CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 23/00

THE STATE

and

GEORGE DZUKUDA First Applicant

WINSTON TILLY Second Applicant

MALOPE JAN TSHILO Third Applicant

Case CCT 34/00

THE STATE

and

MALOPE JAN TSHILO Applicant

Heard on : 16 August 2000

Decided on : 27 September 2000

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JUDGMENT

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ACKERMANN J:

*Introduction*

[1] Both these matters arise out of an order made by Lewis J in the Witwatersrand High

Court on 17 May 2000, declaring section 52 of the Criminal Law Amendment Act 105 of 1997 ("the Act") to be inconsistent with section 35 of the Constitution and invalid.[1] This order has been referred to this Court for confirmation under the provisions of section 172(2)(a) of the Constitution. The first matter (case CCT 23/00) relates to the confirmation of this order, which followed on the three applicants having been convicted of rape in a Regional Court and committed for sentence by the High Court under the provisions of section 52 of the Act. The second matter (case CCT 34/00) is an application by the third applicant in the first matter (to whom reference will be made throughout as "the third applicant") for leave to appeal against the refusal by the High Court to set aside his conviction.

[2] The two matters were heard together by this Court and in both the State was represented by counsel on behalf of the National Director of Public Prosecutions and the Director of Public Prosecutions: Witwatersrand High Court. The directions in the first matter, together with a copy of the High Court judgment were drawn to the attention of the General Council of the Bar of South Africa, the Law Society of South Africa and the Human Rights Commission. Pursuant thereto the Law Society of South Africa delivered written representations, in support of the confirmation, to which due regard has been given. The Court is indebted to Mr Snyckers, who appeared *pro bono* for the third applicant, instructed by the Witwatersrand University Law

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1 The judgment of the High Court is reported as *S v Dzukuda; S v Tilly; S v Tshilo* 2000 (3) SA 229 (W) and references in the present judgment will be to such report.

Clinic, for his comprehensive and helpful argument.

[3] It is necessary at the outset to quote both sections 51 and 52 of the Act in order to appreciate the issues involved in these cases:

> "**51. Minimum sentences for certain serious offences**.
> (1) Notwithstanding any other law but subject to subsections (3) and (6), a High Court shall, if it has convicted a person of an offence referred to in Part I of Schedule 2, sentence the person to imprisonment for life.
> (2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall —
> (a) if it has convicted a person of an offence referred to in Part II of Schedule 2, sentence the person, in the case of —
> (i) a first offender, to imprisonment for a period not less than 15 years;
> (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and
> (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;
> (b) if it has convicted a person of an offence referred to in Part III of Schedule 2, sentence the person, in the case of —
> (i) a first offender, to imprisonment for a period not less than 10 years;
> (ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and
> (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years; and
> (c) if it has convicted a person of an offence referred to in Part IV of Schedule 2, sentence the person, in the case of —
> (i) a first offender, to imprisonment for a period not less than 5 years;
> (ii) a second offender of any such offence, to imprisonment for a

period not less than 7 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 10 years:

Provided that the maximum sentence that a regional court may impose in terms of this subsection shall not be more than five years longer than the minimum sentence that it may impose in terms of this subsection.

(3) (a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.

(b) If any court referred to in subsection (1) or (2) decides to impose a sentence prescribed in those subsections upon a child who was 16 years of age or older, but under the age of 18 years, at the time of the commission of the act which constituted the offence in question, it shall enter the reasons for its decision on the record of the proceedings.

(4) Any sentence contemplated in this section shall be calculated from the date of sentence.

(5) The operation of a sentence imposed in terms of this section shall not be suspended as contemplated in section 297 (4) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

(6) The provisions of this section shall not be applicable in respect of a child who was under the age of 16 years at the time of the commission of the act which constituted the offence in question.

(7) If in the application of this section the age of a child is placed in issue, the onus shall be on the State to prove the age of the child beyond reasonable doubt.

(8) For the purposes of this section and Schedule 2, 'law enforcement officer' includes —

(a) a member of the National Intelligence Agency or the South African Secret Service established under the Intelligence Services Act, 1994 (Act No. 38 of 1994); and

(b) a correctional official of the Department of Correctional Services or a person authorised under the Correctional Services Act, 1959 (Act No. 8 of 1959).

**52. Committal of accused for sentence by High Court after plea of guilty or trial in regional court.**

(1) If a regional court, after it has convicted an accused of an offence referred to in Schedule 2 following on —

(a) a plea of guilty; or

(b) a plea of not guilty,

but before sentence, is of the opinion that the offence in respect of which the accused has been convicted merits punishment in excess of the jurisdiction of a regional court in terms of section 51, the court shall stop the proceedings and commit the accused for sentence by a High Court having jurisdiction.

(2) (a) Where an accused is committed under subsection (1) (a) for sentence by a High Court, the record of the proceedings in the regional court shall upon proof thereof in the High Court be received by the High Court and form part of the record of that Court, and the plea of guilty and any admission by the accused shall stand unless the accused satisfies the Court that such plea or such admission was incorrectly recorded.

(b) Unless the High Court in question —

(i) is satisfied that a plea of guilty or an admission by the accused which is material to his or her guilt was incorrectly recorded; or

(ii) is not satisfied that the accused is guilty of the offence of which he or she has been convicted and in respect of which he or she has been committed for sentence,

the Court shall make a formal finding of guilty and sentence the accused as contemplated in section 51.

(c) If the Court is satisfied that a plea of guilty or any admission by the accused which is material to his or her guilt was incorrectly recorded, or if the Court is not satisfied that the accused is guilty of the offence of which he or she has been convicted and in respect of which he or she has been committed for sentence or that he or she has no valid defence to the charge, the Court shall enter a plea of not guilty and proceed with the trial as a summary trial in that Court: Provided that any admission by the accused the recording of which is not disputed by the accused, shall stand as proof of the fact thus admitted.

(d) The provisions of section 112 (3) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), shall apply with reference to the proceedings under this subsection.

(3) (a) Where an accused is committed under subsection (1) (b) for sentence by a High Court, the record of the proceedings in the regional court shall upon proof thereof in the High Court be received by the High Court and form part of the record of that Court.

(b) The High Court shall, after considering the record of the proceedings in the regional court, sentence the accused, and the judgment of the regional court shall stand for this purpose and be sufficient for the High Court to pass sentence as contemplated in section 51: Provided that if the judge is of the opinion that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice, he or she shall, without sentencing the accused, obtain from the regional magistrate who presided at the trial a statement setting forth his or her reasons for convicting the accused.

(c) If a judge acts under the proviso to paragraph (b), he or she shall inform the accused accordingly and postpone the case for judgment, and, if the accused is in custody, the judge may make such order with regard to the detention or release of the accused as he or she may deem fit.

(d) The Court in question may at any sitting thereof hear any evidence and for that purpose summon any person to appear to give evidence or to produce any document or other article.

(e) Such Court, whether or not it has heard evidence and after it has obtained and considered a statement referred to in paragraph (b), may —

(i) confirm the conviction and thereupon impose a sentence as contemplated in section 51;

(ii) alter the conviction to a conviction of another offence referred to in Schedule 2 and thereupon impose a sentence as contemplated in section 51;

(iii) alter the conviction to a conviction of an offence other than an offence referred to in Schedule 2 and thereupon impose the sentence the Court may deem fit;

(iv) set aside the conviction;

(v) remit the case to the regional court with instruction to deal with any matter in such manner as the High Court may deem fit; or

(vi) make any such order in regard to any matter or thing connected with such person or the proceedings in regard to such person as the High Court deems likely to promote the ends of justice."

