COPY

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

REPORTABLE

APPEAL NO: AR680/2018P

In the matter between:

SIPHO WISEMAN MTHOMBENI **APPELLANT**

and

THE STATE **RESPONDENT**

ORDER

On appeal from: the Newcastle Regional Court (sitting as court of first instance):

The appeal against sentence is dismissed.

JUDGMENT

Delivered on: 08 July 2020

Gani AJ: (Seegobin J concurring)

[1] On 10 December 2015 the appellant pleaded guilty to two (2) charges, namely robbery with aggravating circumstances on count 2 and rape on count 3. He was sentenced to 15 years' imprisonment in respect of the robbery conviction and life imprisonment in respect of the rape conviction. This appeal is in respect of sentence only.

[2] The circumstances in which the offences were committed, and the basis on which the appellant was convicted, are detailed in the appellant's statement to the court *a quo* under section 112 of the Criminal Procedure Act 51 of 1977 (the CPA). The statement disclosed that on 6 April 2011 the appellant and his friends decided to break into a house in Osizweni Township, Newcastle, and to rob the occupants thereof. During the course of the robbery the appellant heard a female voice in one of the rooms. He proceeded to that room, located the complainant in count 3, and raped her. After the appellant finished raping the complainant, his companion also raped her. After questioning by the court on the rape of the complainant by the appellant's companion, the section 112 statement was supplemented with the words 'that my companion also raped the complainant by inserting his genital organs on her genital organs'.[1] The incident therefore involved a multiple rape of the victim as borne out by the charge on count 3.

[3] The appellant was convicted on the basis of his section 112 statement, and sentenced on the basis that the minimum sentence legislation applied to both counts (i.e., that the robbery charge fell within Part II of Schedule 2 to the Criminal Law Amendment Act 105 of 1997 (the Act)), and the rape charge fell within Part I of that Schedule). The learned magistrate imposed the prescribed minimum sentences in respect of each of the offences, holding that there were no substantial and compelling circumstances warranting a departure therefrom.

This appeal

[4] At the hearing of the appeal, the appellant's counsel raised a point of law to the effect that, in considering the appeal against the sentence of life imprisonment in respect of the rape conviction, this court was bound by the decision of the Supreme Court of Appeal in *Mahlase*[2] and that this division had already accepted *Mahlase* as being binding on it in the matter of *Ndlovu*.[3] On this basis the appellant submitted that this court is obliged to reduce the sentence of life imprisonment on the rape conviction to one of fifteen (15) years' imprisonment.

---

[1] Record at 43, lines 5 to 11.
[2] *Mahlase v S* [2013] ZASCA 191.
[3] *Ndlovu v S* [2019] ZAKZPHC 56; 2019 (2) SACR 484 (KZP).

[5] In as much as the argument was not addressed in the parties' original heads of argument, the court reserved judgment and directed the parties to file supplementary heads of argument addressing the issue. The parties duly did so, but there was some delay in the court receiving the supplementary heads on account of the national lockdown. The court is indebted to the parties for the supplementary heads.

[6] The appellant persists with the appeal in respect of both sentences. In respect of the sentence for the rape conviction, the appeal is primarily based on the *Mahlase* judgment, and in respect of the robbery conviction, the appellant asserts that the court *a quo* materially misdirected itself in imposing the prescribed minimum sentence.

[7] In summary this judgment holds that:

7.1 *Mahlase* is distinguishable from the present appeal, and this court, respectfully, is not bound by that judgment.

7.2 The appellant's rape offence fell within the ambit of Part I of Schedule 2 of the Act and the court *a quo* accordingly possessed the requisite power to impose a sentence of life imprisonment for that conviction, pursuant to section 51(1) of that Act.

7.3 In respect of the sentences for both convictions, the court *a quo* did not misdirect itself in any respect and the prescribed minimum sentences were justified.

The *Mahlase* judgment

[8] To deal firstly with the appellant's argument relating to *Mahlase*, the argument is restricted to the appellant's sentence in respect of the rape conviction, and is to the effect that *Mahlase* is authority for the proposition that, where a victim has been raped more than once, the prescribed minimum sentence for rape in Part I of Schedule 2 to the Act may only be imposed upon an accused if the other person who participated in the rape has also been convicted. The appellant submits that this court is bound by this principle and that the court *a quo* erred in sentencing the appellant to life

imprisonment in respect of the rape conviction in view of the fact that the other person who had raped the victim had not been convicted.

