was reasonable for the applicant to expect a lightening of his sentence. Instead, he received a higher custodial sentence for a less serious offence.

[77] Second, this outcome is all the more iniquitous when one considers that the heavier sentence was not requested by the State. The State did not cross-appeal nor apply for an increase in sentence and neither did it argue for this.[95] Therefore, inasmuch as the matter was argued on conviction and sentence, it was not argued on the exact point of a possible increase in sentence. The applicant received no notice that the Supreme Court of Appeal

[93] See [10]-[16] above.

[94] To use a hypothetical example, if an accused person were convicted of theft of a motor vehicle in the court a quo and sentenced to three years' imprisonment, it would be peculiar if the accused successfully appealed, on the basis that he did not have the requisite intention to permanently deprive the owner of the property, and were then convicted of unauthorised borrowing of the vehicle (a less serious offence) but sentenced to a longer period of five years' imprisonment.

[95] See above [9].

was considering imposing a higher sentence for conviction on the alternative charge, nor is it evident from the record that he was put on notice of this possibility by any other objective factor.[96] In the circumstances, the applicant had no opportunity to make representations to the Court on why his sentence should not be increased. In this way, the pivotal purposes of the practice were undermined.[97] Indeed, counsel for the State conceded during oral argument that the question of an increase in sentence was not argued and that what happened in this case was not fair. In my opinion, this was a concession correctly made.

Conclusion

[78] Given the importance of the right to a fair trial, the substantive notion of fairness which it embraces and the Supreme Court of Appeal's failure to give notice, which in this case was particularly infelicitous, there was in this case a failure of justice and therefore the appeal was rendered unfair. I consequently set aside the sentence imposed by the Supreme Court of Appeal.

The manner in which courts should give notice

[79] Lastly, it is apposite for this Court to give some assistance on the manner in which appellate courts could give notice to an accused person of a possible increase in sentence

[96] For example, this notice would be unnecessary if the State were cross-appealing on sentence because the applicant would then be on notice that the sentence may be increased and could act accordingly.

[97] See *R H McL* above n 78 at 492.

on appeal. If the court forms a prima facie view before the hearing that it is considering an increase in sentence, for instance while reading the record, it should put the accused person on notice prior to the hearing. If the court forms this opinion during the hearing, then it must formally inform the accused person that it is considering an increase and give the accused person sufficient time, subsequent to the hearing, to make written submissions on this issue. Finally, even if the court is contemplating an increase after the hearing it must formally request the parties to make submissions on this point before making its final decision.

Order

[80] The sentence imposed by the Supreme Court of Appeal is set aside because the applicant's right to a fair trial was infringed at the sentencing stage of the appeal. I am minded to remit the case to the trial court for sentencing as it is ordinarily the court best placed to determine an appropriate sentence.[98]

[81] In the circumstances, the following order is made:

1. Leave to appeal is granted.

[98] See *S v Whitehead* 1970 (4) SA 424 (A) at 435D ("the relatively restricted ambit wherein this Court will interfere with a competent sentence passed by a trial Court"); *S v Ivanisevic and Another* 1967 (4) SA 572 (A) at 575F-H ("it has more than once been pointed out that the power of a Court of appeal to ameliorate sentences is a limited one . . . This is because the trial Court has a judicial discretion, and the appeal is not to the discretion of the Court of appeal: on the contrary, in the latter Court the enquiry is whether it can be said that the trial Court exercised its discretion improperly."); and *S v Fazzie and Others* 1964 (4) SA 673 (A) at 684A-B ("This Court will not readily differ from the Court a *quo* in its assessment either of the factors to be had regard to or as to the value to be attached to them.")

2. The applicant's appeal against his conviction under section 115(e) of the Correctional Services Act 111 of 1998 is dismissed.

3. The applicant's appeal against the five-year sentence of imprisonment imposed by the Supreme Court of Appeal is upheld.

4. The case is remitted to the Modimolle Regional Magistrates' Court for it to impose an appropriate sentence in respect of the applicant's conviction under section 115(e) of the Correctional Services Act 111 of 1998.

