CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 105/12
[2013] ZACC 17

In the matter between:

FRANK NABOLISA Applicant

and

THE STATE Respondent

Heard on : 7 March 2013

Decided on : 12 June 2013

JUDGMENT

SKWEYIYA J (Moseneke DCJ and Van der Westhuizen J concurring):

Introduction

[1] This matter concerns an application for leave to appeal against a decision of the Supreme Court of Appeal in which the applicant, Mr Frank Nabolisa, had his

conviction upheld and his sentence increased from 12 to 20 years' imprisonment.[1] Before this Court for determination is the question whether the State is required to cross-appeal in circumstances where the accused initiates an appeal, or whether notice in the State's Heads of Argument that it seeks an increase suffices.

Factual background and prior proceedings

[2] At some stage prior to or during 2008, Ms Sheryl Cwele and Mr Nabolisa entered into an unlawful criminal enterprise to import cocaine into South Africa. They sought to do so by recruiting two "couriers", Ms Tessa Beetge and Ms Charmaine Moss, to travel overseas and to bring cocaine back into South Africa. Ms Moss declined and withdrew from the relationship. Ms Beetge was flown to Columbia and, on her way home to South Africa, was arrested at an airport in Sao Paulo, Brazil with just over 10 kilograms of cocaine in her possession. Ms Beetge had worked closely with Mr Nabolisa in this enterprise.

[3] Mr Nabolisa was charged, along with Ms Cwele, with contravening section 5(b) of the Drugs and Drug Trafficking Act[2] (Drugs Act) for dealing in a dangerous dependence-producing substance. In the alternative, they were charged with contravening section 18(2)(a) of the Riotous Assemblies Act[3] for conspiracy to deal in

[1] *Cwele and Another v S* [2012] ZASCA 155; 2013 (1) SACR 478 (SCA); [2012] 4 All SA 497 (SCA).

[2] 140 of 1992.

[3] 17 of 1956.

drugs.[4] Mr Nabolisa pleaded not guilty.

[4] The indictment made reference to the provisions of section 51(2) of the Criminal Law Amendment Act[5] and Part II of Schedule 2 to that Act (minimum sentencing legislation). Those provisions, read together, provide that for a conviction under section 5(b) of the Drugs Act, a minimum sentence of 15 years' imprisonment must be imposed on a first time offender.[6] The maximum sentence for contravention of section 5(b) of the Drugs Act is set by section 17(e) of the Drugs Act, providing for imprisonment "for a period not exceeding 25 years".

[5] Mr Nabolisa and Ms Cwele were convicted on 5 May 2011 in the KwaZulu-Natal High Court, Pietermaritzburg (High Court) of dealing in drugs under section 5(b) of the Drugs Act. In sentencing, the High Court recognised that the starting point was the 15 years prescribed by the minimum sentencing legislation but it found that there were compelling circumstances warranting a three year reduction in the prescribed minimum sentence.

[6] The High Court granted Mr Nabolisa leave to appeal to the Supreme Court of Appeal in respect of both his conviction and sentence. Ms Cwele appealed in respect of her conviction only. The State did not apply for leave to cross-appeal against the

[4] Two further charges were preferred against Mr Nabolisa and Ms Cwele, but these were not persisted with by the State after it had closed its case, conceding that no evidence existed for a rerun of a verdict of guilty on the two counts. Accordingly, no further reference will be made to them.

[5] 105 of 1997.

[6] This is provided that the value of the dependence-producing substance in question is more than R50 000, or more than R10 000 if the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy.

sentence. However, it indicated twice, in its Heads of Argument and subsequently in its supplementary Heads of Argument, that the sentences should be increased.

[7] The State, in its Heads of Argument filed on 26 March 2012, stated that "it [would] be submitted that the sentence should have been a term of 15 years' imprisonment each", arguing that there was insufficient basis for deviating from the prescribed minimum. The State also submitted supplementary Heads of Argument, on 12 June 2012, where it argued that "a sentence in the region of 20 years' imprisonment should rather have been imposed." This followed the State becoming aware of the decision in *Keyser v S*,[7] which had been delivered on 25 May 2012, in which a sentence of 20 years was upheld. For the sake of convenience the presentation of these arguments will be referred to as the first and second notices[8] respectively.

[8] The Supreme Court of Appeal heard the matter on 16 August 2012, almost five months after the first notice had been given and over two months after the second notice had been given. During proceedings in the Supreme Court of Appeal, counsel for Mr Nabolisa presented argument on the topic of conviction and sentence. It was argued by Mr Nabolisa's counsel that the sentence imposed by the High Court was just and that no misdirection was committed by the High Court.

[7] [2012] ZASCA 70; 2012 (2) SACR 437 (SCA).

[8] Counsel for the applicant conceded during oral argument that these submissions amounted to "notice".

[9] On 1 October 2012, the Supreme Court of Appeal dismissed the appeals against the conviction and set aside and replaced Mr Nabolisa and Ms Cwele's sentences. The Court held that the provisions of the minimum sentencing legislation applied. It relied on the authority of *Keyser* and considered various factors including the seriousness of the crime and the fact that in most cases the "courier" is caught while the handler remains safe in the background. The Court concluded that a sentence of 20 years would have been the appropriate sentence for the High Court to impose. Given that the disparity between that sentence and the sentence of 12 years' imprisonment imposed by the High Court was so marked, it held that the High Court's sentence could properly be described as "disturbingly inappropriate". The Supreme Court of Appeal set aside the High Court sentence and replaced it with a sentence of 20 years' imprisonment in respect of both Mr Nabolisa and Ms Cwele, antedated to 6 May 2011 in respect of Mr Nabolisa.

[10] Mr Nabolisa applied for leave to appeal to this Court against the conviction confirmed by the Supreme Court of Appeal and the new sentence it imposed. On 19 November 2012, this Court dismissed his application for leave to appeal against conviction. In this Court the matter is confined to the application for leave to appeal against sentence. It is important to note that Ms Cwele is not a party to the proceedings before this Court. She has not appealed against the Supreme Court of Appeal's judgment and for that reason the propriety of the procedure in the Supreme Court of Appeal with respect to her is not of relevance in reaching a decision in this matter.

