CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 174/16

In the matter between:

BRENDAN SOLLY NDLOVU Applicant

and

THE STATE Respondent

Neutral citation:	*Ndlovu v The State* [2017] ZACC 19
Coram:	Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J
Judgments:	Khampepe J (unanimous)
Heard on:	23 February 2017
Decided on:	15 June 2017
Summary:	Criminal Law Amendment Act 105 of 1997 — section 51(1) and (2) — sentencing jurisdiction — regional court fair trial — life imprisonment — rape — condonation

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria):

The following order is made:

1. Condonation is granted.
2. Leave to appeal is granted.
3. The appeal succeeds.
4. The orders of the Supreme Court of Appeal and High Court of South Africa, Gauteng Division, Pretoria dismissing the appeal against sentence are set aside.
5. The sentence of life imprisonment imposed by the Phalaborwa Regional Magistrates' Court on 8 May 2009 is set aside.
6. The applicant is sentenced to 15 years' imprisonment antedated to 8 May 2009.

JUDGMENT

KHAMPEPE J (Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J concurring):

Introduction

[1] This is an application for leave to appeal against the sentence of life imprisonment imposed on the applicant, Mr Brendan Solly Ndlovu (Mr Ndlovu), by the Phalaborwa Regional Magistrates' Court (Regional Court) following his conviction of rape.

[2] The central question is whether Mr Ndlovu's right to a fair trial[1] was infringed when, after he had been charged with rape read with one minimum sentencing provision, he was sentenced pursuant to a different, harsher, minimum sentencing provision. This matter also raises the threshold question whether the Regional Court had the requisite jurisdiction to sentence him to life imprisonment in the circumstances.

Background

[3] The salient facts are as follows. In the early hours of 28 October 2007, Mr Ndlovu accosted the complainant while she was walking home. He assaulted and threatened to kill her. She managed to escape but he apprehended and continued to assault her. He assaulted her with fists, as well as stones and bricks. Then he raped her.

[4] After Mr Ndlovu had raped the complainant she managed, naked and covered in blood, to escape once again and to run to her uncle's house. The police and an ambulance were called and she was taken to Maputa Hospital where she was admitted for five days. She sustained various wounds to her head and mouth, which resulted in scarring. The attack left her with two six-centimetre lacerations on her lips; a four-centimetre laceration on her forehead; and a four-centimetre laceration near her eye. The resultant scars were still visible when the complainant gave her evidence in the Regional Court. One of her teeth had to be removed as a result of the assault and the evidence was that more of her teeth would be removed in future. The details of the complainant's injuries were set out in the J88 form, which was completed on the morning of the assault by a medical practitioner. This form was later accepted as evidence by the Regional Court, without objection from Mr Ndlovu.

[5] Despite the grievous injuries suffered by the complainant, Mr Ndlovu was only charged with rape: unlawfully and intentionally having sexual intercourse with a female

[1] Section 35(3) of the Constitution guarantees the right to a fair trial, including the right "to be informed of the charge with sufficient detail to answer it".

without her consent "read with the provisions of [s]ection 51(2) of the Criminal Law Amendment Act 105 of 1997" (the charge).[2]

[6] At the commencement of the trial, the prosecutor put the charge to Mr Ndlovu and the Magistrate informed him that, if he was convicted of the charge, the Court was bound to impose a minimum sentence of "15 years imprisonment if he was a first offender".[3] During the trial, a great deal of evidence was led regarding the violent

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[2] For ease of reference I refer to the Criminal Law Amendment Act 105 of 1997 as the Minimum Sentencing Act. Section 51(2) provides:

> "Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in—
>
> (a) Part II of Schedule 2, in the case of—
>
> (i) a first offender, to imprisonment for a period not less than 15 years;
>
> (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and
>
> (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;
>
> (b) Part III of Schedule 2, in the case of—
>
> (i) a first offender, to imprisonment for a period not less than 10 years;
>
> (ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and
>
> (iii) a third or subsequent offender of any such offence, to imprisonment for a period of not less than 20 years;
>
> (c) Part IV of Schedule 2, in the case of—
>
> (i) a first offender, to imprisonment for a period not less than 5 years;
>
> (ii) a second offender of any such offence, to imprisonment for a period not less than 7 years; and
>
> (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 10 years; and
>
> (d) Part V of Schedule 2, in the case of—
>
> (i) a first offender, to imprisonment for a period not less than 3 years;
>
> (ii) a second offender of any such offence, to imprisonment for a period not less than 5 years; and
>
> (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 7 years.
>
> Provided that the maximum term of imprisonment that a regional court may impose in terms of this subsection shall not exceed the minimum term of imprisonment that it must impose in terms of this subsection by more than five years."

