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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: A005/2013

In the matter between:

NDLOVU JEFFERY

Appellant

and

THE STATE

Respondent

JUDGMENT

FISHER J:

Introduction

[1] On 14 June 2011 Regional Magistrate Mudau (as he then was) found that the

appellant was part of a group of three men who kidnapped the complainant at gunpoint, and one of two men who raped her. His co-perpetrators were not apprehended. The Magistrate convicted the appellant of rape. He sentenced him to life imprisonment on the basis that the minimum sentencing provisions in s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Act) applied as the rape took place in circumstances where the complainant was raped more than once.

[2] The appellant was also convicted of robbery with aggravating circumstances, as it was found that the complainant was robbed at gunpoint. For this offence, he was sentenced to 15 years' imprisonment. The sentences were to run concurrently.

[3] Rape perpetrated by more than one person on another is rife in South Africa. It is a phenomenon which has generated terms in popular culture such a '*gang rape*' or '*jackrolling*'. It generally involves groups of men preying on women. It is a base and perverted display of male domination and machismo and a random orchestration of dehumanisation and humiliation of the woman. If not apprehended these men simply go on their way- probably to reoffend. Survivors are left changed forever.

[4] The Legislature has, in its minimum sentencing legislation, acknowledged this form of rape as particularly serious in that it is one of crimes for which life imprisonment is demanded. Section 51(1) of the Act is prefaced by the words: 'Discretionary minimum sentences for certain serious offences'. In s 51(1), the Act provides that:

'(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.'¹

[5] Part I of Schedule 2 of the Act provides, *inter alia*, that a regional court or High Court shall have jurisdiction to impose life imprisonment on an offender who is convicted of:

¹ The amendment to this section to include reference to a regional court was effected by The Criminal Law (Sentencing) Amendment Act 38 of 2007.

'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; ...'

[6] Over the past six years, there has been some confusion as to the application of this minimum sentencing legislation in relation to the situation where a victim is raped more than once by more than one perpetrator. This confusion has its origin in *Mahlase v S*,² where the Supreme Court of Appeal (the SCA) found that an accused convicted of multiple rapes could not receive the mandatory minimum sentence of life imprisonment if his co-perpetrators or accomplices had, as yet, not been apprehended and convicted.

[7] Many courts, whilst declaring that the dictum in *Mahlase* appears to be incorrect, have found themselves bound to follow it. The dictum has also had the effect that the prosecution authorities have formulated charges on the basis that the minimum sentencing provisions are not invoked where only one perpetrator of a multiple rape is charged.

The Appeal

[8] The appellant appeals against both the conviction and sentence. As to conviction, he argues that he was wrongly identified. As to sentence, he argues that the application of the *Mahlase* dictum means that the Magistrate incorrectly applied the minimum sentencing provisions.

[9] The State argues that the identification of the appellant is sound. As to sentence, it submits that the recent Constitutional Court decision of *Tshabalala v S; Ntuli v S*³ has

² *Mahlase v S* (255/13) (2013) ZASCA 191 (29 November 2013).

³ *Tshabalala v S; Ntuli v S* CCT323/18; CCT69/19 [2019] ZACC 48 (11 December 2019).

the effect of overruling *Mahlase*. The appellant argues that this is not so, and seeks that this Court apply *Mahlase*. This issue is central to the appeal on sentence.

[10] Further, as to sentence, the appellant raises the point that the charge sheet did not adequately set out that the charge was one in respect of which the minimum sentence would be applied and that thus he has been denied a fair trial.

The Evidence

[11] As with many cases of multiple rapes, the ordeal of the complainant, to whom I will refer as Ms N, began as she was going about her normal business. She testified that she had had a long day working at a restaurant in Randburg, having started her shift at 10:00 and finished it 14 hours later at 00:00. She and five co-employees left work together. I will refer to these co-employees as P, A, O, E, and R.⁴ They were given a lift by the restaurant manager to a public place where they were likely to find a taxi which would take them to central Johannesburg. They all wished to travel together in one taxi as it was late at night and they did not want to leave anyone waiting alone. They hoped that safety lay in numbers. Sadly, it did not. The taxi that stopped to pick them up was a light green and white Toyota Venture. It was driven by the appellant. There were two other male occupants in the vehicle.

[12] The group of women discussed their destination and the fare with the appellant. They boarded the taxi after being assured that they would be taken to Johannesburg at a fare of R20. They were unsuspecting that anything was amiss until they realised that the taxi was taking an unfamiliar route. After approximately 15 minutes, A asked about the route being taken. The man who was seated in the passenger seat in the front of the vehicle produced a firearm. She was told that "she talks too much". The appellant threatened to throw her from the moving taxi. The women were then ordered not to look at the men and to hand over their belongings including jewellery, watches, and handbags. The men began to terrorise the women further by telling them that they

⁴ The women are named as they are in the record. I have excluded their surnames for the purposes of

planned to kill them. The appellant said that they would be dumped in a pit.