[9] Nonetheless, the first question is whether this court is bound by *Mahlase*. A Full Court of this division considered the *Mahlase* judgment in the matter of *Ndlovu*. The majority (per Ploos Van Amstel J and Bezuidenhout J) held that they were bound by *Mahlase*, and that since only one person (Mr Ndlovu) had been convicted of the rape of the victim in that matter, and on the basis of the reasoning in *Mahlase,* they found that Part I of Schedule 2 did not apply and that the regional court had erred in imposing a sentence of life imprisonment for rape. The majority accordingly set aside the sentence of life imprisonment and substituted it with a sentence of 15 years' imprisonment. Hadebe J, however, dissented, holding that the court was not bound by the reasoning in *Mahlase*. The learned judge disagreed with the reasoning in *Mahlase* and held, *inter alia*, that the Supreme Court of Appeal had overlooked the provisions of section 51(1) of the Act read with Part I of Schedule 2 thereof.

[10] In general, a lower court is bound by a decision of a higher court in respect of the specific legal principle laid down by the higher court. A lower court is required to determine precisely what the *ratio decidendi* is, since it is bound only by the legal principle determined by the higher court as having the force of law. The question that arises is precisely what the *ratio* of *Mahlase* is.

[11] In *Ndlovu* the Full Court summarised the *ratio* of *Mahlase* as follows:

> '[4] In *Mahlase* the appellant had been convicted in a High Court of robbery, rape and four counts of kidnapping. In respect of the robbery he was sentenced to 20 years' imprisonment, life imprisonment in respect of the rape and five years' imprisonment in respect of each of the kidnapping convictions. The basis on which the trial court imposed life imprisonment in respect of the conviction of rape was that the victim had been raped by more than one person. On appeal Tshiqi JA (with whom Lewis and Theron JJA concurred) referred to this as a misdirection and said the trial judge had overlooked the fact that the other person who had raped the victim was not before the trial court and had not yet been convicted of the rape. She said in those circumstances it could not be held that the rape fell within the provisions of Part 1 (where the victim was raped more than once), with the result that the minimum sentence for rape was

not applicable. The sentence of life imprisonment was set aside and replaced with 15 years' imprisonment.'

[12] The Supreme Court of Appeal's interpretation of Part I of Schedule 2 quite evidently places a 'first convicted accused' at a substantial advantage in respect of sentencing where there is more than one person who raped the complainant, and where the other persons are convicted subsequently to the first accused. The 'later convicted accused' would face the mandatory life imprisonment sentence, whereas the first accused would not, on the unpredictable basis that at the stage of the first accused's conviction, no other person had been convicted for the multiple rape (even where, as a fact, more than one person had raped the complainant). With respect, the arbitrariness of such a situation and the unconstitutionality of such an interpretation of the Act is fairly clear. This will be considered in more detail hereunder.

[13] Respectfully, it is not clear from *Mahlase* as to the basis on which the court reached the conclusions contained in paragraph 9 of the judgment. With respect, the judgment does not, for instance, deal with the court's process of interpreting the Act and Part I of Schedule 2 thereof which gave rise to the court's conclusions, or furnish the specific reasons for the conclusions in paragraph 9 of the judgment The judgment also does not make reference to the constitutional rights and interests which arise in the case of rape. In respect of the offence of rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, Part I of Schedule 2 of the Act provides for the offence to have taken various forms. Paragraph 9 of the judgment refers to 'Part 1 Schedule 2', whereas that part is fairly detailed in its terms and caters for various forms of offences of rape. *Mahlase* respectfully does not address which particular form of rape provided for in Part I of Schedule 2 requires the conviction of all of the perpetrators before the prescribed minimum sentence will apply.

[14] Section 51(1) of Act provides as follows:

'(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life'.