JAFTA AND NKABINDE JJ (Zondo AJ concurring):

[82] We have read the majority judgment, which dismisses the appeal against conviction but upholds it against sentence. We agree that leave to appeal should be granted and that the appeal against the conviction on the alternative charge should fail. But we disagree that the appeal against the sentence imposed by the Supreme Court of Appeal should succeed. The majority holds, on the basis of the common law as developed by it, that the Supreme Court of Appeal committed an irregularity that resulted in a failure of justice.[99]

[83] We do not agree that any irregularity was committed, let alone of the kind that leads to a failure of justice. In our respectful view, and for various reasons to which we

[99] Majority judgment at [75].

later return, the need to develop the common law does not arise in this matter and it is not a proper course to follow.

[84] Before we articulate our reasons for the findings referred to above, it is necessary to set out the ground on which the sentence imposed by the Supreme Court of Appeal is impugned. It is important to record at the outset that the applicant did not ask for the development of the common law in his founding affidavit, replying affidavit and written argument. The complaint is that the applicant's right to a fair trial entrenched in section 35(3) of the Constitution[100] was breached, when the Supreme Court of Appeal imposed a sentence without giving him prior notice to the effect that it contemplated increasing the sentence imposed by the trial court.

[85] In the founding affidavit the complaint is framed in these terms:

> "Applicant was not forewarned that the Supreme Court of Appeal was of the *prima facie* view that the sentence should be increased if convicted on the alternative count. It is a long salutary practice to notify the appellant that the sentence might be increased. The imposition of a heavier sentence on the lesser offence is disturbingly inappropriate and induced such a sense of shock that this Honourable Court is entitled to intervene.
>
> . . .
>
> The Supreme Court of Appeal was in reality acting as a court of first instance with regard to the sentence imposed on the alterative count. The Applicant's right to be heard with respect to the sentence was ignored."

[100] Section 35(3) is quoted in [49] of the majority judgment.

[86] Contradicting propositions emerge from this formulation of the complaint. First, the Supreme Court of Appeal is accused of deviating from practice by not giving notice that it contemplated increasing the sentence imposed by the trial court. Second, the applicant accepts that a new sentence was imposed following his conviction on the alternative charge. His complaint in this regard is that he was denied a hearing in respect of the sentence that was to be imposed on the alternative charge. These complaints are mutually exclusive.

[87] The applicant concludes by stating:

> "The right to a fair trial is fundamental to the rule of law. It is in the interest of justice that Applicant has the right to put mitigating factors before a Court where the Court is of the opinion that the sentence should be increased after setting aside the conviction and sentence on the more serious count and the Applicant is convicted on a less serious offence than the offence he was originally convicted of. Quite apart from the aforesaid the Applicant had the right to be informed that his sentence will be increased even where his appeal was upheld on the serious charges. The Applicant was with regard to the foregoing not afforded fair procedure in terms of his right to appeal as envisaged by section 35(3)(o) of the Constitution."

[88] The challenge to the sentence imposed by the Supreme Court of Appeal must be assessed in the context of this factual background. The applicant was charged, amongst other offences, with harbouring persons suspected to have committed offences specified in the Protection of Constitutional Democracy against Terrorist and Related Activities

Act.[101] In the alternative, he was charged with harbouring escaped prisoners in contravention of section 115(e) of the Correctional Services Act.[102] Section 115(e) provides that "[a]ny person who . . . harbours or conceals or assists in harbouring or concealing an escaped inmate . . . is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding ten years or to such incarceration without the option of a fine or both." The trial court convicted him on the main charge and sentenced him to an effective three years' imprisonment, an additional two years having been suspended for five years conditionally.

[89] An appeal to the High Court was unsuccessful but he was granted leave to the Supreme Court of Appeal. In a split decision, the Supreme Court of Appeal set aside the conviction and sentence. The majority convicted the applicant on the alternative charge and imposed a new sentence of five years' imprisonment, after taking into account the mitigating and aggravating factors relevant to sentence.[103]

Was the applicant's right to a fair hearing infringed?

[90] The burden to show the infringement of the right to a fair trial rests on the applicant. As stated earlier, the applicant asserts that he was denied a fair hearing in

[101] 33 of 2004. Section 11, under which he was charged, provides that––

> "Any person who harbours or conceals any person, whom he or she knows, or ought reasonably to have known or suspected, to be a person who has committed a specified offence, as referred to in paragraph (a) of the definition of '**specified offence**', or who is likely to commit such an offence, is guilty of an offence."

[102] 111 of 1998.

