REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO: A111/2012

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

28 MARCH 2013

FHD VAN OOSTEN

In the matter between

SHAUN VOSTER	**FIRST APPELLANT**
DAVID FOURIE	**SECOND APPELLANT**
ALLEN WHITE	**THIRD APPELLANT**
MALCOLM ORANGE	**FOURTH APPELLANT**

and

THE STATE **RESPONDENT**

Criminal law - Appeal from Magistrate's Court - against conviction and sentences on altogether 16 charges including kidnapping, rape, indecent assault and unlawful possession of firearm and ammunition arising from one incident - Identity of the appellants - alibi defence - evidence analysed - no identification parade held - principles applicable – credibility of complainant and reliability of identification - reasonable doubt as to the correctness of the convictions of appellants 1,2 and 4 - their appeal upheld - appellant 3 on the evidence as a whole correctly convicted.

Sentence - life imprisonment imposed for multiple rapes - appropriateness of - s 51(1) of Act 105 of 1977 applicable - considerations arising - appellant 3's appeal against sentence dismissed.

J U D G M E N T

VAN OOSTEN J:

[1] The appellants following upon a trial lasting almost four and a half years were convicted and sentenced on a number of charges, all arising from a protracted incident during which the complainant was *inter alia* raped. The sentences imposed on each of the appellants were ordered to run concurrently with the sentence of life imprisonment (which in any event would have followed *ex lege*: see s 39(2)(i) of the Correctional Services Act 111 of 1998). The appeal before us is against conviction and sentence, the appellants having exercised their automatic right of appeal that existed at the time.

[2] The appellants were arraigned for trial on altogether 16 charges. They pleaded not guilty to all charges, but were convicted and sentenced as follows:

- On count 1 (Possession of unlicensed firearm), and count 2 (Unlawful possession of ammunition): appellant 3 only convicted, and sentenced to 3 years and 12 months' imprisonment respectively.
- Count 3 (Kidnapping): All four appellants convicted, each sentenced to 2 years' imprisonment.
- Count 4 (Pointing of a firearm): appellant 2 only convicted and sentenced to 12 months' imprisonment.
- Count 5 (Pointing of a firearm): appellant 3 convicted as the main perpetrator and sentenced to 12 months imprisonment; appellants 2 and 3 as accomplices and sentenced to 6 months' imprisonment each.
- Count 6 (Assault common): appellant 3 convicted as the main perpetrator and sentenced to 12 months imprisonment; appellant 2 convicted as an accomplice and sentenced to 6 months' imprisonment.
- Count 8 (Rape): appellant 2 convicted as the main perpetrator and in terms of the Criminal Law Amendment Act 105 of 1997 sentenced to life imprisonment; appellants 1, 3 and 4 convicted as accomplices and each sentenced to 10 years' imprisonment.
- Count 9 (Indecent assault): appellant 4 (as the main perpetrator) to 12 months imprisonment and appellants 1, 2 and 4 (as accomplices) to 6 months imprisonment.

- Count 10 (Rape): appellant 4 was convicted as the main perpetrator and sentenced to life imprisonment; appellants 1, 2 and 3 were convicted as accomplices and each sentenced to 10 years' imprisonment.
- Count 11 (Rape): appellant 1 convicted and sentenced to life imprisonment; appellants 2, 3 and 4 convicted as accomplices and each sentenced to 10 years' imprisonment.
- Count 12 (Rape): appellant 3 was convicted as the perpetrator and sentenced to life imprisonment; appellants 1, 2 and 4 convicted as accomplices and each sentenced to 10 years' imprisonment.
- Count 13 (Indecent assault): appellant 3 convicted as the main perpetrator and sentenced to 3 years' imprisonment; appellants 1, 2 and 4 convicted as accomplices and sentenced to 6 months' imprisonment each.
- Count 14 (Rape): appellant 2 convicted as the main perpetrator and sentenced to 10 years' imprisonment; accused 1, 3 and 4 convicted as accomplices and sentenced to 8 years' imprisonment each.
- Count 15 (Theft): appellants 2 and 4 convicted as the main perpetrators and sentenced to 12 months' imprisonment; accused and 1 and 3 convicted as accomplices and sentenced to 6 months' imprisonment each.
- Count 16 (Rape): appellant 3 only convicted and sentenced to 10 years' imprisonment.

