THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 888/2021

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS,
KWAZULU-NATAL, PIETERMARITZBURG **APPELLANT**

and

XOLANI NDLOVU **RESPONDENT**

Neutral citation: *Director of Public Prosecutions, Kwazulu-Natal Pietermaritzburg v Ndlovu* (888/2021) [2024] ZASCA 23 (14 March 2024)

Coram: PETSE DP, ZONDI, MOKGOHLOA and MABINDLA-BOQWANA JJA and SIWENDU AJA

Heard: 06 September 2023

Delivered: 14 March 2024

Summary: Criminal law and procedure – appeal by Director of Public Prosecutions in terms of s 311 of the Criminal Procedure Act 51 of 1977 – import

of s 51(1) of the Criminal Law Amendment Act, 105 of 1997 (the 1997 Act) prior to its amendment – on appeal to it, high court concluding that it was bound by this Court's decision in *S v Mahlase* in which it was held that s 51(1) of the 1997 Act finds no application in circumstances where the rape victim was raped by two or more persons, if not all of the co-perpetrators are before the trial court and have not been convicted of rape – such conclusion constituting a question of law – appeal by Director of Public Prosecutions against such decision competent – appeal upheld and sentence imposed by trial court reinstated.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Ploos van Amstel J, Bezuidenhout J concurring and Hadebe J dissenting, sitting as court of appeal):

1 The appeal is upheld.

2 The question of law raised by the State is determined in its favour.

3 Paragraph (b) of the order of the high court is set aside and in its place the following order is substituted:

'3.1 The appeal against sentence is likewise dismissed.'

4 The sentence of life imprisonment imposed by the trial court is reinstated.

5 The reinstated sentence of life imprisonment is ante-dated to 23 May 2017 in terms of s 282 of the Criminal Procedure Act 51 of 1977.

JUDGMENT

Petse DP (Zondi, Mokgohloa and Mabindla-Boqwana JJA and Siwendu AJA concurring):

Introduction

[1] A little more than nine years ago and in the rural village called Msunduzi the complainant, NM, a 22 year old female, was kidnapped from her home by three men in the early hours of 29 November 2014. She was forcefully taken to a neighbouring homestead where she was repeatedly sexually molested by her assailants, both vaginally and anally, who took turns to violate her physical integrity and thus invaded the innermost zones of her bodily privacy. After a

prolonged ordeal and once the perpetrators had satisfied their sexual lust, they left her locked inside the room, not only stark naked but also with her hands bound together with an electric cord whilst they went to enjoy themselves at a nearby shebeen, blithely indifferent to her plight and mental anguish.

Trial Court

[2] A couple of days later, on 19 December 2014, the respondent, Mr Xolani Ndlovu who was well known to NM, was apprehended. As a result, charges were laid against him, one for a statutory contravention whilst the other was under the common law. As to the first count, it was alleged that he was guilty of contravening s 3 read with ss 1, 2, 50, 56(1), 56A and 57 – 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and further read with ss 94, 256 and 261 of the Criminal Procedure Act 51 of 1977 (the CPA). The prosecution also invoked ss 51(1) and 51(2) of the Criminal Law Amendment Act 105 of 1997 read with Part I of Schedule 2 thereto insofar as it related to the offence of rape.

[3] It bears emphasising that both the charge sheet and the regional magistrate (the latter at the commencement of the trial) made explicit reference to s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the 1997 Act). Section 51(1) now, as it was the case even at the time material to the respondent's trial, specifies under ss 51(3) and (6) that in the absence of what is termed 'substantial and compelling circumstances' justifying a lesser sentence, an accused convicted of an offence referred to in Part I of Schedule 2 is liable to a mandatory sentence of life imprisonment.

[4] In count 2, the respondent was charged with kidnapping, it being alleged that on 29 November 2014 he unlawfully and intentionally removed NM from her home with intent to deprive her of her liberty of movement.

[5] At the trial that ensued before the Pietermaritzburg Regional Court (the regional court), the respondent, who featured as the only accused, pleaded not guilty to the two counts. There was no dispute as to the misfortune that befell NM on the fateful night. What was contested was solely the issue of whether the respondent was one of the perpetrators. His identification had become an issue only because during the course of the perpetrators' criminal escapades, NM, induced by fear, had pretended not to know the respondent whose face was unmasked throughout the ordeal. As for his two cohorts, NM testified that their faces were concealed. That the respondent was indeed known to NM before the rape incident was, on the evidence before the regional court, beyond question.

[6] At the conclusion of the trial, the regional magistrate was satisfied that the State had proved its case beyond reasonable doubt. Consequently, the respondent was convicted on both counts as charged. After hearing both the defence and prosecution on mitigation and aggravation of sentence, the regional magistrate sentenced the respondent to imprisonment for life on the rape count in accordance with s 51(1) of the 1997 Act. Insofar as the second count of kidnapping is concerned, the respondent was sentenced to three years' imprisonment.

[7] I pause here to mention that in regard to count 1, the regional magistrate found that there were no substantial and compelling circumstances warranting a departure from the prescribed mandatory sentence of life imprisonment. In addition, the respondent was, after having been afforded the opportunity to

address the trial court, declared unfit to possess a firearm in line with the dictates of s 103 of the Firearms Control Act 60 of 2000.

High Court

[8] Dissatisfied with the regional court's verdict in relation to both counts, the respondent appealed to the KwaZulu-Natal Division of the High Court, Pietermaritzburg (the high court) against his convictions and resultant sentences upon leave granted by the high court after the regional magistrate had refused leave.

[9] On appeal to it, the high court by a majority (per Ploos van Amstel J with Bezuidenhout J concurring) dismissed the appeal against the convictions, but upheld it in relation to sentence in respect of the count of rape. In upholding the appeal against sentence, the majority in essence held that the regional magistrate had erred in sentencing the respondent to life imprisonment. In reaching this conclusion the majority relied on the decision of this Court in *Mahlase v The State*.[1] Mahlase, who was indicted in the high court on several counts, one of which was rape, was sentenced to life imprisonment on the rape count. '[T]he basis on which the sentence of life imprisonment was imposed by the trial court in respect of the rape count', the majority found, 'was that the victim had been raped by more than one person'.

[10] However, on appeal to it, this Court found in *Mahlase* that this constituted a material misdirection. This was, so the majority of the Full Court held, because this Court had found in *Mahlase* that 'the trial judge had overlooked the fact that the other person who had raped the victim was not before the trial court and had not been convicted of the rape.' Thus, the majority held that 'in those

[1] *Mahlase v The State* [2013] ZASCA 191 delivered on 29 November 2013 (*Mahlase*).

circumstances it could not be held that the rape fell within the provisions of Part I of Schedule 2…, with the result that the minimum sentence for rape was not applicable.' Consequently, taking its cue from this Court in *Mahlase*, the majority set aside the term of life imprisonment imposed by the regional magistrate and substituted it with a sentence of 15 years' imprisonment.

[11] Before substituting the sentence imposed by the regional magistrate, the majority surveyed a number of decisions of this Court and various Divisions of the High Court.[2] The majority was rightly cognisant that it was bound by decisions of this Court, in particular *Mahlase* which was on point. Nevertheless it went on to observe that the 'circumstances of the rape were horrendous' and that a sentence of life imprisonment would otherwise have been justly deserved. However, it also opined that it could not impose such a sentence because the penal jurisdiction of the regional magistrate at the material time was limited to 10 years' imprisonment, which the regional magistrate could not, in terms of s 51(2) of the 1997 Act, exceed by more than five years. Therefore, concluded the majority, they were also precluded from imposing 'a sentence in excess of what the regional court could have imposed.' Thus, unsurprisingly the majority gave the submission advanced by the State that *Mahlase* was wrong short shrift, finding that whatever view it took of the matter it had no room to manoeuvre as it was bound by *Mahlase*.