[3] The correct position was that conviction of an offence contemplated in section 51(2) at that time carried a minimum sentence of 10 years, not 15 years, for a first offender. See section 51(2)(b)(i) of the Minimum Sentencing Act quoted at n 2 above.

assault and rape of the complainant. Before the pronouncement of the verdict, the Magistrate stated that the complainant's evidence was satisfactory in all material respects, and that there was no evidence to suggest that she was not honest or was biased.

[7] The Magistrate explained that Mr Ndlovu was charged with "rape read with the provisions of [s]ection 51(2)" and noted that "after the charge was put to [Mr Ndlovu] he indicated that he understands it". On 8 May 2009, the Regional Court found Mr Ndlovu "guilty as charged".

[8] On the same day, in a perplexing turn of events, the Regional Court sentenced Mr Ndlovu to life imprisonment in terms of section 51(1) of the Minimum Sentencing Act,[4] despite his having been charged with rape read with section 51(2).[5] During sentencing, the Magistrate stated:

> "Coming to the nature of the offence that the accused [has] been convicted of, the offence of rape falls within the [ambit] of the minimum sentence act whereby the court is obliged to impose a life imprisonment as it involves infliction of serious bodily harm.
>
> The court can only deviate from the prescribed [minimum] sentence only if there are substantial and compelling circumstances. The defence left everything in the hands of the court regarding deviation from the prescribed minimum sentence.
>
> . . .

[4] Section 51(1) provides:

> "Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life."

See also Schedule 2 to the Minimum Sentencing Act, Part I, at paragraph (c) under "Rape":

> "Rape as contemplated in Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007—
>
> . . .
>
> (c) involving the infliction of grievous bodily harm."

[5] After the initial reference to 15 years' imprisonment discussed at [6], it does not appear that the applicable sentence was further commented upon until sentencing. It appears from the record that the first mention of life imprisonment was made at the beginning of the hearing on sentencing.

> Therefore the court finds that there are no substantial and compelling circumstances that may allow the court to deviate from the prescribed minimum sentence."

[9] It is this sentence of life imprisonment imposed by the Regional Court that is the subject of the present application.

Litigation history

In the High Court

[10] Mr Ndlovu appealed against both his conviction and sentence to the High Court of South Africa, Gauteng Division, Pretoria (High Court).[6] He appealed against the sentence on the basis that his right to a fair trial had been infringed by the reference to an incorrect provision of the Minimum Sentencing Act in the charge sheet.

[11] Considering the fair trial question, the Court noted that Mr Ndlovu had been incorrectly advised of the provisions of the law applicable to his case. The Court held that "[t]he provisions of the Act are, however, quite clear and he falls within provisions where the imposition of a life sentence [is] appropriate and had to be imposed". The Court held that Mr Ndlovu was represented and that the case was conducted in a way that it could not be said that any other information would have changed the outcome.[7] It concluded:

> "It cannot be said that the mere fact that the wrong section of the Act was initially and repeatedly used in any way prejudiced the appellant as far as the sentence is concerned."[8]

[12] Bearing in mind the seriousness of, and violence involved in, the rape, the High Court was not convinced that the Magistrate erred in any way by imposing the

[6] *Ndlovu v S* [2011] ZAGPPHC 233 (High Court judgment). The appeal on conviction was not pursued by Mr Ndlovu and accordingly the High Court considered only the appeal on sentence.

[7] Id at 2.

