CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 122/17, 220/17 and 298/17

CCT 122/17

In the matter between:

M T Applicant

and

THE STATE Respondent

CCT 220/17

In the matter between:

A S B Applicant

and

THE STATE Respondent

CCT 298/17

In the matter between:

JOHANNES SEPTEMBER Applicant

and

THE STATE Respondent

Neutral citation: *M T v The State; A S B v The State; Johannes September v The State* 2018 ZACC 27

Coram: Mogoeng CJ, Cachalia AJ, Dlodlo AJ, Froneman J, Goliath AJ, Jafta J, Khampepe J, Madlanga J, Petse AJ and Theron J

Judgment: Dlodlo AJ (unanimous)

Heard on: 10 May 2018

Decided on: 3 September 2018

Summary: **Criminal Law Amendment Act 105 of 1997** — section 51(1) — minimum sentences — exclusion from charge sheet

Leave to appeal — inherent power of courts — section 173 of the Constitution — interests of justice — constitutional matter not considered

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ORDER

On appeal from the Supreme Court of Appeal, the following order is made:

Under CCT 122/17 (*M T v The State*):

1. Condonation is granted.
2. The application for leave to appeal is dismissed.

Under CCT 220/17 (*A S B v The State*):

1. Condonation is granted.
2. The application for leave to appeal is dismissed.

Under CCT 298/17 (*Johannes September v The State*):

1. The application for leave to appeal is dismissed.

JUDGMENT

Dlodlo AJ (Mogoeng CJ, Cachalia AJ, Froneman J, Goliath AJ, Jafta J, Khampepe J, Madlanga J, Petse AJ and Theron J concurring):

[1] The three applicants, Messrs T, B and September, apply for leave to appeal against life sentences imposed under the Criminal Law Amendment Act[1] (Minimum Sentences Act). Their arguments, with little variation, are that the High Court is precluded from sentencing under the Minimum Sentences Act where an accused person is not made aware of its potential application from the beginning of the trial. The failure to inform in these cases, they contend, renders the sentencing procedures unfair and liable to be set aside.

[2] At issue is whether the state failed adequately to inform the applicants of the minimum sentencing regime at relevant times in each of their trials and, if so, what the effects of these alleged failures are in each case. The cases were heard simultaneously on the basis of their strikingly similar issues and legal submissions.

[3] The Minimum Sentences Act came into effect in 1998. It provides minimum sentences for certain serious offences in section 51 unless the sentencing court is satisfied that there are substantial and compelling circumstances to justify the imposition of a lesser sentence.[2] Section 51(1) directs that a Regional Magistrates' Court or a High Court "shall" impose a sentence of life imprisonment where it has

[1] 105 of 1997.

[2] Section 51(3).

convicted a person of an offence referred to in Part 1 of Schedule 2.[3] For the purposes of these matters, the following offences listed in the schedule are relevant:

> "Murder, when—
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> . . .
>
> (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:
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> . . .
>
> (ii) robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 1977;[4] or

[3] Section 51(1) provides that "[n]otwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part 1 of Schedule 2 to imprisonment for life".

The offences listed in Part 1 of Schedule 2 include—

(a) murder;

(b) rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Sexual Offences Act);

(c) compelled rape as contemplated in section 4 of the Sexual Offences Act;

(d) any offence referred to in sections 2, 5-10 or 14 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004;

(e) trafficking in persons as provided for in section 4(1) and involvement in the offence as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act 7 of 2013; and

(f) any offence referred to in Parts 1 or 2 of Schedule 1 to the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

[4] 51 of 1977. Section 1 provides:

> "'[A]ggravating circumstances', in relation to—
>
> . . .
>
> (b) robbery or attempted robbery, means—
>
> (i) the wielding of a fire-arm or any other dangerous weapon;
>
> (ii) the infliction of grievous bodily harm; or
>
> (iii) a threat to inflict grievous bodily harm,
>
> by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence."

(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 as contemplated in section 3 of the [Sexual Offences Act][5]—

(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;

. . .

(b) where the victim—

(i) is a person under the age of 16 years."

