"WE'LL TEACH YOU A LESSON": THE ROLE OF THE SCA AS EDUCATOR AND DISCIPLINARIAN - A NOTE ON *S v MASHININI* 2012 1 SACR 604 (SCA) AND *S v M M* 2012 2 SACR 18 (SCA) WITH REFERENCE TO *S v KOLEA* 2013 1 SACR 409 (SCA)

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1 INTRODUCTION

The superior courts in South Africa, quite apart from the primary functions of adjudication, discipline, protection, the creation of precedent and the development of the common law, also fulfil a guiding and often educatory role. This is sometimes a subtle aspect of a superior court's function, relying as it does on theories motivating a particular approach to aspects of the criminal justice process which have the indirect incentive of behavioural modification. This article focuses on the court's educative role or disciplinary function *vis-a-vis* the law enforcement agencies or other participants in the criminal justice process as exhibited in two recent judgments, making the argument that there is a right way and a wrong way to go about doing this. The three cases discussed in this article illustrate that there is a significant difference between educating on the one hand and teaching someone a lesson on the other.

2 THE COURT'S EDUCATIVE ROLE

Perhaps the most widely known and understood example of the court's educative role is to be found in the court's approach to illegally obtained evidence. This is both an appropriate example and a useful parallel given the circumstances in the two cases under discussion.

In South Africa, s35(5) of the Constitution[1] states clearly that evidence obtained in violation of a right contained in the Bill of Rights must be excluded if the admission of the evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice. Thus, essentially, the rule is neither rigid nor absolute but only requires exclusion if the consequences of admission are significant.

[1] Constitution of the Republic of South Africa, 1996.

One of the most significant arguments in favour of the exclusionary approach is the need to educate law enforcement authorities that they must observe the due process of the law when obtaining evidence, otherwise they run the very real risk of it being held to be inadmissible. This is phrased in several ways of course. For example: to disincentivise illegal methods of obtaining evidence; "To deter –to compel respect for the constitutional guaranty in the only effective way by removing the incentive to disregard it,"[2] or by referring to the court's "educative role".[3] Ultimately, however, it boils down to one thing: "the disciplinary function of the court".[4]

The principles of deterrence, of compelling respect for and compliance with procedural rules, and of educating participants in the criminal justice process can be extrapolated from the sphere of admissible or inadmissible evidence and can be applied to virtually any facet of the criminal justice process, as indeed they were in the first two cases under discussion.

3 *S v MASHININI*2012 1 SACR 604 (SCA)

In *S v Mashinini*, two men were convicted of rape in the Regional Magistrates' Court, Nigel, and were referred to the South Gauteng High Court for sentencing. The convictions were based on guilty pleas by both accused, supplemented by written statements in terms of s 112 of the Criminal Procedure Act,[5] and on DNA evidence linking them to the crime and the victim. They were represented throughout. Their crime constituted a gang rape, the significance of which is that the prescribed minimum statutory sentence for rape in such circumstances is life imprisonment unless extenuating circumstances justify otherwise. The High Court did not find any extenuating circumstances and duly sentenced both accused to life imprisonment. The two accused appealed against the sentence on the basis that "it is too much".[6]

During the hearing of the appeal, and not based on or raised in the papers, it came to light that the original charge sheet had erroneously referred to "rape read with the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997".[7] S 51(2)

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2 *Elkins v United States* 364 US 206 217 (1960).
3 *Stone v Powell* 428 US 465 492 (1976).
4 *S v Mphala* 1998 1 SACR 388 (W) 400B.
5 51 of 1977.
6 *S v Mashinini* 2012 1 SACR 604 (SCA) para 47.
7 Ibid, para 1.

refers to the minimum sentences for offences listed in parts II and III of Schedule 2, i.e. it prescribes a minimum sentence of 10 years for ordinary rape. The charge should instead have read "rape read together with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997". S 51(1) is the section that prescribes a minimum sentence of life imprisonment for gang rape. The accused were aware at all times that they were pleading guilty to a charge of rape, that it was a gang rape, that it carried a minimum sentence, that it was too severe a sentence to be imposed by a Magistrate, and that the matter thus had to be removed to the High Court for sentencing. In addition, they were legally represented throughout and did not at any point raise any issue with the charge sheet.

