IN THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURTOF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A11/2016

DATE: 18/5/2017

L MANYATHI W MAKHUBELA APPELLANT

and

STATE RESPONDENT

JUDGMENT

KHUMALOJ

INTRODUCTION

[1] Exercising his automatic right to appeal that arose by virtue of a sentence of life imprisonment that was imposed upon him by the Regional Court held in Pretoria on 12 May 2015, following his conviction and sentence on 8 Counts as follows:

[1.1] Count 1, rape, life imprisonment

[1.2] Count 2, rape, 10 years imprisonment ;

[1.3] Count 3 , rape, 10 years imprisonment;

[1.4] Count 5, robbery with aggravating circumstances, 15 years imprisonment;

[1.5] Count 6, robbery with aggravating circumstances, 10 years imprisonment;

[1.6] Count 7, rape, 15 years imprisonment;

[1.7] Count 8, robbery with aggravating circumstances, 5 years imprisonment;

[1.8] Count 9, robbery with aggravating circumstances, 15 years imprisonment.

the Appellant is duly appealing both conviction and sentence on all counts. The sentences imposed on Count 2 to 9 were ordered to run concurrently with the life imprisonment sentence imposed on Count 1. He was acquitted on Count 4.

[2] The offences arose from three (3) different incidents that occurred on three (3) different days, that its alleged Appellant perpetrated against various complainants located at different places.

[3] Counts 1 to 3 were allegedly committed on 28 August 2009 at Kekana Gardens, the Complainant is S. M. (M.) whom the trial court found to have been repeatedly (three times to be exact) raped by the Appellant. Count 5 was committed on 23 June 2009 at Hammanskraal, the Complainant Edward De Klerk, was robbed of his jewellery, cutlery and cash at knifepoint. A golf club was found to have also been used. On Counts 6 to 9 the Complainant, J. J., was on 2 December 2009 at her house in Kammeeldrift raped, her and her son T. and daughter K. robbed of a laptop, medals, cellular phones, playstation, jewellery and cash at knifepoint, allegedly by the Appellant.

[4] During the trial Appellant had legal representation and pleaded not guilty to all the charges. He invoked his right to remain silent in terms of s 35 (3) (h)of the Constitution of the Republic of South Africa, 1996, and did not disclose the basis of his defence.

[5] He was convicted by the court a quo on the testimony of the respective complainants on each of the eight offences and other state witnesses including 2 medical practitioners who examined M. and J., the complainants in the rape counts, a Constabel in the South African Police Service, Kale Noah Malete ("Malete") who investigated all the cases, one M. M. ("M.") to whom Mienaar made a report and K. J.. The Appellant was the only witness for the defence. The version of the respective complainants is recounted in the sequence in which the offences were committed.

Count 1 to 3

[6] S. M. the Complainant testified that on 28 August 2009 she was at Sammy's tavern with

three (3) of her cousins, namely K., E. and C. M.. She was introduced to Appellant by C.. Thereafter her cousins apparently left, leaving her talking to the Appellant. Appellant asked her to come or walk with him to the gate. Whilst standing there Appellant suddenly pulled her out of the gate. He told her to come with him to his place and started slapping and kicking her. She screamed but in vain as the music at the tavern was very loud. She was dragged by the Appellant all the way to his shack. He pushed her in and locked the door. She tussled with him but Appellant pinned her down on the bed with his knees on her hands, took off her pants and raped her. The rape was repeated three (3) times, everytime after a tussle. Each of those times she tried to fend him off without success. When Appellant tried to rape her for the fourth time he did not succeed. He thereafter went to the toilet outside the shack, leaving the door open. Complainant managed to run away. She met up with M., another cousin. She reported to her what had just happened. M. told their uncle W. who in turn phoned the police. She was taken to hospital and her statement taken by the police the next day. Appellant was later arrested at his girlfriends house. She confirmed that Appellant did not use a condom.

[7] Elizabeth Noziko a medical practitioner who examined M. at Jubilee hospital and completed the J88 medical report, that is Annexure "A" was the next witness. She confirmed the contents of the J88 and the history she completed specifically that "M. was offered to the Appellant for sex by her cousin and aunt in exchange for beer. Appellant grabbed M. to his house where he assaulted her, took off her clothes and penetrated her vaginally. M. does not know how many times she was penetrated and if a condom was used. She managed to escape and ran to her relative's place."

