IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

CASE NO: A1261/04

In the matter between:

LESEKA NCHECHE Appellant

and

THE STATE Respondent

JUDGMENT

GOLDSTEIN J:

[1] In *Bopape v S* (Unreported Case No A548/01–WLD) I delivered a minority judgment in which I expressed the view that this Court is bound, when imposing sentence to following the precedents established by the Supreme Court of Appeal when that Court sets aside a sentence on appeal and itself determines an appropriate sentence. I have reconsidered that view and now believe it to have been erroneous for the reasons which follow.

[2] In *S v Pieters* 1987 (3) SA 717 (A), Botha JA stated, at 734 D–F that the decisive question facing a court of appeal on sentence, was whether it was convinced that the court, which had imposed the sentence being adjudicated upon, had exercised

its discretion to do so unreasonably. If so, the court of appeal was entitled to interfere, and, if not, not. After pointing out, at 734 G–H that the determination of a specific period of imprisonment in a particular case cannot occur in accordance with any exact, objectively valid standard or measure, the learned Judge of Appeal goes on at 734 H–I to say (citing *R v Alwyn* 1955 (3) SA 207 (A) at 213B–D, *S v Sibiya* 1973 (2) SA 51 (A) at 58B–59 A, and *S v Skenjana* 1985 (3) SA 51 (A) at 54I–55F) that even if the court of appeal is of the view that it would have imposed a much lighter sentence, it would not be free to interfere if it were not convinced that the court below could not reasonably have imposed the sentence which it determined. In *Alwyn* five Judges of Appeal

subscribed to the view that they would have imposed a suspended sentence if they had been the court of first instance; nevertheless, they dismissed an appeal against an effective sentence of 18 months' imprisonment; this aspect of the case was referred to with approval in *Sibiya* at 58E–F.

[3] In *Hiemstra Suid–Afrikaanse Strafproses*, 6th ed, at 836–7, the learned authors, Kriegler and Kruger, say that Botha JA's dicta on sentence in *Pieters* have been repeatedly approved by the Appellate Division and ought to be the last word on the subject. Respectfully accepting that this is so, it seems to me to follow that provided that a court imposing sentence exercises its discretion reasonably, it is not bound by sentences imposed by other courts, including higher courts.

[4] The appellant was accused 1 in the Regional Court and was convicted together with accused 2 of the rape by each of a woman of 27 years of age, and of having assaulted her with intent to do her grievous bodily harm. He was also convicted of

the assault of another victim. On the charge of assault with intent to do grievous bodily harm both accused were sentenced in the Regional Court to 3 years' imprisonment and on the conviction of assault the appellant was sentenced to 30 days' imprisonment. The question of sentence on the rape count was then referred to Masipa J in this Court on 5 December 2001 in terms of the provisions of section 52(1) of Act 105 of 1997. The learned Judge, after hearing evidence and argument on sentence, sentenced each of the accused to life imprisonment. The learned Judge refused a subsequent application for leave to appeal against the convictions of rape and the sentences imposed in respect thereof. On 17 May 2004 the Supreme Court of Appeal granted the appellant leave to appeal to the Full Court of this Division against his sentence of life imprisonment.

[5] I turn to deal with the material facts. Accused 2 was born 22 December 1980. He was thus 19 years old when the rape occurred on 26 March 2000. The appellant was born on 13 November 1975 and was thus 24 years old at the time of the crime.

[6] The appellant had had a relationship with Ms Beauty Mfazwa, the complainant in the third charge. During the night in question accused 2 asked the appellant to return his (accused 2's) "armband". They went to look for the item at appellant's "shack" and failed to find it. The appellant began thinking that Mfazwa must have removed it together with her own and some of his possessions. The two accused then went, apparently at the appellant's suggestion to find Mfazwa.

[7] It appears that Mfazwa had resided with the complainant on the rape count, Ms Nospha Quezo. The latter lived in what is described as a "pandokkie."

