Significance

The Zimbabwe Constitutional Court recognised and articulated many of the issues that are associated with child marriages. Many countries in Africa have ratified the ACRWC and are obligated under Article 21 of the treaty to abolish child marriages. As the Court recalls, these obligations include legislative measures such as prohibiting persons below 18 from marrying. Some countries in Africa have yet to take such legislative measures. However, the greater challenges are reflected in the recent headline "Legal ages of marriage across Africa: Even when it's 18, they are married off at 12!"[6] Indeed legal ages of marriage can be set, but how should they be enforced by states? Would criminalization be the best way to ensure compliance with domestic law? Such are the sort of questions that states must address.

Nvumeleni Jezile v. The State and 7 Others
[2015] ZAWCHC 31, High Court Case No. A 127/2014
South Africa, High Court, Western Cape Division, Cape Town

COURT HOLDING

The offences for which the Appellant was charged took place after a traditional *ukuthwala*, a practice leading to negotiations for a customary marriage on which the Appellant relied for his defence, would have occurred. Therefore, the Appellant could not rely on the practice of *ukuthwala* to justify his conduct.

Practices associated with the aberrant form of *ukuthwala* do not comply with the requirements of the Recognition of Customary Marriages Act 120 of 1998 (RCMA), and cannot be protected under the law.

Summary of Facts

The Appellant was convicted of human trafficking, rape, common assault, and assault with intent to cause grievous bodily harm, and was serving his sentence. This was an appeal against the conviction and sentence.

In December of 2009 or early January 2010, the Appellant left his residence for his village to find a girl to marry, in accordance with his custom. He identified a 14-year-old girl (the Complainant), who was still in school (Grade 7), as the girl he desired to be his wife. His family and the family of the Complainant initiated and concluded marriage negotiations within one day. The family of the Complainant then forcibly took her to the house where the Appellant resided, where she was informed that he was to become her husband. While there, she was made to undergo traditional ceremonies, even though she protested, at the conclusion of which she allegedly became the Appellant's wife according to customary law. A bride price of 8000 Rand (about 565 USD) was paid to the Complainant's maternal grandmother with whom the Complainant had been living.

The Complainant was forced to accompany the Appellant to his place of residence, where she was unhappy and ran away. She was found by members of her family and returned to the Appellant's

residence a few days later. The Appellant subsequently required the Complainant to travel to Cape Town with him to reside with the Appellant's brother, where the Appellant and the Complainant had sexual intercourse on multiple occasions, all of which instances the Complainant contended were against her will. Shortly after her arrival in Cape Town, the Complainant ran away and reported the matter to police. The Appellant was charged and convicted on one count of human trafficking, three counts of rape, one count of assault with intent to cause grievous bodily harm and one count of common assault.

Issues

The issues on appeal were:

1. Whether the trial court's determination of the issues should have taken into account the practice of *ukuthwala,* which allows the "bride" to be coerced, and
2. Whether the two convictions for assault should have been treated as one charge, given that both assaults were part of one overall assault.

Court's Analysis

Based on the submission of the Friends of the Court regarding the traditional and aberrant forms of *ukuthwala*, the Court evaluated the Appellant's defence that his actions were justifiable as a customary practice.

The Court took judicial notice of a public debate on the practice of *ukuthwala* that "its current practice is regarded as an abuse of traditional custom and a cloak for the commission of violent acts of assault, abduction and rape of not only women but children as young as eleven years by older men."[7]

The Court considered the legal framework regulating customary marriages, including constitutional provisions, legislation, and human rights treaties to which South Africa is a signatory. Section 211(3) of the Constitution of South Africa (Constitution) requires courts to apply customary laws subject to the Constitution and relevant legislation. Section 28 of the Constitution provides that protection of the child from harm and also the best interests of the child are paramount in matters concerning children. Further, Section 28 of the Constitution defines a child as a person under the age of 18 years. The Constitution also provides guidance for interpreting the constitutional rights in the Bill of Rights (Section 39).

