Republic of South Africa

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

High Court Case No: A 127/2014

In the matter between:

NVUMELENI JEZILE **Appellant**

and

THE STATE **Respondent**

NATIONAL HOUSE OF TRADITIONAL LEADERS **1st Amicus Curiae**

WOMEN'S LEGAL CENTRE TRUST **2nd Amicus Curiae**

CENTRE FOR CHILD LAW **3rd Amicus Curiae**

COMMISSION FOR GENDER EQUALITY **4th Amicus Curiae**

RURAL WOMEN'S MOVEMENT **5th Amicus Curiae**

MASIMANYANE WOMEN'S SUPPORT CENTRE **6th Amicus Curiae**

COMMISSION FOR THE PROMOTION AND PROTECTION OF RIGHTS OF CULTURAL, RELIGIOUS AND LINGUISTIC COMMUNITIES **7th Amicus Curiae**

Court: Justice N J Yekiso, Justice V Saldanha *et* Justice J Cloete

Heard: 22 August 2014, 24 October 2014 and 5 December 2014

Delivered: 23 March 2015

JUDGMENT

The Court

Introduction

[1] On 7 November 2013 the appellant was convicted in the Wynberg regional court on one count of human trafficking, three counts of rape, one count of assault with intent to cause grievous bodily harm and one count of common assault. All of the convictions pertain to a single complainant.

[2] On 13 February 2014 the appellant was sentenced to 10 years' imprisonment on the human trafficking count, 20 years' imprisonment on the 3 rape counts (which were taken together for purposes of sentence), 6 months' imprisonment on the count of assault with intent to cause grievous bodily harm, and 30 days imprisonment on the count of common assault. The trial court further ordered that 8 years of the sentence for human trafficking, as well as the sentences imposed for the two assaults, would be served concurrently with the sentence imposed for the rapes. The appellant was thus sentenced to an effective

22 years' direct imprisonment. In addition, the trial court ordered that the appellant's details be included in the National Register for Sexual Offenders in accordance with s 50(2)(a) of the Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007 (*'the Sexual Offences Act'*).

[3] The convictions all relate to a series of events which occurred over the period January to March 2010, starting in a remote rural area of the Eastern Cape and ending with the complainant fleeing from the appellant's home in Philippi near Cape Town and laying criminal charges against him.

Background

[4] The facts which became common cause during the trial are succinctly set out in the trial court's judgment and we can do no better than to largely repeat them, amplifying where we consider it necessary.

[5] During December 2009 or early January 2010 the appellant, who was 28 years old at the time, departed from his residence in Phillippi for his home village in the Eastern Cape with the specific intention of finding a girl or young woman there in order to conclude a marriage in accordance with his custom. His stated requirements were that the girl or young woman should be younger than 18 years old because, over that age, she would likely have children. He wanted a virgin. According to the appellant the ideal age for his chosen wife was 16 years old.

[6] During January 2010 the appellant noticed the complainant, then 14 years old, and decided that she would make a suitable wife. They had neither spoken to nor even been introduced to each other at that stage; and the complainant was entirely unaware of who the appellant was or what his intentions were. She had just commenced Grade 7 at her local school. The only reason why the appellant even had occasion to notice the complainant was because she had been sent by a male family member, whom she referred to as her uncle, to fetch a cigarette for him from a house at which the appellant was present at the time. The complainant's father is deceased and she lived with her maternal grandmother and other family members because her mother worked in a nearby village or town and was only able to come home to visit at the end of each month.

[7] On the same day that the appellant first saw the complainant, he requested his family to start the traditional *lobola* negotiations with the complainant's family. He and two of his family members then approached the complainant's male family members (in a neighbouring village) to start the negotiations. It would appear that they were concluded over the course of one day. Early the following morning the complainant was called to a gathering of various male members of the two families and informed by one of them, who was not known to her, that she was to be married in another village.

[8] The complainant was instructed by her uncle to take off her school uniform and to put on different clothes. Her resistance to this instruction was ignored. Her uncle thereafter took her one hand and another man the other. She was removed from her home and taken to the house at which the appellant had noticed her a day or so earlier. On the way to this house she was introduced to the appellant for the first time and informed that he was to be her husband.

[9] Having arrived at the appellant's house in his home village, the complainant was immediately dressed in *amadaki* (specially designed attire for the new bride, or *makoti*, which was referred to in the trial as "the *makoti* attire or clothing"). She was instructed to partake in various traditional ceremonies as well as attending to certain household duties for the appellant, which, after resisting, she apparently did. It was during one of these ceremonies that the complainant allegedly became the appellant's customary law wife. At a stage *lobola* of R8 000 was paid by the appellant to the complainant's maternal grandmother, who subsequently gave it to the complainant's mother.

[10] The complainant was unhappy and ill at ease (the reasons and extent of this were in issue during the trial) and left her new marital home a few days into the marriage, hiding first in a nearby forest and then, on her mother's instruction, at another house. She was found and promptly returned to the appellant by her own male family members two to three days later. Shortly thereafter the appellant informed the complainant that he would be returning to

Cape Town with her. This trip was sanctioned by her male family members. They travelled from the Eastern Cape to Cape Town by taxi and after their arrival, resided with the appellant's brother and his wife in their shared home in Phillippi. During the period in which the complainant resided with the appellant in Cape Town, he would leave each morning to seek employment while she was required to remain behind and attend to household chores.

[11] Sexual intercourse took place between them on various occasions (the complainant maintained that there were seven such occasions within a matter of a few days after their arrival in Cape Town, all of which were against her will). Within the same period the appellant and complainant argued. During one of their arguments the complainant sustained an open wound to her leg. It was shortly thereafter that the complainant fled from the appellant on 2 March 2010. On the same date she reported the events to the police, who took her to be examined by a doctor on 3 March 2010.

[12] At issue in the trial were the following:

12.1 Whether the complainant travelled willingly with the appellant from the Eastern Cape to Cape Town, and remained in Cape Town willingly with him until she fled, or whether she was trafficked to Cape Town by the appellant for purposes of exploitation or abuse of a sexual nature;

12.2 Whether sexual intercourse took place on at least three occasions; and if so, if this was with the complainant's consent (her age would only become relevant for purposes of a conviction on statutory rape if it was found that she had consented – although she was 14 years old, the appellant claimed that she told him that she was 16 years old); and

12.3 Whether the injury that she sustained to her leg was caused by the appellant.

[13] It should be noted that, although the complainant testified about seven rapes, all of which occurred after her arrival in Cape Town, the appellant was only charged with three rapes. Furthermore, on his own version, sexual intercourse occurred on two occasions. According to the appellant, sexual intercourse took place once before they left the Eastern Cape and once after their arrival in Cape Town. This is also relevant when considering the conviction on the human trafficking count.

The evidence in the court a quo

[14] The state adduced the evidence of four witnesses, namely the complainant, her mother, the police reservist who had taken her statement and Dr Narula who had examined her on 3 March 2010. The appellant (who had exercised his right to make no admissions at the outset or to provide an explanation for his plea of not guilty) testified in his own defence. He called two witnesses,

namely his sister-in-law (with whom he and the complainant had resided in Cape Town) and Professor Francois De Villiers, an expert in customary law. Given the common cause facts, what follows is a summary of the evidence of the various witnesses on the disputed issues only.

[15] The complainant testified that during her errand to fetch a cigarette for her uncle, one of the two men who she met there had asked her to identify herself by her name which he already knew. She became suspicious and when she returned with the cigarette, pleaded with her uncle never to force her into a customary marriage. She knew that this had happened to a number of other young girls and dreaded the prospect of it occurring to her.

[16] Whilst being forcibly restrained by being held by her arms en route to her “marriage” by her uncle and the appellant’s family member (a considerable distance away) she cried and pleaded but was instructed by her uncle to stop. She was then handed over to the appellant and two of his family members who they met along the way. She was similarly restrained by them for the remainder of the journey to the appellant’s village.

[17] After being instructed to put on her *amadaki*, the complainant was told to sit behind a door, thereafter to eat and later to spend the night with the appellant. When she refused to eat the appellant’s brother threatened her with a stick. She again protested and he left her alone. She wept and told the appellant

that she did not want to be his wife, nor did she want to sleep with him. She ended up sleeping on the same bed as the appellant, wrapped in a blanket, but faced away from him.