[8] Id.

sentence of life imprisonment. It did not deal with the threshold issue whether, in the prevailing circumstances, the Regional Court had jurisdiction to impose a life sentence on Mr Ndlovu.

[13] On 4 October 2011, the High Court dismissed the appeal, but on 31 July 2012 granted Mr Ndlovu leave to appeal to the Supreme Court of Appeal.

In the Supreme Court of Appeal

[14] Mr Ndlovu appealed his sentence on the same basis as in the High Court. Considering the fair trial question, the Supreme Court of Appeal, with reference to the judgments in *Makatu*[9] and *Legoa*,[10] found that the Court had been reluctant to lay down a general rule as to what the charge sheet must contain.[11] The Court held that "[t]he question to be answered is whether the accused had a fair trial, and this is a fact based enquiry that entails a 'vigilant examination of the relevant circumstances'".[12]

[15] Mr Ndlovu argued that, if he had known he faced the prospect of life imprisonment rather than 15 years' imprisonment, he would not have taken the decision to have his trial continue without DNA results.[13] The Court rejected this submission, and found that there was no factual foundation to support a finding that Mr Ndlovu's right to a fair trial was infringed by the error in the charge sheet.[14] The Court agreed with the High Court that the case was conducted in such a manner that it could not "be said that any other information would have changed [the case]"; and that it could not be

[9] *S v Makatu* [2006] ZASCA 72; 2006 (2) SACR 582 (SCA) (*Makatu*).

[10] *S v Legoa* [2002] ZASCA 122; 2003 (1) SACR 13 (SCA) (*Legoa*).

[11] *Ndlovu v The State* [2014] ZASCA 149 (SCA judgment) at para 7.

[12] Id.

[13] Id at para 13, where the Court explains the surrounding circumstances:

> "On 9 October 2008, the matter was adjourned at the instance of the defence for 'DNA tests to be conducted on the accused'. On 6 May 2009, the public prosecutor advised the court that the DNA results had not yet been received and that there was a more than six month backlog at the forensic laboratory. The state then closed its case. [Mr Ndlovu's] legal representative addressed the court in the following terms . . . . 'It will be in the [interests] of justice that the matter be proceeded with in the absence of such results'."

[14] Id at paras 13-4.

said that "the mere fact that the wrong section of the [Minimum Sentencing] Act was initially and repeatedly used in any way prejudiced" Mr Ndlovu.[15]

[16] The Court also considered whether to interfere with the sentence of the Regional Court, and concluded that there were no substantial and compelling circumstances justifying a departure from the prescribed minimum sentence of life imprisonment.[16]

[17] Like the High Court, the Supreme Court of Appeal did not consider the question of the Regional Court's jurisdiction in the prevailing circumstances. On 26 September 2014, the Supreme Court of Appeal dismissed Mr Ndlovu's appeal.

In this Court

[18] Mr Ndlovu now seeks leave to appeal to this Court to set aside his sentence and replace it with a sentence within the jurisdiction of the Regional Court in terms of section 51(2) of the Minimum Sentencing Act. He also seeks an order condoning the late filing of the application.

Applicant's submissions

[19] Mr Ndlovu submits that the Regional Court did not have jurisdiction to impose life imprisonment. The Regional Court found him "guilty as charged". He submits that this refers to the charge of rape of an adult victim *simpliciter*: the Regional Court failed to specify that the rape involved the infliction of grievous bodily harm; the nature and extent of the injuries were not evaluated; and the Regional Court even failed to record a finding that the injuries were in fact inflicted on the complainant. A Regional Court's general sentencing jurisdiction is 15 years' imprisonment.[17] As a creature of statute, that court's general sentencing jurisdiction is limited to what the statute specifies.

[15] Id at para 14.

[16] See section 51(3)(a) of the Minimum Sentencing Act.

[17] See section 92(1)(a) of the Magistrates' Courts Act 32 of 1944 (Magistrates' Courts Act).

Mr Ndlovu submits that the Regional Court would have acquired increased sentencing jurisdiction under section 51(1) of the Minimum Sentencing Act only if he had been charged in terms of that section.