M T v The State

[4] In 1999, Mr T raped a 10-year-old child after drinking socially with her father. He threatened to kill her if she told her parents but she immediately informed her mother and grandmother. Mr T was charged with the rape of a child under the age of 16. He pleaded not guilty but was convicted as charged in the Boksburg Regional Magistrates' Court.

[5] The Magistrate referred Mr T's case to the Witwatersrand Local Division of the High Court for sentencing on the basis that: (i) the Minimum Sentences Act applies to the rape of a child under the age of 16; and (ii) a life sentence under the Act was beyond the Magistrates' Court's penal jurisdiction. Section 52(1) of the Act, before its repeal, explicitly provided for this procedure.[6]

[5] Section 3 provides that "[a]ny person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape".

[6] Section 52(1) read:

"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

[6] The High Court found that no substantial and compelling circumstances justified deviation from the minimum sentence and, on 13 March 2000, sentenced Mr T to life imprisonment. Mr T applied for leave to appeal against conviction and sentencing and, in 2004, was granted leave to appeal against sentence only.

[7] On appeal, the Full Court of the High Court set aside the sentence of life imprisonment on the basis of the then precedent in *Rammoko*,[7] which required evidence to be led on the effect of the rape on the complainant before sentencing.

[8] Mr T's case was referred back to the High Court for re-sentencing. Following the requirements in *Rammoko*, the High Court considered a comprehensive report by a counselling psychologist on the effect of the rape on the complainant. It also considered a pre-sentencing report on Mr T. It found no substantial and compelling circumstances to deviate from the minimum sentence of life imprisonment.

[9] After the second High Court judgment, Mr T was, once again, granted leave to appeal against his sentence to the Full Court. But it was not persuaded that the High Court had failed to exercise its discretion judicially and reasonably. The appeal was dismissed.

[10] In 2012, Mr T successfully petitioned the Supreme Court of Appeal and was granted special leave to appeal against his sentence. The Supreme Court of Appeal's judgment was divided. Schoeman AJA, with Dambuza JA and Nicholls AJA found there to be no substantial and compelling circumstances to deviate from the minimum

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(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 . . . the court shall stop the proceedings and commit the accused for sentence by a High Court having jurisdiction."

[7] *S v Rammoko* [2002] ZASCA 138; 2003 (1) SACR 200 (SCA).

sentence. Further, they found that even if there was no prescribed sentence, life imprisonment would still have been an appropriate sentence on the facts of this case.

[11] The Supreme Court of Appeal majority considered the effect of applying the Minimum Sentences Act without warning at the beginning of the trial in the light of an accused's right to a fair trial under section 35(3) of the Constitution. Referring to *Legoa*, it held that "a vigilant examination of the relevant circumstances" had to be undertaken to determine whether an accused's constitutional right to a fair trial had been violated and that this was a question of "substance and not form".[8]

[12] Bosielo and Tshiqi JJA dissented. They considered the Magistrate and Prosecutor both to bear a duty to inform an accused of the application of the Minimum Sentences Act to their case and that this could not be inferred from the nature of the crime for which Mr T was charged. Because he was charged with rape in the Magistrates' Court, Mr T reasonably believed he would be sentenced under the penal jurisdiction of the Magistrate, attracting a maximum sentence of 10 years imprisonment. The minority would thus have reduced Mr T's sentence to 10 years.

A S B v The State

[13] Mr B was convicted of four counts of rape and one count of indecent assault committed against his 13-year-old daughter. He pleaded not guilty and denied his guilt throughout the trial, characterising the allegations as fabricated by his wife.

[14] After being convicted in the Regional Magistrates' Court in Welkom, Mr B's case was referred to the Free State Division of the High Court for sentencing under the Minimum Sentences Act. The High Court found no substantial and compelling circumstances warranting a departure from the minimum sentence. In fact, it found a number of aggravating circumstances to be present. It sentenced Mr B to life imprisonment.

[8] *S v Legoa* [2002] ZASCA 122; 2003 (1) SACR 13 (SCA) (*Legoa*) at para 21.

[15] Mr B applied first to the High Court and then, more than 16 years later, to the Supreme Court of Appeal for leave to appeal against his conviction and sentence. Having considered the trial record and the judgment of the Magistrates' Court, the High Court concluded that the Magistrate had properly evaluated the evidence led and that there was no prospect of another court coming to a different conclusion.[9] Likewise, in relation to sentence, the High Court held that there was no reasonable prospect of another court coming to a different decision, as on the evidence there were no substantial and compelling circumstances to justify a lesser sentence. It accordingly dismissed Mr B's application for leave to appeal against conviction and sentence.

