THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 140/2016

In the matter between:

VUSUMUZI NKOSINATHI MHLONGO **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Mhlongo v The State* (140/16) [2016] ZASCA 152 (3 October 2016)

Coram: Bosielo, Swain, Zondi and Mocumie JJA and Dlodlo AJA

Heard: **24 August 2016**

Delivered: **3 October 2016**

Summary: Criminal Law and Procedure — conviction on one count of rape — the charge sheet erroneously referred to Part 2 of Schedule 2 and not Part 1 of Schedule 2 to s 51(1) of the Criminal Law Amendment Act 105 of 1997 — sentence of life imprisonment imposed — whether this irregularity vitiated the sentence proceedings — application in terms of s 276B of the Criminal Procedure Act 51 of 1977 — importance and permanent infusion of the Victim Impact Statement at the sentencing stage — duty of the prosecution to place all information before the court — Comprehensive guidelines, protocol and model VIS instruments must be drafted by the National Director of Public Prosecutions — matter remitted to court a quo.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Van Zyl J and Vahed J sitting as court of appeal):

1. The appeal is upheld.
2. The order of the court a quo in terms of s 276B of the Criminal Procedure Act 51 of 1977 is set aside.
3. The matter is remitted to the court a quo for the parties to make representations on the desirability of granting an order in terms of s 276B of the Criminal Procedure Act 51 of 1977.

JUDGMENT

Mocumie JA (Bosielo, Swain and Zondi JJA and Dlodlo AJA concurring):

[1] On 10 March 2009 the appellant was charged with and convicted by the Regional Court, Empangeni, on one count of rape. On 12 March 2009 he was sentenced to life imprisonment. Subsequently, on 8 September 2011, he applied for and was granted leave to appeal against his conviction and sentence to the full court of the KwaZulu-Natal Division, Pietermaritzburg. The full court dismissed the appeal against the conviction but upheld the appeal against the sentence of life imprisonment and substituted it with a sentence of 18 years' imprisonment. In addition, it fixed a non-parole period of 12 years in terms of s 276B of the Criminal Procedure Act 51 of 1977 (the Act). The appellant appeals against the sentence imposed and the fixing of the non-parole period with special leave of this court.

[2] In relation to the non-parole period, the appellant launched a three pronged attack. First, he contends that there was no application made by the State to fix the non-parole period either before the regional court or before the full court. Secondly, that he

was not given a notice that s 276B will be invoked. Thirdly, that the parties were not given an opportunity to present argument or evidence for or against the fixing of a non-parole period. The appellant contends further that there was no basis or finding that his character could only be rehabilitated after a period of 12 years. The full court gave no reasons for fixing the non-parole period. As to the invocation of s 51(1) of Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (the Criminal Law Amendment Act) by the regional court, the appellant contends that since s 51(1) was not specified in the charge sheet, it committed a material misdirection by imposing the sentence of life imprisonment.

[3] A non-parole order is a determination that has serious consequences for an accused. '. . . [I]t is an order that a person does not deserve being released on parole in future.[1]' Its effect is to ultimately restrict the liberty of a person who is sentenced to a term of imprisonment, since such a person cannot be released on parole, or correctional supervision, until the expiry of the non-parole period.[2] The fixing of a non-parole period entails the exercise of a discretion vested in a court which like all discretionary powers must be judicially exercised. Especially in criminal matters where the liberty of a person is at stake, it must be exercised judiciously and in accordance with principles of fairness and justice.

