

[REPORTABLE]

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

CASE NO.: A 610/2002

In the matter between:

**ANDREW JOHN
Appellant**

and

**THE STATE
Respondent**

JUDGMENT : 27 AUGUST 2003

COMRIE J. :

[1.] The appellant was convicted by a regional court of rape and sentenced to 13 years' imprisonment. He appeals against the conviction and sentence. The appellant was initially one of three accused in the court below: he was accused no. 2. Accused no. 1 was also convicted of rape and the same sentence was imposed. He does not appeal. Accused no. 3 died during the course of the trial and accordingly no verdict was reached in respect of him.

Ad conviction

- [2.]** The complainant, a young woman who was still a teenager, stated that on the night of 4 December 1996 she missed the last train home. She spent the first part of the night in the company of another woman, C., in the city centre where certain untoward things occurred. Among those whom she encountered were the appellant (also known as “Waterkop”) and no. 1. Thereafter, on what seems to have been a pretext, with or without an element of duress, she was persuaded to accompany a group of men, which included the appellant and no. 1, to a council building on the foreshore. There she was raped successively by several men including no. 1 and the appellant. He was the third man to rape her. The complainant was alone with each rapist in a separate room at the time of each rape. Each rapist wore a condom.
- [3.]** The complainant stated that the next day she reported the rapes to her close friend, who testified in confirmation of that report. The complainant’s parents were alerted and the police were informed. An examination by a private medical practitioner was superficial because he felt that the complainant should rather be seen by the district surgeon. No such examination appears to have taken place.
- [4.]** At an identity parade held some two and a half months later, the complainant identified all three accused as being men who had raped her on the night in question. The parade appears to have been properly conducted.
- [5.]** The appellant’s principal defence was an alibi. He claimed that during the relevant period he and his girl friend were staying with his sister, Mrs. Botha, at Manenberg; that during the first week of December 1996 he painted the inside and outside of his sister’s house; that he painted the outside brown;

and that he ventured nowhere near the city during that time. Mrs. Botha testified in support of this alibi and many of its details. She and her brother differed, however, on the colour. Mrs. Botha stated that the appellant painted part of the outside (the front part) and that he painted it blue. The witness tried to escape from this answer when the obvious discrepancy between brown and blue was put to her in cross-examination. But the damage in my view was done. Mrs. Botha could also not explain why, aware of the alibi, she had failed to proffer it to the police.

[6.] The appellant had an ancillary defence, the force of which diminished as the trial progressed. In summary it was that the complainant was a prostitute and that Armien Andrews, a pimp, had put her up to implicating the appellant and others. Armien and his friends had given her the appellant's nickname. The reason for the conspiracy had something to do with gang rivalry. The complainant denied all these assertions. The defence was considerably watered down during the defence case. The appellant stated that he had no personal problems with Armien, and that he (the appellant) was not a member of the relevant gang (although there was other evidence suggesting that he was a leading member of that gang, the Dock Road Kids). According to the appellant there was thus no reason for Armien to want to get rid of him. It emerged further that the appellant had learned of the conspiracy from a third party, viz. another prostitute. Then it transpired that the appellant had half inferred the conspiracy because he claimed to have seen the complainant associating with Armien after 4 December and prior to the identity parade. Later in his cross-examination the appellant was forced to concede that he could not explain why the complainant should have invented her implication of him. Still later the appellant stated that he had met Armien, who had denied the complicity.

[7.] A witness by the name of Julian Petersen, also known as "Green Eyes", also testified for the appellant. Petersen was partly discredited and he was in any event altogether unimpressive.

[8.] It might have been of some concern to enquire more closely into what this young complainant was doing in the city at a late hour and after the last train had departed. Petersen, for what it is worth, implied that she and C. were prostitutes. In the light of the way in which this ancillary defence developed, and based as it was on little more than speculation, I think there is no need to examine the theory further.

