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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED:

Date: **8th June 2018** Signature: _____

CASE NO: A304/2016

COURT A QUO CASE NO: 41/2589/2007

DPP REF NO: 9/2/5/1-2016/467

DATE: 8th June 2018

In the matter between:

JAARS, ROGER

First Appellant

BOTHA, SHANE

Second Appellant

and

THE STATE

Respondent

JUDGMENT

ADAMS J:

[1]. This is an appeal by the first and second appellants against their convictions and sentences. The first and second appellants were respectively accused 2 and accused 1 in the court *a quo*, being the Johannesburg Regional Court. At all relevant times the appellants were legally represented in the court below. On the 4th February 2014 the first appellant was convicted as follows: On five counts of rape; read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 ('the CLAA'), one count of assault, one count of kidnapping and one count of indecent assault. On the same day the second appellant was convicted on five counts of rape, read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997, and one count of kidnapping.

[2]. On the 5th of June 2015 the first appellant was sentenced as follows:-

1. On the five convictions of rape, which, for purposes of sentence, were taken as one, the court *a quo* imposed a sentence of direct imprisonment for life;
2. On the conviction for common assault: two years direct imprisonment;
3. On the conviction for kidnapping: ten years direct imprisonment; and
4. In respect of the conviction for Indecent assault: five years direct imprisonment.

Ex lege, the sentences run concurrently.

[3]. On the same day the second appellant, who, according to the Learned Magistrate *a quo*, played a lesser role in the commission of the crimes, was sentenced as follows:-

1. On the five convictions of rape, which, for purposes of sentence, were taken as one, the court *a quo* imposed a sentence of direct imprisonment for life;
2. On the conviction for kidnapping: ten years direct imprisonment; and

Ex lege, the sentences run concurrently.

[4]. The appeal against conviction principally turns on the reliability of the evidence of the complainant and her witnesses as contrasted against the evidence of the appellants, who claimed, in a brief plea explanation in terms of section 115 of the Criminal Procedure Act 51 of 1977 ('the CPA'), that the sexual intercourse with the complainant was consensual. The appellants also deny the allegations against them relative to the other charges, notably the kidnapping charge. There is also an issue relating to the admissibility against the first appellant of admissions made by the second appellant in terms of the provisions of s 112 of the Criminal Procedure Act. I shall return to that aspect of the matter in due course.

[5]. Some of the rape convictions of the appellants were based on the doctrine of common purpose. The Magistrates Court had found that the first appellant had physically raped the complainant three times, and convicted him on those three counts of rape. Additionally, the court *a quo* convicted him on two more charges of rape, with the reference to the physical rape of the complainant by the second appellant, on the basis of the doctrine of common purpose. Conversely, the Magistrates Court had convicted the second appellant on five counts of rape, three of which related to the physical raping by the first

appellant of the complainant. The point about this issue, which was not raised by any of the Counsel on behalf of the appellants or the State Advocate, but which is raised by us *mero motu* in the interest of justice, is that this may very well have been a complete misdirection on the part of the Regional Court. I shall return to this aspect of the matter later on in my judgment.

[6]. There are certain facts in this matter which are common cause by virtue of the fact that the parties either agreed some of those or the evidence in support of other facts were not seriously challenged by the defence. Those facts are the following.

[7]. The appellants and the complainant met each other on the evening of Thursday, the 29th November 2007. The appellants gave the complainant, her sister and a friend a lift to Melville where they intended attending an 'after – party'. First appellant at some point gave the complainant R200, and the idea was that that amount would be used as entrance fee to the night club which was hosting the after – party. Shortly after the first appellant gave the complainant the R200, she gave it to another friend of hers. She wanted to 'knock' the first appellant, meaning she intended cheating him out of the cash.

[8]. At some point during the evening, after some to and fro in the Melville and surrounding areas by their party, consisting of the appellants, the complainant, her sister and the friend, the appellants and the complainant left Melville without the sister and the friend, and went to a deserted place which goes by the name of 'the Dooks' near Riverlea. There the first appellant and the second appellant took turns to have sexual intercourse with the complainant. The first appellant had sexual intercourse with the complainant at least three times, whilst the second appellant twice had intercourse with her.

[9]. In the early hours of that morning, being Friday, the 30th November 2007, the appellants dropped off the complainant in Riverlea. Later that same morning, the complainant laid charges of rape against the appellants and both of them were arrested shortly thereafter. At about 13H40 in the afternoon on the same day, the complainant was examined by Dr S L Phoshoko, who completed the Form J88 Medico – Legal Examination Report.

[10]. The issues in dispute which the Court *a quo* was required to adjudicate in sum were the following: Whether the appellants took the complainant by force and removed her from Melville, thus kidnapping her; whether the complainant was assaulted by the first appellant; whether the first appellant indecently assaulted the complainant; and importantly whether the complainant had consented to having sexual intercourse with the appellants.

[11]. The evidence on behalf of the state, succinctly summarised, was as follows.

[12]. The State presented the evidence of a single witness namely, E G ('the complainant'), who testified that she met the appellants for the first time during the early evening of Thursday, 29 November 2007, at about 20h30. They were travelling in a white Polo, driven by the second appellant. At that stage she was called to the car by the first appellant, who asked her whether she had any plans for the night, to which she responded that she intended attending a Matric Farewell after – party in Melville later on that night. They offered her a lift to Melville as, according to them, they had no plans for the night. The three of them then went to her grandmother's house and collected her friend, T A ('T') and her sister, U G ('U'). Thereafter they made their way to the after – party in Melville.

[13]. During the course of the night, whilst they were driving around the Melville area waiting for the after – party to get going, the first appellant suggested that he would like to have sex with all three of them, being the complainant, U and T. T and U replied by saying that the evening is still young, whilst the complainant's response was to the effect that they were not that type of girls.

[14]. Later on they returned to the club in Melville and the first respondent gave the complainant R200 to pay for their entrance fee. When they got to the club the first respondent stopped her from immediately paying the entrance fee, at which stage she decided to 'knock' the first appellant by handing the R200 to another friend of hers, one C. This seemingly made the first appellant somewhat agitated and resulted in an altercation between them all. The complainant attempted to defuse the tension by offering to get the money back from C, but the first appellant would have none of that. By then the situation had developed into a serious situation and the complainant instructed T and U to go and get the money from C. Whilst they were gone, the first and second appellants physically forced the complainant into their car – first appellant held her mouth shut and pulled her into the car, whilst the second appellant dragged her by her legs. Thereafter, second appellant drove off at high speed with her in the car. At some point during the high speed drive, she attempted to open the car door, but it was locked. The first appellant gave her a slap across her face with an open hand for good measure. They drove to a deserted place in Riverlea, where the first appellant undressed her by pulling down her pants. He penetrated her vagina with his penis and raped her. He used a condom. She was not sure if he ejaculated, but he stopped and got out of the car. Thereafter the second appellant also took off his pants and he penetrated her vagina with his penis and raped her without a condom. He stopped after he ejaculated. While second appellant was raping her, the first appellant was standing outside the car.