[18] The complainant's first attempt to escape was the following morning when she accompanied a female relative of the appellant to fetch water from a nearby river. She changed out of her *amadaki* in bushes nearby and ran away. She was chased by the appellant who caught and questioned her. She pretended that she had been practicing for a sporting event. The appellant instructed her to return with him to his home. She was thereafter ordered to make tea but refused. A sheep was slaughtered and she was given something to drink. She threw the drink away.

[19] The complainant's second attempt at escape was that evening when, on the pretext of fetching water to wash herself, she again ran away. She sought shelter at a relative's house but was turned away. The relative told her that another young girl had previously hidden there but had been found and returned to her "husband". The complainant slept in a forest and hid there for the following day. That evening she walked the long journey back to her home village. On her arrival she saw that certain members of her family were still awake. She was afraid to go inside because she feared that she would be caught by the male family members and returned to the appellant. She slept outside in the garden and hid in bushes the next day.

[20] She encountered a woman who told her that her mother had returned to the village and was looking for her; and that it was safe to return home because her mother was alone there. When the complainant returned, her mother asked if she wanted to be married. She replied that she did not, and that she wanted to return to school. Her mother told her to pack a suitcase. The arrangement was that the complainant was to hide in a nearby family house and then take a taxi to join her mother in the village where she worked. However the complainant was found in that house by her uncle and various other men, some of whom were relatives, and taken back by them to the appellant.

[21] Upon her arrival back at the appellant's house she was told by the appellant and his uncle to dress herself again in her *amadaki*. When she refused, they beat her with a sjambok and sticks until she agreed. She later overheard that she would be leaving with the appellant for Cape Town the following day. She was neither consulted nor even informed herself of this.

[22] That night the appellant asked her for sexual intercourse. She refused. When she awoke the following morning a taxi was waiting outside and she was told that she was to leave immediately with the appellant for Cape Town. She refused. She was made to get into the taxi against her will by the appellant and his relatives. She arrived in Cape Town (a city completely foreign to her).

This occurred sometime towards the end of February 2010.

[23] That evening she again refused to eat when instructed by the appellant, his brother and sister-in-law to do so. She also again refused to have sexual intercourse with the appellant. The appellant's brother told her that she would have to have intercourse with the appellant because she was his wife. Again she refused. The appellant's brother held her down while they removed her panties. She was struggling and the appellant proceeded to rape her. After the rape the appellant's brother returned to his own room. The following morning the appellant and his relatives left for the day and she was locked in the house. She could not leave the house because the front door and gates were kept locked at all times. During the course of her being locked up by the appellant she told him that she wanted to attend school. He refused, saying that he did not want an "educated wife".

[24] That evening she again refused to eat. She was told to draw a bath for the appellant. She complied but refused his instruction to take out fresh clothes for him. The appellant told her to come to bed and she refused. He locked the bedroom door and took off his belt. He slapped her hard and she fought back. The appellant hit her with both an aluminium handle of a mop or broom, which broke, as well as with his belt. During their scuffle she sustained an open wound to her leg. The appellant held her down and raped her for the second time. Later that night he raped her a third time. In the early hours of the

following morning he raped her a fourth time. She was again locked in the house that day while the appellant and his relatives attended church.

[25] Upon their return the complainant was chastised for refusing to wear the *amadaki* headscarf. She refused to cook when instructed. She also refused to eat. That evening the appellant locked their bedroom door and demanded sexual intercourse. She refused and he raped her a fifth time. After she had washed herself, he raped her a sixth time. Early the following morning he raped her for the seventh time.

[26] Before the appellant and his relatives left the next day, the complainant took R100 cash out of his wallet. She asked the appellant's sister-in-law not to lock the doors and gates on the pretext that she wanted to wash clothing. The sister-in-law only locked the outside gate when they left. The complainant washed herself and packed a few items of clothing in a bag. She took a dustbin to the corner of the yard in order to jump over the fence. She jumped over the fence and she took a taxi to the nearest taxi rank. There she met two women. She showed them the wound to her leg. One of the women called the police who arrived and took her to the police station. Her mother was contacted. She slept at the police station that night and was taken to the doctor the following morning. Her brother, who lives in Cape Town, then fetched her.

[27] The complainant was found by the trial court to be an excellent witness whose version was not undermined in any material respect. She was still visibly traumatised when testifying almost two years after the events.

[28] The complainant's mother's testimony may be summarised as follows. During February 2010 she discovered that the complainant had been given away in a customary marriage by her own mother and brother (who is the uncle to whom the complainant referred during her testimony). She would never have consented to the complainant's "marriage" because she was too young. She went home the following week to discover that the complainant was indeed no longer there. She could obtain very little information as to who the complainant had "married" or where she was. *Lobola* of R8 000 was paid to the maternal grandmother, and in turn later handed to her. The complainant's mother subsequently ascertained that the complainant had run away from her "marital home" when the appellant came to inform her brother. Despite her search the complainant could not be found. On the following day she received information that the complainant was hiding in a forest and sent word for her to come home at a time when her mother and brother would not be there. The complainant returned in an hysterical state, crying uncontrollably. She told her mother that she did not want to be married and that the appellant was a violent man. She told the complainant to pack a bag and early the next morning sent her to hide at her family house until she could borrow money to send the complainant by taxi to where she worked.

[29] However, her brother and other male family members discovered the complainant and returned her to the appellant. She herself was too scared of the men to interfere, but noting the child's distress, begged her not to take her own life. After the male family members returned from delivering the complainant to the appellant for the second time, she was told that the complainant would be leaving for Cape Town with her new "husband" the following day. The complainant had telephoned her from Cape Town about a week or two later. She repeated that she did not want to be with the appellant and that he was violent. She asked the complainant to persevere until she was able to fetch her in Cape Town. The appellant called her shortly thereafter reporting that he had hit the complainant with a mop handle, but claimed that the complainant was not seriously injured. A day or so later the appellant contacted her again to report that the complainant had disappeared while he was at work. That night she was contacted by the police.

[30] Reservist Constable Tengiwe testified that she was on duty on 2 March 2010. The complainant arrived at the trauma section of the police station with two police officials. The complainant told her that she had been forced into marriage in the Eastern Cape and recounted what had happened to her. The complainant limped, had a deep wound on her thigh that was starting to heal and a bruise on her back. The complainant told her that she had sustained these injuries when the appellant had assaulted her with a mop or broom

handle when they had argued about her refusal to have sexual intercourse. The complainant reported that she did not wish to be married to the appellant. She wanted to be with her mother and return to school. Her mother was contacted and the complainant was taken to a doctor.

[31] Dr Narula testified that she had examined the complainant on 3 March 2010. The complainant appeared traumatised, fearful and tearful, still wearing her *amadaki* dress. During examination Dr Narula noted a huge gaping wound on the lower thigh that had become septic, as well as two healing abrasions on the complainant's left forearm and a haematoma on her toe. On gynaecological examination she found a healing tear of the hymen, scarring of the posterior fourchette, redness at the hymen and bilateral vestibular redness of the vagina, as well as vaginal discharge. Her findings were compatible with the history given as well as recent forceful vaginal penetration by a penis or object. Dr Narula testified that the complainant was a virgin prior to sustaining the gynaecological injuries.

[32] Dr Narula referred the complainant to the hospital's casualty unit to manage her leg wound. The wound was irrigated and dressed and the complainant was given a tetanus injection and antibiotics. She was also referred to a social worker because she was so obviously traumatised. It was Dr Narula's opinion that the open leg wound was consistent with the complainant having been assaulted with the handle of a mop or broom, and that the injuries on her arm

and foot were consistent with the complainant having been assaulted with a belt.

[33] The appellant testified of the complainant's visible unhappiness on their first night together. His evidence was that on the second night (while still in the Eastern Cape) he asked for sexual intercourse and this took place apparently with her consent. Thereafter he could *'see a difference'* in the complainant. If his memory served him correctly she only disappeared after about a week. He went to her home to report this to the complainant's uncle, who told him not to bother to keep looking for her because he (the uncle) would ensure her prompt return to the appellant as soon as she was found.