[4] In *S v Pakane & others*[3] this Court said that the intention of the legislature in enacting s 276B of the CPA is to invest sentencing courts with discretionary power to 'control the minimum or actual period to be served by the convicted person'.[4] Furthermore, this section provides the courts with the 'overall latitude' and flexibility in determining whether to fix or refrain from fixing non-parole periods, but not as a matter of routine.[5] Hence, in interpreting s 267B of the Act, this Court in *Mthimkhulu* in recognising a progression from subsection 1 to subsection 2, said that:

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[1] *Strydom v S [2015] ZASCA 29 para 16; S v Bull & another* [2001] ZASCA 105 at 692D-I, 693D-G and 697A.
[2] *S v Williams*; S v Papier [2006] ZAWCHC 5; 2006 (2) SACR 101 (C).
[3] *S v Pakane & Others* [2007] ZASCA 134; 2008 (1) SACR 518 (SCA).
[4] Ibid paras 46–47.
[5] *Mthimkhulu v S [2013] ZASCA 53; 2013* (2) SACR 89 (SCA) para 14.

'What s 276B(2) in fact does is to enjoin a sentencing court, once it has exercised its discretion under s 276B(1)*(a)* against the convicted person, to then fix the non-parole period in respect of the effective period of imprisonment taking cognisance of the provisions of s 276B(1)*(b)*'.[6]

[5] The principles that determine the exercise of this exceptional order of non-parole are well-stated; first, as to why a court should exercise the discretionary power; second, as to what facts are germane to its exercise, and third, as to the procedure to be followed. In *Mthimkhulu*,[7] this court held:

'An order in terms of s 276B should therefore only be made in exceptional circumstances, when there are facts before the sentencing court that would continue, after sentence, to result in a negative outcome for any future decision about parole'.[8] The judiciary, within the matrix of South Africa's constitutional democracy, stands as a bulwark against any arbitrary exercise of power and owes every citizen a duty of ensuring that every exercise of power conforms to the Bill of Rights. The principle of fair hearing enshrined in the South African Bill of Rights is a key aspect of the rule of law.'[9]

[6] This Court has consistently held in several reported judgments that the provisions of s 276B must be invoked for substantial reasons. Three of these decisions warrant special mention. They are *Strydom v S*,[10] *S v Stander*[11] and *Mthimkulu v S*[12]*.* In *Strydom*, the appellant was convicted of 36 charges of fraud involving a benefit of R375 816.92. She was consequently sentenced to serve a term of five years' imprisonment with the provision that in terms of s 276B of the Act the appellant serve three years of imprisonment before being placed on, or being considered eligible for parole. On appeal this court stated the following:

'[A] court should not resort to s 276B of the CPA lightly and rather, as this court has often indicated, allow the officials of the Department of Correctional Services, who are guided by the

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[6] Ibid para 16.
[7] See also *S v Stander* [2011] ZASCA 211; 2012 (1) SACR 537 (SCA) para 16.
[8] Above fn 6 para 19.
[9] Section 34 of the Constitution of the Republic of South Africa 108, 1996 provides: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'.
[10] *Strydom* v *S [2015] ZASCA 29.*
[11] *S v Stander* 2012 (1) SACR 537 (SCA).
[12] *Mthimkhulu v S* 2013 (2) SACR 89 (SCA); See also *S v Mhlakaza & another* [1997] ZASCA 7; 1997 (1) SACR 515 (SCA).

[Correctional Services Act 111 of 1998] (CSA) and the attendant regulations, to make such assessments and decisions as well as the parole board.'[13].

[7] In *Stander*, the appellant was sentenced to eight years' imprisonment for fraud, two years of which were conditionally suspended for five years. The trial court also ordered, in terms of s 276B of the CPA that the appellant serve at least 36 months of her sentence before she could be considered for parole (the non-parole order).[14] On appeal the court held that the failure of the magistrate to give reasons for the sentence made it impossible to assess what prompted the order in the first instance. On appeal, this Court found that a court can only invoke s 276B when there are circumstances specifically relevant to parole in addition to any aggravating factors pertaining to the commission of the crime, and where a proper, evidential basis had been laid for a finding that such circumstances exist so as to justify the imposition of such an order.[15]