[12] With respect to the decision of the Full Court in *Khanye* (penned by Carelse J and in which Kubushi and Twala JJ concurred) the majority stated that the reasoning in *Khanye* was fundamentally flawed principally because the court in

[2] See *S v Cock*; *S v Manuel* [2015 ZAECGHC 3; 2015 (2) SACR 115 (ECG) para 19 (*S v Cock; S v Manuel*); *Khanye v The State* [2017] ZAGPJHC 320 (13 March 2017) (*Khanye*); *S v Legoa* 2003 (1) SACR 13 (SCA) (*Legoa)*; *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd* 2004 (3) SA 160 (SCA) and the cases referred to in para 20 of that judgment; *Nyaku v S* (A212/2018) [2018] ZAFSHC 208 (22 November 2018).

Khanye seemingly 'overlooked the fact that it was dealing with an appeal from a regional court.' Thus, it concluded that the application of Part I of Schedule 2 could not be triggered in circumstances where the victim had been raped by more than one person 'unless [all] of them have been convicted.' Properly understood, so held the majority, the 'effect of *Mahlase* is that it cannot be said that the victim had been raped by more than one person unless all of the perpetrators have been convicted.'

[13] For its part, the minority (per Hadebe J) likewise accepted that the appeal against the convictions fell to be dismissed. However, insofar as the appeal against the sentence of life imprisonment is concerned, it took a diametrically opposed view. Whilst cognisant that she was bound by *Mahlase*, the learned Judge in effect curiously called into question the underlying reasoning in *Mahlase* explicitly stating that she found herself 'in great difficulty to agree with the reasoning in *Mahlase*.' She continued and stated that the learned Judges of Appeal in *Mahlase* misunderstood the import of s 51 (of the 1997 Act) and misstated the factual findings of the trial court which, as a general rule, can be upset on appeal only if shown to be demonstrably wrong or otherwise attributable to material misdirection. Ultimately, the minority held that absent any material misdirection it would have dismissed the appeal against the sentence of life imprisonment too.

This Court

[14] It is apposite at this juncture to mention that this appeal has been brought to this Court by the Director of Public Prosecutions under s 311 of the CPA. In *Director of Public Prosecutions, Gauteng Division, Pretoria v Moloi*,[3] delivered on 2 June 2017, this Court held by a majority of three Judges against two, that an

[3] *Director of Public Prosecutions, Gauteng Division, Pretoria v Moloi* [2017] ZASCA 78.

appeal under s 311 on a question of law against a decision of the Full Court of any Division of the High Court does not require special leave to appeal.[4] In short, the Director of Public Prosecutions therefore enjoys an automatic right of appeal to this Court. The correctness of that decision is not in issue in this appeal. Whether the issue brought on appeal by the State constitutes a question of law, is a matter for this Court to determine on a case by case basis. Unsurprisingly, because of the potential ramifications of the appeal, the respondent is opposing the appeal.

[15] In *Director of Public Prosecutions, Gauteng v Grobler* [5] I had occasion to observe that the right of the State to appeal under s 311 of the CPA is explicitly regulated by this statutory provision. Thus, s 311 alone deals with the issue confronting us in this case to the exclusion of the Superior Courts Act,[6] to the extent that the latter statute deals with appeals.[7] The Superior Courts Act[8] finds no application in matters of the kind contemplated in s 311. Moreover, in the same case I alluded to the fact that in circumstances where a Division of the High Court substitutes a sentence imposed by a lower court on appeal to it and thereby gives a decision in favour of the convicted person on a question of law, this Court would have the legal competence to determine whether the decision of the high court in favour of the convicted person came about as a result of an error relating to a question of law.[9]

Issues

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[4] See para 70-71.
[5] *Director of Public Prosecutions, Gauteng v Grobler* [2017] ZASCA 82; 2017 (2) SACR 132 (SCA) para 16.
[6] Superior Courts Act 18 of 2013.
[7] See s 1 of the Superior Courts Act 10 of 2013 which provides: 'appeal' in Chapter 5, does not include an appeal in a matter regulated in terms of the Criminal Procedure Act, 1977 (Act 51 of 1977), or in terms of any other criminal procedural law.
[8] Superior Courts Act 18 of 2013.
[9] Cf: *S v Seedat* [2016] ZASCA 153; 2017 (1) SACR 141 (SCA) paras 29-30.

[16] In this case the State relied on three principal grounds it asserted constituted questions of law. These are:

'2.1 Whether the court a *quo* was correct in holding that it was bound by Mahlase (*supra*) notwithstanding the factual distinction between Mahlase (*supra*) and the present case, in that in Mahlase (*supra*) the primary motive for the attack was robbery whereas in the present case the primary motive was specifically for the gang to kidnap and rape the complainant;

2.2 Whether the court a *quo* was correct in overlooking the *ratio decidendi* contained in the dictum of S v Legoa 2003(1) SACR 13 (SCA) that upon the jurisdictional facts having been proved prior to the verdict, a court is obliged to impose the prescribed minimum sentence as contained in the CLAA unless substantial and compelling circumstances are established;

2.3 Whether the court a *quo* was correct in overlooking that firstly, in terms of the principle enunciated in Legoa (*supra*) and secondly, in terms of the ordinary words and meaning of the CLAA, neither of which were addressed in Mahlase, the Mahlase dictum was rendered *per incuriam* as the jurisdictional facts that had to be proved in order to invoke the provisions contained in Section 51(1) and Part 1(a)(ii) of Schedule 2 of the CLAA were simply and without qualification:

i) That the complainant was raped more than once whether by the accused or by any co-perpetrator or accomplice;

ii) By more than one person, where such persons acted in the execution of the furtherance of a common purpose or conspiracy.'

Statutory framework

[17] It is timely at this stage to make reference to s 311 of the CPA. It provides:

'(1) Where the provincial or local division on appeal, whether brought by the attorney-general or other prosecutor or the person convicted, gives a decision in favour of the person convicted on a question of law, the attorney-general or other prosecutor against whom the decision is given may appeal to the Appellate Division of the Supreme Court, which shall, if it decides the matter in issue in favour of the appellant, set aside or vary the decision appealed from and, if the matter was brought before the provincial or local division in terms of-

(a) section 309(1), re-instate the conviction, sentence or order of the lower court appealed from, either in its original form or in such a modified form as the said Appellate Division may consider desirable;. . .'

[18] There is also s 51 of the 1997 Act read with Part I of Schedule 2 that bears mentioning. This is a critical provision which is at the heart of this appeal. To the extent relevant for present purposes – before its amendment by the Criminal Law (Sexual Offences and Related Matters) Amendment Act 12 of 2021 (Act 12 of 2021) – it provided as follows:

'(1) 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 Schedule 2 to imprisonment for life.

. . .

(3)*(a)* If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part I of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.

. . .

(6) This section does not apply in respect of an accused person who was under the age of 16 years at the time of the commission of an offence contemplated in subsection (1) or (2).'

[19] On the other hand, Part I of Schedule 2 in relevant part reads:

'Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007 –

(a) when committed –

(i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;

(ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy.'

