REPORTABLE

CA

NO. 16/2002

IN THE HIGH COURT OF SOUTH AFRICA

(BOPHUTHATSWANA PROVINCIAL DIVISION)

In the matter between:

THE STATE

and

ENOCH MODUKANELE

REVIEW JUDGMENT

MOGOENG J.

Introduction

[1] On 28 November 2001 the accused in this automatic review was convicted of sodomy and sentenced to undergo an effective term of two years imprisonment.

[2] Two questions fall to be decided in this review. Firstly, whether a conviction of sodomy was, in our law, still competent at the time. Secondly, whether any justification exists for punishing the so-called 'male rape' any less seriously than a female rape

of the same gravity.

Background

[3] The accused is a 30 years old male resident at Gopane village in the Lehurutshe area. The complainant, Tebogo Bosi, is an 18 years old young man who resides at the same village as the accused. On Saturday, 13 November 2001, the accused was at the complainant's parental home. He had come to repair a television set. After fixing the television set he bought and consumed two beers. He remained at the complainant's parental home until late at night. The rain fell while he was still there. On these reasons, he asked the complainant's mother to allow him to spend the night at her home. The complainant's mother obliged. She, however, decided that the accused would sleep in a different house from that in which she and the complainant would spend the night and informed the accused accordingly. The accused implored her to allow him to share a room with the complainant since they were both men. Again, she relented. Consequently, one bed was prepared for the accused and another for the complainant in the same room.

[4] At some stage during the night, the accused left his bed and slept in the complainant's bed. The accused undressed the complainant, and inserted his erect penis into the anus of the complainant and made up and down sexual movements. He held the complainant so tightly that, though the complainant tried to break loose, he could not. After the accused had finished, the complainant unsuccessfully tried to wake up his mother.

[5] It was not until the ensuing Monday afternoon that the

complainant reported the above incident to his mother. The matter was then reported to the police. On Tuesday, 16 November 2001, the complainant was examined by a medical doctor whose observations were that the complainant's anal orifice was bruised and that it had some tears. None of the above was disputed by the accused.

[6] A charge of sodomy was preferred against the accused in the district Court of Lehurutshe. The verdict of guilty was returned. He was then sentenced to undergo a term of two years imprisonment.

[7] After perusing the record I queried whether, in our law, it was still competent for the Court *a quo* to convict the accused of sodomy. I also questioned whether (i) the sentence imposed was not too lenient having regard to the seriousness of the offence; (ii) the matter should not have been referred to the Regional Court for sentence; and (iii) traditional stereotypes aside, any justification exists for the Courts to continue viewing and treating unlawful sexual intercourse with a male victim less seriously than its equivalent, in terms of severity and gravity, with a female victim. In response, the learned Magistrate suggested that the conviction should be altered from sodomy to indecent assault. As regards the suitability of the sentence imposed, the learned Magistrate, *inter alia*, said the following:

> "I however concede that there is no reason for not regarding sexual intercourse with a male person without his consent as an equivalent to rape.

I unfortunately followed tradition and decided on the appropriate sentence from the premise that sodomy fell under the category of crimes against the community. I therefore found the sentence of two(2) years imprisonment appropriate under the circumstances of the case against

the accused.

I concede that if I could have viewed the accused's conduct as being equivalent to rape I could have possibly considered a much more heavier sentence."

We turn now to consider the appropriateness of the conviction and the suitability of the sentence.

Conviction:Sodomy

[8] The common-law offence of sodomy is defined as 'unlawful and intentional sexual intercourse *per anum* between human males'.[1] It entails anal intercourse between man and man irrespective of whether or not the intercourse takes place in private and between willing participants. The constitutional validity of this offence was challenged since the law did not at the same time criminally proscribe consensual anal intercourse between a man and a woman nor did it proscribe intimate sexual acts in private between adult women. Heher J declared that the common-law offence of sodomy in its entirety was unconstitutional.[2] This matter came to the Constitutional Court on appeal.[3] It is imperative to point out that it is actually other orders, which were made by Heher J simultaneously with the aforegoing order, which were referred to the Constitutional Court for confirmation in terms of s 172 (2)(a) of the 1996 Constitution. The order relating to the common-law offence of sodomy was not so referred since s 172 (2)(a) neither requires confirmation by the Constitutional Court of orders of constitutional invalidity of common-law offences nor empowers referral for that purpose. Therefore, the constitutionality of the common-law offence of sodomy was not directly before the

Constitutional Court. However, it had to be decided upon because a finding of constitutional invalidity in respect of sodomy was an indispensable and unavoidable prerequisite to properly deciding the constitutional validity of the other orders which were squarely placed before the Constitutional Court in terms of s 172 (2)(a).[4] The Court per Ackermann J [5] expressed itself, on the constitutionality of the common-law offence of sodomy, in the following terms:

> "[69] . . . There can be no doubt that the existence of the common-law offence was not dictated by the objective of punishing 'male rape'. The sole reason for its existence was the perceived need to criminalise a particular form of gay sexual expression; motives and objectives which we have found to be flagrantly inconsistent with the Constitution. The fact that the ambit of the offence was extensive enough to include 'male rape' was really coincidental. The core of the offence was to outlaw gay sexual expression of a particular kind.
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> [71] . . . Acts of male rape still constitute crimes at common law, whether in the form of indecent assault or assault with intent to do grievous bodily harm. These are criminal forms by means of which anal intercourse with a woman, without her consent, is punished. . . .
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> [72] . . . For all the above reasons I am of the view that there is no adequate justification for making a limited declaration of invalidity in regard to the common-law offence of sodomy and that consequently there is no warrant for interfering with the ambit of the order made in the High Court in declaring the offence of sodomy constitutionally invalid in its entirety."

