



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

REPORTABLE

CASE NO: AR96/2018

In the matter between:

XOLANI NDLOVU

Appellant

and

THE STATE

Respondent

ORDER

- (a) The appeal against the conviction is dismissed.
- (b) The appeal against the sentence succeeds. The sentence of life imprisonment is set aside and replaced with a sentence of 15 years' imprisonment. The sentence is ante-dated to 23 May 2017.

JUDGMENT

Delivered on: 12 August 2019

Ploos van Amstel J (Bezuidenhout J concurring)

[1] I have read the judgment prepared by my colleague Hadebe J. I agree with her that the appeal against the conviction of rape should fail, for the reasons set out in her judgment. I write separately because we differ on a point of law with regard to sentence. This concerns the decision of the Supreme Court of Appeal in *Mahlase v S*,¹ and in particular whether we are bound to follow it in the matter before us.

[2] The magistrate found that the complainant was raped several times by the appellant and his companions, acting with a common purpose, after they had kidnapped her from her home. The appellant was the only one who was arrested and prosecuted. The identities of his co-perpetrators are not known.

[3] The magistrate held that the prescribed minimum sentence was life imprisonment in terms of s 51(1) of the Criminal Law Amendment Act 105 of 1997 read with Part 1 of Schedule 2. Part 1 includes the offence of rape as contemplated in s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, when committed in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice; or by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy. He found that there were no substantial and compelling circumstances which justified the imposition of a lesser sentence, and imposed life imprisonment.

[4] In *Mahlase* the appellant had been convicted in a High Court of robbery, rape and four counts of kidnapping. In respect of the robbery he was sentenced to 20 years' imprisonment, life imprisonment in respect of the rape and five years' imprisonment in respect of each of the kidnapping convictions. The basis on which the trial court imposed life imprisonment in respect of the conviction of rape was that the victim had been raped by more than one person.² On appeal Tshiqi JA (with whom Lewis and Theron JJA concurred) referred to this as a misdirection and said the trial judge had overlooked the fact that the other person who had raped the victim was not before the trial court and had not yet been convicted of the rape. She said in those circumstances it could not be held that the rape fell within the provisions of Part 1 (where the victim was raped more than once), with the result that the

¹ *Mahlase v The State* [2011] ZASCA 191.

² See *S v Cock*; *S v Manuel* 2015 (2) SACR 115 (ECG) para 19, where Pickering J quotes from the trial court's judgment in *Mahlase*.

minimum sentence for rape was not applicable. The sentence of life imprisonment was set aside and replaced with 15 years' imprisonment.

[5] In subsequent cases a number of judges have expressed their puzzlement about the reasoning and outcome in *Mahlase*. In *Cock and Manuel*³ the court dealt with two separate appeals directed against a sentence of life imprisonment imposed on each of the appellants consequent upon their convictions on a charge of rape. The convictions of the two appellants arose out of the same incident, the State having alleged that on 26 December 2010 the complainant was raped by both appellants, who were acting in the furtherance or execution of a common purpose to rape her. The one appellant, Cock, was apprehended first. He pleaded guilty and in respect of the conviction of rape was sentenced to life imprisonment. The other appellant, Manuel, was only apprehended after Cock had been sentenced. He also pleaded guilty and in respect of the conviction of rape was sentenced to life imprisonment.

[6] Pickering J (writing for a full court) said *Mahlase* gave rise to an anomalous situation in that the appellant Cock was liable to a minimum prescribed sentence of ten years' imprisonment, and any other accused who is thereafter convicted as having been part of the gang which raped the complainant (the appellant Manuel) would be liable to the prescribed minimum sentence of life imprisonment, it by then having been established, in terms of *Mahlase*, that the complainant had indeed been raped more than once, by two men. The learned judge expressed himself as follows:

'[27] I do not understand on what basis the credible and cogent evidence of the complainant that she was raped by two men, one of whom was identified as being the accused, should be disregarded, not only to the prejudice of the victim and of the state, but also, by way of contrast, to the benefit of the accused on the arbitrary basis that he happened to be the first of the gang to have been arrested and convicted.'

[7] The full court found that despite these difficulties, it was bound by *Mahlase*. It held therefore that the trial judge had erred in finding, in the case of the appellant Cock, that the prescribed minimum sentence of life imprisonment was applicable. The court set the sentence aside, proceeded to consider the question of sentence afresh, and in the exercise of its common law jurisdiction held that the only appropriate sentence in the circumstances of the case was life imprisonment, which

³ Note 2 above.

it imposed. In the case of the appellant Manuel the prescribed minimum sentence of life imprisonment was applicable in as much as his accomplice, Cock, had already been convicted of raping the complainant. In Manuel's case the sentence of life imprisonment was upheld.