[9.] Although she was a single witness, and still young, the complainant was found by the trial court to be an outstanding witness. She gave her evidence on

different days spread over a period of time. A perusal of her testimony in transcript shows that she testified with exceptional clarity. There was but one contradiction which in my view was not of a serious nature. I consider that it should be accepted, as was found by the trial court, that the complainant was indeed raped successively by several men in the council building on the foreshore. That leaves the question whether the appellant was one of the rapists. On the appellant's version of events she met the appellant in the city centre earlier that evening. Further, she stated that at the council building the lighting was such that she had a reasonable view of each of the rapists, including the appellant. In addition she pointed him out as one of them at the identity parade.

[10.] The appellant by contrast was a poor witness whose alibi defence foundered and whose ancillary defence virtually disappeared. There is no realistic scope for the contention that the complainant mistakenly identified the appellant as one of her rapists. She had more than adequate opportunity to see the appellant's face in the city centre, on the way to the foreshore, and in the council building. And she knew the appellant's nickname. Either the complainant was lying or she was not. I can find no reason to differ from the trial court's conclusion that she was telling the truth, or to differ from the conclusion that the appellant's guilt was proven beyond reasonable doubt. I would confirm the conviction.

Ad sentence

[11.] The first contention to be considered is whether the trial magistrate exceeded her penal jurisdiction when imposing a sentence of 13 years' imprisonment. The potentially relevant dates are as follows. The offence was committed on

4 December 1996. The appellant was arrested some time later, in 1997, and appeared in court. After various remands the trial proper commenced on 29 April 1998 when the appellant and his co-accused pleaded. At that juncture the magistrate's general penal jurisdiction was a maximum of 10 years' imprisonment. With effect from 7 October 1998 that jurisdiction was increased to 15 years' imprisonment. See s. 6 of the Magistrates Amendment Act 66 of 1998 amending s. 92(1) of the principal Act 32 of 1944. At the same time the general penal jurisdiction of district magistrates was increased from 1 to 3 years' imprisonment. The appellant's trial was eventually concluded on 16 November 2001, when he was convicted and sentenced.

[12.] It will immediately be observed that the appellant could not have been sentenced (for rape) by the court *a quo* to more than 10 years' imprisonment when the offence was committed, or when he was arrested and first appeared in court, or more particularly when he pleaded. It was only in October 1998, in the course of the trial, that a heavier/longer sentence became competent. It is so that prior to his plea the appellant could have been indicted by the prosecuting authority in the High Court, having greater penal jurisdiction, but that course was not followed. The sentence in excess of 10 years' imprisonment can therefore only be justified, if at all, on the basis that it was constitutionally and otherwise lawfully authorised by the amending legislation.

[13.] This appeal does not concern the so-called compulsory minimum sentence legislation, because Act 105 of 1997 was enacted and came into force after the commission of the offence. See *S. v. Willemse* 1999(1) SACR 450 (C) in which cases such as *R. v. Mazibuko* 1958(4) SA 353 (A), *R. v. Sillas* 1959(4) SA 305 (A), and *S. v. Mpetha* 1985(3) SA 702 (A) were cited. As will appear later those leading decisions accord with s. 35(3) (n) of the Constitution, subject to

a qualification.

[14.] In *S v Arendse* 1999(1) SACR 454 (C) I dealt with the increase in the general penal jurisdiction of district courts from 1 to 3 years' imprisonment. It was an automatic review. The offence (robbery) was committed on 26 July 1998. The two accused pleaded two days later. The trial was heard on 29 October 1998, when the accused were convicted and sentenced to 2 years' imprisonment each. I pointed out that an increase in a court's general penal jurisdiction is usually regarded as prospective rather than

retrospective. *S. v. Ndevu* 1975(3) SA 519 (O) at 520; *S. v. Qualinga en Ander Sake* 1978(4) SA 556 (NC) at 559. In the case of the two accused I found that there was no prejudice resulting from the increased jurisdiction because the district magistrate, who convicted them, could in any event have referred them to the regional court for sentence. Sec. 116 of the Criminal Procedure Act 51 of 1977.