[16] In the Supreme Court of Appeal, his application was dismissed because the Court found no reasonable prospects of success on appeal and no other compelling reasons for leave to be granted.

Johannes September v The State

[17] Mr September was the second of three co-accused persons indicted in the Free State Division of the High Court on charges arising from a violent robbery of a bar in Bloemfontein, killing the owner and seriously injuring three others. All of the accused persons, including Mr September, pleaded not guilty. Liability was imputed to him as an accomplice and he was convicted of murder, three counts of attempted murder and robbery with aggravating circumstances. The High Court sentenced him to life imprisonment under the Minimum Sentences Act and refused leave to appeal on 30 August 2002.

[18] In March 2017, Mr September applied to the Supreme Court of Appeal for leave to appeal against sentence. The Supreme Court of Appeal called for the trial

[9] *[A S B] v The State*, unreported judgment of the Orange Free State High Court, Case No 2920/2000 (19 September 2000).

record in order to consider whether to grant leave. Mr September wrote to the Registrar noting that the cost of copying the entire record was prohibitive and, on 17 October 2017, the Registrar indicated that the Court would alert Mr September as to which portions of the record were required. Without communicating this and, therefore, without considering the record, the Supreme Court of Appeal dismissed Mr September's application on 6 November 2017. Mr September did not allege that this had any effect on the fairness of his trial, nor did he ask for any related relief. As a result, this Court makes no findings on this point.

Summary of submissions before this Court

[19] The three cases are premised on two main arguments: first, that the applicants' rights to a fair trial were infringed by their not being informed of the applicability of the Minimum Sentences Act at the beginning of their hearings; and second, that this caused demonstrable prejudice to the applicants. Additionally, Mr T and Mr B contended that the Magistrates presiding over their trials were precluded from referring the cases to the High Court for sentencing. The applicants were charged with rape in the Magistrates' Court and thus reasonably expected that they would be sentenced within the jurisdiction of the Magistrates' Court (up to a maximum term of 10 years imprisonment).

[20] Last, Mr T submitted that the Supreme Court of Appeal judgment did not attach sufficient weight to a string of its decisions,[10] or this Court's judgment in *Ndlovu*.[11] These cases, with the exception of *Kgantsi*, overturned sentences imposed under different legislative provisions from those explicitly mentioned in the charge sheets. Counsel for Mr T argued that the "absolute absence in the charge sheet" of

[10] *S v Kolea* [2012] ZASCA 199; 2013 (1) SACR 409 (SCA); *S v Mashinini* [2012] ZASCA 1; 2012 (1) SACR 604 (SCA); *S v Mthembu* [2011] ZASCA 179; 2012 (1) SACR 517 (SCA); *S v Makatu* [2006] ZASCA 72; 2006 (2) SACR 582 (SCA) and *S v Ndlovu* [2002] ZASCA 144; 2003 (1) SACR 331 (SCA). See also *S v Kgantsi* [2012] ZASCA 76; 2012 JDR 0856 (SCA) (*Kgantsi*).

[11] *S v Ndlovu* [2017] ZACC 19; 2017 (2) SACR 305 (CC); 2017 (10) BCLR 1286 (CC) (*Ndlovu*).

reference to the Minimum Sentences Act was an even worse violation than referencing the incorrect section of it.

[21] The state, responding to Mr T's application, conceded that a charge sheet must explicitly refer to the Minimum Sentences Act but contended that Mr T had sufficient information about the charge to answer it. He knew that the charge was one of rape of a girl under the age of 16, which automatically attracts a sentence under section 51(1) of the Minimum Sentences Act. The requirements of a charge sheet are prescribed by section 84 of the Criminal Procedure Act (CPA)[12] and the charge sheet in this case met those requirements. On the whole, therefore, Mr T had a fair trial. The state agreed that the case raises a constitutional issue but contended that it has no prospects of success after five appeal attempts have already failed.

