REPORTABLE

CASE NO: P 1/2014

IN THE SUPREME COURT OF NAMIBIA

In the matter between

THE STATE **Applicant/Appellant**

and

LK **Respondent**

Coram: SHIVUTE CJ, MAINGA JA, STRYDOM AJA, MTAMBANENGWE AJA and HOFF AJA

Heard: **30 March 2015**

Delivered: **13 November 2015**

JUDGMENT ON PETITION FOR LEAVE TO APPEAL TO THE SUPREME COURT AND THE APPEAL

STRYDOM AJA (SHIVUTE CJ, MAINGA JA, MTAMBANENGWE AJA and HOFF AJA concurring):

[1] The respondent, in this matter, LK, was convicted in the High Court of Namibia of contravening s 2(1)*(a)* read with ss 1, 2(2), 2(3), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000, in that he, being a 20 year old male person, had inserted his

finger into the vagina of the complainant, she being a 7 year old female. He was sentenced to 7 (seven) years imprisonment of which 4 (four) years were suspended for 5 (five) years on condition that during the period of suspension he is not again convicted of the offence of rape read with the provisions of the Combating of Rape Act 8 of 2000.

Background

[2] The applicant (the State) was not satisfied with this outcome and applied for leave to appeal to this court only against the sentence imposed by the trial court. The application was denied. The State thereupon petitioned the Chief Justice for leave to appeal against the sentence only. Initially the State petitioned for leave to appeal only against the trial court's refusal to grant them leave. Later on they supplemented their application and then also asked for leave to appeal against the sentence and the finding that substantial and compelling circumstances existed.

[3] Because some doubts were raised as to the competency of the State to appeal against sentence only, and because of the importance of the matter for all parties as well as the court, the Chief Justice decided to have the matter argued before a court consisting of five Judges of Appeal. The parties were notified by letter dated 7 May 2014 that the matter would be heard on 11 July 2014. The letter further set out certain time frames within which the parties had to deliver further affidavits, if so advised, and the dates before which heads of argument had to be filed. The letter further identified

certain questions which the court required the parties to address. These were the following:

‘1. Regard being had to the provisions of s 316(6) of the Criminal Procedure Act (the Act), as applied *mutatis mutandis* to s 316A of the Act -

1.1 will it be competent for the Chief Justice and/or the judges considering the petition to grant the petitioner leave to appeal “against the judgment of the Honourable Judge-President dismissing your petitioner’s application for leave to appeal against the lenient sentence he imposed on the respondent” and, if so,

1.2 will it be competent for the Supreme Court to entertain an appeal against that judgment or order, and, if so,

1.3 what order, if any, does the State propose the Court should make if it finds in favour of the State in the course of such appeal and what will the effect thereof be?

2. Is the finding of the High Court that there “existed in this case substantial and compelling circumstances that warranted a departure from the mandatory minimum sentences prescribed by the Combating of Rape Act 8 of 2000” an appealable “finding” as contemplated in s 316A(1) of the Act –

2.1 in the absence of a prayer in the petition pertinently seeking leave to appeal against the sentence imposed by the High Court and

2.2 in any other event

if regard is had to the judgment of this Court in *S v Malumo and Others* 2010 (2) NR 595 (SC) at para 30 and elsewhere?

3. Does s 316A(1) authorise the Prosecutor-General to appeal to the Supreme Court against a sentence only if imposed on an accused person by the High Court sitting as a court of first instance and, if so, does that authority arise from–

3.1 the provision in the subsection that the Prosecutor-General may appeal against "any decision given in favour of an accused in a criminal case in the High Court" or,

3.2 the provision in paragraph (a) of the subsection or,

3.3 any other provision in law?

4. Without derogating from the generality of the question in paragraph 3, if the Prosecutor-General is relying for such authority on –

4.1 the provision referred to in para 3.1 above, can it be held that a "sentence" may notionally constitute a "decision in favour of an accused in a criminal case" notwithstanding the punitive nature of a sentence and the adverse effect that it may have on the rights, freedoms or patrimony of a convicted accused, and, if so, under which circumstances?

4.2 the provision referred to in para 3.2, what is the meaning and qualifying effect, if any, to be accorded –

(a) to the word "including" which precedes paragraph (a) in the subsection and

(b) to the word "resultant" in paragraph (a) of the subsection?

4.3 any other provision in law referred to in para 3.3, which provision is being relied on?'

[4] Because of the prevalence of the crime of rape, and other sexually related crimes, the Legislature enacted the Combating of Rape Act 8 of 2000 (the Act) to protect those who were vulnerable to attacks of this kind. In an attempt to stem the flood of sexually related crimes, which did not previously constitute the crime of rape, such as those defined in s 1(1)*(a)* (the latter part of it), 1(1)*(b)* and 1(1)*(c)*, are now, per definition, regarded as rape. This was done as follows:

(i) In s 1(1) the words 'sexual act' was defined as:

> '(a) The insertion (to even the slightest degree) of the penis of a person into the vagina or anus or mouth of another person; or
>
> (b) The insertion of any other part of the body of a person or of any part of the body of an animal or of any object into the vagina or anus of another person, except where such insertion of any other part of the body (other than the penis) of a person of any object into the vagina or anus of another person is, consistent with sound medical practices, carried out for proper medical purposes; or
>
> (c) Cunnilingus or any other form of genital stimulation.'

(ii) Section 2(1) of the Act then provides as follows:

> 'Any person (in this Act referred to as a perpetrator) who intentionally under coercive circumstances –
>
> (a) commits or continues to commit a sexual act with another person; or

(b) causes another person to commit a sexual act with the perpetrator or with a third person,

shall be guilty of the offence of rape.'

[5] The following provisions of the Act are relevant to sentencing in this instance:

(a) Where a complainant under the age of 13 years is a victim of a rape, s 3(1)*(a)*(iii)(bb)(A) provides that a perpetrator be sentenced to imprisonment of not less than 15 years.

(b) Section 3(2) provides that where 'substantial and compelling circumstances exist' in a particular case, which would justify the imposition of a lesser sentence than that prescribed by the Act, those circumstances shall be entered on the record of the proceedings and the court may thereupon impose a lesser sentence.

(c) In terms of s 3(4) the court may not suspend a minimum sentence as is provided for in s 297(4) of the Criminal Procedure Act (CPA.)