[13] The terrified women were driven to an open veld and told to disembark. As they did so, they were manhandled by the men who searched them for further valuables and in the process groped their breasts and genitals. The women were then made to lie down on the ground on their backs. As they lay there, the appellant selected Ms N and one of the others selected P. They were told to stand and were taken to the vehicle. They were informed that they had been selected to be raped. P was seated in the front seat between the appellant and the man who had 'selected' her. This was the same man who had produced the firearm. The third man sat at the back.

[14] Presumably to add to their humiliation, the appellant told the women that he was intending to rape both the woman on one bed. Both women mentioned this in their evidence. The taxi was driven off, leaving the others behind in the veld. The two women were then driven to an informal settlement. Ms N was taken by the appellant from the vehicle to a dark room. She pleaded for her life. She was ordered to sit on a bed and undress. The appellant then put his finger into her vagina and thereafter raped her using his penis and without a condom. She was told to dress which she did. At that point and whilst the appellant was still in the room, one of the other assailants (who appeared to have been waiting outside the room), entered the room and informed her that he would also rape her. She was taken back to the bed and ordered to undress again. Before leaving the room, the appellant told the other man that he had not used a condom. In her statement to the police, Ms N stated that the second rapist had at first used a condom, but that on withdrawing had emptied the contents of the semen into her vagina. In her evidence she said that he had not used a condom, but had ejaculated into her vagina. What appears clear is Ms N was raped by this man. At that stage of the events, she was obviously traumatised. The issue of whether a condom was used is, to my mind, not a material contradiction.

[15] All this time P had remained in the car and was held at gunpoint. She was able to

maintaining their privacy and that of the complainant.

identify the appellant when he went to open the door to take Ms N out and into the shack. She saw that he was wearing an orange T-shirt. Later, when Ms N was brought back to the vehicle, P remained sitting in front, between the appellant and the front seat passenger. She testified that she had escaped being raped by pleading with the men to spare her because she had given birth a week previously and still had stitches. Chillingly, she was chided by the men for not explaining this sooner so that they could have chosen one of the other women for the planned rape. The appellant later informed P that he had wanted to rape her, but that he had made do with Ms N.

[16] Ms N was again forced into the vehicle and sat beside the man who had not participated in the rapes. She immediately disclosed to P that both men had raped her. The appellant then said that the women should be killed or burnt in the vehicle. The man who had not participated in the rapes dissuaded the others from killing the women. They were then taken to another open veld and left there.

[17] Ms N was on the point of collapse by this stage, but they were so terrified that the men would return that P almost carried Ms N away from the scene. Fortunately, they then came upon a security guard who phoned colleagues who then took the women to the Douglasdale Police Station. From there, Ms N was taken to Olivedale Clinic and examined by a doctor. The J88 report compiled by the doctor reveals evidence of penetration, bruising and bleeding, and a white discharge in her vagina. The bleeding was not a menstrual bleed; it was a result of the rapes. The doctor, in the J88 report, concluded that Ms N had been raped.

[18] Meanwhile, the other women who had been left in the veld earlier managed to find a petrol station. The manager of the petrol station called the police who arrived and took their statements. Notwithstanding their own ordeal, the women attempted to assist the police in searching the area for Ms N and P. Whilst they were searching, the police received a call to say that Ms N and P had been brought to the Douglasdale Police Station. It was there that the women were all reunited. Notwithstanding her own shock and discomfort, A accompanied Ms N to the hospital to offer support and comfort. By

this stage the night had worn on to morning and it was approximately 04:00.

[19] Constable Mamba, who was the arresting officer, then took up the story. He testified that he took the women to the clinic. They had described the vehicle and the appellant's clothing. The appellant was wearing an orange T-shirt and a black cap. On leaving the clinic, he and his partner took it upon themselves to patrol the area. They did not inform Ms N and A that they were going to look for the appellant. Constable Mamba suspected that the vehicle was in general use as a taxi and hoped to locate it in the area. Whilst at Diepsloot, he spotted a green and white Toyota Venture vehicle that matched the description given by the women. He confronted the driver, who was wearing an orange T-shirt and black cap. He searched the vehicle and found a number of items including a bottle of brandy, a bottle of cola and many personal items (which items were later confirmed to have been taken from the women). According to Constable Mamba, the appellant stated that the items must have been left there by a passenger.

[20] On apprehending the appellant, Constable Mamba took him directly to Olivedale Clinic. The vehicle was left in the street in the custody of his partner. When he arrived at the clinic with the appellant, A screamed and Ms N began to cry uncontrollably. A testified that when she first saw the appellant she believed he had come back for them. She did not notice that he was in the presence of a police officer. The identification by both women was spontaneous. They also identified the clothing worn by the appellant as those worn by him during the previous night. A distinctive article of clothing worn by him was the orange T-shirt, which was worn with blue trousers.

[21] In his evidence, the appellant sought to explain his presence in the vehicle thus: he was part of a group of five drivers who drove the Venture. They could be called at any time after hours by clients to collect them from work. The vehicle keys were left in the vehicle after hours so that any one of the drivers who needed the vehicle could use it for a fare. He had parked the vehicle at the home of the owner of the taxi at approximately 19:30, and he had collected it again early that morning and shortly before

his arrest.