[22] Responding to Mr B and Mr September's applications, the state contended that this Court can deduce that the applicants' legal representatives alerted them to the applicability of the Minimum Sentences Act. In Mr B's case, his rights may additionally have been explained to him before the Magistrates' Court because no record exists to refute this. The Minimum Sentences Act was also not raised before the High Court. Further, the applicants enjoy no prospects of success because there is no suitable sentence for their crimes apart from life imprisonment. No reasonable prosecutor would have entered into a plea bargain with either of the accused persons. As a result, they ask that leave to appeal be dismissed.

[12] Section 84 provides:

> "(1) Subject to the provisions of this Act and of any other law relating to any particular offence, a charge sheet shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.
>
> (2) Where any of the particulars referred to in subsection (1) are unknown to the prosecutor it shall be sufficient to state that fact in the charge.
>
> (3) In criminal proceedings the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient."

Condonation

[23] Mr T and Mr B applied for condonation for the late filing of their applications. In Mr T's case, the Supreme Court of Appeal order was issued on 15 December 2016 and the application was lodged in this Court on 22 May 2017. It was approximately four months late. The applicant's explanation is that he was not aware of the Supreme Court of Appeal's judgment until March 2017. At first, he believed his application had been successful because Bosielo JA, the senior judge, had found in his favour. He submits that there are reasonable prospects of success and that it is in the interests of justice to grant him condonation.

[24] The condonation application is not opposed by the state. The applicant's explanation is satisfactory, no prejudice will be suffered by the respondent if condonation is granted and it is in the interests of justice that condonation be granted.[13]

[25] In the Supreme Court of Appeal, Mr B applied for leave to appeal 16 years and 8 months after his application was refused by the High Court. Mr September applied for leave to appeal 15 years and 7 months after his application was refused by the High Court. Mr B's reason for the delay was that he was unaware that he could appeal on the ground that he was never informed of the applicable minimum sentences. Mr September, similarly, contends that he only became aware of the possibility of appealing on the basis of the Minimum Sentences Act in 2016. He then faced further unavoidable delays in obtaining money to pay for the transcripts of the judgments. In both cases, the Supreme Court of Appeal granted condonation.

[26] The state has tendered submissions, before this Court, arguing that the Supreme Court of Appeal erred in granting condonation to Mr B and Mr September and that the explanations for the delay were unsatisfactory. But it is not for this Court

[13] Requirements set out in *Brummer v Gorfil Brothers Investments (Pty) Ltd* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3.

to decide whether the Supreme Court of Appeal was correct in granting condonation for their applications to that Court, even after excessive delay.

[27] In this Court, Mr September's application was filed timeously. The filing of Mr B's application was not excessively late. The application was served four days late and filed five days late. Mr B's explanation for the late filing is primarily that he is a layman in the legal field and due to being in prison. He did not have easy access to a legal representative. He further submits that his appeal raises an arguable point of law of general public importance and that there are prospects of success in his matter. Therefore, despite protestations by the state as to the excessive delay before the Supreme Court of Appeal, I am of the view that condonation should be granted.

Jurisdiction

[28] This Court's jurisdiction is governed by section 167(3)(b) of the Constitution. The Court is empowered to decide "(i) constitutional matters; and (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court".

[29] A significant proportion of each applicant's case concerns factual determinations by the courts a quo. First, the question whether the applicants were prejudiced by not knowing that the Minimum Sentences Act might apply is a factual enquiry. The applicants failed to prove prejudice. In Mr September's case, it is not even proven that he was not informed of the Minimum Sentences Act at trial because the court record has been destroyed.

[30] A second overlapping issue is what the applicants may have done differently had they known that the Minimum Sentences Act applied to their cases. Their counsel argued that if the applicants were informed of the applicability of the relevant penal

provision of the Minimum Sentences Act, they may have pleaded guilty or entered into a plea bargain with the state.[14] This suggestion militates against the applicants' chosen defence. It is likely that they may have been even less inclined to plead guilty knowing that guilt attracted a minimum sentence of life imprisonment. Mr B, for instance, denied that he had raped his daughter and alleged that it was his wife who fabricated the charges against him.

[31] This Court has made it clear that a challenge to a decision on the basis that it is wrong on facts is not a constitutional matter and falls outside of this Court's jurisdiction.[15] We cannot postulate and we cannot consider these factual questions.