[8] In *Mthimkulu*, the appellant was convicted in the high court on one count of murder, possession of a fully automatic firearm (an AK47 assault rifle) without a licence to possess such firearm and possession of five rounds of live ammunition (7.62 mm) without the required licence. The appellant was sentenced to 20 years' imprisonment on the murder count and five years for both unlawful possession of a prohibited firearm and ammunition. The trial court directed that the term of five years' imprisonment in respect of the latter two counts, run concurrently with the 20 years' imprisonment imposed in respect of the murder count and fixed a non-parole period of 13 years. There was no invitation by the trial court to counsel to address it prior to the fixing of the non-parole order. This Court held that the failure to afford the parties the opportunity to address the sentencing court might, depending on the facts of each case, constitute an infringement of fair-trial rights.[16]

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[13] *Strydom para* 15.
[14] *Stander* para 1.
[15] Ibid para 20.
[16] *Mthimkhulu* para 21.

The procedure for fixing a non-parole period and the accused's entitlement to be heard

[9] A trial court has a duty to impose an appropriate sentence according to long standing principles of punishment and judicial discretion. A convicted person, generally speaking, has a reasonable expectation of being paroled after serving a portion of the term of imprisonment. Parole can therefore be regarded as an essential element in the punishment of an offender. The right of an accused to a fair trial extends throughout the entire proceedings, including the sentencing stage.[17] The fixing of a non-parole period is part of a criminal trial and it must thus accord with the dictates of a 'fair trial' that an accused person be given notice of the court's intention to invoke s 276B of the Act and to be heard before a non-parole period is fixed. Failure to do so amounts to a misdirection by the sentencing court.[18]

[10] In *Stander* this Court stated categorically, '[a]t least two questions arise when such an order [non-parole order] is considered: first, whether to impose such an order and second, what period to attach to the order. In respect of both considerations the parties are entitled to address the sentencing court. *Failure to afford them the opportunity to do so constitutes misdirection.'*[19] (My emphasis)

[11] At the heart of the right to a fair criminal trial and what infuses its purpose, is for justice to be done and also be seen to be done. Dignity, freedom and equality are the foundational values of the Constitution. In relation to sentencing, what the right to a fair trial requires, amongst other things, is a procedure which does not prevent any factor which is relevant to the sentencing process and which could have a mitigating effect on the punishment to be imposed, from being considered by the sentencing court. The Constitutional Court emphasised '[i]n the present circumstances a fair trial would also have to ensure that, in the process of the sentencing court being put in possession of

[17] *S v Dodo [2001] ZACC 16;* 2001 (1) SACR 594 (CC) at para 38*; Prinsloo v Van der Linde & another [1997] ZACC 5;* 1997 (3) SA 1012 (CC) para 31. S v *Stander* para 22.
[18] *Strydom* para 17; See generally: *Mthimkulu* and *Stander*.
[19] *Stander* para 22.

the factors relevant to sentencing, the accused is not compelled to suffer the infringement of any other element of the fair trial right.'[20]

[12] The principle to be derived from *Strydom*, *Stander* and *Mthimkhulu* is that the discretion to fix a non-parole period must not be exercised lightly, but only in exceptional circumstances which can only be established by an investigation and a consideration of salient facts, and further evidence upon which such a decision rests.[21] Giving reasons for decisions is a long-standing and salutary practice that serves the interests of justice. Furthermore, it helps to show the rationale for the decision.[22] Without reasons for a judgment on sentence as is the case in this matter, in respect of the invocation of s 276B, such lack of reasons is highly prejudicial to the accused person. Thus the court a quo's failure to state the rationale for its judgment is a vitiating factor.

[13] It is clear, as the State conceded, that the court a quo erred materially. This Court is therefore bound to set aside the order in terms of s 276B and remit the matter to the court a quo to afford the parties an opportunity to address it.