[34] The complainant was indeed returned to the appellant by her male family members two days later. The reason which she gave for running away was that she had been afraid to ask for permission to visit her family and had thus sought to *'escape'* from the appellant. He told her that there was no need to be afraid because his family would have granted her permission. However he was planning to return to Cape Town. According to the appellant, the complainant there and then willingly agreed to accompany him. They mutually agreed upon their date of departure and left for Cape Town a week later. By the time of their arrival in Cape Town he claimed that they *'were getting along very well'.*

[35] On the second night in Cape Town the appellant again asked for sexual intercourse and the complainant willingly complied. It was only after the complainant received a telephone call from a female relative on the following day that her attitude changed towards him. She became *'very cheeky and she was not respectful'* and told him that she was no longer his *makoti*.

[36] There were a number of arguments over the days which followed. During one of these the appellant *'lost control'* and grabbed a mop handle with which he threatened the complainant. During their ensuing scuffle the handle broke and struck the complainant's leg. He was so shocked and concerned about the complainant that he arranged for his sister-in-law to take her to a doctor for treatment (on two separate occasions). About two days after the second visit to the doctor the complainant ran away.

[37] The appellant maintained that he had never assaulted the complainant with a belt. He only aimed the mop handle at her and it was because she wrestled with him that it broke and injured her. He never raped the complainant. His brother had never held her down so that the appellant could rape her. He never instructed anyone to keep her locked in the house during the day. The complainant never expressed the wish to return to school. He was puzzled by the complainant's allegations against him. His testimony was that:

> *'I'm deeply hurt, because… I don't know what I am going to do about this, because now even what has happened between the two of us, we didn't just do it of our own or elope and go and get married, we involved the elders and this is a traditional wedding.'*

[38] The appellant was not unduly concerned when the complainant ran away in the Eastern Cape. He testified that:

> *'This is a normal thing, always when a makoti is a newlywed, normally she does do those things of running away and coming back, running away and they bring her back, but when the time goes on, she settles down and stays…'*

[39] The appellant's sister-in-law testified that she had not noticed any problems between the appellant and the complainant during their time together in Cape Town. The complainant had not expressed any unhappiness or concerns. The complainant had in fact told her that she did not wish to return to school because she hated it. She had never locked the complainant in the house. She knew about the wound to the complainant's leg which she described as serious, and maintained that the complainant had blamed herself for the injury. She had taken the complainant to the doctor for treatment. She was *'amazed'* by the complainant's allegations against the appellant. The complainant had told her that she had run away in the Eastern Cape *'because she didn't want to get married* [at] *that time, she just wanted to have a good time and fun as a single woman'.* The complainant had subsequently changed her mind and

decided to remain “married” to the appellant.

[40] The appellant’s defence was thus one of consent. He maintained that the complainant had willingly engaged in sexual intercourse on the only two occasions (spanning weeks) that he had requested this. She willingly travelled with him to Cape Town. She willingly remained alone in a house for days on end in a place completely foreign to her without any friends or support system, attending to chores and other duties for him. She never expressed the wish to return to school. On the contrary, her wish was to abandon her education. The appellant never forced himself upon her or abused her in any way; his testimony in this regard was contradictory: on the one hand he maintained that he had only asked for sexual intercourse twice; later in his evidence he conceded that there had been other occasions too but that he had not forced himself upon the complainant when she declined.

[41] He also maintained that the complainant had only herself to blame for her leg wound. All that he had done was to discipline her when she became defiant and disrespectful after having a telephone conversation with a female relative. She knew that in their culture a “wife” was required to be completely submissive to her “husband”. The following portion of the record is relevant:

> *‘Okay so … did you buy yourself a wife? Did you pay her family money for her? --- No, I didn’t. No. According to the culture you don’t buy a wife. You pay*

lobola for her, not buying.
Yes, but the lobola is so that she can be your wife. --- Yes, in that manner you pay lobola.
As your wife did it mean that she had to do as you told her? Was she a sub-ordinate to you? Did she have to listen to you as being your wife? --- That is right yes.'

[42] However there was an additional and important element to the appellant's testimony. He maintained that the process which he had followed to obtain a "wife" was that of his culture and tradition. His testimony was as follows:

'Okay, Mr Jezile, is there anything else that you would like to explain to this court? --- What I wanted from them, that of my heart is to get a wife and then to use the protocol, to do the right thing, involve the elderly people so that I can get a wife that I can stay with, not at all there to play … (indistinct) to. And I wanted to follow the tradition and do the right things and follow my fathers and my forefathers, to do things according to our tradition.'

[43] Significantly the appellant's evidence was that he believed that his custom did not permit forced marriages, and thus if the complainant had ever truly expressed the wish not to marry him or remain married to him, she would have been free to leave. This evidence conflicted with that of the appellant's last witness, Professor Francois De Villiers, who was called as an expert in customary law.

[44] His opinion was that the process followed by the appellant to obtain a "wife" was, broadly speaking, in accordance with traditional custom, although it was

common cause that there had been no compliance with the provisions of the Recognition of Customary Marriages Act 120 of 1998. Professor De Villiers referred to this non-compliance as a *'defect'.* His evidence was further that historically women and girls could indeed be forced into these "marriages". It was in this context that he testified generally about the tension between traditional practices and constitutional imperatives, and that various legislative measures had been implemented to safeguard against such occurrences.

The trial court's judgment on conviction

[45] In evaluating the evidence the magistrate, mindful of the cautionary rules pertaining to a single, youthful witness such as the complainant, found her testimony to be both honest and reliable. She found that there was no evidence to suggest that the complainant had willingly left her home without her mother's knowledge or consent to be married to a complete stranger twice her age. The undisputed evidence was that the mother's views and wishes would in any event have been disregarded by the complainant's male relatives. This was borne out by the mother's futile attempt to protect the complainant. The mother's evidence corroborated that of the complainant about the latter's attitude towards the "marriage", and her escape from the appellant within days of it taking place. The trial court concluded that it was inconceivable that the complainant would willingly have subjected herself to the "marriage". It was even the appellant's evidence that the complainant was

unhappy and ill at ease after her arrival at the “marital home”.

[46] The trial court also found that the appellant’s version of events leading up to the departure for Cape Town was not supported by the objective facts. The complainant had tried to escape from the appellant twice before being brought to Cape Town. On neither of these occasions had she willingly returned to the appellant. Not even the appellant suggested that she was content to be brought back to him by her male relatives. The trial court thus reasoned that it was highly improbable that the complainant would have willingly boarded a taxi for a destination completely unknown to her with a man who was still a virtual stranger, whom she had described to her mother as violent, within a day or so after having being forced to return to him.

[47] The trial court accepted the complainant’s version of events after her arrival in Cape Town. Her evidence about the assaults and at least some of the rapes was corroborated by the findings of Dr Narula. The court pointed out that Dr Narula’s observation that the complainant’s leg wound was septic supported the latter’s evidence that she had not received any medical treatment, contrary to the assertions of the appellant and his sister-in-law.

[48] It was also the trial court’s finding that if the complainant had indeed enjoyed freedom of movement at the appellant’s house in Phillippi, as he alleged, it was most improbable that, injured as she was, she would have gone to the

lengths that she did to escape him at the first opportunity. Furthermore, if the appellant's version was to be believed, the complainant could simply have told him that she wished to leave and he would not have stood in her way.

[49] The trial court accepted that even on the appellant's version he knew that he had no right to force the complainant into anything against her will, which effectively put paid to any doubt being cast on his *mens rea* given the court's acceptance of the complainant's version.

[50] The appellant's sister-in-law was found to be a lying witness whose evidence, along with that of the appellant, was rejected as patently false. The appellant was thus convicted on the counts to which we have referred.