[15] Part I of Schedule 2, in respect of the offence of rape, provides as follows:

'Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007-

(*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;

(ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;

(iii) by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions; or

(iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;

(*b*) where the victim-

(i) is a person under the age of 16 years;

(iA) is an older person as defined in section 1 of the Older Persons Act, 2006 (Act 13 of 2006);

[Sub-para. (iA) inserted by s. 25 (*a*) of Act 8 of 2017 (wef 2 August 2017).]

(ii) is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or

(iii) is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or

(*c*) involving the infliction of grievous bodily harm.'

[16] In our view, the conclusions in *Mahlase* could not reasonably apply to <u>all</u> of the forms of rape provided for in Part I of Schedule 2. The judgment does not say so, and the conclusion in paragraph 9 of the judgment is incongruent with each and every form of rape provided for in Part I. For example, item *(a)*(iv) of the description of the offence of rape in Part I, refers to a rape by a person with knowledge that he has the acquired immune deficiency syndrome. The conclusions in paragraph 9 of the judgment obviously did not apply to this form of rape. Those conclusions consequently could not apply to the whole of Part I, and that such a wide proposition could respectfully not have been the conclusion of the Supreme Court of Appeal. The court's conclusion is only binding in respect of the precise form of rape in Part I to which *Mahlase* relates (as constituting the *ratio* of the case).

[17] It is consequently necessary to determine to which form of rape (provided for in Part I of Schedule 2 of the Act) the conclusion in paragraph 9 of *Mahlase* relates. The *ratio decidendi* of the Supreme Court of Appeal in *Mahlase* is restricted to the form of rape to which the conclusions in paragraph 9 of the judgment relate and a lower court, with respect, is bound to *Mahlase* to that extent only. The Supreme Court of Appeal obviously considered Part I of Schedule 2 on the basis of the facts of that case. Since the reasoning of the court is not clear, it is necessary to consider the facts of that matter in order to determine the precise *ratio*.[4]

[18] The facts appear largely from paragraphs 1 to 5 of the judgment. In essence *Mahlase* was concerned with a common purpose scenario wherein the appellant (Mr Mahlase) and four co-assailants had set out to rob the owners of a bottle store after the store had closed. During the course of that offence they perpetrated further offences of the rape and kidnapping of the victim. Although the Supreme Court of Appeal in paragraph 4 of the judgment states that the victim was 'apparently' raped more than once, and 'allegedly' raped by more than one assailant, it must be accepted that the victim was in fact raped more than once, and by more than one of the assailants since there is nothing to suggest that the trial court did not find those facts as having been proved, and the appellant was convicted on that basis. The appeal was in respect of sentence only and the trial court's findings therefore stood.

[19] Two of the perpetrators in *Mahlase* were charged, namely the appellant and one Mr Thami Mahlangu. Mr Mahlangu subsequently testified on behalf of the State in terms of section 204 of the CPA. The remaining co-assailants were not tried. Mr Mahlangu's testimony was admitted into evidence and the appellant was convicted. Mr Mahlangu had testified that the victim had been raped by three men, one of whom was the appellant.

[20] These facts demonstrate that the appellant in *Mahlase* was charged and convicted of a form of rape committed by more than one person, in a common purpose scenario. This is provided for in item *(a)*(ii) in the description of rape in Part I of

---

[4] Consider, for example, *Fellner v Minister of the Interior* 1954 (4) SA 523 (A) at 542F-G.

Schedule 2 of the Act. None of the other forms of rape provided for in Part I of Schedule 2 are consistent with the facts and circumstances of *Mahlase* as detailed in the judgment of the Supreme Court of Appeal. For instance, items *(b)* and *(c)* are not consistent with the facts of *Mahlase* and the appellant there could not have been convicted by the trial court of those forms of rape. The various counts in respect of which the appellant in *Mahlase* was charged and convicted all stemmed from the incident described in paragraphs 3 and 4 of the judgment and which involved multiple offences, not only the rape of the victim. This placed the offence of rape outside of the categories of rape provided for in items *(a)*(i), (iii) and (iv) of Part I of Schedule 2. The rape of the victim followed upon the original offence of robbery as part of the common purpose on the part of the perpetrators. There is no mention of facts in the judgment which could place Mr Mahlase's conviction into any category of rape other than the common purpose described in item *(a)*(ii) of Part I of Schedule 2. Nor is there any mention of the constitutional justifiability of the court's conclusion. The constitutional issues which arise in the interpretation of the offence of rape and the Act appear not to have been raised in *Mahlase*.