[14] The appellant also assailed the sentence imposed by the regional court on the basis that the trial court misdirected itself by sentencing him in terms of the provisions of s 51(1) Part I of Schedule 2 of the Criminal Law Amendment Act whereas Part 2 of Schedule 2 was specified in the charge sheet. In other words, it was not specified that life imprisonment was the prescribed minimum sentence. Further, no clear and unambiguous explanation was given to the appellant at the commencement of the trial, as to the applicability of a mandatory sentence of life imprisonment in the event of a conviction.

[15] Section 35(3) of the Constitution guarantees the right to a fair trial for everyone charged with a criminal offence,[23] while s 84(1) of the CPA stipulates that a charge must

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[20] *S v Dzukuda & others; S v Tshilo [2000] ZACC 16;* 2000 (2) SACR 443 (CC) paras 11-12.
[21] *Strydom* para 16.
[22] See *Stander* fn 8 with reference to *S v Immelman* 1978 (3) SA 726 (A) at 726A.
[23] Section 35 of the Constitution provides:
'(3) Every accused person has a right to a fair trial, which includes the right–
(a) to be informed of the charge with sufficient detail to answer it;

contain the essential particulars of an offence.[24] Considering the constitutional right of an accused to be sufficiently informed of the charge, and other underlying values of the Constitution, it is very important that a charge sheet makes reference to provisions relevant to the sentence for a particular offence; otherwise the Constitution would become a dead letter.[25] This Court has said on numerous occasions that it is always desirable that a charge sheet refers to those provisions of the law of relevance to the sentence to be imposed for the offence charged.[26] Although there is no fixed rule, a failure to state the relevant section in the Act, unless it occasions substantial prejudice to the accused, does not necessarily vitiate the whole trial.[27] In *Ndlovu*, this Court held that the State's failure to give the accused sufficient prior notice of the applicability of the statute was fatal to the sentence imposed, more so when the accused was unrepresented.[28] In *Legoa* this Court did not prescribe any general rule on the issue, but emphasised the importance of a clearly drafted charge sheet and the reflection of the fundamental principle of a fair hearing in the entire trial process. It also stressed that an accused person should be given sufficient notice of the State's intention to rely on the minimum mandatory sentencing regime in every instance.[29]

[16] I now turn to consider the question of whether the relevant provisions of the Criminal Law Amendment Act were brought to the attention of the appellant. The appellant contends that the legislation was referred to for the first time by the prosecutor

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(b) to have adequate time and facilities to prepare a defence. . .'

[24] Section 84 of the CPA dealing with 'essentials of charge' provides as follows:

'(1) Subject to the provisions of this Act and of any other law relating to any particular offence, a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.

(2) Where any of the particulars referred to in subsection (1) are unknown to the prosecutor it shall be sufficient to state that fact in the charge.

(3) In criminal proceedings the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient.'

[25] *S v Ndlovu [2002] ZASCA 144;* 2003 (1) SACR 331 (SCA) para 11; *R v Zonele & others* 1959 (3) SA 319 (A) at 323A-H; *S v Moloi* 1969 (4) SA 421 (A) at 424 A-C*; S v Legoa* [2002] ZASCA 122; 2003 (1) SACR 13 (SCA) para 20.

[26] Ibid.

[27] *Legoa* paras 20-21.

[28] *Ndlovu* para 12. See also *Seleke & andere* 1976 (1) SA 675 (T) at 682H.

[29] *Legoa* para 21.

in his address in aggravation of sentence, when he said: 'Your worship, the State would submit that there are no substantial and compelling circumstances which the defence has brought to the court's attention.' However, if one reads the record as a whole and despite the incorrect reference to Part 2 of Schedule 2 to section 51of the Criminal Law Amendment Act, there is no doubt that the appellant was apprised of his rights and was well aware of same throughout the proceedings. That the appellant was apprised of his rights in relation to the minimum sentencing regime is borne out by the record. First, the charge, to which the appellant pleaded, is worded unambiguously as follows:

'The accused is guilty of the crime of rape . . .

