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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 958/2013

In the matter between:

GIDIMISANI GILBERT RAMAITE **APPELLANT**

And

THE STATE **RESPONDENT**

Neutral citation: *Ramaite v The State* (958/13) [2014] ZASCA 144 (26 September 2014)

Coram: Cachalia and Willis JJA and Schoeman AJA

Heard: 9 September 2014

Delivered: **26 September 2014**

Summary: Criminal law ─ rape ─11 year old relative of accused accused conducting his own defence ─ fairness of hearing without legal representation —waiver of right to legal representation.

ORDER

On appeal from: The Limpopo High Court, Thohoyandou (Hetisani J) sitting as court of first instance.

1 The appeal is allowed.
2 The conviction and sentence are set aside.

JUDGMENT

Schoeman AJA (Cachalia J concurring)

[1] The appellant was charged in the regional court, Sibasa, with the rape of a young girl who was 11 years old at the time of the incident in August 2002. He did not have a legal representative at the time the trial commenced. After a very brief trial he was convicted. The provisions of s 51 of the Criminal Law Amendment Act 105 of 1997 (the Act) read with Part 1 of Schedule 2 of the Act were applicable, as the victim was under the age of sixteen years and therfore the case was transferred to the high court for sentencing purposes, as life imprisonment is the prescribed minimum sentence. In the high court, Thohoyandou, the appellant was sentenced to life imprisonment (Hetisani J). The appellant appeals to this court against both conviction and sentence with leave of the court a quo.

[2] In this court the appellant was represented by counsel from the Thohoyandou Justice Centre. Several grounds of appeal were raised mainly relating to the irregular conduct of the trial. It was contended that the regional court magistrate failed: (a) to apprise the appellant of his right to legal representation before the trial commenced; (b) properly to explain his right to cross-examination; and (c) to assist the appellant when it was clear that the appellant did not know how to cross-examine the witnesses.

[3] I should add that after the appellant was convicted and the matter transferred to the high court for sentencing, the appellant was legally represented. But it seems that the legal representative did not dispute the fairness of the proceedings before the magistrate and the judge did not consider whether the proceedings in the trial court were in accordance with justice prior to sentencing the appellant to life imprisonment. This omission, however, has no bearing on the outcome of the appeal as this court is in a good position to determine whether the trial was conducted fairly as the sentencing judge was. I turn to consider each of the irregularities, which it is contended cumulatively, vitiated the fairness of the trial.

The trial magistrate failed to inform the appellant of his right to legal representation.

[4] The record reflects that before the trial commenced the prosecutor informed the magistrate that the appellant had previously indicated that he wished to conduct his own defence. The magistrate enquired from the appellant whether that is the position wherafter the appellant answered

'yes'. The appellant was thereupon asked to plead to the charge. He entered a plea of not guilty.

[5] We were belatedly provided with transcripts of the district and regional courts' record pertaining to the postponement proceedings as well as an affidavit by the regional court magistrate who postponed the appellant's case on 20 November 2002. It indicates that the appellant was explained the right to legal representation and he elected to approach the 'Law Clinic'. Neither counsel for the appellant, nor the state, were able to explain what the 'Law Clinic' is, but it is clear that the appellant wanted legal representation at the time.

[6] There is simply no indication why and when the appellant supposedly changed his mind and waived his right to obtain legal representation between 20 November 2002, the date when his rights were explained to him and 8 January 2003, when the trial commenced. The appellant was in custody from his arrest (which according to the charge sheet was on 15 August 2002) until 4 December 2002 when the record reflects that he was on warning. There is no indication from the record, except for the statement tendered from the bar by the prosecutor, that the appellant wished to conduct his own defence, and the appellant's confirmation to this effect. What is clear, however, is that the trial magistrate did not embark on any inquiry to determine the circumstances that led to the appellant's waiving his right after initially expressly indicating that he wanted legal representation.

[7] It is also clear that the trial magistrate neither informed the appellant what the consequences of proceeding with the trial without the assistance of

a legal representative were, nor encouraged him to obtain the services of a legal representative, before he was made to plead to the charge.

[8] The magistrate did explain to the appellant after he had pleaded that if convicted, the matter would be transferred to the high court and he could face a sentence of life imprisonment, the prescribed minimum sentence. But this was merely communicated to the appellant as a matter of fact, but not with a view to encourage him to obtain legal representation owing to the seriousness of the charge and the consequences that would ensue in the event of him being convicted. It seems, due to the lack of any reference to legal representation, that this was done solely to comply with his duty to inform an unrepresented accused that he faced a minimum sentence.[1]

[9] Before the advent of the Constitution the right to legal representation and to be informed of this right was firmly entrenched in our law. Thus in *S v Radebe; S v Mbonani* Goldstone J referred to:

'. . . a general duty on the part of judicial officers to ensure that unrepresented accused fully understand their rights and the recognition that in the absence of such understanding a fair and just trial may not take place.'[2]

And at 196 F-I:

'If there is a duty upon judicial officers to inform unrepresented accused of their legal rights, then I can conceive of no reason why the right to legal representation should not be one of them. Especially where the charge is a serious one which may merit a sentence which could be materially prejudicial to the accused, such an accused should be informed of the seriousness of the charge and of the possible consequences of a conviction. Again, depending upon the complexity of the charge, or of the legal rules relating thereto, and the seriousness thereof, an accused should not only be told of this right but he should be encouraged to exercise it. He should be given a reasonable time within which to do so. He should also be informed in appropriate cases that he is entitled

[1] *S v Maake* 2011 (1) SACR 263 (SCA) para 27.
[2] *S v Radebe; S v Mbonani* 1988 (1) SA 191 (T) at 195B.

to apply to the Legal Aid Board for assistance. A failure on the part of a judicial officer to do this, having regard to the circumstances of a particular case, may result in an unfair trial in which there may well be a complete failure of justice.' (My emphasis.)