[20] Mr Ndlovu further submits that the Regional Court had a duty to accurately advise him of the minimum sentencing provisions applicable to his case, and did not do so. As a result, Mr Ndlovu submits that he suffered irreparable trial-related prejudice.

Respondent's submissions

[21] The state submits that the incomplete charge sheet was automatically cured by the evidence of the state witnesses to include the fact of the complainant's injuries. The state continues to advance the justification underlying both the High Court and the Supreme Court of Appeal judgments: that Mr Ndlovu would not have conducted the trial, or his defence, in any other way had he been informed that he faced life imprisonment or had the mistake not been made in the charge sheet. Therefore, so the argument goes, he suffered no prejudice and the trial was fair.

[22] The state further submits that this Court should not establish a general rule to the effect that an incorrect reference to section 51(2) of the Minimum Sentencing Act automatically precludes a court from imposing a sentence of life imprisonment in terms of section 51(1). It submits that any rule of this kind may create intolerable complexities in the administration of justice and that a fact-based enquiry serves as a clear safeguard for the constitutional rights of an accused person.

Issues

[23] This matter raises two key issues:

(a) First, did the Regional Court have jurisdiction to sentence Mr Ndlovu in terms of section 51(1) of the Minimum Sentencing Act?

(b) Second, if the Regional Court was so empowered, did sentencing Mr Ndlovu in terms of section 51(1) when he had been charged with rape, read with section 51(2), infringe his right to a fair trial?

[24] The jurisdiction question is the threshold concern: if the Regional Court did not have jurisdiction to sentence Mr Ndlovu in terms of section 51(1), the matter ends there and the sentence imposed cannot stand. If the Regional Court did have jurisdiction, a further question needs to be addressed: namely, whether Mr Ndlovu was impermissibly and prejudicially misled by the reference to section 51(2) in the charge sheet to the extent that his right to a fair trial was infringed.

[25] Before turning to the principal issues, the preliminary issues to be determined are:

(a) Whether this Court has jurisdiction to determine the application.

(b) Whether leave to appeal should be granted.

(c) Whether Mr Ndlovu's late filing of his application to this Court should be condoned.

Preliminary issues

This Court's jurisdiction

[26] This matter engages this Court's jurisdiction. The right to a fair trial is guaranteed under section 35(3) of the Constitution and this issue falls squarely within the meaning of "constitutional matters" in section 167(3)(b)(i) of the Constitution.[18]

Leave to appeal

[27] As to leave to appeal, there is an important constitutional issue to be considered here: whether Mr Ndlovu's right to a fair trial was indeed infringed. In addition,

[18] This section provides that the Constitutional Court may decide "constitutional matters".

Mr Ndlovu's application has reasonable prospects of success. It is in the interests of justice that leave to appeal be granted.

Condonation

[28] Mr Ndlovu's application is over 20 months late. He submits that he became aware of the order of the Supreme Court of Appeal within days of judgment being handed down. His attorney then advised him to apply for leave to appeal to this Court, which would have entailed an appeal against sentence only. At that stage, however, Mr Ndlovu says he was devastated, and that he wished to pursue an appeal on the merits – against his conviction as opposed to sentence only. He submits that he had received "legal" advice from his fellow inmates that caused him to question and lose faith in his attorney, and he ultimately failed to instruct his attorney to file the application for leave to appeal with this Court.

[29] Mr Ndlovu further explains that he later came to appreciate that the original advice from his attorney was unassailable, and that he should appeal to this Court against his sentence only. It was only after this realisation that he decided to proceed with the application for leave to appeal in this Court.

[30] Mr Ndlovu submits that, although it was his stubbornness that resulted in the delay, he was suffering mental anguish that caused him to be susceptible to incorrect advice "pronounced with much fervour and self-assuredness". He submits that he was distraught, and latched onto the advice of fellow inmates, who gave him hope that he may be released at once.