[21] In our respectful view therefore, the conclusions in paragraph 9 of *Mahlase* are restricted to the offence of rape of the form provided for in item *(a)*(ii) only. This court is consequently not bound to the conclusions in paragraph 9 of *Mahlase* in respect of an offence of rape of any other form. As addressed below, if due consideration is given to the constitutional rights and values which the Act gives rise to in respect of the offence of rape, the conclusions in paragraph 9 of *Mahlase* could not reasonably apply to any other form of rape provided for in Part I of Schedule 2 and this judgment proceeds on this basis. This court also respectfully disagrees with the reasoning of the Supreme Court of Appeal in *Mahlase* with respect to the form of rape provided for in item *(a)*(ii) of Part I of Schedule 2, and in general, on the basis that that court's interpretation of Part I is inconsistent with several of the rights contained in the Bill of Rights and with entrenched constitutional values, primarily those of human dignity and equality involving the victims of rape of the nature provided for in the Act.

The present appellant's conviction for rape

[22] In the present appeal the appellant was not convicted of the offence of rape in a common purpose context. On the basis of the appellant's section 112 statement

(pursuant to which he was convicted), the victim was raped more than once and by more than one person. In our view this placed the rape within the ambit of item *(a)*(i) of Part I of Schedule 2, which is the form of rape that is committed 'in circumstances were the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice' (the appellant's companion who also raped the victim was a co-perpetrator in respect of the rape). The court *a quo* consequently possessed the required power to impose a sentence of life imprisonment. The question as to whether the court misdirected itself on sentence in any respect is addressed hereunder.

[23] Although this court is of the view that the *Mahlase* judgment is restricted to offences of rape which fall within the common purpose situation provided for in Part I of Schedule 2 (and which, with respect, is not binding in respect of a conviction of rape in the circumstances of the present appellant) it is also relevant as to whether the conclusion of the Supreme Court of Appeal should apply to the offence of rape of the form provided for in item *(a)*(i) of Part I of Schedule 2. This question calls for an interpretation of the Act, and the forms of the offence of rape provided for in Part I of Schedule 2 thereto.

[24] It is well-established that interpretation is a unitary exercise directed at attributing meaning to the words used in a statute or document.[5] In *Endumeni* the Supreme Court of Appeal described this as an objective process requiring a sensible and businesslike meaning to be placed on the wording of a document. In respect of statutory provisions, the Constitutional Court has held 'that all statutes must be interpreted through the prism of the Bill of Rights.'[6] This is expressly provided for in section 39(2) of the Constitution.

[25] In *Investigating Directorate*,[7] the Constitutional Court described the duty which section 39(2) imposes on the courts in the following terms:

---

[5] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA593 (SCA). The judgment has been consistently endorsed in subsequent judgments of the Constitutional Court and Supreme Court of Appeal.

[6] *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & others: In re Hyundai Motor Distributors (Pty) Ltd & others v Smit NO & others* 2001 (1) SA 545 (CC) paras 21–22.

[7] Ibid.

'[21] . . .This means that all statutes must be interpreted through the prism of the Bill of Rights. All law-making authority must be exercised in accordance with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterizes the constitutional enterprise as a whole.

[22] The purport and objects of the Constitution find expression in section 1 which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.'

[26] In *Govender,*[8] the Supreme Court Appeal described the approach postulated in *Investigating Directorate*, in the following terms:

'[11] This method of interpreting statutory provisions under the Constitution requires a court to negotiate the shoals between the Scylla of the old-style literalism and the Charybdis of judicial law-making. This requires magistrates and judges:

(a) to examine the objects and purport of the Act or the section under consideration;

(b) to examine the ambit and meaning of the rights protected by the Constitution;

(c) to ascertain whether it is reasonably possible to interpret the Act or section under consideration in such a manner that it conforms with the Constitution, ie by protecting the rights therein protected;

(d) if such interpretation is possible, to give effect to it, and

(e) if it is not possible, to initiate steps leading to a declaration of constitutional invalidity.' (references omitted)

---

[8] *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA) para 11.