[8] In the matter before us the trial took place in a regional court. The effect of *Mahlase* is that the regional magistrate erred in approaching the matter on the basis that the prescribed minimum sentence was life imprisonment. The offence then fell in Part III of Schedule 2 and the prescribed minimum sentence was ten years' imprisonment, which the regional court could, in terms of s 51 (2), exceed by not more than five years. We can of course not impose a sentence in excess of what the regional court could have imposed.⁴

[9] Counsel for the State referred us to a judgment of the Gauteng Local Division, Johannesburg, in *Khanye v The State*,⁵ where a full court held that it was not obliged to follow *Mahlase*. In that matter the appellant had been convicted in a regional court of kidnapping, assault with intent to do grievous bodily harm and rape. In respect of the conviction of rape he was sentenced to life imprisonment on the basis that this was the prescribed minimum sentence, as he had encouraged others to rape the victim after him.⁶

[10] The reasoning by Carelse J, who wrote for the full court, was as follows. Although the full court was bound by *Mahlase*, it was equally bound by *S v Legoa*.⁷ In *Legoa* Cameron JA said⁸ when the commission of offences scheduled in the minimum sentencing legislation is proved in the form specified in the schedule, the sentencing court acquires an enhanced penalty jurisdiction. It acquires that jurisdiction, however, only if the evidence regarding all the elements of the form of the scheduled offence is led before verdict on guilt or innocence, and the trial court finds that all the elements specified in the schedule are present. Carelse J said the ratio of *Legoa* is that once the jurisdictional facts have been proved, a court is obliged to impose the prescribed minimum sentence unless substantial and compelling circumstances are found to exist. Therefore, once it is proved that the complainant was raped more than once, whether by the accused or by more than

⁴ In *S v Cock*; *S v Manuel* the trial took place in the High Court.

⁵ *Khanye v The State* (A66/2015) [2017] ZAGPJHC 320 (13 March 2017).

⁶ Part I of Schedule 2.

⁷ *S v Legoa* 2003 (1) SACR 13 (SCA).

⁸ Para 18.

one person, the prescribed minimum sentence is triggered. The learned judge pointed out that the trial court in that matter had found that the victim was raped three times by three different men, and held that in those circumstances the prescribed minimum sentence was imprisonment for life. She added that, if the case was not distinguishable from *Mahlase*, it was such a ghastly case of rape that it would justify a life sentence. It would appear that the court overlooked the fact that it was dealing with an appeal from a regional court, which could only have imposed life imprisonment if the matter fell within Part I of Schedule 2.

[11] It seems to me, with respect, that there is a flaw in the reasoning in *Khanye*. The effect of *Mahlase* is that it cannot be said that the victim had been raped by more than one person unless both of them have been convicted. Put differently, unless both have been convicted the jurisdictional facts required to trigger the application of Part I have not been proved. It is no answer to say, as *Khanye* seems to say, that on the basis of *Legoa* the prescribed minimum sentence has to be imposed when the relevant jurisdictional facts have been proved, and that therefore *Mahlase* does not have to be followed. This begs the question of what constitutes such proof. According to *Mahlase* it is the conviction of both.

[12] Counsel for the State submitted before us that the decision in *Mahlase* is wrong. We are not concerned with whether or not this is so. It is a judgment of the Supreme Court of Appeal and we are bound by it.⁹ The courts in *S v Cock*; *S v Manuel*, and *Nyaku v S*¹⁰ also considered themselves bound by it. In the latter case it appears that the court, as in *Khanye*, overlooked the fact that it was dealing with an appeal from a regional court. When it found that on the basis of *Mahlase* the prescribed minimum sentence of life imprisonment did not apply, it could not impose a sentence in excess of what the regional court could have imposed.

[13] The result in my view is that the prescribed minimum sentence in the present matter was ten years' imprisonment, as provided for in Part III of Schedule 2. In terms of s 51 (2) the regional magistrate could have imposed an additional five years' imprisonment.¹¹

⁹ With regard to the deference owed by a court to the decisions of a higher court, see *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd* 2004 (3) SA 160 (SCA) and the cases referred to in para 20 of that judgment.

¹⁰ *Nyaku v S* (A212/2018) [2018] ZAFSHC 208 (22 November 2018).