[103] *S v Bogaards* [2011] ZASCA 196; [2012] 1 All SA 376 (SCA) at para 18.

relation to sentence because the Supreme Court of Appeal did not notify him in advance that it contemplated imposing a sentence harsher than the one that was imposed by the trial court. It is important to note that this entitlement to notice is not based on section 35 of the Constitution. Instead, the claim is that the failure to give notice, which is ordinarily issued as a matter of practice under the common law, rendered the hearing in the Supreme Court of Appeal, unfair. As a result, the applicant's fair trial right under section 35(3)(o) of the Constitution was breached.

[91] The evaluation of this claim requires us to examine what occurred in the Supreme Court of Appeal. This enquiry is mainly factual and also involves the making of a value judgment based on the established facts. As this Court observed in *Key v Attorney-General, Cape Provincial Division, and Another*:[104]

> "What the Constitution demands is that the accused be given a fair trial. Ultimately, . . . fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted."[105] (Footnote omitted.)

[92] Two important principles are enunciated in the statement quoted above. The first is that fairness may be determined upon the assessment of the facts of each case. The

[104] [1996] ZACC 25; 1996 (4) SA 187 (CC); 1996 (6) BCLR 788 (CC).

[105] Id at para 13.

second is that fairness is context-specific. Importantly, fairness does not depend on whether what was done breached the Constitution or not. Conduct that is unconstitutional does not, as a matter of course, render a trial unfair. What needs to be done is to evaluate the impact of such conduct on the hearing in the light of all relevant facts.

[93] In this case, the applicant appealed against conviction and sentence to the Supreme Court of Appeal. The prosecution did not cross-appeal against sentence. In view of the fact that the Supreme Court of Appeal is empowered to set aside an order which is the subject of the appeal and replace it with an order which the court of first instance ought to have granted,[106] the applicant was fully aware that the impugned conviction and sentence might be set aside and replaced with a conviction on the alternative charge and a fresh sentence imposed.[107] He was represented by senior counsel who was alive to the fact that a conviction on the alternative charge could replace the one on the main charge. Indeed,

[106] Section 22(b) of the Supreme Court Act 59 of 1959 provides:

> "The appellate division or a provincial division, or a local division having appeal jurisdiction, shall have power—
>
> (a) . . .
>
> (b) to confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require."

[107] Section 322(1)(b) of the Criminal Procedure Act 51 of 1977 provides:

> "In the case of an appeal against a conviction or of any question of law reserved, the court of appeal may—
>
> (a) . . .
>
> (b) give such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial".

the written argument filed by his counsel in the Supreme Court of Appeal covered this issue.

[94] Addressing the propriety of a conviction on the alternative charge, the applicant contended in the written argument before the Supreme Court of Appeal:

> "Section 6(1)(a) of the Correctional Services Act reads:
>
> > 'No person may be committed to a correctional centre without a valid warrant for his or her detention.'
>
> It is submitted that it is a prerequisite for the lawful detention of a person in a correctional centre that the inmate be detained in terms of a valid warrant of detention. . . . The warrant must be issued by properly authorised official (the Judge or the Registrar or a senior member from his office appointed in terms of section 34 of Act 59 of 1959). . . . A warrant not issued by any of the aforementioned is not a valid warrant as required by section 6(1)(a) of the Correctional Services Act. It is therefore submitted that Gouws and Van Rooyen were not 'inmates' for purposes of the Correctional Services Act. . . . *In the premises, Appellant is also not guilty on the alternative count.*" (Emphasis added.)

[95] In the answering affidavit the prosecution asserted that argument on the alternative charge and sentence was presented to the Supreme Court of Appeal on the applicant's behalf. This allegation is not disputed in the applicant's replying affidavit. On the record before us, the applicant was afforded a hearing on the alternative charge. In our view, the concession made in this Court by counsel for the State, to the effect that the failure to give notice rendered the hearing in the Supreme Court of Appeal unfair, was erroneously

made. Therefore we are not bound by it.[108] Accordingly, there is no merit in the contention that the Supreme Court of Appeal imposed a sentence on the applicant without affording him the opportunity to address the Court on sentence in respect of the alternative charge.

Was the Supreme Court of Appeal obliged to give notice?

[96] What remains for determination is whether the Supreme Court of Appeal ought to have given him notice. This claim is based on the "salutary practice" which was observed by the courts of appeal even before the adoption of the Constitution. It is important to set out what this practice entails. Where there is an appeal against sentence in circumstances where the prosecution does not cross-appeal and if the court contemplates increasing sentence, notice is given to the appellant. The notice enables the appellant to make a choice whether withdraw the appeal or advance argument on why the sentence should not be increased.[109] This practice finds no application in a case such as the present where the conviction and sentence imposed by the trial court are set aside and replaced with a new conviction and a fresh sentence. This is so because no sentence is increased in such cases.

