

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN**

CASE NO: A631/09

In the matter between:

NKOSIVUMILE NGWANE

Appellant

and

THE STATE

Respondent

JUDGMENT DELIVERED THIS 11th DAY OF AUGUST 2010

RILEY,AJ:

[1] The appellant was convicted of five counts of rape and one count of assault in the Regional Court at Parow and sentenced as follows:

- (1) On count 1 (rape) the appellant was sentenced to 10 years imprisonment.
- (2) The remaining four counts (2-5) of rape were taken together for the purpose of sentencing and the appellant was subsequently sentenced to life imprisonment.
- (3) On count 6 (assault), the appellant was sentenced to 6 months imprisonment.
- (4) Since the appellant was sentenced to life imprisonment by a Regional Court he was granted an automatic right to appeal to this court. The appellant now appeals against both his conviction and sentence.

[2] When the matter came before us on appeal it was noted that the trial magistrate

had reconstructed a portion of the record of the proceedings which had not been mechanically transcribed on 8 May 2008. It appears that after the record was presented to the trial magistrate prior to it being submitted to this court for the appeal that she had on her own prepared a reconstruction of this evidence and filed a certificate dated 19 November 2009 which provides as follows:

Rekonstruksie van ontbrekende getuienis gelewer op 8 Mei 2008.

"Ek, Elsa van Zyl sertifiseer hiermee dat die rekonstruksie van die ontbrekende getuienis geLewer op 8 Mei 2008 van my notas gemaak was en dat dit 'n kon-ekte weergawe is van die getuienis wat ek aangehoor het. "

[3] In S v Zenzile 2009 (2) SACR 407. (WC) a portion of the trial record, pertaining to the whole of the State's case was missing and could not be found despite a diligent search. The presiding magistrate had attempted to reconstruct the missing portion working from his trial notes but there was no indication that the accused had been informed of the reconstruction or of his rights in connection therewith. When he had been asked to sign an affidavit verifying the accuracy of the reconstruction, he had refused to do so.

[4] Yekiso J held at paras 16-18 at 413j-414a, 414g-h and 415a-b that the concept of a fair trial within the meaning of section 35(3) of the Constitution of the Republic of South Africa, 1996, was broader than simply the conduct of the trial in terms of constitutionally mandated rules and procedures, it included substantive fairness. The right to a fair trial, so he held, extended up to and included sentencing proceedings. Thus a determination of whether proceedings had been held in accordance with justice could be made only on the basis of a proper or properly reconstructed record of these proceedings.

[5] Yekiso J held further that fairness to the accused meant that he should have been informed of the need for a reconstruction and of his right to participate in that process, as well as of his right to legal representation and if necessary an interpreter and that the fact that the reconstruction had taken place entirely in the magistrate's chambers negated the right of the accused to a public trial before an ordinary court

as well as his right to be present when being tried. In the result, he held that the accused's right to a fair trial had been significantly compromised and set aside the convictions with the proviso that his order was not tantamount to the acquittal of the accused of the charges preferred against him but that the State could elect to re-institute a prosecution against him on the basis of the same charges.

[6] In S v Gora 2010 (1) SACR 159 Kruger AJ held at par 14 p.162 that the "fair trial requirements will have been met if the parties successfully collaborated towards properly reconstructing a sufficiently accurate record of the proceedings in order to allow the court of appeal to properly adjudicate upon the issues raised on appeal". He held further that the record of the proceedings up unto the stage of conviction was properly constructed with due regard to the right of all the parties but that since the appeal on sentence could not be properly adjudicated without the original record or at least a properly reconstructed record that the appellants would not receive a fair trial and referred the matter back to the trial court to sentence the appellants afresh. See p. 164 par 20 and p. 170 paras 51-52.

[7] With reference to the judgment of this court in S v Zenzile *supra* the trial magistrate was requested to provide detailed comment on the following issues:

- (1) Precisely where the record was reconstructed?
- (2) Whether the accused was present in the process of reconstruction?
- (3) Whether the process of reconstruction was consistent with the accused's right to a fair trial, in particular, a right to a public hearing before an ordinary court, a right to be present when being tried, and a right to legal representation, respectively, as set out in ss35(c), (e) and (g) of the Constitution of the Republic of South Africa 1996.