Appeal against conviction

[51] The appellant thus raised as one of his defences and grounds of appeal to the charges of trafficking and the rapes, that he was in a customary marriage with the complainant at the time of the incidents. The magistrate was however of the view that the matter was not about *"…the practice of ukuthwala or forced arranged marriages and its place if any, in our Constitutional Democracy. Rather, this case is about whether the state proved that the accused committed the offences he is charged with and if so whether he acted with the knowledge of wrongfulness and the required intent. To this extent only, reference to the so-called marriage will be made from time to time."* On appeal

the appellant contended that the approach adopted by the magistrate to the relevance of customary law amounted to a misdirection and that *"…having done so … fresh out of the starting blocks* [this] *demonstrates a lack of understanding."*

[52] The appellant advanced two main grounds of appeal against his convictions. Apart from that relating to the two assaults, his essential contention was that the trial court had misdirected itself in not proceeding from the premise that the merits should have been determined within the context of the practice of *ukuthwala*, or customary marriage. It was submitted that "consent" within the practice of *ukuthwala* is a concept that must be determined in accordance with the rightful place which customary law has in our constitutional dispensation, because it is an integral part of *ukuthwala* that the "bride" may not only be coerced, but will invariably pretend to object (in various ways) since it is required, or at least expected, of her to do so. As the appellant's counsel put it in his heads of argument:

> *'*[This] *informs the intention of the male and the most relevant factor in terms of Xhosa custom* [is] *whether the sexual violation of the female is criminal or a sanctioned form of coercion…depending on the permutation the consent of the female* [is] *irrelevant…'*

[53] Insofar as the two convictions for assault are concerned, it was submitted on behalf of the appellant that, even if his version was to be rejected, the convictions themselves amounted to a splitting of charges, given that both

assaults took place as part and parcel of one “overall” assault to compel the complainant to submit to sexual intercourse.

[54] We were of the view that, given the nature and the importance of the customary law issue raised in the appeal and the constitutional implications thereof, it was appropriate that relevant state institutions, organizations and/or experts on the practice of *ukuthwala* in customary law be invited to apply to assist the court as *amicus curiae* on the specific issues of customary marriages and the practice of *ukuthwala*. To that end letters of invitation were sent under the hand of the presiding judge to a number of organizations who had an interest or expertise on the topic to apply in writing to participate in the proceedings as *amici curiae* and to present oral submissions with regard to such applications.

[55] The appellant and the respondent were afforded the opportunity of responding to the applications. In response, the court was favoured with offers of assistance by the following institutions:

55.1 The National House of Traditional Leaders, a statutory body established in terms of the National House of Traditional Leaders Act No 22 of 2009, with its main objective being to represent and advance the aspirations of traditional leaders and their rural communities at a

national level;[1]

55.2 the Woman's Legal Centre Trust, a non-government, legal advocacy and litigation organization with its core objective being the advancement and protection of the human rights of all women and girls in South Africa, and particularly women and girls who suffer intersecting forms of disadvantage and discrimination;[2]

55.3 the Centre for Child Law, based at the University of Pretoria, a registered law clinic that promotes and protects the constitutional rights of children through advocacy and litigation;[3]

55.4 the Commission for Gender Equality, a Chapter 9 institution established under the Constitution[4] with a broad mandate to promote respect for gender equality and the protection, development and attainment of gender equality;[5]

55.5 the Rural Women's Movement, an independent non-profit land and property rights organization that advocates for women's independent land, housing, inheritance and property rights and advocates policy

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1 Notice of application to be admitted as Amicus Curiae, affidavit by Inkosi Sipho Etwell Mahlangu, p 3 para 5.
2 Affidavit by Ms.Hoodah Adrahams-Fayker, p 5, paras 4 and 5.
3 Written Submissions by the CCL, p 3 para 1.
4 Sections 181 and 187 of Act No. 108 of 1996.
5 Affidavit by the chairperson Mr. Dizline Mfanozelwe Shozi, p 4 para [9].

reform in respect of rural women;[6]

55.6 Masimanyane Women's Support Centre, a non-profit international women`s organization that works for the advancement of the rights of women and girls with a specific focus and expertise in the application of the Convention on the Elimination of all Forms of Discrimination against Women (adopted in 1979 by the UN General Assembly, ratified by the SA Government on 15 December 1995);[7] and

55.7 the Commission for the Promotion and Protection of the Cultural, Religious and Linguistic Communities, a state institution established in terms of Chapter 9 under the Constitution[8] to promote respect for and protect the rights of cultural religious and linguistic communities.[9]

Neither the appellant nor the respondent opposed any of the applications and having considered the submissions made on behalf of the applicants each of them were admitted as *amicus curiae* by the court in the appeal proceedings. The *amici* were allowed to submit evidence on the practice of *ukuthwala* under customary law by way of affidavit to which the appellant and respondent were entitled to respond.

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6 Affidavit by Shozi, p 5 para [13].
7 Affidavit by Shozi, p 6 paras [18] and [19].
8 Sections 181 and 185
9 Affidavit by Shozi, p 7 paras [21]-[23].

[56] At the outset we wish to express our gratitude and appreciation to the *amici* and the parties for their assistance to the court in dealing with the complex and contested issue of *ukuthwala* under customary law. We are particularly mindful that the practice of *ukuthwala* has in recent years received considerable public attention and is the subject of much public debate, inasmuch as its current practice is regarded as an abuse of traditional custom and a cloak for the commission of violent acts of assault, abduction and rape of not only women but children as young as eleven years old by older men. These practices – under the guise of custom - have been described by several organisations as a *"harmful cultural practice"*.[10]

Legal framework

[57] Before turning to the submissions of the parties and *amici curiae*, we set out, in broad outline, the relevant constitutional and legislative provisions, as well as relevant conventions and / or protocols to which South Africa is a signatory.

[58] S 211(3) of the Constitution provides that:

> *'The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.'*

[59] S 28(1)(d) [in the Bill of Rights] stipulates that every child has the right to be

[10] Submission made by the second amicus curiae, record p 652, para [12] with reference to their submission made to the South African Law Commission (SALC) – November 2009; and see Discussion Paper under Project.

protected from maltreatment, neglect, abuse or degradation; and s 28(2) that a child's best interests are of paramount importance in every matter concerning the child. A child is defined in s 28(3) as a person under the age of 18 years.

[60] S 39 of the Constitution, which deals with the interpretation of the Bill of Rights, provides that:

> *'39(1) When interpreting the Bill of Rights, a court, tribunal or forum*
>
> *(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;*
>
> *(b) must consider international law; and*
>
> *(c) may consider foreign law.*
>
> *(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.*
>
> *(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.'*

[61] S 1 of the Children's Act 38 of 2005 (*"Children's Act"*) defines *'trafficking'* in relation to a child as including:

> *'(a) The … transportation, transfer, harbouring or receipt of children, within or across the borders of the Republic –*
>
> *(i) by any means, including the use of threat, force or other forms of*

coercion, abduction…abuse of power or the giving or receiving of payments or benefits to achieve the consent of a person having control of a child; or

(ii) due to a position of vulnerability,

for the purpose of exploitation…'

[62] The following provisions of the Children's Act are also relevant:

62.1 S 12(1), which stipulates that every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being;

62.2 S 284(1), which prohibits child trafficking;

62.3 S 284(2), which provides that it is no defence to a charge of contravening s 284(1) that the child or a person having control over that child consented to the intended exploitation;

62.4 S 305(1)(s), which makes a contravention of s 284(1) an offence; and

62.5 S 305(8), which provides that any person convicted of an offence in terms of s 305(1)(s) is, in addition to a sentence for any other offence of which he or she may be convicted, liable to a fine or imprisonment for a period not exceeding 10 years or to both a fine and such

imprisonment.

[63] There are a number of statutory provisions in the Sexual Offences Act (referred to *supra*) which are relevant:

63.1 S 3, which defines the offence of rape;

63.2 S 56(1), which stipulates that it is not a valid defence to rape to rely on the existence of a *'marital or other relationship'*;

63.3 S 56(8), which appears to be the only limitation in relation to criminal liability in respect of cultural practices in the Act, and provides that a person may not be convicted of an offence in terms of s 9 or s 22 (exposing bodily parts) if that person commits such an act *'in compliance with and in the interests of a legitimate cultural practice'*;

63.4 Part 6 (ss 70-72), which contain the transitional provisions pertaining to trafficking in persons for sexual purposes, pending the adoption of legislation in compliance with the Protocols referred to therein. These include (with reference to the preamble to the Act) the UN Convention on the Elimination of All Forms of Discrimination against Women of 1979 and the UN Convention on the Rights of the Child, 1989 (CRC). South Africa, as a member state, is obliged to combat and ultimately

eradicate abuse and violence against women and children;

63.5 S 70(2)(b), which defines the offence of trafficking in similar terms to that contained in the Children's Act. S 70(2)(b)(6) includes trafficking by means of *'the abuse of power or of a position of vulnerability, to the extent that the complainant is inhibited from indicating his or her unwillingness or resistance to being trafficked…'*;

63.6 S 71(1), which makes the trafficking of any person without their consent an offence;

63.7 Ss 71(3) and (4), which stipulate that consent can only be *'voluntary or uncoerced'* as defined therein, and excludes a person submitting to an act as a result of being trafficked; and

63.8 S 56A(2), which provides that the court imposing sentence *'shall consider as an aggravating factor'* that the person: (a) committed the offence with the intention to gain financially, or receive any favour, benefit, reward, compensation or any other advantage; or (b) gained financially, or received any favour, benefit, reward, compensation or any other advantage, from the commission of such offence.

