SECTION 271A OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 (PRESCRIPTION OF CERTAIN PREVIOUS CONVICTIONS) AND MINIMUM SENTENCING LEGISLATION

***S v Jacobs* 2015 2 SACR 370 (WCC)**

OPSOMMING

Artikel 271A van die Strafproseswet (verval van sekere vorige veroordelings) en minimum vonnis-wetgewing

Die appellant is in 2013 skuldig bevind aan oortreding van artikel 3 van die Wysigingswet op die Strafreg (Seksuele Misdrywe en Verwante Aangeleenthede) deurdat hy in 2012

sonder haar toestemming met 'n volwasse vrou geslagsgemeenskap gehad het. Die staat het 'n aantal vorige veroordelings, waaronder verkragting en poging tot verkragting ingevolge die gemenereg, teen die beskuldigde bewys. Die gebruik van die vorige veroordelings was onderworpe aan artikel 271A van die Strafproseswet. Die appellant se vonnisoplegging was ook onderworpe aan die minimum vonnis-bepaling in artikel 51 van die Strafregwysigingswet 105 van 1997.

Die hof het as gevolg van die verloop van tyd die vorige veroordelings teen die 1991-, 1992- en 2009-weergawes van artikel 271A getoets. Die hof het ook gebonde gevoel om 'n letterlike uitleg aan artikel 271A te gee wat meegebring het dat die mees onlangse vorige veroordeling van poging tot verkragting ook weggeval het. Die hof het verder aangedui dat indien sy uitleg van artikel 271A verkeerd was, die vorige veroordelings in elk geval as gevolg van tydsverloop hul regskrag verloor het.

Vir sover dit die uitleg van artikel 51(2)(b) van die Strafregwysigingswet aanbetref het, het die hof verduidelik dat die beskuldigde aan die oortreding van artikel 3 hierbo skuldig bevind is. Artikel 3 verskyn in Deel III van Bylae 2 van die Strafregwysigingswet. Die appellant se vorige skuldigbevinding aan verkragting was ingevolge die gemenereg wat herroep is. Dit is 'n verskillende misdryf met verskillende elemente. Die hof het gevolglik bevind dat die appellant 'n eerste oortreder vir doeleindes van artikel 51(2)(b) was. Die hof het bevestig dat die uitleg van wetgewing streng was en dat indien die hof verkeerd was in sy uitleg, die ouderdom van die appellant se vorige veroordeling as 'n substansiële en dwingende faktor beskou moet word.

Daar word geargumenteer dat die hof fouteer het om die vorige veroordelings teen 1991- en 1992-weergawes van artikel 271A te toets; ook dat die hof fouteer het deur te bevind dat alhoewel artikel 271A bepaal dat sekere veroordelings nie na 10 jaar verval nie, 'n maatstaf toegepas moet word dat dit na 10 jaar verval. Daar word voorts aangevoer dat die hof fouteer het deur te bevind dat die vorige veroordelings weens die verloop van tyd in elk geval nie in ag geneem hoef te word nie. Daar word gewaarsku teen 'n benadering dat die relevansie van 'n vorige veroordeling in alle gevalle met die verloop van tyd verminder. Laastens word geargumenteer dat die gemeenregtelike oortreding van verkragting in hierdie geval as 'n vorige veroordeling vir doeleindes van artikel 51(2) in ag geneem moes word.

1 Facts

The appellant was charged with the contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 in that he had sexual intercourse with an adult female without her consent during November 2012 (para 1). The appellant was legally represented throughout. He was convicted and sentenced during August 2013 (para 2).

The state proved a number of previous convictions of the appellant. In March 1980 he was convicted of rape and sentenced to corporal punishment (he was sixteen years old at the time), and in March 1983 he was convicted of housebreaking and attempted rape and on both counts sentenced to corporal punishment. In June 1985 he was convicted of attempted theft and sentenced to six months' imprisonment. In May 1989 he was convicted of attempted rape and sentenced to eight years' imprisonment (para 26).