[4] In separate cases before the Regional Court all three applicants were convicted of raping girls under the age of 16 years. The first two applicants were so convicted following on their pleas of guilty and, in the case of the third applicant, following on his plea of not guilty. The offence of raping a girl under the age of 16 years is one referred to in Part I of Schedule 2 to the Act[2] and the Regional Court, after convicting each applicant but before imposing sentence,

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[2] Part I of Schedule 2 provides:

"Murder, when —

(a) it was planned or premeditated;

(b) the victim was —

(i) a law enforcement officer performing his or her functions as such, whether on duty or not; or

(ii) a person who has given or was likely to give material evidence with reference to any offence referred to in Schedule 1 to the Criminal Procedure Act, 1977 (Act No. 51 of 1977), at criminal proceedings in any court;

(c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or attempted to commit one of the following offences:

(i) Rape; or

(ii) robbery with aggravating circumstances; or

(d) the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy.

Rape —

(a) when committed —

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

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

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

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

(b) where the victim —

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

stopped the proceedings and committed each accused for sentence by the High Court, acting under the provisions of section 52(1) read with section 51(1) of the Act.

[5] In the case of the third applicant, Lewis J had doubts as to whether the proceedings in the Regional Court were in accordance with justice. Acting under the provisions of the proviso to section 52(3)(b), the learned Judge directed the attention of the presiding Regional Court magistrate to various difficulties which she had and requested reasons for the conviction of the third applicant. The magistrate duly responded to these queries. Lewis J did not, however, deal further with the merits of the case and I shall deal later in this judgment with certain submissions made by Mr Snyckers in this regard. The learned Judge, entertaining doubts as to the constitutionality of section 52 of the Act, requested argument thereon and, having heard argument in all three the cases, made the order presently before this Court for confirmation. It should be stressed that the issue of the constitutional validity of section 51 itself was not before the High Court and is not before this Court. This section must accordingly, for purposes of this case, be assumed to be constitutionally valid.

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

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

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

*The proper construction of section 52(1)*

[6] There has been disagreement among the High Courts on the correct construction of section 52(1). In particular, the question has arisen whether a Regional Court, having convicted an accused of an offence referred to in Part I of Schedule 2 of the Act and being of the opinion that the offence merits punishment in excess of the Regional Court's jurisdiction, is empowered to stop the proceedings and commit such accused for sentence by a High Court. There are High Court judgments that have held that in such circumstances a Regional Court has no power to commit the accused for sentence by a High Court.[3] There are other High Court judgments which have reached the opposite conclusion.[4] Lewis J, although bound by the decision in *Mdatjiece*'s case, independently came to the positive conclusion that it was "absolutely clear" that in the situation mentioned, "such jurisdiction is conferred on the High Court".[5] It is solely because of the consequences of such committal for sentence by a High Court, more particularly the split

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3 See, for example, *S v Mofokeng and Another* 1999 (1) SACR 502 (W) (per Stegmann J); *S v Shongwe* 1999 (2) SACR 220 (O) (per Cillié J); *S v Budaza* 1999 (2) SACR 491 (E) (per Smuts AJ); and *S v Mangesi* 1999 (2) SACR 570 (E) (per Van Rensburg J, Pickering J concurring, Jennett J dissenting).

4 See, for example, *S v Mdatjiece* (a presently still unreported judgment of a full bench of the Transvaal High Court delivered on 30 September 1998, per Marais J, Goldblatt and Nugent JJ concurring); *S v Ibrahim* 1999 (1) SACR 106 (C) (per Cleaver J, Lategan and Foxcroft JJ concurring); and the dissenting judgment of Jennett J in *S v Mangesi* above n 3.

5 Above n 1 at 235I-J.

thereby created in the criminal trial and the resultant effect of the section 52(3)(d) provisions on the sentencing part of the trial, that the High Court held section 52 to be constitutionally invalid.

[7] It is unnecessary to decide which interpretation is correct. It is clear that, on both interpretations, a split procedure arises in which sentencing is undertaken by a High Court in the case of an accused convicted in the Regional Court. The difference between the two interpretations given to section 52 relates to the range of cases to which the split procedure applies. The one interpretation ("the extensive interpretation") extends the range of cases to which the split procedure applies to include an accused convicted in a Regional Court of an offence referred to in Part I of Schedule 2 which, under section 51(1) of the Act, requires the imposition by a High Court of a sentence of life imprisonment in the absence of substantial and compelling reasons to impose a lesser sentence. The other interpretation ("the restrictive interpretation") limits it to accused convicted in a Regional Court of offences referred to in Parts II, III and IV of Schedule 2. On the restrictive interpretation no question of unconstitutionality arises in the case of the sentencing procedure in respect of an accused convicted in a Regional Court of an offence referred to in Part I of Schedule 2, because such an accused has to be sentenced by the same court that convicted him or her. The argument in the first matter, on the basis of the extensive interpretation as applied to an accused convicted of an offence referred to in Part I of Schedule 2, was that the inevitable effect of the split procedure decreed by section 52 was such as to render its provisions unconstitutional, particularly having regard to the character of life imprisonment as a form of punishment. I shall consider this argument below. If it falls to be rejected, then it must *a fortiori* be rejected in the case of the split procedure applied to accused convicted of offences referred to in Parts II, III and IV of Schedule 2, on the former construction.

*Is section 52 of the Act inconsistent with the accused's right to a fair trial under section 35(3) of the Constitution?*

[8] Section 35(3) of the Constitution provides that "[e]very accused person has a right to a fair trial" and further, that such right includes the right -

> "
> ....
> (d) to have their trial begin and conclude without unreasonable delay;
> ....
> (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".

As appears generally from the judgment of the High Court in the present case and, for example, the judgments referred to therein,[6] the division or splitting of the criminal trial between a Regional Court and the High Court brought about by section 52 of the Act has elicited criticism from the High Courts. Lewis J's judgment is, however, the first to consider in detail and directly whether such splitting is constitutionally invalid because of its inconsistency with section 35(3) of the Constitution.

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6 Above n 1 at 236B-G.

[9] As was said by this Court in *Zuma's* case,[7] 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."[8] 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(3) 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*[9] 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

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7 *S v Zuma and Others* 1995 (4) BCLR 401 (CC); 1995 (2) SA 642 (CC) at para 16 per Kentridge AJ.

8 See also, *Sanderson v Attorney-General, Eastern Cape* 1997 (12) BCLR 1675 (CC); 1998 (2) SA 38 (CC) at para 22.

9 The expression employed in *Sanderson's* case id at para 20.

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*.

[11] It would be imprudent, even if it were possible, in a particular case concerning the right to a fair trial, to attempt a comprehensive exposition thereof. In what follows, no more is intended to be said about this particular right than is necessary to decide the case at hand. At the heart of the right to a fair criminal trial and what infuses its purpose, is for justice to be done and also to be seen to be done. But the concept of justice itself is a broad and protean concept. In considering what, for purposes of this case, lies at the heart of a fair trial in the field of criminal justice, one should bear in mind that dignity, freedom and equality are the foundational values of our Constitution.[10] An important aim of the right to a fair criminal trial is to ensure adequately that innocent people are not wrongly convicted, because of the adverse effects which a wrong conviction has on the liberty, and dignity (and possibly other) interests of the accused. There are, however, other elements of the right to a fair trial such as, for example, the presumption of innocence, the right to free legal representation in given circumstances, a trial in public which is not unreasonably delayed, which cannot be explained exclusively on the basis of averting a wrong conviction, but which arise primarily from considerations of dignity and equality.[11]

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10 See, amongst others, sections 1(a), 7(1), 36(1) and 39(1)(a) of the Constitution.