[8] The trial magistrate responded to this as follows:

"The appellant did appear in this court today (21 April 2010). His attorney Mr. February, was present as well as Mrs. Rubin, the prosecutor, who handled the original trial. The proceedings in open court were recorded. The appellant was informed of the situation and my reconstruction of the missing portion of the

record was read out to him with the assistance of an interpreter. He was satisfied that it is a correct version of the missing evidence. Mr. February and Mrs. Rubin had nothing to add. I asked the clerk of the court to have this recording transcribed and forwarded to you as soon as possible."

[9] The proceedings of 21 April 2010 which was held in open court confirms the above.

[10] It is trite law that on appeal, the record of the trial court is of cardinal importance. The record is indeed the whole basis of the hearing by the court of appeal. If the record is inadequate for a proper consideration of the appeal, it will as a rule, lead to the conviction and sentence being set aside (See: S v Chabedi 2005 (1) SACR 415 at 417 f).

[11] In this case we are not dealing with an inadequate record. I am satisfied that the record although reconstructed is adequate for the consideration of this appeal. The crucial question is whether the process of reconstruction followed by the trial magistrate is consistent with the accused's right to a fair trial, in particular, a right to a public hearing before an ordinary court; a right to be present when being tried; and a right to legal representation when being tried; and a right to legal representation respectively, as set out in SS 35(c), (e) and (g) of the Constitution of the Republic of South Africa, 1996. Further concerns which arise are whether or not the trial magistrate did not become *functus officio* at the time when the purported reconstruction of the record was done and filed as part of the record on appeal? And whether it is competent for the trial magistrate to further purport to reconstruct the record without having had the matter remitted back to the court *a quo* by order of this court.

[12] The following is common cause:

- (1) That when the record was presented to the trial magistrate by the clerk of the court prior to it being submitted to this court for consideration of the appeal, she realised that the portion of the record relating to the appellant's testimony and his cross-examination was missing and that it had not been mechanically

recorded;

- (2) That she then proceeded to do a reconstruction of the missing portion of the record with reference to her contemporaneous notes which she had kept during the trial.;
- (3) That based on this, she issued a certificate dated 19 November 2009, that her reconstruction of the missing portion of the evidence adduced on 8 May 2008 is a correct version of the evidence heard by the court *a quo*.
- (4) That after she received the request for comment on the concerns set out in paragraph 7 above, she proceeded to re-convene the proceedings in open court where the appellant in the presence of his attorney of record and the prosecutor who were involved in the original trial, confirmed that the trial magistrate's reconstruction of the missing portion of the evidence is correct.

[13] At the hearing of the appeal, counsel for the appellant and the state were agreed that at the time that the trial magistrate purported to do the reconstruction of the record that she was *functus officio* and not competent to do the reconstruction. They were further agreed that the trial magistrate had in any event not acted in accordance with the principles laid down in *S v Zenzile (supra)* and other decisions of this court dealing with the reconstruction of the record.

[14] The approach adopted by Yekiso J in *S v Zenzile (supra)* and Kruger AJ in *S v Gora (supra)* is sound. It is imperative that criminal trials are conducted in accordance with notions of fairness and justice (See *S v Zuma* 1995 (1) SACR 568 (CC)). On a strict application of the principles as laid down in *S v Zenzile (supra)* and *S v Gora (supra)* this court would be obliged to find that the appellant's rights to a fair trial had been compromised and that the convictions and sentences imposed had to be set aside and that the matter should be remitted back to the regional court for a retrial.

[15] Our appeal courts have however long since recognised that the primary aim of criminal procedure and the role of the courts in matters of a criminal nature is to ensure that substantial justice is done (See *R v Hepworth* 1928 AD 265 at 277).

[16] It is true that the trial magistrate did not follow the correct procedure in regard to

the reconstruction of the record. What is however clear, is that having done the reconstruction in the way that she did, the contents of the missing portion of the record as reconstructed by her was confirmed as correct, by the appellant himself, assisted by his attorney of record, the state prosecutor and an interpreter in proceedings held in open court. In this matter, all the parties including the appellant are *ad idem* about the accuracy or correctness of the reconstructed missing portion of the record.

