REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR759/14

In the matter between:

THABANI ROBERTSON NGCOBO **1ST APPELLANT**

RONALD XOLANI JALI **2ND APPELLANT**

NATHI COSHA HADEBE **3RD APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

Delivered on: 3 March 2016

OLSEN J (GORVEN et SEEGOBIN JJ concurring)

[1] With the leave of the Supreme Court of Appeal, three appellants appeal against the sentences imposed upon them by the high court at Durban on 14 December 2007 following their convictions in the regional court on 28 May 2007.

[2] Each of the appellants was convicted on two counts of robbery with aggravating circumstances, arising out of robberies which took place at the same premises some six weeks apart. The first robbery took place on 15 October 2003 and the second on 26 November 2003. The robberies were

committed at residential premises where women were present. One of those unfortunate women was raped on each occasion by the first appellant. He was accordingly convicted on two counts of rape as well.

[3] After he had convicted the appellants the learned regional magistrate decided that as the complainant on the rape charges had been raped more than once by the first appellant, the proceedings would be stopped in terms of the then s 52(1)(b)(i) of Act 105 of 1997, and the appellants were committed for sentence by the high court.

[4] As it read prior to its amendment by Act 38 of 2007 (with effect from 31 December 2007) s 52(1)(b)(i) of Act 105 of 1997 required a regional court which had convicted an accused of an offence referred to in Part 1 of Schedule 2 to that Act to stop the proceedings and commit the accused for sentence in terms of s 51(1) of the Act by the high court.

[5] On that basis the matter came before Choudree AJ on 20 November 2007 when counsel then representing the State and the appellants conveyed their common view to the learned Acting Judge that the rape convictions did not fall within the provisions of s 51(1) of the Act. The magistrate had made the order referring the matter to the high court upon the basis that the rapes fell within item (a)(i) of Part I of Schedule 2 to the Act because they were committed 'in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice'. Counsel submitted that the section could not be read as applying to the present case as the victim had been raped on two separate occasions some six weeks apart in time. The learned judge accepted that submission and made an order referring the matter back to the regional court to be dealt with on 7 December 2007.

[6] The record before us does not reveal what occurred in the regional court on 7 December 2007. What we see is that the matter served again before the acting judge on 12 December 2007 when he was informed that on reflection the case indeed fell within Part I of Schedule 2, not for the reason

previously thought, but because this was a case of rape committed by a person who had been convicted of two or more offences of rape, but had not yet been sentenced in respect of such convictions (i.e. item (a)(iii) of Part I).

[7] That submission (which was supported by both counsel) was accepted by the court which sentenced

(a) the first appellant to life imprisonment on the two counts of rape and to 15 years imprisonment on each of the counts of robbery;
(b) the second appellant to 20 years imprisonment on each of the two counts of robbery, such sentences to run cumulatively; and
(c) the third appellant to 15 years imprisonment on each of the two counts of robbery, such sentences to run cumulatively.

[8] Section 52 of Act 105 of 1997, prior to its amendment by Act 38 of 2007, gave the high court a jurisdiction it would not otherwise have had to impose a sentence in the first instance following the conviction of an accused person in a trial not conducted before that high court. The circumstances in which such jurisdiction could be conferred on the high court were limited to

(a) the conviction of an accused person in the regional court of an offence referred to in Part I of Schedule 2 to the Act (i.e. one attracting a sentence of life imprisonment); or
(b) the conviction of an accused person of an offence referred to in any of Parts II, III or IV of Schedule 2 when the regional court formed the opinion that the offence merited a punishment in excess of the jurisdiction of a regional court.

The magistrate in this case did not form the opinion that the offences in question fell within any of Parts II, III or IV of Schedule 2, and deserved punishment in excess of his jurisdiction. He made the referral upon the basis that he was compelled thereto because the rape convictions fell within Part I of Schedule 2.

[9] Counsel who appeared for the appellants before us have argued that the rapes in this case did not fall within either of the provisions of Part I of Schedule 2 referred to above; that the referral to the high court was therefore

not competent; and that in the circumstances the high court lacked jurisdiction to sentence the appellants. Counsel for the prosecution agreed with the submission that should we come to that conclusion, the sentences imposed by the high court should be set aside and the matter referred back to the regional court for the purposes of imposing sentence. That concession appears to be correct. (See the order made in *S v Kimberley & another* 2005 (2) SACR 663 (SCA).)

[10] Counsel for the State has argued that the rape convictions in this matter fall under the item of Part I of Schedule 2 to the Act which had been relied upon by the magistrate. However, we should first deal with Item (a)(iii) of the provisions dealing with rape in Part I of Schedule 2, under which the high court accepted jurisdiction. Ignoring the paragraph lettering (which can tend to obscure the meaning of the words employed) the item reads as follows:

'Rape when committed by a person who has been convicted of two or more offences of rape, but has not yet been sentenced in respect of such convictions'.

The language of that item conveys clearly that a rape which falls within it is one committed by a person who has already been convicted of two or more prior offences of rape but has not yet been sentenced in respect of those convictions. The language permits of no other construction. (This is the construction of the item adopted by Mpati JA in the example given by him in paragraph 20 of his judgment in *S v Mahomotsa* 2002 (2) SACR 435 (SCA).)

