

Carmel Rickard

A woman High Court judge has found she is not obliged to follow a controversial decision of the SCA because of the horrific facts of the gang rape she was considering.

The unprecedented decision of Judge Khosi Hadebe comes in the middle of Women's Month, when the question of rape and violence against women are among the issues given particular focus.

Hadebe was one of three judges hearing an appeal by Xolani Ndlovu against his conviction and life sentence, imposed by the regional Magistrate's Court. The woman at the centre of the case told the trial court how Ndlovu and his two collaborators broke into her family home in the early hours of the morning, pulled her out of her bed where she was sleeping with her baby, and carried her outside where they taped up her eyes and her mouth. They took her to Ndlovu's room where Ndlovu stripped her and then tied her onto the bed, arms and legs spread-eagled.

She was raped repeatedly by all three before being turned over and raped anally, causing her to bleed. Hours later, when the men removed the tape from her eyes, she saw that all three were naked. Two were still wearing the balaclavas they had on when they abducted her. Ndlovu, however, had uncovered his face.

They tied her up, then told her they were going drinking and would kill her when they returned. After they left, she was able to escape and ran home, stark naked, where she reported what had happened.

Ndlovu's two companions have never been found. He was initially sentenced to life imprisonment but appealed to the High Court. In their judgment on appeal, two of the three judges said they were bound by a 2011 SCA decision in the *Mahlase* matter, holding that courts could not impose life imprisonment as stipulated for gang rape, where only one member of the gang was before the court.

The *Mahlase* decision has been the cause of considerable controversy ever since, with courts commenting on the anomalies and injustice it created. Several High Court judges have tried to find a way around the SCA decision, but in this case the majority (both men) found they were bound to follow the decision. They said they were not concerned with whether the SCA was wrong, but with the fact that its decisions were binding on lower courts. They therefore reduced the life sentence imposed on Ndlovu to 15 years, commenting: 'The circumstances of the rape were horrendous and I agree with my colleague (Hadebe) that (Ndlovu) deserved to be sentenced to imprisonment for life. On the basis that I have explained, that option is unfortunately not open to us.'

In her minority decision Hadebe went out on a limb. She gave graphic details of what Ndlovu and his colleagues had done, keeping their captive completely naked during her entire ordeal, then taunting her while they sat around naked and smoking after they had satisfied themselves on her body.

In her victim impact statement, the woman said, 'I am completely destroyed.' Hadebe said rape stamped the authority of someone else's control on a woman's body and reminded every woman and girl child of their vulnerability. It seemed there was 'no space that is safe for women'. The woman in this case had been kidnapped and then 'severely, brutally and mercilessly abused over a prolonged time', ridiculed by Ndlovu and threatened with death.

The judge said she was aware of the SCA decision in *Mahlase*, but was also aware of the criticism that decision had engendered. She herself was 'puzzled by the reasoning' in *Mahlase* and described how other High Court judges had attempted to get around the SCA decision. She said in this case the prescribed minimum sentence of 10 years 'would be outrageous'.

In her 'firm view', the only appropriate sentence in this case was life imprisonment and she found herself 'in great difficulty' agreeing with the reasoning in *Mahlase*. She quoted a 2017 case in which a judge, also wrestling with the injustice that would be done to a woman who was gang raped, quoted another SCA decision, *S v Legoa*, delivered some years earlier than *Mahlase*.

*Legoa* continues to be quoted with approval by the SCA, and its principles would allow an interpretation of the prosecution of 'gang rape' that was different from that in *Mahlase*. The *Mahlase* court had not considered the earlier judgment of *Legoa*, said Hadebe, and so the *Mahlase* judgment did not have proper regard to the law.

Hadebe said having considered all the authorities, she was satisfied that 'the present case was one such deserving case where the obligation to be bound by a decision of the SCA can be avoided'. She would thus have dismissed Ndlovu's appeal against his life sentence.