[17] It is trite law that our constitution and our courts recognises the right of an accused person to a speedy trial. The accused has a legitimate expectation that the criminal proceedings which includes the appeal process is finalised within a reasonable time. He is also entitled to finality of the proceedings against him and as is so often said, justice delayed is justice denied. Victims of crime should also not be subjected to unnecessary delays in the disposition of cases and they should not be subjected to the indignity and trauma of having to testify and to be cross-examined at a new trial on the same issues.

[18] In my view the fundamental right to a fair trial does not exclusively focus on the rights and privileges of the accused person. I agree with Leach J where he held in Attorney General: Eastern Cape v Dhlabati (1997] 2 All SA 111(E) at p 115 that the rights and privileges of the accused must be interpreted and given effect to in the context of the rights and interest of the law abiding persons who make up the bulk of society and, in particular the victims of crime.

[19] Even though the trial magistrate did not follow the correct procedure in regard to the reconstruction of the record, I am of the view that the selfsame notion of fairness and justice requires that I condone her error. In my view, substantial justice has been done in this matter. I accordingly find that there has been no infringement on the accused's constitutional rights or his rights to a fair trial due to the trial magistrate's failure to follow the correct procedure in the reconstruction of the record. Despite the condonation of the trial magistrate's conduct in the purported rectification, the fact that I have sanctioned this approach is no authority to magistrates confronted with this kind of dilemma in the future. It is imperative that presiding officers follow the clear principles and guidelines as set out in the authorities referred to above.

[20] What is however of concern is the number of cases that are referred to the High Courts on review and/or appeal from which it is clear that no uniform approach is followed in regard to the procedure applicable to the reconstruction of the record. There is no specific provision in the Criminal Procedure Act 51 of 1977 which prescribes the procedure to be followed in regard to reconstruction of the record. Rule 66 (read with Rule 67) of the Magistrate's Court Rules of Court Act 32 of 1944 (as amended) provides that the preparation of the record in criminal proceedings and the preparation of the record submitted to the court of appeal, which would include reconstruction of the record in the event that reconstruction is required, is the primary function of the clerk of the criminal court. In S v Leslie 2000(1) SACR 347 (WLD) it was held that it is necessary for the Department of Justice (as it then was) to assist appeals clerks with proper guidance about the reconstruction of the record and that it was unacceptable to permit them to flounder in the handling of a task for which both knowledge of the law is required and the capacity to think innovatively but practically. In S v Zenzile (*supra*), Yekiso J laid down further guidelines to be followed in the reconstruction of the record to ensure that the accused's rights to a fair trial is not infringed due to the fact that problems occur in regard to the reconstruction of the record. The effective and fair administration of justice, the rights of the accused to a fair trial in terms of the Constitution and the protection of the rights and interests of the law abiding persons of society require that the Department of Justice and Constitutional Development cause legislation to be passed by parliament based on the principles set out in S v Zenzile (*supra*) and other cases dealing with the issue of reconstruction of court records laying down the procedure to be followed in the reconstruction of records in criminal proceedings.

The merits of the appeal

[21] I now turn to deal with the merits of the appeal against the conviction and sentence.

[22] The state called six witnesses, namely M. M., the complainant in count 1; her sister S. M. to whom she reported the rape; Mieta Solomons, a social worker who testified in support of the state's application in terms of Section 158 of the Criminal

Procedure Act 51/1977 for the complainant on counts 2 to 6 not to testify in open court; N. F., the complainant in counts 2 to 6; N. F. (the sister of N.) to whom N. first reported the rape by the appellant on her and Dr. Donovan Mark Andrews, district Surgeon at Karl Bremer Hospital who examined the complainant N. F. on 2 June 2007. By agreement between the state and defence, the medical report (JBS) completed by Dr. Dahms was handed into court.

[23] The appellant testified in his own defence.