[15.] Less than a month later a full bench of the Transvaal Provincial Division handed down judgment in *S. v. Mbuyane; S. v. Nkittle* 1999(1) SACR 458 (T). The majority of that Court held that the amendment to the jurisdiction was procedural; that the accused had no "right" to a maximum sentence of 12 months' imprisonment; and that the accused were competently sentenced (after 7 October 1998) to longer sentences for their offences (house breaking and theft respectively) committed prior to 7 October 1998. The majority rejected an argument based on s. 35(3) (n) of the Constitution. The Court overruled an unreported case (*Mnisi*) in the same division, and approved an unreported case (*Hendrik Bantam*) in the Northern Cape Division.

[16.] The minority judge (**Prinsloo AJ**) was of the view: first, that the legislation effecting the increase in jurisdiction was retrospective; and second, that the jurisdictional limits before and after the amendment constituted “prescribed punishments” within the meaning of s. 35(3) (n) of the Constitution. That provision of the Bill of Rights reads:

“35. (3) Every accused person has a right to a fair trial, which includes the right –

n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.”

Compare article 15(1) of the International Covenant on Civil and Political Rights which, I am informed, was ratified by South Africa on 10 March 1999. The learned judge’s second view, *supra*, has been supported by De Waal *et al*: *The Bill of Rights Handbook* (4 ed) at 649. See too Steytler: *Constitutional Criminal Procedure* from 367, espec. at 376 - 8.

[17.] *Arendse’s case, supra*, and the majority view in *S. v. Mbuyane*; *S. v. Nkile, supra*, were followed by **H.J. Erasmus J (Cleaver J)** concurring) in an unreported judgment of this Division in *S. v. Mketho* (A 505/01; judgment delivered 30 August 2002). In that appeal the offence (rape) was committed on or about 20 September 1997. The appellant was arrested on 10 June 1998. The date of his first appearance in court is unclear, but he pleaded in the regional court on 3 February 2000. He was in due course convicted by that court and sentenced to 15 years’ imprisonment. A contention that the trial

court had exceeded its jurisdiction was rejected; the sentence was, however, reduced to 10 years' imprisonment on other grounds. The question which I address later in this judgment, namely the significance of the date of the plea, could not have arisen in *S. v. Mketho* since the appellant pleaded more than a year after the jurisdiction was increased.

[18.] Many of the decided cases, and indeed s. 35(3) (n), concentrate on the date of the commission of the offence as the first point of comparison. That is perfectly understandable in most instances where the competent punishment itself is increased or decreased post commission of the offence and prior to sentencing. The answer in the present appeal is that the appellant, having committed rape, was always liable to a sentence in excess of 10 years' imprisonment. The limitation, if any, flowed from the court in which he was charged, namely the regional court. That was a decision of the prosecuting authority made after the commission of the offence. The case is thus taken out of para. (n) *supra* unless it be held (as **Prinsloo AJ** held) that the general penal jurisdiction of a particular court constitutes a "prescribed punishment". I accept that the meaning of that expression is not confined to compulsory or semi-compulsory sentences such as may be found, for example, in Act 105 of 1997 mentioned earlier. I think "prescribed" here also includes punishments which are laid down or specified by law as being competent to impose. Thus our statute law authorises the imposition of sentences for say drunk driving, illicit diamond dealing, or stock theft. Such an accused is not liable to an increase in such potential sentence post commission of the offence, and would be entitled to the benefit of an intervening reduction. That was the position in terms of our common law, and is now enshrined in the Constitution. The qualification in terms of para. (n) is that the legislature may no longer

make an increase in sentence retrospective.