[20] To the extent here relevant, paragraphs *(a)*(i) and (ii) of Part I of Schedule 2 were amended by Act 12 of 2021 by the insertion of, *inter alia*, the following words:

> '(i). . .accused is convicted of the offence of rape and evidence adduced at the trial of the accused proves that the victim was also raped by–
>
> *(aa)* any co-perpetrator or accomplice; or
>
> *(bb)* a person, who was compelled by any co-perpetrator or accomplice, to rape the victim, as contemplated in section 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, irrespective of whether or not the co-perpetrator or accomplice has been convicted of, or has been charged with, or is standing trial in respect of, the offence in question;
>
> (ii) in the circumstances where the accused is convicted of the offence of rape on the basis that the accused acted. . .and evidence adduced at the trial of the accused proves that the victim was raped by more than one person who acted in the execution or furtherance of a common purpose or conspiracy to rape the victim, irrespective of whether or not any other person who so acted in the execution or furtherance of a common purpose or conspiracy has been convicted of, or has been charged with, or is standing trial in respect of, the offence in question.'

Discussion

[21] This amendment took effect on 28 January 2022. As is readily apparent from the text of the amendment, its manifest object was to address the aftermath of the *Mahlase* decision. However, as the incident to which this appeal is a sequel occurred some eight years before the amendment took effect, the amendment has no bearing on what is at issue in this appeal. It therefore goes without saying that this appeal falls to be determined with reference to legislation that was in operation at the time when the rape of which the respondent was convicted on 9 September 2016 was committed.

[22] Accordingly, the cardinal issue confronting this Court is whether the majority decision of the high court is correct and therefore unassailable. On this score, it will be recalled that the majority decision in effect held that the import of s 51(1) read with Part I of Schedule 2 was that when the rape was, for example, committed, the convicted person may be sentenced as follows: (i) a first offender, to imprisonment for a period not less than 15 years; and (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years. But if only one of the perpetrators is charged – in the absence of his or her co-perpetrators – and convicted of rape, s 51(1) finds no application. True, in reaching this conclusion the majority, like the Full Court in *S v Cock*; *S v Manuel*, rightly understood the dictum in paragraph 9 of *Mahlase* as an authoritative statement on the subject by which it was bound.

[23] At this point it is necessary to digress somewhat. The point I want to make is this. It is no exaggeration to say that the decision of this Court in *Mahlase* caused consternation amongst some of the Judges in certain Divisions of the High Court. Some, although expressing misgivings about its correctness, nevertheless rightly considered themselves bound by it, in keeping with the doctrine of *stare decisis.* Others, however, expressed their disinclination to follow it even in circumstances where there was no tenable legal basis to avoid its reach. In certain instances, Judges resorted to employing ingenious ways to distinguish cases serving before them from *Mahlase*.

[24] Therefore, it is necessary to say something about the fundamental importance of precedent and the doctrine of *stare decisis*. In *S v Cock*; *S v Manuel*, Pickering J, who penned the unanimous judgment of the court, was cognisant of the intrinsic value of precedent when he rightly noted that:

'a deviation from a Supreme Court of Appeal decision can only be justified on one of three possible grounds. Firstly, where the case before the Judge is on the facts so distinguishable that the *rationes decidendi* of the Supreme Court of Appeal does not find application, however this requires a careful factual analysis and [is] a ground that must be ventured into carefully so as not [to] undermine the principle of stare decisis on perceived differences that are more contrived than real. Secondly a decision of the Supreme Court of Appeal can be deviated from if it is rendered per incuriam. Per incuriam does not refer to an instance where a lower court deems the Supreme Court of Appeal to have erroneously interpreted the law. It refers to the situation where the Supreme Court of Appeal overlooked legislation governing the case. Thirdly, a decision of the Supreme Court of Appeal is rendered nugatory or obsolete due [to] subsequent legislative development.'[10]

[25] And the Constitutional Court unambiguously tells us in *Camps Bay Ratepayers' and Residents' Association & another v Harrison and another*[11] that: 'Observance of the doctrine has been insisted upon, both by this court and by the Supreme Court of Appeal. And I believe rightly so. The doctrine of precedent not only binds lower courts, but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. *Stare decisis* is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos.'[12]

[26] It is necessary to emphasise that judgments of this Court are, in terms of the hierarchical structure of our courts, binding not only on this Court but also all other courts below it. This Court has consistently emphasised respect for precedent.[13] *True Motives 84* was cited with approval and endorsed by the

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[10] See in this regard: Hahlo & Khan *The South African Legal System and its Background* (1968 ed) at 245-257.
[11] *Camps Bay Ratepayers' and Residents' Association & another v Harrison and another* [2010] ZACC 19; 2011 (4) SA 42 (CC).
[12] Paras 28-30.
[13] *True Motives 84 (Pty) Ltd v Madhi and Others* [2009] ZASCA 4; 2009 (4) SA 153 (SCA) para 100 (*True Motives 84*).

Constitutional Court in *Turnbull-Jackson v Hibiscus Court Municipality and others.*[14]

[27] But this Court has the legal competence to overturn its own previous decisions. However, it can do so only if it is convinced that they are clearly wrong.[15] It has repeatedly been emphasised that without adherence to precedent, the law would be uncertain and unpredictable thereby undermining the rule of law itself which is a foundational value of the Constitution.[16]

[28] As already alluded to above, much judicial attention was devoted to *Mahlase*. And there have also been a number of decisions[17] of certain Divisions of the High Court in which they grappled with the implications of the *Mahlase* judgment as to the import of s 51(1) of the 1997 Act as it was couched at the material time. Indeed, it is, with respect, no exaggeration to say that *Mahlase* caused much consternation generally and, unsurprisingly, generated widespread critical judicial commentary. As already indicated, there has not been a confluence of judicial views on this subject. In some of the cases the various Judges, being cognisant that *Mahlase* was binding, sought to circumvent its effect by either distinguishing it on less than persuasive grounds. In instances where the trial was in the high court, the trial Judges would take refuge in their inherent penal jurisdiction in terms of which it was open to them to impose any sentence they considered appropriate in light of the peculiar circumstances of each case, even including imprisonment for life.

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[14] *Turnbull-Jackson v Hibiscus Court Municipality and others* [2014] ZACC 24; 2014 (6) SA 592 (CC); 2014 (11) BCLR 1310 (CC) para 57.
[15] See, in this regard: *Bloemfontein Town Council v Richter* 1938 AD 195 at 232.
[16] See, in this regard: s 1(c) of the Constitution which provides that the Republic of South Africa is founded on values such as 'Supremacy of the Constitution and the rule of law'.
[17] *S v Cock; S v Manuel* 2015 (2) SACR 115 (ECG); *Khanye v The State* [2017] ZAGPJHC 320; 2020 (2) SACR 399 (GJ); *S v Legoa* 2003 (1) SACR 13 (SCA) relied upon in *Khanye* as its foundation for its conclusion that it was authority for the proposition that s 51(1) read with Part I of Schedule 2 was triggered.

[29] However, others erroneously thought that they were at liberty to simply ignore the effect of *Mahlase* on the basis that *Mahlase*'s correctness was at the very least open to grave doubt. This, of course, was inconsistent with judicial comity and, most fundamentally, the doctrine of *stare decisis.* This must be deprecated.