The use of the previous convictions for sentencing purposes was subject to section 271A of the Criminal Procedure Act 51 of 1977. As the High Court deemed the history of section 271A to be relevant due to the passage of time, I quote all three versions thereof. The first version was introduced by section 12 of the Criminal Procedure Amendment Act 5 of 1991, with effect from December 1991. The 1991 version read as follows:

> "Where a court has convicted a person of –
>
> (a) an offence specified in Schedule 1 [which includes rape], and –

(i) has postponed the passing of sentence in terms of section 297(1)(a) and has discharged that person in terms of section 297(2) without passing sentence or has not called upon him or her to appear before the court in terms of section 297(3); or

(ii) has discharged that person with a caution or reprimand in terms of section 297(1)(c); or

(b) any other offence than that referred to in Schedule 1,

that conviction shall fall away as a previous conviction if a period of 10 years has elapsed after the date of conviction of the said offence, unless during that period the person has been convicted of an offence specified in Schedule 1."

The next version came into effect during March 1992 by way of section 6 of the Criminal Law Amendment Act 4 of 1992. It read as follows:

"Where a court has convicted a person of –

(a) an offence for which the punishment may be a period of imprisonment exceeding six months without the option of a fine, and –

(i) has postponed the passing of sentence in terms of section 297(1)(a) and has discharged that person in terms of section 297(2) without passing sentence or has not called upon him to appear before the court in terms of section 297(3); or

(ii) has discharged that person with a caution or reprimand in terms of section 297(1)(c); or

(b) any other offence than that for which the punishment may be a period of imprisonment exceeding six months without the option of a fine,

that conviction shall fall away as a previous conviction if a period of 10 years has elapsed after the date of conviction of the said offence, unless during that period such person has been convicted of an offence for which the punishment may be a period of imprisonment exceeding six months, without the option of a fine."

The present section 271A came into effect in May 2009 by way of section 2 of the Criminal Procedure Amendment Act 65 of 2008. It provides as follows:

"Where a court has convicted a person of –

(a) any offence in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine may be imposed but –

(i) has postponed the passing of sentence in terms of section 297(1)(a) and has discharged that person in terms of section 297(2) without passing sentence or has not called upon him or her to appear before the court in terms of section 297(3); or

(ii) has discharged that person with a caution or reprimand in terms of section 297(1)(c); or

(b) any offence in respect of which a sentence of imprisonment for a period *not exceeding* six months without the option of a fine may be imposed,

that conviction shall fall away as a previous conviction if a period of 10 years has elapsed after the date of conviction of the said offence, unless during that period the person has been convicted of an offence in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine, may be imposed" (my italics).

The appellant's sentencing was furthermore subject to the provisions of the Criminal Law Amendment Act 105 of 1997. Section 51(2)(b)(i) provides that the court shall sentence a first offender who has been convicted of an offence referred to in Part III of Schedule 2 to imprisonment of a period not less than 10 years. Section 51(2)(b)(ii) provides that a second offender to such offence, shall be sentenced to a period of imprisonment of not less than 15 years. The offence of which the appellant was convicted is listed in Part III of Schedule 2 to the Criminal Law Amendment Act.

The regional court regarded appellant's conviction for rape in March 1980 to be his first offence, and his conviction in the present case as his second conviction of rape. The court accordingly applied section 51(2)(b)(ii) (para 27).

The regional court considered the appellant's personal circumstances, the circumstances of the offence and the previous convictions and concluded that there were no substantial and compelling circumstances justifying a lesser sentence and sentenced the appellant to 15 years' imprisonment (para 27). Leave to appeal against the conviction and sentence was granted by the regional court (para 3).

2 Judgment

The court dismissed the appeal against the conviction (para 22) and considered the effect of the appellant's previous convictions in relation to the minimum sentencing legislation. Central to the judgment was the effect of section 271A of the Criminal Procedure Act, and whether it meant that the appellant's previous convictions fell away because they were more than 10 years old. The High Court did not agree with the approach of the regional court.

The court found certain aspects of the decision of the appellate division in *S v Zondi* 1995 1 A SACR 18 (A) to be particularly relevant to the present enquiry and held as follows: Although appellant's 1980 conviction of rape is older than 10 years it did not fall away in terms of the 1991 version of section 271A after a period of 10 years after conviction. The reasons given were that (1) the offence did not fall within the ambit of section 271A(b), namely, "any other offence than that referred to in Schedule 1"; and (2) that he had in any event been "convicted of an offence specified in Schedule 1", namely, attempted rape, during the 10-year period. Appellant's 1980 rape offence also did not fall away in terms of the 1992 and 2009 versions of section 271A as he was convicted of attempted rape within the 10-year period. Attempted rape being "an offence in respect of which a sentence of imprisonment for a period exceeding six months" without the option of a fine could have been imposed (para 43).

The 1983 conviction of attempted rape did not fall away with the onset of the 1991, 1992 or 2009 versions as he was convicted of attempted rape in 1989 (para 43).