[11] It is true that the meaning of the item derived from its plain language raises questions as to

(a) why such an obscure eventuality should have secured this attention; and as to

(b) why a third rape (not otherwise falling within Part I of Schedule 2) committed after two convictions, but before sentencing, should attract a life sentence; whereas a third rape of the type contemplated in Part III of Schedule 2 committed by a person described in s 51(2)(b) as a 'third offender' should attract a sentence of 20 years' imprisonment.

However, as to (b) above it should be observed that the anomaly remains on the construction of the words adopted when the high court accepted sentencing jurisdiction in this case. Indeed it is more prominent, as the life sentence must then (as in this case) be contrasted with the sentence stipulated in s 51(2)(b) for a second offender (15 years imprisonment).

[12] The fact of the matter is that in more than one respect Schedule 2 to Act 105 of 1997 is not a model of clarity. I will refer presently to three points of principle mentioned in *Kimberley* (supra) which determine the proper approach to the interpretation of Schedule 2 when the wording is not clear. For the time being I simply make the general observation that what is called for is a restrictive interpretation, maintaining the sentencing discretion of the court when confronted with these difficulties. But when the wording is clear there seems to me to be little if any scope for broadening the reach of a provision of the schedule beyond that conveyed plainly by the words employed.

[13] When he committed the rapes in question in this case the appellant had not been convicted of any other rape. The high court could accordingly not have acquired jurisdiction to sentence the appellant on the basis that the rapes of which he was convicted fell within item (a)(iii) of Part I of Schedule 2 to the Act.

[14] I turn now to the argument advanced by the prosecution before us, that the rape convictions in this instance fall within Part I of Schedule 2 to the Act because they were committed 'in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice'. The application of that item of Part I appears to be uncontentious where the victim is raped more than once in the course of an unbroken chain of events which might be referred to as a single incident. Such a single incident might involve multiple rapes perpetrated one immediately after the other; or, for instance, multiple rapes during the course of a prolonged but uninterrupted abduction. Here we are dealing with two rapes perpetrated by

the same rapist on the same victim but on the occasion of each of two separate and distinct robberies committed six weeks apart.

[15] We were not referred by counsel to any cases in which this problem is dealt with. However it has been considered before.

[16] In *S v M* 2007 (2) SACR 60 (W) Satchwell J was charged with the duty of sentencing an accused person who had been convicted of raping his stepdaughter once in December 2004 and once in March 2005. The learned Judge considered whether the facts of the case before her fell within the provision we are concerned with here, and decided that they did. The following appears in paragraph 24 of the judgment:

'To my mind the wording of the descriptions and categorisations of the circumstances of these rapes is clear and without ambiguity or confusion. What is proscribed is rape by the same rapist of the same rape victim on more than one occasion. All that is required is that the rapes are repeated. It matters little whether the rapes are separated by hours or days or weeks or months.'

[17] In *S v Senyolo* 2010 (2) SACR 571 (GSJ) the court considered an appeal from the imposition of a life sentence in the regional court where the appellant had been convicted of raping a 10 year old child on two occasions, once on 10 November 2007 and, on the second occasion on 25 November 2007. The court came to the same conclusion as that reached in *S v M*. Van Eeden AJ reasoned as follows in paragraph 15:

'If it were accepted that the provision is triggered where the victim was raped more than once by an accused where there is an element of continuity, then I cannot see why it should not also be triggered by a second crime, even when totally removed from the first in time and place. When the rape of 10 November 2007 was committed, the victim was not raped more than once and the provision of the schedule would not have been triggered. However, when the rape of 25 November 2007 occurred, the victim was raped only once on that day, but under circumstances where she was

raped for the second time by the appellant. This second attack triggers the provisions of Part 1 of Schedule 2. If not, it would have the effect that the appellant will be treated differently for purposes of sentences, than if he had raped his victim twice on the first occasion.'

[18] In both *Senyolo* and *S v M* the victims were children. The learned Judges were not obliged to make a decision on the issue as to whether the fact that there were two rapes by the same rapist on the same victim brought the case within s 51(1) of the Act. However it does appear from paragraph 25 of the judgment in *S v M* that, when considering sentence, the Judge considered it significant that the crimes fell within the provisions of Part I of Schedule 2 for more than one reason.

[19] In *S v Maxabaniso* 2015 (2) SACR 553 (ECP) the court considered the question as to whether, where a victim is raped more than once in the course of a single encounter, it is proper to charge the accused with one or two counts of rape. In the course of dealing with that question Plasket J mentioned the cases of *Senyolo* and *S v M*, and made the observation (in paragraph 22) that he was not convinced that they were correctly decided. But it was not necessary to decide the issue in that judgment.

[20] I share the misgivings expressed by Plasket J, and have concluded that in fact the courts in *S v M* and *Senyolo* reached incorrect conclusions on the point at issue.

[21] In my view a good starting point when interpreting the provision is paragraph 13 of the judgment in *Kimberley* (*supra*). Three points of principle were identified as applicable to the interpretation of paragraphs (a)(i) and (a)(ii) of Part I of Schedule 2 to the Act where the wording may not be clear:

(a) The court ‘will interpret the paragraphs so as to render an interpretation least harsh to the affected person’.