¹¹ The finding that the offence of which the appellant was convicted does not fall within Part I of Schedule 2 because none of his co-perpetrators have been convicted, is a finding in the appellant's

[14] The circumstances of the rape were horrendous and I agree with my colleague that the appellant deserved to be sentenced to imprisonment for life. On the basis that I have explained, that option is unfortunately not open to us.

[15] This court is therefore unanimous with regard to the appeal against the conviction, but with regard to sentence there is a dissenting judgment.

[16] On the basis that we are bound to follow *Mahlase*, the following order is made:

- (a) The appeal against the conviction is dismissed.
- (b) The appeal against the sentence succeeds. The sentence of life imprisonment is set aside and replaced with a sentence of 15 years' imprisonment. The sentence is ante-dated to 23 May 2017.

Ploos van Amstel J

Hadebe J (dissenting on sentence):

[17] This is an appeal against conviction and sentence on rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 read with s 51(1) and Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (the CLAA).

[18] The appellant was initially charged on two counts i.e. the count of rape and that of kidnapping before the Regional Court, Pietermaritzburg. He was convicted on both counts and was sentenced to life and three years' imprisonment respectively.

[19] He launched an application for leave to appeal against his conviction and sentence on the count of kidnapping. His application was dismissed by the trial court with the court finding that there were no prospects of success in the case of both conviction and sentence in respect of that count. The dismissal of the application for leave to appeal against the conviction and sentence on the count of kidnapping was never petitioned by the appellant and as such, it stands.

favour on a question of law. In the light thereof the State has the right, in terms of s 311 of the Criminal Procedure Act 51 of 1977, to take the matter on appeal to the Supreme Court of Appeal, should it so wish.

[20] In the appeal before us, the appellant is basing his appeal on his automatic right of appeal in terms of s 309(1)(a) of the Criminal Procedure Act 51 of 1977.

[21] The appellant is challenging his conviction and sentence on the rape charge on the basis that the complainant was a single witness and the averment by the appellant in this regard is that her evidence was not reliable on account of the contradictions between her evidence and the other two State witnesses, the Madondos, who are her neighbours and also the contradictions based on the reports she made to her mother as well as to the Madondos. The other criticism of the complainant's evidence is based on the reports she made to the doctor and the actual findings made by the doctor in so far as the existence of injuries on the complainant is concerned.

[22] On the aspect of the sentence handed down by the trial court, the submission made on behalf of the appellant is that the learned regional magistrate failed to attach sufficient weight to mitigating factors based on the appellant's personal circumstances and that had the court done so, it would have found that cumulatively these factors amounted to substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence.

[23] During argument at the hearing of this appeal before us, the parties' attention was drawn to the judgment of *S v Mahlase* 2013 JDR 2714 (SCA). This is a judgment where a s 204 witness had testified that the complainant had been raped by three men. Only the appellant had appeared before Makgoba J sitting as a court of first instance in Thohoyandou, Limpopo High Court. Although the evidence proved that the complainant had been gang raped and Makgoba J found as such the Supreme Court of Appeal found that the trial court had misdirected itself in finding that the provisions of Part 1 of sch 2 of the CLAA were applicable in these circumstances.

[24] The parties seemed not to have been aware of the *Mahlase* judgment. They were thus accordingly invited to submit further heads of argument which they have obligingly done. Counsel for the appellant insists that this court should abide by the *Mahlase* judgment and not impose the sentence of life imprisonment. The argument on behalf of the State on the other hand is that this court should not follow the decision of the SCA in the *Mahlase* judgment. The court has been referred to decisions of other divisions of the high court where the *Mahlase* judgment has not

been followed. These are the judgment of Pickering J (with Plasket and Smith JJ concurring) in *Cock v S; Manuel v S*; the judgment of Carelse J also writing for the full court in *Khanye v The State* (Counsel for the State has also referred us to the writing of the authors Hahlo and Khan: *The South African Legal System and its Background* (1968) at 245 – 257 where they write under the heading: Sources of Law: Judicial Precedent.

[25] I will revert to what is entailed by the authorities to which we have been referred to and whether such references have any impact on the matter that this court is seized with.

[26] The evidence presented by the State at the trial of this matter was to the effect that in the early hours of 29 November 2014, the complainant was abducted from her home. She was physically carried to a secluded house by three men wearing balaclavas. The men had gained entry into her home by raising down the kitchen door to her house.

[27] Whilst the breaking down of the kitchen door was ongoing, she had run to her mother's bedroom to try and alert her to what was happening. She discovered that her mother was not in her bedroom. Her sister's children who had been sleeping with her mother were alone inside the mother's bedroom. She had then called out for help to a neighbouring Madondo house. The lady of the house had assured her that she and her husband were on their way.