[22] Whilst he testified that he had told Constable Mamba this, his version was not given to the police by way of a statement at the time of his arrest. Whilst he had no legal obligation to give a statement, his evidence was wholly unsatisfactory in this regard. The appellant testified that although he had lived at the home of the taxi owner for some time, he did not know the address of the owner or his telephone number. He had never taken note of the number of the plot. His employer's telephone number had been recorded on his phone which was taken at the time of his arrest. Thus, any one of the other four drivers could have taken the vehicle that night. As to his clothing on the night, he testified that the orange T-shirt and blue trousers was a uniform worn by all the drivers. He later stated that he was wearing a brown shirt the previous night. He gave a confused version as to why he wasn't wearing the 'uniform' the previous night. It was to the effect that he had taken the vehicle to be repaired on the morning and was not driving. He had not worn the orange T-shirt to his girlfriend's house that evening, but had changed into those clothes on the morning, having previously left the clothes at his girlfriend's house.

Conviction

[23] Much was made by the appellant of fact that the events unfolded in the dark and that the women were ordered not to look at the men. Ms N, P, and A were however adamant in their identification of the appellant. They testified that they were able to get a proper look at him, notwithstanding the dark. It was some fifteen minutes before they were told not to look at the appellant and the other two males. There was a light in the car that went on when the door was opened when they first got in -the appellant opened the door and was next to them as they embarked. There was also some light coming from the mall across the road. Ms N engaged the driver in conversation as to where they were going and the cost thereof. She was looking at the appellant as they spoke. In addition, the lights went on each time the vehicle door was opened. Both Ms N and P had adequate time to observe and the appellant. The appellant opened and closed the door each time, as it could not be opened from inside the vehicle. A testified that the

appellant was drinking in the car and she confirmed that he smelled of alcohol when she saw him again in the hospital.

[24] The Magistrate's analysis of the evidence relating to identification of the appellant was careful and his reasoning impeccable. His findings are consistent with the principles laid down in *S v Mthetwa*⁵ where the Appellate Division (as it then was) stated the following:

"Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities ... "

[25] It is my view that the testimony of Ms N, P, and A pass muster in accordance with the principles laid down in *Mthetwa*. The Magistrate's conclusion that the identification was established beyond a reasonable doubt cannot be faulted.

[26] The appellant called an alibi witness, Ms Maseko, his girlfriend who is the mother of his child. Her evidence was unsatisfactory and unreliable. The appellant was arrested at approximately 04:30. Although she was unable to give a precise time, she stated that the appellant was with her until 'past five to six'. Both she and the appellant testified that the appellant arrived with the police at her house. The appellant stated that he was driving the vehicle, followed by the police. Constable Mamba testified that after

⁵ *S v Mthetwa* 1972 (3) SA 766 (A) at 768A-C.

accosting the appellant, he took him straight to the clinic. His partner remained with the vehicle. It is highly unlikely that the police would have permitted the appellant to drive his vehicle to his girlfriend's house. Why Ms Maseko would have remembered precisely what the appellant was wearing on that day, when he slept there on so many occasions, is suspicious. At some point in her testimony, she testified that the appellant was wearing a brown shirt when he arrived at her house the previous evening; later she stated that he was wearing an orange shirt; she then attempted to correct herself. This alibi was, to my mind, correctly rejected by the Magistrate as being contrived.

[27] It is trite that the onus which rests on the State in criminal cases is to prove the guilt of an accused beyond reasonable doubt, but not beyond all shadow of a doubt. A court does not have to rely upon absolute certainty, but merely upon justifiable and reasonable certainty.⁶

[28] To sum up, the appellant was found approximately two hours after the attack, driving the taxi which was used in the commission of the offences. In it were some of the items stolen from the women. P, A, and Ms N identified him as their assailant. They recognised his clothes too - particularly the orange T-shirt. His attempts to suggest that he was not wearing the clothes in the hours leading up to his arrest, and that he had freshly changed into them early that morning, were unconvincing and fell to be rejected as false.

[29] The conviction of the accused was based on the factual findings of the trial court. In *Mkhize v S*,⁷ Mocumie AJA held:

'The approach to be adopted by a court of appeal when it deals with the factual findings of a trial court is trite. A court of appeal will not disturb the factual findings of a trial court unless the latter had committed a material misdirection. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct. The appeal court will only reverse it where it is

⁶ *S v Ntsele* 1998 (2) SACR 178 (SCA), see headnote at 180D.

⁷ *Mkhize v S* (16/2013) [2014] ZASCA 52 (14 April 2014) at para 14 (Maya, Shongwe, Willis and Saldulker JJA concurring).

convinced that it is wrong. In such a case, if the appeal court is merely left in doubt as to the correctness of the conclusion, then it will uphold it. This court in S v Naidoo & others⁸ reiterated this principle as follows:

"In the final analysis, a Court of appeal does not overturn a trial Court's findings of fact unless they are shown to be vitiated by material misdirection or are shown by the record to be wrong."