[15]. Thereafter, the appellants took turns to rape her again – the first appellant twice more, without using a condom and the second appellant one more time. She was crying during her ordeal, and the second appellant told her not to cry.

[16]. When she was confronted by the first appellant for the third time, he turned her on her stomach and wanted to penetrate her anus. She asked him not to do that, and he obliged. He lit a cigarette and used it to burn her arm. He then took a bottle and broke it. He wanted to insert the broken bottle into her vagina, but she acted as if she was in love with him and climbed on top of his lap. She told him that he is now her boyfriend and that she would do anything just to get out of there alive. This behaviour caused him to change his mind and he did not insert the broken bottle into her vagina.

[17]. At about dawn, she asked if she could urinate and was allowed to get out of the car. She tried to flee. She cried for help and tried to get the attention of two men standing on a nearby bridge. These men did not respond to her cries for help. First appellant ran after her, caught her and gave her another slap across the face and forced her back into the car. At that stage they also forced her to drink a shot of Rum. At some point during the whole unsavoury saga the first appellant told her that he had been in prison for 18 years because he had raped someone. He told her that he is not scared to go back again, but when he comes out, he will kill her. He said that he knew her and her family even though they do not know him.

[18]. Both the appellants then fell asleep. She woke up the second appellant and begged him to take her home. Second appellant then took her back to Riverlea and she got out of the car. When he dropped her off, the second appellant apologised to her for everything that happened and asked her not to lay charges against him.

[19]. She thereupon ran to the house of her friend, one W, and told them that she had been raped. She was crying and clearly in shock, and W's cousin gave her sugar water to drink in order to calm her down. Thereafter, they accompanied her to her grandmother's house, where she found her sister, U, and her uncle's girlfriend, Cindy. She reported the rape to them as well. They then all went to her friend, Janka's house where the police was called. The police arrived and took her to LanCLAAgte Police Station, where she formally laid a charge of rape against the appellants. She was taken to a doctor who examined her and gave her medication. She remembered that she had a bite mark on her arm, but could not recall exactly when during the assaults, she was bitten.

[20]. Later on the appellants were arrested when they presented themselves at the LanCLAAgte Police Station, after having been told by two guys that the complainant was claiming that she had been raped by the two of them. The complainant was at the police station when the two appellants were arrested. That was before she was taken to the doctor.

[21]. She was asked by the prosecutor to give more clarity about how many times she had been raped. She explained that first appellant raped her first, then second appellant raped her once. Thereafter first appellant raped her a few more times, whereafter second appellant raped her for the second time and then the first appellant raped her the last time.

[22]. The second state witness was W D. She is a friend of the complainant. She testified that on Friday, 30 November 2007, at about 08h30, the complainant arrived at her home in a state. She was shaking and crying, and she was visibly in a bad space. The complainant told her that two men had raped her at 'the Dooms'. She told her that earlier that evening, the men demanded some money back, but by then she did not have the money. They

forced her into the car and drove to 'the Dooms', where they assaulted her by slapping her across the face and burned her with a cigarette. The complainant explained that she knew the two assailants. The witness remained with the complainant until the police came to fetch her.

[23]. T A was the third state witness. She is a friend of the complainant and testified that on Thursday, 29 November 2007, at about 20h30 she was with the complainant's sister when she noticed a white VW Polo with two male occupants accompanied by the complainant. They were called by the complainant and they all went to Melville. She confirmed the complainant's story relating to the rest of the evening in all the material respects.

[24]. She furthermore testified that she and U went to another club and when they came out of the club, she saw the first appellant busy choking the complainant. She asked first appellant what was going on and he told her that he wanted his money back. They went to the car and first appellant and the complainant got into the car. She did not notice where the second appellant was at that stage. She and the first appellant then had an argument about the money, whereafter she and U went back into the club to try and find the missing R200. As they were walking back to the club, she saw the car being driven off by the second appellant with the complainant and the first appellant as passengers. She testified that she knew the first appellant by sight, but she did not know the second appellant before the night of the incident in question.

[25]. The sister of the complainant, U G, was the fourth state witness. Her evidence accorded in the main with the evidence of the complainant and T. She also testified that at some point during the course of the evening the first appellant suggested that all three of them, namely she, the complainant and T, should have sexual intercourse with him. All three of them, according to her, replied that that was not going to happen as they are not that type of girls.

[26]. She also confirmed the version of T relating to what happened up to the point when the appellants sped away from in front of the club with the complainant still in the car. Thereafter, they waited a long time to get a lift back home and only manage to arrive home in the early hours of the next morning, being Friday, the 30th November 2007.

[27]. Thereafter the doctor who examined the complainant on the afternoon of Friday, the 30 November 2007, Dr S L Phoshoko, testified that, on examination, she found bruising of the complainant's left cheek, as well as a bite mark on the right forearm and a cigarette burn mark on the complainant's right shoulder. Her findings confirmed the reported history of a physical assault on the person of the complainant. A clinical examination of the vaginal area revealed that: her *labia majora* were tender; there were fresh bruises on her *labia minora*; the *posterior fourchette* had a tear or laceration; and there was swelling around the hymen. Dr Phoshoko concluded that her findings were consistent with forceful vaginal penetration.

[28]. She furthermore testified that even during prolonged vigorous and rough sexual intercourse she would not expect a consensual woman to expose herself to be hurt and torn without complaining at some stage about the pain, especially with the kind of injuries she found on the complainant. The Form J88 Medico – Legal Examination Form, completed by Dr Phoshoko, was received into evidence as an exhibit.

[29]. The doctor was re – called on application by the defence. She was cross-examined about whether beads implanted under the skin of the penis would have caused gynaecological injuries during consensual sexual intercourse. The doctor had no knowledge or experience in something like that and could not really assist the Court, except to speculate that if the beads under the skin of the penis were not smooth, it would be possible that it could cause injuries.