In this Court

Applicant's submissions

[11] Mr Nabolisa contends that the State was required to have cross-appealed against sentence if it sought to have his sentence increased on appeal, and it failed to do so. He submits that properly interpreted, section 316B of the Criminal Procedure Act[9] creates a peremptory statutory requirement of cross-appeal by the State. Section 316B provides:

> "**Appeal by attorney-general against sentence of superior court**
>
> (1) Subject to subsection (2), the attorney-general may appeal to the Appellate Division against a sentence imposed upon an accused in a criminal case in a superior court.
>
> (2) The provisions of section 316 in respect of an application or appeal referred to in that section by an accused, shall apply *mutatis mutandis* with reference to a case in which the attorney-general appeals in terms of subsection (1) of this section.
>
> (3) Upon an appeal in terms of subsection (1) or an application referred to in subsection (2), brought by the attorney-general, the court may order that the State pay the accused concerned the whole or any part of the costs to which the accused may have been put in opposing the appeal or application, taxed according to the scale in civil cases of that court."

[12] Mr Nabolisa describes the practice that existed prior to 1990 (before the introduction of section 316B of the Criminal Procedure Act) as one where the State "was able merely to request a Court of Appeal in its Heads of Argument or by notice to increase the sentence" where the convicted and sentenced person has appealed.

[9] 51 of 1977.

However, he argues that the introduction of section 316B of the Criminal Procedure Act abolished that practice. To allow this "old practice" to continue would render section 316B superfluous and would be absurd because it would allow the State to request an increase in sentence in instances where leave to appeal may have been refused.

[13] Mr Nabolisa submits that his sentence was not increased *mero motu* by the Supreme Court of Appeal, but in the light of the State's notice in its Heads of Argument. If, however, the Supreme Court of Appeal had in fact increased his sentence *mero motu*, he argues, the Court failed to comply with its duty to notify him that it was considering increasing his sentence as it was required to do following the decision of this Court in *Bogaards*.[10]

[14] It is submitted that by increasing his sentence in the circumstances, the Supreme Court of Appeal infringed on Mr Nabolisa's constitutional right to a fair appeal process under section 35(3)(o) of the Constitution. In so doing, it occasioned a miscarriage of justice. He also alleged infringements of his rights under sections 34 and 9 of the Constitution but he did not pursue these arguments.

Respondent's submissions

[15] The State offers a contrary interpretation of section 316B. It argues that section 316B merely filled a lacuna that had existed in the law. Prior to the enactment

[10] *Bogaards v S* [2012] ZACC 23; 2013 (1) SACR 1 (CC); 2012 (12) BCLR 1261 (CC).

of section 316B, the State was unable to appeal to rectify a sentence that was overly lenient when the accused had elected not to appeal. Section 316B, it is argued, filled this lacuna by adding to the law a mechanism for the State to appeal at its own initiative. It was not intended to remove the "old practice". There was, as a result, no need for the State to seek leave to cross-appeal when Mr Nabolisa appealed to the Supreme Court of Appeal. The determination of a possible new sentence was already a live issue before the Court.

[16] The State submits that it twice gave notice of its intention to seek an increase in sentence in its first and supplementary Heads of Argument. Where it has given such notice, there is no need for the court of appeal to give additional notice to the appellant. Additional notice from the court would, in any event, be undesirable because it would appear that the court was in agreement with the State's request to increase sentence. It further argues that it is immaterial whether the court or the State notifies the appellant. In substance, it is argued, the proceedings in the Supreme Court of Appeal were scrupulously fair.

[17] The State further seeks to distinguish this case from *Bogaards* on the facts. In *Bogaards* there had been no indication from the State that an increase was sought and, further, *Bogaards* turned on the consequence of the court of appeal considering a sentence afresh when imposing a different conviction. The present matter cannot be likened to the "forensic ambush" in *Bogaards* because Mr Nabolisa was adequately notified and had ample time to prepare his case.

Issues

[18] The substantive issues before this Court can be set out as follows:

(i) Does section 316B of the Criminal Procedure Act require the State formally to cross-appeal in order to seek an increase in sentence in circumstances where the accused has appealed?

(ii) If so, does the State's failure to cross-appeal in itself render the appeal unfair?

(iii) Was the appeal conducted in accordance with the dictates of a fair hearing?

Leave to appeal

[19] Leave to appeal should be granted when a constitutional matter or an issue connected with a decision on a constitutional matter is raised, and when it is in the interests of justice to grant leave.

[20] Sentencing is not generally a constitutional matter.[11] However, the interpretation of section 316B of the Criminal Procedure Act implicates the constitutional right to a fair appeal.[12] This is plainly a constitutional matter.[13]

[11] Id at para 42.

[12] Section 35(3)(o) of the Constitution.

[13] *S v Shaik and Others* [2007] ZACC 19; 2008 (2) SA 208 (CC); 2007 (12) BCLR 1360 (CC) at para 83. See also *National Director of Public Prosecutions v Elran* [2013] ZACC 2; 2013 (1) SACR 429 (CC); 2013 (4) BCLR 379 (CC) at para 19.

[21] Do the interests of justice favour the grant of leave to appeal? The interpretation of section 316B of the Criminal Procedure Act has broad implications for the criminal appeal process. The fact that there remains uncertainty as to its correct interpretation makes it both appropriate and desirable that this Court provides clarity. Mr Nabolisa's points are eminently arguable. For all of these reasons, I would grant leave to appeal.

Merits

[22] Ordinarily an appeal court will only interfere with a sentence if—

> "there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it."[14] (Footnotes omitted.)

[23] In this case, the starting point of this enquiry is whether an irregularity occurred in Mr Nabolisa's appeal. If an irregularity indeed occurred, it will then be necessary to enquire whether this irregularity resulted in a failure of justice. Failure to establish this will deprive this Court of jurisdiction to interfere in the sentence imposed by the Supreme Court of Appeal.

[14] *Bogaards* above n 10 at para 41.

Irregularity

[24] An irregularity is a wrongful or irregular deviation from the formalities and rules of procedure aimed at ensuring a fair trial.[15] In *Jaipal v S* irregularities were described as deviations from "what one would regularly expect in a properly conducted criminal trial."[16] If a cross-appeal by the State was required then the State's failure to do so in this instance will result in an irregularity.

Is cross-appeal required?

[25] The wording of section 316B of the Criminal Procedure Act is not, on the face of it, conclusive of whether a formal cross-appeal is mandatory.[17] Nothing explicit in the section indicates that it is peremptory.