[64] It is noted that the Prevention and Combatting of Trafficking in Persons Act 7

of 2013 was assented to on 28 July 2013 but has still not been enacted. The following provisions are of relevance to the extent that they indicate the legislature's attitude towards trafficking in compliance with South Africa's international obligations. S 4(2) creates as a separate offence, a person concluding a forced marriage for the purpose of exploitation of a child or other person. S 11(1)(a) stipulates that consent of the other person is no defence. S 13 imposes hefty penalties including life imprisonment (subject to s 51 of Act 105 of 1997). S 14 lists the *'aggravating factors'* that a court must consider in sentencing (in addition to any other factors) and include: (a) whether the victim was held captive for any period; (b) whether the victim suffered abuse and the extent thereof; (c) the physical and psychological effects the abuse had on the victim; and (d) whether the victim was a child. *'Forced marriage'* is defined as *'a marriage concluded without the consent of each of the parties to the marriage'*, but *'marriage'* itself is not defined.

[65] The Recognition of Customary Marriages Act 120 of 1998 (*'RCMA'*) was enacted to recognise customary marriages in accordance with South Africa's constitutional obligation, and contains mandatory requirements for a valid customary marriage[11].

[11] The preamble records: *"To make provision for the recognition of customary marriages; to specify the requirements for a valid customary marriage; to regulate the registration of customary marriages; to provide for the equal status and capacity of spouses in customary marriages; to regulate the proprietary consequences of customary marriages and the capacity of spouses of such marriages; to regulate the dissolution of customary marriages; to provide for the making of regulations; to repeal certain provisions of certain laws; and to provide for matters connected therewith."*

[66] S 3(1) lists these three requirements, namely that: (a) the prospective spouses must both be over the age of 18 years; (b) must both consent to be married to each other under customary law; and (c) the marriage must be negotiated and entered into, or celebrated, in accordance with customary law. S 3(3)(a) stipulates that if either of the prospective spouses is a minor, both his or her parents, or if he or she does not have parents, his or her legal guardian, must consent to the marriage. S 3(4)(a) confers on the Minister the power to grant permission to a person under the age of 18 years to enter into a customary marriage if he or she considers such marriage to be desirable and in the interests of the parties in question, where either prospective spouse is below the age of 18 years. However this does not relieve the parties to the proposed marriage of their obligations to comply with all other requirements prescribed by law).

[67] S 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 prohibits unfair discrimination against any person on the ground of gender, including: (a) gender-based violence; and (b) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including undermining the dignity and wellbeing of female children.

[68] South Africa has also signed and ratified a number of international conventions and protocols:

68.1 The Universal Declaration of Human Rights, which includes a clause that marriage shall be entered into only with the free and full consent of the intending spouses;

68.2 The UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which requires member states to take all appropriate measures to: (a) modify the social and cultural patterns of conduct of men and women, in order to eliminate prejudices and discriminatory customary and other practices (art 26); (b) implement legislation to supress all forms of trafficking in women (art 5); (c) eliminate discrimination against women in all matters relating to marriage and family relations, and in particular to ensure, on the basis of equality of men and women, the same right to enter into marriage with free and full consent (art 16(1));

68.3 The UN Protocol to Prevent, Suppress and Punish Trafficking In Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organised Crime (“Trafficking Protocol”) which compels member states to make trafficking in persons a criminal offence;

68.4 The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, which is to similar effect as CEDAW;

68.5 The CRC (referred to *supra*) which stipulates that member states: (a) shall take effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children (art 24(3)); and (b) shall protect children against all forms of exploitation, including trafficking (arts 34 and 35);

68.6 The African Charter on the Rights and Welfare of the Child (ACRWC) in terms of which: (a) child marriage or betrothal is prohibited (art 21(2)); and (b) sexual exploitation and the inducement, coercion or encouragement of a child to engage in any sexual activity is likewise prohibited (art 27). Member states must take all appropriate measures to prevent the abduction, sale or trafficking of children for any purpose, in any form, and by any person including parents or legal guardians of a child (art 29);

68.7 The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. Art 2 thereof defines the sale of children as follows:

'(a) Sale of children means any act or transaction whereby a child is

transferred by any person or group of persons to another for remuneration or any other consideration…' and

68.8 The Addis Ababa Declaration on Ending Child Marriage in Africa of 11 April 2014, prepared by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) under the auspices of the African Union.

[69] There is accordingly an abundance of clear authority to the effect that child trafficking, and any form of child abuse or exploitation for sexual purposes, is not to be tolerated in our constitutional dispensation. This is furthermore borne out by the provisions of s 51 as read with Part 1 of Schedule 2 of Act 105 of 1997 to which we refer hereunder.

Submissions of the parties and the Amici Curiae

[70] In August 2009, the South African Law Commission (the SALRC) was requested by the Gender Directorate in the Department of Justice and Constitutional Development to include as a priority in its law reform program an investigation into the practice of *ukuthwala*.[12] The SALRC requested that the following aspects be included in the investigation: the impact of *ukuthwala* on the girl child; the appropriateness, and the adequacy, of the current laws on *ukuthwala*; and whether or not the laws upheld the human rights of the girl

[12] Affidavit filed by Professor Ronald Thandabantu Nhlapo deposed to in his personal capacity and in support of the submissions of the fourth, fifth, sixth and seventh applicants, page 6 of the record.

child (taking into consideration the principle of *"the best interests of the child"*).[13] The *amici* and parties also very helpfully referred the court to a number of academic articles in law journals and newspaper reports about the practice of *ukuthwala*, narratives of instances of abuse of young children and opinions on the constitutionality of the practice of *ukuthwala*.

[71] In the affidavit filed on behalf of the National House of Traditional Leaders (NHTL), Inkosi Sipho Etwell Mahlangu, a senior traditional leader of the Ndzundza Mabusa Traditional Community and leader of the delegation from Mpumalanga to the National House of Traditional Leaders, stated that as a result of the confusion surrounding the practice of *ukuthwala*, the NHTL proactively, and together with customary law experts from various communities in South Africa, produced a White Paper on the practice. The White Paper has been submitted to Parliament for consideration.[14] We are

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[13] Annexure RTN2 to the affidavit of Nhlapo, pp 28-89. A Discussion paper, Project 138 titled *"The Practice of Ukuthwala"* was issued in May 2014 with the closing date for public comment as 31st October 2014.

[14] The deponent referred to the following as the outline of the proposed policy on *ukuthwala* ;

"58. The following is an outline of the proposed policy on ukuthwala:

(58.1) The need for the policy has arisen due to the abuse of the culture by some in the Eastern Cape, where the appellant originates.

The more prevalent cases are of old men abducting young girls and raping them, well below the age of marriage in terms of the Act.

(58.2) A most unfortunate phenomenon is where the parents of the girl enter into an agreement with the old men, for financial gain. A most telling characteristic of this form of abduction is for the girl to be raped as soon as she arrives. An occurrence that is not permitted in 'ukuthwala'".

The objectives of the policy are stated as :

- *To regulate ukuthwala custom to make sure that it is consistent with the Constitution in particular the Bill of Rights and sections 7(2), (9 (3) and (4), 28 and 31 of the Constitution and sections 8 and 25(1)(c) and Chapter 5 of the Promotion of Equality and the Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000) and Article 13 of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW);*
- *To criminalize actions related to the abductions and kidnapping of women and girl children in the name of ukuthwala and any actions which are inconsistent with the Constitution and applicable indigenous African law;*
- *To promote popular education on ukuthwala, its guiding principles and safeguards; and*
- *To influence amendments to the Recognition of Customary Marriages Act, (Act No. 120 of 1998).*

therefore also mindful that the practice is receiving the attention of not only the affected communities, but also relevant statutory bodies, organs of civil society and both the executive and legislature.