[28] The abductors overtook the Madondos to the house when they managed to gain entry and remove the complainant. In the process of her abduction, the complainant's 14 month old baby with whom she had been sleeping in her bed was left behind crying frantically.

[29] As soon as the complainant was out of her home, now in the hands of her captors, she was muzzled with sellotape and the same tape was used to close her eyes. She could hear the Madondos calling out her name as she was caused to drift away from her home. She could not respond as she was now taped around her mouth.

[30] Immediately as she and the three males entered the unknown room, the lights were put on and the appellant removed his balaclava. He enquired if the complainant knew him. She denied such knowledge. This denial was not the truth as she actually

knew the appellant. At one stage he had come to her house to deliver material to build an RDP house at her home. The appellant had shown interest in the complainant, asking her to give him her cell number. This had been rejected by the complainant who was not interested in the appellant's advances. She said she had deliberately denied knowing him as she feared that if she confirmed such knowledge of the appellant, the likelihood was that he might kill her.

[31] It was at that stage that the appellant started gloating, asking the complainant if she thought he would not find her. Having the complainant now at his mercy, exactly where he wanted her, he proceeded to undress the complainant, leaving her stark naked. With the help of his companions, he managed to tie the complainant onto the bed where she had been caused to sit, each of her arms and each of her legs was tied to the extreme end of the bed. She was again taped around her mouth and eyes. At that stage she was aware that the appellant had also completely undressed himself. His two companions still had their balaclavas on and had not removed their clothes.

[32] She felt somebody mounting on top of her, penetrating her and having sexual intercourse with her. She was repeatedly raped by what she believes were different people. In her blinded state, she was unable to say who exactly raped her at what turn. However, she was aware that after the first person had ejaculated into her vagina, he had invited the second person to have his turn in raping her. The process went on, with the people taking turns in raping her vaginally. In the process, they would ask each other to make it quick, so that the next person would have his turn. At one stage she felt herself being wiped with something that felt like a towel. As the rape continued, with her captors taking turns as indicated, she could only feel a person climbing on top of her but could not feel anything thereafter. She attributed this to numbness caused by the pain she felt around her vaginal area.

[33] She was aware that at one stage she was turned around and was caused to kneel on the bed. She was penetrated anally, by at least two people taking turns. After the first anal penetration, she felt that she was being wiped with something that felt like a wet towel. She was again penetrated anally for the second time. When she was turned around to lie on her back, it was at that stage that she realised she was bleeding from her anus.

[34] The sellotape was removed after the anal abuse of the complainant. She realised that all three men were naked. The two still had their balaclavas on whereas the appellant's face was still uncovered. At this stage the appellant persisted in questioning the complainant if even then she still maintained that she did not know him. She still maintained that she did not know the appellant. The appellant started making threats that he would kill the complainant because she had lied. He was concerned that if they let her go, she would go and report her ordeal to the police.

[35] She begged the appellant, asking him to consider her little child. She gave him assurances that she would not make a report to the police. The appellant insisted that she needed to be killed. When she tried to cry out at this insistence by the appellant, the latter replaced the sellotape around her mouth. At this stage the sun was up and she could clearly observe her surroundings and the people around her. The other two people still had their balaclavas on. One of the other two pleaded the complainant's case, indicating they should let her go. The appellant was seriously opposed to that suggestion, indicating that she could not be let free as she knew him, had seen him and that she would go and report the incident to the police.

[36] The men seem to have taken their time in their naked pose; they sat around and started smoking. The complainant was right through naked, with the three men sitting around her, seemingly savouring their conquest. Something seems to have struck a human nerve on the appellant as he enquired if the complainant wanted anything to eat, which offer she denied. He then informed her that they were going on a drinking spree and that on their return, they would kill her. She told the court that this caused her hurt and she started crying all over again.

[37] As the three men were leaving, after they had dressed up, it was the appellant who took an electric cord, using it to tie together the complainant's hands. The three men left, taking her pyjamas with them. She could hear the door being locked from the outside. She was left inside the room where she had endured her ordeal from the early hours of the morning until sunrise. She sat there contemplating her fate. She resolutely tried to untie herself which she eventually managed to do. She removed the sellotape from around her mouth. She spotted a bucket inside the same room. She turned it upside down, climbed on top of it and jumped out of the window, still naked as she had been right through the day. It was now night and her abductors had not returned to the room where they had left her.