11 In his instructive work *Due Process and Fair Procedures* (Clarendon Press, Oxford 1996), DJ Galligan points out (at 9-24) how the concept of appropriate procedures has moved away from Bentham's view "that the object of procedures at the criminal trial is to produce an accurate outcome" (at 9-10), because of the "utility in the social stability which follows from the accurate and regular application of the laws..."(at 8-10), towards one that combines accuracy of outcome with procedural fairness. While "legal processes serve social ends and goods, they do so through a distinct, normative, legal structure" (at 13), which in turn is "based on the tiers of values relevant to that process which constitute the standards of fair treatment, so that a person treated in accordance with them is treated fairly" (at 52). The learned author also observes

that "procedures are fair or unfair only by reference to standards of fairness, and standards of fairness are in turn based on values" (at 55). In relation to the controversy over whether the adversarial nature of the trial at common law is to be preferred to the more inquisitorial procedures of continental Europe, Galligan says the following:

> "Each may be as effective as the other in leading to fair treatment, that is, in reaching correct outcomes and in maintaining respect for other values; there is no evidence, moreover, to show that one is better than the other in adhering to those ends. The real debate in comparing the two approaches is not about which will lead to more correct outcomes, but rather what values are relevant, with one tradition regarding an equal contest and the autonomy of the parties as important, the other emphasizing the importance of centralized control and unrestricted investigation by the magistrate and judge. The real difference, in other words, between the two traditions is what standards of fair treatment should govern the trial process; and because different answers are given to that question within each tradition, the procedures within them will also naturally vary" (at 62-3).

[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.

[13] The High Court considered that there were four aspects of section 52 that, both individually and collectively, infringe the accused's right to a fair trial, namely -

(a) the fragmentation of the trial;

(b) the nature of the sentence that may be imposed and the sentencing discretion within such fragmented trial;

(c) the adverse consequences for the accused of the procedures detailed in section 52(3) (which the High Court referred to as "double jeopardy"); and,

(d) institutional delay.

The arguments before this Court in favour of constitutional invalidity supported these grounds, and the reasoning of the High Court in relation thereto. There was, in the High Court's judgment, considerable overlapping between the first and the second aspects and it is more convenient to deal with them together.

*Fragmentation, the sentencing discretion and the nature of the sentence that may be imposed.*

[14] In dealing with the split procedure that results in the accused being convicted by one court and sentenced by another, Lewis J characterised the resulting problem thus:

> "[T]he sentencing court is faced with a bare record of the trial, and has not had the opportunity to assess the characters of the accused and the complainant where relevant. It can hardly be suggested that that is an ideal procedure, nor that the High Court is in as good a position to sentence the accused as it would have been had it tried the accused, listened to the evidence and weighed it up in the process of determining guilt."[12]

The test is not whether the procedure is ideal, but whether it is fair. A deviation from the perfect does not by that reason alone result in the accused not being afforded a fair trial. I am only too conscious of the dangers of relativism for the proper protection of fundamental rights both domestically and internationally and of too readily invoking a lack of resources to justify inadequate protection. Taking the protection and enjoyment of fundamental rights seriously demands constant vigilance and effort to attain in practice what is promised in the Constitution. This is a grave responsibility.

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12 Above n 1 at 238E.

[15] Lewis J correctly pointed out that the split procedure, where an accused is convicted in one court and sentenced in another, is not something new, but that section 116 of the Criminal Procedure Act 51 of 1977 ("the CPA") provides for the referral of an accused for sentence from a district court to a Regional Court; indeed section 52 of the Act is, in regard to pleas of guilty, modelled on section 114 of the CPA and in regard to pleas of not guilty, modelled on the provisions of section 116. Section 116 of the CPA has been implemented and reviewed by the courts for many years but, as correctly observed by the High Court, this does not by itself establish that it, or any comparable procedure, passes constitutional muster. The learned Judge drew attention to the fact[13] that the implementation of section 116 had been the subject of adverse criticism in cases such as *S v Ngubane*[14] and *S v Cele and Others*,[15] in which the advantages of sentence being imposed by the same court have been stressed.

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13 Id at 238G-H.

14 1991 (1) SACR 163 (N) at 165i-j.

15 1994 (1) SACR 616 (N) at 619f-g.

[16] It is unfruitful, in my view, to consider whether, as the High Court concluded,[16] there are significant differences between section 116 of the CPA and section 52 of the Act, which place the accused under the latter in a substantially inferior position compared with that of an accused under the former. This comparison does not assist in determining whether the split procedure under section 52 infringes the accused's right to a fair trial. The question is whether the procedure under section 52 is fair, not whether it is inferior to section 116 of the CPA.

[17] In the High Court judgment great stress is laid on the superior position the trial court enjoys when it comes to the imposition of sentence. This already appears from the passage cited in paragraph 14 above. Reference was also made[17] to cases highlighting the advantages which a trial court enjoys over an appellate tribunal when it comes to the imposition of sentence, such as *S v Toms; S v Bruce*[18] and the well-known *dictum* of Innes CJ in *R v Mapumulo*[19] that-

> "[t]he infliction of punishment is preeminently a matter for the discretion of the trial court. It can better appreciate the atmosphere of the case and can better estimate the

16 Above n 1 at 239F-240F.

17 Id at 240G.

18 1990 (2) SA 802 (A) at 806H-807B.

19 1920 AD 56 at 57.

circumstances of the locality and the need for a heavy or light sentence ..."[20]

[18] The High Court incorrectly assessed the nature of a High Court's sentencing function under section 52. It is an original sentencing jurisdiction, designed to place the High Court in the same position as the trial court after it has convicted the accused, and not comparable to that exercised by a court on appeal. In any event, the *Toms* case dealt with a sentence prescribed by the legislature that leaves the court with no discretion at all, which distinguishes it from section 51 of the Act. It therefore throws no further light on the extent to which the convicting court is in a better position to impose sentence than another court.

[20] See also the passage in the High Court's judgment, above n 1 at 244I.

[19] In the same part of the High Court judgment, Lewis J expressed the view[21] that -

> "... the Legislature, in enacting the Amendment Act, has decided that it should no longer be the prerogative of a Court to consider the nature of the offence or the interests of the public."

Whether or not this conclusion is correct, a matter on which I express no view, it is irrelevant to the constitutionality of section 52, relating as it does to the provisions of section 51.

[20] In the course of this part of the High Court's judgment[22] the following is also stated:

> "[The obligation under section 51 to exercise a discretion] necessarily requires that the Court have as much information as is possible about the trial, the offence committed, the accused and the complainant.
>
> . . . .
>
> A transcription of proceedings can never place a Court of appeal or review, or a sentencing court, in the *same* position as the trial court." (Emphasis in the original)

In my respectful view this overstates the position. Not all information concerning the

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21 Id at 242I.

22 Id at 243E-G.

trial, the offence or the parties is relevant to the question of sentencing and a fair trial does not require the sentencing court to be in a position identical to that of the trial court, provided it is in all material respects in the same position and the procedure adopted affords the accused a fair trial.