[8] On gynaecological examination she confirmed that she wrote that "the Franulum of the clitoris was slightly bruised and red, the labia majora was slightly bruised and Cervix had erosions, being scratched with reddening. The conclusion consistent with allegations of sexual assault. The markings on her body even though they were not visible it was

possible for them to show later since when she went to hospital the incident had just happened."

[9] M.'s testimony was that on Friday the 28 August 2009, she was sitting outside her home when she saw M. coming towards their house with her hands on her head. M. was hysterical. She told her that Appellant had raped her. M. asked her to accompany her to hospital. She first went to the public phone and telephoned the police. The police told them to phone an ambulance as she must go to hospital. M.'s top was torn and her clothes covered with sand. She was very traumatised and in pain. Her uncle's friend took them to Jubilee Hospital.

[10] The story M. reported to her was that a man bought her a few drinks at a tavern and as they were drinking the man forced her out of the tavern. The man slapped her and dragged her to his place where he continued to assault her. He locked her in his room and forced himself on her. At some point she got a chance to run away. She came straight to her place and reported the matter. She did not know the Appellant but her sister and M. knew him. On the date of the incident he saw him sitting at another tavern but she was on her way home. She went to fetch M. from the tavern and she said she was coming, so she and her sister left her there. M. left with her to another tavern, at Sammys. She (M.) did not go there. M. was with K. and C.. When she went back later to look for M. at the tavern they did not know where she went. She was drunk and her clothes torn.

Count 4 to 5

[11] Edward de Klerk ("De Klerk") the complainant testified that he was working and residing at Gwalata Games Ranch in Hammanskraal. When the robbery happened he had just come back from work and finished feeding the dogs. He was walking back into the house when two men came from the back of the house and accosted him on the veranda. One had a golf stick and the other a knife. They ordered him to lie down on the floor. He hit one of them with a bowl who retaliated by hitting him on the ribs two times with a golf

stick. He was pinned down and told to lie on the floor face down. His hands were tied and was told not to look at them. He was taken inside the house and told to lie with his face down. One searched the bedroom whilst the other ransacked the kitchen. His belongings were strewn around. He managed to get his hands loose and went into the kitchen. The assailant in the kitchen punched him to the ground and tied his hands with a cord from the grass cutter. The two men took whatever they could carry and left. He said he did not see their faces because they kept them away from him. They got away with his DVD player, jewellery and knives. He pressed the panic button and one of his neighbours came and called the police. The police searched and combed through the house. They also took fingerprints.

[12] Constabel Malete was stationed at Hammaskraal at the time. He said on 28 August 2009 he was on standby and assigned the investigation of the M. rape case after it was reported. M.'s sister, M. reported the matter to the police on behalf of M.. She also informed the police when M. was now at Jubilee hospital. He at once went to Jubilee hospital to obtain a statement but when he realised that M. was still traumatised he delayed until the next day. He however handed over the crime kit to the doctor. He subsequently received the J88 report from the hospital. He obtained M.'s statement on 30 August 2009 in which she identified the Appellant as the person who raped her. He traced Appellant for seven months. Even though he knew where he stayed, he could not find him, even at his relatives place. They conducted some search operations at night without success. In March 2010 he received information from his informer that the Appellant was injured and admitted at Jubilee and later transferred to George Mkhari. When he went to George Mkhari Appellant was already discharged. A few days thereafter he got information that he was at his girlfriend's place that is where he got arrested. He knew the Appellant before the M. case because he was wanted by the police on various cases.

[13] The state applied for the following documents to be entered into evidence in terms of s 212 of the CPA.

[10.1] The report from the fingerprints taken from a house at plot 441 Kameeldrift as Exhibit "2".

[10.2] The report on the DNA analysis on the J. rape charge as Exhibit "B".

Count 6 to 9

[14] The evidence of J. J. (J."), the complainants on these Counts was that she has just unlocked her security gate that leads to the balcony to let her kitten in at about 11h00 in the morning when she saw Appellant jumping over the jacuzzi. He grabbed and pushed her back into the house. He held a knife against her throat. At that moment the children came in the door screaming. Appellant put all of them in the bathroom and started searching the bedroom looking for weapons. He tied J. up and took her and the children into the main bedroom and thereafter from room to room searching and asking them about guns. He was all that time threatening them and showing them the knife. He took them to T.'s room, after ransacking it he tied the children up with shoelaces and made them sit on the floor. Her daughter K. was smacked across the face for moaning when her hands were tied. He then tied the children to the bed and took J. to K.'s room downstairs. He threatened her with a hot iron, instructed her to take off her tracksuit pants. He helped her to do so when she struggled. He tried to penetrate her from behind but failed. He then made her lie on her back with her legs spread and penetrated her vagina with his penis without using a condom. He insisted she call him Meneer over and over again whilst he was raping her.

