Editorial note: Certain information has been redacted from this judgment in compliance with the law.

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

CASE NO: 350/2003

In the matter between

THE STATE **APPELLANT**

and

KHEHLANI MVAMVU **RESPONDENT**

CORAM: **MTHIYANE, CLOETE and VAN HEERDEN JJA**

HEARD: **9 SEPTEMBER 2004**
DELIVERED: **29 SEPTEMBER 2004**

Summary: **Rape – Appeal by State against sentence– rural and unsophisticated accused sentenced to an effective 5 years' imprisonment for the multiple rape (on two occasions) of his customary law wife – substantial and compelling circumstances found to exist – sentencing court required to balance all factors relevant to sentencing against benchmark provided by the Legislature in section 51 of the Criminal Law Amendment Act 105 of 1997.**

JUDGMENT

MTHIYANE JA:

MTHIYANE JA:

[1] This case highlights the importance of the individualization of punishment[1] and the need for the sentencing court properly to balance all the factors relevant to sentencing against the benchmark provided by the Legislature in respect of certain serious offences.[2] The State appeals against an effective five-year prison sentence imposed on the respondent ('the accused') for the multiple rape (eight incidents on two occasions), abduction and assault of his customary law wife, Ms C.S. ('the complainant').

[2] The accused was convicted in the regional court at Knysna on two counts of rape, one count of abduction and one count of assault. The matter was thereafter referred to the Cape High Court for sentence in terms of s 52 of the Criminal Law Amendment Act 105 of 1997 ('the Act'). The court *a quo* (Moosa J) confirmed the convictions and sentenced the accused to 5 years' and 3 years' imprisonment respectively on the two rape counts, and to 3 years' and 3 months' imprisonment respectively for the abduction and the assault. The sentences were ordered to run concurrently.

[1] *S v Toms; S v Bruce* 1990 (2) SA 802 (A) at 806 H-I.
[22] See s 51 of, read with Schedule 2 to, the Criminal Law Amendment Act 105 of 1997 for a description of the offences concerned.

[3] The State contends that, having regard to the minimum sentence provisions contained in s 51 of the Act, the sentence imposed on the accused was too lenient. Sections 51 (1) and 51 (3) (*a*) of the Act provide that if a High Court has convicted a person of an offence referred to in Part I of Schedule 2, it shall sentence that person to imprisonment for life unless it is satisfied that there are substantial and compelling circumstances which justify the imposition of a lesser sentence.[3]

[4] Before turning to the facts a brief consideration of the background of the accused and the complainant is necessary for a better understanding of the setting against which the offences were committed. The accused was born at Qumbu in the Transkei, where he lived according to the traditions, customs and beliefs of his tribe. Although he passed grade seven at school he led a simple and unsophisticated life. In 1995 he entered into a customary marriage with the complainant whom he had known from childhood. She was about 15 years old at the time. They had two children: one who died soon after birth and a daughter who was approximately five years old when the accused was sentenced. In April 1999 their marriage experienced problems which resulted in the complainant leaving the accused to stay with her brother, Mr S.S.. She assumed that the marriage had ended, not least because the accused's uncle had given her permission to remove her traditional wedding attire. (The accused's father was deceased, having committed suicide some years previously.) The accused on the other hand regarded the

[3] See, in this regard, *S v Malgas* 2001 (1) SACR 469 (SCA) para 25.

marriage as extant, because the *lobolo*[4] he had paid in respect of the complainant had not been returned by her family.[5] In addition, according to the accused, the two families had not met to attempt to reconcile the couple, as required by customary law.[6] Both of these latter two aspects were emphasized by the expert witness called by the court, Reverend Ngesi. The accused also believed that the complainant's family were the cause of the break-up of their marriage. The problems in the marriage arose some time after the accused and the complainant had left Transkei for Knysna, where the accused was working.