There was no material misdirection and the findings of fact were correct. Thus the conviction must stand.

Sentence

The Application of the Mahlase Dictum

[30] It often happens that only one person accused of having been involved in a gang rape is apprehended and convicted in due course. *Mahlase* was such case. In the court *a quo*⁹ Makgoba AJ set out the complainant's evidence as follows:

'The motor vehicle moved and while they were on their way complainant heard one of the attackers saying that "I am asking for condoms" from Mr. Budeli and one or more of the attackers indicated that "let's have sex with this woman." They indeed unzipped her jeans and two of the attackers had sex with her. They proceeded with their journey until they stopped somewhere in the bush near a place called Solomondale where she was ordered to alight and she did alight and then she ran into the bush.'

[31] Makgoba AJ accepted the complainant's evidence. In sentencing the accused he stated as follows:

'When I come to the rape incident, with regard to accused 6, no words can express the horror that woman, the victim, found herself in. How to humiliate a woman like that, raping a woman in a moving car in front of other people and the said rape being committed by more than one person.'

⁸ S v Naidoo & others 2003 (1) SACR 347 para 26.

⁹ See S v Mahlangu and Others unreported Venda Provincial Division case no CC46/03 dated 2003-11-20 Makgoba AJ, as he then was, convicted the appellant, Mahlase (who was charged as accused number six) of having raped the complainant together with another man who had, at the time of appellant's trial,

[32] He found that the mandatory minimum sentence of life imprisonment applied because of his finding that the complainant was raped more than once. He accordingly sentenced the appellant to life imprisonment. Leave to appeal to the SCA was granted against sentence only. Thus the conviction stood.

[33] However, notwithstanding that the judge *a quo* had found that the complainant was raped twice and the conviction was not under appeal, the SCA refused to find that the complainant had been raped twice for the purposes of sentencing. The judgment reads as follows on this point:

*'Whilst the motor vehicle was moving, Ms. DM was raped, apparently more than once, and allegedly by more than one of the assailants.'*¹⁰ (My emphasis.)

[34] The court went on to hold that there had been a misdirection in the imposition of the mandatory sentencing provisions. It reasoned as follows:

*'The second misdirection pertains to the sentence imposed for the rape conviction. The Court correctly bemoaned the fact that Ms. OM was apparently raped more than once and in front of her colleagues. The learned Judge however overlooked the fact that because accused 2 and 6, who were implicated by Mr. Mahlangu, were not before the trial court and had not yet been convicted of the rape, it cannot be held that the rape fell within the provisions of Part 1 of Schedule 2 of the Criminal Law Amendment Act (where the victim is raped more than once) as the high court found that it did. It follows that the minimum sentence for rape was not applicable to the rape conviction and the sentence of life imprisonment must be set aside.'*¹¹

[35] The premise in *Mahlase* is that, in order for the minimum sentencing provisions to be triggered, there must be an actual conviction of rape of the co-perpetrator/s. The illogicality of this approach is shown by the facts and reasoning in *Cock v S; Manuel v*

absconded.

¹⁰ *Mahlase* (note 2 above) para 4.

¹¹ *Ibid* para 9.

S,¹² where in the case of a gang rape where both men had pleaded guilty at separate hearings before different judges, the rapists then each appealed their respective life sentences on the basis of the *Mahlase* dictum. The court, per Pickering J, had the following to say in this regard:

'A trial court is obliged to sentence an accused who appears before it on the basis of the facts which it found to have been proven when convicting the accused. The Mahlase dictum, however, gives rise, with respect, to the illogical situation that a trial court, having found beyond reasonable doubt that the complainant was raped more than once by two men and having convicted the accused accordingly, must, for purposes of the Act, disregard that finding and proceed to sentence the accused on the basis that it was not in fact proven that she was raped more than once; that the provisions of the Act relating to the imposition of the prescribed minimum sentence of life imprisonment are therefore not applicable; and that the minimum sentence applicable in terms of the Act is one of only ten years imprisonment.

I do not understand on what basis the credible and cogent evidence of the complainant that she was raped by two men, one of whom was identified as being the accused, should be disregarded, not only to the prejudice of the victim and of the State, but also, by way of contrast, to the benefit of the accused on the arbitrary basis that he happened to be the first of the gang to have been arrested and convicted.

*This in itself gives rise to the anomalous situation that, whereas the first accused to be convicted and sentenced (the appellant Cock in this matter) is liable to a minimum prescribed sentence of only ten years imprisonment, any other accused who is thereafter convicted as having been part of the gang which raped the complainant, (the appellant Manuel in this matter) would be liable to the prescribed minimum sentence of life imprisonment, it now having been established in terms of Mahlase supra that complainant had indeed been raped more than once, by two men.'*¹³

¹² Cock v S; Manuel v S (CA108/2013, CA121/2014) [2015] ZAECHGHC 3 (3 February 2015); 2015 (2) SACR 115 (ECG).

¹³ Ibid paras 26-28.