In that upon or about and or between 16 March 2006 at or near Ngwelezane B section in the Regional Division of Natal, the said accused did wrongfully and unlawfully have sexual intercourse with N[redacted] B[redacted] without her consent, and or against her will in circumstances *where she was raped more than once by the accused*.' (My emphasis)

Secondly, not only was the appellant made aware of his rights within the purview of the Criminal Law Amendment Act at the beginning of the trial, but he was conscious of the seriousness of the charge because he even sought the regional court's indulgence for a postponement to discuss this very aspect with his parents; which indulgence the regional court granted from 2 February 2006 to 14 February 2006. Thirdly, and crucially, the appellant was at all times legally represented.

[17] From these three aspects, it is undoubtedly clear, as counsel for the appellant was constrained to concede, that the fact that the charge sheet had a defect which was never rectified in terms of s 86(1) of the CPA, did not of its own vitiate the sentencing proceedings.[30] The facts of this case are for that matter, distinguishable from those of *Ndlovu* and subsequent cases in which this court considered the irregularity on the part of the State which it found to be so material misdirection, that it vitiated the whole proceedings. As this Court has repeatedly emphasised, each case must be treated and judged on its own facts, before any decision to set aside the proceedings can be taken.

[30] *S v Kolea* [2012] ZASCA 199; 2013 (1) SACR 409 (SCA) para 18.

In *S v Ndlovu; Sibisi*[31], which was cited with approval by this Court in *S v Mabuza & others*,[32] it was said that:

'It will not be essential to inform [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 to be aware of this.'[33]

[18] Turning to the sentence imposed by the regional court, which was then set aside by the court a quo, the salient facts relevant to the sentence are as follows. The complainant, a 27 year old young woman, testified that she was lured by the appellant and his uncle to get a lift home on the fateful afternoon of 16 March 2006 as it was raining and there were no buses from Empangeni to her home, due to a strike. After dropping off an older man whom she believed to be the uncle of the appellant, the appellant drove in the opposite direction to her home until he reached his own home. Once inside the house, he demanded to have sexual intercourse with her. When she refused, he assaulted her and threatened to kill her. Ultimately he overpowered and raped her repeatedly throughout the night until he released her the next day. She went directly to a clinic where she made a report to a nurse. She testified that she was still a virgin and further that she was subsequently diagnosed with HIV. When the trial ended, the State placed on record without any demur from the defence that she succumbed to Aids thereafter. Regrettably, the State did not tender evidence to link her Aids status to the appellant.

[19] In imposing sentence, the regional court found that no substantial and compelling circumstances existed which justified a departure from the minimum sentence of life imprisonment, specified in Part 1 of Schedule 2 of the Criminal Law Amendment Act, where the complainant was raped more than once by the same person. The regional court then imposed the ordained life imprisonment. Disgruntled with the sentence, the appellant appealed to the court a quo.

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[31] *S v Ndlovu; S v Sibisi* 2005 (2) SACR 645 (W).
[32] *S v Mabuza & others [2007] ZASCA110; 2009 (2) SACR 435 (SCA) para 15.*
[33] *At* 654F-G.

[20] In upholding the appeal against the sentence the court a quo found that:

'[I]n the present [case] there is a significant degree of callousness in the manner in which the complainant was enticed into the vehicle, effectively abducted, and subjected to a night of terror and repeated rapes. The crimes, of which the appellant had been convicted, fall into a serious category which requires direct imprisonment for a lengthy period. The appellant acted with callous disregard to the rights, feelings, welfare or the impact of his actions, upon the life and wellbeing of the complainant. At no stage did he indicate any genuine remorse for his actions. *Nevertheless, this is not the worst kind of rape one can imagine*. Although that is not necessarily the criteria for avoiding a sentence of life imprisonment, in all the circumstances of this case, I take the view that a sentence of imprisonment of life, is disproportionate to the nature of the crime and that an injustice would result if that sentence were permitted to stand. I would uphold the appeal against sentence and propose that the sentence, imposed by the magistrate be set aside and replaced by a sentence of eighteen (18) years' imprisonment.' (My emphasis.)