In order to interfere with a judgment from a court *a quo*, the appeal court must find, inter alia, that the judge erred in his or her findings or sentence to such an extent that the error constituted an irregularity, and that the irregularity was so gross that it rendered the proceedings unfair. The nature of the error was not the incorrect reference to s 51(2) in the original charge sheet, but the judge's failure to notice the incorrect reference.[8] This, argued the appeal court, meant that the judge had erred when sentencing the accused to life and not 10 years,[9] which resulted in a gross irregularity allowing the appeal court to interfere.

3 1 The Majority Judgment

The majority judgment of the SCA focused on what was essentially an incorrect subsection reference (possibly a typographical error) in the charge sheet, which was completely inconsistent with the recognised and agreed facts, charges, pleas and ultimately sentences, and used this as a basis not to overturn the conviction (which is in itself tantamount to an acknowledgement that the process had not been sufficiently tainted to warrant interference) but to reduce the life sentences imposed to sentences of 10 years.

The reasoning of the court was as follows: Every accused is entitled to a fair trial (s35 (3)(a) of the Constitution), which includes the right to be informed of the charge in

[8] Ibid, para 7.
[9] Ibid, para 18.

sufficient detail to answer it.[10] The accused here were so informed, the charge sheet containing all the essential elements of the charge of rape was at no point disputed by the accused. However, the court went on to add that this right to a fair trial also included the right to be informed of the potential sentence the crime carries.[11] This, of course, has never previously been the case in South African law, but there has been a move in recent cases to include knowledge of possible sanctions in this ambit and in principle it is a sound one. The court referred to, and quoted from, three cases reflecting this trend as authority for the fact that the charge sheet must include information as to sentencing.

In *S v Legoa* 2003 1 SACR 13 (SCA), Cameron JA stated that

> "…under the common law it was therefore 'desirable' that the charge sheet should set out the facts the State intended to prove in order to bring the accused within an enhanced sentencing jurisdiction. It was not however essential.[12] The Constitutional Court has emphasised that under the new constitutional dispensation, the criterion for a just criminal trial is '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'.[13] The Bill of Rights specifies that every accused has a right to a fair trial. This right, the Constitutional Court has said, is broader than the specific rights set out in the subsections of the Bill of Rights' criminal trial provision. One of those specific rights is 'to be informed of the charge with sufficient detail to answer it'. What the ability to 'answer' a charge encompasses this case does not require us to determine. But under the constitutional dispensation it can certainly be no less desirable than under the common law that the facts the State intends to prove to increase sentencing jurisdiction under the 1997 statute should be clearly set out in the charge sheet."[14]

The court then referred to *S v Ndlovu*2003 1 SACR 331 (SCA),[15] where Mpati JA had likewise made reference to the desirability of the sentencing regime being "pertinently brought to the attention of the accused at the outset of the trial…" and that this was "to enable him to conduct his defence properly".[16]

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10 Ibid, para 11.
11 Ibid, para 14.
12 See too *S v Moloi* 1969 (4) SA 421 (A) 424A-C, per van Winsen AJA.
13 *S v Zuma and others* 1995 2 SA 642 (CC) para 16, drawing a contrast with *S v Rudman and Another*; *S v Mthwana* 1992 (1) SA 343 (A) 377; and see *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) para 22, per Kriegler J.
14 *S v Legoa* 2003 1 SACR 13 (SCA) para 20.
15 *S v Ndlovu* 2003 1 SACR 331 (SCA).
16 Ibid, para 12.