[36] *Mahlase* has been roundly criticised - but at the same time it has been accepted as binding precedent.¹⁴ In *Khanye v S*,¹⁵ a full bench of this division had occasion to deal with the dictum in *Mahlase* under similar circumstances to these. The court (*per* Carelse J) in dealing with the binding effect of *Mahlase* had resort to the dictum in *S v Legoa*,¹⁶ which it held equally bound it. The learned Judge found that the ratio of *Legoa* is that once the jurisdictional facts which trigger the mandatory sentence have been proved, a court is obliged to impose the prescribed sentence unless substantial and compelling circumstances are found to exist. She referred in this regard to the following passage in *Legoa*, *per* Cameron JA (as he then was):

*"... offences scheduled in the minimum sentencing legislation are likewise not new offences. They are but specific forms of existing offences, and when their commission is proved in the form specified in the Schedule, the sentencing court acquires an enhanced penalty jurisdiction. It acquires that jurisdiction, however, only if the evidence regarding all the elements of the form of the scheduled offence is led before verdict on guilt or innocence, and the trial court finds that all the elements specified in the Schedule are present."*¹⁷

[37] Carelse J thus opted to follow *Legoa* instead of *Mahlase*, as she found she was entitled to do so. She stated the position thus:

*'Although Mahlase binds this court, S v Legoa equally binds this court and continues to be referred to with approval by the Supreme Court of Appeal. S v Legoa was never considered by Pickering J in Cock v S, Thompson AJ in S v Nkosinathi Standford Mejeni and the Supreme Court of Appeal in S v Mahlase. I have no doubt that had Legoa been considered it may have resulted in a different finding.'*¹⁸

¹⁴ Ibid para 30; and for example also *Khanye v S* (A66/2015) [2017] ZAGPJHC 320 (13 March 2017); *Ndlovu v S* (AR96/2018) [2019] ZAKZPHC 56 (12 August 2019); 2019 (2) SACR 484 (KZP); *Nyaku v S* (A212/2018) [2018] ZAFSHC 208 (22 November 2018).

¹⁵ *Khanye v S* (A66/2015) [2017] ZAGPJHC 320 (13 March 2017).

¹⁶ *S v Legoa* (33/2002) [2002] ZASCA 122 (26 September 2002); 2003 (1) SACR 13 (SCA).

¹⁷ Ibid para 18.

[38] In *Ndlovu v S*,¹⁹ the majority of the full court found that the reasoning in *Khanye* is flawed in that it begs the question of what constitutes proof for the purposes of the minimum sentencing legislation in issue.²⁰

[39] In the present case the conviction was based on the evidence of Ms N and the other witnesses. Ms N's evidence was accepted. Once that evidence is accepted, it constitutes the requisite proof needed to convict the appellant of multiple rapes, triggering the minimum sentence legislation. I am not satisfied that the reasoning in *Khanye* is wrong. I thus find that I am bound to follow the dictum in *Khanye* and equally the dictum in *Legoa*.

[40] However, even if the *Ndlovu* approach is to be preferred, in my view, the recent findings in the Constitutional Court in *Tshabalala* serve to overrule the *Mahlase* dictum.²¹ I now turn to examine this position.

The Effect of Tshabalala on the Mahlase dictum

[41] *Tshabalala* also involved multiple rapes perpetrated by a group of men. The attack took place in an informal settlement. The group moved from one home to another in a prearranged sequence. The Constitutional Court found that all the accused associated themselves with the criminal enterprise and that they had an understanding that they would, as a group, invade houses in the community. Included in this understanding was that some women found in the houses which the group invaded would be raped. No member of the group disassociated himself from the violent actions perpetrated by the others in the group.

[42] The main issue which arose for consideration was whether the doctrine of common purpose was applicable to the common law crime of rape. The applicants contended that the doctrine does not apply because rape, as then defined, required the

¹⁸ *Khanye* (note 16 above) para 28.

¹⁹ *Ndlovu v S* (AR96/2018) [2019] ZAKZPHC 56 (12 August 2019); 2019 (2) SACR 484 (KZP).

²⁰ *Ibid* para 10.

²¹ *Tshabalala* (note 3 above).

unlawful insertion of the male genitalia into the female genitalia.²² They thus reasoned that it was impossible for the doctrine to apply as, by definition, the causal element cannot be imputed to a co-perpetrator. This is a common argument applied in a number of judgments and espoused by many writers in the field of criminal law and jurisprudence. It is widely referred to as the 'instrumentality argument'.