[24] M. M., a 23 year old female testified that she resided at Kosuvu in Langa with her family. She knew the appellant as Boy-Boy and her family obtains electricity from the appellant's family house. Although she greeted the appellant when she saw him, she had never actually spoken to him. On the night of 30 November 2006 she slept over at the shack of her boyfriend A.. On 1 December 2006 and whilst she was still asleep, she was awoken by a knock at the door between 08h00 and 09h00 in the morning. As she thought it was the neighbour she opened the door. She was surprised to see that it was the appellant. As she was only dressed in a t-shirt she first closed the door and put on her long pants. She then opened the door again and the appellant entered.

[25] The appellant greeted her and said that he had a Motorola cellphone for sale. She told him that she did not have money. He was, however, adamant that she should take the cellphone. She then showed her boyfriend's telephone to him and said that she already had one. He then offered her money which she refused.

[26] He then closed the door and ordered her to undress. When she refused he took a knife from the cupboard, threatened her with the knife, to undress. After she had taken off her pants he pushed her down onto the bed and then had sexual intercourse with her without her consent. He left thereafter.

[27] After the appellant had left, she went home crying and then told her sister S. that she had been raped by the appellant. They went to the appellant's house where they told his sister about the rape. She and her sister thereafter went to the police to lay a charge and she was later examined by a doctor.

[28] S. M. confirmed that M. had arrived at home crying on the morning of the 1st December 2006 and that she had told her that she had been raped by the appellant. She corroborated the complainant's version in material respects.

[29] The medical examination report of Dr. Dahms, which was handed in by agreement between the state prosecutor and defence indicates that M. had no injuries. She was sexually active prior to the date of the incident and she had reported to Dr. Dahms that she last had sexual intercourse the day before the rape. Remnants of the hymen were found to be present during the examination.

[30] N. F., a 17 year old female testified in a separate room in accordance with the provisions of Section 158 of the Criminal Procedure Act whilst all the other parties could see and hear her by way of a closed circuit television.

[31] She testified that she knew the appellant as Boy-Boy as she visited a girl friend who stayed in the back yard of appellant's parent's home. Apart from greeting the appellant when she saw him upon visiting her friend, she did not have dealings with him.

[32] She was at home when the appellant and his friend arrived there, and the appellant asked her sister P. where she was. The appellant asked her if she could come with him to help him, to which she agreed to. She then walked with them until they reached a bridge which goes over the railway line at Langa. The appellant's friend remained at the foot of the bridge and she and the appellant went to the top of the bridge where the appellant asked her to hold his cap and/or jacket. She refused to do this and he then said the police was there. When she looked down she did not see the police nor the appellant's friend.

[33] He then told her that they should run because he was being sought by the police. He then held her hand and they then ran down the bridge. When they reached an area close by the railway line he told her to sit. He said that he would stab or shoot her and that they had to go to another place. She refused to go with him. She resisted him and they started struggling with each other. In the process of

this struggle he choked her and she in turn choked him. During the struggle, the button on her shirt, her belt and her trouser's button got loose. In the process of the struggle she fell onto her back and he then got on top of her. She does not know when he loosened his pants, but she grabbed hold of his penis and pulled *it*. He screamed and said that his friend must kill her but she saw no one else. When she did not let go of his penis, he bit her on her cheek. She continued to fight back and he then pushed his finger in her eye and choked her into submission. During the course of this her nose had started to bleed. The appellant then pulled down her pants and proceeded to rape her. She testified that she screamed and that the appellant in turn screamed at her.

[34] Thereafter the appellant told her that they should go to a place where there was a sponge. When they got up and he let go of her she tried to run away but stumbled as her pants was still at her knees and she then fell down. The appellant then got onto her again and raped her for a second time.

[35] The appellant thereafter told her that she should choose whether he should tie her up and leave her there or that she had to give him what he wanted. When she told him that she chose to be tied up and left there he told her that she was talking nonsense. She screamed again and again and tried to run away but she fell again. The appellant told her that she was making him struggle; they wrestled with each other again and he then raped her for the third time.

[36] The appellant then told her that they should go to a place where there was a cement slab. He then told her to lay down on the cement slab and when she refused he tripped her and then raped her for the fourth time. She managed to escape and ran home. When she arrived at home she awoke her sister P. and reported to her that the appellant had raped her. She sneezed up blood and vomited. Her sister P. then called the neighbours who accompanied them to the appellant's house where the people reported what had happened to the appellant's mother and sister. The next morning they went to the police and she was taken to a doctor for examination. At the time of the incident she was still a virgin. N. F. corroborated her sister's evidence in material respects.