[19.] I am not persuaded, however, that a change in the general penal jurisdiction of a court within the judicial hierarchy, which does not of itself alter the authorised sentence, can be regarded as “prescribed”. The contrary view, adopted by **Prinsloo AJ**, with respect unduly strains the language of s. 35(3) (n).

[20.] It seems to me that a more fruitful line of enquiry in the context of a general increase in the penal jurisdiction of the trial court is to examine the position not at the time of the commission of the offence, but at the time when an accused pleads and thereafter. The general rule, which is subject to exceptions, is that an accused person who pleads not guilty is entitled to a verdict [s. 106(4) of the Criminal Procedure Act] and is deemed to demand that the issues raised by the plea be tried (s. 108). *S. v. Sibuyi* 1993(1) SACR 235 (A) at 248 – 9. Generally speaking the verdict would emanate from the court before which the accused pleads. The trial may result in a conviction (or an acquittal) and as **Smalberger JA** said in *S. v. Tieties* 1990(2) SA 461 (A) at 466 E:

“A conviction has important consequences for as long as it stands. For one, it precludes a further trial against the person convicted in respect of the same or a similar offence based on substantially the same facts.”

That has since become a constitutional right; see s. 35(3)(m):

“not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted.”

Also speaking generally, and again subject to exceptions, the court which convicts an accused is the court which sentences him or her. The exceptions to both general propositions are many; in what follows I shall consider those exceptions which bear an penal jurisdiction.

[21.] The most obvious exception is to be found at district court level (referred to in the Criminal Procedure Act as a magistrate’s court). By s. 114 (conviction following a plea of guilty) and s. 116 (conviction following a plea of not guilty) a district magistrate may in appropriate circumstances refer the convicted accused to the regional court for sentence. This is quite common in practice. Such an accused is then exposed to the enhanced penal jurisdiction of the regional court. There is, however, no corresponding provision in the Criminal Procedure Act which enables a regional court to refer a convicted accused to the High Court for sentence. That may be sufficient to distinguish the present appeal from *Arendse’s* case, *supra*.

[22.] Section 117 provides for the special, but rare case where an accused challenges the validity of a provincial ordinance or proclamation as a ground of his defence. In such a case the accused must be committed for trial in the High Court.

[23.] Chapter 19 (section 119 – 122) provides that an accused who is to be indicted in the High Court may be required to plead in the district court. This procedure is followed on the instructions of the attorney-general, now the director of public prosecutions. Different consequences flow according to whether the accused pleads guilty or not guilty. Ultimately it is the decision of the attorney-general as to the court before which the accused will be arraigned for sentence (plea of guilty) or trial (plea of not guilty). Chapter 19 A (sections 122 A – D) provides for a similar but not identical procedure in respect of cases which should be heard by a regional court, except that the attorney-general plays no overt role. Under both chapters a plea of guilty, properly made, will usually be binding on the accused, leaving sentence to be imposed by the court chosen by the attorney-general (ch. 19) or by the regional court (ch. 19A). In all instances under both chapters I would expect the magistrate, as a matter of fairness, to explain to an unrepresented accused the special nature of the plea proceedings and the implications thereof. If an accused is legally represented, I would expect that representative to explain the position to the client. What seems to be clear is that these plea procedures have to be specifically invoked at the right time, namely the time of plea, and cannot be invoked midway through a trial in the district court.

[24.] Finally, there is chapter 20: preparatory examinations (sections 123 – 143). In the normal course where the attorney-general decides on a preparatory examination, the accused is not required to plead until the end of the proceedings. See s. 131 read with s. 130. However, s. 123 (b) provides for an exceptional case. It empowers the attorney-general to convert a part-heard trial in the district or regional court into a preparatory examination. The

paragraph states: “at any stage . . . before sentence”, but in *S. v. Tieties supra*, where the history of the legislation is set out, the court of appeal redrafted the provision to read: “before conviction”. It would appear *prima facie* that the accused will have to plead a second time, namely at the conclusion of the proceedings. The accused may adduce evidence (s. 134) and may even be discharged (s. 135), but such discharge is not binding on the attorney-general [s. 137 read with s. 139(b)]. Different judicial officers may hear different stages of the examination (s. 138). By s. 139 it is the prerogative of the attorney-general to arraign an accused before the court of the former’s choice for sentence (plea of guilty) or for trial (plea of not guilty) or to decline to prosecute.