[30]. The sixth and last state witness was R G, the complainant's mother. She gave evidence that on the Saturday following the commencement of the trial; the second appellant came to her home with his wife. The second appellant requested to speak to the complainant. He explained that he wanted to ask for her forgiveness for what happened on the evening that she was raped. The witness insisted that the second appellant explained to her exactly what had happened on that fateful night. He told her that he was with the first appellant when they gave the complainant a lift to a party. At some stage during the evening, he withdrew some money and handed it to the first appellant, who in turn handed to the complainant the R200 in order for her to pay the entrance fee at the function. When first appellant wanted his money back, an altercation ensued and the first appellant pulled the complainant into the car, whereafter he (the second appellant) drove off before the complainant could escape. He was instructed by the first appellant, so the second appellant explained to her, to drive off to 'the Dooks' near Riverlea so that he could 'teach the complainant a lesson'. There the first appellant assaulted the complainant, tore off her clothes from her body and raped her. He explained that the first appellant raped the complainant several times. When he was finished, he forced the second appellant to rape the complainant as well. While he (the second appellant) was busy raping the complainant, the first appellant pulled him out of the car, and then proceeded to rape the complainant again and assaulted her as well. The first appellant raped the complainant repeatedly, whereafter he fell asleep. In the early hours of the next morning, the complainant woke him up and begged him to take her home, which he then did.

[31]. The second appellant begged the complainant, so he told the complainant's mother, to withdraw the charges against him as at the end of her ordeal he was the one who helped the complainant to escape. She told him that they could not withdraw the charges.

[32]. She also saw the complainant on the morning after the rapes and confirmed that she was crying a lot. She saw that her lip and one eye were swollen. She was in a horrible state and repeatedly said that the appellants would kill her.

[33]. That concluded the evidence on behalf of the State, and the appellants thereafter gave evidence in their defence.

[34]. The second appellant was the first to give evidence. He confirmed that they met the complainant, her sister and their friend on the evening of Thursday, 29 November 2007. The complainant requested a lift from them to Melville, and they agreed that they would take them there. When they arrived in Melville the complainant found that her friends were not there yet. They stayed inside the car and drank some of the appellants' liquor. At some stage the complainant asked the first appellant for money, and he agreed to give her money. However, first appellant indicated that he would want sexual intercourse in return for the money. They drove to a nearby ATM, where the second appellant withdrew R400 and gave R200 to complainant. They returned to Melville and everybody got out of the car. He went to buy cigarettes.

[35]. On his return to the vehicle, the second appellant found that only the first appellant and the complainant were sitting in the car. The complainant asked him to drive to Riverlea, which he did. She instructed him to stop at a certain house. She went into the house and returned shortly thereafter. She directed him to a field near a railway line and instructed him to stop there. He got out of the car to urinate, upon his return he noticed that the first appellant and the complainant were arguing about the R200 and drugs. As he got into the car, the complainant asked the first appellant to tell him (the second appellant) to get out of the car. The complainant and the first appellant then engaged in consensual sexual intercourse.

[36]. At some point, security guards came to the car and the complainant gave them cigarettes. She then instructed him to drive deeper into the veld. He did as instructed, got out of the car and the first appellant and the complainant had sexual intercourse again. When they were done, first appellant told him that the complainant was asking for him. He went to her and she asked if he had any money. He told her he had R200. She asked him to give her the money and she would then also have sexual intercourse with him. He insisted that for R200 she should have sexual intercourse with him twice, and the complainant agreed. They then engaged in sexual intercourse twice.

[37]. After they all had sexual intercourse, they sat in the car and continued drinking until they fell asleep. The next morning the complainant asked him to take her home, which he did. He and the first appellant went to the first appellant's house, and whilst there they were confronted by two males who claimed that, according to the complainant, they had raped her. This obviously concerned them and they immediately went to the Police Station.

[38]. On the 13th of August 2013, after all of the evidence on behalf of the State and the Defence had been completed and just before closing arguments were about to commence, the second appellant had a change of heart and proffered a guilty plea and a statement in terms of section 112 of Act 51 of 1977 on two counts of rape. The section 112 statement was received into evidence by the court *a quo*, but the plea on the two counts of rape was not accepted by the State. In his section 112 statement the second appellant made a number of admissions which implicated not just himself, but also the first appellant in the commission of the various offences with which they were charged. He admitted that he raped the complainant twice. He further admitted that they kidnapped the complainant and he stated that the first appellant had also raped the complainant. As indicated *supra* this statement gave rise to a number of issues in the trial in the Magistrates Court, notably the first applicant's application for a separation of the trials, which application was refused by the Magistrate. In this

appeal, Counsel for the first appellant has again raised this aspect in the context of the admissibility of the incriminating section 112 statement against the first appellant. I will return to this issue later on my judgment.

[39]. The first appellant thereafter testified in his own defence. He denied all the allegations against him and his evidence was to the effect that he knows the complainant's father, but Thursday, the 29th November 2007, was the first time that he ever met the complainant herself. She approached the car that he and second appellant were sitting in and asked them for a lift for her and her friends to Melville. The second appellant, who is the owner of the car, agreed to take them to the party. When they arrived in Melville the three girls got out of the car and asked them to wait for ten minutes, which they did. After a while the three girls returned to the car. The complainant asked him to give her R300 for drugs and told him that she would have sexual intercourse with both of them in return. All five of them drove to an ATM in Westbury where the second appellant withdrew money, and gave R200 of that to the complainant.

[40]. The complainant wanted to go and buy drugs in Riverlea, but her two friends wanted to go back to Melville. They dropped the two girls off in Melville and thereafter went to go and buy drugs at a house pointed out to them by the complainant. Having bought the drugs, the complainant directed them to a deserted place near Riverlea. When they got there, she used the drugs and thereafter asked them if they had condoms, to which they replied no. She then said that that is fine.

[41]. The complainant thereupon instructed the second appellant to get out of the car and she undressed herself. The first appellant pointed out during his evidence that beadings were implanted under the skin of his penis. He said that the complainant had consensual sexual intercourse with him. During the sexual intercourse, the complainant complained that the beads in his penis were

hurting her and they stopped having sex. She nevertheless then called the second appellant and she had sexual intercourse with him as well. She thereafter dressed herself and they sat in the car and continued drinking. Two security guards came to the car and asked for cigarettes, and the complainant gave them. When the security guards left, he was so drunk that he fell asleep. He woke the next morning in his bed at his home.

[42]. He was woken by his sister, who told him that she was told by two men that the complainant was saying that he and the second appellant had raped her. One of these men was the complainant's boyfriend. He and the second Appellant then went looking for these guys and found them in the company of the complainant. The complainant's boyfriend then accused them of raping her. He testified that they went to the police station a few times before they were arrested.

[43]. The next witness for the defence was the first appellant's sister, Jacqueline Heidi Jaars. She confirmed the first appellant's version about what happened on the morning of Friday, 30 November 2007. Her evidence added very little value to the matter.

