IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No A354/2010

In the matter between:

ANDILE ALAM **Appellant**

and

THE STATE **Respondent**

JUDGMENT: FRIDAY 13 MAY 2011

CLOETE AJ:

INTRODUCTION

[1] The appellant was convicted on one count of abduction and five counts of rape in the regional court, Somerset West, and, on 19 March 2009, sentenced to one year's imprisonment for the abduction and five terms of life imprisonment for the rapes, with all of the sentences to run concurrently.

ISSUE IN LIMINE

[2] It is apparent from the record of the proceedings in the regional court that on 23 April 2010 the appellant filed an application for leave to appeal against both his convictions and sentence, together with an application for condonation for the late filing thereof. There is however no indication in the record whether these applications were ever heard by that court.

[3] Accordingly, the first issue to be addressed is whether the appeal is properly before this court. Mr Theron, who appeared for the state, referred us to the Criminal Law (Sentencing) Amendment Act 38 of 2007, which came into effect on 31 December 2007 and which *inter alia* amended the provisions of s 309(1)(a) of the Criminal Procedure Act 51 of 1977 (the "CPA"). This amendment introduced an automatic right of appeal against both conviction and sentence for persons sentenced to life imprisonment by a regional court under s 51(1) of the Criminal Law Amendment Act No 105 of 1997 ("the Criminal Law Amendment Act").

[4] The relevant portion of the amended s 309(1)(a) of the CPA read as follows:

'(a) Any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction: Provided that—

(i) if that person was, at the time of the commission of the offence—

(aa) below the age of 16 years; or

(bb) at least 16 years of age but below the age of 18 years and was not assisted by a legal representative at the time of conviction in a regional court; and

(cc) sentenced to any form of imprisonment as contemplated in section 276 (1) that was not wholly suspended; or

(ii) if that person was sentenced to imprisonment for life by a regional court under section 51 (1) of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997),

he or she may note such an appeal without having to apply for leave in terms of section 309B.' (my emphasis)

[5] On 1 April 2010, s 309(1)(a) of the CPA was again amended by s 99(1) of the Child Justice Act 75 of 2008 (the "Child Justice Act"). The relevant portion of the further amended s 309(1)(a) reads as follows:

'Subject to section 84 of the Child Justice Act, 2008, any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction.' (my emphasis)

[6] Section 309B(1)(a) of the CPA reads as follows:

'Subject to section 84 of the Child Justice Act, 2008, any accused, who wishes to note an appeal against any conviction or against any resultant sentence or order of

a lower court, must apply to that court for leave to appeal against that conviction, sentence or order.' (my emphasis)

[7] Accordingly, since the amendment of 1 April 2010, all persons other than those who fall under s 84 of the Child Justice Act who wish to note an appeal against any conviction or against any resultant sentence or order of a lower court, have no option but to apply to that lower court for leave to appeal against that conviction, sentence or order.

[8] The relevant provisions of section 84 of the Child Justice Act read as follows:

'**84. Appeals.**—(1) An appeal by a child against a conviction, sentence or order as provided for in this Act must be noted and dealt with in terms of the provisions of Chapters 30 and 31 of the Criminal Procedure Act: Provided that if that child was, at the time of the commission of the alleged offence—

(a) under the age of 16 years; or

(b)16 years or older but under the age of 18 years and has been sentenced to any form of imprisonment that was not wholly suspended,

he or she may note the appeal without having to apply for leave in terms of section 309B of that Act in the case of an appeal from a lower court.' (my emphasis)

[9] The effect of the amendment of 1 April 2010 to s 309(1)(a) of the CPA is thus that persons sentenced to life imprisonment by a regional court

no longer have an automatic right of appeal unless, at the time of commission of the alleged offence, such person was (a) under the age of 16 years; or (b) 16 years or older but under the age of 18 years and sentenced to any form of imprisonment that was not wholly suspended.

[10] In this matter, the appellant was 20 years old at the time of commission of the alleged offences. He accordingly does not fall within the ambit of s 84 of the Child Justice Act. However, the appellant was convicted on 20 January 2009 and sentenced on 19 March 2009. He was thus convicted and sentenced after s 309(1)(a) of the CPA was amended by the Criminal Law (Sentencing) Amendment Act (which came into effect on 31 December 2007) but before the amendment to s 309(1)(a) of the CPA by s 99(1) of the Child Justice Act (which came into effect on 1 April 2010). The amendment of 1 April 2010 is not retrospective and the appellant thus falls squarely within the "window period" in which a person sentenced to life imprisonment by a regional court was entitled to note an appeal against both conviction and sentence without having to apply for leave to appeal to the lower court which convicted and sentenced him.