[37] Dr. Andrews examined N. on 2 June 2007 and completed the J.88 which was handed in as an exhibit. On examination he found fresh bruises and abrasions to her left cheek, right elbow, vestibule and cervix. Her left cheek was swollen and her vagina had bleeding lacerations. In his opinion, the injury to her cheek could have been caused by a bite. At the time of the examination she was very emotional, nervous and traumatised. During his gynaecological examination he found that there was redness of the clitoris, the frenulum of the clitoris, the urethral orifice, para-urethral folds, the labia majora, labia minora and the posterior fourchette. There were fresh tears in the posterior fourchette, fresh tears and abrasions in the fossa navicularis. Her hymen had multiple fresh tears and was torn. The cervix was freshly bruised and abraded. In his expert opinion the injuries were consistent with her version that she had been raped several times. In his view it was highly unlikely that the injuries had been caused during consensual intercourse. His findings were consistent with the fact that the complainant was a virgin prior to the incident. He excluded prior penetrative sexual intercourse prior to the incident as unlikely as he found no "old" tears in the hymen.

[38] The appellant's version was that he had intimate love relationships with both the complainants at the same time which had endured up and to the particular incidents. His version was that he had previously had sexual intercourse with both the complainants. In short he stated that on 1 December 2006 he was walking to Bonteheuwel when he saw M. outside a shack with her pajamas on, where she was throwing out water and that she called him. He went into the shack with her and they spoke. She asked him for money as she wanted to go home and also asked for his cellphone. She went to lay down on the bed and invited him to come and sit next to her. They then both took off their clothes and had consensual intercourse. When he left, she reminded him of the money she needed and he said that he would give it to her later. According to him, M. had laid the charge because she thought that the people who were sitting outside saw him and knew the man that she was living with.

[39] In regard to counts 2-5 he confirmed that he had gone to N.'s house and enquired from P. where she was. He entered the house and spoke to N. who agreed to accompany him to his house. When they got to his house there were people chatting to his sister and they then went to his friend L.'s house. He then told N. that

there were people at his sister's house and that he decided to go to L.'s place. He testified that at L.'s house they first sat and chatted. The complainant had an argument with him after she accused him of having a relationship with another girl. They however resolved the issue and that he thereafter had consensual sexual intercourse with her on four occasions.

[40] Thereafter whilst walking her home she became angry at him again about the other girl and kicked him on his private parts. He then grabbed hold of her and bit her on her cheek. Thereafter they chatted again and he then walked her to her house and then went home. According to him she laid the charge against him when she heard of his relationship with the other girl.

[41] In respect of count 1, it is common cause that the appellant had sexual intercourse with M. M. on 1 December 2006. The only issue in dispute is whether or not the sexual intercourse was with her consent. In respect of counts 2-5 it is common cause on appellant's own version that he had sexual intercourse with N. F. on 1 June 2007. What is in dispute is where the sexual intercourse took place and whether it was with or without her consent. On count 6 it is alleged that the appellant choked, bit and pushed his finger in her eye. It is not in dispute that the appellant bit N. on her cheek. What is however in dispute is whether the assault by him on the complainant took place before or after they had sexual intercourse and under what circumstances the biting occurred.

[42] It was contended on behalf of the appellant that the trial court had erred in not approaching the evidence of the witnesses with caution in particular since they were single witnesses and because the charges were of a sexual nature.

[43] There is no basis for this contention. In my view the learned Regional Magistrate was very much alive to the fact that she was dealing with the evidence of single witnesses in respect of the allegations against the appellant. This is illustrated by the following remarks at page 117 of her judgment where she stated -