[44]. Fabian Johnston was the last defence witness. He testified that the first appellant is known to him as a person who resided in the same area as him. He did not really know first appellant very well as they just greeted each other. He knows the complainant very well because she used to live across the street from his residence. He was also at the Matric Farewell after party in Melville on the evening of Thursday, 29 November 2007, and he saw the appellants in the company of the complainant and two other females. He only saw them as they alighted from the car at the club.

[45]. His evidence was that on the next morning he was in the company of a group of people in a park near a tunnel in Riverlea. They were using drugs and drinking. Just after 06h00, he saw the complainant walking through the tunnel. She was alone. She asked if they would give her drugs and alcohol, and he gave it to her. She told him that she was still 'high'. She stayed with the group of people for about 30 to 45 minutes and left. When he saw her at that time, he did not notice that her clothes were torn or that she had any injuries. She did not report to them that she was raped by the first appellant.

[46]. During cross-examination, the wheels came off for Fabian. He was confronted with the Form J88 – Medico Legal Examination Report and the complainant's injuries noted thereon. He was not able to explain these injuries in the light of his evidence that she was injury – free when he saw her at 06h00 that morning. He suggested that she may have been assaulted by her boyfriend as he saw them 'fighting' during the course of that Friday.

[47]. After he heard that the first appellant had been arrested for raping the complainant he realised that this was wrong, as he had seen her that morning and she did not complain to him about any rape. He could not get hold of the first appellant at that stage. He also did not inform the police, because he did not know who the investigating officer was and because LanCLAAgte Police Station was corrupt. During 2010, he visited the first appellant in jail and told him that he saw the complainant on the morning after the alleged rape. First appellant asked him to testify in his case and he gave him his contact number. First appellant never contacted him. During November 2012, he was arrested and he met the first appellant in the prison. That was when they had a chance to speak about the case and his sense of justice told him that he had no choice but to testify in the defence of the first appellant. He was requisitioned to go to court.

The second appellant's section 112 Statement / Guilty Plea Explanation – should the court *a quo* have admitted it?

[48]. As I alluded to above, the second appellant on the 13th of August 2013, indicated through his Counsel that he intended changing his plea to one of guilty on two of the rape charges. In his brief statement / plea explanation in terms of section 112 of the CPA, the second appellant stated that his Counsel had explained to him his constitutional rights and that he was making the said statement freely and voluntarily. He furthermore stated that on the night of Thursday, the 29th November 2007, he and the first appellant forced the complainant into his car and drove to Riverlea with her. There he (the first appellant) twice had sexual intercourse with the complainant 'against her will and without her consent', after the first appellant had sexual intercourse with the complainant which was also against her will and without her consent. He furthermore confirmed that he was guilty of the charge of rape and that he was pleading guilty thereto freely and voluntarily with full knowledge of the elements of the crime he was accused of. The section 112 statement was received and accepted into evidence, but the second appellant's plea on only the two counts of rape was not accepted by the state and the court *a quo*. The said statement implicated not only the second appellant, but also the first appellant in the commission of crimes of kidnapping and rape of the complainant. The statement was inculpatory relative to both the first and the second appellants.

[49]. An issue which I believe we need to deal with at this stage relates to the admissibility of the statement against the first appellant as well as against the second appellant. I interpose here to note that at the hearing of the appeal, Mr Tlake, Counsel for the second appellant, did not take issue with the admissibility of the section 112 statement against the second appellant. This, in my view, does not however mean that we have to accept that the admissions are admissible against the second appellant. The issue, in our judgment, still requires interrogation. Even more so in the case of the first appellant, on whose

behalf, Mr Penton, his Counsel at the hearing of the appeal, submitted that the admissions should not have been allowed to stand against the first appellant. Put another way, the enquiry relating to the s 112 admissions by the second appellant is this: were the first and the second appellants accorded a fair trial in terms of s 35 of the Constitution?

[50]. Whilst it probably goes without saying, it requires emphasising that the second appellant's changed plea of guilty was not under and in terms of the provisions of s 105A of the CPA, which defines and makes provision for 'plea – bargain negotiations'. The state and the second appellant had not agreed that he would tender a guilty plea on the two charges of rape only and that the state would accept such a plea without further ado. There were seemingly very little, if any plea negotiations. The procedural formalities as required by s 105A were not followed, such as a formal agreement signed or handed up in the trial court. The second appellant simply handed up a s 112(2) statement, indicating that he was pleading guilty on two of the charges of rape. Therein lies the difficulty.

[51]. The answer to the above question of admissibility of the statement relative to the second appellant can, in my view, be found in the *ratio* in *S v Sewela*, 2007(1) SACR 123 (W), at par [7]. The court had this to say in relation to section 112 admissions, read with the provisions of s 113:

'[7] The proviso lays down that 'any allegation . . . admitted by the accused up to the stage at which the court records a plea of not guilty, shall stand as proof . . . of such allegation'. Clearly, none of the allegations admitted in the appellant's statement in terms of s 112(2) were being admitted by him 'up to' the point at which the plea was changed; at that stage, he was thus no longer making the admissions concerned, and so, they no longer served to 'stand as proof'. Any doubt in this regard is removed by the phrase 'other than an allegation referred to above'. The reference in the phrase is to an allegation in the charge which is no longer admitted and, therefore, to the appellant's initial statement, which now no longer stands as proof. Further

support for this interpretation is the injunction to the court to 'require the prosecutor to proceed with the prosecution', indicating that the State now has to prove the allegations no longer admitted.

[52]. Section 113 provides as follows under the heading: 'Correction of plea of guilty' —

'(1) If the court at any stage of the proceedings under section 112 (1) (a) or (b) or 112 (2) and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he or she has pleaded guilty or if it is alleged or appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge or if the court is of the opinion for any other reason that the accused's plea of guilty should not stand, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: Provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation.'

[53]. In sum, the above judgment, with which we agree, lays down the principle that the admissions made by the second appellant in terms of s 112 could no longer stand for the simple reason that his plea of guilty did not stand. That means that the court *a quo* misdirected itself and erred in attaching any weight to the admissions and by regarding same as corroboration for the version of the complainant, who was a single witness in respect of the incident of the rapes.

[54]. It follows logically that, if the admissions should not have stood against the second appellant, they could not have stood against the first appellant as well. That is simply a matter of common sense. In any event, even if the

admissions were admissible, they would most certainly not have been admissible against the second appellant's co – accused, namely the first appellant. In that regard, I can do no better than refer to the decision in *Mhlongo v S; Nkosi v S*, [2015] ZACC 19, in which the Constitutional Court held that the common law position that extra curial confessions and admissions by an accused are inadmissible against a co – accused, must be restored. I can think of no reason why this principle can and should not have equal application to section 112 admissions made during the course of a criminal trial. Therefore, the court *a quo* ought not to have admitted same against the first appellant and its contents were therefore inadmissible.