[97] Moreover, non-compliance with this practice has never been taken to constitute an irregularity because it has always been treated as a rule of practice which has no legal

[108] *Matatiele Municipality and Others v President of the RSA and Others* [2006] ZACC 2; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC) at para 67.

[109] *R v Swanepoel* 1945 (AD) 444 at 451.

force. In other words it is neither a legal rule nor principle. It cannot be elevated to principle in view of the provisions of section 322 of the Criminal Procedure Act. Without requiring notice to be given, this section empowers an appeal court to impose a sentence more severe than that of the trial court.[110] It follows that by not giving the applicant notice, the Supreme Court of Appeal did not breach any rule of law or practice.

Impact of a failure to give notice

[98] On the assumption that the sentence was increased and that the Supreme Court of Appeal ought to have given notice, the question is whether that failure in and of itself alone, had the impact of rendering the proceedings in the Supreme Court of Appeal unfair. This issue must be assessed with reference to the nature of the complaint and the relevant facts. In the present circumstances, the absence of notice had no adverse impact on the proceedings. The applicant was afforded the opportunity and he presented argument on the alternative charge and what he considered to be the appropriate sentence, in the event of a conviction in respect of that charge. Therefore, we are not persuaded that the failure to give notice resulted in unfairness of the proceedings.

Development of the common law

[99] Apart from the fact that the applicant did not ask for the development of the common law, there are considerations that militate against its development. The first is that the applicant has failed, in our view, to show at the level of fact that the Supreme

[110] *R v Mkwanazi and Others* 1948 (4) SA 686 (A) at 690-1.

Court of Appeal has increased the sentence imposed by the trial court. The majority holds that the sentence was not increased in the technical sense but that the Court effected an increase of sentence in substance.[111] For this proposition, reliance is placed on *S v Andhee*.[112] We do not agree. In our view, the question whether sentence has been increased for purposes of invoking the common law practice turns on the facts. What needs to be established is the simple fact that the appeal court contemplates to increase the sentence that was imposed by the trial court. This, in our respectful view, does not involve any technicalities.

[100] *Andhee*, on which reliance is placed, does not support the proposition. What happened in that case is that the High Court to which the appellant had appealed, gave notice that it contemplated increasing the sentence imposed by the trial court. The Supreme Court of Appeal did not interfere with the sentence imposed by the High Court on the basis that the sentence was increased without notice. The Supreme Court of Appeal held that the High Court had overlooked the fact that as an appeal court, its power to alter the sentence imposed by the trial court was limited. In this regard the Supreme Court of Appeal said:

> "In the present instance the Court *a quo* in essence doubled the appellant's sentence in respect of fewer and less serious crimes than he was convicted of originally. This it could not do merely in the exercise of an untrammelled sentencing discretion. It was only

[111] Majority judgment at [74].

[112] 1996 (1) SACR 419 (A) (*Andhee*).

> entitled in the present case to increase the sentences if it was satisfied that the sentences determined were, or the effective period to be served was, glaringly inadequate, even for the offences found by the magistrate to have been committed. . . . At no time did it express the view that the effective sentence imposed by the magistrate was glaringly inadequate."[113]

This illustrates that the Supreme Court of Appeal in *Andhee* was concerned with the general power of an appeal court to intervene, amend or vary a sentence imposed by a trial court.

[101] The second consideration is that section 35(3) of the Constitution is designed to cover the whole field relating to protection of accused persons against procedural unfairness in criminal proceedings. This is evident from the opening words of the subsection which declare "[e]very accused person has a right to a fair trial, which includes". Then the subsection proceeds to enumerate a list of no less than 15 rights, including the right of appeal to a higher court. The opening words illustrate that the scope of the right to a fair trial extends beyond the listed rights. Properly construed, it affords accused persons protection against any procedural step that is unfair.

[102] This Court adopted the approach outlined above in construing the predecessor of section 35(3) in *S v Zuma and Others*.[114] In that case the Court interpreted section 25(3) of the interim Constitution and said:

[113] Id at 422d-g.
[114] [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC).