[8] At 1h00 on the day of the rape having been asleep and alone in her dwelling, Quezo awoke to find accused 2 hitting her on her shoulder. The appellant was also in the room. She deduced that the appellant must have opened the door to her home because, she said, he knew how they locked it. She had known him very well.

[9] She then sat up and accused 2 asked where "daardie hoer" was. She knew that he was referring to Mfazwa. He thereupon hit her with a bottle which broke and cut her; accused 2 then stabbed her with the broken bottle, twice on her right upper arm, on her back, her buttocks and thighs. She bled.

[10] Accused 2 then indicated to the appellant that they should have sexual intercourse with her. Accused 2 removed her panty and had intercourse with her. Thereafter the appellant also had intercourse with her.

[11] She then took a panty hanging next to her bed to stop the bleeding and fled to the neighboring shack. She was then bleeding, says the record, "onder die oog–bo my bolip". There were two beds in the shack, and she fell onto one of them. Accused 2 followed her all the time, stabbing her with the bottle. She heard the appellant saying to the accused 2: "(N)ee laat ons haar los, sodat ek vir Mamani (Mfazwa) wat hulle gesoek het gaan roep."

[12] She had no clothes on at that stage. She then testifies: "Ek het net daardie broekie gehad waarmee ek bloed wou gestop het met dit." After they left the shack accused 2 gave her the T-shirt he was wearing so that she could wear it.

[13] Whilst they were walking to Mfazwa the appellant hit her, apparently on the journey, with an object – "'n soort byl" – on the back of her head. On arrival at the place where Mfazwa was staying the two accused told her to knock on the door. Whilst she was doing this the appellant kicked the door open; she goes on to say that Mfazwa opened it. They pulled Mfazwa out and hit her with clenched fists and kicked her with their shod feet. She screamed for help and a Mr Albert Ndlovu, who also gave evidence appeared on the scene. The two accused fled but they were apprehended soon thereafter. Ndlovu said that both accused hit and kicked Mfazwa. However, Mfazwa herself

testified that only the appellant assaulted her with clenched fists and shod feet.

[14] Dr Lushikwa Mulamba Kalume examined the complainant on the rape charge about 8 hours after the incident. Apart from the lacerations and bruises which must have been caused by the assault on her body which preceded and followed upon the rapes, he found her vagina to be very painful and noted a "heavy brownish discharge." The rape victim gave no evidence before Masipa J, and none was given about the sequelae of the rape. It appears that she died during 2001.

[15] The Court *a quo* was furnished with a report of a social worker, Ms Martha Maria Elizabeth Raath, who also gave evidence on the appellant, having interviewed him

twice and having also interviewed his father. The mother apparently disappeared after having been told to see Raath. The appellant, she said, denied his involvement in the rape.

[16] The appellant's parents had been married according to customary law in 1974, but were separated for 5 years. The appellant had an older half–brother, born to his mother out of a previous relationship. He and his half–brother lived in a shack on the premises of his mother who lived in a two–roomed house. She was employed at a factory whilst he was growing up but had recently lost her employment, he told Raath; however, the father said he had found her work about 2 months before the report. The appellant said that he had a positive relationship with both parents; but his father did not visit him in prison, his mother being more supportive.

[17] After failing grade 8 as a result, he said, of the bad influence of his friends, he was send to his paternal grandmother in Rustenburg to complete his school career there. He completed grade 11, then left, because, he said, his parents did not want to pay his school fees; his father says, however, that he was not interested in attending school any more. He told Raath that his parents were fighting with him because he was drinking too much.

[18] He was unemployed during 1995 and employed for 6 months during 1996, after which he was retrenched. In 1997 he moved back to his grandmother because she was staying alone, and was employed for three months that year. In 1998 he

moved back to his mother's house and was employed again for three months, after which he remained unemployed.

[19] He had a two–year old child, with whose mother he had a relationship which lasted until his arrest. She never came to visit him in prison. He had last seen the child when she was 4 months old; he had never paid maintenance due to his unemployment.

