REPORTABLE

CASE NO. CA 53/2004

IN THE HIGH COURT OF SOUTH AFRICA

(BOPHUTHATSWANA PROVINCIAL DIVISION)

In the matter between:

GILBERT KAGISO MOIPOLAI APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

MOGOENG JP.

Introduction

[1] The Appellant in this matter was convicted of rape and sentenced to undergo an effective term of 10 years imprisonment by the Regional Court. This is an appeal against both conviction and sentence. The factual background relevant to this appeal follows below.

Factual Background

[2] The following facts are either common cause or not disputed:

a) This appeal relates to the sexual intercourse ("the intercourse") that actually took place between the Appellant and the Complainant in this matter;

b) It took place during the night of 27 July 2002 at Mayayane village in the Molopo district;

c) As at the time of the incident, the Appellant and the Complainant had two children together. The Complainant was then eight months pregnant with their third child. They had been lovers for about seven years.

d) Complainant was at the Appellant's parental home at the instance of the Appellant.

e) The intercourse between the Appellant and the Complainant took place at the time when these two and a lady called Matron were sharing the same bed.

f) Complainant had already been beaten up when the intercourse took place.

g) At about 05h00 on 28 July 2002, the Complainant went to the nearby police station to lay a charge of rape against the Appellant. What follows are the versions of the Complainant and of the Appellant.

[3] Complainant's version is that at some stage during the night of 27 July 2002, whilst she was at the Appellant's parental home, she told the Appellant that she wanted to sleep. The Appellant then advised her to go into the house and sleep. Sometime thereafter, the Appellant and Matron entered the house in which she was sleeping. The Complainant was made aware that all three of them were to share the same bed. She refused to be party to the arrangement. Consequently, she then dismounted the bed and told the Appellant that she was leaving for her parental home. The Appellant punched her between her cheek and chin on the right hand side. She fell

down and also sustained a laceration on the right arm. The Appellant then ordered her not to go anywhere. She gave up leaving and slept.

[4] Thereafter, the Appellant undressed the Complainant of her pair of pants and of her panties. He then had intercourse with her against her will. Matron was still on the same bed with them. The presence of Matron in the same room and on the same bed with her and the Appellant made the idea of intercourse between her and the Appellant repugnant to her. The Complainant also said that she could not have consented and did not consent to intercourse with the Appellant shortly after she had been beaten up by the Appellant. The Appellant testified as set out below.

[5] The Complainant arrived at his parental home, where liquor was being consumed, at the time when there were only about three patrons remaining. One of these people was a man who wanted to forcibly take Matron away from the Appellant's parental home. Eventually, the Appellant intervened. His intervention exasperated the Complainant who did not appreciate why the Appellant had to make the issue between Matron and that other man any of his business. The Complainant then struck Matron with an open hand. Matron hit back and this is how the Complainant sustained her injuries.

[6] Complainant then entered the house followed by the Appellant. She locked Matron out of the house. After a while, the Complainant suddenly opened the door and pulled Matron into the house. A quarrel ensued between the two women. The Appellant commanded both of them to leave the house since they were quarrelling. In response, the Complainant said that she was not going anywhere. After the quarrel had ended, the Appellant entered the blankets, followed by the Complainant and then Matron who was instructed by the Complainant to join in. All three of them shared the

same bed.

[7] Appellant then had intercourse with the Complainant. He denied that he raped her. His reason for this denial was basically that the Complainant is the mother of his children and he cannot, therefore, be said to have raped her. I understood this to mean that the nature of their relationship is such that it renders their intercourse incapable of being legally categorised as rape.

The issues

[8] The question that falls for determination in respect of the conviction is, whether or not the Complainant consented to the intercourse with the Appellant. With regard to sentence, the question is whether or not the sentence imposed induces a sense of shock or whether it is substantially heavier than the one we would have imposed had we originally been seized of the case.

The Conviction

[9] Counsel for the Appellant submitted that the State cannot be said to have proven the absence of consent to the intercourse beyond a reasonable doubt. This was based on the fact that the Appellant and the Complainant were lovers for some seven years, they had two children together, the Complainant was expecting their third child and at no stage did the Complainant offer any resistance whatsoever to the intercourse. She neither verbalised her opposition thereto nor did she act, at the crucial moment, in a manner which could reasonably be said to have conveyed her

opposition to the intercourse, to the Appellant. The State contended that the totality of the circumstances clearly demonstrate that the Complainant could not have consented to the intercourse with the Appellant and that the guilt of the Appellant was proved beyond a reasonable doubt.