[55]. In the circumstances, we are of the view that the second appellant's section 112 admissions ought to have been disregarded by the court *a quo*.

The Remaining Case against the Appellants

[56]. The second appellant's section 112 statement and admissions being inadmissible, the question which we then had to consider is this: what remains of the case against the appellants? Closely linked to that question is whether, by admitting the second appellant's s 112 admissions and by the court *a quo* having regard to its contents, the appellants nevertheless received a fair trial.

[57]. The evidence on behalf of the State I have summarised above. The question is whether this evidence is sufficient to prove the guilt of the appellants beyond a reasonable doubt. Put another way, the question is whether, at the end of the trial, the evidence as a whole was sufficient to ground the conviction of the appellants?

[58]. To determine whether the state had proved the guilt of the appellants beyond a reasonable doubt, the whole mosaic of evidence must be considered. This evidence as a whole should be considered in deciding whether the version of the appellants, namely that they both had consensual sexual intercourse with the complainant in a deserted place in the dead of night, is reasonably possibly true.

[59]. It is trite that the State bears the onus of establishing the guilt of the appellants beyond a reasonable doubt, and the converse is that they are entitled to be acquitted if there is a reasonable possibility that they might be innocent (*R v Difford*, 1937 AD 370 at 373, 383). In *S v Van der Meyden*, 1999 (2) SA 79 (W), which was adopted and affirmed by the SCA in *S v Van Aswegen*, 2001 (2) SACR 97 (SCA), it was reiterated that in whichever form the test is applied it must be satisfied upon a consideration of all the evidence. Just as a court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt, so too does it not look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true. In similar vein the following was said in *Moshephi and Others v R*, LAC (1980 - 1984) 57 at 59F - H, which was cited with approval in *S v Hadebe and Others*, 1998 (1) SACR 422 (SCA) at 426f - h:

'The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a

pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees'.

[60]. What is important is the overall picture. If the version of the appellants is to be accepted, it would mean that the state witnesses fabricated and concocted their entire story from beginning to end. The version of the appellants also does not explain the medical evidence of the injuries sustained by the complainant. Viewed holistically the version of the appellants is not tenable.

[61]. Although the complainant was a single witness in respect of the incident, the court *a quo* evaluated her evidence with caution, as it was required to do. See: *R v Mokoena*, 1932 CPD 79; *S v Stevens*, 2004 JDR 0505 (SCA). Section 208 of the CPA provides that a Court is entitled to convict an accused person on the evidence of a single witness.

[62]. As I indicated *supra*, the appellants were convicted upon the evidence of a single witness which was substantially satisfactory in all material respects and corroborated. (*S v Ganie*, 1967 (4) SA 203 (N)).

[63]. The court *a quo* clearly was cognisant of the cautionary rule relating to a single witness, but also understood that the exercise of the cautionary rule must not be allowed to displace the exercise of common sense. See: *S v Sauls and Others*, 1981 (3) SA 172 (A) at 180E-G; *S v Artman and Another*, 1968 (3) SA 339 (SCA). In *S v Jones*, 2004 (1) SACR 420 (C) it was held that the cautionary rule requires that a court must be aware of factors which render uncritical acceptance of evidence hazardous. Cautionary rule does not require that evidence must be free of all criticism, it requires only that evidence must be substantially satisfactory in relation to material aspects or corroboration. Even though a single witness' evidence might be criticized in some aspects, it still

does not exclude the fact that a Court might despite the criticism levelled against the witness, find the witness a credible witness. (*S v Abdoorham*, 1954 (3) SA 163 (N); *S v Sauls*, 1981 (3)SA 172 (A)).

[64]. We agree with the submissions by Ms Muller, Counsel for the respondent, that the Court *a quo* correctly approached the evidence of the complainant with extra caution after it weighed up her good and bad qualities as a witness. The Court *a quo* correctly found that the complainant's version is substantially corroborated by independent evidence. Even if one excludes the second appellant's section 112 admissions, there is plenty of corroboration to be found for the version of the complainant, not the least of which is the version of the appellants who confirm that the complainant was taken to a deserted place where she would not have been able to solicit the help of anyone. There are also the clinical findings in the Form J88 Medico – Legal Report, which is clear evidence that the complainant was assaulted and burned with a cigarette. The gynaecological findings surrounding the genital injuries suffered by the complainant confirms her evidence of forceful penetration – rape. This belies the claim by the appellants that the sexual intercourse was consensual.

[65]. The evidence of the second, fourth and sixth state witnesses about the state the complainant was in during the morning after the rape, also corroborates her version. They testified that she was shacking and crying. She had injuries and her clothes were torn. She immediately reported that she was raped. In my view, this is not the natural behaviour of a young woman who had consensual sexual intercourse.

[66]. There are almost always some contradictions to be found between the evidence of state witnesses. I agree with the submission by Ms Muller that if the inconsistencies and differences which exist are of a relatively minor nature and the sort of thing to be expected from honest but imperfect recollection,

observation and reconstruction, if anything the contradictions points away from any type of conspiracy between the witnesses. See: *S v Mkhohle*, 1990 (1) SACR 95(A).

[67]. We are of the view that the court *a quo*, after considering all the probabilities and improbabilities and particularly the fact that there is no onus on the appellants to convince the court of the truth of their explanation, correctly held the evidence of the appellants was inherently improbable and false beyond a reasonable doubt. Their evidence, in addition to being contradictory in material respects inter the defence witnesses and between what was put to the state witnesses and what their *viva voce* evidence was in the end, was inherently improbable in more than one respect. The learned Magistrate's finding that sufficient corroboration existed for the evidence of the complainant cannot be faulted. The improbability or implausibility of the appellants' version, particularly the fact that on their version the state witnesses concocted the whole story against them, is apparent.

[68]. We are accordingly of the view that, even after the statement by the second appellant is excluded from the evidence before the court *a quo*, there is no reason for disturbing any of the factual findings made by the court *a quo*. The case against the appellants was overwhelming, even if the second appellant's statement is excluded from the evidence, and the Regional Magistrate was correct in his finding that the first appellant raped the complainant three times and the second appellant raped her twice, as per her evidence.

[69]. As far as the kidnapping is concerned, there can be no doubt that the appellants, acting in concert, had deprived the complainant of her freedom by forcing her into their vehicle and driving her to a deserted place. In any event, they were both involved in the act of kidnapping the complainant – they both

forced her into the car and the second appellant drove away whilst the first appellant was restraining her in the vehicle. The offence of kidnapping stood separate and distinct from the rape, and it cannot be said that there was an improper duplication of charges.