[21] In regard to an argument advanced by the State, the High Court held as follows:

> "A court required to sentence, without having conducted the trial, is in no better position than a Court of appeal. Yet it is required to do what a Court of appeal does not do: exercise its own discretion based primarily on the record. The comparison between the position of a sentencing court and an appeal Court does not thus advance the argument of the State."[23]

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[23] Id at 244F-G.

I regret that I am unable to agree with this conclusion. In the first place it ignores the fact that section 52(3)(d) of the Act enables all evidential material relevant to sentencing to be placed before the High Court, an advantage which a court of appeal does not ordinarily enjoy. In fact the High Court, exercising the powers under section 52 consequent upon a section 52(1) committal, is exercising an original sentencing jurisdiction. In this regard section 274(1) of the CPA provides that "[a] court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed." In *S v Dlamini* the Appellate Division of the Supreme Court, in the context of this provision, commented on the fact that there was no legal reason why a judge should, in considering sentence, be restricted to the material placed before the court by the parties. It also alluded critically to the fact that often so little and such superficial attention is given to sentencing, in stark contrast to the time, resources and talent devoted to procuring the conviction of an accused.[24]

[24] 1992 (1) SA 18 (A) at 30D-31D.

[22] In the second place it fails to distinguish between two different functions of an appeal court considering an appeal against sentence. The first is concerned with the setting aside of the sentence imposed by the trial court. It is trite law that the grounds for doing so are limited to patent and latent misdirections, as appears from the authorities cited in the judgment of the High Court.[25] The second is the function of a court of appeal once it has, after applying the correct test, set aside the sentence of the trial court. Although the court of appeal is at liberty, in appropriate circumstances, to refer the case back to the sentencing court for the reimposition of sentence, it often proceeds to impose an appropriate sentence itself and does so on the "bare record" of the trial court. It does so for a variety of reasons, including the consideration that the trial court has misdirected itself in such a manner that it would not be fair for it to reimpose sentence or, even when this is not the case, in order to avoid the further incurring of costs and to obviate further delay.

[23] Even when exercising the first function referred to above, there are circumstances when a court of appeal is obliged, on the bare record, to consider what punishment it would have imposed in the case under appeal. This occurs when no patent misdirection has been demonstrated but the court of appeal sets aside a sentence on the grounds that -

> "... there exists such a striking disparity between the sentenc[e] ... passed by the [trial court] and the sentenc[e] which [the court of appeal] would have passed ... as to warrant interference with the exercise of the [trial court's] discretion regarding sentence."[26]

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25 Above n 1 at 243J-244E.

26 As stated by Ogilvie Thompson JA in *S v Whitehead* 1970 (4) SA 424 (A) at 436C-E. See also *S v Salzwedel and Others* 2000 (1) SA 786 (SCA) at paras 10-1.

As part of this evaluative process the court of appeal has to determine what sentence it would itself have passed; and this it does on the bare record of the trial court. This of course does not by itself establish that such sentencing procedure is consistent with the right to a fair trial under our present Constitution. It is in fact a procedure employed in other democratic countries, such as England, Canada, Australia, New Zealand, India, France and Germany.[27]

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[27] As to England see sections 9 and 11(3) of the Criminal Appeal Act 1968, section 36(1) of the Criminal Justice Act 1988 and Richardson et al *Archbold's Criminal Pleading, Evidence and Practice 2000* (Sweet & Maxwell, London 2000) at paras 7 - 118-9, 126, 304. As to Canada see section 687(1) and (2) of the Criminal Code (R.S.C. 1985 c.C-46) and Salhany *Canadian Criminal Procedure* 6 ed (Canada Law Book Inc., Ontario, loose leaf edition, November 1997) at para 9.640 and 9.860. As to Australia see section 28(1) and (5) of the *Federal Court of Australia Act* 156 of 1976 and Gibbs et al (eds) *Halsbury's Laws of Australia* Volume 9 (Butterworths, Sydney 1995) at 251,260 to 251,261; para [130-13965]. As to New Zealand see section 121 of the Summary Proceedings Act of 1957; Burston "Criminal Procedure" in Cooke et al (eds) *The Laws of New Zealand* (Butterworths, Wellington 1995) at 257; para 290 and 278; 319; and Doyle and Hodge *Criminal Procedure in New Zealand* 3 ed (The Law Book Company Ltd, Auckland 1991) at 220 and 227-8. As to India see section 386(b) and (c) of the Code of Criminal Procedure Act 2 of 1974; Mitra *Code of Criminal Procedure* (Arup Kumar De Kamal Law House, Calcutta 1995) at 1320, 1328 and

1337; *Sham Sunder v Puran* AIR 1991 SC 8 at paras 7-9; *Emperor v Kamal Dattatraya* 1943 AIR Bom 304 at 306. As to France see West et al *The French Legal System* (Butterworths, London 1998) at 268-9. As to Germany see Sections 328 and 354 of the German Criminal Procedure Act (Strafprozessordnung - "StPO"). By contrast, in the case of the Federal Courts in the United States of America, if a court of appeal finds, under section 3742(f) of Title 18 of the *United States Code* (18 U.S.C. 3742) that a sentence was imposed in violation of an applicable statute, as a result of an incorrect application of the sentencing guidelines, outside the range of the sentencing guidelines, or in cases where there is no guideline, was plainly unreasonable, the court must remand the matter for further sentencing proceedings with such instructions as the appellate court considers appropriate. This also appears to be the favoured procedure in state jurisdictions; see O' Shaughnessy "Appellate Review of Sentences" in "Twenty-Ninth Annual Review of Criminal Procedure" (2000) 88 *The Georgetown Law Journal* 799 at 1637-45.

[24] On this part of the case, the High Court has significantly overestimated the benefits enjoyed by the trial court. There are two aspects of the sentencing process which must be distinguished in this regard. The first relates to the process whereby the factors relevant to sentencing are placed before the court. The second to the determination of the appropriate sentence on the basis of such factors.

*The first aspect of the sentencing process*

[25] The first is the establishing of the factual basis relevant to the imposition of a balanced and just sentence according to the so-called "triad" referred to in *S v Zinn,*[28] consisting of "the crime, the offender and the interests of society." I cannot, in this regard, see that it is necessarily more favourable for the accused to be sentenced by the trial court. As far as the circumstances of, and surrounding the offence are concerned, these would emerge from the judgment on the merits. Even where the trial court imposes the sentence, it is itself bound by such factual findings in its judgment.[29] Where necessary, additional evidence relevant to sentence which supplements, but does not contradict such factual findings, may be received. There is nothing in the provisions of section 52 which places the High Court in any worse position than the Regional Court. In no way does it prevent the High Court from enabling the accused to place all relevant material before the High Court which might be necessary to ensure a fair trial for the accused on sentence.

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28 1969 (2) SA 537 (A) at 540G.

29 See Du Toit *Straf in Suid-Afrika* (Juta, Cape Town 1981) at 131; Terblanche *The Guide to Sentencing in South Africa* (Butterworths, Durban, 1999) at 103 (para 4.3.2) as well as *S v Swarts* 1983 (3) SA 261 (C) at 263B; *S v Moorcroft* 1994 (1) SACR 317 (T) at 320g and *S v Jansen* 1999 (2) SACR 368 (C) at 371a-e.

[26] Similarly, where the law, consistently with the Constitution, permits the leading of further evidence on the conviction (a matter I deal with more fully in paragraphs 45-9 below), the accused dealt with under section 52 is not in a worse position than an accused sentenced by the trial court. This is so whether the accused is liable to be sentenced to imprisonment for life under section 51(1) or faces a lesser sentence under section 51(2).