[25.] I shall assume, without deciding, the constitutionality of s. 123(b) and the provisions ancillary thereto. It is none the less a startling procedure, albeit very seldom used. To my mind it is undesirable that the prosecution, even the chief prosecutor, should be empowered to interfere in the trial in this manner after a plea of not guilty has been entered; and I fear that such intervention may conceivably lead to an unfair trial. Be that as it may, the fact remains that the s. 123(b) procedure was not invoked in the present case. Nor were the appellant and his co-accused required to plead, for later trial, in terms of chapter 19 or chapter 19A. Neither the appellant nor his co-accused challenged the validity of a provincial ordinance or proclamation in terms of s. 117, since there was naught to challenge. We are back where we started: the district court can refer a convicted accused to the regional court for sentence, but the regional court enjoys no corresponding power (save in terms of Act 105/1977, which is not applicable in this case). The question, as I see it, is whether the imposition by the trial magistrate of a sentence in

excess of her general jurisdiction at the time of plea, but within her general jurisdiction at the time when sentence was imposed, infringed the appellant's right to a fair trial in terms of s. 35(n) of the Constitution.

[26.] I am not convinced that the decision in *S. v. Arendse, supra*, was wrong, and it has in principle been followed in this Division in *S. v. Mketho, supra*. I remain of the view that the general penal jurisdiction of a court does not constitute a prescribed punishment, and that an increase in such jurisdiction is procedural and prospective and does not constitute an increase of a prescribed punishment. That is all very well at district court level where the magistrate can in an appropriate case refer the accused to the regional court for sentence, such power existing at the time of plea though exercisable later (after conviction). But there is no counterpart to s. 114 and s. 116 in respect of the regional court whereby a convicted accused, such as the appellant, can be referred to the High Court for sentence. As I said earlier the sentence in excess of 10 years' imprisonment can only be justified, if at all, by virtue of the increase in the regional court's general penal jurisdiction.

[27.] In *S. v. Zuma and Others* [1995]4 BCLR 401 (CC) and in *S. v. Dzukuda and Others*; *S. v. Tshilo* [2000]11 BCLR 1252 (CC) the Constitutional Court made it clear that the right to a fair trial is not limited to the specific rights listed in s. 35(3). There is no numerus clausus. In the latter case **Ackerman J** said:

“[9] As was said by this Court in *Zuma's* case, an accused's right to a fair trial under section 35(3) of the Constitution is a comprehensive

right and “embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force.” Elements of this comprehensive right are specified in paragraphs (a) to (o) of subsection (3). The words “which include the right” preceding this listing indicate that such specification is not exhaustive of what the right to a fair trial comprises. It also does not warrant the conclusion that the right to a fair trial consists merely of a number of discrete sub-rights, some of which have been specified in the sub-section and others not. The right to a fair trial is a comprehensive and integrated right, the content of which will be established, on a case by case basis, as our constitutional jurisprudence on section 35(5) develops. It is preferable, in my view, in order to give proper recognition to the comprehensive and integrated nature of the right to a fair trial, to refer to specified and unspecified *elements* of the right to a fair trial, the specified elements being those detailed in sub-section (3).

- [10] It should not be assumed that a fair trial, as required by section 35(3), can only be achieved by one specific system of criminal procedure. There may be more than one way of securing the various elements necessary for a fair trial and provided the legislature devises a system which effectively secures such right, it cannot be faulted merely because it settles for a system which departs from past procedures. The norm prescribed by section 35(3), is a “fair trial”. The question to be determined in each case is whether the criminal procedure scheme, or the relevant part thereof, devised by the legislature, whatever its *form*, conforms in substance to that *norm*.”