[70]. We are therefore satisfied that, notwithstanding the misdirection on the part of the Magistrate *a quo* by admitting the second appellant's s 112 admissions, the appellants had a fair trial, and that we ought not to interfere with his factual findings. This does not however mean that the convictions and sentences should be confirmed.

Common purpose – the rape counts

[71]. As mentioned *supra*, we are concerned that there may have been a complete misdirection by the Regional Magistrate in his finding that, on the fact he found proven, between the two of them the appellants acted in concert in raping the complainant five times. There is an oddity in the judgment of the learned Magistrate. He convicted the appellants on additional counts of rape in respect of those charges where the co – perpetrator was in fact the one who committed the actual *actus* of rape. This, we assume, he did on the basis that he was of the view that the doctrine of common purpose found application. The peculiarity lies therein that in his judgment the basis for these convictions is that the second appellant, for example, was an accomplice to the physical rape by the first appellant of the complainant. The regional Magistrate had this to say in his judgment on this point:

'Hy erken inderdaad dat beskuldige 2 ook die klaagster verkrag het in sy teenwoordigheid en met sy medewete. Dit maak homself aandadig as medepligtige aan die verkragting wat beskuldige 2 op die klaagster uitgevoer het. Dit het duidelik met sy goedkeuring plaasgevind, waar hy nie self die dader tot die verkragting was nie, was hy medepligtig daartoe. Sien in die verband S v

Kok, 1988 (1) SA 37 (A). Die argument geld inderdaad ten opsigte van biede beskuldigdes'.

[72]. Also later in his judgment, the Magistrate concludes as follows:

'Soos ek reeds aangedui het is dit ook duidelik dat die een beskuldigde die ander se verkragting bevorder het. Derhalwe het beide die beskuldigdes hulle skuldig gemaak aan 5 klagte van verkragting.'

[73]. The wording and the formulation in the judgment suggest that what the regional court had in mind was to convict the appellants, on these additional charges, of being an accomplice to rape. In the end it in fact convicted of rape on the basis of common purpose. Either way, there was a gross misdirection on the part of the learned Magistrate. I say so for the reasons which follow.

[74]. The general principles relating to the doctrine of common purpose have been set out in *S v Mgedezi & others*, [1988] ZASCA 135; 1988 (1) SA 687 (A) at 7051I-706C. In the absence of any prior agreement, the State has to prove the following requirements for the doctrine of common purpose in order for the appellants to be held criminally accountable. Firstly, that the particular appellant was present at the scene of the rape. Secondly, that he was aware of the perpetration of such offences against the complainant. Thirdly, that he had intended to make common cause with his co – perpetrator who was actually perpetrating the offences. Fourthly, that he manifested his sharing of a common purpose with his co - perpetrator of the offences by himself performing some act of association with the conduct of the other. Fifthly, that he had the requisite *mens rea*, that is that he intended to rape or must have foreseen the possibility of the commission of this crime and performed his own act of association with reckless disregard as to whether or not such eventuality ensued.

[75]. As I said, these are the general principles in relation to the doctrine of common purpose. Our courts have on previous occasions held that, as regards the doctrine of common purpose, special requirements apply in relation to the offence of rape. We agree with this view, and I will explain our rationale shortly.

[76]. *In casu*, the rapes literally occurred days before the Criminal Law (Sexual and Related Matters) Amendment Act 32 of 2007 ('the Sexual Offences Act') came into force on the 16th of December 2007 in terms of which the common law offence of rape was repealed and replaced with a new expanded statutory offence of rape, applicable to all forms of sexual penetration without consent, irrespective of gender. The appellants were accordingly charged with and convicted of common law rape.

[77]. Under the common law, as is the case in terms of the provisions of the Sexual Offences Act, the offence of rape, as opposed to that of 'compelled rape', is a crime which can only be committed by the instrumentality of a person's own body.

[78]. In this regard, the author, C R Snyman, Criminal Law, 6th Ed (2014) states as follows at p 266 para [13]:

'The common purpose doctrine cannot be applied to crimes that cannot be committed through the instrumentality of another person but can only be committed through a person's own body or part thereof. Rape as well as certain other sexual offences such as intercourse with a girl below the age of sixteen are examples of such crimes.'

[79]. This passage was quoted with approval by Eksteen J in delivering the judgment of the Full Bench of the Eastern Cape Division of the High Court, Grahamstown, in *S v Kholosa and Another*, [Unreported case no: CA183/2010].

We find ourselves in agreement with this approach to the application of the doctrine of common purpose in rape cases.

[80]. It is clear therefore that the regional magistrate erred in convicting the appellants of rape on five counts solely on the basis that the one acted with a common purpose when the other physically raped the complainant and *vice versa*. The first appellant should have been convicted of three counts of rape only and the second appellant of two counts of rape only. In the exercise of our inherent jurisdiction the convictions of the appellants will be altered accordingly.

Were the appellants accomplices to the rapes by their co – conspirators?

[81]. The next question is whether the appellants were guilty of being accomplices to these rapes perpetrated by their respective co – perpetrators. The crime of being an accomplice has its own requirements and essential elements, and the state is required to prove those elements beyond a reasonable doubt. A proper reading of the appeal record confirms, in our view, that the state has, in any event, not proven beyond a reasonable doubt that the particular appellant had furthered the commission of the rape by the other appellant.

[82]. In coming to the aforesaid conclusion I have had regard to the reasoning in *Phetoe v S*, (1361/2016) [2018] ZASCA 20 (16 March 2018). Mocumie JA referred with approval to *Minister of Justice and Constitutional Development & Another v Masingili & Others*, [2013] ZACC 41; 2014 (1) SACR 437 (CC), in which the Constitutional Court grappled with the meaning of the term ‘accomplice’. Having considered the facts before it, it stated the following:

‘An accomplice is someone whose actions do not satisfy all the requirements for criminal liability in the definition of an offence, but who nonetheless furthers the

commission of a crime by someone else who does comply with all the requirements (the perpetrator). The intent required for accomplice liability is to further the specific crime committed by the perpetrator.'

[83]. The learned author, C R Snyman, Criminal Law 6 ed (2014) at pg 266 describes the position as follows:

'Accomplice liability may be defined as follows:

1. A person is guilty of a crime as an accomplice if, although he does not satisfy all the requirements for liability contained in the definition of the crime and although the conduct required for a conviction is not imputed to him by virtue of the principles relating to common purpose, he unlawfully and intentionally engages in conduct whereby he furthers the commission of a crime by somebody else.
2. The word "furthers" in rule 1 above includes any conduct whereby a person facilitates, assists or encourages the commission of a crime, gives advice concerning its commission, orders its commission or makes it possible for another to commit it.'