[27] Mr Snyckers strongly pressed this Court with the argument that the imposition of the sentence of life imprisonment itself, as well as the statutory provision for a minimum imprisonment for life, undeniably entail "constitutional fragility", that is to say they "live at the borders of unconstitutionality." These considerations, supported by comparative human rights materials, have given rise to grave constitutional concerns in the courts of this country and in Namibia. This fragility and the attendant concerns, so the argument developed, when taken collectively, create a "constitutionally problematic" situation which must be acknowledged by this Court. The constitutional fragility of mandatory minimum sentences in general and the mandatory imposition of a sentence of life imprisonment in particular have, so the argument runs, motivated the legislature to provide for, what Mr Snyckers termed, a constitutional "safety valve" in the form of the "substantial and compelling circumstances" exception in section 51(3)(a). This Court must accordingly more closely and anxiously scrutinise the effect of the split procedure on the efficacy of this safety valve. This argument concluded on the basis that the above safety valve, "chosen to save the constitutionality of the minimum sentence is destroyed by the fragmentation in section 52" because it places the sentencing court in a position that is not identical to the situation where the trial court also imposes sentence.

[28] The process of determining whether a statutory provision is constitutionally invalid, involving as it does a two-stage process of determining whether there has been a limitation of a Chapter 2 right and, if so, whether such limitation is justified under section 36, is inherently a complex process. To introduce concepts relating to a provision being constitutionally "fragile" or "problematic", but still falling short of constitutional invalidity, is in my view to make of constitutional jurisprudence something unacceptably abstract and over-subtle. I have a further difficulty with this approach. Neither the constitutionality of life imprisonment nor that of compulsory minimum sentences, either in the abstract or as related to section 52, is before this Court. It would therefore be impermissible, in any event, to hazard a view as to the extent to which either is constitutionally problematic or fragile, even if such an exercise were possible.

[29] It is also not permissible in this case to attempt to have the constitutionality of section 51(2) or that of life imprisonment considered by, as it were, the back door. An argument cannot be countenanced which is in substance based on the proposition that the "substantial and compelling circumstances" criterion is unconstitutional because of its impact on the fair trial, but is in form directed at the split procedure occasioned by section 52 and presented as though the former sentencing problem is created by the split procedure. The only inquiry in the case before this Court is whether the split procedure created by section 52 limits an accused's right to a fair sentencing trial.

[30] As far as the fundamental considerations and procedures regarding sentencing are concerned, our law does not distinguish between heavy and lesser sentences. The responsibility resting on a judicial officer may well be more onerous, in human terms, when considering the

choice between a sentence of life imprisonment and a lesser sentence on the one hand, than when considering the choice between sentences of three or five years imprisonment or the choice between a custodial and a non-custodial sentence, on the other. Yet the broad principles are the same and in all these cases the judicial officer must, among other things, be put in possession of all information relevant to the imposition of a sentence and in particular information relevant to mitigating circumstances, in the broadest sense of the expression, which might ameliorate the severity of the ultimate punishment.

[31] Even when the High Court has to sentence an accused who has been convicted by a Regional Court of an offence referred to in Part I of Schedule 2 for which a mandatory life sentence is provisionally prescribed under section 51(1), and whatever the correct construction of "substantial and compelling circumstances" in section 51(3)(a) may be, there is nothing in the provisions of section 52 that hinders the High Court from being placed in possession of all relevant sentencing material so as to ensure that the accused is fairly sentenced.

[32] Where an accused has pleaded guilty in the Regional Court and the High Court has made a formal finding of guilty under section 52(2)(b), the ensuing sentencing proceedings are hardly distinguishable from what would have happened if the Regional Court had conducted them. The High Court in fact came to this conclusion[30] and Mr Snyckers, on behalf of the third applicant frankly and properly conceded this. Ms Mansingh, who argued the matter in this Court on behalf of the first and second applicants vigorously persisted with the submission that even in such a case an accused was deprived of the valuable atmosphere of the trial court. She could not,

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[30] Above n 1 at 237J-238A.

however, indicate specifically what, in the atmosphere of a court in which an accused is convicted on a plea of guilty, could be relevant to the sentencing hearing or deprive the accused of any element of a fair trial. In my view there is nothing.

[33] In the course of her judgment[31] Lewis J referred to problems experienced by herself and other judges of the High Court with, amongst other things, "having to work with records from the courts of first instance which are rarely adequate." If the inadequacy relates to the transcription of the records there are of course means for the High Court to ensure adequacy in this regard. If the inadequacy relates to the evidence or judgment, the matter can be cured by the High Court ensuring that all the necessary evidence, for purposes of sentence, be placed before it. Nothing in section 52 precludes it from doing so, and from obtaining, under the proviso to section 52(3)(b), the Regional Court's reasons for conviction.

[34] Where, in the course of the judgment on conviction, a finding of credibility in favour of or adverse to the accused is made, this will appear from the record. I cannot see how the atmosphere alone in the trial court could be relevant to the imposition of sentence. Neither can I see how it provides an advantage to accused of which they are deprived by the split procedure. More often than not the conviction of accused would have followed a rejection of their evidence and an express or implied credibility finding against them. An accused might in fact, on this score, benefit from being sentenced by another court that will not subconsciously be influenced

31 Id at 237B.

by atmosphere at the trial adverse to the accused.

*The second aspect of the sentencing process*

[35] The second aspect of the sentencing process involves the determination by the sentencing court of the nature and severity of the sentence, having considered all the relevant facts that the law requires it to consider and having weighed up against one another, in the manner required by the law, the often competing considerations which constitute the "triad" referred to above. In order to reach such a conclusion, the sentencing court has, in each particular case, to decide what weight is to be given to each element in the triad. This calls for the exercise of a normative judgment, almost invariably referred to as a "discretion", for which no precise formula exists and which could lead different sentencing courts, on exactly the same facts and scrupulously applying their minds to the correct sentencing principles applicable, to reach different conclusions. The mere atmosphere of the trial can have little place in the actual weighing up and evaluative process of sentencing. On this part of the case I conclude that the provisions of section 52 do not in any way limit the accused's right to a fair trial.

*The imputation that the procedures detailed in section 52(3)(d) have adverse consequences for the accused*

[36] For convenience I repeat that section 52(3)(d) provides the following:

> "The Court in question may at any sitting thereof hear any evidence and for that purpose summon any person to appear to give evidence or to produce any document or other article."

The High Court correctly found that paragraph (d) did not infringe the guarantee against

double jeopardy embodied in section 35(3)(m) of the Constitution which provides that every accused person has the right "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." It did however conclude that this paragraph renders a trial of an accused governed by sections 51 and 52 unfair.[32]

[32] Id at 249F-G, read with 251J.

[37] Before dealing with the High Court judgment in this regard, it is important to refer to certain principles laid down by this Court in *De Lange v Smuts NO and Others,*[33] *Bernstein and Others v Bester and Others NNO,*[34] *Nel v Le Roux NO and Others*[35] and *The Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others; In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others,*[36] which principles may be summarised as follows:

(a) The purport and objects of the Constitution find expression in section 1, which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.

(b) The fact that statutory provisions relating to the examination of witnesses are general in terms and contain no express limitations as to their application, does

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33 1998 (7) BCLR 779 (CC); 1998 (3) SA 785 (CC) para 85.

34 1996 (4) BCLR 449 (CC); 1996 (2) SA 751 (CC) paras 46 and 60.

35 1996 (4) BCLR 592 (CC); 1996 (3) SA 562 (CC) paras 6 and 18.