Appellants 1, 2 and 3 (which was meant to be all the appellants) were declared unfit to possess a firearm. Concurrency of the various sentences was ordered resulting in an effective sentence of life imprisonment in regard to each of the appellants.

[3] The issue in this matter concerns the identification of the appellants: they all relied on an alibi. The State called 6 witnesses to testify. They were all extensively cross-examined by counsel for the defence. The evidence adduced by the State duly proves, and this has been conceded by the defence in the court below as well as before us, the commission of the crimes the appellants have been convicted of. Appellants 1, 2, 3 and 4 and thereafter 5 witnesses for the defence testified. The Regional Magistrate in terms of s 186 of the Criminal Procedure Act 51 of 1977 ordered that the evidence of Grant Dennis Probert be placed before the court and he testified after the close of the appellants' case.

[4] A brief summary of the events from which the charges arose, is the following: The complainant in the company of her aunt, Laverne Africa (the second state witness) and uncle (Simon Africa), on the day of the incident, which was 21/22 March 2003, attended the tavern of her cousin, Jonathan van Wyk (the third state witness). They arrived at the tavern sometime late that afternoon or later in the evening. All the appellants were unknown to the complainant. Appellant 2 during the course of the evening came to her where she was sitting with her aunt and asked for a cigarette. She told him that she had none. Appellant 4 sometime later came to her and also asked for a cigarette. She gave the same response. Appellants 1 and 3 were also somewhere in the tavern. Laverne Africa sometime after midnight decided that they should leave as the uncle by then was drunk. They proceeded outside to where a *bakkie*, apparently belonging to the Africa's, was parked. The three of them got into the front of the *bakkie*. Appellant 2, as she was about to close the door of the vehicle, stood at the door and pulled it open from the outside, holding a firearm in his hand. He told her to get out. He pulled her out, cocked the firearm, pointed it at Laverne Africa (count 4) and told them to drive off. They did so and left the complainant behind in the company of appellant 2. Appellant 3, who had been standing at the gate of the tavern premises, joined them from across the street and appellant 2 handed him the firearm which he pointed at her (count 5). They took her along (count 3) and walked along the street and the appellants, whist talking amongst one another, threatened that they would kill her. She started crying and appellant 3 hit her in the face with an open hand (count 6) and told her to remain silent. At the corner of the street appellant 4 appeared, joined them and made some remark concerning the complainant's boyfriend having killed his friends. They arrived at an open field next to the primary school premises. Appellant 1 arrived on the scene and informed them that "the coast is clear". They climbed through a hole in the fence onto the school grounds. Appellant 2 told her to undress. Appellants 2 and 4 stripped her of items of clothing. They walked further off to another tree where it was darker. Appellant 2 threw her to the ground and raped her (count 8). Appellant 4 rubbed her breasts and put his finger in her vagina (count 9) and then raped her (count 10). Appellant 1 then proceeded to rape her (count 11). Appellant 4 was given the firearm. Appellant 3 told her to suck his penis which she did (count 13), he took

the firearm from appellant 4 and held it against her head and then raped her (count 12). Appellant 2 proceeded to rape her for a second time (count 14).

[5] Although she had put her clothes back on, her shoes were put in a bag and taken by appellants 2 and 4 (count 15). Appellant 3 asked appellants 1, 2 and 4 to go and buy cigarettes. They left. What by now must have been the early hours of the morning, appellant 3 took her to house of Probert, in Extention 7, where he raped her again (count 16). During the ordeal he inflicted what she referred to as a "love bite" on her neck. She overheard Probert telling appellant 3 that Jonathan van Wyk had just been around looking for her. Appellant 3 requested Probert to take her home. He gave her shoes to wear and accompanied her on her way home. On their way they met her uncle and aunt who took her to the house of Lavern Africa. She accompanied the complainant to the police station where the incident was reported. She informed the police of the address where she had last been raped which enabled them to come into contact with Probert who provided them with further information. That same afternoon at 14h45 she was medically examined by Dr Truscot (the sixth and last state witness).