[10] The right is ensconsed in the Constitution, which includes the right to choose and be represented by a legal practitioner; and to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result and to be informed of these rights promptly.[3] Furthermore, that '. . . the accused's rights were explained to him, must appear from the record, in such a manner as, and with sufficient particularity, to enable a judgment to be made as to the adequacy of the explanation'[4]. It would not be sufficient to record that the rights have been explained without sufficient particulars to determine whether that was in fact adequate. It is clear that if a judicial officer believes that an accused is aware of his rights, the right to legal representation must nevertheless be properly explained to him, in open court. If the accused chooses not to have legal representation in serious cases, it is incumbent on the presiding officer to inform an accused of the seriousness of the charges and advise him to make use of a legal representative.[5] It can safely be assumed in any case where the possibility of imprisonment is real, an injustice would result if an accused does not have legal representation.[6] For such explanation to be effective, it must be done prior to the commencement of the trial, which means prior to an accused pleading to the charges.

[11] It is, however, not the failure of the magistrate to record the rights that have been explained accurately that is irregular, but the failure to

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[3] S 35(3)(*f*) and (*g*) of the Constitution.
[4] *S v Daniëls & 'n ander* 1983(3) 275 (A) at 299G-H.
[5] *S v May* 2005 (2) SACR 331 (SCA); *S v Sikhipha* 2006 (2) SACR 439 (SCA) para 10.
[6] *S v Lombard & 'n ander* 1994 (2) SACR 104 (T) at 108j; S v *Moos* 1998 (1) SACR 372 (C) at 379E.

explain those rights. In *S v Mabuza*[7] it was found that the failure to record verbatim what was explained to an accused was not an irregularity, as '. . . it appears from his cryptic notes and also from his judgment, which were recorded verbatim, that not only did he inform them of their right to legal representation when they first appeared in court and again before the trial commenced, but he also explained its importance, the seriousness of the charges and their right to apply for legal aid. Nor is there any suggestion that they did not understand the magistrate's explanation when they elected to conduct their own defences. Each indicated he did.'

[12] Before it can be said that the appellant waived his right to legal representation between 20 November 2002 when he indicated that he elected to approach the 'Law Clinic', and 8 January 2003 when the prosecutor informed the court that the appellant had elected to conduct his own defence, the state had to prove that the appellant had waived his right in the full knowledge of what he was doing.

[13] In *S v Gasa & others*[8] Howard JP said the following when discussing the right of an accused to be informed of his right to legal representation before a pointing-out.

'In follows that accused No 1 was not fully informed of his rights in terms of s 25(1)*(c)* of the Constitution and as he did not have full knowledge of such rights, he could not validly waive them.

According to the decision in the *S v Mathebula and Another* 1997 (1) BCLR 123 (W), with which I respectfully agree, accused No 1 should have been informed of his constitutional rights in regard to consulting a legal practitioner, specifically with reference to the pointing-out, and that in the absence of a waiver of those rights, the pointing-out and any admissions arising therefrom are inadmissible.'

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[7] *S v Mabuza* 2009 (2) SACR 435 (SCA) para 12.
[8] *S v Gasa & others* 1998 (1) SACR 446 (D) at 448B-C.

[14] This decision was quoted with approval in *Mohamed & another v President of the Republic of South Africa & others* [9] where the court, dealing with the alleged consent by Mr Mohamed to be removed from the Republic of South Africa and be taken to the United States of America to face a criminal charge where he faced the death penalty, said:

'[63] . . . We will, without deciding, assume in favour of the respondents, that a proper consent of such a nature would be enforceable against Mohamed. To be enforceable, however, it would have to be a fully informed consent and one clearly showing that the applicant was aware of the exact nature and extent of the rights being waived in consequence of such consent.'

[15] The fact whether an accused has waived his right to legal representation is not only relevant to extra-curial proceedings, but is as important in a trial. In *S v Manuel*[10] Claassen J said the following with which I agree:

'A trial with the clear potential for 'substantial injustice' cannot continue in the absence of a legal representative assisting the accused, except insofar as he or she has made an informed and voluntary election *not* to avail him or herself of that right. There is simply insufficient evidence on record to persuade an independent observer that he did, indeed, do so.'

[16] Waiver is a question of fact and the mere say so of the prosecutor, without more, that the appellant has elected to conduct his own defence, was not sufficient to prove that the appellant was aware and fully informed of his right to legal representation and that he was aware and informed that he could have a legal practitioner assigned to him at state expense if substantial injustice would otherwise result. The appellant could only abandon and validly waive his right to legal representation if he had full

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[9] *Mohamed & another v President of the Republic of South Africa & others* 2001 (2) SACR 66 (CC) para 63 and 64.