[15] Afterwards he escaped by getting out under the garage door taking the tog bag he had stuffed with the stolen items. The Appellant was wearing a faded yellow t-shirt, blue tracksuit pants and sort of new takkies. The moment he got out J. locked the garage from inside. She managed to retrieve the car keys that were lying outside the garage. She

bundled the children in the car and drove to the neighbouring plot from where they called the police. The police and Netcare 911 arrived as well. The children were counselled and she was taken to Montana Hospital where she received medical treatment for sexually transmitted diseases and put on ARV's. She identified the Appellant at an identification parade. He had a tattoo on his arm that looked like a woman's face. She confirmed that the stolen stuff was never retrieved and with an estimated valued of R40 000.00 (Forty Thousand Rand).

[16] She explained that her son who was 9 years old at the time is still a very scared little boy and will not be able to testify. Her daughter from whom she tried to hide the rape did find out later by mistake. She as a result of this incident went back to her home town in Port Elizabeth.

[17] Under cross examination it was put to her that the Appellant was a hawker near Kameeldrift who knew her very well as she was his customer. He sold drugs to her and she owed him R1 500.00 (One Thousand Five Hundrend Rand) for the drugs which amount had been owing for a period of three months before the incident. Appellant visited her regularly at her house and she paid him R100 per sex encounter. He has been at her house for almost six occasions. She used to pick him up after dropping the kids at school and they would go back to her house. On that day since she knew he was coming, he was not expecting the children to be at home. The sex that day was consensual and thereafter she told him how to exit the house. She gave him the rings, laptop and the stolen jewellery so that it can look like a robbery. He told him to run using the backdoor as there was a police vehicle parked outside.

[18] The next witness was K. J.. Her evidence was that on the day of the incident she was playing with her brother on J.'s laptop at about 10h00 in the morning. Her mom (J.) was on the balcony to check their new kitten. The next thing she heard her scream and the gate slammed. She and T. ran into the room and saw a man holding a knife against J.'s throat.

Her testimony corroborated J.'s evidence confirming that Appellant took them into various rooms searching for weapons through the cupboards and drawers. He took a bag from T.'s room and stuffed in it some clothing and jewellery from her mother's cupboard. He was looking for guns. He took them back to T.'s room where he tied their hands and legs with shoelaces. He slapped her across the face for moaning about the tied hands. He took J. downstairs. She heard J. crying and asking the Appellant please no. Appellant kept shouting at J. to keep quiet. A long silence followed. She after some time heard a car start and the garage door open. The car alarm went off and the garage door was slammed. She saw J. running back into the room where they were. T. untied J.. They drove as fast as they can to their neighbour who called the police. She was also able to identify Appellant at the identification parade. Her phone, its charger and box got stolen. She was very emotional when she testified.

[19] The identification parade report was also accepted by the parties and admitted into evidence. The defence also did not object to the handing in of a statement compiled under oath by Steven Solomon Moyane, on the fingerprints Warrant Officer Tibane lifted from the second incident that took place in Klipdrift, Hammanskraal. The report confirmed that the print that was lifted from scotch tape was made with a left thumbprint of the Appellant. According to the scotch tape exhibit one was lifted on the outside of the glass jar which was found on top of the kitchen cabinet in the kitchen. It was marked exhibit 2.

[20] The last state witness was Dr Botturi- Kruger, a general practitioner who compiled the J88 medical report after examining J. on 2 December 2009. His testimony was that her gynaecological examination showed visible proof of penetration with semen obtained during the examination sent for evidence collection. The kit was collected by the police for tests. The results were with the police. Both her wrists had red swollen areas which was in keeping with her evidence that her hands were bound. In the posterior fourchete there was bruising, redness indicating a forced penetration and inside her vagina there was visible

signs of semen. The injuries were still fresh. The treatment given was protocol for ARV's, medication to prevent pregnancy and any sexually transmitted diseases. J. was very upset although calm and glad that her children were not harmed. She was very calm until her husband came and she started crying. He explained that the sex could be forced even if it was consensual. He explained that the penetration was forced because J.'s evidence was that she was bound and there is proof of bruising on her wrists indicating such and she was very emotional. It is forced also because there was no lubrication to help with penetration. With forced rape usually there is no lubrication evidenced by the redness and abrasions that he found. The J88 was admitted into evidence as Exhibit 'E'.