[10] It is correct that the Complainant did not at any stage express her opposition to the intercourse to the Appellant. She neither said no nor did she offer any physical resistance, to the intercourse after the Appellant had manifested his intention to have intercourse with her. How then could her boyfriend or so-called common law husband have known that she was in fact opposed to the intercourse? Whether one finds that there was or there was no consent to the intercourse would depend on whether it is the State's or the defence's version which is found to be probable since each version points to a different conclusion.

[11] The crucial part of the defence's version is that after a fight between the Complainant and Matron, they suddenly made peace. Both women and the Appellant slept on the same bed. The Appellant and the Complainant then fondled each other and this culminated in their consensual intercourse. If this version were found to be probable or reasonably possibly true, then there must have been consent to the intercourse because it would mean that: (a) there never was a misunderstanding, let alone a fight, between the Appellant and the Complainant; and (b) the Complainant's active participation in the caressing would have been reasonably construed by the Appellant as the outward manifestation of her willingness to have intercourse with the

Appellant.

[12] The defence's version was, however, rejected by the Court ***a quo*** for good reason. The Appellant's version was that he and Matron were lovers several months prior to the incident. The version put by his legal representative to the Complainant was that they were still lovers at the time of the incident. The Complainant was opposed to this affair, so much so that she went to Matron's place, confronted her, fought with her and even stabbed her with a knife. The Complainant again fought with Matron on the night of the incident as a result of which the Complainant was injured. Consequently, the Complainant then locked Matron outside the house in which she and the Appellant were to sleep. Suddenly, the Complainant opened the door of the house and pulled Matron inside whereafter she invited Matron to share the bed with them. It was in the presence of Matron that the Appellant and the Complainant fondled each other and had intercourse.

[13] I find it to be improbable that after manifesting such intense hatred for Matron, this 8-months pregnant Complainant who had just been injured by Matron would be the one to open the door for her and to invite her onto her bed with the Appellant (the father of her children). It is highly improbable that the Complainant, who was apparently sober, would have wanted to make love to the Appellant in the presence of another person. The Appellant's own response to the Prosecutor's question whether he would find it acceptable to make love in full view of other people, or in public, was in the negative. This reinforces

the correctness and validity of the stance which the Complainant claims to have taken to having intercourse with the Appellant in the presence of Matron. The improbability of the Appellant's version is highlighted even more by the question why the Complainant would, having fondled with the Appellant and having had consensual intercourse with him, as alleged, as early as 05h00 the next day, rush off to the police station to lay a charge of rape against him. This version defies logic and was, therefore, correctly rejected by the Court ***a quo*** as not being reasonably possibly true.

[14] The version of the Complainant, on the other hand, clearly explains why she would have rushed off to the police station to lay a charge of rape against the Appellant first thing in the morning. As I have stated above, she said that she was so opposed to sharing the bed with Matron that she got off the bed and told the Appellant that she was leaving for her parental home. The Appellant punched her once. As a result she fell down. This caused her to desist from leaving. The violence must also have put an end to any opposition from her to anything that was contrary to the will of the Appellant. Having punched the Complainant, the Appellant undressed her and had intercourse with her in the presence of Matron. Logic dictates that if the Complainant found the idea of sharing the same bed with Matron to be so unacceptable that she wanted to go to her home at night, and had to be forced by a punch to stay, the idea of having intercourse with the father of her children in the presence of Matron must have been even more outrageous to the Complainant. That is why she had to be undressed of her

pants and of her panties which shows lack of cooperation from her. It would also explain why she had to report this incident to the police at the earliest available opportunity. This is a highly probable version. I, therefore, endorse the favourable credibility finding of the Magistrate in respect of the Complainant, as well as his conclusion that the Complainant did not consent to the intercourse.

[15] I am satisfied that the conviction is in order. Accordingly, the appeal in respect of the conviction falls to be dismissed and the conviction must be confirmed. I turn now to consider sentence.

The sentence

[16] Appellant attacked the sentence imposed on the basis that it induces a sense of shock and that another Court would impose a lesser sentence.