[30] Nevertheless, it must be stated that I have derived great benefit from those judgments and one must readily acknowledge that there is much to be said about the valuable insights gained from them. Be that as it may, I do not propose to analyse all of them in this judgment. To do so would render it unpalatable and tortuous for the reader. I shall therefore confine my discussion to only two of those cases.

[31] The first of the two judgments is the decision of the Full Court of the Eastern Cape Division penned by Pickering J, concurred in by Plasket and Smith JJ. It dealt with two appeals against judgments of two different Judges, sitting as courts of first instance, in two unrelated cases in which the appellants were, in both instances, convicted of rape that implicated s 51(1) of the 1997 Act read with Part I of Schedule 2. What emerges from the judgment is that both appellants were co-perpetrators who had raped the same victim. The one appellant, Mr Cock, appeared before Dilizo AJ, charged with, *inter alia*, rape that implicated s 51(1) of the 1997 Act to which he pleaded guilty. During January 2013 the trial Judge convicted him in accordance with his plea. And having found that there were no substantial and compelling circumstances justifying a lesser sentence than the statutorily ordained one, namely, life imprisonment, he sentenced the accused to life imprisonment.

[32] The other appellant, Mr Manuel, was apprehended long after Mr Cock had already been convicted and sentenced and was indicted before Malusi AJ on two counts, one of which was rape. In respect of the latter count, the State invoked s 51(1) of the 1997 Act. Similarly, the accused pleaded guilty to both counts and was duly convicted in accordance with his plea. He was likewise sentenced to life imprisonment in respect of the rape count as the trial Judge had found that there were no substantial and compelling circumstances present. Mr Cock and Mr Manuel were subsequently granted leave to appeal against their respective sentences of life imprisonment.

[33] When the two appeals were heard together by the Full Court, the Full Court was confronted with the decision of this Court in *Mahlase*, referred to earlier. This, by reason of the fact that they had not been charged together and convicted. Accordingly, the sole issue was, ultimately, whether the prescribed minimum sentence of life imprisonment as ordained by s 51(1) was applicable because the complainant was admittedly raped by more than one person acting in the execution or furtherance of a common purpose.

[34] In the course of his judgment, Pickering J turned his focus to the cardinal issue under consideration and quoted a passage from *Mahlase* in which this Court said:

'The second misdirection pertained to the sentence imposed for the rape conviction. The court correctly bemoaned the fact that Ms D M was apparently raped more than once and in front of her colleagues. The learned judge however overlooked the fact that because accused 2 and 6, who were implicated by Mr Mahlangu, were not before the trial court and had not yet been convicted of the rape, it cannot be held that the rape fell within the provisions of Part 1 Schedule 2 of the Criminal Law Amendment Act (where the victim is raped more than once) as the high

court found that it did. It follows that the minimum sentence for rape was not applicable to the rape conviction and the sentence of life imprisonment must be set aside.'[18]

[35] Later in his judgment the learned Judge said:

'A sentence of 15 years' imprisonment was substituted for that of life imprisonment. I should mention that the reference in paragraph 9 to accused no 6 not being before the trial Court is incorrect. As appears from the judgment of Makgoba AJ appellant was in fact accused no 6. The charges against accused no 1, Mahlangu, were withdrawn as he became a State witness, and accused 2, 3, 5 and 7 were not before the Court. Accused no 4, who was charged together with the appellant, was not convicted of rape but of robbery and various counts of kidnapping.

Reverting to what is stated in paragraph 9, I have, with the greatest respect, considerable difficulty in understanding the basis upon which the conclusion was reached that the rape did not fall within the provisions of Part 1, Schedule 2 of the Act where the complainant had been raped more than once by more than one person.'[19]

[36] He continued:

'The complainant's evidence was accepted as being credible by Makgoba AJ whose findings in this regard were not challenged by the appellant on appeal, the appeal being only against sentence. The complainant's evidence did not, with respect, consist of mere "allegations" of an "apparent" gang rape. On the contrary, her evidence established beyond a reasonable doubt that she had indeed been raped more than once by two men, one of whom was the accused. Once that evidence was accepted, as it was by Makgoba AJ, then the fact that one of the men who raped her had not yet been apprehended and convicted of the rape appears to me, with respect, to be entirely irrelevant. The finding that the complainant was raped more than once by two men was a factual finding based on the evidence led at the trial. The accused was accordingly convicted of an offence referred to in Part 1 of Schedule 2 of the Act and the matter, on the face of it, therefore fell squarely within the provisions of s 51(1) of the Act.

A trial court is obliged to sentence an accused who appears before it on the basis of the facts which it found to have been proven when convicting the accused. The Mahlase dictum,

[18] *Mahlase* fn 1 para 9.
[19] *S v Cock; S v Manuel* fn 24 paras 22 and 23.

however, gives rise, with respect, to the illogical situation that a trial court, having found beyond reasonable doubt that the complainant was raped more than once by two men and having convicted the accused accordingly, must, for purposes of the Act, disregard that finding and proceed to sentence the accused on the basis that it was not in fact proven that she was raped more than once; that the provisions of the Act relating to the imposition of the prescribed minimum sentence of life imprisonment are therefore not applicable; and that the minimum sentence applicable in terms of the Act is one of only ten years imprisonment.'[20]

[37] He then crystallised the issue and concluded:

'I do not understand on what basis the credible and cogent evidence of the complainant that she was raped by two men, one of whom was identified as being the accused, should be disregarded, not only to the prejudice of the victim and of the State, but also, by way of contrast, to the benefit of the accused on the arbitrary basis that he happened to be the first of the gang to have been arrested and convicted.

This in itself gives rise to the anomalous situation that, whereas the first accused to be convicted and sentenced (the appellant Cock in this matter) is liable to a minimum prescribed sentence of only ten years imprisonment, any other accused who is thereafter convicted as having been part of the gang which raped the complainant, (the appellant Manuel in this matter) would be liable to the prescribed minimum sentence of life imprisonment, it now having been established in terms of Mahlase supra that complainant had indeed been raped more than once, by two men.'[21]

[38] In my view, the Full Court in *S v Cock*; *S v Manuel* said all that could possibly be said about the effect of *Mahlase*. It remains merely to add a further example to underscore the potential anomaly that is likely to arise were the conclusions reached in *Mahlase* to be left undisturbed. Take, for instance, a situation where a rape victim is raped by several perpetrators, but only one of them is apprehended, prosecuted and convicted whilst his cohorts are at large. The effect of *Mahlase* is that such an accused would not be liable to be sentenced

[20] Ibid paras 25 and 26, underlining in the original text.
[21] Ibid paras 27 and 28.

to life imprisonment as ordained in Part I of Schedule 2, notwithstanding overwhelming evidence that the victim was raped by several perpetrators. This, purely because the co-perpetrators are still at large, having managed to evade justice. And assuming they are apprehended a couple of years later, prosecuted and convicted. Would they be liable to be sentenced to life imprisonment in the absence of substantial and compelling circumstances? Ordinarily they would be liable to be sentenced to life imprisonment pursuant to s 51(1) read with Part I of Schedule 2 because the other member of the gang has already been charged, convicted and sentenced. But it is a well-settled principle of our law that persons convicted of the same offence must, as a general rule, receive the same punishment, of course making allowance for individualised sentences, and taking into account differences in the personal circumstances of each accused.[22] One can readily conceive of other plausible imponderables likely to give rise to anomalies of the kind foreshadowed in *S v Cock*; *S v Manuel*.