[27] Most recently in *Pickfords Removals*[9] the Constitutional Court reiterated that interpreting legislation 'through the prism of the Constitution' is a 'mandatory constitutional canon of statutory interpretation'. The court held further where there are two possible interpretations, the court should determine 'which of these two interpretations better promotes the spirit, purport and objects of the Bill of Rights'.

[28] The Constitutional Court has also recently affirmed the gravity of the offence of rape and the justifiability of the minimum sentence legislation.[10] In our view, the form of the offence of rape provided for in item *(a)*(i) of Part I of Schedule 2 cannot reasonably be interpreted to require that the minimum sentence of life imprisonment only becomes available to a court, where a person is raped more than once, only if the other perpetrator is also convicted (as *Mahlase* concluded).

[29] To deal firstly with the wording of item *(a)*(i) of Part I of Schedule 2, it relates to when a rape is committed in circumstances where the victim was raped more than once. By including a rape which matches these elements into Part I of Schedule 2, the Legislature obviously regarded such conduct as so grave as to warrant the mandatory imposition of life imprisonment. In this regard the gravity of the offence of rape has been the subject of many judgments. In *Tshabalala,* the Constitution Court commences its judgment with a quotation from an earlier case[11] which described the offence of rape in following terms:

> '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. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.'

[30] The object of the inclusion of item *(a)*(i) is to punish the multiple rapes of a victim more severely. The provision applies when the person is raped 'more than once

---

[9] *Competition Commission v Pickfords Removals SA (Pty) Ltd* [2020] ZACC 14 paras 35-37.
[10] *Tshabalala v S; Ntuli v S* [2019] ZACC 48; 2020 (3) BCLR 307 (CC) paras 61 & 80.
[11] *S v Chapman* [1997] ZASCA 45; 1997 (3) SA 341 (SCA) paras 3-4.

whether by the accused or by any co-perpetrator or accomplice'. Having regard to the constitutional rights and values which the offence of rape violates, and specifically the rights of women to be protected from gender-based violence, the provisions can only sensibly refer to a multiple rape performed collectively by an accused, a co-perpetrator or an accomplice (and not necessarily a multiple rape by one of them). It would be absurd to suggest that the minimum sentence would not apply to an accused where the accused raped the victim once, and a co-perpetrator also raped the victim once, such that neither of them did so more than once.

[31] The words 'more than once' must be interpreted to refer to the victim having been raped by any of the accused, a co-perpetrator or an accomplice collectively more than once in the circumstances in which the crimes were committed, and the word 'or' should be interpreted to mean 'and/or'.[12] The alternative would mean that a victim could, as a fact, be raped more than once, but an accused is spared the minimum sentence on the basis that the accused only raped the victim once (with the second and further rape of the victim, in the same circumstances of the offence, being disregarded). Such an interpretation would infringe the right to dignity of the victim and disregard that the victim was, as a fact, raped more than once in the circumstances in which the crime occurred (which included being raped by the appellant). This interpretation would not promote the spirit, purport and objects of the Bill of Rights. At the very least, such an interpretation would not 'better promote the spirit, purport and objects of the Bill of Rights' and should be disavowed on the basis of the reasoning of the Constitutional Court in *Pickfords Removals*. In our view therefore, item *(a)*(i) of Part I of Schedule 2 clearly applies to a situation when a victim has been raped more than once by any of the accused, a co-perpetrator or an accomplice, or by them collectively.

[32] We are also respectfully of the view that the reasoning of the Supreme Court of Appeal in *Mahlase* cannot legitimately apply to a case of multiple rape as contemplated in item *(a)*(i) of Part I of Schedule 2. To interpret those provisions in a manner to be applicable to an accused only if the other person who had raped the victim has also been convicted would be insensible and contrary to the constitutional rights and values which the offence of rape implicates.

---

[12] Consider *Barclays National Bank Ltd v Love* 1975 (2) SA 514 (D); *Bouwer v Stadsraad van Johannesburg* 1978 (1) SA 624 (W).