[31] The explanation given by Mr Ndlovu for the gross delay in making his application to this Court is unsatisfactory. This Court takes a dim view of parties disregarding its rules, and generally requires that a reasonable explanation be given for a delay before it will grant condonation. In *Grootboom v National Prosecuting Authority*, this Court held:

> "It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation of the non-compliance with the rules . . . . Of great significance, the explanation must be reasonable enough to excuse the default."[19]

[32] However, the sufficiency of the explanation given for the delay is not wholly determinative of whether condonation should be granted. The pertinent question to consider is whether it would be in the interests of justice for condonation to be granted.[20]

[33] In *Brummer*, this Court explained:

> "The interests of justice must be determined by reference to all relevant factors, including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect."[21]

[34] At stake is the protection of a right guaranteed in the Bill of Rights – the right to a fair trial. The importance of the right in question weighs heavily in favour of condonation being granted.

[35] In addition and due to the lack of a consistent approach to the issues raised in this matter by the lower courts, this matter raises a point of law of general public importance which ought to be considered by this Court.[22]

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[19] *Grootboom v National Prosecuting Authority* [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC) at para 23.

[20] See *S v Mercer* [2003] ZACC 22; 2004 (2) SA 598 (CC); 2004 (2) BCLR 109 (CC) at para 4; and *Head of Department, Department of Education, Limpopo Province v Settlers Agricultural High School* [2003] ZACC 15; 2003 (11) BCLR 1212 (CC) at para 11.

[21] *Brummer v Gorfil Brothers Investments (Pty) Ltd* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3.

[22] See, for example, *S v Tshoga* [2016] ZASCA 205; 2017 (1) SACR 420 (SCA); *Nndateni v The State* [2014] ZASCA 122; *S v Kolea* [2012] ZASCA 199; 2013 (1) SACR 409 (SCA); *S v Mashinini* [2012] ZASCA 1; 2012 (1) SACR 604 (SCA); *S v Thembalethu* [2008] ZASCA 9; 2009 (1) SACR 50 (SCA); *Makatu* above n 9; *Legoa*

[36] The state has not argued that it will suffer any prejudice. This is not a matter where the effect on the administration of justice entails that condonation should be denied.

[37] In addition, the matter bears reasonable prospects of success. We must bear in mind the relief sought in the event that Mr Ndlovu is indeed successful. Mr Ndlovu seeks to overturn a sentence of life imprisonment – the most severe penalty that can be imposed under our law[23] – on the ground that his right to a fair trial has been infringed. To bar Mr Ndlovu from approaching this Court to consider whether this maximum penalty was imposed following a fair trial, on the basis of a delay in bringing his appeal in circumstances where the delay does not appear to have prejudiced the state, would be draconian. Accordingly, I am of the view that it is in the interests of justice that condonation be granted.

Jurisdiction of the Regional Court

[38] As stated above, the threshold question is whether the Regional Court had jurisdiction to sentence Mr Ndlovu in terms of section 51(1) of the Minimum Sentencing Act. Section 51 of the Minimum Sentencing Act sets out minimum sentences applicable to certain offences. Section 51(1) provides:

> "Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life."

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above n 10; *S v WV* 2013 (1) SACR 204 (GNP); *Mahlaba v S* [2016] ZAFSHC 127; and *S v Langa* 2010 (2) SACR 289 (KZP).

[23] See section 73(6)(b) of the Correctional Services Act 111 of 1998, which provides:

> "A person who has been sentenced to—
>
> . . .
>
> (iv) life incarceration, may not be placed on day parole or parole until he or she has served at least 25 years of the sentence."

See also *Van Vuren v Minister of Correctional Services* [2010] ZACC 17; 2012 (1) SACR 103 (CC); 2010 (12) BCLR 1233 (CC) at para 92, which makes it clear that an "offender would have to serve 25 years' incarceration to qualify for parole consideration".

Part I of Schedule 2 includes reference to rape involving the infliction of grievous bodily harm.[24]

[39] Section 51(2)(b) provides for minimum sentences for a range of offences referred to in Part III of Schedule 2.[25] The minimum sentence for a conviction of rape under Part III of Schedule 2 varies from 10 to 20 years, depending on whether the convicted person has committed previous offences.[26]

[40] Section 51(2) further provides that "the maximum term of imprisonment that a *regional court* may impose in terms of [subsection 2] shall not exceed the minimum term of imprisonment that it must impose in terms of [subsection 2] by more than five years".