Apropos sentencing the learned Judge said:

“(12) More particularly, in relation to sentencing in the

context of the present case, it seems to me that 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. In the present circumstances a fair trial would also have to ensure that, in the process of the sentencing court being put in possession of the factors relevant to sentencing, the accused is not compelled to suffer the infringement of any other element of the fair trial right.”

[28.] It strikes me as unfair that an accused person should attract a heavier sentence than that to which he or she was exposed at the time of plea, when issue was joined. That in effect is what happened to the appellant. As **Prinsloo AJ** put it in his minority judgment, *supra*, the goal posts were shifted during the course of the trial, and shifted to the detriment of the appellant. When he pleaded in the regional court, the maximum punishment to which he was exposed was one of ten years’ imprisonment. That limit was an incidence of the trial court’s jurisdiction at the time. To hold that the procedural nature of the general increase in the trial court’s penal jurisdiction *in res medias* afforded a valid basis to enable the trial magistrate to impose a higher sentence than she could competently have done when the appellant pleaded, would be to ignore the very material substantive consequence of the procedural amendment. In effect, it would be akin to allowing what in a different, but analogous context, is expressly proscribed by s. 35(3)(n) of the Constitution. It would at the very least be unfair to the appellant.

[29.] The question which is presented in this case well illustrates the ‘imprecision of the dichotomy and the sometimes elusive nature of the distinction’ between statutory provisions which are characterised as ‘procedural’ and those which are not, remarked on by **Marais JA** in *Minister of Safety and Security v Molutsi and Another* 1996(4) SA 72 (A) at 90 F – J. It is firmly established that a statutory provision which, while procedural in character, substantively affects vested rights adversely is to be construed as prospective in effect, so as not to negate the affected rights.

[30.] The appellant had no vested right, in the true sense of the words, to a sentence limit of ten years’ imprisonment when he pleaded. The limit of the trial court’s general penal jurisdiction was nevertheless a circumscribing factor when his trial commenced in the regional court and any upward shift in the sentencing jurisdiction while the trial was in progress would, if availed of by the presiding officer, adversely affect his position substantively. The consequent prejudice, amounting to not less than an extra three years’ imprisonment, compels the conclusion of unfairness. To that extent the appellant (and accused no. 1) did not in my opinion receive the fair trial to which the Constitution entitled them. It was correctly not argued that the amendment to s. 92 was intended to be retrospective. Nor was it argued, again I think correctly, that the sentences were saved by s. 36 of the Constitution. It follows that the maximum sentence which the regional magistrate was competent to impose *in casu* was 10 years’ imprisonment.

[31.] Mr. **Bischoff**, for the appellant, was unable to argue convincingly that the appellant merited anything less than 10 years. The crime was heinous. The appellant was the third man to rape the complainant and he must have known that he was the third in line. He has a previous conviction for murder. In his favour I will take into account, as did the court *a quo*, the substantial period which he spent in custody awaiting the trial and its conclusion. None the less it appears to me that the maximum of 10 years' imprisonment would be the appropriate sentence.

[32.] In the exercise of this Court's inherent review jurisdiction the sentence imposed on accused no. 1 falls to be reduced to the competent maximum.

[33.] The order is as follows:

- a) The appellant's appeal against conviction is dismissed and the conviction is confirmed;
- b) The appellant's appeal against sentence succeeds. The sentence is set aside and replaced by:

"Tien (10) jaar gevangenisstraf".

- c) In the exercise of this Court's inherent review jurisdiction the sentence imposed on accused no. 1, Peter Arries, is set aside and replaced by:

“Tien (10) jaar gevangenisstraf.”

R.G. COMRIE
JUDGE

I agree.

A.G. BINNS-WARD
ACTING JUDGE