[10] *S v Manuel* 2001(4) SA 1351 (W) at 1355I-1356A.

knowledge of the right that he decided to abandon and therefore make an informed decision. The record does not reflect that the right was fully explained to the appellant and the affidavit of the magistrate who allegedly explained his rights, does not set out that those rights had been fully explained. I should add that the fact that the appellant elected to engage the services of a legal representative prior to the commencement of the trial and again at sentencing stage is indicative that he did not make an informed decision at the stage when he elected to conduct his own defence. I am of the view that the magistrate failed in his duty to properly inform the appellant of his rights in respect of legal representation and the consequences of not exercising those rights. The magistrate did not encourage the appellant to make use of a legal representative, as was required, and the appellant did not validly waive this right, as he was not fully informed of the right. This constitutes a material irregularity.

[17] If that be the position 'the crucial question to be answered is what legal effect such irregularity had on the proceedings at the appellant's trial. What needs to be stressed immediately is that failure by a presiding judicial officer to inform an unrepresented accused of his right to legal representation, if found to be an irregularity, does not *per se* result in an unfair trial necessitating the setting aside of the conviction on appeal'.[11] It must be shown that the irregularity tainted the conviction and that the appellant had been prejudiced thereby. To determine that, it is necessary to evaluate how the trial was conducted in the absence of legal representation for the defence.

The further conduct of the trial

The cross-examination

[11] *Hlantlalala and others v Dyantyi NO and Another* 1999 (2) SACR 541 (SCA) at 545f–h; *May (supra)* para 7; *S v Mabuza* 2009 (2) 435 (SCA) para 15.

[18] The magistrate explained to the accused, after the first witness testified his rights to cross-examination and the purpose thereof viz '. . . firstly, to dispute what they said which you do not agree with. Secondly, to put your version to them so that they can have the opportunity to answer you on your version. You may even attack the credibility of the witnesses.'

[19] However, when the appellant was given the opportunity to cross-examine the complainant, he did not have the slightest idea how to cross-examine or the import of putting his version to the complainant. He initially indicated that he had no questions to ask. When asked if he agreed with everything the complainant had said, he asked one disjointed question and indicated that he had no further questions. The magistrate then said that he will assist him and asked the appellant whether he had had sexual intercourse with the complainant. The appellant said 'no'. The magistrate then put the response to the complainant. Thereafter the appellant asked a few desultory questions and concluded his cross-examination.

[20] The appellant's testimony was short and he testified as follows.

'Court: Yes, Gilbert, you are the accused in this case? - - - Yes, I am.

Did you rape the complainant? - - - No.

You did see her on this day in question, the 17th of August? - - - Yes, I met her at home at around 12:00.

Did you call . . . - - - I was from my place of employment.

Did you call her? - - - Yes, I called her.

And then you asked her to call this . . ., or to call this Kati? - - - Yes, I sent her.

I sent her for Kati, but Kati was not there? - - - Yes.

Did you then met Lucky? - - - I did not meet Lucky, I just heard her talking about (inaudible).

You do not know Lucky? - - - I know him.

Right, and then you gave her 50 cents? - - - When she took the 50 cents I was still at home.

I gave her 50 cents, but you never had sexual intercourse? - - - Correct.
It does not seem to me that there was any bad blood between you . . ., between the family?
- - - Yes, there was no bad blood.'

[21] The prosecutor's cross-examination of the appellant centred on the reasons why he did not dispute the evidence of the complainant when she said that they had met a certain Lucky, which evidence the appellant disputed when he testified. Furthermore the appellant was cross-examined on evidence that he supposedly gave, but did not. The following exchanges took place between the prosecutor and the appellant.

'You testified that after she came back and said Kati was not there, she went home, is that not what your evidence is?-----No, that is not what I said.'

and

'You said the complainant left for home after you left Kati's place. Now you come and say that you went to the headman's kraal with her. - - - From Kati's place we proceeded to the headman's kraal.'

The appellant did not testify as put to him by the prosecutor as is evident from the reading of his testimony in para 21 supra.

[22] A judge or magistrate is not merely an observer but has a duty to prevent unfair questioning of an accused. This obliges a magistrate to stop a prosecutor from asking unfair questions and putting incorrect statements to an accused, especially if there is no legal representative to object on behalf of an accused.

[23] In this instance it is clear, that the appellant is an unsophisticated person with no understanding of the law or the legal processes. This is evident if regard is had to his ineptitude when cross-examining the complainant as set out above.

[24] It is unfair to allow cross-examination of an undefended unsophisticated accused on his failure to cross-examine and that should not have been held against him.

[25] It is apparent that there are incongruities and other matters where proper legal represenation might have made a difference in the presentation of the appellant's defence.

The rape of the complainant

[26] The totality of the evidence of the complainant, describing the rape, was contained in one sentence:

'He then undressed me of my trousers and my panty and then undressed of his trousers.
Yes? ---- After that he climbed on top of me and inserted his penis into my vagina.
Yes? --- After that he pulled up and led me where my trouser was and also pulled his trouser.
Now was this the first time that you had sexual intercourse? --- I do not know.
Was it the first time a man slept on top of you? ---- Yes.'

The complainant further testified that she did not bleed due to the rape. A sophisticated person would not have handled the cross-examination in such a bumbling way, and he would have clarified her evidence with regard to the rape, the injuries that she sustained and why she did not know if it was the first time that she had had sexual intercourse. A legal representative could have clarified these aspects of her evidence unless he consciously decided not to contest the evidence. There is no indication at all that the appellant consciously elected not to cross-exam the complainant on these key aspects of her testimony.

The medical report

[27] The medical report was read into the record, with the consent of the appellant, without the doctor testifying and in this way it was received as evidence.

