

S v MTHOMBENI 2020 (2) SACR 384 (KZP)

KEY CONCEPTS	
Sentencing in rape cases	Guilty pleas not mitigating factor
Multiple rapes	Life imprisonment
Gravity of rape and gender based violence	Impact of rape

ISSUE: An appeal against sentences imposed in a regional magistrates' court for robbery with aggravating circumstances and rape.

FACTS: The appellant pleaded guilty to charges of robbery with aggravating circumstances and rape. He was sentenced to 15 years' imprisonment for the robbery and life imprisonment for the rape. The appellant and his friends broke into a house to rob the occupants. The appellant heard a female voice in one of the rooms and went in search. He found the complainant and raped her, after which his companion raped her.

The appellant made a s112 statement and was sentenced in terms of the minimum-sentence legislation (ie the robbery charge fell within part II of sch 2 to the Criminal Law Amendment Act 105 of 1997, and the rape charge fell within part I of that schedule). The magistrate found that there were no substantial and compelling circumstances warranting a departure from the minimum sentence.

On appeal, appellant's counsel raised a point of law that, with respect to the sentence of life imprisonment imposed on the conviction of rape, the court was bound by the decision of the Supreme Court of Appeal in *S v Mahlase* [2013] ZASCA 191 and, therefore, obliged to reduce the sentence to 15 years.

DISCUSSION: The appellant argued that the decision in *Mahlase* was binding on the court i.e. that where a victim has been raped more than once, the prescribed minimum sentence for rape in part 1 of sch 2 to the Act may only be imposed upon an accused if the other person who participated in the rape has also been convicted. The appellant, therefore, argued that he should not have received the minimum sentence for rape, because the other person who had raped the complainant had not been convicted.

Was this court bound by Mahlase?

Generally, a lower court is bound by a decision of a higher court in respect of the specific legal principle laid down by the higher court. The lower court must determine precisely what the *ratio decidendi* is since it is only bound by the *ratio decidendi*. The *ratio* of *Mahlase* was:

"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. On appeal, Tshiqi JA (with whom Lewis JA and Theron JA 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 minimum sentence for rape was not applicable. The sentence of life imprisonment was set aside and replaced with 15 years' imprisonment.'

- This interpretation does not make sense since it places the first convicted accused at a substantial advantage as far as sentencing is concerned. The accused convicted later would face the mandatory sentence of life imprisonment whereas the first accused would not since no other person had been convicted. The arbitrariness of this is clear as is its unconstitutionality.
- It is not clear from *Mahlase* on what basis the court reached this conclusion – no explanation of how the section was interpreted or reasons for the conclusions.
- Part 1 schedule 2 is detailed and caters for various forms of rape, but *Mahlase* does address which form of rape provided for in part 1 schedule 2 requires the conviction of all the perpetrators before the prescribed minimum sentence can apply.
- Section 51(1) of the CPA 1977 provides:
'Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.'
- The offences of rape listed in part 1 schedule 2 include rape when committed:
 - where the victim was raped more than once, whether by the accused or by any co-perpetrator or accomplice;
 - by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;
 - by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions; or
 - by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;
 - where the victim is
 - a person under the age of 16 years
 - an older person as defined in the Older Persons Act 2006
 - a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or
 - a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or
 - where the rape involves the infliction of grievous bodily harm.
- The present court was of the opinion that the conclusions reached in *Mahlase* could not reasonably apply to all forms of rape provided for in part 1 of sch 2. It could not, for instance, apply to rape by someone with HIV in (a)(iv), therefore, the court's decision is only binding in respect of the precise form of rape in part 1 to which *Mahlase* relates.

- The ratio decidendi of the SCA in *Mahlase* is restricted to the form of rape to which the conclusions in para 9 of the judgment relate and a lower court, with respect, is bound by *Mahlase* to that extent only. The SCA obviously considered part I of sch 2 on the basis of the facts of that case. Since the reasoning of the court is not clear, it is necessary to consider the facts of that matter in order to determine the precise ratio.
- *Mahlase* was concerned with a common-purpose scenario. The appellant and four co-assailants had set out to rob the owners of a bottle store after the store had closed. During the course of that offence they perpetrated further offences of the rape and kidnapping of the victim. This is provided for in item (a)(ii) in the description of rape in part I of sch 2 to the Act. None of the other forms of rape provided for in part I of sch 2 are consistent with the facts and circumstances of *Mahlase*. The rape of the victim followed upon the original offence of robbery as part of the common purpose on the part of the perpetrators.
- The present court was, therefore, of the opinion that the conclusions reached in *Mahlase* are restricted to the offence of rape of the form provided for in item (a)(ii) only i.e. common purpose. This court was consequently not bound by the conclusions in *Mahlase*.
- The court also disagreed with the reasoning of the SCA in *Mahlase* with respect to the form of rape provided for in (a)(ii) of part I of sch 2 (common purpose) on the basis that that court's interpretation of part I is inconsistent with several of the rights contained in the Bill of Rights and with entrenched constitutional values, primarily those of human dignity and equality, involving the victims of rape of the nature provided for in the Act.
- In the present case before the court, the appellant was not convicted of rape in the context of common-purpose. The victim was raped more than once and by more than one person. This placed the rape within the ambit of (a)(i) where the victim was raped more than once, whether by the accused or by any co-perpetrator or accomplice. This means that the trial court did have the power to impose a sentence of life imprisonment .

Did the court misdirect itself on sentence?

In part 1 sched 2 (a)(i) the victim must be raped more than once. Does the “more than once” mean that life imprisonment can only be imposed where a person is raped more than once and the other perpetrator has been convicted?