[6] The respondent was therefore correctly convicted of the crime of rape bearing in mind the provisions of the Act set out above. He therefore qualified for the minimum sentence of 15 years imprisonment unless the court *a quo* had been satisfied that there existed substantial and compelling circumstances which would justify the

imposition of a lesser sentence. The trial court was so satisfied and imposed a lesser sentence as set out herein before.

The competency of the State's appeal against sentence only

[7] The first issue to be dealt with is whether it was competent for the State to appeal against the sentence only. It seems to me that there are three possible answers to this question. Firstly that it was competent for the *State* to appeal only against the sentence where it constitutes a decision in favour of the accused. Secondly that the State has an outright right to appeal against any sentence imposed by the High Court, subject to the limitations imposed by the CPA of obtaining leave to appeal, and thirdly that it has no right to appeal where the appeal lies only against the sentence.

[8] It was common cause between the parties that the State's right of appeal in this instance derived from s 316A(1) of the CPA. The relevant section provides as follows:

> **'**316A. Appeal from High Court by Prosecutor-General or other prosecutor
>
> (1) The Prosecutor-General or, if a body or person other than the Prosecutor-General or his or her representative, was the prosecutor in the proceedings, then such other prosecutor, may appeal against any decision given in favour of an accused in a criminal case in the High Court, including –

(a) Any resultant sentence imposed or order made by such court;

(b) Any such order made under section 85(2) by such court

to the Supreme Court.

(2) The provisions of section 316 in respect of an application or appeal by an accused referred to in that section, shall apply *mutatis mutandis* with reference to an appeal in subsection (1).'

[9] Counsel on both sides dealt with the various questions *seriatim* and although they mostly travelled by different routes, they sometimes ended up with the same answers. In regard to *QUESTION 1* both parties pointed out that although, in its original petition, the State appealed against the refusal of the court *a quo* to grant the petition, the State, in its supplementary petition for special leave to appeal, now specifically appealed against the sentence imposed and the finding of the court that substantial and compelling circumstances existed which would enable the court to impose a lesser sentence than the minimum sentence prescribed by the Act. The objection which could have been raised against the initial grounds of appeal was therefore met by the amendment in the supplementary petition.

[10] In regard to *QUESTION 2* the parties agreed, with reference to the *Malumo* case that the court's finding that the State could only appeal against sentence after an acquittal, was an *obiter dictum* as the *ratio decidendi* dealt with the time when it was competent for the State to appeal, and not with whether the State could appeal. Mr

Trengove therefore submitted that it was competent for the State to apply for leave to appeal on the grounds set out in its supplementary petition.

[11] As far as *QUESTION 3* was concerned both parties were agreed that the State has a right to appeal against a sentence only, where imposed by a judge of the High Court sitting in first instance. According to the State this power was derived from s 316A(1) and s 316A(1)*(a)*. According to counsel on behalf of the respondent that power derives from the provisions of s 316A(1)*(a)*.

[12] On behalf of the State, Mr Trengove submitted that in regard to *QUESTION 4* a dispute is raised where the prosecutor in a criminal case asked for a heavier sentence than that asked for by defence counsel. If the court then imposes a lesser sentence, than that suggested for by the prosecutor, that would constitute a decision in favour of the accused which would be appealable by the State. According to counsel for the State the purpose of subsec (a) was merely to place beyond doubt that the Prosecutor-General may appeal against the sentence imposed by the High Court if it is the result of a decision in favour of the accused. Mr Boesak argued that the word ‘including’, where used in a statute, means ‘as well as’ and given the construction of s 316A(1), any sentence resulting from a conviction in the High Court would be appealable in terms of the section.

[13] It is clear that both parties have considered the effect that the word ‘including’ may have on the interpretation of s 316A. According to Mr Trengove it merely

confirmed that the State would have an appeal against sentence if it follows upon a decision in favour of an accused and this would be so when the court imposes a lesser sentence than that asked for by the prosecutor. Mr Boesak, on the other hand, submitted that in this instance the word 'including' broadened the scope and the State has an unfettered right of appeal as far as sentencing is concerned. It is therefore clear that both counsel were of the opinion that it was competent for the State to appeal to this court where the appeal only concerns the sentence imposed by the court *a quo*, albeit that in the former instance a decision is required in favour of an accused.

[14] I agree with counsel that where the words 'include' or 'including' are used in an enactment that, depending on the context in which it was so used, it may either extend the meaning of a definition clause or may have the effect of being exhaustive, in the sense that it does not add to the meaning but confirms the meaning of whatever it is that is included. Guidelines to distinguish between the two possibilities were again confirmed in *De Reuck v Director of Public Prosecutions, WLD* 2004 (1) SA 406 (CC) para 18. The following was stated in this regard:

> 'The correct sense of "includes" in a statute must be ascertained from the context in which it is used. *Debele* provides useful guidelines for this determination. If the primary meaning of the term is well known and not in need of definition and the items in the list introduced by "includes" go beyond that primary meaning, the purpose of that list is then usually taken to be to add to the primary meaning, so that "includes" is non-exhaustive. If, as in this case, the primary meaning already encompasses all the items in the list, then the purpose of the list is to make the definition more precise. In

> such a case “includes” is used exhaustively. Between these two situations there is a third, where the drafters have for convenience grouped together several things in the definition of one term, whose primary meaning – if it is a word in ordinary, non-legal usage – fits some of them better than others. Such a list may also be intended as exhaustive, if only to avoid what was referred to in *Debele* as “n moeras van onsekerheid” (quagmire of uncertainty) in the application of the term.’

(See also, *R v Debele* 1956 (4) SA 570 (A); *King NO v Pearl Insurance Co Ltd* 1970 (1) SA 462 (W); *Sandton Town Council v Homeward Investments (Pty) Ltd* 1982 (3) SA 67 (W) and *Minister of Health & another NO v New Clicks SA (Pty) Ltd & others* 2006 (2) SA 311 (CC) para 455.)

[15] I am satisfied that the third possible meaning, referred to by the learned judge in the *De Reuck* case, is not relevant as we are not here dealing with a list of matters which the drafters of the CPA have grouped together for the sake of convenience.