[6] Appellants 1 and 3 were arrested that same afternoon by Const De Jaap (the fourth state witness) who was accompanied by Sgt Ponsonby (the fifth state witness) on information having been furnished by Probert. Appellant 3 was searched and a 9mm Beretta pistol with magazine containing 15 live rounds was found in his possession (counts 1 and 2). Appellants 1 and 3 were later that afternoon taken to the complainant where she was visiting at her grandmother's house. The complainant identified both the appellants where they were sitting in the police vehicle. Accused 3 she identified as the one who had a firearm. The following morning appellants 3 and 4 in response to an earlier message left for them to contact him, handed themselves over to Ponsonby, at his house which is almost adjacent to the police station. He took them to the police station where they were charged and incarcerated. The complainant was contacted and she proceeded to the police station. Appellants 3 and 4 were called from the police cells and taken to where the complainant was waiting. At the request of the police she identified them as part of the group of four men that had raped her.

[7] As mentioned the defence version of all the accused was an alibi. Inspector November and Const Sholtz (the first and second defence witnesses) testified in regard to the signing and commissioning of statements of state witnesses that had been handed in. Their evidence did not take the matter any further. The remaining three witnesses, Ronel Vorster (the sister of appellant 1), Elsie Christian (appellant 2's sister) and Elton Prince (a friend of appellant 3) were called to corroborate the alibis. The Regional Magistrate accepted the evidence adduced by the State and rejected the defence version as false.

[8] The principal question in this appeal, as in the trial court, as I have mentioned, turns on the reliability of the identification evidence. In this regard a two tiered enquiry is necessary: firstly, an assessment of the credibility of the identifying witnesses and, secondly, and independently, a consideration of the reliability of the identification that was made (*S v Mthetwa* 1972 (3) SA 766 (A)).

[9] Turning now to the credibility of the complainant which was viciously attacked in cross-examination. Her testimony at the trial extended into four sessions over a period of three and a half months. She was rigorously and extensively cross-examined by counsel for the appellants: every possible minute detail was laboriously extracted from her. The whole incident she testified about lasted from approximately midnight until the early morning the next day. The complainant suffered a traumatic experience that incontestably caused her great anguish: she was tortured and physically abused in what can best be described as a gang rape. She was raped on altogether 6 occasions, by four assailants. The incident happened after dark. It commenced at the tavern and then proceeded to a tree adjacent to an open veldt where there was no direct lighting. Against this background contradictions were to be expected. And those did in fact surface in cross-examination. It will serve no useful purpose to list the contradictions. What is important is to consider the nature of the contradictions and effect thereof on the complainant's identification of the appellants (*S v van Aswegen* 2001 (2) SACR 97 (SCA); *S v Radebe* 1991 (2) SACR 166 (T) 167j-168h). It has not been argued that the complainant was an untruthful witness. Counsel for the appellants submitted before us that she "tailored" her evidence in certain respects. I am satisfied that this is an incorrect assessment of her evidence: the complainant in cross-examination indeed advanced more details as to the events

but here is nothing to show that she deliberately tailored her evidence with a view to implicate the appellants.

[10] This brings me to the reliability of the identification evidence. At the outset it is necessary to refer to the unsatisfactory manner in which the complainant was asked to identify the appellants. No identification parade was held. Her identification under those circumstances carries no more weight than a so-called "dock-identification". The dangers generally attendant upon such identification are self-evident (see *S v Tandwa and others* 2008 (1) SACR 613 (SCA) para [129]-[131]). But, the identification that was made cannot and should not be ignored: it forms part of the evidential matter upon which the case must be decided (see *Matwa v S* [2002] 3 ALL SA 715 (E) 721*f*).

[11] It is as well to deal with the identification of appellant 1 at this stage already. He was identified by Laverne Africa who corroborated the complainant's version that appellant 1 was standing at the gate of the tavern premises when they were at the *bakkie* ready to depart. Her identification, likewise, is in the nature of a dock-identification as no identification parade was held. The evidence of Probert on which the Regional Magistrate heavily relied as corroboration of the complainant's evidence as to identification, however casts some doubt on the reliability of his identification by the complainant. I interpose to briefly review the evidence of Probert. He testified that the appellants were all known to him and that he and they had been at Jonathan's tavern during the evening in question. He however did not see the complainant at the tavern. Nor was she known to him. He became drunk and around midnight decided to go home. The next morning he woke up and proceeded to the house of his grandmother. Upon his return, approximately half an hour later, he met Van Wyk in the street who asked him whether he knew where appellant 3 was. He replied that he had last seen him at the tavern the previous evening. At his house he found appellant 3 and the complainant in a bedroom and was told by his younger brother that he had let them in. Appellant 3 told him that he had found the complainant in the street, that she had been robbed of her *tekkies* and jewellery and that he was helping her. She had no shoes and he later gave her a pair of shoes to wear. The complainant asked him to escort her halfway home. She gave appellant 3 her cell phone number and thanked him for helping her. He walked with her for some