[21] A report on the tattoos of the Appellant compiled under oath by Dr Seller on Warrant Officer Joubert's instruction was read into the record and the defence did not object to it being admitted into evidence as exhibit "G". It documented the tattoos on the Appellant's body.

DEFENCE

Count 1 to 4

[22] According to the Appellant he was at Andrew's tavern in the company of his younger brother, sitting and drinking beer when the M. aunts arrived. They joined him and his brother. He bought them a beer. Later S. M. (M.) arrived and asked the aunts about the relish they left home to go and buy a long time ago as they were now sitting there drinking. M. (S.) was introduced to him as the daughter of their sister that stays in Eersterus. She joined them and he bought her two beers. Whilst they were drinking he invited M. to sit next to him. He proposed love to her and she accepted his proposal. He told the M.s that he has a wife who might come looking for him there and suggested that they move to another tavern at Sammys. Before they moved M. M. arrived holding a 3 months old baby. M. then left. He remained with the three aunts and M.. They continued drinking until three o clock in the afternoon. He told M. his money was finished he needed to go to his place to

get more money. They then told the aunties that he and M. were going to his place to fetch more money. He was familiar with the M. aunts as they lived in the area. The aunties agreed. He left with M.. At his shack he took the R300 and told M. that he was aware how her aunts behaved with guys changing them every week and suggested that they have sex immediately because she might later run away. M. agreed, so he locked the door and they had consensual sex. After that they went back to the tavern. Whilst walking through the soccer field they met a young man who seemed to be in a love relationship with M.. The man confronted her about where she has been. He told the young man that M. was new at that place and she had been with him at his place. The young man followed M. and does not know what happened to them. Upon arrival back at the tavern, the M.'s aunts wanted to know what happened to her. He told them she took another road with her boyfriend or husband. He left the tavern with his younger brother at about five o clock in the afternoon. The following day he heard that the police were looking for him. He was arrested at his wife's place. The police were brought there by M.'s boyfriend who knew where his wife's parents live. He denied raping M. and alleged that they had an agreement. Also that she was asked by her boyfriend to prove that there was no agreement by laying a complaint of rape with the police. The boyfriend works at the tavern and that is where he heard the story. M. had a habit of laying false charges against people. She has previously accused somebody else of rape whilst his case was running in that court. Another person is appearing in the magistrate court in Pretoria on the same allegations.

Counts

[23] His story on this incident is that in June 2009 he worked next door to where De Klerk worked, separated only by a fence. People doing odd jobs came to Kekana Gardens to come and look for work at De Klerk's place. Sometimes they hire people from his work. He heard a detective saying that his fingerprints were found there. He has been there several times to paint and to do other odd jobs and also sell photo frames. They might say they do

not know him because they do not register people who do odd jobs. They only give out specific jobs like painting wherein a person will come with his own staff and do the job. When the job is finished they leave, they are never registered. The house De Klerk stays in was painted by him as De Klerk confirmed that when he moved into the house the paint was still fresh.

[24] On the J. incident he testified that he used to sell flowers and photo frames along the Zambezi Road. He also used to sell drugs called German. J. used to come and pass by the store where he sold his wares when she comes back from taking the kids to school. Sometimes she would take him back to her house because she stayed alone there. Her boyfriend worked somewhere else. She will drop him back there on her way to fetch the kids from school. They were very close and used to each other spending a lot of time together. On the particular day she told him that her child 's birthday was on Friday she will leave him a piece of cake and he must come on Monday. She was surprised to see him and asked him why he was there. They were overheard by her daughter but J. denied to the daughter that she was talking to somebody. She went upstairs and he followed her because she was owing him R1 500.00 for the drugs and he wanted his money. He found her daughter (K.) and son (T.) upstairs. He thought she did not take the children to school because she was trying to evade paying him using the children as a scapegoat, which made him angry. He went there for a piece of cake as well as the money that she owed him for the drugs he gave her on credit. J.'s boyfriend worked at Engen Garage on Zambezi Road. The relationship between them was solely based on him supplying her with drugs and sex. He traded drugs for sex, notwithstanding she still owed him R1 500.00. They then went to talk in the dining room. He wanted to know what explanation she was going to give the children since he is a blackman. She suggested a house robbery. She gave him the stuff, the four rings, two cellphones and two laptops. The following day she phoned him from a public phone and told him that the police arrived at