[39] It is now generally accepted that sentencing courts should strive for reasonable uniformity of sentences even where co-perpetrators have been charged separately. The rationale for this salutary and enduring principle was explained by Rogers J in *S v Smith* [23] thus:

'Generally one should strive to punish co-perpetrators equally unless there are circumstances justifying differential treatment. Justice must not only be done but be seen to be done. The imposition of unequal sentences on equally guilty perpetrators violates one's sense of justice. This principle applies even where co-perpetrators have been tried separately. Where there is a disturbing disparity in sentences, and the degrees of participation are more of less equal, and there are not personal circumstances warranting the disparity, appellate interference may be warranted on the ground that the harsher sentence is disturbingly inappropriate. This is subject to the important qualification that the milder sentence should not have been unreasonably

[22] See in this regard: *S v Dombeni* 1991 (2) SACR 241 (A) at 245c-d.
[23] *S v Smith* 2017 (1) SACR 520 (WCC).

lenient. If the milder sentence was clearly inappropriate, an appeal against the harsher sentence would have to be assessed on its own merits and subject to the usual restraints on appellate interference (see *S v Marx* 1989 (1) SA 222 (A) at 225B-226B.)'[24]

[40] I have taken the liberty to quote copiously from the judgment of Pickering J because, on the view I take of the matter, it neatly captures the crux of what is at the core of this appeal as will become apparent later. Despite having emphatically expressed his views on the matter as encapsulated above, the learned Judge was cognisant of the fact that the Full Court was bound by *Mahlase* in conformity with the doctrine of *stare decisis*. In the event, with this insurmountable obstacle on its path and conscious of the gravity of the rape charge and the circumstances appertaining thereto, the Full Court invoked its common law penal jurisdiction and re-imposed life imprisonment on Mr Cock – which it had set aside in light of *Mahlase* – and dismissed Mr Manuel's appeal against the sentence of life imprisonment imposed by the trial court.

[41] The second case meriting scrutiny is the judgment of a Full Bench of three Judges in the Gauteng Local Division, Johannesburg penned by Carelse J with whom Kubushi and Twala JJ agreed.[25] The salient facts of the case, which I shall for the sake of brevity not traverse, are comparable to those of the first judgment discussed above except that the appeal emanated from the regional court. Apropos this decision, the Full Bench, although taking issue with the correctness of *Mahlase* readily accepted that it was bound by it. But, unlike the Full Court's judgment in *S v Cock*; *S v Manuel*, the Full Bench realised that if s 51(1) was not open for invocation to the regional court, the regional court's penal jurisdiction would be limited to 15 years' imprisonment. However, having regard to the

[24] Ibid para 109. See also *DPP, Gauteng v Tsotetsi* 2017 92) SACR 233 (SCA) in which this Court said (para 19) that the 'general principle is that if justice is to be done and seen to be done, where a number of people are convicted of the same crime, there ought to be reasonable uniformity in respect of sentences imposed on them, due regard being given to respective mitigating and aggravating circumstances.'
[25] *Khanye* fn 2.

horrendous nature of the so-called 'gang rape', the court held that a sentence of 15 years' imprisonment would be woefully inappropriate and that, in fact, life imprisonment would best serve the interests of justice.

[42] Confronted by this conundrum, the court invoked the decision of this Court in *Legoa*.[26] On this score, Carelse J then said:

'Although *Mahlase* binds this court, *S v Legoa* equally binds this court . . . *S v Legoa* was never considered by Pickering J in *Cock v S*, Thompson AJ in *S v Nkosinathi Standford Mejeni* and the Supreme Court of Appeal in *S v Mahlase*. I have no doubt that had *Legoa* been considered, it may have resulted in a different finding.'[27]

[43] After quoting certain passages from *Legoa* [28] the learned Judge continued:

'The Criminal Law Amendment Act does not create new offences but creates jurisdictional factors which will trigger the provisions of section 51(1) or (2) read with Parts 1 or 2 of Schedule 2. Consequently if a court upon a proper evaluation of the evidence is satisfied that the State has proven the jurisdictional fact which is required to trigger the provisions of section 51(1) or (2) of the Criminal Law Amendment Act, that finding sets the basis for the approach to sentencing. In *Jaga v Dönges No and Another*; *Bhana v Dönges NO and Another* Schreiner JA remarked as follows at 662G: "Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context". This approach has been confirmed by the Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Home Affairs and Others*.[29] In my view section 51(1) read with Part 1 of schedule 2 properly construed does not mean that more than one person must be convicted to trigger the provisions of section 51(1) of the Act. The approach in *Mahlase*, with respect, reads words into the section which are not there, in conflict with the principles [30] of contextual interpretation.'[31]

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[26] *Legoa* fn 2.
[27] *Khanye* para 28.
[28] Paras 13 and 18.
[29] *Bato Star Fishing (Pty) Ltd v Minister of Home Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC) (*Bato Star*) para 89.
[30] These are explained in the judgment of Schreiner JA in *Jaga v Dönges No and Another; Bhana v Dönges NO and Another* 1950 (4) SA 653(A) at 662G-663A.
[31] *Khanye* para 30.

[44] With respect, I do not subscribe to the views expressed by the learned Judge in *Khanye*. They are not borne out by what this Court said in *Legoa*. Quite at the outset, in *Legoa* this Court, after alluding to what the case was all about, proceeded to say:

'Two questions are in issue: the meaning of "value" in the minimum sentencing legislation; and whether at the trial of an accused charged with dealing the state is entitled to prove the value [of dagga valued at more than R50 000 that attracted a mandatory minimum sentence of 15 years] in question after conviction but before sentencing, so as to invoke the minimum sentences.'[32]

[45] In *Legoa* the value of the dagga found in the possession of the appellant was the only disputed issue. Accordingly, there can be little doubt that in the passages [33] quoted from *Legoa* and heavily relied upon by the Full Bench in *Khanye*, Cameron JA (who wrote for a unanimous court) sought to underscore the fact that in the context of the facts of that case and the nature of the charge, the value of the dagga constituted one of the elements of the offence charged. Thus, as *Legoa* makes plain, it was incumbent upon the prosecution to present evidence as to the value of the dagga before conviction for the regional court to acquire 'an enhanced penalty jurisdiction.' To my mind, whatever else was said by Cameron JA (in paras 13-18 of *Legoa*) was no more than a substratum for his ultimate conclusion that the value of the dagga had a bearing not just on sentence but, fundamentally, also in respect of the elements of the offence itself that the State was obliged to prove in order to procure a conviction.