[41] It is trite that Magistrates' Courts are creatures of statute and have no jurisdiction beyond that granted by the Magistrates' Courts Act and other relevant statutes.[27] Because Mr Ndlovu was treated as a first offender,[28] under section 51(2) the sentencing jurisdiction of the Regional Court was limited to a maximum of 15 years' imprisonment. The Regional Court, however, sentenced Mr Ndlovu to life imprisonment under section 51(1), which it would have had the power to do *only* if the application of the section was triggered.

[42] In terms of section 51(1) of the Minimum Sentencing Act, the Regional Court would have had jurisdiction to sentence Mr Ndlovu to life imprisonment only if it had

[24] See Schedule 2 to the Minimum Sentencing Act, Part I, paragraph (c) under "Rape" at n 4 above.

[25] See section 51(2) at n 2 above.

[26] Id.

[27] *Riversdale Divisional Council v Pienaar* (1885) 3 SC 252 at 256; and *Stork v Stork* (1903) 20 SC 138 at 139.

[28] During sentencing the Magistrate stated that for the purposes of sentencing the Court would regard Mr Ndlovu as a first offender. Therefore the minimum sentence applicable under section 51(2)(b) would have been 10 years. In terms of the proviso to section 51(2) (see [40] above), the maximum term of imprisonment that the Regional Court could impose under section 51(2) is the applicable minimum sentence (10 years) plus five years – 15 years.

convicted him of an offence referred to in Part I of Schedule 2. The question is thus whether Mr Ndlovu was convicted of an offence referred to in Part I of Schedule 2.

[43] When handing down its judgment convicting Mr Ndlovu, the Regional Court first made reference to the fact that Mr Ndlovu was charged with rape read with section 51(2) of the Minimum Sentencing Act. The Regional Court then recounted all of the evidence put before it, and finally concluded:

> "The evidence of the complainant is satisfactory in all materials. There is no evidence to suggest that she is not honest or [is biased]. Therefore the Court is satisfied with the manner in which the complainant testified. Therefore the accused is **FOUND GUILTY AS CHARGED** as his version is not possibly true."

[44] The Magistrate's statement that the accused is found "guilty as charged" is unambiguous. Mr Ndlovu was convicted of "rape read with the provisions of [s]ection 51(2)". This means that he was convicted of an offence referred to in Part III of Schedule 2 – not an offence referred to in Part I of Schedule 2.

[45] The Magistrate was aware that the charge was "rape read with the provisions of [s]ection 51(2)" and specifically found Mr Ndlovu "guilty as charged". This wording simply does not permit an interpretation that the Magistrate in fact convicted Mr Ndlovu of rape contemplated in section 51(1). Nor does the evidence of the complainant's injuries automatically cure the charge in terms of section 51(1), as posited by the state. A defective, or incomplete, charge may be remedied by evidence in some instances by section 88 of the Criminal Procedure Act.[29] However, this charge was complete and not defective. Quite simply, the charge was not rape involving the infliction of grievous bodily harm and evidence alone could not make it so.[30]

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[29] 51 of 1977 (Criminal Procedure Act). Section 88 provides:

> "Where a charge is defective for the want of an averment which is an essential ingredient of the relevant offence, the defect shall, unless brought to the notice of the court before judgment, be cured by evidence at the trial proving the matter which should have been averred."

[30] I note that the existence of aggravating factors does not create a separate offence and therefore rape involving grievous bodily harm is not a separate offence to rape not involving grievous bodily harm. See *Minister of Justice and Constitutional Development v Masingili* [2013] ZACC 41; 2014 (1) SACR 437 (CC); 2014 (1) BCLR 101

[46] In the light of this, I can do nought but conclude, inexorably, that the Regional Court did not have jurisdiction to impose life imprisonment in terms of section 51(1) of the Minimum Sentencing Act. Mr Ndlovu was convicted of rape, read with section 51(2); accordingly, the Regional Court was required in terms of section 51(2) to impose a minimum sentence of 10 years (as he was treated as a first offender).[31] The Regional Court's jurisdiction was limited in terms of section 51(2) to imposing a maximum sentence of 15 years.[32]

[47] In the result, because the Regional Court did not have jurisdiction to sentence Mr Ndlovu in terms of section 51(1), his application must succeed. In the circumstances, it is unnecessary to consider the fair trial question.