[32] Then, the applicants raised a point of law which they argued warranted this Court's intervention. It is this: Magistrates have no power to refer matters to the High Court for sentencing where the Minimum Sentences Act has not been explicitly raised with the accused persons. This is a question of law and is of public importance.

[33] Counsel for Mr T, in written argument to this Court, implied that the Magistrate in Mr T's case should have invited legal argument on whether to transfer the matter to the High Court before doing so. At the same time, he conceded that the referral was duly made "[i]n terms of the minimum sentence legislation prevailing at that time". Here, counsel was referring to section 52(1) of the pre-amended Act,[16] which was still in effect when Mr T's and Mr B's trials were conducted. The subsection provides that "the [Magistrates'] Court *shall* stop the proceedings and commit the accused for sentence by a High Court [having] jurisdiction" if the crime for which the accused is convicted is in excess of their jurisdiction. The Magistrates' Court is not empowered to ignore this statutory injunction.

[14] In terms of section 105A of the CPA.

[15] *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 15.

[16] Set out in full at n 6 above.

[34] When questioned at the hearing, neither counsel could indicate which law empowered a Magistrate to consider sentencing outside of the Minimum Sentences Act or precedent where this has occurred and been sanctioned by a High Court. As a result, we do not consider this a point of law that ought to be considered at this stage.[17]

[35] Lastly, the applicants contend that their rights to a fair trial under section 35(3) of the Constitution are infringed by the failure to inform them of the possible applicability of the Minimum Sentences Act. Whether the applicants in this case had a fair trial is a factual enquiry. However, whether the failure to include the relevant section of the Minimum Sentences Act in a charge sheet infringes an accused's right "to be informed of the charge with sufficient detail to answer it" is a constitutional matter.[18] This Court therefore has jurisdiction to determine this issue.

Leave to appeal

[36] It is trite that not every case implicating a constitutional issue warrants intervention by this Court.[19] In *Pennington*, this Court characterised "leave to appeal" as "a requirement needed to 'protect' the process of this Court against abuse by appeals which have no merit".[20] It will only grant leave to appeal where it is in the interests of justice that the appeal be considered.

[17] Section 167(3)(b)(ii) reads: "The Constitutional Court . . . may decide . . . any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance *which ought to be considered by that Court*". (Emphasis added.)

[18] Section 35(3)(a) of the Constitution.

[19] Section 173 of the Constitution confers on the High Court, the Supreme Court of Appeal and the Constitutional Court "the inherent power to protect and regulate their own process . . . taking into account the interests of justice". Further, at section 167(6)(b) it provides that "the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Court . . . to appeal directly to the Constitutional Court from any other court". Rule 19(6)(a) of this Court's Rules empowers the Court to decide whether to grant leave to appeal. See *Paulsen v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) 479 (CC); 2015 (5) BCLR 509 (CC) at para 29. See also *Boesak* above n 15 at para 12 and *S v Pennington* [1997] ZACC 10; 1997 (4) SA 1076 (CC); 1997 (10) BCLR 1413 (CC) at para 11.

[20] *Pennington* above n 19 at para 26.

[37] This Court has delineated the following factors to be taken into account in determining whether it is in the interests of justice to grant leave to appeal:

(a) the nature of the order appealed against;[21]

(b) the importance of the issues raised;[22]

(c) the importance of determining those issues;[23]

(d) whether the matter has been considered by the Supreme Court of Appeal;[24]

(e) the public interest;[25] and

(f) prospects of success.[26]

No one factor is decisive and all should be read together.[27]

[38] The cases before us come after a number of Supreme Court of Appeal judgments with differing approaches to the necessity of citing the Minimum Sentences Act's provisions in the charge sheet. The starting point is *Legoa*, where the Supreme Court of Appeal held that it was not desirable to lay down a general rule as to what is required in a charge sheet and that whether an accused's right to a fair trial, including their ability to answer the charge, has been impaired will depend on "a vigilant examination of the relevant circumstances".[28] Since then, the Supreme Court of Appeal has primarily dealt with cases where charge sheets cite the incorrect section of the Minimum Sentences Act. In *Ndlovu*, this Court held decisively that, where an accused is convicted in a Magistrate's Court of an offence under an incorrect section

[21] *Mabaso v Law Society of the Northern Provinces* [2004] ZACC 8; 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC) at para 26. See also *Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 10.