36 Case CCT 1/00, an as yet unreported judgment of this Court, delivered on 25 August 2000, at paras 22-3.

not mean that they are to be construed as permitting anything not expressly excluded. On the contrary, such provisions must be applied in conformity with the Bill of Rights.

(c) If such provisions, properly construed, compel the presiding officer (judicial or otherwise) to act or apply such provisions in a way which would infringe any of the examinee's constitutional rights, then the constitutionality of such provisions would properly be in issue. That would also be the case if the presiding officer were prohibited by the provision from acting or intervening in a way which would prevent a particular infringement which would inevitably follow in the absence of such intervention.

(d) The Court is not required to consider a multitude of questions relating to hypothetical decisions or rulings which may (not must) be made in applying such provisions, or the question whether such *rulings* or *decisions* would or might infringe any of the examinee's constitutional rights.

(e) The application of such provisions stand under judicial control and the courts in this country have developed a considerable body of case law the design of which is to prevent the mechanisms of these provisions being used oppressively, vexatiously or unfairly towards the examinee, and will continue to do so having due regard to the spirit, purport and objects of the Constitution's Bill of Rights. It must also be borne in mind, that judgments concerning the proper construction and application of such provisions before the Constitution came into operation will not necessarily correctly reflect the post-constitutional position.

[38] These principles are directly applicable to the procedures detailed in section 52(3)(d) of the Act and dispose, in my view, of all the difficulties raised by the High Court. The provisions of this section are capable of being applied, and must be applied, in conformity with the Bill of Rights and in particular in conformity with the accused's section 35(3) fair trial right. They do not compel the High Court to act or apply them in a way which would infringe an accused's constitutional rights, nor do they prohibit the High Court from acting or intervening in a way which would prevent any such infringement. I therefore propose dealing briefly with the difficulties in this regard raised by the High Court in various passages of the judgment.

[39] The first passage reads as follows:

> "And if [the High Court] does have the power to hear evidence on the commission of the offence, then, even though there may not be an infringement of the principle *autrefois convict,* the accused could be subjected to a process entailing the rehearing of his or her evidence which inevitably will give rise to inconvenience, the use, possibly wasteful, of scarce resources; the duplication of work; and, most importantly the rehearsal of the trauma of the trial. That trauma would not, of course, be confined to the accused. Moreover, it might be difficult, or even impossible to find the witnesses, including the complainant, who are required to give evidence at the hearing conducted by the High Court."[37]

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37 Above n 1 at 245E-F. Although this passage occurs in the section of the High Court judgment dealing with fragmentation, it is relevant to the inquiry concerning section 52(3)(d).

[40] The provisions of section 52(3)(d) of the Act are, on the application of the principles to which I have alluded in paragraph 37 above, capable of application, and ought therefore to be applied, so that they do not affect the accused any more negatively than in the case where the trial court is also the sentencing court. Save in exceptional cases, the sentencing part of the trial does not permit the revisiting of the merits of the conviction in any way that would contradict the findings of fact on conviction.[38] The accused's right under section 35(3)(h) of the Constitution "to remain silent, and not to testify during the proceedings" applies to the sentencing stage as well, including the proceedings here in question. A proper construction and application of the provisions will obviate any unnecessary trauma, ie any more trauma than would arise if the trial court had conducted the sentencing proceedings.

[41] Mr Snyckers contended that one of the insurmountable difficulties of employing the powers under section 52(3)(d) in order to utilise the section 51(3)(a) safety valve properly is that "to the extent that the process of enlightenment approximates the 'ideal' position — i.e. places the judge in a position properly and sensitively to exercise the discretion based on the full drama of the trial — the trial has to be repeated." He also submitted that "[i]f the safety valve is to be saved by recourse to section 52(3)(d), then the procedure must manifestly be deprecated as an expensive farce, if nothing else. The impact such duplication of resources would have on the right to a trial within a reasonable time ... need not be over-elaborated." The logic of the submission may be impeccable, but the premises are false. The "ideal position" is not, as

[38] See the authorities cited in 29 above.

explained in this judgment, the constitutional test. Sentence is not imposed by a trial court on the "full drama of the trial." In order to have before it all the facts relevant to the imposition of a just punishment the High Court does not have to retry the accused.

[42] The second passage is to the following effect:

> "I consider, therefore, that the provisions of s 52 do not contravene the principle of double jeopardy in the strict sense. But that does not mean that the process of recalling witnesses, *especially the accused* and the complainant (where relevant), and the hearing of new evidence or the rehearing of evidence is fair. While it is true that the accused may not be prejudiced by such process, and that the evidence might even persuade the Court that substantial and compelling circumstances warrant the imposition of a lesser sentence, the absence of prejudice does not always lead to fairness. *The indignity and the ordeal of being examined and cross-examined,* the inevitable lengthening of the period before the pronouncement of sentence, the tension of sitting through another court process, and the possible unavailability of key witnesses at the new hearing, all lead to a situation where the accused is placed in an unfair position."[39] (Emphasis added)
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> ....
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> "In my view, s 52(3)(d) ... may well lead to a situation where an accused is dealt with unfairly simply by reason of the fact that he may be subjected to examination and cross-examination twice; that he will be in this position while uncertain of his fate, and of whether a sentence of life imprisonment might be imposed on him. That is inherently

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39 Above n 1 at 247F-H.

unfair."[40]

The conclusions reached previously are equally applicable to the criticisms and concerns expressed in this extract. The accused is not compelled to testify again, anymore than if the convicting court also conducted the sentencing hearing. The accused is not compelled to suffer "[t]he indignity and the ordeal of being examined and cross-examined."

[43] The third passage reads:

40 Id at 249F-G.

> "The State argued that ... the provisions of s 52 (3) were capable of fair application, and that fairness would be dependent on the presiding Judge. This contention is plainly unacceptable. In determining whether a procedure is fair, one cannot hope for a good Judge: the procedure itself must conduce to fairness. If there is any possibility that a provision regulating trial procedures might result in unfairness then the provision cannot be constitutional unless justified under s 36 of the Constitution ..."[41]

For the reasons already advanced, I am compelled to the opposite conclusion. The presiding judge in these proceedings stands under the Constitution and is both able and obliged to conduct them in conformity with its provisions. An accused is entitled to expect no less. However, judges are human and liable to err. Should this happen, the accused has the right, under section 35(3)(o) of the Constitution, "of appeal to, or review by, a higher court."

[44] In the last passage the perceived problems are expressed thus:

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41 Id at 247I.

> "A further factor conducive to unfairness is that, should a High Court hear evidence as to conviction, it might well 'perfect' the conviction, in the sense of hearing and accepting evidence that was not heard in the regional court. A conviction that might have been appealable by an accused may then be rendered unappealable as a result of the High Court's intervention."[42]

Substantial parts of section 52(3) of the Act, in particular paragraphs (d) and (e) thereof, are clearly modelled on the provisions of section 304 of the CPA which regulate the procedure to be followed in what have come to be known as "automatic review" proceedings under section 302 of the CPA. A considerable body of case law has been developed on the application of section 304 of the CPA and related review provisions.[43] Neither the constitutionality of section 304 of the CPA nor that of such case law is before this Court and their constitutionality is not questioned in this judgment. However, just as in the case of the judgments referred to in paragraph 37 above, provisions such as those embodied in section 304 must now be construed in the light of the Bill of Rights and it

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42 Id at 249E.