[84]. In *Phetoe* (supra) the SCA remarked as follows at par [15]:

'To convict the appellant on the basis of his mere presence is to subvert the principles of participation and liability as an accomplice in our criminal law. For criminal liability as an accomplice to be established, there must have been some form of conduct on the part of the appellant that facilitated or assisted or encouraged the commission of the rape of Ms M during the two separate incidents in her shack. Ms M's evidence does not disclose any assistance rendered by the appellants in the commission of the rapes; and the conduct does not amount to facilitation, assistance or encouragement. That, in my view, should have been the end of the matter. The fact that the appellant laughed after being asked why they were 'doing such a thing' may be conduct that showed his

approval of what was happening, but that is not enough to establish his liability as an accomplice. In *S v Nooroordien & Andere*, in 1998 (2) SACR 510 (NC), in which two persons had been present when a murder had been committed, the court at pg 524F-G stated:

“Alles wat gebeur het mag, en het in alle waarskynlikheid hulle goedkeuring weggedra. Dit is egter nie genoeg nie...”

Loosely translated to English it means ‘all that happened seems to have carried their approval. That is however not enough.’

[85]. Applying these principles in this appeal, we are not persuaded that the state had proven that the appellants were accomplices to the rapes by their co – conspirators.

[86]. Accordingly, the convictions of the first appellant on three counts of rape are confirmed, but his convictions on two counts are set aside. As regards the second appellant, his convictions on two counts of rape stand to be confirmed, whereas his convictions on three counts of rape should be set aside.

Sentence

[87]. I now turn to deal with sentence. Both the appellants were sentenced effectively to direct imprisonment for life. It is trite that an appeal court can interfere with sentence only where the sentence is affected by an irregularity or misdirection entitling this court to interfere.

[88]. However, as the basis for the appellants’ convictions had changed, the question is whether this court should set aside the sentences imposed by the

Regional Magistrate, reconsider these sentences and impose sentences different from those imposed by the court below.

[89]. This was a particularly serious case of rape where a young woman was forcibly taken by the appellants to a deserted place and subjected to a humiliating and degrading 'gang' rape. In my judgment, the fact that appellants have now been convicted on less counts of rape should not generally speaking, in the circumstances of this matter, result in a lesser sentence. The question remains however whether, all things considered, we should interfere with the life sentences imposed by the regional court.

[90]. A convenient starting point is the fact that the provisions of s 51(1) of the CLAA, read with Part I of schedule 2 of the said Act, apply. This means that a minimum sentence of imprisonment for life finds application. The question is whether substantial and compelling circumstances exist which justify the imposition of a lesser sentence.

[91]. Section 51(1) of the CLAA reads 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.'

[92]. Section (3) of the said Act provides as follows:

'(a) 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 must thereupon impose such lesser sentence: Provided that if a regional court imposes

such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.

(aA) When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

- (i) The complainant's previous sexual history;
- (ii) an apparent lack of physical injury to the complainant;
- (iii) an accused person's cultural or religious beliefs about rape; or
- (iv) any relationship between the accused person and the complainant prior to the offence being committed.'

[93]. Part I of Schedule 2 list the crime of '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).'

[94]. I take into consideration what was stated by the SCA in *S v Vilakazi*, 2009 (1) SACR 552 (SCA). Nugent JA had this to say at par [58]:

‘In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of ‘flimsy’ grounds that *Malgas* said should be avoided. But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again. While that can never be confidently predicted his or her circumstances might assist in making at least some assessment. In this case the appellant had reached the age of 30 without any serious brushes with the law. His stable employment and apparently stable family circumstances are not indicative of an inherently lawless character.’

[95]. It was necessary for the court to find the existence of substantial and compelling circumstances before it was entitled to impose a lesser sentence. In considering whether substantial and compelling circumstances were present, the learned magistrate had regard to the appellants’ personal circumstances and the fact that both appellants were not first offenders. The first appellant, in particular, was previously convicted on the 7th of June 1996 on a charge of rape and sentenced to ten years imprisonment. The court also had regard to the severity and the seriousness of the offences committed by the appellants.

[96]. I am satisfied that, with regard to the first appellant, the learned regional court magistrate properly considered whether there were substantial and compelling circumstances to deviate from the minimum sentences provided for in respect of the offences under the relevant provisions of section 51(1) of the CLAA as read with part I of schedule 2 thereof, and also carefully considered the triad of factors relevant to sentencing, namely the nature of the offence, the

personal circumstances of the offender, including their moral blameworthiness and the interests of society by which I include the interests of the victim. In that regard, the Magistrates Court was assisted by a victim impact report, as well as by pre – sentence reports in respect of both the appellants.

[97]. On first principles, the aggravating circumstances far outweigh the personal circumstances of the appellants. I do not consider there to be any misdirection in the Regional Magistrate's judgment on the sentence imposed on the first appellant, which would entitle this court to interfere with the sentences imposed. It moreover cannot be said that the sentences are unduly harsh or inappropriate (see *S v Kgosimore*, 1999 (2) SACR 238 (SCA)). In my view the imposition of the life sentence does not induce a sense of shock nor is it disproportionate particularly having regard to the values to which we subscribe and the application of section 51 of the CLAA.

[98]. I take into consideration, as held in *S v Vilakazi*, that in respect of —

‘serious crime the personal circumstances of the offender . . . recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be . . . ’

[99]. At the time of the imposition of the sentence the first appellant was 37-years old and unmarried. He had reportedly dropped out of school when he was in grade 12, which means that his highest level of education is grade 11. He apparently has no children. He has previous convictions, including a conviction during 1996 on a charge of rape.

[100]. Accordingly, life imprisonment remains, in my view, an appropriate sentence with respect to the first appellant.

[101]. However, the second appellant, in my view, stands on a different footing. He was also 37 years old at the time when he was sentenced by the trial court. He was in a committed relationship, and had fathered seven children with different mothers. He attended school up to grade 8, and dropped out of school whilst in that grade. His highest level of education therefore is grade 7. He reportedly had learning difficulties which caused him to drop out of school at such a low level. Up to the point that he was convicted he was in permanent employment as a spray painter. He also has previous convictions, which in our view, should not be taken into account in the sentencing of the second appellant in view of the fact that these offences of housebreaking and theft were committed as far back as 1990. The court *a quo* therefore treated him, rightly so in our view, as a first offender.