The question whether appellant's 1989 conviction of attempted rape fell away was more problematic and depended upon a proper interpretation of section 271A(b) of the 2009 version. In the 2009 version, the introductory words changed from "any other offence than that" in the 1992 version to "any offence". The words "exceeding six months" in the 1992 version were also changed to "not exceeding six months". This radically changed the ambit of section 271A(b) to include all offences. A sentence of imprisonment for a period of six months without the option of a fine may, depending on the circumstances, be imposed for practically all offences (see also Kruger *Hiemstra's criminal procedure* (loose-leaf, updated to July 2016) 27-3).

The court found itself constrained to give a literal interpretation to section 271A(b), which meant that the appellant's conviction of attempted rape fell away with the onset of the latest version of the section in 2009. Attempted rape was an offence in respect of which a sentence of less than six years' imprisonment might, depending on the circumstances, be imposed. The appellant had also not been convicted of any offence in the 10 years after 1989 (para 55).

The court was also of the view that if they were wrong in the interpretation of section 271A(b), the result would be the same as the appellant's 1989 conviction had lost its force through the passage of time (para 56). The court held that although section 271A provided that certain previous convictions fell away in certain circumstances, this did not mean that a court was bound to continue to take such a conviction into account, whatever its age. The courts therefore in principle had attached less weight to a previous conviction, the longer the period that has elapsed since the date of such conviction (referring to Terblanche *Guide to sentencing in South Africa* (2007) 189 and the cases cited in fn 45; para 57).

Given the period of time that had elapsed, the court was of the view that the 1989 conviction was so dated that it should not have been taken into account at all in the sentencing of the appellant (para 58).

As far as the interpretation of section 51(2)(b) of the Criminal Law Amendment Act 105 of 1997 was concerned the court explained that the appellant had been convicted of the offence described in Part 111 of Schedule 2 to the same Act, as rape and compelled rape was provided for in sections 3 and 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act. In 1980, the appellant was convicted of the common-law offence of rape which does not appear in Part 111 of Schedule 2 to the Criminal Law Amendment Act 105 of 1997. It is a different offence with different elements and it does not exist anymore. In terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, the common law relating to certain crimes, including rape, was repealed (para 60). The appellant was therefore a "first offender" for purposes of the application of section 51(2)(b) (para 61).

The court, referring to *Masethla v President of the Republic of South Africa* 2008 1 SA 566 (CC) para 192, held that the test for interpreting a provision in a statute was strict, and that there was no necessity to change the plain literal wording of section 51(2)(b) (para 62).

Referring to *The Firs Investments (Pty) Ltd v Johannesburg City Council* 1967 3 SA 549 (W) 557E–G, the court also held that the content of a statutory provision which is sought to be implied must be clear and certain. In this instance, considerable uncertainty would exist with formulation of the suggested implied term (para 64).

The court added that even if it were wrong in its interpretation of section 51(2)(b)(ii), and the appellant were a second offender, the age of the appellant's 1980 conviction of rape should have been regarded as a substantial and compelling circumstance justifying a lesser sentence than 15 years' imprisonment, and not more than 10 years (paras 66 67).

The court held that the 1983 conviction of attempted rape should also have been disregarded due to the amount of time that had elapsed (para 68).

The court was accordingly of the view that the previous convictions should not have played any role in the appellant's sentencing and that he should have been treated as a *de facto* first offender (paras 58 69).

On the basis that the appellant was a first offender, the court found that there were additional substantial and compelling circumstances which justified a lesser sentence than the minimum sentence of 10 years' imprisonment prescribed by section 51(2)(b)(i). The first circumstance was that the appellant spent 10 months in custody prior to his sentence, and the second was that he was intoxicated when he committed the offence.

The court set aside the sentence of 15 years and replaced it with 8 years' imprisonment backdated to the day he was sentenced (para 72).

3 Discussion

The first issue that comes to mind is whether the High Court had been correct in testing whether the appellant's previous convictions fell away in terms of the 1991 and 1992 versions of section 271A, and not only in terms of the 2009 amended version that was in place when the appellant committed the crime (and when he was subsequently convicted).