distance when a red bakkie arrived and she was picked up by whom he assumed were family members. Later the police arrived at his house and he took them to appellant's 3's house where he was arrested and a firearm found on him. He also took the police to appellant 1's house and later showed them where appellants 2 and 4 lived, which happened to be in the same street where he lived. He was present when the complainant identified appellants 1 and 3, while they were sitting in the police vehicle, shortly after their arrest. He was adamant that the complainant was not sure of her identification of appellant 1. His evidence on this score stands alone: it was not specifically dealt with by either the two police witnesses or the complainant. It was of course not possible to put this allegation to these witnesses as he testified after them and they, regrettably, were not re-called to respond thereto. Although hardly reconcilable with the evidence of the complainant and police witnesses I do not think that it can be discarded.

[12] Probert, in my view, was a most unsatisfactory witness. I shall revert to my reasons for the finding later in the judgment. The question arising is what weight should be afforded to Probert's evidence that the complainant was not sure when pointing out appellant 1? Although I am not inclined to unreservedly accept the evidence of Probert, the Regional Magistrate did, as I have mentioned, rely on his testimony for the finding that the appellants, contrary to their respective alibis, were present at the tavern that evening. I have accordingly come to the conclusion that the uncertainty expressed by the complainant, and the absence of other corroborative evidence, should be taken into account in favour of appellant 1. The complainant's evidence moreover, as I have alluded to, was that appellant 1, although she had observed him earlier in the tavern, was standing at the gate and only later joined in after she had been kidnapped, at a stage when they were at the school grounds where it was dark. Appellant 1 relied on an alibi defence. There was no onus on him to prove it. I am satisfied that the evidence of Probert I have referred to, casts reasonable doubt as to appellant 1's identification and the appeal against his conviction and sentence must accordingly succeed.

[13] Next, I turn to the appeal of appellants 2 and 4. They were, as I have mentioned, identified at the request of the police, at the police station. No identification parade was held. In this regard Sgt Ponsonby testified that the complainant was told that

they (*ie* appellants 2 and 4) "need to be identified'. The complainant testified that she was asked by the police if it was them which she confirmed. The value of the identification is materially compromised by suggestion and of course the absence of an identification parade. It is true that the complainant, in her evidence, was able to furnish details of the clothing the appellants were wearing as well as to describe certain features of some of the appellants. A few examples thereof will suffice: appellant 1 she said had a white skipper and a white hat, appellant 2 was of a light complexion, dressed in black long sleeve skipper with two stripes and had a golden teeth which she observed as he was talking; appellant 3 was wearing a dark brown skipper and appellant 4 a white skipper, and he had large ears. She readily conceded that the opportunity for observation although there was lighting in the street, at the points where she was raped, was limited. But, her evidence in this regard waters down and is in fact contradicted by the evidence of the two police witnesses who both testified that she was unable to describe her assailants or their clothing. It is my impression from a reading of their evidence and further considering the superficial and unsophisticated manner in which the investigation was conducted that they had never pertinently asked the complainant for such a description. Be that as it may, the contradiction stands and therefore ought to be considered on the totality of the facts (*S v Carstens* 2012 (1) SACR 485 (WCC) para [14]).

[14] The complainant, with remarkable precision, described the role of each of the appellants in the six rapes committed. On this aspect her evidence throughout remained unshaken. As for possible corroboration, regard must be had of firstly, the evidence of Laverne Africa. Although she was at the tavern for a considerable time and was sitting next to the complainant that evening she did not see either appellant 3 or 4 there. This remains unexplained to a certain extent as the complainant testified that the appellants were together most of the time while in the tavern and that appellant 4, also appearing from nowhere, had asked her for a cigarette. Be that as it may, her evidence, as for the identification of appellant 4, is of no assistance. Van Wyk was drunk that night and his evidence on who was present must be viewed with circumspection. He in any event was unable to recall whether appellants 1, 2 and 4 were present at the tavern that evening. His assistant, one Bonzie, who was on duty in the tavern, and who probably would have been able to shed some light on

the events at the tavern that evening, although his whereabouts were known to the State, was not called to testify.