[16] I am of the opinion that the key to the interpretation that must be given to s 316A(1)*(a)*, and for that matter, also subsec (*b*) of s (1), is to be found in the context in which the word ‘including’ is used in order to determine whether it is intended to add to the instances where the State can appeal or whether it is used exhaustively. Furthermore, in regard to the various questions formulated in the letter dated 7 May 2014, once the court has come to a conclusion, it must not be tempted to express gratuitous opinions or to deal with issues which are, at that stage, only of academic interest or which are moot. The rules which cover these instances are as

strong, or even stronger, than the rule against piecemeal appeals, bearing in mind further that this court is a Court of Appeal. (See, *inter alia, R v Solomons* 1959 (2) SA 352 (AD) at 360D.)

[17] Various applications for condonation were also filed by both parties as well as an application by the State to file a supplementary petition for leave to appeal. In regard to the various applications for condonation, as well as the State's application to supplement their petition for leave to appeal, none of the parties raised any objection to any of the applications during argument. In each instance the non-compliance with the Rules of this court was adequately and fully explained. It also did not result in an inordinate delay of the proceedings. Furthermore because of the importance of the matter to both parties, and the court, condonation is hereby granted in respect of all such applications. The State's application to supplement their petition is also hereby granted. (From documents filed it seems that the respondent was at some stage opposing the State's supplementary application for special leave to appeal but no argument was presented to us, either in regard to condonation or to accept or move the application.)

[18] It is generally accepted that a judicial officer's approach, when dealing with the merits of a criminal case, differs from his approach when dealing with the sentencing phase. In this regard the following was stated by Kriegler in *Hiemstra Suid-Afrikaanse Strafproses* 5 ed at 654-655 in discussing the sentencing process:

‘Nou is dit die regterlike beampte se sware plig om regverdig oor die lot van die beskuldigde te beslis. Dit is weliswaar nog deel van die verhoor en gevolglik onderworpe aan die algemene voorskrifte dienaangaande. Maar (a) nou is dit nie meer so ‘n kliniese oefening as wat die beslegting van die meriete was nie; (b) nou is daar nie afgebakende geskilpunte en formele kwyting van bewyslaste nie; (c) nou gaan dit nie soseer om *feite* nie maar om indrukke; (d) nou kan gekyk word na oorwegings wat by die meriete irrelevant was (byvoorbeeld motief); (e) nou word spesifiek na die person van die beskuldigde gekyk, na sy karakter en algemene lewenswandel en nie net na sy gewraakte handelinge nie; (f) nou is dit in hoofsaak ‘n toekomsblik terwyl dit by die meriete gegaan het om gedane sake, en (g) les bes, nou moet ‘n komplekse waardeoordeel gemaak word waarby die vier oogmerke van straf in samehang met mekaar en aan die hand van die *Zinn*-trits oorweeg word . . . . Dit lê immers in die wese van die vonnisfase dat die inwin van tersaaklike gegewens nie deur die regiede reëls van die meriete fase gekniehalter moet wees nie. Bowendien verg vonnisoplegging ‘n aktiewer rol van die hof as die wat by die meriete geld.’

(It is now the difficult task of the judicial officer to decide the fate of the accused. It is indeed still part of the hearing process and consequently subject to the general directions there anent. But (a) it is now no longer such a clinical exercise as when the merits had to be decided; (b) now there are no demarcated disputes and formal discharging of the onus of proof; (c) now it does not so much concern facts but rather impressions; (d) now consideration can be given to issues which were irrelevant in regard to the merits (for instance motive); (e) now the focus is on the person of the accused, his character and general way of life, and not only on the actions complained of; (f) now it is mainly a look into the future whereas the merits concerned themselves with what had previously happened; (g) last but not least, now a complex value judgment must be made where the four objectives of

> punishment must be considered in context with each other and on the basis of the *Zinn*-triad. . . . It is indeed in the nature of the sentencing phase that the collecting of relevant data should not be hampered by the rigid rules of the merit phase. Above all the imposing of a sentence requires a more active role from the court as was required during the hearing of the merits.) (My free translation.)

[19] I have referred to this excerpt from Kriegler (*op. cit.*) to illustrate the difference of the court's task when dealing with the hearing on the merits and the sentencing phase. This difference is so marked that one can rightfully say that sentencing is *sui generis.* However, it is not necessary for me to make such a finding as there are clear indications that the court is here dealing with a situation where the context shows that the Legislature intended that the word 'including', as used in s 316A(1), was meant to add subsecs (a) and (b) in order to extend the rights of the State to appeal.

[20] If, as was submitted by Mr Trengove, that the purpose of subsection 1(a) was merely to ensure that the State's right of appeal is more clearly stated and that it did not intend to add to the right of appeal, then it follows, as was also argued by counsel, that an appeal against sentence would only lie when it constitutes a decision in favour of the accused. And, according to counsel, this would be when the sentence asked for by the State is heavier than the sentence asked for by the defence and the court

imposes a sentence which is less than that asked for by the State. That would then constitute the decision in favour of the accused.

[21] This seems to me to be a very shaky foundation on which to determine the jurisdiction of the Supreme Court in appeals by the State against a sentence from the High Court. It is dependent on the subjective judgment of a prosecutor and a defence lawyer. Whether a particular prosecutor, or defence lawyer, has 6 months experience or 30 years, his or her say so will determine the jurisdiction of this court. The scheme is open to abuse, and all that is necessary to establish a right of appeal for the State, is for the prosecutor to trump the defence lawyer's submission in regard to what an appropriate sentence should be. Not every accused is able to afford legal representation, or is provided with legal representation by the Legal Aid Director. It is common knowledge that in our society, more often than not, the accused before the court may not have had any formal schooling. We were not told how undefended and unsophisticated accused should deal with such a difficult issue such as sentencing. Even more problematical is the question of when it can be said that a sentence of imprisonment is a decision in favour of an accused. In *S v D* 1995 (1) SACR 259 (A) at 264d-e the learned judge stated the following in regard to imprisonment:

> '. . . Even if imprisonment has no permanent detrimental effect on a prisoner, it means loss of employment, temporary, if not permanent, loss of wife and family, the risk of contamination and impaired ability to get further employment. Small wonder then that prison has come to be regarded as the sentencer's last resort.'