her place after he left they looked for him along the railway line. When he was found she came out of her boyfriend's car into the detective's car. She told the detectives that he had sexual intercourse with her on that particular day and she told him not to ever come to her place as the children have seen him now. She later phoned him and told him not to bring back the items she gave him but to sell them and get the money she owed him. She lied about where the children attended school it was not in Sinoville but East Lynn. The daughter also lied J. never screamed or said no. He had consensual sex with her. He did not rob her. He was arrested because of the detective who did a great job otherwise J. would not have told anybody about the incident and he would not have been arrested. He was arrested seven months after the incident whilst serving a sentence for another matter.

[25] He confirmed that his arrest came three months after M.'s incident because soon thereafter he was admitted in hospital for about two months and was discharged a month before he was arrest. Also that the police, who were accompanied by M. and her boyfriend, found him at his wife's place whose surname he could not remember with a name M.. By 2010 he was already an awaiting trial prisoner in a different matter. The M. aunts sold their bodies at the shebeen in exchange for beers. On that day they were there to look for money to buy relish and used themselves to attract money. After some time of drinking they forgot about the relish. They heard him proposing love to M.. After that he did not want to suffer from not having the meat.

[26] Under cross examination he said the relationship with J. was about 'free smoke and free sex' with no money involved. He actually has been to her place ten or eight times. There were other times she would take drugs from him without paying and promise to pay when her boyfriend gets paid. They had consensual sex at her place four times. They arranged that she will leave a piece of cake for him. He entered through the kitchen he did not go back because K. had already seen him in the kitchen. The child saw them in the dining room. He went everywhere including everybody's bedroom and followed J. upstairs

as well. He took her to her bedroom and told her to give him something hers so that the children will think that it was a house robbery. When he entered the house the children were already in T.'s bedroom, K. was teaching T. school work. He denied stealing the medals. He alleged the intercourse was consensual with her saying goodbye to him. He only goes to Kameeldrift for the purpose of selling Cat to his customers there. He stays in Hammanskraal but has a lot of customers in Kameeldrift. That was the defence's case.

[27] In essence the defence's case was that on both incidents of rape there was consensual sex. On the robbery at De Klerk house, his fingerprints were found because he has been there previously, approximately two years ago to paint the house and also to sell flowers and frames and will have touched the jug since the houses are fully furnished when the occupants take residence. On the J. robbery, there was no robbery, the items were removed to fake a robbery to hide the liaison he had with J.. The defence argued that his version was reasonably possibly true.

[28] The court a quo in evaluating the evidence considered the evidence of M. and De Klerk to be that of a single witness and the cautionary rule to apply as well as to part of J.'s evidence. I would imagine on J.'s case it would specifically be on rape. In both rape incidents the court correctly took into account that reports were made immediately after it happened. Their allegation of rape was corroborated by the medical evidence which evidence and medical expertise were not disputed or by the fact that a further witness who could corroborate the evidence testified. All the complainants were found to have made a good impression to the court in the manner in which their evidence was delivered. The witnesses also were found to have given their evidence in a straight forward manner, being truthful and withstanding the test of cross-examination, notwithstanding J. and M. being subjected to extensive and humiliating cross examination. The court found no material discrepancies in their evidence and concluded that there was no reason why any of those witnesses would want to falsely implicate the Appellant.

[29] On the other hand the trial court found that there were discrepancies, inconsistencies and improbabilities noted in Appellant's evidence. His explanation of how he got to be implicated not making any sense. In the case of M., he first alleged to have told the aunts that he was leaving with M. to go and fetch more money for beer and they agreed. He turned around under cross examination and spoke of hugs and kisses all the way to his shack that they had to be reprimanded by the aunts. He also made new accusation during his evidence in chief about M.'s tendencies to make false allegations of rape and a demand for payment for the sex which were never put to the Complainant. He seems to have been making his case as he goes along.