[5] I now turn to consider the facts. On Wednesday 12 May 1999 the accused and the complainant attended the magistrate's court at Knysna for the hearing of a child maintenance complaint and a domestic violence dispute. At the conclusion of the hearing a domestic violence interdict was issued against the accused by consent. Upon their return to their respective places of residence the accused persuaded the complainant to travel with him in the same taxi. When she reached her destination he tried to prevent her from disembarking and begged her to return to his home. She refused and proceeded to alight from the taxi. He also disembarked. When she ran away soon after alighting he pursued her and caught up with her near a neighbour's house. He began to drag her away and a scuffle ensued. As he was trying to pull her towards him

[4] *Lobolo* is consideration paid by the bridegroom to the family of the bride before the marriage. It is similar to a dowry or bride price in a Western marriage, though not quite the same. Bekker *Seymour's Customary Law* 5 ed (1989) 151 describes *lobolo* as 'the rock on which the customary marriage is founded.'

[5] Warner *A Digest of Native Case Law* para 1794 records that if the court grants a decree of divorce in a customary marriage, an order for the return of *lobolo* or any portion thereof furnished the woman's father is peremptory.

[6] According to Warner op cit para 1788, an attempt at reconciliation is an essential preliminary to the action for divorce at customary law.

she clung on to a pole supporting the neighbour's boundary fence. Her resistance came to naught as the pole gave in and was ripped out of the ground. She then broke away from him and ran into the neighbour's house but he followed and again accosted her. The accused ultimately had his way and took her to his home by force. He kept her there against her will from Wednesday 12 May until Friday 15 May 1999. During that period he raped her on six occasions. The complainant managed to escape on Friday 15 May, after the accused had left the house for a while.

[6] The second incident occurred on 29 May 1999. The accused visited the complainant at her brother's house. He asked to speak to her but the complainant's brother was only prepared to allow him to do so if this took place in the house. But shortly after the complainant's brother had left the house (to fetch his uncle to help him to deal with the accused, who was armed with a knife), the accused forcibly removed the complainant and dragged her into the bush to a place near an abandoned abattoir where he raped her twice. On this occasion he also assaulted the complainant by hitting her twice on her thigh with a stick.

[7] Having regard to the minimum sentence provisions, the judge *a quo* found that 'substantial and compelling circumstances' justifying the imposition of a lesser sentence were present as contemplated by the Act.[7] I cannot find any fault with this conclusion. In the appeal before us the correctness of this finding was conceded by the State.

[7]Section 51(3)(*a*) of the Act.

[8] In passing sentence the judge *a quo* took into account the following factors in aggravation of sentence in relation to the first incident: the fact that the accused had forced the complainant to accompany him to his home and had held her captive for two days; that he had raped her on six occasions; that he had threatened her with a knife and had also threatened to douse her with petrol and burn her; that the rape took place after the complainant had just come from court, where she had obtained a domestic violence interdict against him; and that, had it not been for the fact that the complainant had escaped and reported the matter to the police, he would in all probability have continued with his conduct.

[9] As to the second incident the judge *a quo* took into account the fact that the complainant had been forcibly removed from her place of residence; that she had been threatened with a knife; that the accused had performed certain acts of witchcraft to frighten her; that she had been raped twice; that she had been hit with a stick; that the accused committed the second rape knowing that the police were looking for him; and that he may have continued to rape and assault the complainant, had he not been interrupted by the complainant's brother and some elders. The court also noted that the accused had shown no remorse.

[10] The learned judge then had regard to the seriousness of both offences and the interests of the community, in particular the community's demand for the imposition of heavy sentences on perpetrators of sexual offences against women.

[11] In mitigation of sentence the learned judge found that the crimes were what he termed ‘crimes of passion’; that the accused had repeatedly tried to effect a reconciliation with the complainant and had pleaded with her to return to him; that members of the complainant’s family had possibly contributed to the break-up of the marriage; that the complainant still had ‘feelings’ for the accused; that, if the family had left the couple to lead their lives, the problems between them might not have arisen; that the complainant had not complained to the accused’s sister when she arrived at the accused’s home during the period when the complainant was being held against her will; and that the accused and the complainant had different perceptions of whether they were still married to each other or not.