[43] This argument is supported by the academic, CR Snyman, who singles out rape as one of the crimes to which the doctrine of common purpose does not apply. He writes thus:

*'Rape as well as certain other sexual offences such as intercourse with a girl below the age of sixteen in contravention of section 14 of the Sexual Offences Act 23 of 1957 are good examples of such crimes. Thus if X rapes a woman while his friend Z assists him by restraining the woman but without himself having intercourse with her, Z is an accomplice, as opposed to a co-perpetrator, to the rape.'*²³

[44] *S v Kimberley and Another*²⁴ is characteristic of this approach. In this case, the court interpreted paragraphs (a)(i) and (ii) of Schedule 2 of the Act to require that the complainant be raped more than once. In other words, there needs to be two acts of penetration. Although, in that case, Zulman JA found that it was not necessary to go into the degrees of participation in the rapes for the purposes of interpreting paragraphs (a)(i) and (ii), he concluded:

'So for example a woman who assists a man to rape another woman or who makes it possible for him to do so, cannot be held to have committed the act of

²² The definition has now been extended under the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA) to allow for the crime of rape to be committed using not only one's body, but any inanimate object. Section 1 states that 'sexual penetration' includes any act which causes penetration to any extent whatsoever by-

(a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;

(b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or

(c) the genital organs of an animal, into or beyond the mouth of another person, and 'sexually penetrates' has a corresponding meaning.

²³ Snyman Criminal Law 5 ed (LexisNexis, Durban 2008) at 269.

²⁴ *S v Kimberley and Another* (519/2004) [2005] ZASCA 78 (19 September 2005).

rape (S v Jonathan en Andere 1987 (1) SA 633 (A) at 643 H-1).

*Simply put it is of fundamental importance to vest a High Court with jurisdiction, to impose a sentence of life imprisonment that there be more than one act of rape.*²⁵

[45] The instrumentality argument, focusing as it does on the act of penetration, imbues the crime of rape with a measure of exactitude which seeks to introduce a caution into the enquiry which is unprincipled, inappropriate and unjustified. This focus has the added effect of casting doubt on the ability of complainants to properly determine, with the correct degree of precision, whether there has been the required penetration in the absence of the weighing up of the version of the person who has penetrated her.

[46] The required proof of penetration cannot be elevated to a degree where the caution to be taken by a court is such that the credible evidence of the complainant is rejected if the second rapist has not been apprehended, indicted and convicted. This approach seeks to introduce a cautionary rule based on the fact that the complainant is usually a single witness. This approach has been dealt with in many cases. It is trite that a court is entitled to treat single witnesses with a certain amount of caution. This does not elevate the position to that of applying the cautionary rule.²⁶ The court need only find that the evidence was trustworthy, and that the truth has been told. See *S v Sauls*²⁷ where it was held that:

'There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness.... The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule... may be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, however slender,

²⁵ Ibid para 12.

²⁶ See *S v M* 1999 (2) SACR 548 (SCA).

²⁷ *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E-G.

of the witnesses' evidence were well founded" It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.'

[47] In *S v Artman*,²⁸ Holmes JA held as follows:

'She was, however, a single witness in the implication of the appellants. That fact, however, does not require the existence of implicative corroboration: indeed, in that event she would not be a single witness. What was required was that her testimony should be clear and satisfactory in all material respects.'

[48] In *S v Mahlangu and Another*,²⁹ the court said the following: *'The court can base its findings on the evidence of a single witness, as long as such evidence is substantially satisfactory in every material respect or if there is corroboration. The said corroboration need not necessarily link the accused to crime... '* In the present case, such corroboration, if required is found in the J88 report.

[49] The regional court found that the complainant's evidence passed this test. The instrumentality approach goes against the developments in our law in relation to rape. In her concurring judgement in *Tshabalala*, Victor AJ eloquently expressed the scourge of paternalism in South African jurisprudence and the law of evidence thus:

'A historical overview of these legal barriers in our South African jurisprudence demonstrates a number of embedded patriarchal gender norms in the procedural rules of evidence in relation to rape. This Court has recognised this, for example in Masiya, where Nkabinde J referred to the statutory developments in the definition of the crime of rape in recent decades. In 1993, for example, the rule that a husband could not rape his wife, the so-called marital rape exemption, was abolished. Other legal impediments to the conviction of a rape offender included excessive shielding of the perpetrator, the medieval hue and cry rule, and the cautionary rules and as relevant in this case the concept of instrumentality and

²⁸ *S v Artman and Another* 1968 (3) SA 339 (A) at 341A-8.

²⁹ *S v Mahlangu and Another* [2011] ZASCA 64; 497/10 (1 April 2011); 2011 (2) SACR 164 (SCA) at 1718-C.

*common purpose in the crime of rape.*³⁰ [Footnotes omitted].

[50] The Constitutional Court in *Tshabalala* has now conclusively put paid to the instrumentality argument. Mathopo AJ held as follows on this point:

*'The instrumentality argument has no place in our modern society founded upon the Bill of Rights. It is obsolete and must be discarded because its foundation is embedded in a system of patriarchy where women are treated as mere chattels. It ignores the fact that rape can be committed by more than one person for as long as the others have the intention of exerting power and dominance over the women, just by their presence in the room. The perpetrators overpowered their victims by intimidation and assault. The manner in which the applicants and the other co-accused moved from one household to the other indicates meticulous prior planning and preparation. They made sure that any attempt to escape would not be possible.'*³¹

[51] The facts and reasoning in *Cock* (which emerges from that passage of the judgment quoted above) show the absurdity of the application of the *Mahlase* dictum at work: the rapist first convicted is not subject to the mandatory minimum sentence provisions but subsequently tried rapists, involved in the same factual complex, are.³²

[52] It was apparently assumed by the SCA in *Mahlase* that this anomalous state of affairs could only be cured by having the multiple rapists tried together. The instrumentality argument lies at the heart of the *Mahlase* dictum, its premise being that group rape must be viewed apart from its purpose and effect, and with the focus on the physical. The true answer, however, lies in the understanding that the harm caused by rape is something greater than non-consensual penetration but is, at its core, the assumption of power typically exerted by men against women.