[20] The appellant had enjoyed good health. He had never used illegal drugs. He was a heavy drinker, starting in 1991. He became aggressive and argumentative when under the influence. He was short–tempered and would become angry easily when he felt that people disrespected him. He was often involved in fights at school and when drunk would be argumentative and disrespectful to his parents. He drank beer on the day in question but slept in the afternoon, did not drink that night and was sober during the rape. He had a good friend, 2 years older than himself, whom he saw practically daily. They decided things jointly but if his friend disagreed he would leave and do what he wanted to do; Raath deduced from this that his friend was not able to influence him. He and accused 2 were not close friends, but lived in the same street and sometimes met at a tavern.

[21] In her judgment on sentence Masipa J referred to the fact that the rape *in casu* occurred in the context of "a vicious attack on the complainant…(who) suffered several serious injuries." She dealt with the appellant's personal circumstances and

mentioned his persisting in denying that he had raped the complainant or witnessed any assault on her.

[22] The learned judge goes on to say the following (153 – 4):
"I now deal with the interest of society. The unprecedented spate of violence and especially rape against women and children is escalating at an alarming rate. Helpless defenceless women feel unsafe, even in the sanctity of their own homes, and look to these courts to protect their interests and the courts can protect these interests by meting out harsh sentences.

It is indeed true that the modern day approach to punishment should lay emphasis on rehabilitation and prevention, especially when the accused are young.

In this particular case, however, I am of the view that deterrence should play a more prominent role because of the seriousness and prevalence of the offence. It is a sad fact that it is youngsters who commit these atrocious crimes such as rape. It is youngsters who made our streets and our homes unsafe, it is youngsters who are a danger to our society. I would be failing in my duty if I were to ignore this fact.

In this particular case the complainant was asleep in her home, thinking she was safe,

when the two accused broke in, attacked her and raped her. They violated her privacy and dignity and showed her no respect for her as a fellow human being. And as if that was not enough, they made her walk the streets at night only half dressed in a T-shirt to show them where her sister was."

I have some doubt as to whether the complainant's evidence does not mean that she was wearing a panty as well as a T-shirt whilst she accompanied the two accused. However, nothing of substance turns on this.

[23] Masipa J goes on to say:

"Although accused are both young, their youth, in my view, is far outweighed by the seriousness of the offence and the interest of the society. I have indeed borne in mind the words of Marais JA in … *S v Malgas* 2001 SACR 469 (SCA) at 477 D – E, where he says:

'The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypothesis favourable to the offender, personal doubts as to the efficacy of the policy implicit in the amending legislation and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances.'

In this case both accused have no previous convictions. That should indeed count in their favour. Unfortunately for the accused their personal circumstances are not the only consideration. None of what came out during the submissions and in pre-sentencing reports can justify the conduct of the accused on 26 March 2001 when they raped the complainant, none can comply as substantial and compelling circumstances."

[24] Mr McKelvey, who appeared for the appellant, contended that he had gone to Quezo's home to retrieve his property and that of accused 1, and not to rape her; the rape was thus not premeditated or planned, and the decision to rape was taken by accused 1, and not the appellant, after Quezo had been assaulted with the bottle; the appellant was probably influenced by accused 1 in committing the rape and the latter played a far more dominant role in regard thereto. Counsel contends that none of these factors were considered by the Court *a quo*. Of course, it is trite that no judgment can be entirely comprehensive; it is by no means clear that the factors referred to by counsel were not considered by the Court *a quo*. In any event, none of them are sufficiently significant, singly or cumulatively to render unjust See *S v Malgas* 2001 (1) SACR 469 (SCA) at 482 e–f the sentence passed by the Court below.

[25] Then submits counsel that the attack on Quezo must be ignored when considering the rape sentence. I disagree. Rape is an act of violence committed against a woman; if she is injured when the rape occurs she is damaged even more by it, and the complainant's injuries made the rapes we are concerned with all the more painful, outrageous and morally reprehensible.