[38] After she had managed to exit through the window, looking around, the complainant realised that the house where she had been holed in was a Dlamini house, a residence in the area. It transpired and was not disputed under cross-examination that the Dlamini homestead, where the complainant had been detained was actually a place where the appellant rented premises. His actual home was confirmed to be at Ezakheni, Ladysmith by the investigating officer, Constable Bhengu who effected the arrest of the appellant at his parental home.

[39] The complainant ran all the way until she reached her home where she found that her family had gathered around. She was still stark naked when she reached her home.

[40] Although the complainant made every effort to be seen by a doctor on the same night, she was caused to wait and shuffle on the hospital benches until the following day when she was eventually examined by a doctor. The doctor who examined the complainant was no longer available at the trial stage of this matter. The report of the doctor's findings was read into the record by a Dr A Akinola who described himself as the Head of the Thuthuzela Care Centre, Edendale Hospital. He could not advise of the whereabouts of Dr Dladi who had examined the complainant at the same Centre after the rape incident.

[41] Of relevance in the report read into the record by Dr Akinola are the findings of the examining doctor that the findings were in keeping with the history (given) and that sexual assault could not be excluded. His expert advice to the court under cross-examination is relevant. This is what he said in this regard.¹²

'Q. And will you be able to inform us maybe as to why there would be no injuries as to if there was blunt force?

A. Okay, firstly, if the hymen is absent, there is less resistance to go through to bluntly penetrate the vagina. Number two, the level of relaxation, or I can call it submission of the victim. And by that, I mean if the victim is tense and there was a lot of struggle, we will expect to see some or more injuries. And if the client is **submissive** [my emphasis], we will see less injuries.

Q. Now, doctor, if the hymen were absent and, as indicated, was only one centimetre of the finger that could be inserted, would there still probably be no injuries?

¹² Page 102, line 7 to line 20.

A. Yeah, there is also possibility of there being no injury. You must also remember that the vagina is capable of expanding widely, that is where babies come from, you know, so it is quite possible.'

[42] Dr Akinola went on explaining, giving his opinion under which circumstances injuries in the anal area could be observed depending on the capacity, training and competency of the particular doctor doing the examination.

[43] According to the version of the appellant the sexual intercourse between him and the complainant on the morning of the incident was pre-planned. He had been proposing love to the complainant prior to this. He had come across her at a local shop on the morning prior to the day of the incident and arrangements had been made for him to come to the complainant's home as her mother would not be around. He had obliged and had gone to the complainant's home that same evening.

[44] From the appellant's version it is apparent that the complainant was worried about the children who would be left alone. His version does not go far enough to indicate what was going to be the solution for this hurdle. He seems to leave that aspect hanging and jumps to the part where he and the complainant had to move to his place and ended up being intimate.

[45] I found this statement by the appellant intriguing "...nothing was mentioned about love because the way we were towards each other, it was as if we were loving – we were in a love relationship with each other." Surely, nothing in this statement, in my mind suggests that the complainant ever acceded to the appellant's love proposals.

[46] Another aspect of the appellant's evidence which was new when he testified is the fact that when he left with the complainant she was wearing a track suit. This was never put to the complainant. Her evidence was clear, indicating that she was taken from her home in her pyjamas as she had been sleeping with her 14 month old baby.

[47] It was also a new aspect of the appellant's version that the complainant ever asked to use his cellphone to phone through to her cellphone which according to him she had found to be off.

[48] It is common cause that this so called pre-arranged visit by the complainant, to the appellant's apartment was for the first time on the day of the incident. He

never saw her nor spoke to her again after that. When he heard that the police and members of the community were looking for him, he had disappeared from the surface of the earth and had gone back to his homestead in Ladysmith, leaving his employment behind.

[49] In his evaluation of the evidence in its totality, the regional magistrate found the appellant's version to be palpably false and rejected it. He warned himself that he had to approach the evidence of the complainant with the necessary caution. On the proven facts he found that any other inference was excluded other than the inference that the complainant was raped by more than one person including the appellant and that those people were furthering a common purpose.

[50] Based on the totality of the evidence before it, the court found that the guilt of the appellant had been proved beyond reasonable doubt in relation to the two counts, to wit the counts of rape and kidnapping.

[51] The trial court's findings of fact and credibility are presumed to be correct because the trial court has had the advantage of seeing and hearing the witnesses and is in the best position to determine where the truth lies (See *S v Francis* 1991 (1) SACR 198 (A) at 204c-d); *R v Dhlumayo & another* 1948 (2) SA 677 (A)). It is only in instances where a court of appeal finds that there was demonstrable and material misdirection on the part of the trial court in its findings of fact that it would find reason to interfere (*S v Hadebe & others* 1997 (2) SACR 641 (SCA) at 645e-f).