[26] The historical rationale for the enactment of section 316B affirms this view. Prior to 1990, before the introduction of sections 310A and 316B through the Criminal Law Amendment Act, in terms of the common law the State had no formal right to appeal against sentences where the accused had not appealed. However, a practice existed whereby the State could motivate in oral argument for an increase in sentence. It also developed, as a rule of practice, that the State would give notice of its intention to do so.[18] Section 316B was, in my view, intended to fill the lacuna in the law by creating an *independent* right for the State to appeal, which it previously lacked. I see

[15] Id at para 53.

[16] *Jaipal v S* [2005] ZACC 1; 2005 (4) SA 581 (CC); 2005 (5) BCLR 423 (CC) at para 44.

[17] See [11] above where section 316B is reproduced in full.

[18] *Director of Public Prosecutions v Olivier* [2005] ZASCA 121; 2006 (1) SACR 380 (SCA) at para 19; *Kellerman v S* [1996] ZASCA 139; 1997 (1) SACR 1 (A); [1997] 1 All SA 127 (A); *R v Swanepoel* 1945 AD 444 at 451; and *S v Naidoo* 1987 (3) SA 834 (N).

no basis to conclude that its enactment changed the "old practice" and created a requirement for the State to cross-appeal where the accused had already appealed because, in those instances, the State would be before the court of appeal already. It seems illogical to me, absent express wording to the contrary, that the section should be interpreted to require the State, in such an instance, to launch a separate "cross-appeal" in order to present argument on a matter already before the court. This view is strengthened by the presumption that legislation does not alter the common law, absent an explicit statement to the contrary.[19] This reading of section 316B is supported by the Supreme Court of Appeal decision in *Kellerman v S*.[20]

[27] Further, this reading of section 316B must, in my view, be correct in the light of the extensive power of courts of appeal with respect to sentencing. Section 22 of the Supreme Court Act,[21] read together with section 322 of the Criminal Procedure Act, provides that a court of appeal is empowered to confirm, amend or set aside a judgment or order which is the subject of the appeal and give any judgment or make

[19] See *Gordon NO v Standard Merchant Bank Ltd* 1983 (3) SA 68 (A) at 94; *Bill of Costs (Pty) Ltd and Another v The Registrar, Cape, NO and Another* 1979 (3) SA 925 (A) at 942D-E; *Dhanabakium v Subramanian and Another* 1943 AD 160 at 167; *S v Khumbisa and Others* 1984 (2) SA 670 (N) at 680; *Kaplan v Incorporated Law Society, Transvaal* 1981 (2) SA 762 (T) at 770; and *Rand Bank Bpk v Regering van die Republiek van Suid-Afrika en Andere* 1974 (4) SA 764 (T) at 767D.

[20] Above n 18. The South African Law Reform Commission (*Simplification of Criminal Procedure: The Right of the Director of Public Prosecutions to Appeal on Questions of Fact*, Third Interim Report, Project 73, 2000) seems to agree with this interpretation where it stated:

> "Despite some objections in extending the State's right of appeal to inadequate sentences, the Criminal Law Amendment Act, 107 of 1990, granted the Attorney-General the right to appeal against sentences imposed by lower and by superior courts. . . . The Attorney-General always had and *the DPP still has the right*, when the accused has appealed against his conviction and/or sentence, to apply to the court of appeal to increase the sentence." (Footnotes omitted and emphasis added.)

[21] 59 of 1959.

any order which the circumstances may require.[22] The court may interfere in sentence even when it is only a reduction in sentence that is sought and even when the appeal is against conviction only. In *Kgosimore*[23] the Supreme Court of Appeal held:

> "It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a court of appeal may interfere. These include, whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the court of appeal would have imposed. All these formulations, however, are aimed at determining the same thing; *viz* whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis this is the true inquiry. . . . Either the discretion was properly and reasonably exercised or it was not. If it was, a court of appeal has no power to interfere; if it was not, it is free to do so. I can accordingly see no juridical basis for the stricter test suggested by counsel; nor is there anything in section 316B of the [Criminal Procedure Act], or for that matter section 310A, to suggest otherwise. . . . It follows that, in my view, whether it is the attorney-general (now the Director of Public Prosecutions) or an accused who appeals against a sentence, the power of a court of appeal to interfere is the same."[24]

[28] In essence, therefore, the issue of sentencing is always potentially before an appellate court in a criminal matter.[25] There would thus be no need to bring it before court by cross-appealing. It is important not to limit, through formalities, the ability of the State and the accused to raise argument and authority on sentencing in order to

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[22] *Toubie v S* [2012] ZASCA 133; [2012] 4 All SA 290 (SCA) at para 13.

[23] *Kgosimor*e *v S* [1999] ZASCA 63; 1999 (2) SACR 238 (SCA).

[24] Id at para 10.

[25] This is unique to the issue of sentencing. On an appeal against sentence only, a court of appeal has no power to substitute a conviction for a more serious crime (*S v Tladi* 1989 (3) SA 444 (BGD)). This is not to say that the power of a court of appeal to interfere with sentence is without any limits. For example, only in specific circumstances may a court of appeal interfere with the sentencing discretion of the trial court. Further to this, the court of appeal does not have the jurisdiction to increase a sentence beyond the penal jurisdiction of the trial court (*S v Louw* 1990 (3) SA 116 (A) at 126B and *S v Peter* 1989 (3) SA 649 (CkA)).

allow a court best to exercise its sentencing discretion. This is re-enforced through section 274 of the Criminal Procedure Act.[26]

[29] In this case, the issue of sentence was explicitly raised before the Supreme Court of Appeal by Mr Nabolisa's own appeal against sentence and conviction. The State, by arguing for an increase in sentence, was thus not raising a new issue.

[30] I conclude that section 316B of the Criminal Procedure Act does not create a peremptory requirement for cross-appeal and the failure by the State to do so does not constitute an irregularity. This cannot be understood to permit an appeal by the State through "the back door" because the issue is already before the Court. The issue of an appropriate sentence is thus not a new matter in which the State and the appellant have not joined issue or one which would take any of the parties or the court by surprise.

[31] In addition, I do not think the State's failure to cross-appeal deviates from what would normally be expected in a properly conducted criminal appeal. It appears that there is inconsistency in the State's manner of seeking to effect an increase in sentence: while it makes use of the old practice of informal notification,[27] it at times

[26] Section 274 provides:

> "(1) A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.
>
> (2) The accused may address the court on any evidence received under subsection (1), as well as on the matter of the sentence, and thereafter the prosecution may likewise address the court."