[28] In *S v Daniëls en 'n Ander*[12] the following was said regarding admissions made by an undefended accused.

'Similarly, when the court asks the accused under s 115(2)*(b)* whether an admission made by him may be recorded as such, the accused should be told that the effect of making a formal admission is to relieve the State of the necessity of proving the admitted fact by evidence; and that he is under no obligation to make any admission or to assist the State in proving the case against him. This is in accordance with the salutary rule of practice in South African courts which requires that an unrepresented accused should not, without his having been fully informed of his rights, be asked whether he makes a formal admission of a fact the *onus* of proving which is on the State. This rule is exemplified by the case of *S v Mavundla* 1976 (4) SA 731 (N), where DIDCOTT J said at 732:

"It emerges from the transcript of the evidence that, as soon as the admission was tendered, the magistrate allowed it to be recorded, and that he did so without any enquiry at all. He ought not to have done that. When an accused person proposes to admit a fact under s 284 (1) (*sc* of Act 56 of 1955), but he lacks legal representation, the judicial officer trying him must satisfy himself, before accepting the admission in evidence, that the accused's decision to make it has been taken with full understanding of its meaning and effect, and under no misapprehension that he is obliged or expected to supply the State or the court with it".'

[29] The magistrate did not act in accordance with *Daniëls* or *Mavundla* where Didcott J stressed that 'Extra caution is therefore needed when an undefended accused offers to admit a fact unlikely in the nature of things to be within his own knowledge'.[13]

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[12] *S v Daniëls en 'n Ander* 1983 (3) 275 (A) at 299J-300B.
[13] *S v Mavundla* 1976 (4) SA 731 (N) at 733B.

The date of the appellant's arrest

[30] According to the medical report the doctor examined the complainant just after midnight on 18 August 2002. The charge sheet states that the rape was committed on 17 August 2002. The date of the incident was placed on record in answer to a leading question by the prosecutor.

The record reflects that the mother of the complainant was asked the following question:

'Now, on the 17th day of August, the day of the incident, where were you? --- I was at home.'

The complainant was only referred to 'the day of the incident', without any reference to the date or day of the week when such incident occurred.

The appellant also answered the magistrate's leading question that he saw the complainant on the day in question, 'the 17th of August' as set out in para 20 supra. However, the charge sheets of the district and regional courts both indicate that the appellant had been arrested on 15 August 2002, two days prior to the date mentioned in the charge sheet and three days prior to the examination of the complainant by the doctor.

The date of arrest being on 15 August 2002, a Thursday, is in line with the appellant appearing in court for the first time on 19 August 2002. Section 50(1)(*d*) of the Criminal Procedure Act make provision that an arrested person must be brought before court within 48 hours and if that period expires outside ordinary court hours or on a day which is not an ordinary court day, the accused shall be brought before a lower court not later than the end of the first court day. That means he must be brought to court before the end of court on the Monday.[14]

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[14]*Mashilo v Prinsloo* (576/11) [2012] ZASCA 146 (28 September 2012) para 13; Section 35 (1)(*d*) of the Constitution.

The doctor stated that there were fresh tears to the private parts of the complainant when he examined her, reconcilable with the rape having occurred the previous day. As the doctor never testified it was not possible to establish how fresh those tears were and if they could have been inflicted on 15 August 2002. It might be that there was a satisfactory explanation for these discrepances, but this was not clarified which must create some doubt regarding the state case. In my view, the cumulative prejudice to the appellant because of the lack of legal representation is manifest.

[31] It follows that not explaining the appellant's right to legal representation constituted an irregularity. This prejudiced the appellant in the presentation of his case and it therefore vitiates the entire trial. The conviction cannot be allowed to stand.

[32] The following order is made:

1 The appeal is allowed.

2 The conviction and sentence are set aside.

I Schoeman
Acting Judge of Appeal

Willis JA

[33] I have read the judgment of Schoeman AJA. I regret that I cannot agree that the correct decision is to set aside the conviction and sentence. In view of the issues of principle involved, I think it may assist in following my reasoning, if I set out, separately from Schoeman AJA, the facts which I consider to be relevant.

[34] The appellant was arraigned in the Sibasa regional court in the Limpopo province on a charge of rape of an 11 year old girl. He was 33 years old at the time. The offence was alleged to have been committed on 17 August 2002 in Davhana in the district of Vuwani. The appellant had been arrested on the same day. He was first brought before the district magistrate on 19 August 2002 whereafter his case was remanded, to 6 September 2002, 27 September 2002 and 29 October 2002, on which date the case was transferred to the regional court for trial on 20 November 2002. On that date, the regional magistrate explained to the appellant his rights to legal representation. The appellant is recorded as having said that he elected to approach 'the Law Clinic'. The case was then postponed, once again, to 4 December 2002 and then again to 8 January 2003. Until he was convicted, the appellant was on bail – released 'on warning'. It is not correct, as Schoeman AJA says, that the appellant was in custody until 8 January 2003.

[35] On the cover of the charge sheet, it is recorded that the appellant was arrested on 15 August 2002. This was a Thursday. The allegation in the charge is that the crime was committed on 17 August 2002. This was a Saturday. The record shows that the appellant first appeared in court on the charge on Monday, 19 August 2012.