[17] An effective term of 10 years imprisonment was imposed on the Appellant. This was done in an attempt to show mercy but on the mistaken belief that the law enjoined the Court to impose a term of 15 years imprisonment.

[18] The learned Magistrate has, with respect, misdirected himself with regard to the application of the provisions of the Criminal Law Amendment Act 105 of 1997 ("the Act"). That the Act applies is beyond question. The problem lies with whether it is Part II or Part III of Schedule 2 to the Act which applies to this case. The Magistrate assumed that it was Part II. This is evident from some

remarks he made in his judgment on sentence. He found that there were no substantial and compelling circumstances. Having done so, he went on to say: **'Instead of giving you 15 years I will give you 10 years.'** This reference to 15 years imprisonment could only have been made by a presiding officer labouring under the incorrect impression that s 51(2)(a)(i) of the Act applies to this case. This is the subsection that provides that a first offender convicted of an offence referred to in Part II of Schedule 2 to the Act, (that is a certain kind of: murder; robbery; offence under the Drugs and Drug Trafficking Act of 1992; offence relating to exchange control; corruption; extortion; fraud; forgery; uttering; theft; dealing in or smuggling of firearms, ammunition, explosives or armament; possession of an automatic or semi-automatic firearm, explosives or armament) will be sentenced to imprisonment for a period of not less than 15 years. The assumption that s 51(2)(a)(i) applies to this case was clearly incorrect since there is no mention of rape whatsoever in Part II of Schedule 2. Rape is only referred to in Part I and Part III of Schedule 2. The rape referred to in Part I attracts a minimum sentence of life imprisonment. (See s 51(1)). The rape of the nature committed by the Appellant, is the one referred to in Part III of Schedule 2. The minimum sentence prescribed by s 51(2)(b)(i) for such a rape, committed by a first offender, is imprisonment for a period of not less than 10 years. The Court ***a quo*** erred in its application of the provisions of the Act. It sought to reduce what it assumed to be the prescribed sentence for a first offender by 5 years. This is evident from the remark that **'instead of giving you 15 years I will give you 10 years.'** Ten years is the prescribed minimum sentence and its imposition did not,

therefore, amount to the reduction of sentence.

[19] Besides, there is a problem with the reduction of the sentence in the manner in which the learned Magistrate purported to do it. The problem is his non-compliance with the provisions of s 51(3)(a) which require that:

> "IF ANY COURT REFERRED TO IN SUBSECTION (1) OR (2) IS SATISFIED THAT SUBSTANTIAL AND COMPELLING CIRCUMSTANCES EXIST WHICH JUSTIFY THE IMPOSITION OF A LESSER SENTENCE THAN THE SENTENCE PRESCRIBED IN THOSE SUBSECTIONS, IT SHALL ENTER THOSE CIRCUMSTANCES ON THE RECORD OF THE PROCEEDINGS AND MAY THEREUPON IMPOSE A LESSER SENTENCE."

[20] THE LEARNED MAGISTRATE DID NOT RECORD ANY SUBSTANTIAL AND COMPELLING CIRCUMSTANCES ON THE STRENGTH OF WHICH HE IMPOSED A "LESSER SENTENCE". ON THE CONTRARY, ALL HE SAID IN THIS CONNECTION IS THE FOLLOWING:

> "I CANNOT FIND ANYTHING WEIGHING IN FAVOUR OF THE ACCUSED. AND LIKE THE DEFENCE CORRECTLY SAID YOU CONCEDED THERE IS NOTHING SUBSTANTIAL IN THIS MATTER JUSTIFYING A LESSER SENTENCE. HOWEVER THE SENTENCE THE COURT IS INTENDING TO IMPOSE IS BLENDED WITH A MEASURE OF MERCY BECAUSE MERCY IS THE [SIC] OF JUSTICE.

Instead of giving you 15 years I will give you 10 years. I just hope it will do you good because going home will not help you, you are just useless at home."