Remedy

[48] The sentence that the Regional Court imposed on Mr Ndlovu was, because of the conviction "as charged", beyond its jurisdiction. Accordingly, it must be set aside.

[49] While it is normally preferable for the trial Magistrate to impose a new sentence on a convicted person, any benefit arising from the Magistrate's familiarity with this case has been seriously eroded by the length of time that has passed since Mr Ndlovu's trial. It is accordingly in the interests of justice for this Court to determine the matter finally, within the limitations of the Regional Court's jurisdiction in terms of section 51(2) of the Minimum Sentencing Act.

[50] As Mr Ndlovu was treated as a first offender in respect of this offence, the minimum applicable sentence was 10 years' imprisonment. The maximum sentence that could have been imposed by the Regional Court was 15 years' imprisonment. Rape

(CC). The issue in this matter is that the Magistrate convicted Mr Ndlovu "as charged" and he was charged with the offence of rape, without reference to the aggravating factor of grievous bodily harm.

[31] See above n 28.

[32] See discussion at [40], read with n 28.

is a serious offence. It is, in and of itself, a deeply destructive and dehumanising act.[33] The circumstances of this rape were especially heinous. Mr Ndlovu threatened to kill the victim, and then viciously and mercilessly assaulted and raped her. Following the attack, the victim was admitted to hospital for five days.

[51] These circumstances elevate the seriousness of the offence so that the minimum sentence of 10 years' imprisonment is grossly inadequate. Indeed, the legislature has indicated in perspicuous terms, by the enactment of section 51(1) of the Minimum Sentencing Act, that a sentence of life imprisonment is most appropriate in comparable cases.

[52] The appropriate and proportionate sentence to be imposed in the circumstances is the maximum sentence that the Regional Court could have imposed following the conviction of rape read with section 51(2) of the Minimum Sentencing Act: 15 years' imprisonment.

The responsibilities of prosecutors and the courts

[53] Mr Ndlovu's crime is just one instance of one of the most harrowing and malignant crimes confronting South Africa today – rape. Rape is perhaps the most horrific and dehumanising violation that a person can live through and is a crime that not only violates the mind and body of a complainant, but also one that vexes the soul. This crime is an inescapable and seemingly ever-present reality and scourge on the nation and the collective conscience of the people of South Africa.

[54] Despite my finding in this matter, there is nothing before me to indicate that Mr Ndlovu's blameworthiness for this deplorable crime is in any way diminished. This is a case where the state's remissness has failed the complainant and society.

[33] To borrow the words of Mahomed CJ in *S v Chapman* [1997] ZASCA 45; 1997 (3) SA 341 (SCA) at 344: rape is a "humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim".

[55] Section 165 of the Constitution vests judicial authority in the courts and nowhere else.[34] They are the gate-keepers of justice. The evidence of the injuries sustained by the complainant should have alerted the Magistrate that the appropriate charge should have been rape read with section 51(1) of the Minimum Sentencing Act: rape involving the infliction of grievous bodily harm. Furthermore, the acceptance of the evidence relating to the infliction of grievous bodily harm should have made it clear to the Magistrate that the crime fell squarely within the ambit of section 51(1) of the Minimum Sentencing Act.

[56] In this case, the Magistrate could have and should have taken steps to ensure that Mr Ndlovu was prosecuted or convicted in terms of the correct provision of the Minimum Sentencing Act. Courts are expressly empowered in terms of section 86 of the Criminal Procedure Act to order that a charge be amended.[35] Upon realising that the charge did not accurately reflect the evidence led, it was open to the Court *at any time before judgment* to invite the state to apply to amend the charge and to invite Mr Ndlovu to make submissions on whether any prejudice would be occasioned by the amendment. This the Magistrate failed to do. It was only after conviction, at sentencing, that she sought to invoke the correct provision. This failure is directly implicated in the finding made in this judgment.