[72] It is not necessary for purposes of this judgment to set out in detail the contents of the evidence presented by the *amici* in their affidavits. What is of significance though are the common threads in the evidence of the experts, activists and in the submissions of all the *amici* with regard to the practice of *ukuthwala* in both its traditional conception and the present and prevailing practice of the custom. Professor Ronald Thandabantu Nhlapo, a renowned expert on customary law, and author of several publications on the topic who chaired the advisory committee that assisted the SALC in the development of the Discussion Paper in Project 138, explained in an affidavit that it was critical to understand that customary law posits both regular and irregular means of initiating and concluding a customary marriage. *Ukuthwala* is one such irregular method which would, if the precepts of the custom were correctly followed, eventually lead to the conclusion of a valid marriage under customary law. Nhlapo explained that the regular method for the conclusion of a customary marriage entails a proposal of marriage by the intended bridegroom's family, which is extended to the family of the intended bride, and, if accepted, negotiations with regard to the payment of *lobola* by the betrothed man's family to the betrothed woman's commences. Once the negotiations are

- *To develop a legislation on Harmful cultural practices."*
-

concluded and the *lobola* fixed, a series of what he termed *"highly ritualized ceremonies,"* which vary amongst different traditional communities, occur, and which formalises the relationship. He explained that there are instances where circumstances do not readily permit for the regular method of pursuing a customary marriage. In such circumstances customary law allows for a number of *"irregular means"* for circumventing obstacles with a view to commencing marriage negotiations. *Ukuthwala* is one such means, of which both the traditional and essential features are:

72.1 the woman must be of marriageable age, which in customary law is usually considered to be child-bearing age;

72.2 consent of both parties is necessary to perform *ukuthwala*. He notes though that there are instances where a woman would be taken unaware and acquiescence in the process only occurs after the fact. If however the woman does not agree the process fails and her father could institute a civil action against the man's guardian;

72.3 as part of the process, the parties would arrange a mock abduction of the woman at dusk. The woman would put up a show of resistance for the sake of modesty but in fact would have agreed beforehand to the arrangement;

72.4 the woman would then be smuggled into the man's homestead and placed in the custody of the women folk to safeguard her person and reputation. The father of the man would thereupon be informed of the presence of the woman in his homestead and of his son's desire to marry;

72.5 sexual intercourse between the couple is strictly prohibited during this period. If it does occur between the couple either willingly or by coercion, it is punishable by the payment of a fine or *"bopha"* of one herd of cattle to the woman's father. This, Nhlapo remarks, is akin to damages for seduction at common law; and

72.6 the man's family would then send an invitation to the woman's homestead either on the day of the mock abduction or on the following morning to inform her family that she was with his family. This would be a signal to the woman's family that the man's family wished to commence negotiations for their marriage.

[73] Nhlapo contends that a pivotal tenant of customary law is that no marriage is possible without the consent of the woman's parents. Therefore if following an *ukuthwala* the woman's family rejects the proposal she has to be returned to her home along with the payment of damages for the unsuccessful *ukuthwala*.

If on the other hand her family accepts the proposal she would be returned to her home to be prepared for the nuptials and regular *lobola* negotiations would commence. Nhlapo points out that the process of *ukuthwala* is not a marriage in itself, but, properly understood, is the method instigated by willing lovers to initiate marriage negotiations by their respective families. He explained that there are several circumstances under which *ukuthwala* could be resorted to by a couple that wished to marry, the foremost being:

73.1 When a woman objected to an arranged marriage and would rather marry a lover of her choice;

73.2 When the woman's family objected to her marrying the man of her choice;

73.3 Where the man was unable to afford and secure marriage through the payment of *lobola* in full; and

73.4 Where time was off the essence and it was necessary to conclude marriage especially in instances where the woman was pregnant.

[74] Nhlapo was of the view that *ukuthwala* has to be seen as a self-directed form of betrothal by a man and woman to each other, subject to parental approval, and is a collusive strategy of the couple to counter the influence of extreme

parental authority and to give effect to the will of young lovers. The first *amicus*, NHTL, described this traditional form of *ukuthwala* as *"innocuous, romantic and a charming age old custom".*

[75] Having considered the record of the trial in the court *a quo*, Nhlapo was of the view that *ukuthwala* was not properly performed in the matter. The young age of the complainant, her lack of consent and the fact that *lobola* was paid before the *ukuthwala* occurred indicated that it was in fact not a true instance of *ukuthwala*. He noted though that this was not a unique situation, as the Discussion Paper traversed several situations in which *ukuthwala* was abused to justify patently offensive behaviour such as rape, violence and similar criminal conduct under the guise of *ukuthwala*.

[76] This *"misapplied form"* of the customary practice was also described by Inkosi Mahlangu as a perversion of the custom and *"aberrant"*, in which young women or girls are abducted – and usually subjected to violence, including sexual abuse and assault – to coerce them into submission. The aberrant form of *ukuthwala* often occurs with the agreement of the girl child's parents and family, who are paid a fee – improperly described as *"lobola"* - for permission *"to abduct their daughter."* Nhlapo noted that the parents and family of the girl in such circumstances are usually from poor socio-economic circumstances, trapped in the cycle of poverty, and that the money or cattle derived from the abduction of the girl child for the marriage is unfortunately often attractive.

[77] In the supporting affidavits filed on their behalf the fourth, fifth and sixth *amici,* while acknowledging the traditional concept of *ukuthwala* described by both Nhlapo and Inkosi Mahlangu, voiced the opinion that the appellant's conduct was not only an aberrant form of *ukuthwala*, but also indicative of a widespread practice in the many communities in which they worked. In their accounts of the practice, young girls are often forced into unions with their abductors, in many instances, with the complicity of their families, who are paid the *"lobola"* upfront. Girl children are often abducted, raped and beaten in an effort to force them into submission as young brides.

[78] These *amici* very appropriately described this practice as a most severe and impermissible violation of women and children's most basic rights to dignity, equality, life, freedom, security of person and freedom from slavery. They noted though that while they and many other organisations condemned such conduct, the practice of the aberrant form of *ukuthwala* relies on a degree of participation and acceptance in parts of very many communities. They described the practice as no more than sexual slavery under the guise of a customary practice. They also shared the view expressed by Nhlapo and Inkosi Mahlangu that, to a large extent, the practice arose and remains prevalent because of widespread poverty, especially in rural areas.

[79] In their submissions, the fourth, fifth, sixth and seventh *amici* also expressed the view that both *"forms"* of *ukuthwala*, the traditional and aberrant, feed on the patriarchal nature of customary law, and in this regard referred to the remarks of Langa DCJ (as he then was) in the context of the customary law of succession in the matter of *Bhe and others v Magistrate, Khayelitsha and Others (Commissioner for Gender Equality as Amicus Curiae)* 2005 (1) SA 580 CC at para [78] in which he described customary law as *"a system dominated by a deeply embedded patriarchy which reserved for women a position of subservience and subordination and in which they were regarded as perpetual minors..."* They contended that there were echoes of such patriarchy even in the relatively benign form of *ukuthwala* described by Nhlapo. They submitted though, correctly in our view, that this was not a debate that this court was required to deal with in the appeal before us.

[80] The Legal Resources Centre, who represented the fourth, fifth, sixth and seventh amici at the hearing of the appeal, presented argument on the status of customary law in South Africa with reference to the relevant provisions of the Constitution, and decisions of the Constitutional Court in the following matters: *Gumede v President of the Republic of South Africa and Others* 2009 (3) SA 152 (CC) at para [22]; *Pilane and Another v Pilane and Another* 2013 (4) BCLR 431 (CC); *Bhe & Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC) at para [41]; *Alexkor and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC) at para [51]. For the determination of the

content of customary law the court's attention was directed to the process formulated by Van Der Westhuizen J in the matter of *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC).[15]

[81] The court's attention was also directed to the opinions expressed by Nhlapo and Inkosi Mahlangu, on which counsel on behalf of all the *amici* submitted that, in application of the factors outlined by Van Der Westhuizen J in *Shilubana and Others* (above), only the traditional form of *ukuthwala* could be recognized under our law.