The Court reviewed the Children's Act, 2005 (Children's Act), and referred amongst others to Section 1 on the definition of trafficking, Section 12(1) which prohibits subjecting children to cultural practices that are detrimental to their wellbeing, and Section 284(1) which prohibits child trafficking. Section 284(2) provides that it is no defence that the child or the person having control over the child consents to trafficking.

The Court referred to provisions of the Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007 (Sexual Offences Act) on rape, and called attention to Section 56(1) which provides that it is not a defence to the charge of rape to rely on a marital or existing relationship. It also referred to Sections 70 to 72 of the Sexual Offences Act, which prohibit trafficking in persons for sexual

purposes. The Court also noted that the Sexual Offences Act defined trafficking in a similar manner to the definition in the Children's Act, and that the Sexual Offences Act makes trafficking of any person without their consent an offence; consent can only be voluntary or uncoerced.

The Court made reference to the Prevention and Combatting of Trafficking in Persons Act, which at the time of the judgment had been passed but had not yet entered into force (it has since been signed into effect). However, the Court stated that the Act's various provisions pointed to the intention of the Legislature to comply with its obligations under international human rights law.

The Court then made reference to the RCMA which provides for recognition of customary marriages under the Constitution and stipulates the requirements for contracting a valid customary marriage. Section 3(1) lists the following requirements: (a) prospective spouses should be over the age of 18 years; (b) both must consent to the customary marriage; and (c) the process must be in accordance with customary law. Sections 3(3)(a) and 3(4)(a) provide for conditions under which a person below the age of 18 can enter into a customary marriage with the consent of parents or guardians.

The Court also referred to Section 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, which prohibits discrimination on the grounds of gender and includes any cultural practice that impairs the dignity of women or undermines the dignity and welfare of female children.

Finally, the Court reviewed several international human rights treaties and South Africa's obligations in relation to them, including the Convention on the Rights of the Child (CRC), which stipulates that member states take measures to abolish traditional practices prejudicial to the wellbeing of children and also protect children from exploitation, and the African Charter on the Rights and Welfare of the Child (ACRWC) which prohibits child marriage and betrothal. The Court determined that there was clear authority that child trafficking and child abuse or exploitation for sexual purposes was "not to be tolerated in [its] constitutional dispensation."[8]

The Court subsequently reviewed information provided by the parties and *amici curiae* regarding the practice of *ukuthwala*. The *amici* indicated that *ukuthwala* is one of a number of alternative ways under customary law to bring about marriage negotiations, and that it generally requires (a) the woman to be of marriageable age, typically child-bearing age; (b) the consent of both parties, though there are instances in which the women's acquiescence in the process occurs after the fact; (c) a mock abduction of the woman at dusk, during which the woman would feign protest but would have agreed beforehand; (d) a smuggling of the woman to the man's homestead; and (e) an invitation sent to the woman's homestead to inform the woman's family that she was with the man's family, which was supposed to signal the desire of the man's family to enter into marriage negotiations. The *amici* argued that, based on the record, *ukuthwala* was not properly performed in the matter due to the Complainant's young age, her lack of consent, and the payment of the bride fee before the *ukuthwala* occurred.

After evaluating the legal framework and the information provided on the practice of *ukuthwala*, the Court then turned to the facts of the case. The Court determined that the offences for which the Appellant was charged had taken place after a traditional *ukuthwala* would ordinarily have happened, as the trafficking and sexual assaults occurred after the customary marriage. Therefore, the Court held that the Appellant could not rely on the traditional practice of *ukuthwala* to justify his criminal conduct.

Further, the Court was persuaded largely by the views of Professor Nhlapo and Inkosi Mahlango on the distinction between the traditional and the aberrant forms of *ukuthwala*. The aberrant form did not have the same requirements of consent and age. The Court found that the Appellant had relied on an aberrant form of *ukuthwala* and held that the Appellant could not rely on the misapplied form of *ukuthwala*, which did not comply with the requirements of the RCMA, to justify commission of the offences of trafficking and rape.