[12] Turning to the personal circumstances of the accused, the learned judge noted that the accused was 33 years old; that the couple had known each other from childhood and had a five-year old child; that the accused left school in grade eight (standard six); that he was at the time of the incidents in permanent employment with Murray and Roberts; that, according to the social worker, he did not appear to be an aggressive person; that he lived according to traditional values and customary practices; and that he had to be treated as a first offender as no previous convictions had been proved against him. Although the accused’s attorney informed the court from the bar that he had a previous conviction for assault, for which he had been sentenced to nine months’ imprisonment, no account was taken of this – and properly so, as the State did not seek

to prove it.[8] The court was informed further that the complainant in that case was the accused's sister-in-law whom the accused regarded as interfering with his marriage.

[13] Although the judge *a quo* granted the State leave to appeal against the sentences on all the counts, argument before us was limited to an attack on the propriety of the sentences imposed on the rape counts. Counsel for the State submitted that the sentence of five years for the first rape count was too light and that the second rape count, for which the accused was only sentenced to three years' imprisonment, was in fact more serious than the first. This was because at that stage the accused knew that he was being sought by the police for the first incident. A number of factual misdirections were relied upon. First, the learned judge's finding that the offences in question were 'crimes of passion' was attacked. In my view this finding is, with respect, not correct as the offences were not committed without rational reflection whilst the perpetrator was influenced by barely controllable emotion, which is an essential characteristic of a crime of passion. Secondly, the finding that the complainant still had 'feelings' for the accused was correctly attacked because the complainant had made it clear to the accused that she did not want to have anything further to do with him and had in fact left him. A third misdirection, so counsel for the State submitted, was the learned judge's reliance – as a mitigating factor - on the complainant's failure to report the rape to the accused's sister, when the latter had arrived at the house where the complainant

[8]See in this regard, *S v Maputle* 2002 (1) SACR 550 (W) at 555 f-g, a case in which the trial magistrate took into account a previous conviction of the accused which the State had not proved. This was found by the court of appeal to be a serious irregularity.

was being held captive. Counsel reminded us that in her evidence the complainant had given a plausible explanation for her failure to report - she said that the sister had previously been antagonistic towards her and would not have been sympathetic to her plight - and this explanation appears to have been overlooked by the judge *a quo.*

[14] I agree that the court *a quo* did indeed misdirect itself in the respects set out above, and that the misdirections are material, so entitling this court to interfere with the sentence imposed. The circumstances in which a court of appeal is entitled to interfere with sentence were encapsulated by Marais JA in *S v Malgas* as follows:

'A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a Court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"'.[9]

[15] I am also satisfied that the sentences imposed in respect of the two rape counts were so disturbingly inappropriate as to lead to the inference that the judge *a quo* failed

[9] *S v Malgas supra* para 12; also *S v Abrahams* 2002 (1) SACR 116 (SCA) para 15.

to exercise his discretion properly. As already indicated I agree with the finding of the court *a quo* that there were substantial and compelling circumstances *in casu* justifying the imposition of a lesser sentence than life imprisonment. The complainant and the accused were not strangers to each other. They had lived together as husband and wife in a customary marriage relationship for a number of years before the rapes. There was no evidence that the complainant suffered any lasting psychological trauma to speak of, although she did mention in her evidence that she still thought about the incidents. She only suffered minor injuries. In fact, at the time sentence was considered, the complainant could not be found and gave no evidence in aggravation of sentence. While rape is undoubtedly a very serious offence, I am not convinced that this is a case, despite the provisions of the Act, which requires the maximum sentence which can be imposed by a court. In this regard the remarks of Cameron JA in *S v Abrahams*, a case which concerned the imposition of the minimum sentences prescribed by the Act, are both instructive and apposite:

'… rape can [n]ever be condoned. But some rapes are worse than others, and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust.'[10]

[16] As stated earlier in the judgment the accused believed that he and the complainant were still married at the time of the incidents. Having regard to the evidence of Reverend Ngesi, it would appear at the time of the offence that the couple were indeed in all probability still formally married under customary law. It is clear