[11] Accordingly in my view, although there is no indication in the record of the proceedings in the regional court whether the appellant's applications for leave to appeal and for condonation for the late filing of his application for leave to appeal were ever heard by that court, the appellant's appeal is properly before this Court.

[12] The indications are that the removal of the automatic right of appeal of adults sentenced to life imprisonment by a regional court under the minimum sentencing legislation was inadvertent. If this be the case there is clearly a pressing need for legislative correction of this oversight.

BACKGROUND

[13] The essential facts which emerged during the trial were the following.

[14] On 28 April 2003 the complainant, who was 13 years old at the time, was visiting a residential area known as Masekane near Gansbaai. She had friends who lived there and she spent the day with some of these friends, although they were not all with her all of the time. They smoked dagga and cigarettes and visited a shebeen and the caravan of a local drug dealer.

[15] During the course of the day she and her friend Bianca Pontak encountered Mr Simphiwe Tutu, whom they knew as he had attended the same school as them. Tutu was accused no.1 in the trial. They walked together to purchase cigarettes. Tutu then met two of his friends (who were accused no.2 and the appellant (as accused no.3 in the trial) and thereafter did not accompany the complainant and Bianca any further.

[16] A little later that day the complainant, Bianca and another friend, Shirene, stopped at the home of one Phumeza, where a fire was burning outside. Accused no's.1 and 2 arrived together with the appellant. Accused no.2 had a beer bottle in his hand and the appellant wore an army jacket.

Accused no.2 grabbed Shirene by the arm, but she pulled herself free and ran away.

[17] The appellant and accused no.2 took hold of the complainant and dragged her into the bushes nearby. She was terrified and tried to break free but without success. Accused no.1 accompanied them. Accused no.2 raped her while the other two held her down. The appellant then raped the complainant while the other two held her down. Accused no.1 then raped her. She was thereafter ordered to dress herself, during the course of which at least one of the three hit her.

[18] The appellant then ordered the complainant to lie down again and raped her a second time while the other two held her down. Thereafter accused no.2 raped her again.

[19] One of the complainant's friends called out to her and accused no's.1 and 2 left the scene. The appellant proceeded to assault the complainant and pull her along the path through the bushes. They arrived at a hut and the appellant locked them into this hut. He instructed her to take off her clothes. She refused and he again assaulted her, whereafter she removed her clothing.

[20] The appellant removed his clothes and ordered the complainant to perform oral sex on him. When she refused, he again assaulted her. He pulled the duvet off the bed onto the ground, threw her down and raped her a third time. He then fell asleep while lying on top of the complainant.

[21] There was a knock on the door and when the appellant went to open it the complainant managed to escape and ran until she encountered a vehicle in which the investigating officer, Inspector Julies, was sitting. She reported to him that she had been raped and at his request accompanied him to point out the hut from which she had just escaped. Before they arrived the appellant came running towards them. The complainant immediately identified him as one of the perpetrators and Inspector Julies arrested him. The appellant identified himself as Andile Jali, although accused no.1 later informed Inspector Julies that the appellant's surname was in fact Alam. Accused no.1 was arrested later that evening and accused no.2 a week later.

[22] It transpired that Inspector Julies had been searching for the complainant following Bianca Pontak's notification to the police that the complainant had been abducted by the appellant and accused no's. 1 and 2.

[23] Later that evening the complainant was examined by the district surgeon, Dr Barnard who testified that the complainant was extremely shocked and that her clothing was dirty. She had scratch marks on her back and scratch marks from fingernails on her right forearm. Her private parts were torn in two areas and were bloodied and bruised. From her injuries he concluded that it was highly probable that the complainant had been raped more than once, although it was not possible to state precisely how many times.

[24] Dr Barnard took swabs and a blood sample from the complainant and this, together with the long pants worn by the complainant, were sealed in a crime kit and sent away for forensic analysis. The complainant had lost her panties and sleeping shorts during the incident.