[30] On the Count 5, 'none of his explanations made sense on the fingerprints that were found on a glass jar that was on the cabinet. He alleged to have been there prior to the robbery to sell flowers and frames without explaining how he will have got to leave his fingerprints on the jug in De Klerk's residence. He alleged that he painted and did renovations in De Klerk's residence. There was evidence that any paintings or renovations at that residence must have taken place two years ago, since De Klerk moved into his residence two years ago and no renovations have taken place since then. The jug would have remained on that cabinet untouched and unwashed for a period of more than 2 years.

[31] On J. his versions were found to be contradictory and highly unlikely. He alleged that J. was a customer for drugs who had an outstanding debt of R1 500.00. In the same breath he alleged that their relationship was of exchange, he had sex with her she paid him R100 or it was sex for drugs. In that case there would be no money owed to Appellant for drugs, albeit if any for sex. The supposed relationship or debt is alleged to have been in existence three (3) months before the incident, but J. has been staying in the house for less than two months. On one occasion he suggested that her husband or boyfriend works somewhere far and was not always at home but then again alleged that he works at a B P

Garage on Zambezi Street which is actually on the same street that he (Appellant) supposedly sold his wares and was picked by J. everyday to take him back to her house for their occasional or daily sex sessions. He then claimed to have been to the house on six occasions and later under cross examination said eight to ten times. He further said on the day of the incident she was going to pay him with the items given to him but then had sex with him whilst her children were present in the house just so to say goodbye. This is farcical, the court a quo was correct to find his version highly improbable.

[32] At the same time the J88 report pointed towards a forced penetration indicating a lack of lubrication and bruises on J.'s wrists which contradicts Appellant's allegations that the sex was consensual. K. also testified that J. was heard saying please no on being taken to her bedroom after they have been tied to the bed. She would not have allowed her children to be assaulted and threatened and thereafter have a bye-bye sex with him. He found it difficult to explain how could that have happened. The trial court properly found that the Appellant's version could not be reasonably possibly true, its illogical.

Grounds of Appeal

[33] The Appellant's ground for appeal are that M.'s evidence was not satisfactory in all material respects, having regard to the following, that:

[33.1] Although she alleged to have been assaulted she did not exhibit any injuries. She lied about the time she went to the doctor for the injuries to be noted by the doctor.

[33.2] The Complainant's cousins were not called to testify as there is no evidence that they looked for her. Failure to call the witnesses should raise some doubt as to M.'s evidence. C. could have given some light.

[33.3] De Klerk could not recognise the assailants, the only link to the robbery was by fingerprint that was found on the glass. Appellant's explanation as to how the print got there was reasonable. De Klerk could not reject the explanation as he did

not own the property.

[33.4] He gave a reasonable explanation as to how he ended up at J.'s place when he pretended to stage a robbery which was to mislead the children, even though they corroborated each other. His version was reasonable possibly true.

[33.5] It cannot be said there were three separate counts of robbery with aggravating circumstances.

[34] On Appellant's contention that M. did not reveal any injuries and lied about the time of going to the doctor. Evidence led on the medical report was that the conclusion made on the gynaecological examination showing bruises, scratches and erosions on the clitoris, cervix and labia majora are injuries that were consistent with allegations of sexual assault. In respect of the markings on her body even though they were not visible it was possible for them to show later since when she went to hospital the incident had just happened.

[35] M.'s evidence was that M. came back from Appellant's place with her clothes full of sand', her top torn, crying and very traumatised, that she immediately looked for a public phone and phoned the police. As she was also in pain, even though the police told them to phone an ambulance she took her through to hospital in her uncle's motor vehicle. This is consistent with conduct of a person who has had a nasty experience. There was no delay from M. in either reporting the matter or going to hospital. According to M. the sexual assault happened that evening and she escaped on the same evening whilst Appellant went to the toilet.

[36] Appellant further contends that M.'s evidence was not satisfactory in all material respects because there was no proof that the aunts looked for her. M. is the one who testified that she looked for M. at the shebeen later that day and nobody knew where she was. She could not find her. Therefore the calling of the aunts would not have taken the issue any further.

[37] The issue raised on the fingerprints was adequately dealt with by the Court a quo and

the absurdity of those allegations uncovered. De Klerk gave an adequate and plausible reason why what the Appellant was alleging could not be true. He may not be the owner but has been resident in that house for a period of two years during which no renovations had been effected. The raising of the same issues by the Appellant without indicating the actual misdirection in the court's reasoning does not justify the probation of the issue again.