"n Gebrek aan toestemming kan bewys word deur die direkte ge/oofwaardige getuienis van 'n klaagster. As die klaagster 'n enkel getuie is ten opsigte van

die geskilpunt moet haar getuienis met versigtigheid oorweeg word. Daar moet nie al/een bevind kan word dat sy geloofwaardig is nie maar ook dat haar getuienis betroubaar is. Selfs al word bevind dat haar getuienis geloofwaardig is, moet daar steeds bepaal word of daar waarborge vir die betroubaarheid van haar getuienis gevind kan word in die ander gelewerde getuienis. Onafhanklike of ander getuienis oor haar optrede voor of na die beweerde verkragting, en veral haar toestand direk na die gebeure en of sy onmiddellik rapport daaroor gemaak het, kan belangrike waarborge vir haar betroubaarheid wees. Mediese getuienis ten opsigte van beserings kan ook aanduidend wees van die betroubaarheid van haar getuienis. 'n Ander belangrike faktor wat die betroubaarheid van haar getuienis kan ondersteun of teenspreek is die kwaliteit en die geloofwaardigheid al dan nie, van die getuienis."

[44] I am satisfied that the trial magistrate critically and thoroughly evaluated the evidence of Malezwa and N. and I agree with her finding that both complainants presented their evidence in a credible, clear and satisfactory manner.

[45] It was contended on behalf of the appellant that the trial magistrate had erred when she rejected the appellant's version as so unreliable and improbable that she had no alternative but to reject his version as false and untruthful. I do not agree that the trial magistrate had erred when she made these findings. The appellant was indeed a pathetic witness who was untruthful and adapted his version as and when it suited him.

[46] In my view, the trial magistrate is correct in rejecting the appellant's version as false, untruthful and not reasonably possibly true. His evidence in chief differed in material respects from his plea explanation and further differed from the version which was put to the state witnesses. He contradicted himself in his evidence in chief and it is clear to me that he adapted his version as the trial progressed. This was particularly clear during cross-examination, on his own version. His explanation as to why the complainants had falsely accused him does not make sense. In his evidence in chief he testified that he had been involved in a relationship with M. for more than a year. This aspect was never put to M. during cross examination. At most it was put

to her that they had sexual intercourse previously. Even though it was put to her initially in cross-examination that she told the appellant on the day of the incident that it was her boyfriend's house, the appellant never mentioned this in his evidence in chief and expressly denied this fact while he was under cross-examination. In his evidence in chief he testified that he had found out before the incident that M. was living with another man but later stated that he only heard about it after his arrest.

[47] Even though he initially testified that he knew that she did not live at the place where the incident occurred, he stated under cross-examination that she just told him that he lived there. During cross-examination it was put to M. that she saw that her boyfriend's neighbour was sitting outside his shack and that she was possibly scared that the neighbour would tell her boyfriend that the appellant had been there. The evidence of the appellant differed materially in this regard. He initially testified that there were other people in the shack who went out when she and appellant went into the shack. Later he adapted his version by saying that the people sat in another shack with an open door and that they could see M. go in with him. According to his version these people must have seen that M. called him into the shack. If M. was so concerned that her boyfriend would find out that appellant was there, she would surely not invite him into her boyfriend's home in full view of other people. This version by the appellant makes no sense at all and is highly improbable especially for the reasons he advanced as to why M. would have a motive to falsely implicate him. It is further highly unlikely and most improbable that if they were in fact involved in an intimate relationship with each other and if they did have consensual intercourse, that she would immediately go home distraught and crying reporting that he had raped her, informing his family and then go to the police.

[48] In respect of counts 2-5 he stated in this plea explanation and later in cross-examination to N. that on the day of the alleged rape he had consensual intercourse with N. on one occasion. In his evidence in chief he surprisingly stated that he had had sexual intercourse with N. on four occasions. This was a material deviation from his defence in respect of counts 2-5. The appellant could give no explanation as to why there was this material difference between his plea explanation in comparison to his testimony.

[49] The trial magistrate is accordingly correct in her finding that appellant had fabricated this version in an attempt to bring it in line with N.'s version.

[50] The version of the appellant that he and N. had first kissed and petted and that there was sufficient foreplay between them so that, she was so to say ready and receptive for consensual sexual intercourse, is in direct conflict with the independent medical evidence from which it appears conclusively that N. was a virgin at the time that the incidents occurred. I agree that it is highly unlikely and improbable that N. had had intercourse previously. The nature of the injuries suffered by her, seen in its totality, excluded consensual sexual intercourse.