Finally, the court referred to *S v Makatu* 2006 2 SACR 582 (SCA),[17] in which Lewis JA stated: "…as a general rule, where the State charges an accused with an offence governed by s 51(1) of the Act… it should state this in the indictment."[18] Lewis JA, like Mpati JA, stated that the purpose of the rule is to enable the accused to make decisions with regard to his or her trial – such as "whether to conduct his or her own defence", "whether to testify", "what witnesses to call", etc.[19]

On the authority of the above cases, the majority found that the error in the charge sheet amounted to "a misdirection which vitiates the sentence."[20] Then, instead of referring the matter back to the trial court, the court proceeded to impose a new sentence, that of 10 years imprisonment, in accordance with s 52(2) of the Act.

3 2 Analysis

The reasoning is, with respect, not entirely sound for several reasons.

Firstly, the majority takes a point which, in all three of the judgements cited as authority, the respective judges had deliberately avoided making a binding rule and turned the point into an absolute rule that is binding in the circumstances. Cameron JA, in *S v Legoa*, specifically stated:

> "The matter is however one of substance and not form, and I would be reluctant to lay down a general rule that the charge must in every case recite either the specific form of the scheduled offence with which the accused is charged, or the facts the State intends to prove to establish it."[21]

In fact, in quoting selectively from the judgment of Cameron JA in *S v Legoa*, the court avoids reference to that portion of the judgment that seems directly opposed to its view. Cameron JA went on to state explicitly in the same paragraph that:

> "A general requirement to this effect, if applied with undue formalism, may create intolerable complexities in the administration of justice and may be insufficiently heedful of the practical realities under which charge sheets are frequently drawn up. The accused might in any event acquire the requisite knowledge from particulars furnished to the charge or, in a superior court, from the summary of substantial facts the State is obliged

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17 *S v Makatu* 2006 2 SACR 582 (SCA).
18 Ibid, para 7.
19 *S v Makatu* 2006 2 SACR 582 (SCA) paras 3, 7.
20 *S v Mashinini* 2012 1 SACR 604 (SCA) para 18.
21 *S v Legoa* 2003 1 SACR 13 (SCA) para 21.

> to furnish. Whether the accused's substantive fair trial right, including his ability to answer the charge, has been impaired, will therefore depend on a vigilant examination of the relevant circumstances."[22]

The court also overlooked the fact that Mpati JA in *S v Ndlovu* required the information to be brought to the accused's attention "…if not in the charge sheet then in some other form"[23], thus specifically acknowledging that the charge sheet is not the only way to ensure compliance with this rule. Additionally, Lewis JA in *S v Makatu* states that "This rule is clearly neither absolute nor inflexible."[24] In doing so the majority also overlooked the judgment in *S v Mthembu* 2012 (1) SACR 517 (SCA)[25] in which the court, having revisited both *S v Legoa* and *S v Ndlovu*, confirmed that it is not an absolute rule.[26]

Secondly, the majority ignored the purpose for which the non-binding rule exists. Both Mpati JA and Lewis JA correctly point out that the purpose of bringing the minimum sentencing rules to the accused's attention is to enable them properly to conduct their defence. In the circumstances, if this is found not to have been done, surely it means that the accused were unable to conduct their defence properly? This can only mean that the whole trial is compromised, a point made by Ponnan JA in his dissenting judgment in paras 47 and 48. The logical consequence of the majority's argument is that if the accused had known the sentence might be life imprisonment, they may have pleaded not guilty. That the court did not find this to be the case is a clear indication that majority did not consider the accused to have been prejudiced in the conduct of their defence. Even the accused themselves in their application for leave to appeal did not raise this argument.[27] Therefore, the trial was not rendered unfair. The accused actually conceded that the Magistrate, before accepting their pleas of guilty, brought the minimum sentencing regime to their attention,[28] and that they were again informed in the High Court before sentencing itself.[29]

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22 Ibid, para 21.
23 *S v Ndlovu* 2003 1 SACR 331 (SCA) para 12.
24 *S v Makatu* 2006 2 SACR 582 (SCA) para 7.
25 *S v Mthembu* 2012 (1) SACR 517 (SCA).
26 Ibid, paras 16, 17.
27 *S v Mashinini* 2012 1 SACR 604 (SCA) paras 47, 48.
28 Ibid, para 42.
29 Ibid, para 43.