[21] BY WORD OF HIS OWN MOUTH NO SUBSTANTIAL AND COMPELLING CIRCUMSTANCES EXIST. IT IS NOT CLEAR WHAT, APART FROM THE MERCY ALLUDED TO IN THE LAST LINE OF THE FIRST PARAGRAPH OF THE ABOVE QUOTATION, COULD HAVE

SERVED THE PURPOSE THAT IS SUPPOSED TO HAVE BEEN SERVED BY A FINDING THAT SUBSTANTIAL AND COMPELLING CIRCUMSTANCES EXIST. THE SENTENCE WHICH THE LEARNED MAGISTRATE ASSUMED TO BE THE PRESCRIBED ONE WAS REDUCED NOTWITHSTANDING THE ABSENCE OF FACTUAL GROUNDS FOR DOING SO. THIS APPROACH IS INCORRECT AND DEMONSTRATES A LACK OF UNDERSTANDING OF HOW THE PROVISIONS OF THE ACT ARE SUPPOSED TO BE APPLIED. THE FOLLOWING FACTORS ARE RELEVANT TO DETERMINING WHETHER OR NOT SUBSTANTIAL AND COMPELLING CIRCUMSTANCES DO EXIST.

[22] The reasons given by the Court ***a quo*** for imposing the sentence of 10 years imprisonment on the Appellant are that **' . . . when an offence is serious, and prevalent, the Court are [sic] urged to hit hard.'** Further reasons are that the Complainant was 8 months pregnant when the rape took place, the Appellant committed the rape in the presence of another woman, and the Appellant assaulted the Complainant. These are factors worthy of consideration. It was indeed highly insensitive of the Appellant firstly, to punch an 8 months pregnant woman, secondly, to punch her so hard that he caused her to fall, and thirdly to punch her because her sense of decency and privacy did not allow her to share the same bed with the father of her children and another woman. It also heightens his moral blameworthiness for him to have had intercourse with her in the presence of another woman shortly after having been beaten up. It must have been humiliating. These factors though admittedly aggravating were, however, overemphasised at the expense of equally strong mitigating factors.

[23] Some of the important mitigating factors to which no attention was paid were that the Appellant was a first offender, and that the Appellant and the Complainant were no strangers to one another. They were lovers (virtually husband and wife) for a period of seven years. They had two children together and the Complainant was expecting their third child when the rape took place. But for the presence of Matron, the Appellant and the Complainant would probably, just as they did many times before, have had consensual intercourse. In all likelihood the reason why the Appellant had asked the Complainant to come over to his parental home that night, was so that they could have intercourse together. In fact, when the Prosecutor asked the Appellant whether he had asked the Complainant to spend the night with him so that they could have intercourse together, the Appellant's response was that that was not the only reason. Meaning that it was one of the reasons why he wanted to spend the night with her. Similarly, the Complainant must have come knowing that this was either likely to happen or was going to happen for sure and she was, given the nature of their relationship, willing to take part in the intercourse.

[24] This rape should, therefore, be treated differently from the rape of one stranger by another between whom consensual intercourse was almost unthinkable. The Appellate Division was more understanding and even lenient in a case where a man had raped his friend. The mitigatory effect of a relationship of friendship between the assailant and the victim was articulated as follows by Corbet JA (as he then was) in *S v N* 1988 (3) SA

450(A) at 465H-I:

> "IN THE CONCLUDING PORTION OF HIS JUDGMENT ON SENTENCE THE MAGISTRATE SAID:
>
> *'This is not the usual or ordinary type of case where the rapist grabs an unknown person and rapes her. In this case you knew the complainant well and you had often associated with her.'*

It is not clear whether he regarded this as a mitigating or an aggravating factor. To my mind, it is a mitigating factor in that the shock and affront to dignity suffered by the rape victim would ordinarily be less in the case where the rapist is a person well-known to the victim and someone moving in the same social milieu as the victim."

IF THIS COULD BE SAID OF MERE FRIENDS IN CIRCUMSTANCES WHERE THE ASSAILANT HAD EXPOSED THE VICTIM TO THE DANGER OF HAVING TO FLEE TO THE HIGHWAY IN THE EARLY HOURS OF THE MORNING, AFTER SHE HAD PLEADED WITH HIM MORE THAN ONCE TO PLEASE LEAVE HER ALONE, THEN THE RELATIONSHIP BETWEEN THE APPELLANT AND THE COMPLAINANT IN THIS MATTER SHOULD SERVE AS A MUCH STRONGER MITIGATION.