[25] The appellant was also examined by Dr Barnard that evening. Dr Barnard observed blood on the appellant's right hand, on his ring finger and in the crotch area of his pants, although there was no injury to his penis. He found a discharge on the appellant's penis. Samples of the discharge and the appellant's blood were taken and these, together with the appellant's army jacket and pants, were sealed in a crime kit and sent away for forensic analysis.

[26] Superintendent Magro of the South African Police Services Forensic Science Laboratory testified that the DNA found in one of the semen samples on the complainant's pants matched that derived from the appellant's blood sample.

[27] The appellant testified in his own defence (as did accused no's. 1 and 2). He denied all knowledge of the incident, that he had ever met the complainant, or that he knew accused no.1 (accused no.2 was his cousin). He admitted being in the area on the day of the incident but claimed that he had been drinking at a shebeen with a friend and had been arrested when he had gone to fetch his jacket from the friend's house. Neither the shebeen owner nor the friend were called to support his testimony. He was unable to

explain how his semen had come to be found on the complainant's pants and testified that *"...dit is wat my dronkslaan, my deurmekaar maak"*.

GROUNDS OF APPEAL

[28] The convictions were attacked on the basis that the magistrate erred in finding that the complainant's evidence contained no material contradictions and was logical and coherent. The appellant argued that there were in fact many contradictions and shortcomings in her evidence and that these, viewed together with the balance of the evidence as a whole, meant that the State had not discharged the onus of proving beyond a reasonable doubt that the appellant was one of the perpetrators. Each of the "contradictions and shortcomings" in the complainant's evidence advanced by the appellant will be considered in turn hereunder.

[29] The sentences were attacked on the basis that the magistrate made certain factual misdirections in his evaluation of the appropriate sentence. The appellant argued that the magistrate had also over-emphasised the seriousness of the offences and placed no emphasis on the appellant's personal circumstances. In particular he erred in not finding that substantial and compelling circumstances were present which would justify a departure from the prescribed sentence in respect of the convictions for rape.

THE APPLICABLE LAW

[30] In terms of s 208 of the CPA an accused may be convicted of any offence on the single evidence of a competent witness if it is clear and satisfactory in every material respect: see *S v Sauls and Others* 1981(3) SA 173 at 180C-F.

[31] As to the role of the cautionary rule in sexual assault cases, in *S v Jackson* 1998(1) SACR 470 (SCA) at 476e-f, the court stated the following:

'In my view, the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of an accused beyond reasonable doubt – no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.'

[32] In *Director of Public Prosecutions v S* 2000 (2) SA 711 (TPD) the court set out the legal position relating to the evidence of children as follows at 714J-715B, 715F-G and 716C:

'It is so that children lack the attributes of adults and, generally speaking, the younger, the more so. However, it cannot be said that this consideration *ipso facto* requires of a court that it apply the cautionary rules of practice as though they are matters of rote.

On a parity of reasoning, based upon the judgment in *F's* case *supra*, it cannot be said that the evidence of children, in sexual and other cases, where they are single

witnesses, obliges the court to apply the cautionary rules before a conviction can take place.'

'The test may also be framed in words of the oft referred-to judgment of *R v Difford* 1937 AD 370 at 373. I emphasise that the State has to prove the guilt of an accused beyond reasonable doubt. In doing so the evidence in a particular case may call for a cautionary approach (*F's* case *supra* at 1009F (SA) and 476e-f) and that approach depends upon the facts of each case.'

'It does not follow that a court should not apply the cautionary rules at all or seek corroboration of a complainant's evidence. In certain cases caution, in the form of corroboration, may not be necessary. In others a court may be unable to rely solely upon the evidence of a single witness. This is so whether the witness is an adult or a child.'

[33] In *S v Van Der Meyden* 1999(1) SACR 447 (WLD) at 448f-h and 450a-b, the court set out the principles applicable to evaluation of evidence in a criminal case as follows:

'The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, *R v Difford* 1937 AD 370 at 373 and 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put

forward might be true. The two are inseparable, each being the logical corollary of the other.

In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true.'

'The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.'

[34] It is trite that the circumstances entitling a court of appeal to interfere in a sentence which another court has passed are limited, and these circumstances were summarised by Marais, JA in *S v Malgas* 2001(1) SACR 469 (SCA) at 478d-g 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'.