[46] In contrast, the question that pertinently arose for determination in *Mahlase* was whether it was competent for the trial Judge to invoke s 51(1) of the 1997 Act read with Part I of Schedule 2 and, as a result, impose a sentence of life

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[32] *Khanye* para 1.
[33] See *Legoa* fn 2 paras 13 and 18.

imprisonment in circumstances where two other members of the gang that raped the complainant 'were not before the trial court and had not yet been convicted of rape.' This Court answered that question in the negative and held that in such circumstances '[i]t cannot be held that the rape fell within the provisions of Part I of Schedule 2 of the Criminal Law Amendment Act (where the victim is raped more than once)…'. Consequently, this Court concluded and said that: '[I]t follows that the minimum sentence for rape was not applicable to the rape conviction and the sentence of life imprisonment must be set aside.'[34]

[47] Indeed, in *Legoa* this Court, cognisant of the central issue before it, emphasised that the jurisdiction to impose the enhanced penalty is acquired only if all the elements of the offence, as described in the 1997 Act, are proved before conviction and the trial court concludes that they are present.[35] This theme was further clarified in *S v Gagu* [36] where this Court reiterated that: 'the "elements" of the offence must be established before conviction, and the conviction must encompass all the elements of the particular offence as set out in Schedule 2.'[37]

[48] Nevertheless, I must hasten to add that the Full Bench in *Khanye* was undoubtedly correct in its observation that 'section 51(1) read with Part I of Schedule 2 properly construed *does not mean that more than one person must be convicted to trigger the provisions of section 51(1) of the Act.* The approach in *Mahlase*, with respect, *reads words into the section which are not there*, in conflict with the principles of contextual interpretation.'[38] (Emphasis added.) Fundamentally, the conclusion reached in *Mahlase* diminishes the effectiveness

[34] *Mahlase* fn 1 para 9.
[35] *Legoa* para 18.
[36] *S v Gagu* 2006 (1) SACR 547 (SCA).
[37] Ibid para 7.
[38] *Khanye* fn 3 para 30.

of s 5(1) read with Part I of Schedule 2 and the overarching object of the 1997 Act.

Analysis

[49] I now turn my focus to the text of s 51(1) of the 1997 Act read with Part I of Schedule 2 thereto. These statutory provisions have already been quoted in paragraph 18 above. However, for convenience I shall quote them again. In its original formulation (ie prior to its amendment by Act 12 of 2021 in the wake of the *Mahlase* decision) s 51(1), in relevant part, read:

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

[50] However, Part I of Schedule 2 was not affected by the amendment nor itself amended. The relevant part thereof read:

'*(a)* when committed—

(i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice:

(ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy>:

(iii) by a person who has been convicted of two or more offences of rape, but has not yet been sentenced in respect of such convictions: or

(iv) a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus:

(b) where the victim—

(i) is a girl under the age of 16 years;

(ii) is a physically disabled woman who, due to her physical disability, is rendered particularly vulnerable: or

(iii) is a mentally ill woman as contemplated in section 1 of the Mental Health Act. 1973 (Act No. 18 of 1973): or

(c) involving the infliction of grievous bodily harm '

[51] And by way of the amendment that came into operation on 28 January 2022, as alluded to in paragraph 20 above, the following words were inserted in Part I of Schedule 2, namely:

'"*(a)* when committed—

(i) in the circumstances where the accused is convicted of the offence of rape and evidence adduced at the trial of the accused proves that the victim was also raped by—

(aa) any co-perpetrator or accomplice; or

(bb) a person, who was compelled by any co-perpetrator or accomplice, to rape the victim, as contemplated in section 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, irrespective of whether or not the co-perpetrator or accomplice has been convicted of, or has been charged with, or is standing trial in respect of, the offence in question;

(ii) in the circumstances where the accused is convicted of the offence of rape on the basis that the accused acted in the execution or furtherance of a common purpose or conspiracy and evidence adduced at the trial of the accused proves that the victim was raped by more than one person who acted in the execution or furtherance of a common purpose or conspiracy to rape the victim, *irrespective of whether or not any other person who so acted in the execution or furtherance of a common purpose or conspiracy has been convicted of, or has been charged with, or is standing trial in respect of, the offence in question*;

(iii) by the accused who—

(aa) has previously been convicted of the offence of rape or compelled rape; or

(bb) has been convicted by the trial court of two or more offences of rape or the offences of rape and compelled rape, irrespective of—

(aaa) whether the rape of which the accused has so been convicted constitutes a common law or statutory offence;

(bbb) the date of the commission of any such offence of which the accused has so been convicted;

(ccc) whether the accused has been sentenced in respect of any such offence of which the accused has so been convicted;

(ddd) whether any such offence of which the accused has so been convicted was committed in respect of the same victim or any other victim; or

(eee) whether any such offence of which the accused has so been convicted was committed as part of the same chain of events, on a single occasion or on different occasions; or

(iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;

(b) where the victim—

(i) is a person under the age of [16] 18 years;

(iA) is an older person as defined in section 1 of the Older Persons Act, 2006 (Act No. 13 of 2006);

(ii) is a [physically disabled] person with a disability who, due to his or her [physical] disability, is rendered [particularly] vulnerable; [or]

(iii) is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or

(iv) is or was in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998, with the accused; or

(c) involving the infliction of grievous bodily harm"; and

(d) by the substitution for paragraphs (a), (b) and (c) of the offence "Compelled rape as contemplated in section 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007" of the following paragraphs:

"*(a)* when committed—

(i) in the circumstances where the accused is convicted of the offence of compelled rape and evidence adduced at the trial of the accused proves that the victim was also raped—

(aa) as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, by any co-perpetrator or accomplice; or

(bb) by a person, who was compelled by any co-perpetrator or accomplice, to rape the victim, irrespective of whether or not the co-perpetrator or accomplice has been convicted of, or has been charged with, or is standing trial in respect of, the offence in question;

(ii) in the circumstances where the accused is convicted of the offence of compelled rape on the basis that the accused acted in the execution or furtherance of a common purpose or conspiracy and evidence adduced at the trial proves that the victim was raped by more than one person who acted in the execution or furtherance of a common

purpose or conspiracy to rape the victim, irrespective of whether or not any other person who so acted in the execution or furtherance of a common purpose or conspiracy has been convicted of, or has been charged with, or is standing trial in respect of, the offence in question;

(iii) by the accused who—

(aa) has previously been convicted of the offence of compelled rape or rape; or

(bb) has been convicted by the trial court of two or more offences of compelled rape or the offences of compelled rape and rape,

irrespective of—

(aaa) whether the rape of which the accused has so been convicted constitutes a common law or statutory offence;

(bbb) the date of the commission of any such offence of which the accused has so been convicted;

(ccc) whether the accused has been sentenced in respect of any such offence of which the accused has so been convicted;

(ddd) whether any such offence of which the accused has so been convicted was committed in respect of the same victim or any other victim; or

(eee) whether any such offence of which the accused has so been convicted was committed as part of the same chain of events, on a single occasion or on different occasions; or

(iv) under circumstances where the accused knows that the person who is compelled to rape the victim has the acquired immune deficiency syndrome or the human immunodeficiency virus;

(b) where the victim—

(i) is a person under the age of [16] 18 years;

(iA) is an older person as defined in section 1 of the Older Persons Act, 2006 (Act No. 13 of 2006);

(ii) is a [physically disabled] person with a disability who, due to his or her [physical] disability, is rendered [particularly] vulnerable; [or]

(iii) is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or

(iv) is or was in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998, with the accused; or

(c) involving the infliction of grievous bodily harm.'" (Emphasis added.)

[52] However, as the incident giving rise to the criminal prosecution of the respondent (and his resultant conviction and sentence) occurred some seven years prior to the amendment, the current formulation of Part I of Schedule 2 has no bearing on what is at issue in this appeal. Accordingly, the issue raised in this appeal falls to be decided with reference to the legislation that was in operation at the time of the commission of the rape of which the respondent was convicted.

Statutory interpretation

[53] The fate of this appeal therefore hinges entirely on the wording of s 51(1) read with Part I of Schedule 2 at the relevant time. Thus, we are here dealing with the perennial question of statutory interpretation. The principles to be applied in the interpretive process are now well settled.