[22] Terblanche: *The Guide to Sentencing in South Africa;* 2 ed, p 171 para 9.1, states:

> 'Sentencing generally involves punishment, which consists of the infliction of harm on the offender by an organ of state.'

[23] Lastly, the inclusion of the words 'or order' in subsec (1)*(a)* of s 316A puts it beyond doubt that the Legislature intended with the use of the word 'including' to add to the instances which the State can appeal against. It shows that the Legislature was aware of the fact that there were orders which the High Court could make after sentencing and which did not form part of a sentence. One such example is forfeiture orders. (See Terblanche: *op. cit.:* Chapter 1 pa. 3.2.2.1.) This is further borne out by the fact that in subsec (4) of s 316A a right of appeal is granted to a person 'who claims that any right is vested in him or her in respect of any matter or article declared forfeited by the court as if it were a decision by that court' by deeming that in such instance any reference to 'accused' in subsec (1)*(a)* shall be deemed to be a reference to such person having such claim. The State was given a similar right to appeal where such an order was made to such third party by including the word 'order' after the word 'sentence'.

[24] Furthermore s 316A(1)*(b)* is clearly a further addition to the State's right to appeal as it deals with procedures such as the validity of charges against an accused, and further particulars, which can have a significant effect on the State's case and can even lead to the quashing thereof. As these procedures, as provided for by s

85(2) of the CPA, occur before an accused had been called upon to plead, an acquittal is not possible and hence there would have been no right of appeal for the State according to *Malumo.* Consequently the Legislature had to provide specifically for a right of appeal to the State in this instance.

[25] If the subsection was meant as exhaustive, as submitted on behalf of the State, it follows that the determination of the court's jurisdiction, in matters concerning sentence, is left to third parties, a method which can only be described as arbitrary and open to abuse. Add to that the uncertainty as to when a sentence can be said to be in favour of an accused, it follows in my opinion that it could never have been the intention of the Legislator to bring about such a result. I have no doubt that if that was the intention of the Legislature it would have said so.

[26] Furthermore, the finding above has the effect to add to the appeal powers of the State, the right to appeal outright against any sentence imposed by the High Court, subject to the limitations imposed by the CPA in regard to obtaining leave to appeal and is not subject to the question as to whether such sentence is in favour of an accused or not. Subsection (a) of s 316A(1) was also not meant as a screen which would only allow appeals against sentences where previously the court had made a decision which was in favour of an accused. The wording of the subsection is wide. The reference therein to 'such court' can only, in the context of s 316A, refer to the High Court of Namibia and the words 'any resultant sentence imposed or order made' is merely a repeat of similar words used in s 309(1)*(a)* setting out the powers of an

accused to appeal from a lower court. By using the same wording the intention of the Legislature was to give to the State the same powers of appeal as that given to an accused person in regard to sentencing. Sentencing can only result from a conviction by a court, in this instance the High Court of Namibia.

[27] Because the finding, or the absence of such finding, that substantial and compelling circumstances exist, is so interwoven with the process of sentencing, I agree that it would be competent to raise, as a ground of appeal, such determination, or lack thereof, by the trial court. A finding in regard to the existence of such circumstances or a finding that they do not exist has a huge impact on the sentencing process. In the first instance the trial court must impose a lesser sentence than the one prescribed by the Act. (See *Malgas,* para 14.) In the second instance the trial court is obliged to impose, at least, the minimum sentence. Furthermore those same mitigating and aggravating circumstances which influenced the trial court to come to a particular conclusion, are now relevant to determine an appropriate sentence in the latter instance whether to impose the minimum sentence or a sentence which would be in excess thereof.

[28] This brings me to the *Malumo* case and the expression in that case (para 30) that the interest of the State concerning appeals against sentences is confined to where there had been an acquittal. I agree with counsel that the remarks were *obiter* but, whatever the position may be, from what is set out above it follows that such interpretation was too restrictive and cannot be allowed to stand. The only instances

where an acquittal could play a role is when an accused is acquitted on a main charge and convicted on a lesser alternative charge or is convicted on a lesser competent verdict.

[29] Regarding the questions set out in the letter of 7 May 2014, the answers thereto are as follows:

Question 1: The issues raised by this question have become moot as a result of the supplementary petition filed by the State.

Question 2: The issues raised with reference to the *Malumo* case, regarding sentencing can, for the reasons set out herein before, not be allowed to stand.

Question 3: I agree that the State's power to appeal against sentence is derived from the provisions of s 316A(1)*(a).*

Question 4: I have concluded that the interpretation of the word "including" in this instance broadened and added to the State's right of appeal against sentence and that the State has an outright right to appeal any sentence resulting from a conviction by the High Court subject to the limitations imposed by the CPA.

[30] The State was therefore entitled to petition the Chief Justice for leave to appeal even though such leave concerned only the sentence imposed by the court *a quo.*

The application for leave to appeal

[31] Concerning the State's application for leave to appeal against the sentence of the court *a quo* I agree with counsel on the principles set out in the cases to which we were referred by them. (See *R v Muller* 1957 (4) SA 642 (A); *S v Ackerman en 'n ander* 1973 (1) SA 765 (A) and *S v Ningisa & others* 2013 (2) NR 504 (SC).) For the reasons set out here under I am of the opinion that such leave should be granted.

The appeal

[32] At the start of the proceedings the Chief Justice enquired from counsel whether they were prepared to argue the appeal in the event the court should find that it was competent for the State to appeal in this instance, and if leave to appeal were granted. Both counsel indicated that they would prefer to argue the appeal rather than to return on a later occasion to do so. They also indicated that they were fully prepared to address the court on the appeal. For this part of the proceedings we were addressed by Mr Small for the State and Mr Isaacks for the respondent.

[33] The defence of the respondent was that on the particular day he partook of drugs, namely cannabis and cocaine, and that he was so affected thereby that he could not remember anything of what happened. During the relevant time the

respondent was renting a room or rooms from the mother of the complainant and the respondent and the complainant were known to each other.