The importance of allowing both parties the right to address the court on sentence was emphasised in *Mokela v S* [2011] ZASCA 166; 2012 (1) SACR 431 (SCA) at para 14.

[27] See for example *Kgosimore* above n 23. While I have found that section 316B does not make criminal cross-appeal mandatory, I am aware that cross-appeal does occur in practice. The question of whether section 316B

also employs cross-appeal.[28] I cannot conclude that either is more regularly expected than the other and can therefore not conclude that in general, as an incident of failure to adhere to "the norm", a failure to cross-appeal is an irregularity.

Was Mr Nabolisa adequately notified?

[32] An irregularity may have occurred if Mr Nabolisa had not been notified adequately of a potential increase in his sentence. An enquiry on this question is necessary because in *Bogaards* this Court developed the common law to elevate from a salutary practice to a rule that notice of a possible increase in sentence should be provided.[29]

[33] The majority in *Bogaards* reasoned that the notification practice ensured substantive fairness by facilitating an informed exercise of the right of appeal and by ensuring that the requirements of the *audi alteram partem* principle are observed.[30] The Court envisaged that notice may come from either the court, when it *mero motu* considers an increase, or from the State when it seeks an increase. I do not consider it pivotal from whom or in what form the notice is given, even though I accept that there are differences in notice that comes from the State and notice that comes from the

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permits cross-appeal is not before us. Accordingly I restrict my findings to the limited question of whether cross-appeal is *required* where the State seeks an increase. In my reasoning I do not find whether it would be irregular for the State to cross-appeal where the accused initiates an appeal – but merely that cross-appeal would be superfluous and unnecessary.

[28] *Combrink v S* [2011] ZASCA 116; 2012 (1) SACR 93 (SCA).

[29] *Bogaards* above n 10 at paras 55-8.

[30] Id at para 59.

court.[31] To hold that the source or form of the notice, absent more, is determinative would be to put form over substance[32] and substantive fairness is what the Constitution requires.[33] The important question is whether the notice informs the appellant of the possibility of an increase and affords him or her a meaningful opportunity to defend this possibility. If the answer is yes there can be no question of an irregularity. This determination must be made on a case-by-case basis.

[34] Quite distinct from the facts in *Bogaards*, where the appellant was not made aware by any other objective factor that an increase was being considered,[34] Mr Nabolisa was notified. He was put on terms early in the appeal proceedings that there was legal authority to support an increase in his sentence. It is apparent that

[31] For one, the court is required to give notice only once it reaches the *prima facie* view that an increase in sentence is considered. As a result, notice might even be given after the hearing. In contrast, the State must give notice before the hearing. On one hand, the appellant may be in a better position having been informed by the State rather than the court because the State's notice may come at an earlier stage. On the other hand, notice by the court is an indicator of the court's mindset. But is the appellant entitled to this insight? Not necessarily so. The fact that the court offers its *prima facie* view is simply required, as a matter of fairness, where the State has given the appellant no forewarning and the court must step in to ensure fairness in proceedings. The purpose of notice is not, and never was, to give the appellant the benefit of knowing the mind of the court before a decision is given.

[32] "Court notice" typically entails the court directing parties to present argument on the topic of increase. For example, see the phrasing of the Court in *S v Naidoo* 1987 (3) SA 834 (N) at 835. To contend that the State's presentation of argument (made before the court would even consider giving its direction) would fail to achieve the same effect, is an overly formalistic way of viewing the notice requirement.

[33] In *Legoa v S* [2002] ZASCA 122; [2002] 4 All SA 373 (SCA) at para 21, Cameron JA refused to hold that the failure to refer to certain facts 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." (Footnotes omitted.)

[34] *Bogaards* above n 10 at para 77.

Mr Nabolisa did not file supplementary Heads of Argument in response to the State's notice – and he gives no reason why. But Mr Nabolisa's counsel did argue on the issue of sentencing before the Supreme Court of Appeal. He argued against an increase by supporting the 12 year sentence imposed by the High Court.[35] From these facts, and in the absence of his raising any argument as to the substantive inadequacy of the notice, the State's notice was indeed adequate. Mr Nabolisa was made aware of the jeopardy of an increase and was able, with sufficient time and resources, to mount a defence against its possibility.

[35] Because the adequacy of the notice depends on the case at hand, it is ultimately for the court of appeal to ensure that the appellant understands the risk of an increase and has the opportunity to present argument on the issue.[36] Where the State's notice is inadequate, the court would still be required to give additional notice so as to ensure fairness to the appellant.

[36] I conclude that there has been no irregularity. This conclusion should be dispositive of the matter. Nevertheless, I proceed to point out that even if there had been an irregularity, then for many of the same reasons I am of the view that there has been no failure of justice justifying this Court's interference in Mr Nabolisa's sentence.

[35] In his founding affidavit in this Court, Mr Nabolisa stated that his counsel "argued that the sentence imposed by the Trial Court was just and that no misdirections were committed by the Trial Court."

[36] There could well be instances in which the State's notice in this form is inadequate. For example, had Mr Nabolisa been unrepresented and unable to glean from the Heads of Argument that he would need to defend an increase in sentence, the notice might not have been sufficient.

Failure of justice

[37] In order to found a failure of justice, the appellant must satisfy the Court "that there had been actual and substantial prejudice to the accused."[37] A "failure of justice" is understood in the context of section 35(3) of the Constitution to mean an unfair trial.[38] The principle of a fair trial and appeal in section 35 "embraces a concept of substantive fairness"[39] and has further been held to be flexible and informed by the underlying values of dignity, freedom and equality.[40]

[38] Generally, only those irregularities that are so gross a departure "from established rules of procedure that it can be said that the appellant was not properly tried"[41] will be considered a failure of justice *per se*, without the need to establish a miscarriage of justice. In my view, this is not the case in the present matter – prejudice must be established.

[39] When probed by the bench to identify what prejudice he had suffered by the State's "failure" to cross-appeal, counsel for Mr Nabolisa relied squarely on the alleged procedural irregularity itself. What Mr Nabolisa does not argue is that he was

[37] *R v Matsego and Others* 1956 (3) SA 411 (A) at 418E.

[38] *Shaik* above n 13. Section 35(3) of the Constitution ensures the rights of persons accused of criminal offences, and in relevant part provides:

> "Every accused person has a right to a fair trial, which includes the right—
>
> . . .
>
> (o) of appeal to, or review by, a higher court."