[53] This approach was dealt with in *Masiya v Director of Public Prosecutions Pretoria*

³⁰ *Tshabalala* (note 3 above) para 80.

³¹ *Ibid* para 54.

³² *Cock* (note 16 above).

and Another,³³ where Nkabinde J found that our Constitution heralded the movement of rape jurisprudence away from its patriarchal roots to a rights-based approach.³⁴ She stated the position thus:

[54] *'The focus is on the breach of "a more specific right such as the right to bodily integrity" and security of the person and the right to be protected from degradation and abuse. The crime of rape should therefore be seen in that context.'*³⁵ [Footnotes omitted]

[55] In instances of multiple rapes, as in this case, 'the mere presence of a group of men results in power and dominance being exerted over female victims. In his concurrence in *Masiya*, Langa CJ said the following:

*'Today rape is recognised as being less about sex and more about the expression of power through degradation and the concurrent violation of the victim's dignity, bodily integrity and privacy. In the words of the International Criminal Tribunal for Rwanda the "essence of rape is not the particular details of the body parts and objects involved, but rather the aggression that is expressed in a sexual manner under conditions of coercion."'*³⁶

[56] In any event, the facts of the case show, on the application of the principles in *Tshabalala*, that there was a common purpose at work in relation to all three assailants. All three were responsible for luring the women into the vehicle with the purpose of robbing them. When Ms N and P were singled out to be raped, all three men rode along. Notwithstanding that one of the men did not rape Ms N, he did not do anything to suggest that he disassociated himself with the kidnapping and ultimate rapes. He stayed in the vehicle whilst the rapes were taking place and P was being held at gunpoint. The second rapist, as is apparent from the evidence, entered the room before the appellant had left, declared his intention and discussed the question of a condom

³³ *Masiya v Director of Public Prosecutions Pretoria and Another* CCT54/06 [2007] ZACC 9 (10 May 2007); 2007 (5) SA 30 (CC); 2007 (8) BCLR 827.

³⁴ *Ibid* paras 20-24.

³⁵ *Ibid* para 25.

with the appellant.

[57] It seems clear from the evidence that the appellant and his co-perpetrators pre-planned the events of the evening. Even in the absence of a plan, the element of common purpose was established in terms of the principles laid down in *S v Mgedezi & others*.³⁷ In *Thebus and Another v The State*,³⁸ the Constitutional Court said the following with regard to the doctrine of common purpose:

'The doctrine of common purpose dispenses with the causation requirement. Provided the accused actively associated with the conduct of the perpetrators in the group that caused the death and had the required intention in respect of the unlawful consequence, the accused would be guilty of the offence. The principal object of the doctrine of common purpose is to criminalise collective criminal conduct and thus to satisfy the social "need to control crime committed in the course of joint enterprise". The phenomenon of serious crimes committed by collective individuals, acting in concert, remains a significant societal scourge. In consequence crimes such as murder, robbery and malicious damage to property and arson, it is often difficult to prove that the act of each person or of a particular person in the group contributed causally to the criminal result. Such a casual prerequisite for a liability would render nugatory and ineffectual the object of the criminal norm of common purpose and make the prosecution of the collaborative criminal enterprises intractable and ineffectual.'

[58] Based upon the evidence of the State witnesses, the learned Magistrate

³⁶ Tshabalala (note 3 above) para 51.

³⁷ *S v Mgedezi & others* 1989 (1) SA 687 (A). The Appellate Division held that in the absence of proof of a prior agreement, an accused who was not shown to have contributed causally to the actual crime can be held liable for those events if certain prerequisites are satisfied. 'In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault. ... Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite mens rea; so, in respect of the killing of the deceased he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue.'

³⁸ *Thebus and Another v The State* (CCT36/02) [2003] ZACC 12 (28 August 2003); 2003 (6) SA 505 (CC) para 34.

convicted the accused in terms of s 51(1) and Part I of Schedule 2 of the Act. The minimum sentence provisions were thus triggered, and the Magistrate was obliged to impose life imprisonment if no substantial and compelling circumstances justifying the imposition of a lesser sentence were shown to exist. The Magistrate took into account the particulars made available to him in relation to the personal circumstances of the appellant. He correctly found that no substantial and compelling circumstances existed to justify a departure from the mandatory minimum sentence of life imprisonment. As was stated by Nugent JA SCA in *S v Vilakazi*,³⁹

'In cases of serious crime the personal circumstances of the offender, by themselves, will necessary 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'

[59] Not only were no mitigating circumstances found, but the details of the ordeal show the presence of aggravating factors. The crimes committed against these women are heinous. Ms N and P were both mothers who were still breastfeeding; P had given birth a week previously. They were out late at night working long hours in order to earn a living so they could support their families. They were terrorised and brutalised for the perverse gratification of their assailants. From the evidence it is clear that they were in grave danger of being murdered. The appellant intended to murder them but was talked out of doing so by one of the other men.