[36] At the commencement of the trial on 8 January 2003, the prosecutor said: 'Your worship, the accused has previously indicated that he will conduct his own defence'. The magistrate then asked him: 'Is that the position?' to which the appellant replied: 'Yes.' The charge was then put to the appellant. He pleaded not guilty. Before the appellant gave any explanation of his plea, the magistrate warned him that if found guilty of

the offence, the case would have to be referred for sentence to the high court and that the prescribed minimum sentence would be life imprisonment. The appellant then explained that he had done nothing to the complainant on the day in question.

[37] It is common cause that the appellant and the complainant knew each other fairly well. The complainant is the appellant's niece, being the daughter of his elder brother. Dr Mukwevho, a senior medical officer stationed at the Tshilinzini Hospital examined the complainant on 18 August 2002, shortly after midnight on the day after the alleged rape. He found that there were fresh lacerations on the complainant's frenulum, her fourchette and her labia minora. Dr Mukwevho noted that the complainant had reported to him that a relative of hers had forced her 'into sexual intercourse'. His conclusions were that there had been forceful penetration 'with a large object'. There was no suitable sample to be sent for deoxyribonucleic acid ('DNA') analysis. The doctor's evidence was therefore consistent with the allegation of rape.

[38] The complainant's mother testified before her daughter. She said that the complainant had come home on 17 August and reported to her that the appellant had raped her. The complainant's mother said that she had examined the complainant and found that she was 'swollen'. The complainant's mother said that she then took her daughter to the Tshidilizini Clinic where they were kept waiting for quite a long time and that her daughter was examined after midnight.

[39] The appellant cross-examined the complainant's mother. He asked her where, according to the complainant's report, the rape had taken place. She replied that it had taken place behind the Matamele school. He asked

her what time her daughter had come home. She replied that this happened shortly before 19h00. The appellant then asked her what time the complainant was due home to which the answer was 18h00.

[40] The complainant corroborated the evidence of her mother in every material respect. Were it not for the fact that the complainant testified second, I should, more accurately, have observed that the complainant's mother corroborated the complainant in every material respect. She said that the appellant had given her fifty cents and asked her to accompany him to fetch a battery from a friend. While walking, the appellant had enquired from one 'Lucky' whether a certain path on the northern side of the school was used by others. Lucky had replied that it was not. The appellant then took the complainant along that path, whereupon he had raped her. The complainant described all the necessary elements for a crime of rape to have been committed. She said the experience had been very painful and that the appellant had told her that she must not inform anyone about what had happened. The appellant cross-examined the complainant but elicited a reconfirmation of the events as described by her. The State then closed its case.

[41] The appellant testified. He denied the incident with Lucky and that he had raped the complainant. He admitted that he had been in her company that evening, had given her fifty cents and had walked with her. He changed his version as to the sequence of events. At the end of his evidence, the magistrate asked him if it was common cause that the complainant had arrived home so shortly after he had been in her company and if the objective evidence established that the complainant had been raped, who else might be the culprit? The appellant replied that: 'I cannot explain why she had those fresh tears on her vagina'. He was also asked whether there

was any ‘bad blood’ between him and the complainant, to which he replied: ‘There is no enmity, but I am feeling the feeling that I never raped her.’ The appellant called no witnesses in support of his version.

[42] The magistrate convicted the appellant as charged and then, in terms of the then prevailing s 52(1) of the Criminal Law Amendment Act 105 of 1997 (the Act), referred the matter to the high court for sentencing in terms of section 51(1) of the Act. This section provided for a prescribed minimum sentence of life imprisonment for this type of offence, the rape having been perpetrated upon a minor. The section was saved by s 51(3) which provided for a lesser sentence if ‘substantial and compelling circumstances’ were found to exist. Before sentencing, the high court was meant to satisfy itself, in terms of s 52(1)*(b)* of the Act, that the proceedings in the lower court were ‘in accordance with justice’. The record does not indicate that Hetisani J did so.

[43] The appellant was represented by counsel in the high court. The appellant elected not to give evidence. His counsel mentioned from the bar factors such as the appellant’s age, that he was employed at the time of his arrest, that he had a wife and children and that he had no previous convictions. The judge found that there were no substantial and compelling circumstances which existed to justify a lesser sentence than the prescribed minimum. On 28 February 2003 he sentenced the appellant to life imprisonment. The appellant filed his application for leave to appeal on 8 August 2006. Owing to the non-availability of the sentencing judge, Makhafola J granted leave to appeal on 24 May 2011.

[44] The prosecutor informed the magistrate, at the commencement of the trial, that the accused has previously indicated that he would conduct his

own defence. It routinely occurs, when prosecutors are preparing for trial and marshalling their witnesses, that they ascertain who the accused's person's legal representative may be. It is a matter of good practice, operating in the interests of practicality and convenience as much as issues of principle. By way of illustration, the conduct of a trial is facilitated by a prosecutor establishing from an accused person's legal representative what admissions are likely to be made and how many witnesses he intends to call on behalf of the defence.

[45] The fact that the appellant did not, on his own election, have the benefit of legal representation in the regional court proceedings is not, *ipso facto*, a miscarriage of justice. It not infrequently occurs that an accused person elects to conduct his own defence. It is not *contra naturam* to do so. Accused persons are often deeply distrustful of the criminal justice system in general and lawyers in particular. Unfortunate though this may be, it is a reality that cannot be overlooked. Just as much as an accused person has the right to legal representation, he or she has the converse right to elect not to have legal representation.