[34] According to the complainant, who was at the time 7 years old, she and one A, another young child, were watching cartoons on television. This was at the house of A. She left and was on her way to the house of a friend when a person named ‘Again’ brought her to the house where the respondent was residing. Complainant said that when she was in the room with the respondent, he lifted up her dress, pulled down her panty, and put his finger into her vagina. A was at some time chased away by Again but it was A who ran to the house of the complainant’s grandmother and who reported to her what had happened. The witness, NI, was then sent to the house where the respondent was residing. She stood in the kitchen and called the complainant. It seems that the room where the respondent and the complainant had been, was only divided by a blanket hanging where the door was supposed to be. NI said that after she had called the complainant she came out and they then went to the grandmother’s house. There the complainant was examined and some small spots of blood were found on her panty.

[35] The witness Again also testified. He, so it seems, is the half-brother of the respondent. According to him he was busy in the kitchen when he heard the complainant screaming ‘leave me alone’. The witness went into the room where the complainant and the respondent were and saw that the complainant was sitting on the lap of the respondent. Her panty was drawn down to her knees and he saw that

the fingers of the respondent were at the vagina of the complainant. When the witness entered the room the respondent let go of the complainant. The witness asked the accused ‘Hey what are you doing’. The reaction of the respondent was to say ‘Yes this is what you would answer for with the police’. He was also quite aggressive.

[36] The complainant said that when the respondent put his finger into her vagina it was painful and she screamed. She also saw that she was bleeding from her private parts.

[37] The report by the medical practitioner was handed in by agreement between the parties. The examination of the complainant showed that the hymen was still intact but that there was a hypothermia around the vestibule, i.e. that the vestibule was inflamed on examination.

[38] Although the court *a quo* found that the respondent was to some extent under the influence of the drugs used by him on the particular day the court, correctly in my view, rejected the evidence of the respondent that he was under the influence of the drugs to such an extent that he could not remember what he was doing and therefore did not know that he was acting wrongfully. Dealing with the issue as to whether substantial and compelling circumstances existed which would entitle the court to impose a lesser sentence than the prescribed minimum sentence of 15 years

imprisonment, the court found that the following factors constituted such circumstances:

(a) Although the act caused some bleeding to the minor complainant's vagina, the sexual assault was not sustained. As a result of the rape only the victim's vestibule was inflamed;

(b) the fact that the respondent was placed into the care of people, other than his own biological parents, denied him the psychological need, which all humans have, to be cared for and loved by his own biological parents. The respondent was obviously aware all his intelligent life about the poverty that afflicted his biological mother and her inability to care for him and to love him and to provide him with a normal and decent life that all humans desire and deserve;

(c) the age of the offender. The younger the offender the greater need to give him another chance in life. Young people, it is accepted, are less able to control their impulses and offer resistance to temptation compared to adults. Youthfulness coupled with intoxication has always been regarded as a strong mitigating factor. The effect of imprisonment on a young person is much more detrimental than on a more mature person;

(d) the influence of the drugs. That the respondent was acting under the influence of drugs when he committed the crime was not disproved by the State;

(e) the respondent showed remorse for what he had done;

(f) the respondent used his earnings from casual jobs to care for his sickly mother;

(g) the respondent spent 18 months in prison both before trial and after conviction until the court withdrew his bail once he was sentenced;

(h) the State had conceded that there was no evidence on record that the acknowledged poor performance of the minor victim at school was the direct result of the sexual assault at the hands of the respondent.

[39] The court found that the cumulative effect of the factors constituted substantial and compelling circumstances that justified departure from the statutorily prescribed minimum sentence of 15 years imprisonment.

[40] The Namibian Act 8 of 2000 follows to a great extent the regime of ss 51 and 53 of the South African Criminal Law Amendment Act 105 of 1997 as far as the serious crime of rape is concerned. In the latter Act certain minimum sentences are

prescribed which a court must impose on conviction of an accused unless the court is satisfied that substantial and compelling circumstances existed which would justify the imposition of a lesser sentence (s 51(3)*(a)*). Act 8 of 2000 similarly prescribed certain minimum sentences to be imposed unless the court finds that substantial and compelling circumstances existed which would justify the imposition of a lesser sentence than that prescribed. The sections in the two Acts, dealing with substantial and compelling circumstances, are identical. It is therefore not surprising that in interpreting and applying the words 'substantial and compelling circumstances' our courts turned to the ready-made source of High Court decisions on the subject which existed in South Africa. However, courts in South Africa were not unanimous in their interpretation of these provisions until guidance was given by the Supreme Court of Appeal in *S v Malgas* 2001 (2) SA 1222 (SCA).

[41] In the *Malgas* case, a 22 year old woman, who was a first offender, was convicted of murder. She was sentenced to the minimum sentence of life imprisonment because the trial court found that there were no substantial and compelling circumstances which would enable it to impose a lesser sentence than the one prescribed. At the time when the crime was committed the accused acted under the influence of an older dominant woman who coerced her to commit the crime. The crime was passed off as a suicide and would have remained undetected but for a spontaneous confession made by the accused. On these facts the trial court nevertheless came to the conclusion that there existed no substantial and compelling circumstances which would justify the imposition of a lesser sentence. The trial court

came to this conclusion by following the decision in *S v Mofokeng & another* 1999 (1) SACR 502 (W) where it was stated that in order to constitute substantial and compelling circumstances, such circumstances had to be so exceptional in its nature and had to so obviously expose the injustice of the statutorily prescribed sentence in the particular case, that it can rightly be described as 'compelling' before it can be said to justify the imposition of a lesser sentence than that prescribed by Parliament. (Para 30.) This interpretation was rejected by the learned Judges of Appeal in the *Malgas* case. (Para 31.)

[42] In concluding that there existed substantial and compelling circumstances which would permit the court to impose a lesser sentence than the statutorily prescribed sentence, the learned judge of appeal stated as follows:

> '[34] The circumstances in which the crime was committed are undoubtedly such as to render it necessary to impose a sentence of imprisonment for life unless substantial and compelling circumstances justify a lesser sentence. The shooting was premeditated and planned. The fact that the planning and premeditation occurred not long before the deed was accomplished cannot alter that. It was also carried out in the execution of a common purpose to kill the deceased. Giving all due weight to the enormity of the crime and the public interest in an appropriately severe punishment being imposed for it, I consider that the personal circumstances of the accused (her relative youth, her clean record and her vulnerability to Carol's influence by reason of her status as a resident in the latter's home at the latter's pleasure) and the fact that she was dragooned into the commission of the offence by a domineering personality are strong mitigating factors. As a fact, she gained nothing from the commission of the crime. Her remorse cannot be doubted and her

> spontaneous confession which brought to light the commission of a crime which would otherwise have gone undetected is deserving of recognition in a tangible sense. She is young enough to make rehabilitation of her a real prospect even after a long period of imprisonment.'