[51] His version in regard to how and when the bite was inflicted by him on N. underwent several changes during the trial. It was initially put to N. that she had first accused him of sleeping with other women after they had already had sexual intercourse and that she had kicked him on his private parts whilst they were at L.'s shack. When he wanted to stop her from kicking him again she pulled his penis with her hand. He testified that he then bit her so that she could let go of his penis. In his evidence in chief he however stated that she had accused him of having another girl even before they had sexual intercourse. He stated that she had however cooled off, and only after they had sexual intercourse four times and whilst he was accompanying her home she became angry again and then kicked him. He testified that he then grabbed hold of her and bit her before she could grab him or bite him.

[52] On the totality of the evidence presented in respect of the counts of rape I am accordingly satisfied that the appellant's guilt has been proved beyond a reasonable doubt and the appeals in respect of the conviction for rape is accordingly dismissed.

[53] I am however not satisfied that the appellant was correctly convicted on the separate count of assault. In my view the appellant had lured N. away from her house under false pretences. I am satisfied that he lured her to the place at the railway line at Langa with the intention to have sexual intercourse with her. When they arrived at the place he threatened to stab or shoot her. When she refused to accompany him further he started wrestling with her and choked her in the course of the struggle. When she fell on her back he then climbed on top of her. On her

version his pants was already loose and she grabbed at his penis and pulled it in an attempt to prevent the rape. When she refused to leave his penis he bit her on the cheek. When she continued to resist by fighting him off he pushed his finger in her eye and choked her into submission until she could no longer fight. He then pulled down her pants and raped her.

[54] In my view the threats and violence formed part of the first rape and cannot be regarded as a separate assault on N.. The conviction on assault therefore amounts to a duplication. In the result I find that the Regional Magistrate had erred and misdirected herself when she convicted the appellant of the assault on count 6.

[55] The Criminal Law Amendment Act 105 of 1997 prescribes a sentence of 10 (ten) years imprisonment in respect of count 1 and a minimum sentence imprisonment of life in respect of the rapes in respect of counts 2 - 5 unless there are substantial and compelling circumstances that justify a lesser sentence. After considering the personal circumstances of the appellant, the interests of the community and the seriousness of the offences the Regional Magistrate found no substantial and compelling circumstances that justify a lesser sentence and sentenced the appellant to 10 (ten) years imprisonment in respect of count 1 and to life imprisonment in respect of counts 2 - 5 which were taken together for the purpose of sentence.

[56] The rapes in question were callous and brutal, particularly in relation to the second complainant N. . In both instances the appellant abused the trust that the complainants had in him with callous disregard to the rights of the complainants and the sanctity of their bodies. The severity of the offences are aggravated by the use of a knife to threaten M. into submission and the fact that N. was relatively young; a virgin; was seriously assaulted and suffered serious vaginal injuries during the course of the multiple rapes on her. Even though no evidence was presented to the court about the emotional and psychological harm that the respective victims suffered, I am satisfied that they were not left unscathed.

[57] Our courts have repeatedly held that society demands that persons who make themselves guilty of offences of this nature must be severely dealt with. In cases such as this, the element of retribution and deterrence rather than the interest of the

criminal himself come to the fore when it comes to the assessment of what would be a suitable sentence.

[58] Counsel for the appellant submitted that the trial magistrate should have found that there were substantial and compelling circumstances that justify the imposition of a lesser sentence than imprisonment for life and further contended that the trial magistrate had failed to give proper consideration to the approach adopted by our courts in *S v Abrahams* 2002 (1) SACR 116 (SCA), *S v Mahomotsa* 2002 (2) SACR 435 (SCA), *S v Vilakazi and Others* 2000 (1) SACR 140 (W) and *S v Malgas* 2001 (1) SACR 469 (SCA) to mention but a few of the cases, he relied on, when she sentenced the appellant.