[52] A consideration of the regional magistrate's judgment shows that he went through the evidence with a fine comb. Along the analysis of the evidence, he warned himself of the questions that his judgment had to answer. He was alive to the issues of where the onus rested.

[53] The following aspects of the evidence are worth noting. In the entire ordeal that the complainant was subjected to, the appellant appears to have taken a lead role. He was the one who took the initiative when the complainant was tied up and blindfolded before she was brutally raped and indecently assaulted repeatedly. He is the very person who tied the complainant after she had been raped. He is the one who insisted that the complainant needed to be silenced by having her killed.

[54] The appellant has selectively avoided incorporating as part of his evidence that he had initially requested to be given the complainant's cell number and this

request was rejected by the complainant. After the kidnapping and inside the appellant's room the first question that he asked the complainant was if she thought he would not find her. His arrogance and the feeling of control blinded him so much that he was the only one who removed his balaclava when his companions had them on until they left his room.

[55] The State witnesses, including the complainant's mother corroborated the complainant's version on material aspects. Their evidence sufficiently showed that entry into the house was forced. Mr and Mrs Madondo confirmed that the complainant had called out for help in those odd hours of the morning. When Mrs Madondo returned with the complainant's mother after she had gone to call her from where she was, both women confirmed that the complainant's toddler was crying uncontrollably in the dark room where his/her mother had been forcefully taken from. The lights in the house were only put on when the complainant's mother, Ms Mvelase, returned to her home.

[56] The complainant confirmed that the assailants had struck at about 2:45am, she had confirmed the time from her cellphone which was next to where she had been sleeping. Mrs Madondo and her husband confirmed that it was around that time that they had heard the complainant's screams for help. Ms Mvelase finally confirmed that it was around 3:00 in the morning that she returned to her house after she had been alerted by Mrs Madondo as to what was happening at her home. This volume of evidence around the time of the occurrence of the incident puts to question the version of the appellant that he had left with the complainant, with her co-operation that very same night.

[57] The other consideration is that the evidence clearly shows that the complainant only learned for the first time when the door to her home was banged at that her mother was not around. Clearly in the circumstances she could not have made prior arrangements for the appellant to come around on the understanding that her mother was not going to be at home.

[58] The issue of the contradictions raised in the appellant's argument pales in the face of the overwhelming evidence against him. As was stated in *S v Mafaladiso en Andere* 2003 (1) SACR 583 (SCA) at 593-594, not every error by a witness nor every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. This statement finds equal application in the instant

matter. The issue of whether the door was lying flat on the ground or whether it was still holding by the frame, the issue whether the lights were on or not are irrelevant in the light of the overwhelming and uncontradicted evidence presented by the State at the trial of this matter.

[59] I in the circumstances find no misdirection by the regional magistrate, either on fact or on the law, and I am of the view that there will be no justification for this court to interfere with his findings that the appellant is guilty of raping the complainant in furthering a common purpose with his companions.

[60] In handing down sentence, the learned regional magistrate considered the following: that;

- (a) sentencing is not an act of vengeance but an act of correction;
- (b) the sentencing on the count of rape falls to be considered in terms of the minimum sentencing regime which prescribes certain minimum sentences;
- (c) though the CLAA did not eliminate his sentencing discretion, it did, to a certain extent limit it;
- (d) the triad, incorporating the appellant's interests and his personal circumstances;
- (e) he had to engage in a balancing exercise, ie balancing the personal interests of the appellant, the nature of the crime including the seriousness and prevalence thereof and lastly the interests of society. In this regard, the learned regional magistrate warned himself of the fact that the sentence he was to pass should not be to please or fulfil public opinion but to serve the public interest;
- (f) he took into consideration the humiliation that was brought to bear on the complainant in the hands of the appellant and his companions, her dignity that she was completely stripped off;
- (g) he found that there were no substantial and compelling circumstances in the case of the appellant to persuade him to deviate from the prescribed minimum sentence applicable in a case of this nature; and

- (h) he warned himself of the vagaries of a life imprisonment, that it is not a norm, and not a sentence that one can just impose lightly. He found the sentence of life imprisonment to be the only appropriate sentence in the circumstances of this case.