[39] *S v Zuma and Others* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 16, interpreting the interim Constitution. See also *S v Ntuli* [1995] ZACC 14; 1996 (1) SA 1207 (CC); 1996 (1) BCLR 141 (CC) at para 1.

[40] *S v Dzukuda and Others; S v Tshilo* [2000] ZACC 16; 2000 (4) SA 1078 (CC); 2000 (11) BCLR 1252 (CC) at paras 9-11.

[41] *S v Moodie* 1961 (4) 752 (A) at 759C. See also *Bogaards* above n 10 at para 42.

caught off guard, or that there were arguments that he would have raised but which he did not. He does not claim that he was "ambushed" or that he in any way misunderstood the possibility that his sentence might be increased.

[40] It was argued on Mr Nabolisa's behalf that he should not be penalised for presenting argument on increase of sentence out of caution. This illustrates the weakness in Mr Nabolisa's argument. It is exactly because of his being notified of a possible increase that he argued against it. It is a good illustration of the fact that he was put on terms and that fairness was achieved.

[41] I accordingly conclude that no miscarriage of justice has been shown, even if an irregularity had been established.

Conclusion

[42] In the result, I would have granted leave to appeal but dismissed the appeal because no irregularity has occurred.

JAFTA J (Mogoeng CJ, Froneman J, Khampepe J, Mhlantla AJ, Nkabinde J and Zondo J concurring):

[43] I have read the judgment of my Colleague Skweyiya J and I agree with him that leave to appeal should be granted. But for reasons that follow, I do not agree that the appeal must be dismissed.

Factual background

[44] This is an application for leave to appeal the sentence of 20 years' imprisonment imposed on the applicant by the Supreme Court of Appeal. Mr Frank Nabolisa (applicant) was convicted of dealing in dangerous dependence-producing drugs, namely cocaine with a street value of approximately R2 million. He was tried in the KwaZulu-Natal High Court, Pietermaritzburg (High Court) together with Ms Sheryl Cwele, a South African national. The applicant is a Nigerian national residing in South Africa.

[45] Having been convicted and sentenced, the applicant and Ms Cwele appealed to the Supreme Court of Appeal, with leave of the trial Court. Ms Cwele appealed against conviction only whilst the applicant challenged the conviction and the sentence imposed.

[46] The State did not seek leave to cross-appeal against both the sentences, even though it desired to have the sentences increased. The stance it took regarding leave to appeal will be set out and dealt with later. For now it suffices to mention that when it filed its written argument, the State intimated that it would ask for the increase of sentence at the hearing of the appeal, from 12 years' to 15 years' imprisonment.

[47] Emboldened by a later confirmation of a sentence of 20 years' imprisonment by the Supreme Court of Appeal in another case, the State filed supplementary heads of argument, stating that it would argue for the sentence imposed to be increased to 20

years' imprisonment. In short the State had intimated that it would no longer ask for an increase to 15 years' but to 20 years' imprisonment. I deal with the irregularity of this process below.

[48] At this early stage, it is necessary to point out that because Ms Cwele did not appeal against sentence, it is not clear on what basis the State could simply argue that the sentence imposed on her should be increased.

[49] The Supreme Court of Appeal permitted the State to argue for an increase of her sentence. It is apparent from its judgment that the Supreme Court of Appeal considered the issue of an increase in sentence to have been properly placed before it, by way of the State intimating that it would argue for an increase in sentence. The Supreme Court of Appeal said:

> "The appellants were convicted as charged on count 1 and were sentenced to 12 years' imprisonment. With leave of the trial court the first appellant now appeals against her conviction, while the second appellant appeals against both his conviction and the sentence imposed on him. In their original heads of argument counsel for the State gave notice that they would argue before this court that the trial court should have imposed terms of imprisonment of 15 years in respect of each appellant. However, they later filed supplementary heads, giving notice that they would argue, at the hearing of the appeal, that the sentences imposed on the two appellants be increased to 20 years' imprisonment."[42]

[50] And later when dealing with the question of sentence, the Court commenced thus:

[42] *Cwele and Another v S* [2012] ZASCA 155; 2013 (1) SACR 478 (SCA); [2012] 4 All SA 497 (SCA) (Supreme Court of Appeal judgment) at para 2.

> "I turn to the question of sentence. As I have indicated above, the State gave notice in its original heads of argument that it would seek an increase of the sentence of 12 years' imprisonment imposed by the trial court to 15 years' imprisonment. After this court's judgment in *Keyser v S* [2012] ZASCA 70 that stance changed and an increase of the sentence to 20 years' imprisonment was sought. In *Keyser* the appellant, a 35 year old married man, had been convicted by a regional magistrate of dealing in 6545 grams of cocaine in contravention of section 5(b) of the [Drugs Act] and sentenced to imprisonment for 20 years. He had been arrested after boarding a flight to Cape Town at the Johannesburg International Airport (now OR Tambo International Airport) having earlier arrived on a flight from Sao Paulo, Brazil. The sentence of 20 years' imprisonment was confirmed on appeal to the South Gauteng High Court. On further appeal this court, having found the appellant not to have been a mere courier, but a willing and informed participant, also confirmed that sentence, although it observed that it was 'undoubtedly a heavy one'."[43] (Footnotes omitted.)

[51] The judgment in *Keyser*[44] was apparently delivered on 25 May 2012 when the appeal in this matter was already pending in the Supreme Court of Appeal. The appeal in this case was heard by the Court on 16 August 2012 and its judgment was delivered on 1 October 2012.

Leave to appeal

[52] It is by now axiomatic that for an applicant to obtain leave in this Court he or she must meet two requirements. First, the applicant must show that the case raises a constitutional issue or a matter connected to a constitutional issue. If this is satisfied, the applicant must establish that the granting of leave will be in the interests of justice.

[43] Id at para 26.

[44] *Keyser v S* [2012] ZASCA 70; 2012 (2) SACR 437 (SCA).

[53] The applicant in this case sought leave to appeal against the conviction and sentence. But in an order dated 19 November 2012, this Court refused leave against the conviction. His complaint against the increased sentence is that the Supreme Court of Appeal acceded to the State's request and increased the sentence to 20 years' imprisonment, in circumstances where the State had failed to comply with section 316B of the Criminal Procedure Act (Criminal Procedure Act).[45] This section confers on the State the right to appeal against a sentence imposed in a criminal trial in the High Court.