[43] Dealing with the prescribed sentences and the approach of a court to the implementation thereof, the learned judge of appeal stated as follows:

> '[8] In what respect was it no longer 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 or the particular prescribed period of 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, standardized, and consistent response from the courts to the commission of the listed crimes in the specified circumstances unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it. But that did not mean that all other considerations were to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may.'

[44] The court further pointed out that the thrust of the words 'substantial and compelling circumstances' was that the specified sentences were not to be departed from lightly and for flimsy reasons. Apart from that the court stressed that there was no warrant to infer that the Legislature intended a court to exclude from consideration any or all of the usual factors courts would consider when sentencing an offender.

The court further referred to the fact that it is axiomatic, in the normal process of sentencing that, although seen in isolation, mitigating factors may not have persuasive force, seen cumulatively their impact may be considerable. The court again stressed that an appeal court could only interfere with the sentence of a lower court when there was a material misdirection or if the sentence imposed by the trial court was so inappropriate that the appeal court, if it had sat as court of first instance, would have imposed a sentence which would markedly have differed from that imposed by the trial court, so that it could be said that the sentence imposed in the first place was 'shocking', 'startling' or 'disturbingly inappropriate'.

[45] It was further pointed out that the Legislature had refrained from defining, in any way, what circumstances were to be regarded as substantial and compelling. This, so it was stated, was significant as it signaled that it was deliberately left to the courts to decide, in the final analysis, whether the circumstances in any particular case were such as to justify departure from the prescribed sentence. It can also not be denied that in determining whether a prescribed sentence in a particular instance should be regarded as manifestly unjust, courts will have regard to past sentencing patterns, even only to serve as a starting point. No great harm would be done as long as it is understood that the mere existence of some discrepancy would not be enough to interfere with the sentence. However, when speaking of an injustice this need not be a shocking injustice, before departure from a prescribed sentence is justified, as some of the High Court cases required. That the sentence would constitute an

injustice is enough. In para 25 the court summarised the principles laid down in the case and at sub-para **I** the following was stated:

> 'If the sentencing court in consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.'

[46] The *Malgas* case was followed upon by the case of *S v Dodo* 2001 (3) SA 382 (CC) where the Constitutional Court of South Africa confirmed the correctness of the principles set out in the *S v Malgas.* In the *Dodo* case the court was called upon to decide the constitutionality of prescribed sentences and more particularly whether such sentences did not infringe upon the separation of powers. The court concluded that it did not for as long as it did not infringe upon other provisions of the Constitution.

[47] *S v Vilakazi* 2012 (6) 353 (SCA) is another instance where the South African Supreme Court of Appeal had the opportunity to deal with the issues set out herein before. In this matter the accused was convicted of rape and because the crime was committed on a female under the age of 16 years, Act 105 of 1997 prescribed that a sentence of life imprisonment be imposed unless substantial and compelling circumstances existed in which case the court could impose a lesser sentence. The court was satisfied that such circumstances existed and the sentence of life

imprisonment, imposed by the trial court, was set aside and a sentence of 15 years imprisonment was substituted.

[48] The court pointed out that there were eight circumstances where the prescribed sentence for the crime was life imprisonment in contrast to the sentence of 10 years imprisonment prescribed for a first offender for rape and where none of the eight circumstances referred to were present. The learned judge continued to remark as follows:

> '[13] (T)he minimum sentence of ten years' imprisonment progresses immediately to the maximum sentence that our law allows once any of the aggravating features is present, irrespective of how many of those features are present, irrespective of the degree in which the feature is present, and irrespective of whether the convicted person is a first or repeat offender.'

[49] The court revisited the *Malgas* case and confirmed its correctness. It stated that the test applied in the *Malgas* case, and as it was endorsed by the *Dodo* case, made it incumbent on a court in every case to access all the circumstances of a particular case in order to determine whether the prescribed sentence is proportionate to the particular offence, before it could impose the prescribed sentence.

[50] The court again re-iterated that for circumstances to qualify as substantial and compelling they need not be exceptional. (Para18.) To determine whether a sentence is proportionate cannot be determined in the abstract but only on a consideration of

all the material of the particular case, bearing in mind what the Legislature has ordained as well as the other strictures laid down in *Malgas*.

[51] As a first proposition Mr Small submitted that the factors found by the learned judge *a quo* to constitute substantial and compelling circumstances were not based on circumstances that were so exceptional in their nature that they justified the imposition of a lesser sentence than that prescribed by the Act. For this submission counsel found support in *S v Mofokeng, supra,* and *S v Hoaseb* 2006 (1) NR 317 (HC).

[52] With reference to various decided cases, here and in South Africa, counsel further submitted that the learned judge did not properly consider the seriousness of the offence, the vulnerability of the young victim as well as the interests of society in concluding that substantial and compelling circumstances existed. He similarly did also not consider these factors when imposing the discretionary sentence after deciding that substantial and compelling circumstances existed.

[53] Counsel further submitted that the court *a quo* only considered the personal and mitigating circumstances of the accused and did not have regard also to the aggravating circumstances. Counsel contended furthermore that the court misdirected itself in finding that the accused was remorseful and it made conflicting findings in regard to the accused's drug use.

[54] Mr Isaacks referred the court to the *Malgas* case and the principles and guidelines set out therein. He refered to *S v Limbare* 2006 (2) NR 505 (HC), in which van Niekerk J, rejected the finding in *Hoaseb* that in order to constitute substantial and compelling circumstances, the circumstances must be exceptional, and applied the principles set out in the *Malgas* case.