[33] As is apparent from *Malgas*,[13] given the increase in the commission of certain serious offences, the Legislature was not satisfied with the courts simply having a discretion to impose a sentence of life imprisonment in respect of such offences. It enacted the minimum sentence legislation to make a sentence of life imprisonment mandatory in respect of specific offences. Courts are therefore obliged to impose the minimum sentences, save where there were truly convincing reasons for departing therefrom, and 'are not free to subvert the will of the legislature by resort to vague, ill-defined concepts...'.[14] The object of the minimum sentence legislation is to remove those who commit certain serious offences from society for lengthy periods of time.

[34] Section 1 of the Constitution establishes the Republic as a democratic state founded on the values of, amongst others, 'human dignity, the achievement of equality and the advancement of human rights and freedoms', as well as the 'supremacy of the Constitution and the rule of law'. The Constitution entrenches, amongst others, the rights to human dignity in section 10 (inherent dignity and the right to have a person's dignity respected and protected), the right to freedom and security of the person in section 12 (which includes the rights to be free from all forms of violence, not to be tortured in any way and not to be treated or punished in a cruel, inhuman or degrading way), the rights to equality and life (in sections 9 and 11 respectively) and the right to freedom of movement in section 21.

[35] Rape is an exceptionally degrading offence which violates these constitutional rights and the constitutional values on which our State is established. In *Tshabalala,* the Constitutional Court said the following in relation to the offence of rape and the minimum sentence legislation:[15]

> '[61] I interpose to say that in 1997, Parliament took a bold step in response to the public outcry about serious offences like rape and passed the Criminal Law Amendment Act which prescribes minimum sentences for certain specified serious offences. The Government's intention was that such lengthy minimum sentences would serve as a deterrent as offenders, if convicted, would be removed from society for a long period of time. The statistics sadly reveal that the minimum sentences have

---

[13] *S v Malgas* [2001] 3 All SA 220 (A).
[14] *S v Matyityi* 2011 (1) SACR 40 (SCA) para 13.
[15] *Tshabalala* (above) paras 61,63, and 77.

not had this desired effect. Violent crimes like rape and abuse of women in our society have not abated. Courts across the country are dealing with instances of rape and abuse of women and children on a daily basis. The media is in general replete with gruesome stories of rape and child abuse on a daily basis. Hardly a day passes without any incident of gender-based violence being reported. This scourge has reached alarming proportions. It is sad and a bad reflection of our society that 25 years into our constitutional democracy, underpinned by a Bill of Rights, which places a premium on the right to equality and the right to human dignity, we are still grappling with what is a scourge in our nation.

. . .

[63] This scourge has reached alarming proportions in our country. Joint efforts by the courts, society and law enforcement agencies are required to curb this pandemic. This Court would be failing in its duty if it does not send out a clear and unequivocal pronouncement that the South African Judiciary is committed to developing and implementing sound and robust legal principles that advance the fight against gender- based violence in order to safeguard the constitutional values of equality, human dignity and safety and security. One such way in which we can do this is to dispose of the misguided and misinformed view that rape is a crime purely about sex. Continuing on this misguided trajectory would implicate this Court and courts around this country in the perpetuation of patriarchy and rape culture.

. . .

[77] The importance of the proper construction and characterization of rape cannot be gainsaid. This is because in all incidents of rape, there are two victims – the direct victim and the indirect victim. The former refers to someone who is actually raped whereas the latter refers to people who are affected by the rape incident and the treatment of that direct victim. Again, this reinforces that rape is systemic and structural. We ought to heed the warning by Sachs J, albeit in the context of domestic violence that: "The ineffectiveness of the criminal justice system . . . sends an unmistakable message to the whole of society that the daily trauma of vast numbers of women counts for little."' (footnotes omitted)

[36] An interpretation of the Act, to the effect that the sentence of life imprisonment for the offence of rape in the form of those provided for in Part I of Schedule 2 will not apply to an accused where a co-perpetrator has also not been convicted, is inconsistent with constitutional rights and values. Where, as a fact, a victim has been raped by more than one person, it is irrational to require that the other person should

also be convicted before a sentence of life imprisonment would be competent for the first person. Such an interpretation would have the result that where two persons have raped the same victim, an accused who is convicted first would be spared a sentence of life imprisonment, but the sentence of life imprisonment would be mandatory in respect of the second accused, by virtue of the mere fortuity that the second rapist was tried and convicted at a later stage. As between the first convicted person and the second convicted person, the first convicted person would derive a substantially greater benefit and protection of the law without any rational basis while the second convicted person would consequently suffer unfair differentiation in violation of the right to equality. Section 9(1) of the Constitution affords 'the right to [the] equal protection and benefit of the law'. Differentiation between persons will contravene this right if it is not rational.[16] In the context of sentencing, the second convicted person would not have a fair hearing by virtue of him being treated differently from a co-perpetrator who was convicted of the same offence at an earlier point in time.