Thirdly, in any event, the accused both and together, which is significant, pleaded guilty. They cannot thus claim that the trial process was unfair. The relevant considerations mentioned by Mpati JA and Lewis JA – the calling of witnesses, whether to testify or not – were irrelevant in this matter in light of their guilty plea. The fact that the guilty plea was made jointly, in respect of a crime where joint action is a defining sentencing characteristic, indicates clearly that the accused knew they were being convicted of and sentenced for a crime that, by definition, is dependent on their acting together. They both pleaded guilty to raping someone together, i.e. to "Rape… by more than one person".[30]

Fourthly, the majority judgment is in part influenced by an incorrect factual finding by the court. The majority judgment states that the Magistrate did not explain the minimum sentencing regime to the accused[31], while the accused conceded in their heads of argument that "…the Learned Magistrate ensured that they were properly informed and understood the applicability of the minimum sentence regime".[32]

Respectfully, an error of this nature by the majority is cause for concern and it is compounded by overlooking the fact that the Magistrate was entitled to rely on the fact that the accused were legally represented at all times, thus providing reassurance that the accused were aware of the minimum sentencing provisions applicable to them, a point also made by Ponnan JA in his dissenting judgment in para 43.

Further, the process in which the point, upon which the court found, was raised was procedurally unsatisfactory. It was raised in the appellants' heads of argument and was not raised either when seeking leave to appeal or in the appeal papers themselves, thereby precluding the State from being given a meaningful opportunity to address the issue. This is a point made clearly and succinctly in Ponnan JA's dissenting judgment where he stated that "…the State was denied the opportunity of fully investigating the issue and adducing any such evidence as may have been available to it to counter the complaint."[33]

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30 Part I of schedule 2 of the Criminal Law Amendment Act 105 of 1997.
31 *S v Mashinini* 2012 1 SACR 604 (SCA) para 2.
32 Ibid, para 46.
33 *S v Mashinini* 2012 1 SACR 604 (SCA) para 46.

Finally, and this is the focus of this paper, the real rationale for the judgment becomes clear when one reads the following:

> "Even counsel for the respondent was unable to offer any plausible explanation for this serious mistake. This failure, unexplained, speaks of some disturbing flippant attitude on the part of the prosecution. The State must bear the consequences."[34]

Quite apart from the cogent and accurate criticism of this statement by Ponnan JA who states in his dissenting judgment that it is an "inference" that "lacks any factual foundation and therefore ought not to have been drawn",[35] it becomes clear that the Majority is attempting to teach the "staff in the office of the National Director of Public Prosecutions"[36] a lesson for being careless. To be charitable, the Majority is seeking to deter the prosecutorial staff from making such errors in future. It is attempting to compel the prosecutor to respect the law. To be slightly less charitable, it is punishing the prosecutorial staff for a careless typographical oversight, based on an unsubstantiated assumption, in circumstances where the prosecutorial staff was not given an opportunity to respond. How far can one extend the educative function of the court? In cases dealing with the exclusion of evidence, this educative role usually comes into play because the police gathering evidence have done so in breach of a right in the Bill of Rights, have done so illegally, or have done so, albeit utilising the correct procedures, in circumstances when the procedures themselves were authorised on the basis of false information.[37] In most instances it is a pre-trial infringement often, if not always, done intentionally and usually cognisant of the illegality thereof.

The prosecutorial staff in this case did not break the law, did not infringe a right of the accused that is protected in the Bill of Rights, did not act illegally, did not act deliberately, did not taint any evidence, did not attempt to steal a march on the accused, and the error did not in any way change the outcome of the trial itself.