[102]. Whilst the first appellant has thus far shown no remorse and steadfastly maintained that he was wrongly convicted, the second appellant, on the other hand, can be said to have demonstrated a degree of remorse. This is evidenced by the fact that in the hours following the rape, he was the one who decided to end the complainant's ordeal by dropping her off in the Riverlea area close to a friend's house. After the trial commenced, he also reached out to the complainant and her mother and attempted to ask for forgiveness from the complainant. Lastly, he changed his plea to one of guilty on two of the rape charges albeit at a very late stage, namely after completion of all of the evidence and just before the commencement of the closing arguments. To the parole officer he also indicated that he is remorseful, and wish that he could be given a chance to ask for forgiveness from the complainant.

[103]. In addition to the fact that the second appellant reportedly had a difficult upbringing in a completely dysfunctional family setting, there is another aspect which weighs heavily on my mind. That relates to the fact he has a diminished intellectual capacity, which made him prone to being influenced and manipulated by others, which is what probably happened in this case. To the probation officer, Ms T Seboka, the employer of the second appellant described him as 'a good person, dedicated and hardworking'. The employer also indicated that 'despite the accused's mental capacity he can be trusted as one of the best employees in the company'. The second appellant has reportedly been diagnosed with a chronic illness for which he presently receives chronic medication.

[104]. The cumulative effect of the foregoing, in our view, amounts to special and compelling circumstances in relation to the second appellant, which should have made the court *a quo* deviate from the minimum sentence. We are therefore of the view that, having regard to the foregoing, the sentences of life imprisonment imposed on the second appellant is unduly harsh and inappropriate. I say this especially if regard is had to the unchallenged evidence by the parole officer that the second appellant presented with intellectual deficits, which made him prone to outside influences and to manipulation by others. At age 37, he was also a first offender. Accordingly, we are of the view that this court should interfere with the sentences imposed on the second appellant by the trial court.

[105]. Taking into consideration all the known factors, we are of the view that a sentence of 25 years' direct imprisonment on each of the two charges of rape would be appropriate. As discussed in more detail below, if regard is had to the provisions of section 51 of the CLAA, it is undesirable that the convictions of rape were 'lumped' together for purposes of sentence. We are of the view that, for this reason alone, the sentences imposed should be reconsidered, set aside and replaced with sentences in respect of each of the convictions of rape. This

approach, whilst from a practical point of view has very little effect on the appellants, is desirable. In any event, for the reasons alluded to *supra*, the second appellant's appeal against his sentence must succeed.

[106]. The same cannot be said of the first appellant, and, in our judgment, his appeal against sentence should fail, although we do intend altering the sentences to reflect our view that it was undesirable to regard the rape convictions as one, as did the Regional Court, for the purpose of sentencing. I deal with this issue shortly.

Conclusion

[107]. In terms of section 19 of the Superior Courts Act 10 of 2013 this appeal court, on hearing the appeal, has the power to 'confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require.'

[108]. In view of the misdirections by the learned Regional Magistrate alluded to above, we intend setting aside some of the convictions of both appellants and the sentences imposed in respect of the second appellant.

[109]. As far as the sentences are concerned, the Magistrate's approach in taking the rape convictions as one for purposes of sentence, is undesirable. The provisions of the CLAA envisage that for each rape conviction which falls under the auspices of section 51 (1), a life sentence should be imposed. We therefore intend imposing the reduced sentence in respect of the second appellant for the convictions on each charge of rape.

[110]. As far as the first appellant is concerned, despite the fact that he has now been convicted on only three counts of rape, his sentence to life imprisonment remains, in our view, an appropriate sentence. The fact of the matter is however that the court *a quo*'s approach is, in our judgment, undesirable. The sentence of the first appellant therefore stands to be set aside, reconsidered and replaced with a sentence of direct imprisonment for life on each of the three convictions of rape.

Order

Accordingly the following order is made:

1. The appeal by the first appellant, Roger Jaars, against his convictions is upheld in part.
2. The first appellant's convictions in respect of count 1 (rape), count 2 (rape), count 3 (rape), count 8 (assault), count 9 (kidnapping) and count 10 (indecent assault) are confirmed.
3. The first appellant's convictions in respect of count 4 (rape) and count 5 (rape) are set aside.
4. The first appellant's sentence in respect of the rapes be and is hereby set aside and are replaced with sentences of imprisonment for life in respect of each of the rape convictions. His appeal against his sentences in respect of the remaining convictions is dismissed. Therefore the sentences imposed on the first appellant are set aside and in its place and stead are substituted the following:

'(1). Count 1 (rape): direct imprisonment for life;

(2). Count 2 (rape): direct imprisonment for life;

- (3). Count 3 (rape): direct imprisonment for life;
 - (4). Count 8 (Assault): two years direct imprisonment;
 - (5). Count 9 (Kidnapping): ten years direct imprisonment; and
 - (6). Count 10 (Indecent assault): five years direct imprisonment.
 - (7). The sentences shall run concurrently.
 - (8). The sentences are antedated to the 5th June 2015'.
- 5. The appeal by the second appellant, Shane Botha, against his convictions is upheld in part.
 - 6. The second appellant's convictions in respect of count 4 (rape), count 5 (rape) and count 9 (kidnapping) are confirmed.
 - 7. The second appellant's convictions in respect of count 1 (rape), count 2 (rape) and count 3 (rape) are set aside.
 - 8. The appeal by the second appellant, Shane Botha, against his sentences is upheld in part.
 - 9. The second appellant's sentence in respect of the rapes be and is hereby set aside and are replaced with sentences of direct imprisonment for 25 years in respect of each of the rape convictions. His appeal against his sentences in respect of the remaining convictions is dismissed. Therefore the sentences imposed on the first appellant are set aside and in its place and stead are substituted the following:
 - '(1). Count 4 (rape): 25 years direct imprisonment;
 - (2). Count 5 (rape): 25 years direct imprisonment; and
 - (3). Count 9 (Kidnapping): ten years direct imprisonment.

- (4). All of the sentences shall run concurrently, which means that the second appellant is effectively sentenced to direct imprisonment for a period of 25 years.
- (6). The sentences are antedated to the 5th June 2015'.

L R ADAMS

*Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg*

I agree, and it is so ordered

M MAKUME

*Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg*

HEARD ON:	7 th May 2018
DATE OF JUDGMENT:	8 th June 2018
FOR THE FIRST APPELLANT:	Mr Jesse Penton
INSTRUCTED BY:	Legal Aid South Africa
FOR THE SECOND APPELLANT:	Adv Elvis Tlake
INTRUCTED BY:	Johannesburg Justice Centre
FOR THE RESPONDENT:	Adv N Muller
INSTRUCTED BY:	The Office of the Director of Public Prosecutions, Gauteng Local Division, Johannesburg