[37] The interpretation of the Act which arises from *Mahlase* is accordingly inconsistent with the gravity of the offence of a multiple rape of the victim, the rights of the victim and the constitutional values of equality and human dignity. The Act is directed at (amongst others) protecting and restoring the dignity of women who suffer the inhumanity of the offence of being raped multiple times, by mandating a minimum sentence of life imprisonment (save where there are substantial and compelling circumstances to impose a lesser sentence). Where one of the persons who had raped the victim is being sentenced, it is inconsistent with the recognition of the victim's rights and the constitutional values of equality and human dignity to disregard the fact that the victim had actually been raped by more than one person for the purpose of determining whether the minimum sentence should apply. As mentioned already it does not appear that these constitutional imperatives had been raised in *Mahlase* and, specifically, it does not appear that either of the parties made reference to the values, rights and freedoms in the Constitution. As such, the Supreme Court of Appeal was not called upon to conduct the interpretive process provided for in section 39(2) of the Constitution, and in *Investigating Directorate* and *Govender*. The interpretation which this court places upon the Act relating to the offence of rape, based on constitutional

---

[16] *Prinsloo v Van der Linde & another* 1997 (3) SA 1012 (CC) para 25.

values, rights and freedoms, was not considered by the Supreme Court of Appeal in *Mahlase*. There seems to be no other judgment (of which we are aware) which considered such an interpretation.

[38] For the above reasons the view of this court is that:

38.1 In respect of a multiple rape as contemplated in item *(a)*(i) of Part I of Schedule 2 of the Act, it is immaterial, for the purposes of sentencing of one of the persons who had raped the victim, as to whether a co-perpetrator has been convicted, and this is not a jurisdictional prerequisite for the imposition of the sentence of life imprisonment. Since the victim in the present matter had admittedly been raped by more than one person, including the appellant, the offence of rape of which the appellant was convicted of fell within the ambit of item *(a)*(i) of Part I of Schedule 2, and the court *a quo* was not precluded from imposing a sentence of life imprisonment. Section 51(1) of the Act afforded the regional court the power to do so.

38.2 Although the present matter is not concerned with a common purpose situation as was the case in *Mahlase*, with due respect, the interpretation of the minimum sentence legislation in *Mahlase* is not consistent with the rights contained in the Bill of Rights and the constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms.

[39] On the basis of the aforegoing, the other judgments referred to by the parties which refer to or apply *Mahlase* are distinguishable. In *Ndlovu* the majority held that the court was bound by *Mahlase,* and on that basis set aside the sentence of life imprisonment. This court, however, holds that it is not bound by *Mahlase* and it therefore follows that this court is not bound by *Ndlovu*. The court in *Khanye v S*[17] accepted that it was bound by *Mahlase*, but disagreed with the Supreme Court of Appeal's interpretation of Part I of Schedule 2. As stated above, this court is of the view that the findings in *Mahlase* are restricted to a common purpose situation and do

---

[17] *Khanye v S* [2017] ZAGPJHC 320.

not apply to the whole of Part I of Schedule 2. It is consequently not necessary to consider the reasoning in *Khanye* or the disagreement by the majority in *Ndlovu* with the reasoning in *Khanye*.

The merits of the appeal

[40] On the merits, the issue on appeal is whether the court *a quo* misdirected itself in any material respect, and whether the sentence can be said to be shocking or disturbingly inappropriate. The appellant's primary submission is that the court *a quo* overemphasised the aggravating factors in respect of the offences, and failed to attach adequate weight to the appellant's personal circumstances.