[46] I disagree with Schoeman AJA that, in the circumstances of this case, the trial magistrate should have embarked on an enquiry as to why the appellant elected not to have legal representation, or should have encouraged him to have legal representation. I do not understand the relevance of Schoeman AJA's observation that the magistrate should have 'informed the appellant what the consequences of proceeding without the assistance of a legal representative' would be. There is nothing to indicate that the consequences would have been any different.

[47] In *S v Manuel*[15] Claassen J did indeed express himself, in strong terms, about the need for there to be 'an informed and voluntary election not to avail himself' of the right to legal representation. As Lord Steyn said in *R v Secretary for the Home Department, ex parte Daly,*[16] "In law, context is everything". This was approved by the Supreme Court of Appeal in *Aktiebolaget Hässle and Another v Triomed (Pty) Ltd.*[17] The context to which Claassen J was referring was that an appellant, who was an Angolan, had been charged with the attempted theft of a motor vehicle. The appellant had said clearly that he wanted legal representation. He had been denied legal aid because he had not been lawfully resident in South Africa. Claassen J spoke of the need for legal representation 'in a trial with a clear potential for 'substantial injustice''. He did not speak of 'every trial'. The position in which the appellant, before us, found himself was very different from that of the hapless Angolan. I should have come to the same conclusion in that appeal as Claassen J (with whom Mlambo J concurred), although I might have used slightly more restrained wording in emphasising the importance of the Angolan's right to legal representation.

[48] I do not understand Schoeman AJA's apparent dissatisfaction with the fact that it seems it seems to her that, when the magistrate explained to the appellant that, if he were to be convicted, the matter would be transferred to the high court and he could face life imprisonment he, the magistrate, did so 'solely to comply with his duty to inform an unrepresented accused that he faced a minimum sentence'. This, as I understand the position to be, is precisely what the magistrate is meant to do. He cannot be criticized for doing his duty. What the magistrate did in this regard is not inconsistent with Goldstone J's injunctions in *S v Radebe; S v Mbonani*[18]or the general

[15] *S v Manuel* 2001 (4) SA 1351 (W) at 1355I -1356A
[16] [2001] 3 All ER 433 (HL) at 447 a.
[17] 2003 (1) SA 155 (SCA) para 1
[18] *S v Radebe; S v Mbonani* 1988 (1) SA 191 (T) at 195B and 196F-I.

principles in *S v May*[19] and *S v Sikhipha*.[20] I cannot agree that the magistrate committed a 'material irregularity' by not doing more in this respect.

[49] I fail to see the relevance of Howard JP's admonitions, in *S v Gasa & others*,[21] with regard to legal representation at a pointing out. A pointing out is an extra-curial event, during which an arrested person is vulnerable to being misled by overzealous police officers. In general, the legal implications of making a pointing out are variegated and intellectually complex. They are not easily understood by lay persons, especially uneducated ones. The situation with regard to a pointing out is very different from that of a person who is on trial.

[50] I differ from Schoeman AJA on the relevance of what the Constitutional Court had to say in *Mohamed & another v President of the Republic of South Africa & others.*[22] In *Mohamed*, the appellant had consented to his extradition to the United States of America. It appeared that he was probably not aware at the time when he gave his consent that he faced the risk of receiving the death penalty in question. When the Constitutional Court referred to Mohamed's lack of having 'a fully informed consent', it was referring to a situation utterly different from that in which the appellant, in the case before us, had found himself. Here again, the Constitutional Court had been referring to an extra-curial event in which certain procedural safeguards, inherent in a criminal trial, would have been absent. The most important are that, in any criminal trial, the proceedings are not only open to the public and but also that there is a public record thereof.

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[19] *S v May* 2005 (2) SACR 331 (SCA).
[20] *S v Sikhipha* 2006 (2) SACR 439 (SCA) para 10.
[21] *S v Gasa & others* 1998 (1) SACR 446 (D) at 448B-C.
[22] *Mohamed & another v President of the Republic of South Africa & others* 2001 (3) SA 893; 2001 (2) SACR 66 (CC) paras 63 and 64.

[51] It is the public gaze to which the courts are subject, in contrast to the solitariness that usually accompanies detention, consequent upon an arrest that, in large measure, provides the critical distinction between extra-curial and intra-curial proceedings along the road to securing a conviction. As a result of this public gaze, a rigorous curial culture develops which continues to be present, even when proceedings, as might have occurred in this case are exceptionally held in camera in order to protect the identity of the complainant.

[52] I also am unable to discern the relevance of the fact that the only direct evidence of the rape is contained in one sentence that the appellant 'inserted his penis into my vagina'. In almost all rape cases, the evidence of this critical – legally vital – fact is more-or-less identical. What else could the complainant say? Other than in contexts not relevant to criminal proceedings, there is not much else one can say about the rudimentary mechanics of the consummate sexual act between a male and a female. Where the complainant is an 11 year old girl, her consent or otherwise is legally irrelevant. The fact that there was no evidence, in this case, of the consensual aspects of this particular sexual act is immaterial. In determining whether a verdict that an accused person is guilty is the correct one, one must deal with the totality of the evidence. I revert to this aspect later. I accept, however, that the circumstances surrounding the rape may be relevant as to sentence.