[54] More than a decade ago it was stated that:

'The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable

point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

[55] That was said by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality.*[39] Therefore, the inevitable point of departure is the language used in the provision under consideration in the light of the overall scheme of the legislation and the context.[40] *Endumeni* has been consistently followed in this Court ever since [41] and endorsed in a couple of judgments of the Constitutional Court.[42]

[56] The proper approach to statutory interpretation that is consistent with the Constitution is usefully summarised in a recent decision of the Constitutional Court in *Road Traffic Management*.[43] For the sake of brevity, I do not deem it necessary to quote the relevant paragraphs in this judgment. Suffice it to say that in general the process of interpretation pays due regard to the fact that interpretation of documents is a unitary exercise, taking into account the text, context and the purpose of the instrument under consideration.[44]

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[39] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18 (*Endumeni*).
[40] See, in this regard, the judgment of Schreiner JA in *Jaga v Dönges No and Another; Bhana v Dönges NO and Another* 1950 (4) SA 653(A) at 662G-663A whose approach was endorsed by the Constitutional Court in *Bato Star* para 72 and 89-91.
[41] See, for example, *Shoprite Checkers (Pty) Ltd v Mafate* [2023] ZASCA 14; [2023] 2 All SA 332 (SCA) para 18; *Transnet National Ports Authority v Reit Investments (Pty) Ltd and Another* [2020] ZASCA 129 para 56.
[42] See, for example, *Airports Company South Africa v Big Five Duty Free (Pty) Limited and Others* [2018] ZACC 33; 2019 (5) SA 1 (CC) para 29; *Road Traffic Management Corporation v Waymark Infotech (Pty) Limited* [2019] ZACC 12; 2019 (5) SA 29 (CC) paras 29-30 (*Road Traffic Management*).
[43] *Road Traffic Management* fn 47 above paras 29-32.
[44] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC12; 2007 (10) BCLR 1027 (CC); 2007 (6) SA 199 (CC); *Chisuse and Others v Director-General, Department of Home Affairs and Another* [2020] ZACC 20; 2020 (10) BCLR 1173 (CC); 2020 (6) SA 14 (CC) para 52; *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) para 25.

[57] It is as well to remind oneself of the exhortation by Marais JA in *Malgas* [45] that the 'situation [precipitating the enactment of the 1997 Act] was and remains notorious: an alarming burgeoning in the commission of crimes of the kind specified [a reference to, *inter alia*, Part I of Schedule 2] resulting in the government, the police, prosecutors and the courts constantly being exhorted to use their best efforts to stem the tide of criminality which threatened and continues to threaten to engulf society . . . The very fact that this amending legislation has been enacted indicates that parliament was not content with that and that it was no longer to be "business as usual" when sentencing for the commission of the specified crimes.'[46]

[58] The learned Judge of Appeal continued:

'In what respects was it no longer to be business as usual? First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the legislature has ordained life imprisonment… as the sentence which should *ordinarily* be imposed for the commission of the listed crimes in the specified circumstances. In short, the legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes.'[47]

[59] Equally instructive is the observation by the same learned Judge of Appeal that the '. . . provisions [a reference to, inter alia, s 51(1)] are to be read in light of the values enshrined in the Constitution and, unless it does not prove possible to do so, *interpreted in a manner that respects those rights*.'[48] (Emphasis added.)

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[45] *S v Malgas* [2001] ZASCA 30; [2001] 3 All SA 220 (A); 2001 (2) SA 1222 (A).
[46] Ibid para 7.
[47] Ibid para 8.
[48] Ibid para 7. See also the analysis of legislative interpretation under the Constitution undertaken in *Road Traffic Management* paras 29-32.

[60] Bearing in mind the basic principles of statutory interpretation alluded to above, I now turn to a consideration of what is at the heart of this appeal. To my mind, the way in which s 51(1) of the 1997 Act was couched (prior to its amendment by Act 12 of 2021) was clear enough. In unambiguous terms, it provided that 'a regional court or a high court should sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.' And, crucially, Part I of Schedule 2 lists the circumstances in which a sentence of life imprisonment was ordained which is, in the words of Marais JA, 'not to be departed from lightly and for flimsy reasons which could not withstand scrutiny.'[49]

[61] Read together, as they must, both s 51(1) and Part I of Schedule 2 could not be clearer. They mean precisely what they say, namely that insofar as the offence of rape is concerned a sentence of life imprisonment must ordinarily be imposed on a person convicted of rape:

'*(a)* when committed—

(i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice:

(ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy>:

(iii) by a person who has been convicted of two or more offences of rape, but has not yet been sentenced in respect of such convictions: or

(iv) a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus:

(b) where the victim—

(i) is a girl under the age of 16 years;

(ii) is a physically disabled woman who, due to her physical disability, is rendered particularly vulnerable: or

[49] *Malgas* para 9.

(iii) is a mentally ill woman as contemplated in section 1 of the Mental Health Act. 1973 (Act No. 18 of 1973): or

(c) involving the infliction of grievous bodily harm '

[62] This then brings me to the point where the judgment of this Court in *Mahlase* must now be carefully analysed to determine whether it bears close scrutiny. The judgment itself is, with respect, relatively terse. The foundation for the conclusion reached is contained in a single paragraph. When one reads the relevant paragraph, one is immediately struck by want of any underlying reasoning to bolster the conclusion reached. All that this paragraph says is, in essence, that because two members of the criminal gang who raped the victim '*were not before the trial court and had not yet been convicted of the rape, it cannot be held that the rape fell within the provisions of Part I of Schedule 2*.' (Emphasis added.) But wait! Part I of Schedule 2 does not contain this requirement. Significantly, the italicised words are not borne out by the language of the provision. Indeed, the dictum is at odds with the clear and unequivocal wording of the provision. And the weight of its authority is substantially reduced, if not eviscerated, by absence of reasons in support of the conclusion reached.

[63] Yet, crucially, the conclusion in *Mahlase* is subversive of the manifest purpose of the statutory provision in question which was designed to bring within its reach those found guilty of the listed crimes and in the circumstances enumerated, and to single them out for the most severe sentence that a court may, in the absence of substantial and compelling circumstances, impose.

[64] It bears emphasising that the text of Part I of Schedule 2 at the material time was clear and unambiguous. Moreover, it was a provision of considerable

breadth. Thus, I can conceive of no rational basis to limit the ambit of the provision in the manner in which this was done in *Mahlase*.

[65] Accordingly, to the extent that *Mahlase* held that the so-called 'other rape incidents' had to be proved before s 51(1) of the 1997 Act could be invoked, that conclusion is, with respect, clearly wrong. In my judgement, what s 51(1) before its amendment by Act 12 of 2021 in truth required was no more than evidence, established beyond reasonable doubt, that the rape victim was raped more than once whether by the solitary accused on trial or any co-perpetrator or accomplice regardless of whether or not the co-perpetrator or accomplice has been prosecuted and convicted of the rape committed during the same incident.