[41] In our view, the learned magistrate did not err in the sentences imposed on the appellant. Both offences carried prescribed minimum sentences and there was no objective material before the learned magistrate demonstrating substantial and compelling circumstances to depart from them. The learned magistrate was consequently bound to impose those sentences. In any event, the evidence before the court *a quo* justified those sentences and there was no misdirection. The medico-legal report demonstrated that the victim had not only been raped, but that she had also been physically harmed during the course of the sexual assault (there were injuries on her face and on her rear shoulder).[18] There was therefore clearly an element of violence which accompanied the rape.

[42] The appellant and his accomplices commenced their crime with breaking into the home of the victim and her family. Their intention was to rob the occupants of the property and they did so. As the appellant's section 112 statement explains, it was in the course of the robbery that the appellant heard the victim's voice.[19] It was open to the appellant at that stage to simply leave with the items which he wished to steal, yet he then deliberately set-out to rape the complainant. He did so with force and with a knife in his possession. There can be no question that this episode has scarred the complainant for life. The appellant's conduct then spurred his companion to also rape the complainant. It was consequently a multiple rape of the complainant, and it is the appellant's conduct that initiated the rape of the complainant.

---

[18] Record at 23-24.
[19] Record at 41, lines 24-25.

[43] As stated above, the Constitutional Court in *Tshabalala* has affirmed the gravity of the offence of rape and the justifiability of the minimum sentence legislation. None of the appellant's circumstances, or the submissions on appeal, justify a departure from the imposition of the minimum sentence in respect of the rape conviction. We disagree with the appellant's submission that the complainant was not gratuitously assaulted or injured, and that this was a mitigating factor which the court *a quo* failed to take into account. This submission disregards the humiliating, degrading and brutal nature of the offence of rape and the impact which it has on the victim. In any event, the J88 report reveals that the complainant was physically harmed. Similarly, robbery is a serious offence and, in general, lengthy prison sentences are justified, as the Legislature has determined in the Act. In the present matter, the appellant and his companions terrorised and robbed an innocent family in the safety of their own home. They threatened them with knives and physical harm. This is unacceptable in a civilised society. The gravity of the offences must be afforded appropriate weight in respect of sentence, and the court *a quo* correctly did so.

[44] It is not a mitigating factor that the appellant pleaded guilty. The DNA results placed it beyond any doubt that he had raped the complainant and the plea of guilty is a neutral factor.[20] Even though the appellant's circumstances may be that he possesses the ability to work and be economically active, the undisputed evidence is that despite this he chose to steal and to do so with violence. He did not need to steal but chose to do so. In these circumstances the fact that he was a first offender in respect of these two (2) charges consequently does not assist him in respect of the minimum sentences.

[45] Gender based violence and the offence of rape continue to remain a scourge in our country. Rape is the most prevalent and vicious offence which is being committed against the most vulnerable members of our society, namely, women, young girls and even children who are simply powerless to stop these senseless attacks on them. Rape is a degrading and humiliating act, the physical and psychological effects of which remain with the victim forever. The men in this country

---

[20] *S v Matyityi* 2011 (1) SACR 40 (SCA).

who resort to this type of offence against our women and children are deserving of nothing else but the most severe of punishments ordained by the Legislature. Inasmuch as the Legislature has seen it fit to respond to society's concerns regarding the ever-increasing number of rapes taking place in this country on a daily basis, as courts we owe an equal duty to ensure that the minimum sentences prescribed by the Act are imposed. With respect, a rape should not be categorised as being 'not very serious' or 'not the worst case' or with other words to this effect. Whilst the circumstances of a crime may differ, rape is rape and artificial distinctions should not be drawn in order to justify a lesser sentence from that which is prescribed.

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

The appeal is dismissed.

H-P

Gani AJ

Seegobin

Seegobin J

APPEARANCES

Date of hearing	**:**	**21 February 2020**
Date of judgment	**:**	**08 July 2020**

For Appellant	:	Z Anastasio
Instructed by	:	**LEGAL AID BOARD** 187 Hoosen Haffejee Street Pietermaritzburg Tel: 033 – 394 2190

For Respondent	:	Adv. D. Naidoo
Instructed by	:	**DIRECTOR OF PUBLIC PROSECUTIONS** 286 Pietermaritz Street Pietermaritzburg Tel: 033 – 845 4400