[54] The applicant contended that the procedure followed in the Supreme Court of Appeal violated his right to a fair hearing on appeal. To buttress this argument, the applicant called in aid the judgment of this Court in *S v Bogaards.*[46] In that case the majority said:

> "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. 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.
>
> 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

[45] 51 of 1977.

[46] [2012] ZACC 23; 2013 (1) SACR 1 (CC); 2012 (12) BCLR 1261 (CC).

> 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."[47] (Footnotes omitted.)

[55] There can be no doubt that when a court imposes a sentence of imprisonment on an accused person, regardless of whether it is at trial or appeal level, the liberty of that person is taken away. Our Constitution guarantees the right to freedom and security of the person.[48] In particular section 12(1) of the Constitution entrenches the right not to be deprived of freedom arbitrarily or without just cause. The sentencing of a person convicted of a crime implicates his or her right to freedom. If the sentencing process itself is unfair or suffers from irregularity, a further constitutional right – a fair trial or a fair appeal – is infringed. Accordingly this matter raises constitutional issues.

[56] Because leave is sought against the order of the Supreme Court of Appeal, if interference with the sentence imposed is justified, it can only be effected by this

[47] Id at paras 60-1.

[48] Section 12(1) of the Constitution provides:

> "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;
>
> (b) not to be detained without trial;
>
> (c) to be free from all forms of violence from either public or private sources;
>
> (d) not to be tortured in any way; and
>
> (e) not to be treated or punished in a cruel, inhuman or degrading way."

Court. This means that once it is established that there are prospects of success, it must be accepted that the interests of justice warrant the granting of leave. The views expressed by this Court in *Bogaards* in the statement quoted above lend credence to the applicant's argument that the State should have cross-appealed. The absence of a cross-appeal in this case gives merit to the contention that the appeal suffered from an irregularity that rendered the hearing unfair. I am satisfied that there are prospects of success and consequently that leave should be granted.

The issues

[57] The first issue is whether the procedure followed in the Supreme Court of Appeal regarding the increase of sentence constitutes an irregularity. If it does, the other issue is whether that irregularity vitiates the proceedings. But before I consider these issues I must clear the decks and define the scope of the present enquiry.

[58] In a case like the present, the point at which it is convenient to begin is to show what the case is not about. It is not about the length of imprisonment imposed by the Supreme Court of Appeal. The seriousness of the offence of which the applicant was convicted may well justify the sentence of 20 years' imprisonment. But the case also does not concern the competency of the Supreme Court of Appeal to increase sentence. Unquestionably the Court has the power to do so, in circumstances defined in the Criminal Procedure Act.[49] Whether those circumstances were established when

[49] Section 322 reads:

> "(1) In the case of an appeal against a conviction or of any question of law reserved, the court of appeal may—

the Supreme Court of Appeal increased the impugned sentence, is a matter that I return to below. Furthermore, the case is not about the Supreme Court of Appeal increasing the sentence acting on its own accord. This is on the assumption that the Court has such a power, an issue on which I deliberately refrain from expressing an opinion.

[59] Instead, the case concerns the process followed by the State in seeking and obtaining an increase in the sentence that was imposed by the trial Court, namely from 12 years' imprisonment to 20 years' imprisonment. This was achieved without the

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(a) allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice; or

(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; or

(c) make such other order as justice may require:

Provided that, notwithstanding that the court of appeal is of opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect.

(2) Upon an appeal under section 316 or 316B against any sentence, the court of appeal may confirm the sentence or may delete or amend the sentence and impose such punishment as ought to have been imposed at the trial.

(3) Where a conviction and sentence are set aside by the court of appeal on the ground that a failure of justice has in fact resulted from the admission against the accused of evidence otherwise admissible but not properly placed before the trial court by reason of some defect in the proceedings, the court of appeal may remit the case to the trial court with instructions to deal with any matter, including the hearing of such evidence, in such manner as the court of appeal may think fit.

(4) Where a question of law has been reserved on the application of a prosecutor in the case of an acquittal, and the court of appeal has given a decision in favour of the prosecutor, the court of appeal may order that such of the steps referred to in section 324 be taken as the court may direct.

(5) The order or direction of the court of appeal shall be transmitted by the registrar of that court to the registrar of the court before which the case was tried, and such order or direction shall be carried into effect and shall authorize every person affected by it to do whatever is necessary to carry it into effect.

(6) The powers conferred by this section upon the court of appeal in relation to the imposition of punishments, shall include the power to impose a punishment more severe than that imposed by the court below or to impose another punishment in lieu of or in addition to such punishment."

State applying for and obtaining leave to appeal against sentence in the case of Ms Cwele and cross-appealing against sentence in the case of the applicant. This distinction is important because, as stated earlier, Ms Cwele did not appeal against sentence. This much is clear from the judgment of the Supreme Court of Appeal.

State's right of appeal

[60] Under the common law, judgments in criminal matters were final and no appeals were allowed either at the instance of the accused person or the State.[50] As observed in *Grundlingh*:

> "Criminal appeals to this Court are more restricted than civil appeals and from magistrates' courts the Crown can appeal only on questions of law. Today the right to appeal is entirely governed by statute."[51]

[61] I hasten to point out that the decision of the Appellate Division (now Supreme Court of Appeal) in *Grundlingh* predates the Constitution. The right of appeal in criminal matters is now entrenched in section 35 of the Constitution.[52] But it is significant to note that the Constitution merely guarantees the right without regulating how it is to be exercised. The exercise of the right is thus governed by statute. Notably, section 35 guarantees the right of appeal by an accused person. Here we are concerned with the right exercised by the State.

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[50] *R v Grundlingh* 1955 (2) SA 269 (A) at 272D.

[51] Id at 272G-H.

[52] Section 35(3)(o) of the Constitution provides:

> "Every accused person has a right to a fair trial, which includes the right of appeal to, or review by, a higher court."

[62] In so far as appeals by the State are concerned, the Criminal Procedure Act distinguishes between an appeal against the sentence imposed by a Magistrate's Court and a High Court. Since we are engaged with the sentence imposed by the High Court, it is not necessary to refer to the provisions dealing with an appeal from a Magistrate's Court. Suffice it to say that leave to appeal is a requirement.