[82] Nhlapo argued that inasmuch as *ukuthwala* is no more than a portal, albeit an irregular one, to a marriage, the substantive minimum requirements prescribed by the RCMA must by necessary implication apply to the validity of *ukuthwala*. A version of *ukuthwala* that permitted a marriage to follow when these requirements were not met would not only be inconsistent with the Constitution but would also be inconsistent with the RCMA. In this regard the *amici* pointed out that the Constitutional Court in *Mayelane v Ngwenyama and another* (Women's Legal Centre Trust and Others as *amici curiae*) 2013 (8) BCLR 918 (CC) has already held that consent, albeit in the context of a polygamous marriage, is a necessary requirement for a valid customary

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[15] The third *amicus curiae* made extensive and helpful submissions on the position of children in the practice of *ukuthwala*, in the light of the provisions of the Children's Act within the context of the constitutional directive of the protection and upholding *"the best interest of the child".* They also referred the court to South Africa's international law obligations with regard to the rights of children and comparative international case law.

marriage, and the court remarked at paras [74], [75] and [83] as follows:

> *"[74] Given that marriage is a highly personal and private contract, it would be a blatant intrusion on the dignity of one partner to introduce a new member of that union without obtaining that partners consent.*
>
> *[75] In accordance with the Court's jurisprudence requiring the determination of living customary law that is consistent with the Constitution, we thus conclude that Xitsonga customary law must be developed, to the extent that it does not yet do so, to include a requirement that the consent of the first wife is necessary for the validity of a subsequent customary marriage. This conclusion is in accordance with the demands of human dignity and equality. These demands are evident from the terms of the Recognition Act…*
>
> *[83] The Recognition Act is thus premised on a customary marriage that is in accordance with the dignity and equality demands of the Constitution. A customary marriage where the first wife has consented to the further marriage conforms to the principles of equality and dignity as contained in the Constitution. Where the first wife does not give consent, the subsequent marriage would be invalid for non-compliance with the Constitution."*

[83] Nhlapo contended that in customary law, however, the consent of both the man and the woman is already a requirement for a valid *ukuthwala*. This view was shared by Inkosi Mahlangu on behalf of the first *amicus curiae*.

[84] A further requirement for a valid customary marriage considered by the *amici* was the issue of the permissible marriageable age. Nhlapo recorded that amongst the AmaXhosa, marriageable age for a woman is considered to be

when she is able to bear children. However given the clear indication by the legislature, it appeared that for an *ukuthwala* to be considered validly performed, the parties thereto must either be above the age of eighteen or have acquired parental consent (who may also ratify the arrangement *ex post facto)*. Nhlapo claimed that this comported with the position at customary law that if the *ukuthwala* did not lead to the commencement of marriage negotiations, absent the consent of the woman's parents, then damages for the unsuccessful attempt would become payable. It should be noted though that during the course of oral argument the *amici* raised what appeared to be a measure of uncertainty about the minimum age, inasmuch as there was a lack of clarity with regard to whether a child below the age of sixteen years old but above twelve could lawfully be handed into marriage by her parents.[16] Needless to say, these concerns should be addressed in the pending law reform process. Pending such process the provisions of the RCMA and the Marriage Act No 25 of 1961 remain prescriptive.

Evaluation

[85] It is in the context of the evidence with regard to the content of *ukuthwala* as it is traditionally practiced and the practice in its *"aberrant"* form that the defences raised by the appellant on appeal must be considered. It appeared that the appellant conceived of *ukuthwala* as a form of marriage contrary to the opinions of the experts and the *amici* (that it is no more than a portal that

[16] Nhlapo's affidavit p 10 para 19.2; Inkosi Mahlangu's affidavit p 296 para 44.1.

commenced the process of marriage negotiations). In his evidence at the trial the appellant claimed that he had specifically travelled to the Eastern Cape to obtain a wife in accordance with his traditional customs. After literally selecting the complainant as the person he wished to marry he entrusted the negotiations to his family and her uncles. An amount of *lobola* of R8000 (two cows) was agreed to and the complainant was handed over to the appellant and his family by the uncle of the complainant and taken to their village whereupon she was groomed in the traditional *amadaki* as his young bride. He testified that although the complainant initially did not appear to be *"happy,"* after what he claimed to have been consensual sex between the two of them she carried out her chores as a young bride and he was left with no reason to think that she was an unwilling wife anymore. He claimed that he understood that it was necessary in his custom for the complainant to have consented to entering into the marriage. He likewise believed she was also required to have consented to sexual intercourse with him.

[86] Central to his defence at his trial however was the appellant's claim that the complainant had as a fact consented to their customary marriage and the sexual intercourse between them. Moreover he claimed that she had willingly relocated to Cape Town as his wife. The appellant had on his own version not relied on a practice of *ukuthwala* that required any measure of coercion of the complainant. He claimed though that due to the fact that her uncles and his family had entered into the negotiations, and arrived at an agreement as to the

amount of the *lobola* that he paid, and because her family had willingly handed the complainant over to him in marriage and returned her when she absconded, there was compliance with the traditional practices of his custom as he understood it.

[87] The appellant also referred to the customary practice that a female would not explicitly consent to the removal by the man when conducting the *ukuthwala* and would pretend to resist as a sign of her modesty[17]. In this regard both Nhlapo and Inkosi Mahlangu confirmed such conduct on the part of a consenting female in the "abduction" (our underlining). The appellant contended that this created an ambiguity about consent; and with reference to the evidence claimed that when the complainant ran away on the two occasions (which he admitted), the first in the Eastern Cape and the second in Philippi, it was no more than in accordance with such long standing and recognised practice.

[88] In respect of the incident in the Eastern Cape, he claimed that she had said to him that she had only wanted to visit her family, but was afraid that he and his family would not have allowed her to do so. The trial court found, and correctly in our view, that the running away by the complainant could not on the evidence have been an indication of any pretence on her part. If anything, the evidence with regard to her running away in the Eastern Cape,

[17] Appellant's Heads of Argument para 21-23 page 588

walking through a forest at night, alone, sleeping in the open and exposed to the elements was nothing more than a desperate attempt on her part at escaping from the appellant. It is therefore in our view nothing more than a cynical attempt on the appellant's part to claim that he harboured a belief that when the complainant ran away, she did so out of sheer modesty, and his reliance on the customary practice is entirely misplaced.

[89] He claimed in defence of the charge of trafficking that her family was fully aware of his intention to bring her to Cape Town and had not objected to her relocating with him. Moreover, the trial court did not find, on a careful examination of the evidence relating to the relocation and correctly in our view, that the complainant had consented to the customary marriage, the incidents of sexual intercourse with him, and that she had willingly relocated to Cape Town. The appellant claimed though that the complainant had willingly relocated from the Eastern Cape to Cape Town and his reliance on the fact that her family and uncles in particular could have exercised such consent on her behalf is irreconcilable with his claim that she had in fact consented.

[90] With the helpful insights of the experts on the practice of *ukuthwala* and submissions of the *amici*, it became apparent during the appeal that the offences for which the appellant was charged took place after a "traditional" *ukuthwala* would have occurred; this is because the trafficking and sexual assaults occurred after the customary "marriage". Therefore the appellant

could not in any event have placed reliance on the practice of *ukuthwala* (in the traditional sense) as justification for his conduct. However what he did attempt to do was to rely on the aberrant form of *ukuthwala* as being the living form of customary law to justify his conduct.

[91] In clarification of the relevance of the appellant's reliance on the practice of *ukuthwala* in customary law, the trial court had specifically put to De Villiers that the appellant had not asserted any right under customary law to have married or to have had sexual intercourse with the complainant without her consent, nor to have removed her from the Eastern Cape to Cape Town against her will. De Villiers' response is fully encapsulated in the following concluding remarks he made in his testimony;

> *"---Net hoe simpatiek 'n mens ook al wil wees ten opsigte van tradisionele lewende gewoontereg mag mens nooit romantiseer daaroor soos wat soms 'n bietjie gedoen word nie en moet mens gedagtig wees dat die waardigheid en gelykheidsbeginsels van die Grondwet so belangrik is dat selfs die Konstitusionele Hof onlangs in sy meerderheidsuitspraak gesê het 'n man moet vir sy eerste vrou se toestemming by haar kry voordat hy sy tweede vrou mag trou. So die vrou se toestemming word baie vooropgestel en dit is iets wat in hierdie geval ongelukkig miskien nie gebeur het nie."*

[92] The trial court found and correctly so, that the appellant had not asserted any customary law precept to have justified his conduct, or that he had acted in the belief that he had entered into a customary marriage that permitted sexual coercion. It appeared however on appeal that the appellant re-asserted a

reliance on the practice of *ukuthwala*, albeit in its aberrant form, which was permissive of coercion in respect of the sexual assaults to subdue her, and that her family (her uncles in particular) had negotiated the payment of the *lobola* for the marriage and had not objected to her removal to Cape Town.