43 Some of this case law is collected in Du Toit et al *Commentary on the Criminal Procedure Act* (Juta, Cape Town 1987, revision service update 24, 2000) Chapter 30 and Kriegler *Hiemstra Suid-Afrikaanse Strafproses* 5 ed (Butterworths, Durban 1993) at 761 and following.

cannot unquestioningly be assumed that such pre-constitutional case law will necessarily correctly reflect the post-constitutional position.

[45] Whether it is constitutionally permissible, under the provisions of paragraph (d) of section 52(3) of the Act, for the High Court to hear evidence which, in the words of the High Court, would "perfect" the conviction and, if so, under what circumstances, is not an issue that this Court is called upon to decide in the present case. The only point that needs to be emphasised is that the High Court is not obliged by paragraph (d) to do so.

[46] Further to the reasons put forward by the High Court in the extract quoted above, Mr Snyckers also strenuously contended that if, under the exercise of the High Court's powers under section 52(3)(d), the effect of the resulting evidence was to "perfect" the State's case against the third applicant, this would constitute an infringement of his right, under section 35(3)(m) "not to be tried for an offence in respect of an act or omission for which [he] has previously been ... acquitted ..." I tend to agree with Lewis J's rejection of this argument on the simple basis that the third applicant has not been acquitted. Mr Snyckers' argument that, because the High Court ought on the record before it, to have acquitted the third applicant, it should in substance be assumed that there was such an acquittal, I find unsound and unconvincing.

[47] In view of the above approach to the arguments based on the alleged unfair consequences of section 52(3)(d), it is unnecessary to decide whether its application in the way postulated by Mr Snyckers would actually infringe an accused's section 35(3)(m) right, as such right is properly understood, or whether it would amount, in effect, to the reopening of the State case to adduce further evidence under circumstances that would infringe an unspecified element of the

accused's right to a fair trial, analogous to the common law rule which permits the reopening of a trial after conviction only in narrowly circumscribed circumstances.[44] If, on either approach, the adduction of such evidence would infringe the accused's right to a fair trial, the High Court would not cause or allow such evidence to be adduced. For the reasons already mentioned, section 52(3)(d) of the Act does not oblige the court to do so.

[48] Mr Snyckers also submitted in this regard that the power to call for evidence on any matter and to remit the case to the Regional Court "has the potential of being applied in violation of the right not to be tried for an offence in respect of an act or omission for which one has previously been either acquitted or convicted." As indicated above, the true question is whether the provisions under consideration compel the High Court to apply them in contravention of an accused's constitutional rights. As I have indicated, they do not. Potential misapplication of a statutory provision is not the test for unconstitutionality. If the provisions are misapplied the accused has an appeal remedy or may use the special entry mechanism of the CPA in case of irregularity.

[49] I stress, at the risk of supererogation, that neither the provisions of subsection (3) (d), nor any other provision in section 52, requires the High Court to act in a way which would impinge

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44 As to which, see *S v De Jager* 1965 (2) SA 612 (A) at 613A-F and compare *S v Xaba* 1983 (3) SA 717 (A) at 736E-737C and 737G-738F.

on an accused's right to a fair trial. It is for the High Court, in each case committed to it under section 52 for sentence, to ensure that the accused receives a fair trial and nothing in the section prevents the High Court from doing so. It is, in the first instance, the duty of the High Courts to flesh out the procedures enacted in section 52 in a manner consistent with the accused's right to a fair trial.

*Institutional delay*

[50] The High Court found[45] that -

> "... the inevitable institutional delay created by s 52 of the [Act] is an infringement of the right to a trial that begins and concludes without unreasonable delay [as guaranteed by section 35(3)(d) of the Constitution]."

Lewis J came to this conclusion because -

(a) a full record of the proceedings (including a transcript of the evidence) has to be prepared and forwarded to the High Court;

(b) the provisions of section 51(3)(b) are often invoked and the reasons for conviction requested from the regional magistrate; this has occurred in 44 per cent of the cases referred to the Witwatersrand High Court and in all such cases heard by Lewis J;

(c) it is the general experience (in the Witwatersrand High Court I presume)

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45 Above n 1 at 251I, for the reasons furnished at 249H-251H.

that those reasons are not furnished within the period set by the High Court, necessitating a further postponement;

(d) there is the inevitable further delay caused by the fragmented process:

> "The accused must wait, in prison, not knowing whether his conviction might be set aside, or whether he faces a sentence of life imprisonment or a lesser sentence. The anxiety, uncertainty and frustration that is experienced must be enormous. It is no answer to say that he has already been convicted; that he faces life imprisonment, and that the delay can make no difference. Even a convicted person is entitled to be treated humanely, and in such a way that his dignity is not unduly impaired";[46]

(e) the final outcome of the case will be even further delayed if the accused wishes to appeal;

(f) the present uncertainty as to the correct appeal forum can only add to the uncertainty and delay that is inflicted on the accused.

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46 Id at 250J-251B.

[51] A few general comments are necessary. The task of deciding whether the right to a fair trial has been limited by unreasonable delay rests, of course, with the courts; it is, however, for the applicants to prove the facts upon which they rely for the claim of infringement of this right in the present case.[47] The High Court failed to consider the substantial qualitative difference between a delay which occurs before a conviction and one that takes place afterwards. It also omitted to distinguish between the breach of this element of the fair trial right in respect of a particular trial and declaring a statutory provision invalid because it renders such breach inevitable in relation to all trials to which the provision relates. In *Sanderson v Attorney-General, Eastern Cape,*[48] the Court was dealing with an alleged breach of the right in respect of a particular trial. Moreover the profound difficulty which pre-conviction delays present to a court was stressed.[49] In the case of pre-conviction delays, three kinds of interests should be regarded as protected: trial-related interests, liberty and security.[50] Trial-related prejudice refers to prejudice suffered by accused mainly because of witnesses becoming unavailable and memories

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47 *Ferreira v Levine NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) BCLR 1 (CC); 1996 (1) SA 984 (CC) at para 44 and *New National Party of South Africa v Government of the Republic of South Africa and Others* 1999 (5) BCLR 489 (CC); 1999 (3) SA 191 (CC) at para 20.

48 Above n 8.

49 Id at para 23.

50 Id at paras 20-2.

fading as a result of delay, in consequence whereof such accused may be prejudiced in the conduct of their trial.[51]

[51] Id at para 30.

[52] Of particular importance in the pre-conviction stage of the trial is the prejudice suffered by accused to their liberty and security (dignity) interests, features stressed by Kriegler J in *Sanderson.*[52] Despite being presumed innocent, the accused is subject to various forms of prejudice and penalty merely by virtue of being an accused, because many in the community pay little more than lip service to such presumption of innocence. "Doubt will have been sown as to the accused's integrity and conduct in the eyes of family, friend and colleagues."[53] Although *Sanderson* was concerned with the application of section 25(3)(a) of the interim Constitution, which guarantees the right "to a public trial before an ordinary court of law within a reasonable time of having been charged," the principles enunciated in that judgment are of equal application to the right protected by section 35(3)(d) of the present Constitution.

[53] When applied to the post-conviction stage of the trial the prejudice suffered by the accused in respect of liberty and security (dignity) interests of the nature above described, while not totally absent, is significantly reduced. There is the possibility that the accused may ultimately succeed on appeal, but the presumption of innocence, which lies at the heart of pre-conviction prejudice, is absent and it is for the accused to establish, in any appeal, that the conviction should be set aside.

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52 Id at paras 20-3.