[63] Appeals by the State against a sentence imposed in a criminal trial in the High Court are regulated by section 316B of the Criminal Procedure Act. It reads:

> "(1) Subject to subsection (2), the attorney-general may appeal to the Appellate Division against a sentence imposed upon an accused in a criminal case in a superior court.
>
> (2) The provisions of section 316 in respect of an application or appeal referred to in that section by an accused, shall apply *mutatis mutandis* with reference to a case in which the attorney-general appeals in terms of subsection (1) of this section.
>
> (3) Upon an appeal in terms of subsection (1) or an application referred to in subsection (2), brought by the attorney-general, the court may order that the State pay the accused concerned the whole or any part of the costs to which the accused may have been put in opposing the appeal or application, taxed according to the scale in civil cases of that court."

[64] A close examination of the text of this section shows that it imposes on the State the same obligations placed on an accused person by section 316 of the Criminal Procedure Act. The most important is the obligation to apply for leave which must be lodged with the trial Court within 14 days after the passing of the sentence. The terms of this time-bar provision are peremptory. But condonation for non-compliance with its terms may be granted by the trial Court on application and for good cause shown. What this really means is that where the State desires to appeal against sentence, it must apply for leave within 14 days from the date of sentence. If it needs the period

to be extended, it must formally apply for extension and show good cause by giving a satisfactory explanation for its failure to meet the deadline. If the deadline passes, and there is no application for leave and condonation, the State loses the right to appeal against sentence.

[65] The record shows that the State failed to apply for leave to cross-appeal in respect of the case against the applicant and to appeal against the sentence imposed on Ms Cwele. Consequently it lost its right to appeal. Moreover, no extension was asked for and obtained. The State literally did nothing until it filed its written argument and indicated for the first time that it would argue for an increase of the sentence.

Irregularity

[66] Since the appellants before the Supreme Court of Appeal were not similarly positioned, the inquiry into whether it was permissible for the State to seek an increase of their sentences must of necessity be separated. Although Ms Cwele did not lodge an application for leave to this Court, it is appropriate to refer to her case in testing the propriety of the procedure followed by the State and endorsed by the Supreme Court of Appeal.

[67] The answer in respect of Ms Cwele's case is an easy one. The State was not entitled to argue for an increase of her sentence where she did not appeal against sentence. It could only do so if it had obtained leave under section 316. Consequently it was not open to the Supreme Court of Appeal to increase her sentence under these

circumstances. Differently put, the issue of her sentence was not competently placed before the Court for re-evaluation.

[68] The State did not place the question of the increase of these sentences before the Supreme Court of Appeal, in accordance with the peremptory provisions of section 316 of the Criminal Procedure Act. This constitutes an irregularity.

Impact of irregularity

[69] What remains for consideration is the issue whether the irregularity vitiated the proceedings in the Supreme Court of Appeal. Counsel for the State argued that because the provision in the Criminal Procedure Act which confers power on that Court to increase sentence is constitutionally valid, the enquiry must be confined to determining whether the hearing was fair. He argued that from time immemorial, it has been an accepted practice of our courts that sentence may be increased on appeal purely on the basis of notice given by the State or the Court of appeal, acting on its own accord.

[70] In the circumstances of the present case the argument has no merit. First, on the assumption that section 322(6) is constitutionally compliant, there is no justification for assigning to it the construction that the power to increase the sentence may be exercised on the mere notification in the written argument to the effect that the State will argue for an increase. Section 322(6) must be read in the context of section 322 as a whole.

[71] The plain reading of the section reveals that it confers on a Court of appeal the power to increase sentence as an additional power to other powers conferred by the same section. Section 322(6) reads:

> "The powers conferred by this section upon the court of appeal in relation to the imposition of punishments, shall include the power to impose a punishment more severe than that imposed by the court below or to impose another punishment in lieu of or in addition to such punishment."

[72] An examination of section 322(6) indicates that it does not add the power to increase sentence only but also other powers which are additional to those mentioned in section 322(1) and (2). There can be no suggestion that any of the other powers in section 322 can be exercised in circumstances like the present. If we accept, as we must do, that the true position is that those powers can be exercised only when there is an appeal properly placed before an appeal Court, what would justify singling out the power to increase punishment as a power which can be exercised at the instance of the State where it had not been granted leave?

[73] The proposition that where an accused person appeals against conviction only it would be improper to increase the sentence imposed based on the State's request contained in argument cannot be gainsaid. To illustrate the point that it is impermissible under the Criminal Procedure Act for the State to seek to increase the sentence imposed by notification in argument an example is necessary. Take, for instance, a case where the accused person applies for leave to appeal against

conviction and sentence. The trial Court grants him or her leave in respect of conviction only. He or she would not be allowed to prosecute an appeal against sentence because the scope of his or her appeal is limited to conviction. It cannot be suggested that in such a case the State can seek an increase of sentence by a mere notification because the question of sentence would fall outside the ambit of the appeal.

[74] The same result would follow in a case where the accused person obtains leave against conviction and the State seeks but is refused leave to appeal against sentence. Counsel for the State in this case conceded that where the State has been refused leave to appeal against sentence, it does not retain the right to pursue the question of the increase of sentence, based on notification. This will be true even in a case where the accused person obtains leave to appeal the sentence imposed but the State is refused leave to cross-appeal. The State cannot achieve through the back door what it failed to obtain through the front door. Yet if the right to cross-appeal was available to it upon notification, notionally it would be entitled to do so.

[75] Plainly the purpose of section 322 is to set out powers of a Court of appeal. The section does not deal with the process followed by an appeal on its path to the appeal Court. Instead it deals with what should happen when an appeal is already and properly before the appeal Court. The process which must be followed in placing an appeal before the Court is governed by other provisions of the Criminal Procedure Act. In the case of an appeal by an accused person, it is section 316 which applies and

if the appeal is pursued by the State, section 316B read with section 316 applies. Indeed section 322(2) expressly refers to these two provisions. Accordingly, the State's failure to obtain leave does not constitute a breach of form only but it also amounts to a substantive issue relating to the competence of the Supreme Court of Appeal to adjudicate the question of the increase of sentence under these circumstances.

[76] This failure goes to the root of the proceedings in the Supreme Court of Appeal in relation to the sentence that was imposed by the High Court. It is fatal to the increase imposed by that Court, because it means the Supreme Court of Appeal simply did not have jurisdiction to consider the issue of an increase in sentence. As a result it is unnecessary to determine whether the irregularity resulted in a failure of justice.[53]

[77] The argument that there is an established practice of allowing the State to merely give notice that it would seek an increase of sentence at the hearing of an appeal is bad. It loses sight of the fact that whatever practice there might have been in the past, it had its origin and derived its source from the provisions of the criminal procedure legislation applicable at the time of the practice. It was not sourced from the common law. As mentioned earlier the exercise of the right to appeal is entirely governed by statute.