[59] In *S v Abrahams* (*supra*) the appellant was convicted of raping his 14 year old daughter and was sentenced in a High Court to seven years imprisonment. On appeal by the State against sentence the court increased the sentence to 12 years imprisonment. The court held that the life sentence ordained by the Legislature should be- reserved for cases devoid of substantial and compelling factors and that it should only be imposed as a minimum sentence in the most serious cases. In *S v Mahomotsa* (*supra*) the complainant was 15 years old and the accused was convicted of two counts of rape in relation to her. On appeal the minimum life sentence imposed by the court *a quo* was substituted with a sentence of 8 & 12 years imprisonment on the respective counts. In *S v Nkomo* 2007(2) SACR 198 (SCA) the accused was convicted of abduction and rape. The accused was sentenced to 3 years imprisonment for the abduction but referred to the High Court for sentence since he had raped the complainant 5 times and the prescribed sentence was life imprisonment. The sentence of life imprisonment imposed by the High Court was set aside on appeal and substituted with a sentence of 16 years imprisonment. In *S v GN* 2010(1) SACR 93 (T) the appellant was convicted of raping his biological daughter of 5 years old. The life sentence imposed on him was set aside on appeal and the appellant was sentenced to 20 years imprisonment. The approach and its application in *S v Mahomotsa* (*supra*) and the other cases referred to above conveys that even where imprisonment for life is prescribed as a minimum sentence that a court must bear in mind that it is the ultimate penalty that the courts in this country can impose. As such it must not be imposed lightly, even when it is a

prescribed minimum sentence. In order for it to arrive at a just sentence, a court must have a balanced regard to the nature and seriousness of the crime, the personal circumstances of the accused and the legitimate interests of society. The result thereof is that justice demands that, even for similar crimes, different sentences must often be imposed. In *S v Malgas (supra)* at para 25 it was pointed out that s 51 of the Act 'has limited but not eliminated the courts' discretion in imposing sentence ...'. It follows that, even where the Act prescribes a minimum sentence, the courts must still seek to differentiate between sentences in accordance with the dictates of justice. Thus, where the Act prescribes imprisonment for life as a minimum sentence, the fact that it is the ultimate sentence must also be taken into account. In the present case the magistrate did not in her judgment on sentence give consideration to the approach adopted by our courts in the above cases nor did she compare the approach adopted in the above cases with the circumstances of the present case. The approach adopted by the magistrate in regard to sentence in this matter, amounts, in my view to a misdirection, the nature and degree which is sufficient to enable this court to interfere and reconsider sentence. Even though the rapes committed by the appellant were callous and_ brutal they do not in my view qualify as falling in the category of the worst cases of rape. In my view the trial magistrate also failed and neglected to take into account the appellant's favourable personal circumstances. He was 27 years old. Although unmarried, he supported two children. He had fixed employment and was a first offender. At the time of sentence he had been in custody for a year. The magistrate also failed to take into account that the rapes on counts 2-5 are very closely connected in time and space.

[60] Having regard to the cumulative effect of all these factors, I am of the view that substantial and compelling circumstances do indeed exist to impose a lesser sentence than ten (10) years in respect of count 1 and life imprisonment in respect of counts 2 - 5.

[61] Having said that, the crimes remain very serious and must be punished severely. Taking into account all the factors relevant to sentence, I am satisfied that a term of eight (8) years imprisonment on count 1 and a term of twenty (20) years imprisonment on counts 2 - 5 (counts 2 - 5 taken together for the purpose of sentence) is a more reasonable, balanced and justifiable sentence in this matter.

[62] In the premises, I would propose the following order:

- (1) The appeal succeeds in respect of count 6 and the conviction and sentence of six (6) months imprisonment for assault is set aside.
- (2) The appeal in respect of counts 1 to 5 is dismissed.
- (3) The sentence of ten (10) years imprisonment in respect of count 1 and the sentence of life imprisonment in respect of counts 2 to 5 imposed by the court *a quo* are set aside and are substituted with the following sentences:
Count 1: Eight (8) years imprisonment.
Counts 2-5: are taken together for the purposes of sentence and the accused is sentenced to twenty (20) years imprisonment.
- (4) In terms of s 280 of the Criminal Procedure Act 51 of 1977, the sentence imposed on count 1 shall run concurrently with the sentence of twenty (20) years imprisonment imposed on counts 2-5.
- (5) In terms of s 282 of the Criminal Procedure Act 51 of 1977, the sentence is antedated to 19 May 2008.

J. F. RILEY, AJ

I agree. It is so ordered.

N. J. YEKISO, J