(b) Where a statutory provision which is not clear changes the common law it must be interpreted restrictively.

(c) ‘More particularly statutes which prescribe minimum sentences, such as the statute here under consideration, thus eliminating the usual discretion of a court to impose a sentence which befits the peculiar circumstances of each individual case, will usually be construed in such a way that the penal discretion remains intact as far as possible.’

[22] As pointed out in *Kimberley*, the requirement that there must be more than one rape is clear. The question is whether the requirements are met when there are two rapes which took place during two separate and distinct incidents or, as Plasket J put it, ‘on two different occasions’. In my respectful view the courts in *S v M* and *S v Senyolo* paid insufficient attention to the language of the provision when considering this question.

[23] It is best, when considering the language of the provision, not to isolate the words in paragraph (a)(i). The provision reads as follows when rendered in full (but without the additional clutter of the reference to the statutory provisions in which the crime of rape now resides):

‘Rape when committed in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice’.

[24] Rendered that way it seems clear to me that the rape contemplated by the provision must have taken place in circumstances where there was more than one rape. In ordinary language that means on an occasion where more than one rape took place. The first count of rape in this case took place in circumstances where there was no second rape. It cannot therefore attract the imposition of a minimum sentence of life imprisonment. What of the second

count of rape? Surely that crime was also perpetrated in circumstances where the victim was not raped more than once.

[25] The provision requires the rape to have been committed in certain circumstances. The words 'where the victim was raped more than once' define those circumstances. More than one rape must take place at the time when the rape in question (the one which is to attract the life sentence) takes place. The rape has to have been committed 'in circumstances' where the victim 'was' raped more than once. When the occasions were different then there were, in ordinary language, different circumstances in which the victim 'was' raped.

[26] In my view, if there is any doubt about this, or any lack of clarity, the three principles referred to above and set out in *Kimberley* apply, and must inevitably lead to the conclusion that where the legislation provides that a rape which attracts the minimum sentence of life imprisonment under item (a)(i) must be committed in circumstances where the victim was raped more than once, what it conveys is that the rape must have been committed on an occasion where the victim was raped more than once. That construction limits the scope of legislative interference with the court's sentencing discretion, and is a conclusion which does no offence to the wording of the section.

[27] In my view the provision in question is aimed at multiple successive penetrations of one victim on a single occasion, which is unfortunately so often a feature of cases where the victim is abducted; and which is obviously the defining element of the so-called 'gang rape'. In these cases the single incident, occasion or ordeal is rightly assumed to be an even more horrific experience for the victim than is that of a single rape. I respectfully agree with the observations of Plasket J made in paragraph 25 of the judgment in *Maxabaniso*:

'The repeated penetration of his victim is what aggravates the perpetration of the rape and renders him liable for life imprisonment in respect of his entire course of conduct: it is, in other words, the multiple acts of penetration that attract the life sentence, as would be the case in a so-called gang rape. One does not require item (a)(i) to meet the concern that when an accused rapes the same victim twice with the acts of penetration separated by, say, a week, he may be deserving of a sentence of life imprisonment (for at least the second rape): even when the prescribed minimum sentence for rape is 10 years' imprisonment, courts have common-law powers to impose harsher sentences, including life imprisonment, if that is called for in the circumstances.'

[28] I accordingly conclude that the provisions of paragraph (a)(i) (under the heading 'Rape') in Part I of Schedule 2 to the Act are not engaged in the present matter. As the first appellant's convictions of rape did not otherwise fall under Part I of Schedule 2 to the Act, the magistrate's decision to commit the first appellant for sentence by the high court under s 52(1)(b)(i) of the Act was not competent.

[29] There is no need for us to comment upon or discuss the fact that the second and third appellants accompanied the first appellant to the high court to be sentenced despite the fact that it was never suggested that their convictions fell under s 52(1)(b)(i) of the Act. It is clear that they must return with the first appellant to be sentenced in the regional court.

The following order is made.

1. The appeals against sentence are upheld.

2. The sentences imposed on 14 December 2007 by the high court at Durban

(a) on the first appellant on two counts of rape and two counts of robbery; and

(b) on the second and third appellants on two counts of robbery

are set aside.

3. **The convictions of the appellants on the said counts in the regional court at Verulam on 28 May 2007 are confirmed.**

4. **The matter is remitted to the regional court for sentencing afresh on the counts in respect of which the appellants were convicted in the regional court.**

5. **The appellants are remanded in custody.**

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OLSEN J

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GORVEN J

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SEEGOBIN J

Date of Hearing:	MONDAY, 25 JANUARY 2016
Date of Judgment:	THURSDAY, 3 MARCH 2016
For the 1st Appellant:	Ms D Barnard
Instructed by:	NYANDENI & PARTNERS 1st Appellant's Attorneys 320 WEST STREET DURBAN (Ref.: Mr Nyandeni) (Tel No.: 083 – 2042142)
For the 2nd & 3rd Appellants:	Mr S B Mngadi
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