[61] Rape on its own is a horrible experience to be endured by any woman. It stamps the authority of someone's control over the woman's body. It reminds every woman and girl child of how vulnerable they are in a country where the statistics of rape on women and girl children are alarming and do not seem to be abating. It has escalated to such heights that it seems that there is no space that is safe for women. The present case bears testimony to that. The complainant was removed from the safety and sanctity of her parents' home to a secluded spot where she was severely, brutally and mercilessly abused over a prolonged time. She was ridiculed by the appellant and reminded that she could not stand in his way, he could do what he wanted to with her body. As if that was not enough, she was threatened with being killed. I cannot think of any horrific treatment of a human being by another human being than what the complainant endured in the hands of the appellant and his companions.

[62] I associate myself fully with the following pronouncements by Victor J in *S v MS* 2014 (1) SACR 59 (GNP) para 25:

'In regard to an appropriate sentence, the appellant's attitude reflected an approach to women....that they are mere chattels to be used at his will...'

And Bosielo JA in *S v Mashigo* 2015 JDR 0907 (SCA) para 29 that:

'...The evidence paints a horrid picture of three men waiting in the dark for the poor and vulnerable complainant...This behaviour shows lack of respect for the complainant's right to life, her physical integrity, freedom of movement and importantly, her human dignity. The appellant has proffered no explanation for this egregiously barbaric behaviour.'

[63] It is in matters like the present one that courts must, without reservation express their indignation to the type of behaviour as was exhibited by the appellant and his companions. In the victim impact statement, the complainant says:

'I am completely destroyed". That is what the act of rape does to a rape victim. *S v C* 1996(2) SACR 181 correctly noted that what a rapist does is not murdering his victim but that he murders her self-respect and destroys her feeling of physical and mental integrity. The judgment in *S v C* also noted that the monstrous deed of a rapist often haunts his victim

and subjects her to mental torment for the rest of her life, a fate often worse than a loss of life.'

[64] The legislature has put in place sufficiently enabling legislation in the form of the CLAA for cases of this nature. It is now well documented that sentences provided for in this piece of legislation are not to be deviated from lightly and for flimsy reasons which cannot withstand scrutiny (*S v Malgas* 2001 (1) SACR 469 (SCA) para 9).

[65] I am mindful of the reasoning in the Supreme Court of Appeal judgment of *Mahlase v S* where the following was said at para 9 of that judgment:

'...The learned judge however overlooked the fact that because accused 2 and 6, who were implicated by Mr Mahlangu, were not before the trial court and had not yet been convicted of the rape, it cannot be held that the rape fell within the provisions of Part 1 Schedule 2 of the Criminal Law Amendment Act (where the victim is raped more than once) as the high court found that it did. It follows that the minimum sentence for rape was not applicable to the rape conviction and the sentence of life imprisonment must be set aside'.

[66] Section 51 of the CLAA deals with discretionary minimum sentences for certain offences and it provides as follows:

'(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or High Court **shall** sentence a person it has convicted of an offence referred to in Part 1 of Schedule 2 to imprisonment for life.' **(my emphasis)**

Subsection 3 deals with the existence of substantial and compelling circumstances in any given case and how these should be dealt with if they were to be found to exist, whereas subsec 6 deals with the exclusion from the application of s 51 of offenders who would have been 18 years of age at the time of the commission of the offence.

[67] Part 1 of Schedule 2 of the CLAA deals with categories of offences in terms of which s 51(1) finds application. Under the category of rape as contemplated in s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 para (a) (ii) makes provision for rape when committed "by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy".

[68] It is clear from the submissions on sentence made by the parties in the court a quo that the regional magistrate was not referred to the *Mahlase* judgment and as

such he did not consider it in his judgment on sentence. He relied on s 51(1) as it stands in the statute book. I must, with the utmost respect say at this juncture that I find myself puzzled by the reasoning of the Supreme Court of Appeal in *Mahlase*. A consideration of the provisions of s 51(1) do not seem, with respect to provide room for the condition that for this section to find application the perpetrators of a gang rape must all be before the trial court and also be convicted of rape. The section makes the imposition of life imprisonment peremptory pursuant to a conviction of “a person” in the relevant categories of offences dealt with in terms of this section.

[69] In his judgment in *S v Cock; S v Manuel* 2015 (2) SACR 115 (ECG) Pickering J (writing for the full court) says the following at para 23 regarding the *Mahlase* judgment:

‘Reverting to what is stated in para 9, I have with greatest respect, considerable difficulty in understanding the basis upon which the conclusion was reached that the rape did not fall within the provisions of part I of Schedule 2 to the act where the complainant had been raped more than once by more than one person.’

[70] Being unable to agree with the court’s finding in *Mahlase* though agreeing that he was still bound thereby Pickering J resorted to his common law jurisdiction, and was able to avoid the binding effect of *Mahlase* and to impose the sentence of life imprisonment anyway.