There must, surely, be limits on how just how educative a court can be. It is society as a whole that is paying the price of the lesson in this case, not a nameless clerk in an office. Playing fast and loose with the rights of one criminal (or a pair of them in this case) on one hand, and the dignity of multitudes of existing victims, the physical

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34 Ibid, para 16.
35 Ibid, para 46.
36 Ibid, para 28.
37 See *S v Naidoo* 1998 1 SACR 479 (N).

integrity of future victims, the reputation of the law (rendered an ass, in the opinion of the press[38]) and the creation of dubious precedent, on the other, all in the name of teaching some prosecutorial staff a lesson must surely have surpassed the limit, wherever it may be drawn.

4 *S v M M* 2012 2 SACR 18 (SCA)

A more tempered and sensible example of the educative function of the court can be found in the judgment of Wallis JA in the case of *S v M M*. This case also dealt with rape, or the alleged rape, of a minor. The accused pleaded not guilty and the matter duly went to trial. On the basis of the evidence presented including, significantly, the medical report by the doctor who had examined the victim shortly after the incident in question, the Limpopo High Court found the accused guilty of rape. The matter was taken on appeal to the SCA.

There were two problematic issues with the conduct of the criminal justice process, from the accused's arrest to the final hearing of his appeal, that the SCA judgment focused on. Both deal with procedural inefficiencies, or errors. The first relates to the length of time the process took, the second with the failure to call a crucial witness. It is the second, arising as it did from the trial, and not the subsequent delayed appeal proceedings that will be examined first.

4 1 The Crucial Witness

When examining the merits of the matter, Wallis JA paid considerable attention to the evidence of the complainant, finding that although she may have answered all questions put to her, there was a considerable lack of clarity with regard to some of her responses. This was possibly due to the fact that examination in chief, questioning by the court and cross-examination was conducted through an interpreter. The learned judge stated on several occasions that the complainant's evidence was "in some respects cryptic",[39] that the interpreter "added explanations that clearly were not a reflection of what the witness had said",[40] concluding that "All in all one is left with

[38] Rickard *The Mercury*.
[39] *S v M M* 2012 2 SACR 18 (SCA) para 9.
[40] Ibid, para 10.

a measure of uncertainty as to the accuracy of the translation in relation to critical issues in this case".[41]

This was not, however, Wallis JA's central criticism. In light of the uncertainty with regard to the oral evidence, the medical evidence could have played a considerable role in determining the outcome of the case. For this reason it was crucial to proceedings. However, the medical report was handed in by consent, and the doctor who examined the complainant and who subsequently compiled the report was not called as a witness. As Wallis JA pointed out: "It means there is no opportunity for the doctor to explain the frequently subtle complexities and nuances of the report"[42], and that this might well "make the difference between a conviction and an acquittal".[43] Wallis JA was of the opinion that the doctor's evidence was "undoubtedly necessary"[44] in this case. This was especially so because although the report concluded that there had been a sexual assault, it did not say that the complainant had been raped. Without the doctor's oral testimony it was thus impossible to say, beyond reasonable doubt, based on the written report alone that there had been penetration (an essential element in a charge of rape) and thus rape:[45]

> In the absence of evidence from the doctor as to the precise nature of the sexual assault that he concluded from his examination of the complainant had been perpetrated upon her, it would be unsafe to say on the basis of the his evidence that penetration had been proved beyond reasonable doubt.[46]

The stage is thus set for the educative role of the court. Having established that the failure to call the doctor is "too frequently a feature of rape cases" and that, in the experience of the court, "it is increasingly rare for the doctor who examined the complainant in such cases to be called to explain the medical report"[47] (para 24) Wallis JA established from Counsel that there was "no instruction in the office of the National Director of Public Prosecutions that doctors should not be called".[48] The learned judge's concluding remarks neatly encapsulate the SCA's educative role: "it

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41 Ibid, para 10.
42 Ibid, para 15.
43 Ibid, para 15.
44 Ibid, para 15.
45 Ibid, para 20.
46 *S v M M* 2012 2 SACR 18 (SCA) para 21.
47 Ibid, para 24.
48 Ibid, para 24.

may be helpful to afford some guidance to prosecutors",[49] Wallis JA writes, before setting out some guiding principles governing when to call the doctor.