[15] I interpose to briefly refer to the medical evidence adduced at the trial. Regrettably, the examination of the complainant appears to have been hastily done and lacks thoroughness, resulting in a number of shortcomings. The full history relating to the complaint was not obtained. Instead, the recordal of the history leaves many questions unanswered, such as, was the complainant specifically asked about the rape, was she asked how many times she was raped, why was she was walking with difficulty? The outward appearance of a complainant in the medico-legal examination of a rape victim, one would assume, is always of the utmost importance. In the present matter this was simply overlooked: the medical practitioner did not pay any attention to the condition of the complainant's clothing. Although tenderness of both cheeks of the face was recorded nothing is stated as to the complainant's explanation for such tenderness. Further, the recordal that the complainant was "moderately upset" without further clarification, is of little assistance. The conclusion reached by the medical practitioner, firstly, that "there was no gross evidence by four or more men" and secondly, "physical assault and probable multiple intercourse" give rise to its own difficulties. The inadequacy of the medical examination and absence of properly motivated opinions and conclusions, in my view, cloud the threshold requirement of providing corroboration of the complainant's version.

[16] The Regional Magistrate in my view erred in placing reliance on the evidence of Probert on the basis that it was sufficient to rebut the alibi defences of the appellants. Probert was clearly favouring appellant 3 by giving false evidence. His version that the complainant was quite normal and that she had expressed her gratitude to appellant 3 for his assistance is nothing but patently false. His identification of the appellants as to have been present at the tavern the previous evening likewise carries doubtful weight. He admittedly was so drunk ("ek was baie dronk") that he decided to go home. His evidence further is contradicted by the complainant as to the events in his house that morning. He all too conveniently resorted to an alleged loss of memory. In his own words it was impossible for him to remember all the details of the events of that evening except those that he was reminded of by the police. Counsel for the appellants made much of the fact that Probert was only called

to testify at the end of the defence case as previous attempts by the State to trace him were unsuccessful, and that he had conceded that threats and intimidation by the police influenced him to make a statement. There is much to be said for the contentions. Probert was regarded as an accomplice by the investigating po0lice officers. They were earnestly looking for him. He had ample reason to please the police in the hope to avoid prosecution. But he also at all costs attempted to protect appellant 3. The ambivalence led to falsity which, in my view, is insufficient to sustain positive findings against appellants 2 and 4. The State accordingly, on the evidence as a whole, failed to discharge the onus of proof beyond reasonable doubt (*S v M* 2006 (1) SACR 135 (SCA) paragraph [189]). It follows that appellants 2 and 4's appeal must succeed.

[17] Finally, I turn now to deal with appellant 3's appeal. Counsel for the appellants has fairly and correctly conceded that the appellant 3's conviction in respect of the unlawful possession of a firearm and ammunition is unassailable. The evidence overwhelmingly proves appellant 3's involvement in the crimes he has been convicted of. The complainant identified him, not only by virtue of but also because of the name "White" which she told the police was used when the incident occurred. This is corroborated by both police witnesses. Appellant 3, according to the complainant was most of the time in possession of a firearm. He still had it with him the morning in the house of Probert. At his arrest that same afternoon he was found in possession of a firearm. The complainant's version supports as much. Jonathan van Wyk furthermore also identified appellant 3 as having been present at his tavern that evening. Probert's evidence, as supported by the evidence of the two police witnesses, likewise implicates appellant 3 whom he pointed out to the police witnesses. Probert's attempts to protect appellant 3's who was his or his brother's friend, as I have alluded to, became quite apparent during his testimony which is one of the reasons for the unsatisfactory nature of this evidence as a whole. Against this body of damning evidence the alibi raised by appellant 3 cannot stand. In *S v Liebenberg* 2005 (2) SACR 355 (SCA) the Supreme Court of Appeal held:

'[15] Where a defence of an alibi has been raised and the trial court accepts the evidence in support thereof as being possibly true, it follows that the trial court should find that there is a reasonable possibility that the prosecution's evidence is mistaken or false. There cannot be a reasonable possibility that the two versions are both correct. This is consistent with the

approach to alibi evidence laid down by this Court more than 50 years ago in *R v Biya* 1952 (4) SA 514 (A). At 521C-D Greenberg JA said:

'If there is evidence of an accused person's presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime.'