53 *Mills v The Queen* (1986) 21 CRR 76 at 143, as quoted with approval in Sanderson, above n 8 at para 23.

[54] Particularly when applied to section 52 of the Act, the liberty prejudice is substantially reduced, because a conviction referred to the High Court under its provisions is one that, by definition, exceeds the sentencing jurisdiction of the Regional Court. The accused, unless acquitted of the charge by the High Court or on appeal, faces a lengthy period of imprisonment. In her judgment, Lewis J observed:

> "It must be noted further that s 51(4) provides that 'any sentence contemplated in this section shall be calculated from the date of sentence'. Thus the High Court is not able to take into account, as it would normally do in determining the length of a sentence of imprisonment, the period spent by the accused in custody while awaiting trial, or the imposition of sentence."[54]

In my view section 51(4) is irrelevant to the constitutionality of the split procedure. Any unfairness consequent upon the provisions of section 51(4) should be made the subject of a specific challenge to that subsection, which is clearly severable from the other provisions.

[55] In its judgment, the High Court only applied its mind to the striking down of section 52 as a remedy for an accused aggrieved by trial delay. It overlooked the fact that justice could be done on a case by case basis where it appears that, in a particular case, the total time elapsed

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54 Above n 1 at 251E-F.

from the beginning of a trial to the moment the High Court is seized of it, is such that it constitutes an unreasonable delay for purposes of section 35(3)(d) of the Constitution, having regard to all facets of the inquiry and the approach laid down in *Sanderson*.

[56] In my view, accused face a formidable task when they seek to persuade a court, which it is their obligation to do,[55] that a statutory provision (as opposed to a particular lapse of time, in the circumstances of a particular case) limits this fair trial right. It is incumbent on them, in my view, to show that the nature of the provision is such that it must invariably lead, however it is applied, to a delay of such a nature that it compromises the right on the *Sanderson* test. Anything short of this could well be destructive of any criminal procedure system. Any statutory provision, express or implied, for postponement (other than at the request of the accused), however necessary for the functioning of the system in other respects, would then be liable to be struck down if all that had to be demonstrated was that it was a causal factor in leading, *in particular cases*, to delays of such a nature that *in those cases* it compromised this element of the fair trial right.

[57] It is in this regard that the reasoning of the High Court is, in my respectful view, flawed. Although mention is made in the judgment of delays occurring in consequence of the section 52 procedures, no attempt has been made to demonstrate that, in any one of those cases, on the approach propounded in *Sanderson,* the accused's right to have his or her trial begin and conclude without unreasonable delay was constitutionally compromised. If that is so, there is no

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55 Above n 47 and the text to which it relates.

logical basis for concluding that section 52 is unconstitutional because it must lead to "unconstitutional delays".

[58] The above conclusion is dispositive of the High Court's finding that section 52 is constitutionally invalid because of the delay it causes. It also renders it unnecessary to consider any of the statistics placed before this Court by the State. Without excluding the notional possibility that some provision in a criminal procedure related statute might conceivably lead, by itself, to an inevitable delay of such a degree and under such circumstances that it infringed this element of the fair trial right, it seems to me that by far the better course is to consider the infringement of such right on a case by case basis.

[59] The conclusion I have reached must not, however, be seen as an encouragement to the adoption, by any person involved in the implementation of the criminal justice system, of a supine attitude. The disposition of a criminal trial as reasonably expeditiously as possible is the hallmark of a civilized criminal justice system. Regional Court magistrates who have, after a plea of not guilty, convicted an accused of an offence which falls under the committal provisions of section 52, will have given a reasoned judgment in the process. It ought therefore to be possible for such magistrates, notwithstanding the intense pressure under which they work, to respond with reasonable promptness to requests from High Courts under section 52(3)(b) for their reasons for conviction. There also appears to be no good reason, and certainly none has been addressed to this Court, why the trial record in such cases cannot be prepared and dispatched to the High Court concerned with expedition, as in the case of the records in automatic reviews under section 303 of the CPA. This judgment does not insulate unreasonable delays from scrutiny in particular cases.

[60] The conclusion I reach in the first matter is that it has not been established, either for the reasons furnished in the High Court judgment, or for any other reason, whether taken individually or collectively, that the provisions of section 52 of the Act limit an accused's right to a fair trial under section 35(3) of the Constitution. It follows that the order made by the High Court ought not to be confirmed.

*The application for leave to appeal*

[61] The application for leave to appeal of the third applicant must now be adjudicated on the basis that the High Court's declaration of invalidity will not be confirmed and that, but for the argument raised in the application for leave to appeal, the cases of the three applicants will be referred back to Lewis J to be finalised. The essence, however, of the argument in support of the application for leave to appeal is that Lewis J ought to have acquitted the third applicant and that this Court should, on appeal, set aside the conviction in the Regional Court.

[62] In order to deal with this argument it is necessary to quote the relevant part of the judgment of the High Court dealing with the merits of the third applicant's conviction in the Regional Court. The learned Judge, having considered the Regional Court's response to the query she had sent under section 52(3)(b), remained uncertain. She put it as follows:

> "I find quite simply that I am not in a position to say whether there has been a failure of justice without the hearing of further evidence, and that I am not in a position to sentence the accused without having heard evidence from the complainant (possibly through an intermediary, if that is necessary) and from the accused. But if I were to hear evidence on the merits of the conviction I would be guilty of infringing the accused's right to a fair trial. Hence, the determination of the constitutionality of s 52 is essential for the

determination of the *Tshilo* matter."[56]

[63] Should the third applicant's application for leave to appeal fail it would also be necessary to refer his case back to Lewis J for the proceedings to be finalised. Under these circumstances I consider it inadvisable to attempt to gauge from the above passage, or any other part of the judgment, what precisely the learned Judge's preliminary view of the merits of the third applicant's conviction was at that stage, or what the objective would have been for the hearing of further evidence.

[64] It is, however, clear from the passage cited that the High Court had reached no final conclusion, one way or the other, on the merits of the conviction and had made no order thereon. There being no order on the merits, there is nothing before this Court that can be confirmed or set aside.

[65] The consequence of non-confirmation of the order of constitutional invalidity, is that Lewis J is still seized of the third applicant's case. No authority has been cited, and I am unaware of any which, under such circumstances, would permit a court on appeal to make any order on the merits of a criminal case on behalf of or in the place of the court still hearing the matter. Under these circumstances there are no prospects of the appeal succeeding and the application for leave to appeal must accordingly be dismissed.

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56 Above n 1 at 258F-G.

*The Order*

[66] The following order is made:

1. The Court declines to confirm the order declaring section 52 of the Criminal Law Amendment Act 105 of 1997 to be constitutionally invalid.
2. The application for leave to appeal by the third applicant is dismissed.
3. The cases of the three applicants are referred back to Lewis J in the Witwatersrand High Court.
4. The three applicants are to remain in custody until their cases are disposed of by the High Court, subject to any order to the contrary that the High Court might make.

Chaskalson P, Langa DP, Goldstone J, Kriegler J, Mokgoro J, Ngcobo J, O'Regan J, Sachs J, Yacoob J and Madlanga AJ concur with the judgment of Ackermann J.

For the first applicant : URD Mansingh instructed by the Legal Aid Board.

For the second applicant : N Makopo instructed by the Legal Aid Board.

For the third applicant: F Snyckers instructed by the Wits Law Clinic.

For the *amicus curiae* : SA Jazbhay.

For the state : Dr JA van der S d'Oliveira SC, A Nieman, AM Persad and ZJ van Zyl.