It is submitted that the solution to this question depends first on when the rights bestowed in terms of section 271A accrue to a person. If they accrue on the date that section 271A and its amendments respectively came into force, it may have been correct of the High Court to test the previous convictions against all three versions. This was also the position taken by the Appellate Division in *S v Zondi* 1995 1 SACR 18 (A) where Van den Heever JA held that the previous convictions of the appellant (in that instance) automatically fell away on 23 December 1991 when the first version of section 271A came into effect. With reference to the amendment to section 271A that came into effect during March 1992, she held that such amendment did not deprive the appellant of the rights that the legislature and the passing of time bestowed upon him on 23 December 1991. She further explained that section 271A did not provide that previous convictions only be left out of consideration when the person complied with the requirements at the sentencing proceedings after a subsequent conviction (22 23).

However, it is reasonable to accept that the legislature amended section 271A each time with the intention that the amended sentencing regime applies to someone committing a crime after the effective date thereof. The rights of the convicted person with regard to sentencing therefore accrues at the time of the commission of the crime.

It is furthermore doubtful that it was the intention of the legislature to bestow on a convicted person the rights with regard to the falling away of previous convictions that the initial provision, as well as any subsequent amendment thereof, may provide up to the later commission of the crime.

The construction of the High Court and *Zondi* appears to push the concessions to the principles of fundamental freedoms beyond the bounds of reason. Instructive in this regard is the principle of legality which provides sentencing concessions in line with the requirements of the principles of fundamental freedoms.

It is trite law that the principle of legality is entrenched in the South African legal system. (The principle of legality is an offshoot of the rule of law. See s 1(c) of the preamble to the Constitution of South Africa, 1996 which affirms that the Republic of South Africa is founded on the supremacy of the Constitution and the rule of law. The importance of this principle has also been emphasised in international and foreign law. See, eg, the European Court of Human Rights in *Kafkaris v Cypris* (2008) 49 EHRR 35 ECtHR para 137 with regard to a 7 of the European Convention on Human Rights. A 7 itself is similar to a 15 of the International Covenant of Civil and Political Rights (1966). Also, see the decisions by the US Supreme Court in *United States v Aquilar* 515 US 593 600, 115 S Ct 2357 2362, 132 L Ed 520 (1995) and the Supreme Court of Victoria in *Director of Public Prosecutions v Kaba* [2014] VSC 52 for examples

under foreign law.) The aim of the principle is to ensure that the determination of criminal liability, and the passing of sentence, correspond with clear and existing law. Inherent therefore to the principle of legality are the ideas of legal certainty and of a fair warning.

There are a number of corollaries to this principle (Kemp (ed) *Criminal law in South Africa* (2015) 17). One such corollary is the principle of *ius acceptum*. With regard to punishment, it means that a convicted person cannot be sentenced to a punishment unless the punishment in respect to both its nature and extent is recognised or prescribed by statutory or common law (*Malgas* 2001 1 SACR 469 (SCA) 472g–h; *Dodo* 2001 1 SACR 594 (CC) 604e–f). Another corollary is the principle of *ius certum* which entails that the legislature should not express itself vaguely or unclearly when creating and describing punishment. In terms of this principle, a court must, where a provision in an Act which creates and prescribes a punishment is ambiguous, interpret the provision strictly and in favour of the accused (Kemp 18; Snyman *Criminal law* (2014) 49). Yet another corollary is entrenched in section 35(3)(n) of the Constitution, 1996 which provides that every "accused" has the benefit of the least severe of the prescribed punishments, if the prescribed punishment for the offence has been changed between the time that the offence was committed, and the time of sentencing.

It therefore appears that, also with regard to punishment, an accused has the benefit of certain well-settled concessions under the principle of legality in accordance with what is widely believed to be required under the rules of fundamental freedoms. However, these rules do not include a rule requiring that a previous version of a legislative provision which was amended before the commission of the crime, and which may benefit an accused with regard to punishment, also be tested against the facts, so that the accused may benefit therefrom if it provides any advantage. (It is therefore submitted that the rules of fundamental freedoms do not require that in the case under discussion the provision that is most favourable to the accused should be applied.) The policy considerations that underlie the principle of legality do not require such an extension, nor is there any other rational principle of justice to do so.

In the present case, the 2009 amendment of section 271A had not only been promulgated at the time of the commission of the offence, (which in itself would have constituted fair warning), but had been in place for more than three years when the offence was committed in November 2012. As far as the principle of legality is concerned, all indications are therefore that the ideas of legal certainty and a fair warning had been complied with, with regard to all relevant aspects. The appellant therefore had the ability to plan his affairs in accordance with the law.

It is therefore submitted that the High Court erred in applying the 1991 and 1992 provisions to the facts, with the view of giving the appellant any benefit that may accrue therefrom.