> "The right to a fair trial conferred by that provision 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."[115]

[103] Proceeding on the same approach in *S v Dzukuda and Others; S v Tshilo*[116] this Court said, in relation to section 35(3):

> "Elements of this comprehensive right are specified in paras *(a)* to *(o)* of ss (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 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 s 35(3) develops."[117]

[104] The third consideration militating against the development of the common law is this. The object of the development is to use the developed common law as a yardstick against which the fairness of the criminal proceedings is measured. In view of the fact that section 35(3) of the Constitution outlaws unfairness in criminal proceedings, the common law cannot be employed as a separate standard because it does not exist as a system of law parallel to the Constitution. In *Pharmaceutical Manufacturers Association*

[115] Id at para 16.

[116] [2000] ZACC 16; 2000 (4) SA 1078 (CC); 2000 (11) BCLR 1252 (CC).

[117] Id at para 9.

of SA and Another: In re ex parte President of the RSA and Others[118] this Court authoritatively declared that the common law does not exist alongside the Constitution to continue to regulate matters that are governed by the Constitution. The Court stated:

> "I cannot accept this contention, which treats the common law as a body of law separate and distinct from the Constitution. There are not two systems of law, each dealing with the same subject-matter, each having similar requirements, each operating in its own field with its own highest Court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control."[119]

[105] Although the majority finds that in this case the failure to give notice by the Supreme Court of Appeal "constituted an infringement of the right of appeal under section 35(3)(o) of the Constitution",[120] the majority holds that it is necessary still to develop the common law. We disagree. In our view, this finding by the majority renders the development of the common law unnecessary. If section 35(3) is the benchmark against which the fairness of the appeal proceedings is to be tested, the common law cannot be another yardstick because it does not amount to a body of law separate and distinct from the Constitution.

[106] Yet another consideration is that in the context of the rights listed in section 35(3), particularly the right to be informed of the charge with sufficient detail, the Supreme

[118] [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC).

[119] Id at para 44.

[120] Majority judgment at [52].

Court of Appeal in many cases has declined to construe that right as requiring every charge sheet to recite the relevant provisions of the minimum sentencing legislation,[121] for the increased sentences provided for there to be invoked. In *S v Legoa*,[122] Cameron JA refused to hold that the failure to refer to that legislation in the charge sheet renders a criminal trial unfair, if when passing sentence the trial court applies the minimum sentencing legislation. He said:

> "The matter is, however, one of substance and not form, and I would be reluctant to lay down a general rule that the charge must in every case recite either the specific form of the scheduled offence with which the accused is charged, or the facts the State intends to prove to establish it. A general requirement to this effect, if applied with undue formalism, may create intolerable complexities in the administration of justice and may be insufficiently heedful of the practical realities under which charge-sheets are frequently drawn up. The accused might in any event acquire the requisite knowledge from particulars furnished to the charge or, in a Superior Court, from the summary of substantial facts the State is obliged to furnish. Whether the accused's substantive fair trial right, including his ability to answer the charge, has been impaired, will therefore depend on a vigilant examination of the relevant circumstances."[123] (Footnotes omitted.)

[107] An important principle emerging from *Legoa* is that the breach of the common law rule, that the charge sheet should set out the facts that the prosecution intends to prove, in order to bring the accused within an enhanced sentencing jurisdiction, did not of itself result in the proceedings being unfair. The question whether an accused person had an

[121] Criminal Law Amendment Act 105 of 1997.

[122] 2003 (1) SACR 13 (SCA) (*Legoa*).

[123] Id at para 21. See also *Mthembu v The State* 2012 (1) SACR 517 (SCA) at paras 16-7 and *S v Ndlovu* 2003 (1) SACR 331 (SCA) at para 12.

unfair trial depends on the facts and the circumstances of each case. A different approach is not warranted in this case.

[108] Another consideration against the development of the common law is that in terms of the rule as developed, notice is required only in respect of sentence and not where the appeal court contemplates setting aside a conviction and replacing it with a conviction on a more serious charge which may carry a heavier sentence. Notice was not given here in relation to the conviction as well. The applicant does not impugn the conviction on the alternative charge on the basis that he was not given notice. In our view, if the failure to give notice in respect of sentence renders the appeal proceedings unfair, the unfairness flowing from it must equally extend to the conviction. We can think of no reason in logic or principle which warrants that the defect be limited to sentence, more so when one considers that the underlying complaint is that the appellant is denied the opportunity to be heard. The entitlement to a hearing covers both the conviction and sentence.

[109] For all these reasons we would dismiss the appeal.

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