[53] Furthermore, I do not perceive the relevance of *S v Daniëls & another*[23] and *S v Mavundla*[24] in Schoeman AJA's criticisms of the admission of the medical report. *Daniëls* and *Mavundla* deal with the

[23] *S v Daniëls & another* 1983 (3) SA 275 (A) at 299J-300B.
[24] *S v Mavundla* 1976 (4) SA 731 (N) at 732.

admission of facts, especially facts which are or might be expected to be peculiarly within the knowledge of an accused person. These two cases do not deal with the admission of evidence (which is usually of high quality), by way of documents in terms of s 212 of the Criminal Procedure Act 51 of 1977 (the CPA). The report by an authorized medical practitioner on the completion of a medico-legal examination, consequent upon an allegation of rape (widely known simply as 'the J88'), is ordinarily drawn up by an independent, qualified and objective professional, who has no knowledge of either the complainant or the accused. Prima facie it is, therefore, highly reliable. The time of all doctors is precious. It would be highly undesirable to encourage the calling of these medical experts as viva voce witnesses in every rape case. Besides, the evidence of the doctors in cases such as this serves merely to corroborate the other evidence of rape, of which at least some will be direct. Without the latter, the former (ie the evidence of the doctor) becomes irrelevant. Ex facie this particular J88, there is nothing that is both relevant and requires explanation.

[54] Additionally, I am at variance with Schoeman AJA as to the question of any possible relevance of the date of the appellant's arrest as it appears on the cover sheet to the charge. This is quite obviously – at the risk of being tautological – a patent error. It is common cause that the appellant was not merely with the appellant on the day and at about the time in question but also, significantly, that he walked with her where she said that he did and that he had given her a 50 cent coin. If the appellant had indeed been arrested on 15 August 2002 (and been held in custody ever since – as Schoeman AJA finds he was), he would not have been able to have been with the complainant on 17 August 2002. The date of the appellant's arrest could not have been any other than 17 August 20002.

[55] During the course of argument, the appellant's counsel criticised the fact that it did not appear from the record that the sentencing judge had confirmed that the proceedings in the regional court were 'in accordance with justice'. In plain English, the requirement that the sentencing judge should have confirmed that the proceedings in the lower court were 'in accordance with justice' means this: he or she should be satisfied that the accused person had a fair trial before sentencing. The failure to have done so therefore becomes relevant only if it subsequently emerges that the accused person did not, in fact, have a fair trial. If the trial was indeed a fair one, the failure of the judge to have so satisfied him or herself is immaterial.

[56] The appellant did have his rights to legal representation explained to him, albeit short of the standard that one would prefer. He was also warned, although imperfectly, that he faced the prospect of life imprisonment if found guilty. In respect of these key principles, both the explanation of his rights and the warning, it could have been given more frequently and more forcefully. The ethics of the legal profession disallow a legal representative to concoct a version for an accused person. All that a lawyer can do is to present his or her client's case in the best possible way.

[57] It is hardly surprising and not the fault in the administration of justice that the appellant's cross-examination appears to have been a poor imitation of that of a brilliant lawyer. Even if the appellant had the benefit of legal representation, his version, being a denial, could not have been materially different. The necessary elements to secure a conviction on a count of rape are not 'regs-tegnies' except, perhaps, for the fact that actual penetration of a vagina by a penis must be established. In this case that evidence was unequivocal.

[58] In *S v Legoa*[25], *S v Ndlovu* [26]and S v *Makatu*[27] this court has been careful not to stipulate that the failure to warn an accused person that he faces a prescribed minimum sentence will necessarily result in an unfair trial.[28] In *Legoa*, Cameron JA said:

'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.'[29]

Cameron JA also stressed the need for a 'vigilant examination of the relevant circumstances'.[30]

[59] In *Makatu* Lewis JA accepted the need to adopt an approach that was 'neither absolute nor inflexible'.[31]

[60] In *S v Ndlovu; S v Sibisi*[32] it was said that:

'(I)t will not be essential to inform him [the accused person] that he is facing the possibility of a substantial prison sentence or a sentence which may be 'materially prejudicial' if he can reasonably be expected already to be aware of this.'[33]

This court approved this judgment in *S v Mabuza & others*.[34]

[61] Rape is a common law crime. It has always been viewed with the utmost seriousness everywhere in the globe. Particularly is this the case in South Africa, which is known to have among the highest incidence of rape

[25] *S v Legoa* 2003 (1) SACR 13 (SCA).
[26] *S v Ndlovu* 2003 (1) SACR 331 (SCA).
[27] S v *Makatu* 2006 (2) SA 582 (SCA).
[28] See *Legoa* paras 19 to 22; *Ndlovu* paras 12 to 14; and *Makatu* at paras 4 to 7.
[29] Para 21.
[30] Ibid.
[31] Para 7.
[32] *S v Ndlovu; S v Sibisi* 2005 (2) SACR 645 (W)
[33] At 654f-g.
[34] *S v Mabuza & others* 2009 (2) SACR 435 (SCA) para 15.

in the world. An awareness of the seriousness of rape as a crime is not merely a legacy of our common law but also transcends the political divisions of the past and is reflected in our customary law. Stark and grim evidence that there has inescapably been a deep, historical and pervasive awareness in our society that rape is a crime for which a sentence at the extreme end of the scale may ensue, is to be found in the fact that, in our relatively recent past, the death penalty was a competent sentence therefor.[35] Fortunately, in *S v Makwanyane & another*[36], the death penalty was held by the Constitutional Court to be unconstitutional. Against this background, the fact that the appellant might better have been advised more forcefully that he should take advantage of the benefit of legal representation and that he was not warned earlier or more compellingly that he faced the risk of life imprisonment is of no real importance in this particular case.