[25] IT IS ALSO A VERY IMPORTANT MITIGATING FACTOR THAT THEIRS WAS NOT AN ABUSIVE RELATIONSHIP. ACCORDING TO THE COMPLAINANT HERSELF, THE APPELLANT HAD NEVER BEFORE BEATEN HER UP. THE VIOLENCE ON THE DAY IN QUESTION WAS IN FACT A SINGLE ABERRATION IN THEIR OTHERWISE PEACEFUL RELATIONSHIP. THE ONLY NOTEWORTHY PROBLEM THEY EVER HAD RELATED TO THE APPELLANT'S FAILURE TO PAY MAINTENANCE FOR THE CHILDREN. I SAY THIS ALIVE, TO THE RATIONALE BEHIND THE PROVISIONS OF THE ACT IN SO FAR AS THEY RELATE TO RAPE AND TO THE REALITY THAT WE LIVE IN A SOCIETY WHERE PHYSICAL AND

SEXUAL ABUSE OF WOMEN BY BOYFRIENDS, HUSBANDS AND OTHER MALE PERSONS IS RIFE. IT HAS INDEED BECOME SO MUCH OF A CONCERN THAT THERE ARE STRONG WOMEN BODIES FORMED PRIMARILY FOR THE PURPOSE OF COMBATTING THIS ESCALATING ABUSE. NOTWITHSTANDING THIS, EACH CASE MUST BE VIEWED AND DEALT WITH ACCORDING TO ITS OWN MERITS.

[26] I hold the view that the following remarks by Corbet JA in *S v N* ***supra*** at 465J - 466A are a useful guide to this case:

> "The sentence imposed by the magistrate is substantially heavier than the one I would have imposed had I originally been seized of the case. And I think that the disparity is sufficient to warrant interference on appeal. In my opinion, particularly bearing in mind the appellant's personal situation, including the fact that he has no previous convictions, the lack of any serious injury to the complainant and the fact that she was evidently a woman of experience from the sexual point of view, justice would be served by a suspension of half the sentence imposed."

The assailant in *S v N* was sentenced to undergo 5 years imprisonment. The Appellate Division suspended half of the sentence. On the strength of this authority, I am satisfied that a sentence which is lesser than the prescribed sentence of an effective term of 10 years imprisonment is justified in this matter. That lesser sentence can only be imposed if the requirements of s 51(3)(a) are met. That section enjoins even a Court of Appeal to impose a lesser sentence than the sentence prescribed by s 51(2)(b)(i) only if it is satisfied that substantial and compelling circumstances exist and to record those circumstances. As I said

above, the learned Magistrate found that substantial and compelling circumstances do not exist. This finding is, with respect, incorrect. Substantial and compelling circumstances do exist and they are, ***inter alia***, that: (a) the relationship of the Appellant and the Complainant was virtually the same as that of husband and wife; (b) theirs was not an abusive relationship; (c) they had been lovers for about 7 years and had children together; (d) the assault upon the Complainant was not serious; (e) the Appellant is a first offender. Accordingly, I am satisfied that this is a typical case where a sentence of 10 years imprisonment should have been imposed on the Appellant, half of it suspended on appropriate conditions. That would in effect be a lesser sentence than the prescribed sentence which requires the recording of the substantial and compelling circumstances as I have done above.

[27] IN THE RESULT, I MAKE THE FOLLOWING ORDER:

h) The appeal against the conviction is dismissed;

i) The appeal against the sentence is allowed and the following sentence is substituted for the sentence imposed by the Magistrate:

> 'Ten years imprisonment, half of which is suspended for a period of five years on condition that the Appellant is not convicted of the offence of rape or indecent assault or an attempt to commit either of these offences, committed during the period of suspension and for which offence the Appellant is sentenced to a period of imprisonment without the option of a fine.'

M.T.R. MOGOENG
JUDGE PRESIDENT OF THE HIGH COURT

I agree

F.S. GURA
ACTING JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING	:	11 JUNE 2004
DATE OF JUDGMENT	:	20 AUGUST 2004
COUNSEL FOR APPELLANT	:	MR R. DUVENAGE
COUNSEL FOR RESPONDENT	:	ADV V.D. MDABULA
ATTORNEYS FOR APPELLANT	:	ANDRÉ MULLIGAN ATTORNEYS (Ins. by KLINKENBERG, DUVENAGE ATTORNEYS)
ATTORNEYS FOR RESPONDENT	:	THE DIRECTOR OF PUBLIC PROSECUTIONS