The next related issues are whether the court's application of a yardstick (although not inflexible) that previous convictions fall away after 10 years, and that the previous conviction in any event need not have been taken into account at all for sentencing purposes due to the passage of time, was the correct approach.

In terms of section 303*ter* (introduced by way of s 21 of the Criminal Law Amendment Act 16 of 1959), read with the Fifth Schedule to the previous

Criminal Procedure Act 56 of 1955, a previous conviction was not to be taken into consideration in the imposition of a sentence if it was more than 10 years old, unless the accused committed an offence during the previous 10 years (the previous conviction fell away; see *S v Van der Poel* 1962 2 SA 19 (C); *S v Makhae* 1974 1 SA 578 (O); and *S v Mqwati* 1985 4 SA 22 (T)).

A similar provision was not included in the present Criminal Procedure Act. In *Mqwati* 25A the court held that during this time the court had a discretion to take into account any previous conviction, and was not bound by the 10-year period (see also *S v Oosthuizen* 1997 1 SACR 315 (W) 319 where this approach was confirmed). However, the legislature had a change of heart and with the introduction of section 271A reverted back to a similar position provided for in section 303*ter*.

In the case under discussion, the court, after the introduction of section 271A and relying heavily on *Mqwati*, found that it would nevertheless be a salutary and practical starting point, although not an inflexible yardstick, to apply a 10-year period after which a previous conviction would fall away (para 50).

It is submitted that the court erred in this regard. While courts have commonly attached less weight to a conviction the longer the time that has elapsed (see, eg, *S v Kumalo* 1973 3 SA 697 (A) 699H; *Mqwati* 229; *S v Olivier* 1996 2 SACR 387 (NC) 390; *Oosthuizen* 319), there is a difference between when a previous conviction falls away, and the discretion that a court has to attribute little or no weight to a previous conviction due to the passage of time.

The decision as to when a previous conviction falls away is one for the legislature to make. Both sections 303*ter* and 271A have a proviso that provides that a previous conviction only falls away under certain prescribed circumstances. In terms of the present section 271A, the person must not have been convicted during the 10-year period of an offence in respect of which a sentence of imprisonment of six months without the option of a fine may be imposed.

While agreeing that a reading of the legislation is only the starting process in the interpretation of a statutory provision (Botha *Statutory interpretation: An introduction to students* (2012) 111) the wording of section 271A is clear and unambiguous in this regard. Generally, effect should be given thereto.

It is also reasonable to accept that the decision by the legislature to revert back to the position that previous convictions fall away after 10 years, and only under specific conditions, is no coincidence, and that the intention of the legislature was to re-impose the similar sentencing regime.

Yet, if a court were to apply the yardstick that previous convictions fall away after 10 years, or if a court had a discretion to decide that a previous conviction fell away due to the passage of time, irrespective whether the accused had been convicted of a disqualifying offence during the relevant period, the proviso in section 271A would be of no consequence and redundant.

In this regard, it also has long been held that legislation should be interpreted in such a way that no word or sentence is regarded as redundant (Botha 112. See also *Keyter v Minister of Agriculture* 1908 NLR 522 where it was held that it was a court's function to give effect to every word, unless it was absolutely essential to regard it as unwritten, and *Commissioner for Inland Revenue v Golden Dumps (Pty) Ltd* 1993 4 SA 110 (A) where the court held that in practice a court would not easily decide that words contained in legislation were superfluous).

It is therefore submitted that the court erred when it decided that (1) although section 271A provided that certain previous convictions did not fall away after 10 years, a court should apply a yardstick that it fell away after 10 years, and (2) that it had a discretion not to take such previous convictions into account at all for purposes of section 51(2)(b) of the Criminal Law Amendment Act 105 of 1977 in any event, due to the passage of time. Such a previous conviction should therefore qualify as a first offence for purposes of section 51(2)(b).

Of course, this does not mean that when deciding whether there are substantial and compelling circumstances that justify a lesser sentence than the prescribed minimum, or when a suitable sentence is deliberated in the wider sense, a court, due to the passage of time, could not attribute little or no weight to a previous conviction.