(see also *S v Trainor* 2003 (1) SACR 35 (SCA) para [8]–[9]; *Crossberg v S* [2008] 3 ALL SA 329 (SCA) para [121]).

[18] In regard to count 15 (theft) counsel for the State fairly and correctly conceded that the appellant 3's conviction cannot be sustained. The complainant, as I have alluded to, testified that her *tekkies* were taken by appellants 2 and 4. There is accordingly no factual basis for a finding that appellant 3 was an accomplice to the theft.

[19] As for the sentences imposed on appellant 3, the crimes he was convicted of are extremely serious. Appellant 3 was 38 years old at the time of sentencing, not married without any dependants. He worked as car salesman. He refused to be interviewed by a probation officer and professed his innocence. He admitted previous convictions for culpable homicide and robbery for which he was sentenced to 10 years' imprisonment in 1992. He was in prison awaiting finalisation of the trial for 6 years. On the facts of this matter s 51(1) of Act 105 of 1977 is applicable. It provides for mandatory life imprisonment where the victim was raped more than once whether by the accused or any co-perpetrator or accomplice; or by more than one person where such persons acted in the execution or furtherance of a common purpose or conspiracy.

[20] The offence of rape is considered by our courts as one of the most serious crimes that should attract severe punishment. In *State v Chapman* 1997 (3) SA 341 (SCA) 344 the Court remarked:

'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 civilization.'

More recently, in *DPP, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA) 577*g-i* the Court stated:

'Rape of women and young children has become cancerous in our society. It is a crime which threatens the very foundation of our recent democracy which is founded on protection and promotion of the values of human dignity, equality and the advancement of human rights and freedoms. It is such a serious crime that it evokes strong feelings of revulsion and outrage amongst all right thinking and self-respecting members of society. Our courts have an obligation in imposing sentences for such a crime, particularly where it involves young, innocent, defenceless and vulnerable girls, to impose the kind of sentences which reflect the natural outrage and revulsion felt by the law- abiding members of society. A failure to do so would regrettably have the effect of eroding the public confidence in the criminal justice system.'

As for statutory mandatory minimum sentences, Ponnan JA, in *S v Matyityi* 2011 (1) SACR 40 (SCA), stated:

'Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from *Malgas,* it still is 'no longer business as usual'. And yet one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the legislature for the flimsiest of reasons - reasons, as here, that do not survive scrutiny. As *Malgas* makes plain courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and like other arms of state owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of state. Here parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as 'relative youthfulness' or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order.'

It has been held in *S v Vilakazi* 2009 (1) SACR 552 (SCA) and S *v Mahomatsa* 2002 (2) SACR 435 (SCA) that life imprisonment should be reserved for more serious cases of rape: this case in my view, no doubt, falls within that category. Bearing all

material considerations in mind the sentences imposed do not engender in me any sense of shock. The Regional Magistrate has not misdirected himself in any way. It follows that there are no reasons for interference with the sentences imposed on appellant 3.

[21] In the result the following order is made:

1. The appeals of appellants 1, 2 and 4 against their convictions and the sentences imposed are upheld.

2. The order of the court *a quo* in respect of appellants 1, 2 and 4 is set aside and substituted with the following:

"Accused 1, 2 and 4 are acquitted on all counts."

3. The appeal of appellant 3 against his conviction and sentence on count 15 is upheld.

4. The order of the court a quo in respect of appellant 3 is amended to read:

"Accused 3 is acquitted on count 15"

5. The appeal of appellant 3 against his convictions and sentences on the remainder of the charges (*ie* counts 1, 2, 3, 5, 6, 8, 10, 11, 12, 13, 14 and 16) is dismissed.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.

P/P
M MAKUME
JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPELLANTS ***ATTORNEY JESSE PENTON***

COUNSEL FOR THE RESPONDENT ***ADV (MS) M VAN HEERDEN***

DATE OF HEARING	*28 MARCH 2013*
DATE OF JUDGMENT	*28 MARCH 2013*