[35] In terms of s 51(1) and (2) as read with s 51(3) of the Criminal Law Amendment Act the trial court, after having found the appellant guilty of multiple rapes and as an accomplice to a further rape, was obliged to sentence the appellant to life imprisonment in respect of each count, unless he was satisfied that substantial and compelling circumstances existed which justified the imposition of a lesser sentence.

[36] In *S v Nkomo* 2007(2) SACR 198 (SCA) the Supreme Court of Appeal expressed the view that the appellant's status as a first offender for a rape conviction had to be regarded as a substantial and compelling circumstance justifying a lesser sentence. In that matter the regional court had found that the appellant had raped the complainant five times during the course of a night. The appellant only appealed against the sentence of life imprisonment. The sentence had been imposed in 1999 before the Supreme Court of Appeal in *S v Malgas* 2001(1) SACR 469 (SCA) determined the approach to be adopted in finding whether substantial and compelling circumstances exist. The court in the *Nkomo* case stated the following at 205h-i:

'... I do not believe that his crime should attract the heaviest sentence permitted by our law, life imprisonment. I recognise that it may be difficult to imagine a rape under

much worse conditions. But it is possible, and I consider that the prospect of rehabilitation and the fact that the appellant is a first offender must be regarded as substantial and compelling circumstances justifying a lesser sentence. What must be borne in mind as well, is the statement of this Court in *S v Abrahams* (cited in the passage from *Mahomotsa* above) that life imprisonment as a sentence for rape should be imposed only where the case is 'devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust."'

[37] In the *Malgas* case the Supreme Court of Appeal summarised the principles applicable to *"substantial and compelling circumstances"* as follows at 481h-482f:

'In summary -

A. Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part I of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).

B. Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should *ordinarily* and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the

policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

E. The Legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

F. All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

G. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and compelling') and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained.

H. In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.

I. 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.

J. 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.'

[38] In the *Nkomo* case the court commented as follows at 201d-e:

'In *Malgas*, however, it was held that in determining whether there are substantial and compelling circumstances, a court must be conscious that the Legislature has ordained a sentence that should ordinarily be imposed for the crime specified, and that there should be truly convincing reasons for a different response. But it is for the court imposing sentence to decide whether the particular circumstances call for the imposition of a lesser sentence. Such circumstances may include those factors traditionally taken into account in sentencing – mitigating factors – that lessen an accused's moral guilt. These might include the age of an accused or whether or not he or she has previous convictions. Of course these must be weighed together with aggravating factors. But none of these need be exceptional.'

[39] In *S v Kimberley and Another* 2004 (2) SACR 38 (ECD) the court considered the meaning of paragraph (a)(i) of the section dealing with *"rape"* in Part P1 of Schedule 2 to the Criminal Law Amendment Act, which provides as follows:

'(a) when committed –

(i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;'

[40] The court found that where this paragraph refers to rape committed by more than one person, in circumstances in which such persons acted in the execution or furtherance of a common purpose or conspiracy, the legislature must be taken to have employed the concepts of "accomplice", "co-perpetrator" or "common purpose" in a non-legal sense. A layman reading paragraph (a)(ii) would understand it to relate to the so-called gang rape situation, for example where one or more persons hold down the victim

with the "common purpose" that another of their number has sexual intercourse with her, even though such an interpretation gives rise to an anomaly, since it has the effect that the concepts of "common purpose" and "co-perpetrator" have one meaning (a legal one) for purposes of conviction, and another (a non-legal one) for purposes of sentence (at 44i-45c). The effect of this judgment appears to be that an accomplice to a rape is in law as guilty and liable to the same punishment as if he had been the actual perpetrator of the rape (this was the court's finding at 41a).

EVALUATION OF GROUNDS OF APPEAL AND EVIDENCE

[41] The first of the appellant's submissions in respect of the convictions of rape is that the complainant had identified the appellant as the man who wore the army jacket and was the "*langetjie*". However she later changed this part of her evidence and stated that the man to whom she referred as the *"langetjie"* was not the man with the army jacket but the man who held the beer bottle. This appears to have been inadvertent however, since, when it was pointed out to her by the prosecutor she immediately corrected herself and later, throughout cross examination, was consistent in the version which she had given in her evidence in chief as to the respective roles played by the three perpetrators during the incident. In my view, this contradiction was nothing other than a minor instance of confusion on the part of the complainant, which is far outweighed by the balance of her evidence on this aspect as a whole.