As a last point in this regard, it would perhaps be prudent to caution against an approach that the relevance of previous convictions for sentencing purposes in all instances diminishes with the passing of time. It is especially with regard to previous offences of a sexual nature (as in the case under discussion) that previous convictions may remain significant. It informs the sentencing official whether there is the need for specific deterrence, the chances of a successful rehabilitation and the likelihood of recidivism (see also *R v Lavoie* 1992 CanLII 3838 (QC CA) and *R v R (J)* 2011 QCCQ 13685 para 40ff where the Canadian courts espoused the view that the relevance of a similar prior conviction in sexual assault cases did not become less with the mere passage of time. Of course, the reference to foreign law will not be a safe guide unless the principles of comparative law are followed. A discussion of the principles fall outside the scope of this case note. Suffice to say that the comparisons made in this case note are extremely apposite).

The last issue that warrants examination is the restrictive interpretation by the court that the common-law offence of rape does not qualify as a previous conviction for purposes of the application of section 51(2)(b) of the Criminal Law Amendment Act 105 of 1997.

It is submitted that the court also erred in this regard. The common-law crime of rape ("in circumstances other than those referred to in Part 1") was included in Part III of Schedule 2 to the Criminal Law Amendment Act before the implementation of the Criminal law (Sexual Offences and Related Matters) Amendment Act. The conduct targeted by the common-law offence of rape did not cease to be the same abhorrent criminal conduct with the implementation of the Criminal law (Sexual Offences and Related Matters) Amendment Act. This is underscored by the fact that the offence was taken up in section 3 of the same Act (s 3 has an expanded ambit and is included in Part III of Schedule 2 to the Criminal law Amendment Act; see Kemp 343).

There is thus no reason for the legislature to view a previous conviction of rape in terms of the common law for purposes of section 51(2)(b) any differently than a previous conviction of rape in terms of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

The interpretation by the court furthermore leads to absurd results that could not have been intended by the legislature. If the court's approach were to be followed it would mean that if an offender committed common-law rape for the second time a day before the implementation of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, he would be treated as a second

offender for purposes of section 51(2)(b), but if he fell foul of the same conduct for the second time a day after the implementation of the Act, he would be treated as first offender.

It would also mean that someone with any number of convictions for common-law rape would remain a first offender for purposes of section 51(2)(b), but that a person with a single previous conviction in terms of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, would be treated as a second offender. Because of the wider ambit of section 3, which could, for example, include the insertion by one person of a finger into the mouth of another person (see s 3 read with the definition of "sexual penetration" in the Act), the criminal conduct could even have been of a much less serious nature than in the instance of common-law rape where a man had sexual intercourse with a woman without her consent. Yet, if the court's approach were to be followed, the comparatively much less serious previous transgression of section 3 would make the person a second offender for purposes of section 51(2)(b), but not the much more serious previous conviction of common-law rape. Any such result would be irrational.

Lastly, there is little doubt that the principal aim of section 51 of the Criminal Law Amendment Act 105 of 1997 was to try and deter certain serious offences including rape (see also Terblanche 44). If the court's approach were to be followed, it would mean that section 51 has no deterrent effect to someone who had been convicted of common-law rape and who is predisposed to rape again.

It also appears that at least one other High Court that dealt with the interpretation of section 51(2)(a)(ii) did not see fit to interpret the provision as strictly. In *S v Qwabe* 2012 1 SACR 347 (WCC) 353 the court held that the words "any such offence" in section 51(2)(a)(ii) referred to an offence of the same "kind or degree" as the offence for which the sentence is to be imposed. On the facts of the case under discussion, the two offences are certainly of the same "kind or degree". (See also *S v Mokela* 2012 1 SACR 431 (SCA) 435 where the Supreme Court of Appeal indicated that s 51(2)(a)(ii) was triggered if the offences were the same, and called for the same sentence. In view of the similar facts of the offences, and the fact that they mandated the same sentence, it may well be argued that this case supports the approach that the common-law offence of rape should have qualified as "any such offence" in the case under discussion.)

It is therefore suggested that, in this instance, the purpose and objects of the legislation must qualify the meaning of the text to include the common-law offence of rape in Part III of Schedule 2 to the Criminal Law Amendment Act 105 of 1997. (This approach finds precedent in foreign law. See, eg, *R v Paré* [1987] 2 SCR 618 SCC 631 and *R v Loscerbo* 1994 CarswellMan 125 MA CA para 16ff under Canadian law where the courts held that the mere fact that legislation is penal in character does not automatically result in legislation being given the restrictive interpretation most favourable to the accused.) A court must determine whether the narrow interpretation is a reasonable one, given the scheme and purpose of the legislation. If not, the narrow meaning will not be ascribed to the legislation.

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