[21] This court harboured considerable disquiet concerning the sentence imposed by the court a quo, which was canvassed with counsel. There was no justification for the court a quo to interfere with the sentence imposed by the regional court. The facts of this case are very similar to those in *S v Nkomo.*[34] The court a quo stated, in its reasons for sentence that 'it is clear from the evidence of the complainant in this case, that the rapes had a profound effect upon her psychologically.' The court a quo also found that 'there was significant callousness in the manner in which the complainant was enticed into the vehicle, effectively abducted and subjected to a night of terror and repeated rapes. Yet, the court unconvincingly came to the conclusion that 'nevertheless this is not the worst kind of rape one can imagine . . .' To use the words of Theron JA in her minority judgment in *Nkomo*[35] contrary to the sentiments echoed in *S v Abrahams*[36] and *S v Mahomotsa*:[37]

'If life imprisonment is not appropriate in a rape as brutal as this, then when would it be appropriate? I am of the view that this is precisely the kind of matter the Legislature had in mind for the imposition of the minimum sentence of life imprisonment. Courts must not shrink from

[34] *S v Nkomo* [2006] ZASCA 139; 2007 (2) SACR 198 (SCA).
[35] Ibid paras 27–28.
[36] *S v Abrahams* 2002 (1) SACR 116 (SCA) para 29.
[37] *S v Mahomotsa* [2002] ZASCA 61: 2002 (2) SACR 435 (SCA) paras 17-19.

their *duty* to impose, in appropriate cases, the prescribed minimum sentences ordained by the Legislature. Society's legitimate expectation is "that an offender will not escape life imprisonment ─ which has been prescribed for a very specific reason ─ simply because [substantial and compelling] circumstances are, unwarrantedly, held to be present". In our constitutional order women are entitled to expect and insist upon the full protection of the law.'
Even stronger sentiments have been echoed by this court in *S v Matyityi*[38] and subsequent cases. But, in the light of there being no cross appeal by the State against sentence; this court can, unfortunately, do no more[39].

[22] There are two further areas of concern in this case. First, the failure on the part of the State to obtain a Victim Impact Statement (VIS) for purposes of sentence. Secondly, the failure by the State to cross appeal the sentence imposed by the court a quo, which is too lenient in the circumstances. The State acknowledged that it did not compile a VIS during the trial. In *Matyityi*[40] this Court with reference to the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW),[41] UN Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power[42] and the Service Charter for Victims of Crime in South Africa,[43] sent a powerful message on the importance of a VIS which seems to be disregarded wantonly and without fear of any repercussions, by the State. A VIS forms an integral part of the last phase of the trial. It is essential for the court in arriving at a decision that is fair to the offender, victim and the public at large. It serves a greater purpose than contributing only to the quantum of punishment.[44] It generally gives the sentencing court a balanced view of all aspects in order to impose an appropriate sentence. It accommodates the victim more effectively, thus giving her or him a voice and the only opportunity to participate in the last phase of the trial. Moreover, the VIS, gives the victim the opportunity to say in her or his own

[38] *S v Matyityi [2010] ZASCA 127;* 2011 (1) SACR 40 (SCA).
[39] *Kellerman v S* [1997] 1 All SA 127 (A).
[40] *Matyityi* paras16-17.
[41] International treaty adopted in 1979 by the United Nations General Assembly.
[42] Resolution 40/34 adopted by the General Assembly on 29 November 1985.
[43] Approved by Cabinet on 2 December 2004.
[44] K Muller & A van der Merwe 'Recognising the victim in the sentencing phase: The use of Victim Impact Statements in Court' (2006) 22 *SAJHR* at 647–663.

voice how the crime has affected him or her. This is particularly so where no expert evidence is led by the State to indicate the impact of the crime on the victim.