The above judgment was handed down on 09 October 1998. It

follows, therefore, that as at the time when the accused was convicted of sodomy on 28 November 2001, the common-law offence of sodomy had ceased to be part of our law for well over three years. Accordingly, the Court *a quo* was not competent to convict the accused of sodomy when it did.

[9] The current legal position on sodomy does not, however, detract from the fact that a crime had in fact and in law been committed by the accused. The only outstanding question is what that crime is. Section 269 of the Criminal Procedure Act 51 of 1977 ("CPA") essentially provides that indecent assault is a competent verdict of sodomy. Having regard to the facts of this case we would have been satisfied that, for want of a more appropriate and equally serious crime such as 'male rape', the conviction of sodomy should be set aside and replaced with that of indecent assault. However s 269 is not the appropriate mechanism through which to effect the necessary alteration. The very concept of a competent verdict presupposes the existence of an offence of which the accused can be validly or lawfully charged and convicted. No crime can, in law, be a competent verdict of a nullity. It is no longer competent to charge and convict someone of sodomy in our country. There is, therefore, no legally recognisable competent verdict of sodomy of which the accused, in this matter, may be convicted. Section 270 of the CPA also envisages a situation where the accused would have been charged with an offence which still exists though the evidence does not prove its commission but rather proves the commission of another offence whose key elements are embodied in the offence of which the accused was charged. Since nobody may be charged and convicted of sodomy, s 270 cannot be relied on to remedy the present

situation.

The only viable solution to the problem is the amendment of the charge in terms of s 86 of the CPA from sodomy to indecent assault. The amendment only seeks to secure a change in the citation of the charge.

The allegations against the accused would essentially have been the same and his defence would not have been affected by changing the citation of the charge from sodomy to indecent assault. His defence would also not have been presented differently as a result. The accused would not have been prejudiced by the amendment of the charge. Practical considerations must also be kept in mind. The setting aside of the conviction would necessitate the re-charging of the accused and the attendant prejudice of undergoing another trial. The amendment of the charge from sodomy to indecent assault would not amount to substitution in the real sense since the substance and essence of the charge remain the same.[6] The charge to which the accused pleaded is amended by deleting sodomy and substituting indecent assault therefor.

[10] There can be no doubt that the crime committed by the accused amounts to the so-called male rape. The accused has to get away with indecent assault because a man cannot, in our law, be raped. As the Constitutional Court indicated [7] other democratic countries have dealt with male rape by way of new statutory provisions in this regard. South Africa has initiated a process to this end. In 1999 the South African Law Commission [8] proposed a new formulation of the crime of rape which is

wide enough to embrace male rape. The sooner it becomes law the better for the male victims of sexual violation *per anum*. At present, these victims have to contend with the conviction of their assailants with lesser offences such as indecent assault or assault with intent to do grievous bodily harm.

The Sentence

[11] We are of the view that the sentence to be imposed for any crime does not and ought not to depend on the label attached to the particular crime. It is the facts and circumstances surrounding the particular offence that should really dictate a suitable sentence. Accordingly, we do not think that the fact that the offence of which the accused, in this matter, stands convicted is said to be indecent assault should be allowed to trivialize the real nature and gravity of the offence that the accused had actually made himself guilty of. Nomenclature aside, the accused in this matter is in fact guilty of rape and should have been punished accordingly. Ackermann J remarked [9] that the competent punishment, which can be imposed for both anal intercourse with a woman and acts of male rape such as indecent assault, have not been restricted by statute and the severity of such punishments can be tailored to the severity of the offences committed.

[12] Our Courts, therefore, have an open-ended judicial discretion to impose such a long term of imprisonment as the severity of the offence actually committed justifies. There must be a correlation between the sentence and the actual offence. This accords with the reasoning behind the imposition of a sentence

of five years imprisonment in S v BANANA [10] notwithstanding the fact that, though there were about three separate acts of indecent assault, no anal penetration was found to have taken place. In the instant case there was full anal penetration. The legal recognition of anal intercourse as a legitimate form of sexual expression for gay men, which then puts such intercourse on par with vaginal intercourse among heterosexuals, accentuates the need to punish male rape just as heavily as female rape. The sentence imposed on the accused in this matter is, in our view, extremely lenient. It ignores the degradation, the violation of bodily integrity, the injuries sustained by the complainant, the accused's abuse of the trust and hospitality of the Bosi's and all the other considerations that necessitate the imposition of severe penalties for the rape of a female, which should equally have been given expression to.

[13] For the above reasons, we are of the view that the accused in this matter should have been punished more severely. We are, therefore, of the view that the sentence of two years imprisonment is not in accordance with justice. The Magistrate should have referred the matter to the Regional Court for sentence in terms of s 116 of the CPA since the appropriate sentence is above the penal jurisdiction of a district Court. Broadly speaking, a sentence of between 8 and 15 years imprisonment would have been suitable. This Court does not generally have the power to increase sentence on review.[11] We considered whether this was not one of those exceptional cases in which it is legally permissible to increase sentence on review [12] but concluded that it was not.

[14] In the result, the charge to which the accused pleaded is amended in terms of s 86 of the CPA by the deletion of sodomy and the substitution therefor of indecent assault. We are unable to certify the sentence of two years imprisonment as being in accordance with justice.

M.T.R. MOGOENG
REVIEWING JUDGE

I agree

J.H.F. PISTOR
ACTING JUDGE OF THE HIGH COURT

DATED: 28 MARCH 2002