- The gravity of the offence of rape has been addressed in many judgements. In *S v Tshabalala and Another* 2020 (2) SACR 38 (CC) (2020 (3) BCLR 307 the Constitution Court described the offence of rape as follows:

'Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the

apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.'

- The object of the inclusion of item (a)(i) is to punish the multiple rapes of a victim more severely. The provision applies when the person is raped 'more than once whether by the accused or by any co-perpetrator or accomplice'. Having regard to the constitutional rights and values which the offence of rape violates, and specifically the rights of women to be protected from gender-based violence, the provisions can only sensibly refer to a multiple rape performed collectively by an accused, a co-perpetrator or an accomplice (and not necessarily a multiple rape by one of them). It would be absurd to suggest that the minimum sentence would not apply to an accused where the accused raped the victim once, and a co-perpetrator also raped the victim once, such that neither of them did so more than once.
- The words 'more than once' must be interpreted to refer to the victim having been raped by any of the accused, a co-perpetrator or an accomplice collectively more than once in the circumstances in which the crimes were committed, and the word 'or' should be interpreted to mean 'and/or'.
- The legislature was not satisfied with the courts having a discretion to impose a sentence of life imprisonment in respect of such offences. It enacted the minimum-sentence legislation to make a sentence of life imprisonment mandatory in respect of specific offences. Courts are therefore obliged to impose the minimum sentences, save where there were truly convincing reasons for departing therefrom, and 'are not free to subvert the will of the legislature by resort to vague, ill-defined concepts'.
- Rape is an exceptionally degrading offence which violates the constitutional values of human dignity in s 10 (inherent dignity and the right to have a person's dignity respected and protected); the right to freedom and security of the person in s 12 (which includes the rights to be free from all forms of violence, not to be tortured in any way and not to be treated or punished in a cruel, inhuman or degrading way); the rights to equality and life (in ss 9 and 11, respectively); and the right to freedom of movement in s 21.
- An interpretation of the Act, to the effect that the sentence of life imprisonment for the offence of rape in the forms of those provided for in part I of sch 2 will not apply to an accused where a co-perpetrator has also not been convicted, is inconsistent with constitutional rights and values. Where, as a fact, a victim has been raped by more than one person, it is irrational to require that the other person should also be convicted before a sentence of life imprisonment would be competent for the first person. Such an interpretation would have the result that where two persons have raped the same victim, an accused who is convicted first would be spared a sentence of life imprisonment, but the sentence of life imprisonment would be mandatory in respect of the second accused, by virtue of the mere fortuity that the second rapist was tried and convicted at a later stage. In the context of sentencing, the second convicted person would not have a fair hearing by virtue of him being treated differently from a co-perpetrator who was convicted of the same offence at an earlier point in time.

- Where one of the persons who had raped the victim is being sentenced, it is inconsistent with the recognition of the victim's rights and the constitutional values of equality and human dignity to disregard the fact that the victim had actually been raped by more than one person, for the purpose of determining whether the minimum sentence should apply.

Can the sentence be said to be shocking or disturbingly inappropriate?

- The appellant's primary submission is that the trial court overemphasised the aggravating factors in respect of the offences and failed to attach adequate weight to the appellant's personal circumstances.
- The present court was of the opinion that the trial court did not err in the sentences imposed on the appellant:
 - Both offences carried prescribed minimum sentences and there was no objective material before the learned magistrate demonstrating substantial and compelling circumstances to depart from them. The learned magistrate was consequently bound to impose those sentences.
 - The evidence before the trial court justified those sentences and there was no misdirection.
 - The medico-legal report showed that the victim had not only been raped, but that she had also been physically harmed during the course of the sexual assault (there were injuries on her face and on her rear shoulder). There was therefore clearly an element of violence which accompanied the rape.
 - The appellant and his accomplices broke into the home of the victim and her family.
 - The complainant has been scarred for life.
 - The gravity of the offences must be afforded appropriate weight in respect of sentence, and the trial court correctly did so.
 - It is not a mitigating factor that the appellant pleaded guilty. The DNA results placed it beyond any doubt that he had raped the complainant and the plea of guilty is a neutral factor.
 - Even though the appellant's circumstances may be that he possesses the ability to work and be economically active, the undisputed evidence is that, despite this, he chose to steal and to do so with violence. He did not need to steal, but chose to do so. In these circumstances the fact that he was a first offender in respect of these two charges consequently does not assist him in respect of the minimum sentences.
 - Gender-based violence and the offence of rape continue to remain a scourge in our country. Rape is the most prevalent and vicious offence which is being committed against the most vulnerable members of our society, namely, women, young girls and even children who are simply powerless to stop these senseless attacks on them. Rape is a degrading and humiliating act, the physical and psychological effects of which remain with the victim forever. The men in this country who resort to this type of offence against our

women and children are deserving of nothing but the most severe of punishments ordained by the legislature. Inasmuch as the legislature has seen it fit to respond to society's concerns regarding the ever increasing number of rapes taking place in this country on a daily basis, as courts we owe an equal duty to ensure that the minimum sentences prescribed by the Act are imposed.

FINDING: The appeal court held:

- That *Mahlese* is distinguishable from the present case and this court is, therefore, not bound by it. The rape offence did fall within the ambit of part 1 of sch 2 to the Act and the court, therefore, did have the requisite power to impose a sentence of life imprisonment in terms of minimum sentences.
- In respect of a multiple rape as contemplated in item (a)(i) of part 1 of sch 2 to the Act, it is immaterial, for the purposes of sentencing of one of the persons who had raped the victim, as to whether a co-perpetrator has been convicted, and this is not a jurisdictional prerequisite for the imposition of the sentence of life imprisonment.
- The interpretation of the minimum-sentence legislation in *Mahlase* is not consistent with the rights contained in the Bill of Rights and the constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms.

The appeal is thus dismissed.