[62] I consider every adult person, who has not been robbed of his or her faculties, is aware of that the fact that society views rape as a crime of utter gravity, for which sentences must be commensurately severe. Even if the prescribed minimum sentence regime had not been instituted, the appellant could have been sentenced to life imprisonment for his crime and, in all the circumstances of this particular case, a sentence of life imprisonment was not only justified but also warranted. In the words of Cachalia JA in *Mabuza*, the appellant could not have been 'under any misconception that [he] faced the prospect of [a] lengthy term of imprisonment when [he] elected to conduct [his] own defence.' There was no prejudice to the appellant in the manner in which he was informed of his rights to legal representation or the risk of life imprisonment.[37]

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[35] Section 277 of the Criminal Procedure Act 51 of 1977; see also *S v Makwanyane & another* 1995 (3) SA 391 (CC) para 43.
[36] *S v Makwanyane & another* 1995 (3) SA 391 (CC).
[37] See *S v Mabuza* 2009 (2) SACR 435 (SCA) para 15; *Hlantlalala and others v Dyantyi NO and another* 1999 (2) SACR 541 (SCA); [1999] 4 All SA 472 paras 8-10.

[63] By way of contrast, I immodestly refer to my own judgment in *S v Mukwevho*,[38] in which Farber AJ concurred. In that case, the appellant had been charged with unlicensed possession of arms and ammunition and sentenced to 15 years imprisonment in terms of the prescribed minimum sentence legislation. Even though the appellant had enjoyed the benefit of legal representation we set aside the conviction, inter alia, by reason of the fact that the appellant had not been adequately warned of the dire consequences which he faced if duly convicted.

[64] In *S v Jaipaul*[39] the Constitutional Court, in a unanimous judgment said:

'The right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the State. It has to instill confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime.'[40]

This passage was expressly alluded to in this court in *S v Kolea.*[41]

[65] In *Kolea* the court rejected technical objections to procedural fairness and noted that the accused 'had never complained or, nor showed that they had suffered, any prejudice.'[42] When the case is looked at in its totality, I am unable to discern any prejudice to the appellant.

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[38] *S v Mukwevho* 2010 (1) SACR 349 (GSJ).
[39] *S v Jaipaul* 2005 (1) SACR 215 (CC).
[40] Para 29.
[41] *S v Kolea* 2013 (1) SACR 409 (SCA) para 20.
[42] Para 19.

[66] The highest degree of justice is not a guilty person walking free. It is that no innocent person should lose his or her most precious freedom by reason of a wrong conviction or that the accused person and his or her family should not have to endure the shame, humiliation and devastating financial consequences of imprisonment arising from that wrong conviction. The critical question is therefore brutal in its simplicity: did the appellant have a fair trial or did he not? The evaluation of the evidence in a trial requires regard to the totality thereof.[43] By parity of reasoning, an evaluation of the fairness of a trial must be undertaken by having regard to the totality of facts and circumstances relating to the trial, including the evidence itself.

[67] There is objective medical evidence corroborating the complainant's evidence that she was raped. Her mother gave evidence in corroboration that was satisfactory in every material respect. Incontestably, the complainant had been raped. It was common cause that the complainant knew the appellant, indeed that the appellant was her uncle. There is no question of mistaken identity. The appellant could advance no reason why the complainant, having been raped by someone else, would maliciously name him as the perpetrator, when he was not. On the complainant's version of events he had been in the company of the complainant on the day in question. Beyond any reasonable doubt, even if the complainant had enjoyed the services of one of the finest advocates in the world, he would have been convicted. In the end, a lawyer is only as good as his or her case. The appellant was fairly and correctly convicted.

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[43] See *R v Hlongwane* 1959 (3) SA 337 (A) at 340H-341B; *S v Hlapezula & Others* 1965 (4) SA 439 (A) at 442F; *S v Khumalo & Others* 1991 (4) SA 310 (A) at 327H-I*; S v Van Der Meyden* 1999 (2) SA 79 (W); *S v Van Aswegen* 2001 (2) SACR 97 (SCA) at 101A-F; *S v Trainor* [2003] 1 All SA 435 (SCA) para 8; S *v Heslop* 2007 (4) SA 38; [2007] 4 All SA 955; 2007 (1) SACR 461 (SCA) para 11.

[68] As Lord Atkin famously remarked, 'Justice is not a cloistered virtue.'[44] In general, this expression refers to the public accountability of the courts, the fact that court proceedings are held in the public view and that court decisions are amenable to robust criticism. I think it also entails recognition that due allowance should be made for the fact that the administration of justice is undertaken by imperfect human beings, who share, with everyone else, the frailties and fallibilities to which we all are prone.

[69] Imperfect though the advice to obtain legal representation and the warning that the appellant may face life imprisonment may have been, I consider that there are no compelling policy considerations that, in this particular case, require the vitiation of both the conviction and sentence in order to underline the importance of the procedural fountainheads that have been at issue in this case. In respect of both conviction and sentence, I should have dismissed the appeal.

N P Willis
Judge of Appeal

[44] In *Andre Paul Terence Ambard v The Attorney-General of Trinidad and Tobago* [1936] 1 All ER 704 (PC). The case was referred to with approval by this court in *Argus Printing & Publishing Co Ltd v Esselen's Estate* 1994 (2) SA 1 (A) at 25F-G and the Constitutional Court in *S v Mamabolo (eTV & others intervening*) 2001 (3) SA 409 (CC) para 1.

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