[42] The second submission is that the complainant's explanation of how she identified the appellant shortly after the incident was inconsistent with her inability to testify as to his particular facial characteristics. I do not believe that there is any merit in this contention. The complainant was clear and credible in her evidence that she had just managed to escape from the appellant, who, when he was arrested, was again wearing his army jacket. She had had ample opportunity whilst she was being repeatedly raped and assaulted by him to see his face at close quarters (even if it had become dark), and it was never put to her that any of the perpetrators' faces had been obscured. Within minutes of escaping from the appellant (and him apparently pursuing her) she recognised him both by his clothing and his facial features, whereupon he was immediately arrested. In these circumstances details of any of the appellant's distinguishing facial characteristics are not particularly relevant, especially in a situation where the complainant was testifying five years after the incident. Similarly, the complainant's evidence that she would not be able to recognise the appellant and accused no.2 at the trial (some five years later) is also not particularly material.

[43] The third submission is the appellant's criticism of the complainant for not being able to give a better description of accused no.2, other than him being the man who held the beer bottle, when her friend Bianca had described the white clothing which he had been wearing in some detail. To my mind, nothing turns on this for the simple reason that the complainant was never asked, either by the state or the defence, to describe the clothing

worn by accused no.2. During her evidence (including her cross examination) accused no.2 was referred to as the man who held the beer bottle, and the complainant cannot be faulted for not describing the clothing worn by accused no.2 when she was never asked to do so.

[44] The fourth submission is that a puzzling aspect of the complainant's evidence was her account of how many times she was raped, since it was "common cause" that she had been raped seven times but her evidence did not appear to correlate with this. Properly analysed, the complainant's evidence was that she had been raped six times, firstly by accused no.2, then by the appellant, then by accused no.1, then again by the appellant, then again by accused no.2, and finally again by the appellant. She stated that accused no.1 had raped her once, and she only became confused when the prosecutor repeatedly questioned her as to how many times she had been raped by accused no.1, at a point stating that it was twice. Further, she did not attempt to embellish her evidence, and she was clear that, although he had raped her, accused no.1 had not assaulted her. The complainant did not appear to be a witness who was prone to exaggeration and in my view this contradiction in her evidence cannot be regarded as material.

[45] The fifth submission is that a further contradiction in the complainant's evidence was that she testified that she was raped once (by the appellant) in the shack, but told Inspector Julies that she was raped twice whilst there. It should be noted that the complainant's version of what she told Inspector Julies was that she had been raped in the bushes and in the

shack and that *"die een met die weermagbaadjie my gerape het in die hok"*. Inspector Julies' initial evidence is in fact equivocal on this point since he testified that the complainant told him that *"sy op die mat verkrag is en dat sy ook op die bed is. Dis waar die pienk duvet op die bed aangetref was"*. The complainant's testimony was that the appellant pulled the duvet off the bed, threw it on the ground and raped her there. It is not clear how the duvet found its way back onto the bed thereafter, and it is also quite possible that Inspector Julies incorrectly concluded that the complainant had been raped twice in the shack because of where the duvet was found by him.

[46] Inspector Julies also testified that when the complainant ran towards him she was crying and clearly traumatised. It would be understandable then if Inspector Julies had in fact misunderstood some of the detail of what the complainant relayed to him. In his own words, the complainant was *"vreesbevange"* and at the police station *"sy het my net 'n kort weergawe gegee omdat sy getraumatiseerd was"*.

[47] The sixth submission is that the magistrate did not deal with the evidence relating to the dagga which the complainant and her friend Bianca had smoked on the day of the incident, and the effect that this could have had on the memories of these witnesses. This submission is incorrect. The magistrate did deal with it in his judgment, considered it, and did not regard it as casting doubt on the substance of the complainant's evidence.