[71] In *Khanye v S* (A66/2015) [2017] ZAGPJHC 320 (13 March 2017), Carelse J referred to what was said in *S v Legoa* 2003 (1) SACR 13 (SCA) regarding the application of minimum sentences. The following appears at para 18 of the *Legoa* judgment:

‘It is correct that, in specifying an enhanced penal jurisdiction for particular forms of an existing offence, the legislature does not create a new type of offence. Thus ‘robbery with aggravating circumstances’ is not a new offence. The offences scheduled in the minimum sentencing legislation are likewise not new offences. They are but specific terms of existing offences, and when their commission is proved in the form specified in the schedule, the sentencing court acquires an enhanced penalty jurisdiction. It acquires that jurisdiction, however, only if the evidence regarding all the elements of the term of the scheduled offence is led before verdict on guilt or innocence, and the trial court finds that all the elements specified in the schedule are present...’ (footnotes omitted)

[72] Carelse J was of the view that had the Supreme Court of Appeal considered *S v Legoa*, in *Mahlase*, this may have resulted in a different finding.

[73] Writing under “Sources of Law – Judicial Precedent”, the authors *Hahlo & Kahn*¹³ make it clear that the appellate division expects lower courts to follow the *rationes decidendi* of its decisions whatever the size of the appellate division bench. In the same paragraph, the learned authors state the following:

‘The obligation would not exist where there was subsequent overriding legislation or the Appellate Division’s decision had been rendered *per incuriam*. *Incuria* is probably confined to the ultimate court’s overlooking legislation governing the case...’ (footnote omitted).

and at page 247:

‘Obviously the Appellate Division will no more regard itself as bound by one of its decisions than will a lower court, where it was rendered *per incuriam* or there was later overriding legislation. *Incuria* would include overlooking a governing enactment or one of its own decisions in point.’

[74] Pickering J was of the considered view that once the evidence establishes beyond reasonable doubt that the complainant was raped more than once by two men, one of whom was the accused and that once that evidence is accepted, the fact that one of the men who raped the complainant had not been apprehended and convicted of the rape appeared to be entirely irrelevant to him. I endorse this view.

[75] In the matter before us there is evidence in abundance that the complainant was repeatedly raped and indecently assaulted by three men who took turns in raping her. The fact that the appellant ended up being the only one to be prosecuted, does not, in my mind change the correct finding of the regional magistrate that the appellant acted in concert with his companions to achieve a common purpose, ie of raping and humiliating the complainant.

[76] As in the case of *S v Cock*; *S v Manuel* the judgment dealt with by Pickering J in a case like the one before us, I would be of the view that the prescribed minimum sentence of ten years’ imprisonment would be outrageous. I have extensively dealt with what complainant had to deal with in the present matter.

¹³ At page 245.

[77] I am of the firm view that the only and appropriate sentence in this case involving this type of rape of the complainant is that of life imprisonment. In that sense, I find no irregularity in the magistrate's finding that the sentence of life imprisonment was the only appropriate sentence in these circumstances.

[78] Having warned myself of the binding effect of the *Mahlase* judgment, I, like the other judges in the judgments I have referred to in the previous paragraphs, with respect find myself in great difficulty to agree with the reasoning in the *Mahlase* judgment. One of the greatest concerns in my mind are the expressions that the court in *Mahlase* chose to employ. At para 4 the following expressions appear:

'...Ms D M was raped, **apparently** more than once, and **allegedly** by more than one of the assailants. [my emphasis]

[79] I find these expressions concerning in that, in my mind, and with respect to the Supreme Court of Appeal justices, they do not seem to convey the finding of Makgoba J that the complainant was indeed raped by more than one person.

[80] Having considered the authorities that I have, I am satisfied that the present case is one such deserving case where the obligation to be bound by a decision of the Supreme Court of Appeal can be avoided. In interfering with the sentence in the *Mahlase* judgment the SCA did, in my respectful view overlook the provisions of s 51 (1) of the CLAA read with Part 1 of Schedule 2. I accordingly find no misdirection or irregularity in the magistrate's decision to sentence the appellant in terms of this enabling piece of legislation.

[81] I would have made the following order:

"The appeal against conviction and sentence is dismissed".

Hadebe J

Appearances:

For the Appellant : Z Fareed
Instructed by : Pietermaritzburg Justice Centre

For the Respondent : C Kander
Instructed by : The Director of Public Prosecutions
: Pietermaritzburg

Date Judgment Reserved : 28 June 2019
Date of Judgment : 12 August 2019