[10] See *supra* para 29.

from his evidence that at the time of the incidents the accused honestly (albeit entirely misguidedly) believed that he had some 'right' to conjugal benefits. His actions, though totally unacceptable in law, might well be (albeit only to a limited extent) explicable given his background. He grew up and lived in a world of his own, of tradition and Black medicine – which was not completely strange to the complainant (they grew up together and come from the same area). His actions were shaped and moulded by the norms, beliefs and customary practices by which he lived his life. Though the rapes were accompanied by some acts or threats of violence, it does not appear that the prime objective was to do the complainant harm. The key aim, it seems, was to subjugate the complainant to his will and to persuade her to return to him – a consequence of male chauvinism, perhaps associated with traditional customary practices. That these traits or habits are difficult to discard appears to have been true of the accused. The complainant's rights to bodily integrity and dignity and her entitlement to have these rights respected and protected[11] were not foremost amongst his concerns. These ingrained traits and habits of the accused cannot be ignored when considering an appropriate sentence. He wanted the complainant back home, as his wife - in one piece. The threats he made were empty, albeit designed to frighten her.

[17] These factors perforce have to be weighed up against the benchmark provided by the legislature for offences of this type. In imposing the sentences of 5 years' and 3 years' imprisonment for the two rapes (eight incidents) it would appear that the judge *a*

[11] Sections 10 and 12 of the Constitution.

quo reasoned, erroneously, that having found substantial and compelling circumstances to be present, he considered himself to have a free and unfettered discretion to impose any sentence he considered appropriate. In so doing, he appears to have overlooked the benchmark indicating the seriousness with which the Legislature views offences of this type. This approach amounts to a material misdirection. It is as well to recall what Marais JA said in *Malgas*. Dealing with departure from the prescribed minimum sentence provisions prescribed by the Act the learned judge said:

'What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the Legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed.'

Marais JA continued:

'If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed **paying due regard to the bench mark which the Legislature has provided'.**[12] (Emphasis added.)

In *S v Abrahams*, Cameron JA put it thus:

[12] *S v Malgas supra* para 25.

'The prescribed sentences the Act contains play a dual role in the sentencing process. Where factors of substance do not compel the conclusion that the application of the prescribed sentence would be unjust, that sentence must be imposed. However, even where such factors are present, the sentences the Act prescribes create a legislative standard that weighs upon the sentencing court's discretion. This entails sentences for the scheduled crimes that are consistently heavier than before.'[13]

[18] In my view even in the absence of misdirection this court would have been entitled to intervene, given that the sentences imposed in respect of the rape counts were disturbingly inappropriate. I am satisfied that on both of the bases indicated in *Malgas* in the passages quoted in para [14] above, this court is entitled to reconsider the sentence. The crimes committed by the accused were undoubtedly serious and the legislature has provided a benchmark which must be borne in mind at all times. Giving due weight to the aggravating and mitigating circumstances and to the special circumstances of this case as set out above and bearing in mind that, when sentence was passed, the accused had already been in custody for more than three and half years, an appropriate sentence is, in my view, ten years in respect of each of the two counts of rape, such sentences to run concurrently with each other and with the sentences imposed for the other offences.

[19] The appeal accordingly succeeds. The sentences imposed by the court *a quo* are set aside and are replaced by the following sentences:

Count 1: Rape: 10 years' imprisonment;

[13] *Supra* para 25.

Count 2: Abduction: 3 years' imprisonment;

Count 3: Rape: 10 years' imprisonment;

Count 4: Assault: 3 months' imprisonment.

The sentences on counts 2, 3 and 4 are to run concurrently with each other and with the sentence on count 1. To the extent necessary, the sentences are antedated in terms of s 282 of the Criminal Procedure Act 51 of 1977 to 7 November 2002, being the date upon which the sentences were imposed.

_____

KK MTHIYANE
JUDGE OF APPEAL

CONCUR:

CLOETE JA
VAN HEERDEN JA