[60] The manner in which the appellant picked out the two women to be raped was callous and calculated to humiliate them and the other women who had been forced to lie with them on the ground. He arrogated himself, as a man, dominion over their bodies and their possessions and their lives.

³⁹ *S v Vilakazi* (576/07) [2008] ZASCA 87 (3 September 2008); 2009 (1) SACR 552 (SCA) para 58.

[61] The appellant has showed no remorse. He stuck throughout to a version that was untenable on the evidence. Ms N had to go onto medication as a prophylactic against HIV and other sexually transmitted diseases. She had to stop breastfeeding her newborn because of this medicine regime.

[62] The appellant has no prior convictions so, were he sentenced in terms of s 51(2), the maximum sentence applicable would be 10 years; imprisonment, as the appellant seeks here. He would, in the scheme of things, be eligible for parole now. A great injustice to Ms N would result in such an event.

[63] As Mathopo AJ commented in *Tshabalala*-

*'This scourge [of violence against women and children] has reached alarming proportions in our country. Joint efforts by the courts, society and law enforcement agencies are required to curb this pandemic. This Court would be failing in its duty if it does not send out a clear and unequivocal pronouncement that the South African Judiciary is committed to developing and implementing sound and robust legal principles that advance the fight against gender- based violence in order to safeguard the constitutional values of equality, human dignity and safety and security. One such way in which we can do this is to dispose of the misguided and misinformed view that rape is a crime purely about sex. Continuing on this misguided trajectory would implicate this Court and courts around this country in the perpetuation of patriarchy and rape culture.'*⁴⁰

[64] As far as the appeal in respect of the robbery is concerned, the facts show that all the men participated and associated themselves therewith. Although the appellant did not himself use the firearm, he intended that it be used to subdue the women. All the prerequisites of common purpose were present.

Did the Appellant Have a Fair Trial

[65] It is argued by the appellant that he was not properly advised of the fact that the

⁴⁰ Tshabalala (fn 3) para 63.

rape charge could attract a sentence of life imprisonment. I disagree. The charge sheet makes specific mention of the fact that the charge was one in terms of s 51(1) and Part 1 of Schedule 2 of the Act, and thus subject to a minimum sentence of life imprisonment. The provision on the charge sheet reading *'If accused is/are convicted of the charge of part 1 Schedule 2, Section 51(1) (a) makes provision for a minimum sentence of life imprisonment.'*⁴¹

[66] At an early part of the trial, and at the moment when the evidence of the second rape first emerged, the Magistrate was careful to inquire of the prosecutor if he would be relying on the mandatory minimum sentence. The prosecutor confirmed that indeed he would be asking for such minimum sentence in terms of s 51(1).⁴² The Magistrate also enquired whether the appellant's legal representative was aware that the mandatory minimum sentence would be relied on. In the bullet points at the foot of the charge sheet, reference was made to s 51(1)(a), which in its amended version, ass 51(1), contains the requisite information informing an accused that it, together with Part 1 of Schedule 2, refers to the minimum sentence being life imprisonment.

[67] I thus find that the notification of reliance on s 51(1) and Part 1 of Schedule 2 in the charge sheet, and the emphasis of this during the trial, was such that there was adequate forewarning of the appellant that a life sentence would be sought.

Conclusion

[68] Gang rapes are of a nature that they will more often than not involve a common purpose. The model of sentencing proposed by the *Mahlase* dictum led to an irrational result. It also created a motivation for a rapist to stay silent as to the crimes of his co-perpetrators.

[69] Even if I am wrong in this, in my view the reasoning in *Tshabalala* is such that it

⁴¹ Although the charge sheet makes reference to s 51(1)(a) of the Act, subsection (a) was deleted in the Criminal Law (Sentencing) Amendment Act 38 of 2007. It is however clear from the charge sheet that there is reference to s 51 and the fact that the minimum sentence of life imprisonment was applicable.

⁴² There was mention made of s 51(2), but the prosecutor immediately corrected this error, and reaffirmed

leaves no space for the continued application of the dictum in *Mahlase*.

[70] The lack of clarity which *Mahlase* has wrought in this critically important area of the law is such that an express pronouncement on it by either the SCA or the Constitutional Court would be apposite.

Accordingly the following order is made:

1. The appeal against conviction and sentence is refused.

FISHER J

GAUTENG LOCAL DIVISION, JOHANNESBURG

I concur,

WEINERJ

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing: 30 January 2020.

Judgment Delivered: 10 March 2020.

Appearances:

Counsel for the Appellant: Ms M Leoto, Attorney with a right of appearance in the High

reliance on s 51(1) of the Act.

Court.

Instructing Attorneys: Legal Aid

Counsel for the Respondent: Adv N P Serepo

Instructing Attorneys: The NPA