[66] I digress at this point to observe that both the Constitutional Court and this Court have come to accept that when an amendment of existing legislation that seeks to remedy obscurities or address cases where existing legislation fails to fully capture the purpose or the mischief that it was designed to serve or prevent in the first place, it is permissible to take a peek at the amending legislation purely as a guide to the legislature's understanding of the purpose of the existing legislation.[50]

[67] It is as well to remember that courts are, as a general rule, enjoined to heed the constitutional injunction in s 39(2) of the Constitution [51] when interpreting legislation, namely to 'promote the spirit, purport and objects of the Bill of Rights'. Keeping that injunction at the forefront of one's mind, there can therefore

[50] *Patel v Minister of the Interior and Another* 1955 (2) SA 485 (A) at 493A-D; *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others* [2002] ZACC 27; 2003 (2) BCLR 154; 2003 (3) SA 1 (CC) para 66.
[51] *Bato Star* fn 33 para 72.

be no doubt that the interpretation espoused in this judgment is consistent with this constitutional imperative. In addition, such interpretation is consistent with the purposive approach to interpretation of statutes which has received universal approval from both the Constitutional Court [52] and this Court.[53]

Relief

[68] Where the conclusion reached in the preceding paragraph leaves us is the obvious question that now arises. It is therefore our task to determine the nature of the relief to which the appellant is entitled. Having found in favour of the prosecution with respect to the last of the three questions of law relied upon by the State, this Court is consequently enjoined to invoke s 311 of the CPA. To the extent here relevant, s 311(1) provides that if the matter was brought before the provincial or local division in terms of s 309(1) of the CPA, this Court may 're-instate the conviction, sentence or order of the lower court appealed from, either in its original form or such modified form as this Court may consider desirable.'[54]

[69] It is trite that no appeal by the State is legally permissible where a court has erred in evaluating the evidence and drawing inferences therefrom, even in circumstances where such error is grave. This is what this Court reiterated in *Director of Public Prosecutions, Transvaal v Mtshweni*[55] with reference to

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[52] *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) para 28. See also *Dengetenge Holdings (Pry) Ltd v Southern Sphere Mining and Development Company Ltd and Others* [2013] ZACC 48; 2014 (3) BCLR 265 (CC) paras 84-6 and *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) para 5 for purposive interpretation.

[53] See *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76: 2013 (5) SA 1 (SCA) at para 24; *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* [2009] ZASCA 7; 2009 (4) SA 399 (SCA) para 39 and *Bhana v Dőnges NO and Another* 1950 (4) SA 653 (A) at 664E-H for proper contextualisation; *Natal Joint Municipal Pension Fund v Endumeni Municipality* (2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18 (*Endumeni*).

[54] Compare: *Director of Public Prosecutions, Gauteng Division, Pretoria v Buthelezi* [2019] ZASCA 170; 2020 (2) SACR 113 (SCA).

[55] *Director of Public Prosecutions, Transvaal v Mtshweni* [2006] ZASCA 165; [2007] 1 All SA 531 (SCA); 2007 (2) SACR 217 (SCA).

Magmoed v Janse Van Rensburg and Others.[56] In the latter case Corbett CJ made plain that it is not competent, for example, for the State to raise as a question of law, in terms of s 319 of the CPA under consideration in that case, the issue whether a reasonable court could not have acquitted the accused which is essentially a question of fact.[57]

[70] In the context of the peculiar facts of this case, there can be little doubt that the high court committed a grave error of law when it held that on any reckoning the sentence of life imprisonment was plainly incompetent because of the decision of this Court in *Mahlase*.

[71] In this case the regional court sentenced the respondent to life imprisonment in terms of s 51(1) of the 1997 Act. He appealed against both his conviction and sentence to the high court. The appeal against the conviction failed but succeeded with respect to the sentence which the high court set aside, substituting it with a sentence of 15 years' imprisonment. It is necessary to emphasise that the appeal against the sentence of life imprisonment was upheld solely on the basis that it was not competent for the regional magistrate to impose such a sentence in the face of what *Mahlase* – by which the magistrate was bound – had previously decreed. Thus, s 311(1) is implicated.

[72] Faced with this stark reality, counsel for the respondent soon realised, understandably so, that in the context of the facts of this case he would be hard pressed to contend for a lesser sentence than the mandatory one of life imprisonment. In these circumstances the interests of justice as well as basic notions of fairness dictate that in view of the gravity of the offence of rape, its

[56] *Magmoed v Janse Van Rensburg and Others* [1992] ZASCA 208; 1993 (1) SA 777 (AD); [1993] 4 All SA 175 (AD); [1993] 1 All SA 396 (A).
[57] Ibid at 806H-I.

prevalence, the interests of society at large and those of the victim, the respondent's lack of remorse, and the gratuitous violation of the victim's rights to liberty, physical integrity, privacy, personal dignity coupled with society's interests in having rape adequately punished, the sentence of life imprisonment ordained by the legislature imperatively requires nothing short of condign punishment to express society's revulsion at the enormity of this sort of crime.

Conclusion

[73] Rape is an utterly despicable, selfish, deplorable, heinous and horrendous crime. It gains nothing for the perpetrator, save perhaps fleeting gratification, but inflicts lasting emotional trauma and, often, physical scars on the victim. More than two decades ago, Mohamed CJ, writing for a unanimous court, aptly remarked that:

'Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim.

The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization.

Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.'[58]

[74] In similar vein Nugent JA, writing for a unanimous court, in equal measure described rape in these terms:

'Rape is a repulsive crime, it was rightly described by counsel in this case as an invasion of the most private and intimate zone of a woman and strikes at the core of her personhood and dignity.'[59]

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[58] *S v Chapman* [1997] ZASCA 45; 1997 (3) SA 341 (SCA) (*Chapman*) paras 3-4.
[59] *S v Vilakazi* 2009 (1) SACR 552 (SCA) para 1.

[75] In *Tshabalala v S (Commissioner for Gender Equality and Centre for Applied Legal Studies as Amici Curiae); Ntuli v S* [60] the Constitutional Court once again underscored the gravity of the crime of rape and its attendant repulsive consequences. In the same case, Khampepe J, writing separately, said that 'rape is not rare, unusual and deviant. It is structural and systemic.'[61]

[76] In *Masiya v Director of Public Prosecution Pretoria and Another (Centre for Applied Legal Studies and another as Amici Curiae)*[62] the Constitutional Court said the following of rape:

'Today rape is recognised as being less about sex and more about the expression of power through degradation and concurrent violation of the victim's dignity, bodily integrity and privacy.'[63]

Regrettably, 26 years, since the decision of this Court in *Chapman*, the scourge of rape has shown no signs of abating. On the contrary, it appears to be on an upward trajectory.

Order

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

1 The appeal is upheld.

2 The question of law raised by the State is determined in its favour.

3 Paragraph (b) of the order of the high court is set aside and in its place the following order is substituted:

'3.1 The appeal against sentence is likewise dismissed.'

4 The sentence of life imprisonment imposed by the trial court is reinstated.

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[60] *Tshabalala v S (Commissioner for Gender Equality and Centre for Applied Legal Studies as Amici Curiae); Ntuli v S* [2019] ZACC 48; 2020 (2) SACR 38 (CC).
[61] Ibid para 76.
[62] *Masiya v Director of Public Prosecution Pretoria and another (Centre for Applied Legal Studies and another as Amici Curiae)* [2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827 (CC); 2007 (2) SACR 435 (CC).
[63] Ibid para 51.

5 The reinstated sentence of life imprisonment is ante-dated to 23 May 2017 in terms of s 282 of the Criminal Procedure Act 51 of 1977.

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X M PETSE

DEPUTY PRESIDENT

SUPREME COURT OF APPEAL

Appearances

For the appellant:	C Kander
Instructed by:	Director of Public Prosecutions, Pietermaritzburg
	Director of Public Prosecutions, Bloemfontein
For the respondent:	V E Ngwenya
Instructed by:	Legal Aid South Africa, Pietermaritzburg
	Legal Aid South Africa, Bloemfontein