[53] *S v Mkhise; S v Mosia; S v Jones; S v Le Roux* 1988 (2) SA 868 (A) at 871-2; *S v Naidoo* 1962 (4) SA 348 (A) at 354; and *S v Moodie* 1961 (4) SA 752 (A) at 759.

[78] In *S v Kellerman*[54] the Supreme Court of Appeal held, mistakenly in my respectful view, that the practice allowing the State to appeal against sentence by mere notice continues to apply. It reasoned that the scope of section 310A of the Criminal Procedure Act[55] is limited to cases where an appeal is initiated by the State. If the Legislature wanted to dispense with the practice, reasoned the Court, it would have done so in clear terms.[56] I disagree. First, there is nothing in the text of section 310A showing that its provisions are restricted to cases where an appeal is initiated by the State. Second, there was no evidence indicating that Parliament, when enacting section 310A, was aware of the practice concerned. Third, Parliament was not obliged to repeal the practice because it was not a legal rule.

[79] In fact, later decisions of the Supreme Court of Appeal are at variance with the view expressed in *Kellerman.* In *S v Egglestone*[57] the Supreme Court of Appeal remarked that the sentence imposed for the rapes was lenient but declined to intervene because there was no cross-appeal by the State against the sentence.

[80] Furthermore, in *S v Mmboi and Another*[58] the Supreme Court of Appeal observed that the trial Court had irregularly failed to apply the provisions of sentencing legislation that prescribed minimum sentences. The trial Court failed to do so despite reference to those provisions in the indictment. Again the Supreme Court

[54] 1997 (1) SACR 1 (A).

[55] Section 310A is in all material aspects identical to section 316B but it deals with appeals by the State against sentences imposed by a lower court.

[56] *Kellerman* n 54 above at 5e-6b.

[57] 2009 (1) SACR 244 (SCA).

[58] [2012] ZASCA 142.

of Appeal declined to interfere with the sentence in the absence of a cross-appeal. It said:

> "It is beyond question in this case that the High Court determined sentence without any regard for the provisions of subsections 51(1)(a) and 51(2) of the minimum sentences legislation despite being statutorily obliged to do so. But the State, despite its declared intention foreshadowed in the indictment that it would invoke the provisions of the minimum sentences legislation upon conviction, did not cross-appeal against sentence on the grounds that the High Court should have heeded the statutory prescripts bearing on sentence evidently because its attitude, manifested during the hearing of the appeal, was that the second appellant had, in any event, got his just desserts. Consequently it would be wrong for this Court to now revisit that aspect. Nonetheless the glaring oversight of the High Court in this regard is deprecated."[59]

[81] The point that appeals are regulated by statute is underscored in yet another judgment of the Supreme Court of Appeal in *Director of Public Prosecutions v Olivier*.[60] In that case the State, invoking section 316B, sought to appeal against a lenient sentence imposed by the High Court on appeal against a judgment of the Magistrate's Court. The Supreme Court of Appeal held that the State's right to appeal against sentence is to be found in the Criminal Procedure Act. Since that Act did not, reasoned the Court, cater for an appeal against sentence imposed by the High Court on appeal, the Supreme Court of Appeal had no jurisdiction to entertain the appeal.[61]

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[59] Id at para 34.

[60] 2006 (1) SACR 380 (SCA).

[61] Id at paras 24-5. In that case Navsa JA said:

> "Sections 20(1) and 21(1) of the Supreme Court Act predate the introduction of subsections 310A and 316B. The latter sections granted rights of appeal to the [Director of Public Prosecutions] which it did not previously have. It is established here, and in other comparable jurisdictions, that the State's right to appeal against sentences and acquittals is limited and that statutes dealing with the State's right of appeal and dealing with appeals in general should be construed against the background, and in the context, of the fundamental

This was so, held the Court, because section 316B gives a right of appeal to the State which is limited to cases where the trial took place in the High Court.[62]

[82] On the approach alluded to by this Court in *Bogaards* and the Supreme Court of Appeal in *Egglestone*, *Mmboi* and *Olivier*, the Criminal Procedure Act did not empower the Supreme Court of Appeal in the present case to adjudicate the increase of sentence. And since the State's right to appeal is sourced from that statute, and no other law empowers it to appeal in the manner it sought to in this case, the Supreme Court of Appeal lacked jurisdiction to increase the sentence imposed by the trial Court.

[83] It follows that the appeal should succeed and the sentence imposed by the Supreme Court of Appeal must be set aside. The effect of this would be to reinstate the sentence imposed by the High Court. The blame for this outcome must be placed squarely at the State's door, for failing to place the issue of the increase of sentence properly before the Supreme Court of Appeal.

> principles referred to earlier in this judgment. Sections 20(1) and 21(1) cannot be interpreted to offend against established principles. If the words 'any judgment or order' and 'any decision' were to be interpreted widely, it would mean that the State would have the right to appeal an acquittal on factual grounds, which, it is accepted in our law, is not permissible. See in this regard *S v Basson* 2004 (1) SACR 285 (CC) (2005 (1) SA 171; 2004 (6) BCLR 620) at para [43].
>
> In my view, in the absence of an empowering provision in the [Criminal Procedure Act], or in any other statute, which specifically grants this Court jurisdiction and which is consistent with the Constitution, this Court does not have jurisdiction to entertain the appeal. This is regrettable in that the State's complaints about the leniency of the sentence appear to be justified. The misappropriation of trust moneys in the amount of R454 521 to sustain a luxurious lifestyle is a serious offence, which, on the face of it, was properly appreciated by the magistrate, who imposed a commensurate sentence. The respondent has the means to pay the fine and to replace the misappropriated moneys. One is left with a sense of deep unease that she has escaped appropriate punishment."

[62] Id at para 15.

Order

[84] The following order is made:

1. Leave to appeal is granted.

2. The appeal against sentence succeeds.

3. The sentence imposed on Mr Nabolisa by the Supreme Court of Appeal is set aside.

For the Applicant:	Advocate G C Muller SC instructed by Shaun Hamilton Attorneys.
For the Respondent:	Advocate I P Cooke instructed by the State Attorney.