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[34] *Justice Alliance of South Africa v President of Republic of South Africa, Freedom Under Law v President of Republic of South Africa, Centre for Applied Legal Studies v President of Republic of South Africa* [2011] ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC) at para 34.

[35] Section 86 relevantly provides:

> "(1) Where a charge is defective for the want of any essential averment therein, or *where there appears to be any variance between the averment in a charge and the evidence adduced* in proof of such averment, or *where it appears that words or particulars that ought to have been inserted in the charge have been omitted therefrom*, or where any words or particulars that ought to have been omitted from the charge have been inserted therein, or *where there is any other error in the charge*, the court may, at any time before judgment, if it considers that the making of the relevant amendment will not prejudice the accused in his defence, order that the charge, whether it discloses an offence or not, be amended, so far as it is necessary, both in that part thereof where the defect, variance, omission, insertion or error occurs and in any other part thereof which it may become necessary to amend.
>
> (2) The amendment may be made on such terms as to an adjournment of the proceedings as the court may deem fit." (My emphasis)

[57] Furthermore, section 179 of the Constitution provides for a "single national prosecuting authority . . . structured in terms of an Act of Parliament".[36] The National Prosecuting Authority Act[37] gives effect to section 179 of the Constitution. Section 2 of the NPA Act provides for a "single national prosecuting authority established in terms of section 179 of the Constitution" and section 20(1)(a) provides that the power to prosecute is vested in the National Prosecuting Authority (NPA); a power exercised on behalf of the people of South Africa.[38]

[58] When even the most heinous of crimes are committed against persons, the people cannot resort to self-help: they generally cannot prosecute the perpetrators of these crimes on their own behalf.[39] This power is reserved for the NPA. It is therefore incumbent upon prosecutors to discharge this duty diligently and competently. When this is not done, society suffers. In this case the prosecutor failed to ensure that the correct charge was preferred against Mr Ndlovu. The prosecutor was from the outset in possession of the J88 form in which the injuries sustained by the complainant were fully described. It boggles the mind why the proper charge of rape read with the

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[36] Section 179(1) provides:

> "There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of—
>
> (a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and
>
> (b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament."

[37] 32 of 1998 (NPA Act).

[38] Section 20(1) of the NPA Act provides:

> "The power, as contemplated in section 179(2) and all other relevant sections of the Constitution, to—
>
> (a) institute and conduct criminal proceedings on behalf of the State;
>
> (b) carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and
>
> (c) discontinue criminal proceedings,
>
> vests in the prosecuting authority and shall, for all purposes, be exercised on behalf of the Republic."

[39] In the event that the Director of Public Prosecutions declines to prosecute an alleged offence, a private person with a substantial and peculiar interest in a matter may apply to the NPA for a certificate *nolle prosequi* (refusal to prosecute) in terms of section 7(1)(a) of the Criminal Procedure Act. This certificate is required for a private person to institute a private prosecution, however instituting a private prosecution is prohibitively expensive.

provisions of section 51(1) of the Minimum Sentencing Act was not preferred. This can only be explained as remissness on the part of the prosecutor that, further, should have been corrected by the Court. This error is acutely unfortunate – victims of crime rely on prosecutors performing their functions properly. The failings of the prosecutor are directly to blame for the outcome in this matter.

Order

[59] The following order is made:

1. Condonation is granted.
2. Leave to appeal is granted.
3. The appeal succeeds.
4. The orders of the Supreme Court of Appeal and High Court of South Africa, Gauteng Division, Pretoria dismissing the appeal against sentence are set aside.
5. The sentence of life imprisonment imposed by the Phalaborwa Regional Magistrates' Court on 8 May 2009 is set aside.
6. The applicant is sentenced to 15 years' imprisonment antedated to 8 May 2009.

For the Applicant:	H L Alberts and J M Mojuto instructed by Legal Aid South Africa, Pretoria Justice Centre
For the Respondent:	M Jansen van Vuuren and P W Coetzer instructed by the Director of Public Prosecutions, Pretoria