[26] Then says counsel, she suffered no injuries to her genitalia, and there is no evidence that she suffered from any long– term or permanent psychological trauma as a result of the rape. The first point is not supported by the record. As I have pointed out her vagina was painful during examination.

[27] The second point involves consideration of the decision in *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA), in which a 13 year old girl was called into the house of the 34 year old accused, struck several times on her back with a belt, raped and allowed to leave. In paras [12] – [15] Mpati JA said the following at 204 g – 206 a;

"[12] For the rape of a girl under the age of 16 years (as in the present case) the prescribed sentence is life imprisonment. However, the Court's discretion to impose a different sentence has not been eliminated by the Act, but in the absence of weighty justification the prescribed sentence must be imposed (*Malgas* in para [25]). In the matter of *S v Boesman Mahomotsa* (case No 85/2001, 31 May 2002, yet to be reported), *a case where the respondent, a 23-year-old man, had raped two 15-year-old girls, I had occasion to say the following:

'[17] The rapes that we are concerned with here, though very serious, cannot be classified as falling within the worst category of rape. Although what appeared to be a firearm was used to threaten the complainant in the first count and a knife in the second, no serious violence was perpetrated against them. Except for a bruise to the second complainant's genitalia, no subsequently visible injuries were I inflicted on them. According to the probation officer - she interviewed both complainants - they do not suffer from any after-effects following their ordeals. I am sceptical of that but the fact remains that there is no positive evidence to the contrary. These factors need to be taken into account in the process of considering whether substantial and compelling circumstances are present justifying a departure from the prescribed sentence.'

What emerges from this is that the fact that a victim may be under the age of 16 years is not the only criterion necessary for the imposition of a sentence of life imprisonment. Further in the *Boesman Mahomotsa* case (in para [18]):
'Even in cases falling within the categories (of rape) delineated in the Act there are bound to be differences in the degree of their seriousness. There should be no misunderstanding about this: they will all be serious but some will be more serious than others and, subject to the caveat that follows, it is only right that the differences in seriousness should receive recognition when it comes to the meting out of punishment. As this Court observed in *S v*

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* Now reported at 2002 (2) SACR 435 (SCA)–Ed.
Abrahams 2002 (1) SACR 116 (SCA) "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" (para [29].)'

The objective gravity of the crime, therefore, plays a role, indeed an important role.

[13] Life imprisonment is the heaviest sentence a person can be legally obliged to serve. Accordingly, where s 51(1) applies, an accused must not be subjected to the risk that substantial and compelling circumstances are, on inadequate evidence, held to be absent. At the same time the community is entitled to expect that an offender will not escape life imprisonment - which has been prescribed for a very specific reason - simply because such circumstances are, unwarrantedly, held to be present. In the present matter evidence relating to the extent to which the complainant has been affected by the rape and will be affected in future is relevant, and indeed important. Such evidence could have been led from the complainant's mother, her school teacher or a psychologist. No attempt was made to do so.

[14] And the placing of this important information before the sentencing court is not the responsibility of State counsel alone. The presiding officer, who must satisfy himself before imposing the prescribed sentence that no substantial and compelling circumstances are present, also bears some responsibility. Van der Walt J, in *S v Dlamini* 2000 (2) SACR 266 (T), correctly sums up the position, when he says (at 268d - e):

'Die hof wat vonnis opl in 'n strafsaak neem 'n aktiewe rol in die verhoor en sit nie net passief by waar getuienis gelei word nie. Inderdaad bepaal art 186 van die Strafproseswet 51 van 1977 dat die hof kan op enige stadium van strafregtelike verrigtinge iemand as 'n getuie by daardie verrigtinge

dagvaar of laat dagvaar en die hof moet 'n getuie aldus laat dagvaar indien die getuienis van so 'n getuie vir die hof blyk noodsaaklik te wees vir die regverdige beregting van die saak.'

In the present case nothing prevented the Court *a quo* from directing, for example, that the complainant be interviewed by a psychologist or other appropriately qualified or trained person to establish the effects of the rape on her, present and future.