[55] Counsel also submitted that it is trite law that sentencing is discretionary and is exercised by the trial court and cannot on appeal be interfered with, except on limited grounds. Counsel further submitted that the Act did not do away with the trial court's discretionary function. He found support for his submission in *S v Kauzuu* 2006 (1) NR 225 (HC) and *S v Limbare*, *supra.*

[56] Although this court is no longer bound by decisions of the Appellate Division in South Africa, the fact that we share with South Africa the same legal system, not only in regard to our common law, but just as much in regard to our law of evidence, our law of procedure and the rules of the interpretation of statutes, have the result that judgments, and more particularly of the Supreme Court of Appeal, have particular persuasive value, and are often followed by Namibian courts. I am fully in agreement with the reasoning and the findings in *Malgas, Dodo* and *Vilakazi*. The *Malgas* case had been repeatedly followed by judges of the High Court of Namibia. (See *e.g. S v Lopez* 2003 NR 162 (HC); *S v Gurirab* 2005 NR 510 (HC); *S v Limbare, supra,* and *S v Kauzuu* 2006 (1) 225 (HC).)

[57] It follows therefore that Mr Small's reliance on *Mofokeng* and *Hoaseb* for the proposition that to constitute substantial and compelling circumstances, such circumstances must be exceptional, is no longer good law. What is required by the above cases is a consideration of all the facts and circumstances, also those which traditionally were part of the sentencing process, to balance them with the aggravating circumstances, and then to consider if the prescribed sentence is justified in the interest of the victim as well as the accused and the needs of society.

[58] I agree with Mr Small that each case must be considered on its own. It is clear that factors which may in a given instance be substantial and compelling may not be sufficient in another case to tip the scales into a finding that substantial and compelling circumstances exist.

[59] I find myself unable to agree with Mr Small that the court did not also consider the aggravating circumstances in coming to its conclusion that substantial and compelling circumstances existed which would enable the court to impose a lesser sentence than that prescribed by the Act. The learned judge fully discussed the impact of the actions of the respondent on the young victim. To that extent the court also had the assistance of pre-sentence reports on both the victim and the respondent. Although the court discussed these issues separately that is not to say that the court, in coming to its conclusion that substantial and compelling circumstances existed, did not weigh up those circumstances. That the learned judge was at all times aware of the aggravating circumstances is shown by the fact that

when he had to decide on an appropriate sentence he again dealt with some of those issues. The judge was seemingly of the opinion that the cumulative effect of the mitigating circumstances were so strong that they outweighed the aggravating circumstances to such an extent that it would have been an injustice to impose the prescribed sentence of 15 years imprisonment in this instance.

[60] Mr Small further submitted that the trial judge, when considering sentence, without any further evidence, found in favour of the accused that he 'partook of a very dangerous drug under peer pressure and was under its influence when he committed the crime' whereas when dealing with the matter in his judgment on the merits the court found that the accused in essence fabricated his version in order to escape criminal liability. I find no conflict between these findings by the court. Considering that the version of the accused had been that he was to such an extent under the influence of the drugs used by him that he could not remember anything and that he was therefore not criminally liable for his actions then it becomes clear that the learned judge, when he dealt with respondent's drug use in the above citation, was dealing with the defence of the respondent. That much is clear from the judge's reference to the attempt of the accused to escape criminal liability. This latter finding has nothing to do with the court's finding that the respondent had used drugs on this particular occasion but that the evidence showed that he was not to such an extent under its influence that he could escape criminal liability.

[61] I can also not accept Mr Small's submission that the court, sort of in passing, found that the respondent was remorseful. There was first of all the pre-sentence report by a social worker in which she expressed the opinion that the respondent felt guilty about what he had done and that he had expressed remorse for his actions. The respondent also gave evidence in mitigation where he assured the court that he no longer uses drugs and avoids friends who may lead him astray. He also testified that he wanted to contact the family of the victim to apologise to them for what he had done but he could not do so because it was one of the conditions of his bail not to make contact with the family of the victim. He again pleaded for their forgiveness. The judge *a quo* did not only have this evidence but was also in a position to observe the respondent. As such the learned judge was in a much better position than we are, sitting on appeal, to determine whether the remorse of the respondent was genuine or not.

[62] An important aspect which needs consideration was the proportionality of the crime committed by the respondent in relation to other more serious manifestations thereof. The Legislature did not distinguish between circumstances under which the crime was committed but prescribed the same minimum sentence, namely 15 years imprisonment, also where the rape victim was younger than 13 years and the rape consisted of penile penetration, or where the victim was seriously assaulted and injured, or where she was repeatedly raped. One can go on and come up with various examples which are by no means far-fetched or even imaginary and which are, on a scale of seriousness, much more serious than the rape committed by the respondent

in this instance. This is illustrated by a case where the High Court was satisfied that a sentence of 15 years imprisonment would be an appropriate sentence where the crime committed had been much more serious than the present instance. In *S v Nango* 2006 NR 141 (HC) the accused threatened to kill the complainant if she did not lie down and remove her panty. The accused then raped the 12 year old victim. The accused then ordered the victim to follow him and threatened her again if she would not do as ordered. He dragged her to some bushes where he again threatened to stab her. He threw her on the ground where he raped her a second time. The accused was sentenced to 12 years imprisonment by the Regional Court which sentence was increased on appeal to 15 years imprisonment. In another case where the victim was older than 13 years, namely *S v Kauzuu, supra,* the accused repeatedly raped the 14 year old daughter of his girlfriend. He was sentenced to 20 years imprisonment which sentence was reduced to15 years on appeal. It seems that the courts had been satisfied that in these more serious instances the minimum prescribed sentence of 15 years imprisonment was an appropriate sentence.

[63] Dealing with the approach of a court in determining whether a prescribed sentence is, in all the circumstances, unjust, the court in *Malgas,* (para 22), stated the following:

> ‘The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hardened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of

> the particular case render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of a consideration of the circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence.'

[64] It was further pointed out that the fact that the Legislature did not define what circumstances should rank as substantial and compelling indicates that this was deliberately and advisedly left to the courts to determine whether the circumstances in a particular case call for a departure from the prescribed sentence. (Para 18.)

[65] The *Malgas* case, and those following upon it, stressed the fact that each case must be judged on its own circumstances, so that circumstances which, in a particular case, are sufficient to find that substantial and compelling circumstances exist to depart from the prescribed sentence may, in another case, not tip the scales in favour of such a finding.