[22] *Dengetenge Holdings v Southern Sphere Mining and Development Company Ltd* [2013] ZACC 52; 2014 (5) SA 138 (CC); 2014 (3) BCLR 265 (CC) at para 53.

[23] *Mabaso* above n 21 at para 26.

[24] Id.

[25] *Dengetenge Holdings* above n 22 at para 53.

[26] *Boesak* above n 15 at para 12.

[27] *Dengetenge Holdings* above n 22 at para 53.

[28] *Legoa* above n 8 at para 21.

of the Minimum Sentences Act, that Court will only have jurisdiction to sentence under that section.[29]

[39] This precedent has not created a hard-and-fast rule that each case where an accused has not been explicitly informed of the applicability of the Minimum Sentences Act will automatically render a trial unfair. However, a practice has developed to include the relevant section of the Minimum Sentences Act in the charge sheet because of this precedent.

[40] It is indeed desirable that the charge sheet refers to the relevant penal provision of the Minimum Sentences Act. This should not, however, be understood as an absolute rule. Each case must be judged on its particular facts. Where there is no mention of the applicability of the Minimum Sentences Act in the charge sheet or in the record of the proceedings, a diligent examination of the circumstances of the case must be undertaken in order to determine whether that omission amounts to unfairness in trial. This is so because even though there may be no such mention, examination of the individual circumstances of a matter may very well reveal sufficient indications that the accused's section 35(3) right to a fair trial was not in fact infringed.

[41] The cases before us do not take the matter any further. The applicants attempted to locate their cases in precedent on incorrect citations in charge sheets, with a bald statement that it is an even worse infringement of the right to a fair trial when no section is mentioned at all. This was entirely unsubstantiated. They also failed to present arguments as to which Supreme Court of Appeal approach is constitutionally correct. It is not even clear whether they argue that the charge sheet itself needs to explicitly include the applicable provisions of the Minimum Sentences Act or if mere mention in the trial would suffice.

[29] *Ndlovu* above n 10 at para 48.

[42] It is also not clear what test, if any, the applicants believe should be applied to determine whether the failure to inform an accused person of the applicability of the Minimum Sentences Act renders a trial unfair. These questions may yet be considered and dealt with by this Court if they arise in a subsequent matter.

[43] In *Magajane*, this Court declined to consider a substantive constitutional issue because it did not have the benefit of comprehensive argument on the points of law before it.[30] It concluded that it was not in the interests of justice to consider the matter without extensive argument by the parties or the opinions and reasoning of other interested parties.[31] The same rationale applies to these cases. Most of the issues before us were questions of fact and, on the points of law; it is not in the interests of justice to consider them at this stage.[32]

Order

[44] The following order is made:

Under CCT 122/17 (*M T v The State*):

1. Condonation is granted.
2. The application for leave to appeal is dismissed.

Under CCT 220/17 (*A S B v The State*):

1. Condonation is granted.
2. The application for leave to appeal is dismissed.

Under CCT 298/17 (*Johannes September v The State*):

1. The application for leave to appeal is dismissed.

[30] *Magajane v Chairperson, North West Gambling Board* [2006] ZACC 8; 2006 (5) SA 250 (CC); 2006 (10) BCLR 1133 (CC) at para 31.

[31] Id at para 32.

[32] It cannot be disputed that an accused person's right to a fair trial in section 35(3) of the Constitution constitutes a foundation of a criminal trial. Section 35(3) of the Constitution gives constitutional effect to the provisions of section 84(1) of the CPA. The charge sheets in all three cases complied fully with the requirements set out in section 84(1) of the CPA.

For the Applicant (in CCT 122/17):	W A Karam and N L Skibi instructed by Legal Aid South Africa.
For the Respondent (in CCT 122/17):	L R Surendra and C Britz instructed by the National Director of Public Prosecutions.
For the Applicants (in CCT 220/17 and 298/17):	P Peyper instructed by Peyper Austen Inc Attorneys.
For the Respondents (in CCT 220/17 and 298/17):	S Giorgi instructed by the National Director of Public Prosecutions.