[15] Although this Court is at large, by reason of the misdirections mentioned earlier in this judgment, to consider sentence afresh, it cannot be in the interests of justice to do so in this matter in view of what has been discussed above. It would be proper, in my view, to remit the matter to the Court *a quo* for reconsideration of the sentence."

[28] A number of factors render *Rammoko* distinguishable from the present case. In *Rammoko,* the Court *a quo* had not had the benefit of *Malgas*, and accordingly

misdirected itself on the test to be applied to satisfy the requirements of "substantial and compelling circumstances" necessary to justify the imposition of a lesser sentence than life imprisonment, leaving the Supreme Court of Appeal at large to sentence afresh; Masipa J committed no such misdirection. Then *Rammoko* concerned a single act of intercourse, whilst the present case involves a double rape; in *Rammoko* the complainant was hit with a belt – *in casu* she was repeatedly stabbed with a bottle and was bleeding; in *Rammoko* the complainant's home was not violated as occurred *in casu*. Borrowing *dicta* from *Abrahams* to which the learned Judge of Appeal refers in the para [12] of his judgment (para [18] of the judgment in *Mahomotsa*), I am of the view that the present case is "devoid of substantial factors compelling the conclusion that …a sentence (of life imprisonment) is inappropriate and unjust".

[29] The question arises whether *Rammoko* lays down that the failure to lead evidence on the effect of the rape on the complainant amounts to a misdirection requiring us to set aide the sentence imposed by the Court *a quo*. As I have already stated, it appears that the complainant had died at the time of the hearing before Masipa J. Nevertheless evidence of how the rape had affected her could have been given by others (cf *Rammoko* at 205 F). In *S v Mbele* (Unreported W L D Case No 67/2004 – 5 November 2004) Borchers J said at p 6 of the typed judgment that since *Rammoko* she insists that evidence of the emotional state of the rape victims be placed before her for purpose of sentencing. It seems to me that cases of rape may be so serious that, regardless of the

emotional *sequelae*for the complainant, they justify life imprisonment and the finding of the absence of substantial and compelling

circumstances justifying a lighter sentence. In *casu*, the Court *a quo* does not refer to any such emotional *sequelae* and was apparently not influenced thereby in
arriving at the conclusion that the prescribed minimum sentence ought not to be departed from. I cannot fault that approach. In *Rammoko* the Supreme Court of Appeal was, it seems, of the view that if serious emotional *sequelae* for the victim were absent, a lesser sentence than the prescribed one, might be suitable; it seems to me that that consideration does not apply to the present case.

[30] Mr McKelvey submits that whilst the rape in *casu* (like any other) is undoubtedly very serious, it cannot be said to fall "within an extreme category of rape." Of course, the fact that more serious rapes than those *in casu* occur, or are conceivable, does not render the sentence imposed unjust. See *Mahomotsa* para [19] at 444 d–e.

[31] I reject counsel's submission that Masipa J gave insufficient consideration to the appellant's relative youth. In fact she mentions that young people are usually the perpetrators of rape. Furthermore the appellant was not that young; he was 24 at the time of the rape.

[32] Then counsel submits that the appellant grew up in a dysfunctional home with his parents living apart from time to time. This does not appear to be so; they separated about 5 years before the hearing in the Court *a quo.* It is true, as counsel submits, that the appellant's assertion of a positive relationship with his father is contradicted by the fact that the father wishes not to be telephoned by him from prison. Counsel submits that appellant appears to be a person who is easily influenced by others,

and that he appears to have been influenced by accused 1 to commit the rape. The appellant withstands peer pressure when it suits him to do so (para [20] above);
furthermore, according to the evidence, he immediately acceded to accused 1's suggestion that they rape the complainant.