[66] Bearing in mind the circumstances in this case, the relative youth of the respondent and the finding that he showed remorse for his actions, which showed that he might be susceptible to rehabilitation; the fact that he was, to a certain extent, under the influence of drugs; the circumstances of the crime committed; that no serious injury was done to the complainant; that he used only so much force as was necessary to achieve his objective; that the act must have been of short duration; and that, on a scale of seriousness, the actions of the respondent ranked on the low side, I am satisfied that the court *a quo* was correct in its finding that substantial and

compelling circumstances existed to enable the court to impose a lesser sentence than that prescribed by the Act. Against these mitigating circumstances there is the aggravating fact that the crime was committed against a young victim of just 7 years, a victim who had been specially targeted for protection by the Legislature when it enacted the Act, and in regard of whom the Legislature has prescribed a heavy sentence which could only be departed from if the trial court found substantial and compelling circumstances to be present. Nevertheless, I am convinced that to impose under these circumstances a sentence of 15 years imprisonment would be unjust and grossly disproportionate to the crime, the criminal and the legitimate needs of society.

[67] This brings me to the alternative argument of Mr Small that the sentence is startlingly inappropriate in all the circumstances. By imposing a sentence of 7 years imprisonment and suspending more than half of the sentence, namely 4 years, the sentence imposed by the trial court is startlingly inappropriate. In doing so the court, in my opinion, overlooked two important issues, namely, the benchmark which was set by the prescribed sentence of 15 years, and the fact that the Legislature particularly extended protection to those persons who were most vulnerable, namely young children. I say that the court overlooked these issues because no mention was made thereof in the judgment of the court and the fact that the sentence of 7 (seven) years, of which 4 (four) years were suspended, does not reflect that due regard has been paid thereto.

[68] In regard to the first issue, the following was stated by the court on p 1222J in the *Malgas* case namely:

> 'In so doing, (i.e. imposing a sentence) account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided.'

[69] In regard to the second issue the respondent would previously, before the enactment of the Combating of Rape Act 8 of 2000, have been charged and convicted in terms of the Combating of Immoral Practices Act 21 of 1980. Section 14(1) thereof prohibits any male to commit or attempt to commit any immoral or indecent act with a girl under the age of 16 years. On conviction a court could impose imprisonment of 6 years or a fine not exceeding N$3000, or such fine in addition to such imprisonment. In terms of Act 8 of 2000 as already stated, where the accused committed a sexual act under coercive circumstances with a complainant under the age of 13 years, he shall be guilty of rape and liable to be sentenced to a minimum sentence of 15 years imprisonment unless the court finds that substantial and compelling circumstances exist in which case a lesser sentence could be imposed.

[70] It is clear that in elevating, what was previously regarded as an immoral or indecent act, to constitute the crime of rape and to prescribe a minimum sentence of 15 years therefor, the Legislature intended to convey the prevalence and seriousness of such crimes and its commitment to protect, specifically young children, to become

victims of such crimes. The victim in this case was particularly vulnerable, being a young girl of 7 years. In my opinion the fact that the court *a quo* suspended 4 (four) years of the sentence of 7 (seven) years imposed by it does not reflect the intention of the Legislature to protect particularly young children from being sexually abused by older people.

[71] Mr Isaacks referred the court to two instances where the accused had penetrated a young victim by putting his finger into her vagina. The first matter is *S v Swartz,* unreported, Case No CC 08/2010, delivered on 18 November 2011 in the High Court of Namibia. The accused was a juvenile of 16 years and the victim was 4 years old. The accused was sentenced to 8 years imprisonment of which 4 years were suspended on the usual conditions. The second case is *S v Gomaseb* 2014 (1) NR 269 (HC). The accused in this matter was 15 years old. The victim was 5 years old. The sentence of the court was 6 years imprisonment of which 3 years were suspended. Although the victims in the above cases were younger than the victim in the present case the accused persons were also much younger than the accused in the present case and can be regarded as juveniles. Furthermore, s 3(3) of the Act provides that where a convicted person is under the age of 18 years the minimum sentence prescribed in s 3(1) shall not apply and the court was free to impose any appropriate sentence. In both these instances the accused persons were under the age of 18 years so that the prescribed minimum sentence of 15 years imprisonment never applied to them. This, by itself, distinguishes the present case from those cases.

[72] Having considered all the above circumstances I am satisfied that if I had sat in first instance on this case I would have sentenced the respondent to 9 (nine) years imprisonment of which 4 (four) years were suspended on condition that the accused is not again convicted of rape, read with the provisions of the Combating of Rape Act, Act 8 of 2000, committed during the period of suspension.

[73] This sentence differs substantially from the sentence imposed by the trial court and this court is therefore entitled to sentence the respondent afresh.

[74] The respondent was released from prison on 11 September 2014 after having served, together with remission earned, the custodial component of the sentence imposed by the High Court. It follows that the period already served by the respondent, namely 3 (three) years, must be deducted from the custodial component of this court's sentence of 5 (five) years imprisonment.

[75] In the result the following orders are made:

1. The late filing of the applicant's and respondent's heads of argument on the merits of the petition is condoned.

2. The late filing of the applicant's supplementary petition for special leave to appeal is condoned.

3. Leave is granted to the applicant to file the said supplementary petition for special leave to appeal.

4. It is confirmed that the State has, in terms of section 316A(1)*(a)*, a right of appeal against any sentence imposed by the High Court, on a conviction subject to the limitations imposed by the provisions of the Criminal Procedure Act 51 of 1977, as amended.

5. The applicant is granted leave to appeal against the sentence imposed by the High Court.

6. The appeal against sentence succeeds and the sentence imposed by the High Court is set aside and the following sentence is substituted therefor:

'(a) The accused is sentenced to 9 (nine) years imprisonment of which 4 (four) years are suspended for 5 (five) years on condition that the accused is not again convicted of rape, read with the provisions of the Combating of Rape Act 8 of 2000, committed during the period of suspension.

(b) The period of 3 (three) years imprisonment already served by the respondent is deducted from the period of 5 (five) years imprisonment imposed by this court, leaving a period of 2 (two) years imprisonment still to be served by the respondent. This part of the sentence is also subject to remissions earned by the respondent.'

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STRYDOM AJA

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SHIVUTE CJ

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MAINGA JA

_____

MTAMBANENGWE AJA

_____

HOFF AJA

APPEARANCES

APPLICANT/APPELLANT:	W Trengove SC (with him D F Small)
	For the State
RESPONDENT:	W Boesak (with him B B Isaacks)
	Instructed by the Director of Legal Aid