On the second issue, the Court concluded that the Appellant's two convictions of assault both arose out of the same incident. The Court therefore concluded that the two counts should be treated as a single offences in order to prevent a duplication of punishment.

Conclusion

The appeal against the convictions for trafficking and rape was dismissed, and the Appellant's convictions on the counts of assault were set aside.

Significance

The United Nations (UN) General Assembly resolution on child, early and forced marriages (CEFM) recognises that:

> Child, early and forced marriage is a harmful practice that violates, abuses and impairs human rights and is linked to and perpetuates other harmful practices and human rights violations and that such violations have a disproportionately negative impact on women and girls….[9]

Though CEFM is a global problem, it is most prevalent in Sub-Saharan Africa and South Asia. The African Union (AU) responded to this challenge on 29 May 2014 at its Headquarters in Addis Ababa, Ethiopia,[10] by launching a campaign to end child marriage across Africa. Another important event on the African continent was the First African Girls' Summit on Ending Child Marriage in Africa, held in Lusaka, Zambia between 26 and 27 November, 2015. A statement from this meeting reminded Africa that:

> Article 21(2) of the African Charter on the Rights and Welfare of the Child, which requires that child marriage and the betrothal of girls and boys shall be prohibited, and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and to make registration of all marriages in an official registry compulsory.[11]

As submitted by the *amici curiae*, poor socio-economic conditions and poverty fuel the cycle of CEFM. CEFM is both a manifestation and a cause of poverty which survives the generations because of the complicity of families and the acceptability of the practice to members of the community. Other factors that sustain CEFM include patriarchal socio-cultural norms that subjugate girls and women, especially by suppressing their self-determination in matters relating to their sexuality and sexual relationships. Violence, abduction and rape are tools for maintaining the subjugated position of women in society.

This case has generated debate around an issue the Court did not determine, and that is whether *ukuthwala,* even in its innocuous form as described by Professor Nhlapo and Inkosi Mahlangu, is nevertheless shrouded in patriarchal values that are contrary to gender equality and human rights.[12] Indeed, why should mock-abduction be a feature for the girls and not the boys? Does it not in fact, even if only symbolically, represent the subjugated position of the girl in relation to the man? Another challenge is that *ukuthwala* seems to focus on the consent of families rather than the person's consent. Noteworthy also was the Appellant's appreciation of the ambiguity about consent which the practice of mock-abduction poses. This is an important observation because mock-abduction mystifies the process of consent and obscures whether it does in fact take place, or whether the girl succumbs to pressure or merely acquiesces after being coerced. The whole practice of *ukuthwala* is therefore suspect, as it is based on patriarchal notions about the place of women in society. However, it is no simple matter to dissuade communities from continuing such practices because of the reasons described above, including that they are a source of income, and caused by socio-cultural pressure.

Finally, one is left wondering why family members who participated in the crime were not prosecuted. The evidence showed that the Complainant's uncle and other family members, and also the family members of the Appellant, were accomplices to the abduction. The brother of the Appellant had also allegedly held the Complainant down while the Appellant raped her. The Court, however, agreed with the trial court in the view that:

> … the involvement of the complainant's male family members and grandmother was nothing more than a neutral factor insofar as the Appellant's own blameworthiness was concerned.[13]

The Court agreed with the trial court without explaining its reasoning, even though it was evident that family members played key roles in the commission of the offences. Extending liability to members of the family may have had the implication of prosecuting a whole group of family members or members of a community. Understandably this may not have appealed to the prosecutors or the courts. It may indeed not have been received well by the wider community. However, this raises questions about fairness of the criminal justice system when it fails, without justification, to prosecute those who are involved as accomplices in criminal activity relating to CEFM.