4 2 The Procedural Delay

The alleged rape took place on the 31st of March 2004. The appellant was arrested in April and brought to trial in October 2004 at which time he was convicted and sentenced. He chose to appeal against both conviction and sentence. However, it took four and a half years before the appellant's application for leave to appeal was heard. This finally took place in May 2009 and was successful. However, the delays did not end there. It took a further three years for the appeal to be heard. A delay of over seven years from conviction to appeal is, of course, *prima facie*, unacceptable, although the reasons for the delay may perhaps excuse it in part. A careful and thorough examination of the long and tortuous road from conviction to appeal, including reading most of the correspondence addressed by the appellant to various parties involved in the process, led Wallis JA to conclude that the process was "a sorry mess", to consider all concerned as "having no regard to the appellant's rights" or "the need to deal with applications of this sort expeditiously" and, ultimately, to find that there was no "…regard paid to the provisions of the Criminal Procedure Act and the provisions of the rules of this court".[50]

That this reasoned analysis, based on an assessment of the facts, differs markedly from the speculative conclusion, extrapolated from an error in a charge sheet, in the absence of an opportunity to respond, as in the judgment of Mhlantla JA in *S v Mashinini,* hardly needs to be spelled out. Even more markedly different is the method chosen to deal with the error. Whereas in *S v Mashinini* the victim, and society as a whole, bears the cost, in *S v M M* Wallis JA states that the registrar of the SCA:

> "...will be directed to send a copy of this judgment to the Director-General of the Department of Justice for consideration of appropriate action against the registrar of the High Court Thohoyandou and to the head of the Justice Centre for consideration of the conduct of the officials employed in the Justice centre in Thohoyandou."[51]

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[49] Ibid, para 24.
[50] *S v M M* 2012 2 SACR 18 (SCA) para 7.
[51] Ibid, para 7.

5 CONCLUSION

As can be seen from these two judgments, the SCA plays an invaluable educative role. It sets out guidelines, draws attention to faults or failings in the system which need to be addressed, and it highlights glaring procedural miscarriages of justice. The two cases discussed above provide examples of each of these but approach the role in very different ways. The court is *S v M M* adopted an approach which acknowledges that sometimes when faults appear the court should direct these to the attention of the relevant authorities so that processes can be put into place to ensure they do not recur. The court did not arrogate to itself a punitive role and, most importantly, was careful that it did not inadvertently create a poor binding precedent.

However, the majority in *S v Mashinini* did not follow the same approach, resulting in a judgment which is of little practical educative value and which sets a poor precedent. That the SCA itself has recognised this undesirable consequence is apparent from its judgment in *S v Kolea* 2013 (1) SACR 409 (SCA),[52] a case on all fours with and "inspired by the judgment of the majority in *S v Mashinini*"[53]. In this case a full bench of the SCA reacting almost immediately and directly to *S v Mashinini* stated that "A close investigation of the circumstances in *Mashinini* reveals that s 51(2) of the Act was erroneously typed instead of s 51(1) of the Act…", and that "the conclusion at which the majority arrived in *Mashinini* was clearly wrong".[54]

The court should have conducted "a vigilant examination of the relevant circumstances" (a phrase used by the SCA in *S v Legoa*,[55] *S v Ndlovu*[56] and Ponnan JA in his dissenting judgment in this very case in para 51) and then set guidelines (not a general rule - the very one Cameron JA was reluctant to set) on how to deal with such situations should they arise in the future. Thus, when taking on the role of educator, it could have done so in a considered manner that admits of general application, not an *ad hoc* addressing of individual errors. Perhaps, albeit inadvertently, this is the most important lesson to be learnt from this judgment.

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52 *S v Kolea* 2013 (1) SACR 409 (SCA).
53 Ibid, para 15.
54 *S v Kolea* 2013 (1) SACR 409 (SCA) para 19.
55 *S v Legoa* 2003 1 SACR 13 (SCA) para 21.
56 *S v Ndlovu* 2003 1 SACR 331 (SCA) para 12.