[33] Mr McKelvey next submitted that the fact that the appellant was not advised of the minimum sentence he was facing until after the State had closed its case constituted a substantial and compelling circumstance justifying a lighter sentence. *S v Ndlovu* 2003 (1) SACR 331 (SCA), on which counsel relies in this regard, concerned a finding by the Court *a quo* that the weapon Ndlovu was accused of possessing was a semi-automatic firearm, and the imposition of a minimum

sentence in regard thereto, without apprising the accused that he faced the risk of such sentence. In these circumstances, the Supreme Court of Appeal sentenced the accused afresh accepting that the firearm did not fall within the description involving the minimum sentence. That case is quite different from the one *in casu*. Then counsel invokes *S v Mbambo* 1999 (2) SACR 421 (W), a case which held that an accused ought to be encouraged to obtain legal assistance in circumstances such as obtained *in casu*. We are only concerned with sentence and have no power to reconsider conviction. It follows that *Mbambo* does not assist the appellant.

[34] In my judgment in *Bopape* I referred to *Mahomotsa* and to *S v Gqamana* 2001(2) SACR 28 (C), to which reference is made with apparent approval in para [24] of *Mahomotsa*. I expressed the view, which I still respectfully hold, that in this Division

Gqamana and Mahomotsa would have received substantially heavier sentences than were imposed upon them. In my minority judgment in *Bopape,* as I have said, I
expressed the belief that I was bound by the sentences imposed by the Supreme Court of Appeal. I no longer believe so.

[35] Rape is an appalling and utterly outrageous crime, gaining nothing of any worth for the perpetrator, and inflicting terrible and horrific suffering and outrage on the victim and her family. It threatens every woman, and particularly the poor and vulnerable. In our country it occurs far too frequently and is currently aggravated by the grave risk of the transmission of Aids. A woman's body is sacrosanct and anyone who violates it does so at his peril and our Legislature, and the community at large, correctly expect our courts to punish rapists very severely. In this case, the complainant lived in a shack, without the security enjoyed by many citizens in more affluent circumstances. Unfortunately, very many people in our country still live in these circumstances, and are entitled to look to the courts for protection.

[36] I am satisfied that Masipa J committed no misdirection in sentencing the appellant, and that it cannot be said that she did not exercise her discretion to sentence him properly or reasonably. I am unable to find that the learned Judge erred in failing to find that there were substantial and compelling circumstances which would justify a lesser sentence than the prescribed minimum.

[37] It behoves our courts to bear in mind that we 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". *Malgas* at 481g Moreover,

the crime of rape evokes widespread outrage in communities throughout South Africa, and "(u)nless there are, or can be seen to be truly convincing reasons for a different response, the (crime) in question (is) ..required to elicit a severe, standardised and consistent response from the courts." *Malgas* at 481 i-j And if we fail to take account of that outrage, we risk encouraging the breakdown of law and order, and communities taking the law into their own hands. Schreiner J A 's words in *R v Karg* 1961 (1) SA 231 (A) at 236B remain as relevant as ever:
"It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands."

[38] In *S v Zitha and Others* 1999 (2) SACR 404 (W) I expressed a view, which is not good law, on the meaning of the phrase "substantial and compelling" in the relevant legislation. However, I still subscribe to the following statement at 418 h:
"The word must go out to the cities and to the suburbs, to the towns and to the townships, and to the countryside that Parliament has directed the courts to punish the perpetrators of gang rape and child rape as heavily and severely as the law will allow in the absence of substantial and compelling circumstances dictating otherwise, and that the courts will not shrink from their duty of carrying out this directive however painful it may be to do so."

[39] In the result the appeal is dismissed.

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E L GOLDSTEIN
JUDGE OF THE HIGH COURT
(WITWATERSRAND LOCAL DIVISION)

I agree

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S SNYDERS
JUDGE OF THE HIGH COURT
(WITWATERSRAND LOCAL DIVISION)

I agree

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N P WILLIS

JUDGE OF THE HIGH COURT

(WITWATERSRAND LOCAL DIVISION)

For Appellant: C T H McKelvey

For Respondent: S Van Tonder

Date of Hearing: 21 February 2005

Date of Judgment: 23 February 2005