[48] The complainant testified that she had only smoked one dagga cigarette that day, whilst Bianca testified that they had both smoked dagga at least four times. The complainant's evidence was that although they had smoked dagga earlier that day, they had gone to lie on the drug dealer's bed in his caravan until its effects wore off. There was no evidence that after they had rested they had smoked more dagga. In the complainant's own words *"die oggend toe ons gaan toe rook ons dit en in die middag se kant toe gaan lê ons om dit te laat uittrek"*. Under cross examination Bianca testified that *"Dagga rook is maar net hy maak jou bietjie bedwelmd in jou kop. Ons lag baie, maak jokes maar jy kan nog altyd onthou wat jy sien en hoor"*. This evidence was not challenged. It thus appears that the magistrate correctly found that the fact that the complainant and Bianca had smoked dagga that day was not of any material relevance in the circumstances.

[49] Lastly, it was argued that, since it appears that the charges were withdrawn against the appellant at one stage (he was re-arrested in 2005), this in some manner (which is not clear) weakened the State's case against the appellant. The fact of the matter is that no evidence whatsoever was placed before the trial court in this regard and to arrive at any conclusion based on this fact would amount to nothing other than speculation.

[50] In my view, on a consideration of the evidence as a whole (including that of the investigating officer, the district surgeon, the DNA evidence and that of the appellant himself) the State succeeded in proving beyond a reasonable doubt that the appellant was one of the men who abducted the

complainant, that he held her down whilst she was raped by accused no.2, and that the appellant himself raped her three times.

[51] However, as indicated the State failed to prove beyond a reasonable doubt that the appellant raped the complainant twice in the hut, regard being had to the evidence of the complainant herself in this respect.

[52] To my mind therefore the magistrate correctly convicted the appellant on counts 1, 2, 3, 5 and 7 but incorrectly convicted him on count 8.

[53] At the time of the commission of the offences the appellant was 20 years old. The probation officer's report indicates that he was raised without a father in straitened social and financial circumstances and that he had few friends. He left school at the age of 15 after the school building was set alight during a political protest. He started using dagga and continued to do so until 2005. Upon reaching the age of 18 years he became employed at a golf course for approximately a year, but this employment was terminated when he was convicted of robbery for which he received a sentence of 3 months imprisonment.

[54] The appellant was released on parole in July 2001. In June 2002 he was convicted of theft and sentenced to 12 months imprisonment, but was released on parole prior to completion of his sentence. At the time of commission of the present offences he was employed as a labourer and in receipt of regular income. When he was convicted of the present offences he had been in custody as an awaiting trial prisoner for just over four years.

[55] In considering an appropriate sentence, the magistrate referred to the appellant's age, lack of education, circumstances of his upbringing and previous employment. In his opinion however the seriousness of the offences (he described the conduct of the appellant and his co-accused as *"barbaric"*) meant that there were no substantial and compelling circumstances which would justify the imposition of a lesser sentence.

[56] In my view the magistrate misdirected himself in attaching no weight at all to the appellant's personal circumstances and the fact that he was a first offender for rape. These, together with the appellant's youth, are clearly mitigating factors and, in my view, notwithstanding the seriousness of the offences, constitute substantial and compelling circumstances. The magistrate did not consider at all the possibility that the appellant could be rehabilitated. The sentences which he imposed for the rapes were the heaviest permitted by law. When one takes into account the mitigating factors the five sentences of life imprisonment imposed by the magistrate for the rapes were, in my view, disturbingly inappropriate.

[57] As I have found that the magistrate not only misdirected himself but also imposed a sentence which is disturbingly inappropriate, I consider that this court is entitled to interfere with the sentence imposed by the lower court.

[58] To my mind, taking all of the circumstances into account (including that the appellant was in custody for four years prior to his convictions) an effective sentence of 18 years imprisonment in respect of each of the four

counts of rape is appropriate, subject to these sentences running concurrently.

[59] I would therefore propose the following order:

"(a) The appeal against the conviction in respect of count 8 is upheld and the sentence of life imprisonment in respect of this conviction is set aside.

(b) The appeal against the convictions in respect of counts 1, 2, 3, 5 and 7 is dismissed.

(c) The appeal against the sentences imposed in respect of counts 2, 3, 5 and 7 is upheld, such sentences being set aside and replaced with a sentence of 18 years' imprisonment in respect of each count with effect from 19 March 2009. It is further ordered, in terms of s 280 of Act 51 of 1977, that the sentences imposed in respect of counts 1, 2, 3, 5 and 7 shall run concurrently."

J I CLOETE

BOZALEK, J: I agree. It is so ordered.

L J BOZALEK