[23] After several judgments of this Court have pointed out the substantial importance of the VIS and that it must form part of the sentencing process, the South African criminal justice system requires the permanent infusion of a VIS into the justice process. Comprehensive guidelines, protocols and model VIS instruments must be drafted by the National Director of Public Prosecutions in order to achieve that. This will address the lackadaisical manner in which the State treats victims of violent crimes and in particular, rape. If this is not dealt with decisively, there will soon come a time when the State will be held accountable for this failure of its duty,[45] by victims of violent, particularly sexual crimes such as rape.

[24] The failure by the State to cross appeal the sentence imposed by the court a quo merits mention. In addressing this court, the State was initially in agreement with the appellant that a sentence of 18 years imposed by the court a quo was sufficient. However, after this Court had pointed out several seriously aggravating aspects of the evidence of the complainant and the devastating effect the rapes had on her, counsel for the State accepted the sentence was too lenient. It is a travesty of justice that the State failed to lead expert evidence on the impact of the rapes on the complainant and in particular the possible link between her death and being infected with HIV by the appellant.

[25] Rape is undoubtedly a serious crime which violates the dignity, security, freedom and wellbeing of the victim. The wave of rape cases is increasing at an alarming rate and it is a crime which calls for long term imprisonment.[46] According to the Law Reform Commission statistics it is estimated there are 1,7 million rapes a year. On average only

[45] In terms of s 174 of the Criminal Procedure Act 51 of 1977 read with s 179 of the Constitution of South Africa together with s 22 (6)(*a*) of the National Prosecuting Authority Act 32 of 1998 (Code of Conduct) and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) it is the duty of the prosecution to place all the information before the court which assists the court in arriving at a fair and just sentence.
[46] *Matyityi* para 22.

54 000 rape survivors lay charges.[47] Only 344 out of every 1000 sexual assaults are reported to the police, which means approximately two out of three sexual assaults remain unreported.[48] The rape rate refers to the number of reported rapes which occur per 100,000 people.[49] Despite these distressing statistics the State chose not to cross appeal against the sentence imposed by the court a quo.

[26] Lastly, one aspect requires comment i.e. the number of appeals against s 276B non-parole orders emanating from various Divisions of the high court. From my observation on reported cases of this Court[50], it is clear that appeals on s 276B are multiplying in numbers every year. This is inappropriate and results in cases of greater complexity and truly deserving of the attention of this Court having to compete for a place on the court roll. [51]

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

1. The appeal is upheld.
2. The order of the court a quo in terms of s 276B of the Criminal Procedure Act 51 of 1977 is set aside.
3. The matter is remitted to the court a quo for the parties to make representations on the desirability of granting an order in terms of s 276B of the Criminal Procedure Act 51 of 1977.

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BC Mocumie
Judge of Appeal

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[47] L du Toit *A Philosophical Investigation of Rape: The Making and Unmaking of the Feminine Self* 6ed (2009) at 186.
[48] Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, National Crime Victimization Survey, 2010–2014 (2015).
[49] South African Police Service analysis of the 2014/15 national crime statistics and the Statistics of South Africa's mid-year population estimates for annual rape rates from 2008/09 to 2014/15.
[50] Between 2006 and 2016, this Court had to deal with eleven appeals on s 276B of the Criminal Procedure Act 51 of 1977 from various Divisions of the High court.
[51] *S v Monyane & others* 2008 (1) SACR 543 (SCA) para 28.

Appearances

For Appellant:	S B Mngadi
	Instructed by:
	Durban Justice Centre, Durban
	Bloemfontein Justice Centre, Bloemfontein
For Respondent:	F van Heerden
	Instructed by:
	The Director of Public Prosecutions, Pietermaritzburg