[93] In the initial heads of argument filed on behalf of the appellant on appeal, his counsel quoted an excerpt[18] from an article by visiting Yale University student Ms N Karimakwenda titled *"Today it would be called rape: a historical and contextual examination of forced marriage and violence in the Eastern Cape by Nyasha Karimakwenda 2013 Acta Juridae 339 (at 352T)* in support of his contention as to the content of the practice. Karimakwenda argues that violence was always a part of the traditional form of *ukuthwala* and explored the continued prevalence of violence in the present day practices and more generally the use of violence in relationships. However the appellant's reliance on this insightful piece of research in order to justify his conduct is, in our view, misplaced. Counsel for the appellant also referred to an article of K Wood *"Group rape in the post-apartheid South Africa"* (2005) 7(4) Culture, Health & Sexuality 303 at 313-314[19]:

> *'the act of penetration – violently enacted or not – was one crucial part of the process of turning a girl into a wife, and thus enabled her attainment of an adult status (assuming her prior virginity), and this could not be equated with … rape, which had no decent intention. The act of sexual union marked the*

[18] Appellant's heads of argument paras [20] – [25] p 588.

[19] Appellant's heads of argument para [29] pp 588 – 589.

> *woman as belonging to the man: if the girl returned to her home after ukuthwala, the implication was that she was disgraced and "damaged" by the man's sexual marking and "owning" of her – a marking without substance.'*

[94] On appeal the appellant relied on this practice as constituting the living customary law that eschewed the requirements of consent and the prescript of age as determined in the RCMA. Counsel for the appellant submitted that the appellant had effectively entered into what he termed a *"putative customary union."*

[95] However, in our view, it cannot be countenanced that the practices associated with the aberrant form of *ukuthwala* could secure protection under our law. We cannot therefore, even on the rather precarious ground of the assertion by the appellant of a belief in the aberrant form of *ukuthwala* as constituting the *"traditional"* customs of his community, which led to a *"putative customary marriage,"*[20] find that he had neither trafficked the complainant for sexual purposes (as defined) nor committed the rapes without the necessary intention.

[96] We can furthermore find no fault with the trial court's credibility findings, nor with its reasoning and conclusions in respect of the convictions on both the trafficking and rape counts.

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[20] Appellant's heads of argument p 590 of the record para [38].

[97] Insofar as the two convictions for assault are concerned, it is our view that these amount to a duplication of convictions. In *S v BM* 2014 (2) SACR 23 (SCA) at para [3] the relevant test was formulated as follows:

> *'It is apparent that charging Mr BM with two separate counts, arising out of what was clearly one and the same incident, involved an improper duplication (splitting) of charges. It has been a rule of practice in our criminal courts since at least 1887 that "where the accused has committed only one offence in substance, it should not be split up and charged against him in one and the same trial as several offences". The test is whether, taking a common sense view of matters in the light of fairness to the accused, a single offence or more than one has been committed. The purpose of the rule is to prevent a duplication of convictions on what is essentially a single offence and, consequently, the duplication of punishment. Its operation is well illustrated by the example given in* R v Kuzwayo*, of the theft of 10 apples from an orchard on one occasion, where there is only a single offence, and the theft of one apple a day over 10 days, where there are 10 offences. Here, if there were an offence it was patently a single offence committed with a single intention. It should not have been split into two charges.'*

[98] On the complainant's own version, the assaults with the mop handle and the belt took place because the appellant wanted to subdue her so that he could rape her. The assaults themselves were the precursor to that rape. They immediately preceded the rape. As such the assaults arose out of the same incident as that of the rape. We thus conclude that the assaults formed part of

a single offence, namely rape, committed with a single intention. To uphold the convictions on these two counts would amount to a duplication of convictions on what is essentially a single offence and consequently, would amount to a duplication of punishment.

Sentence

[99] It is trite that a court of appeal may only interfere with a sentence imposed by the trial court if there has been a material misdirection or the sentence imposed is shocking, startling, or disturbingly inappropriate.

[100] As a first offender for the multiple rape of a minor, and for trafficking a person for sexual purposes, the appellant faced life imprisonment in terms of Part 1 of Schedule 2 of s 51(1) of the Criminal Law Amendment Act 105 of 1997, unless the trial court was satisfied that substantial and compelling circumstances existed which justified the imposition of a lesser sentence in accordance with s 51(3). However the charge sheet in respect of the count of trafficking did not reflect the minimum sentence provision.

[101] We note the distinction between Part 1 of Schedule 2 (which refers to s 71 of the Sexual Offences Act) on the one hand, and s 305(8) of the Children's Act on the other, which stipulates that a maximum of 10 years imprisonment may be imposed for child trafficking. It would appear that the distinction lies in the purpose of the trafficking, given that s 285(1) of the Children's Act (creating the

statutory offence of child trafficking) does not specifically refer to trafficking for sexual purposes. This indicates to us that the legislature regards the offence of trafficking for sexual purposes as a particularly heinous crime, punishable by the most severe sentence of imprisonment which a court can impose.

[102] Again, the trial court's approach to sentencing the appellant and the sentences which it imposed cannot be faulted. It correctly pointed out the failure by the state to reflect the minimum sentence of life imprisonment for trafficking for sexual purposes in the charge sheet. It thus correctly found that in the interests of justice the court's ordinary penal jurisdiction would have to prevail.

[103] The trial court carefully weighed the well-known triad of the nature of the offences, the appellant's personal circumstances, and the interests of society. It paid due regard to the probation officer and victim impact reports. Their contents form part of the record and will thus not be repeated herein. The trial court accepted that the appellant's moral blameworthiness was mitigated by the belief which he held concerning traditional practices, and accepted that in his own mind the appellant had not foreseen the catastrophic consequences to the complainant when he set in motion the course of events. We wish to emphasise however that in our view, any diminishing of the appellant's moral blameworthiness must be clearly distinguished from the notion or perception that any aberrant form of custom or traditional practice can of itself constitute a substantial and compelling circumstance. This could never have been

contemplated by the legislature, as it would fall foul of our Constitution, and would in any event defeat one of the very purposes for which s 51 of Act 105 of 1997 was enacted.

[104] The trial court also correctly found that the involvement of the complainant's male family members and grandmother was nothing more than a neutral factor insofar as the appellant's own blameworthiness was concerned. It thus found that substantial and compelling circumstances existed which justified the imposition of a lesser sentence than that prescribed on the counts of rape. Similarly no criticism can be levelled at the sentence imposed by the trial court when exercising its ordinary penal jurisdiction on the count of trafficking.

Conclusion

[105] In the result, save only in respect of the convictions on the counts of assault, there is no basis for this court to interfere in the trial court's decision.

[106] **We thus make the following order:**

1. The appeal succeeds in part.

2. The appellant's convictions on the counts of assault with intent to cause grievous bodily harm, and common assault, are hereby set aside.

3. Save as aforesaid, the appellant's appeal against his convictions and sentences is dismissed. The convictions and sentences are confirmed.

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N J YEKISO

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V SALDANHA

_____

J I CLOETE

For Appellant Instructed by	**Adv Mornay Calitz** Legal Aid, Cape Town
For Respondent	**Adv B E Currie-Gamwo** **Adv Maria Marshall**
The National House of Traditional Leaders Instructed by	**Adv S Poswa-Lerotholi** The State Attorney
The Women's Legal Centre Trust	**Adv Z Titus**
The Centre for Child Law	**Ms K Ngidi**
The Commission for Gender Equality The Rural Women's Movement The Masimanyane Women's Support Centre The Commission for the Promotion of the Rights,	**Adv M Bishop &** **Adv U K Naidoo**

of Cultural Religious & Linguistic Communities
Instructed by

Legal Resources Centre,
Cape Town