[38] In respect of his contention on the last count that he gave a reasonable explanation as how he ended up at their place when he pretended to stage a robbery which was to mislead the children. Even though they corroborated each other. The Appellant's version in that regard has also been substantively and adequately dealt with by the trial court detailing the improbability of his evidence. This court has further elaborated that point. The bald contention by the Appellant without dealing with the reasoning of the trial court has no merit.

[39] The Appellant has therefore failed to show that the learned magistrate erred in convicting him.

[40] With regard to his contention on Count 6, 8 and 9 that it cannot be said that there were three separate counts of robbery with aggravating circumstances therefore have to be viewed as one. It is clear that each of the complainants found in the house was threatened and their hands tied. A demand was made not to each one of them but to them collectively to surrender the weapons or guns and their belongings. They were then each dispossessed of their belongings. The objection is against the splitting of the charge into three on the basis that there was one act of robbery.

[41] The most important factor is that this was not raised at trial when the Appellant was charged or tried on the three separate charges of robbery with aggravating circumstances committed at the same household, date and time with property belonging to different persons stolen. He continued to plead to the charges. Thereafter he did not follow the

provisions of s 281 by seeking permission from this court to raise a new contention on appeal. The issue was raised for the first time in the heads of argument. The trial court never had an opportunity to deal with it. The deciding factor would therefore be whether or not it would be fair and in the interest of justice for the court to allow the matter to be heard on an issue raised for the first time in the heads of argument, evidently an issue that was supposed to have been raised in the trial court before or on commencement of the trial. Whether any party will suffer prejudice resulting in the proceedings being deemed to be unfair.

[42] The issue is a valid contention even though we lament its timing. It has indeed been raised regrettably in the Appellant's heads for the first time. It is materially relevant to the outcome of the trial. The Prosecution however had an opportunity to respond to it and did address the issue extensively and also did not object to the issue being raised for the first time as done by the Appellant. It seems there will be no prejudice to any of the parties if the issue is decided upon. It is therefore in the interest of justice and fairness to deal with the matter.

[43] In essence what the Appellant is seeking is the quashing, after conviction, of the 2 charges on the ground that this was one act of robbery committed in the same household against one family. There is a common law rule against the "splitting of charges" with the view of avoiding the duplication of convictions as held in *S v Radebe* 2006 (2) SACR 604 (0) at 609 that:

> "The rule against the duplication of convictions is a rule primarily aimed at fairness. Its main aim and purpose is to avoid prejudice to an accused in the form of "double jeopardy," that is, being convicted and punished twice for the same offence when in fact he or she has only committed one offence."

[44] According to Hiemstra s Criminal Procedure, Issue 1 at 14-4, there is no universally valid criterion for determining whether there is splitting. The courts over the course of time

developed two practical aids elucidated in *S v Benjamin en Ander* 1980 (1) SA 9SO (A) at 9S6E- H) as follows:

> "(i) if the evidence which is necessary to establish the one charge also establishes the other charge, there is only one offence. if one charge does not contain the same elements as the other, there are two offences (R *v Gordon* 1909 EDC 254 at 268 and 269)
>
> (ii) if there are two acts, each of which would constitute an independent offence, but only one intent, and both acts are necessary to realize this intent, there is only one offence (*R v Sabuyi* 1905 TS 170). There is a continuous criminal transaction. This test is referred to as "a single intent test"

[45] The tests are said to be in *Benjamin,* aids that should be applied in their particular factual context.

[46] In *S v Dlamini* [2012] All SA 569 (SCA); 2012 (2) SACR 1 (SCA) it was held that where three complainants are robbed in the same robbery (transaction) there can be three separate convictions. However, in *S v Ndlovu* 1962 (1) SA 108 (N) Four charges of theft where the accused had taken goods from four different inhabitants of the same room was regarded as splitting. There was a single intent namely to steal. Who the owners of the goods were was of no importance to the perpetrator.

[47] Appellant had one intention, to rob the household. Unless if it can be proven on each one of the charges of robbery that he had intended to rob each person that was found in the house of their belongings individually, each threat being directed to each person individually at a particular time to formulate a separate intent. It must also be proven that he knew that the property he intends to steal belong to each individual separately and it mattered to him.

[48] Secondly the evidence which was necessary to establish the one charge of robbery by J. established the other complaint by T. and K., therefore there is only one offence. The

other two charges for robbery with aggravating circumstances in respect of T. and K. resulted in the duplication of convictions which are to be set aside.

AD SENTENCE

[49] The Appellant's grounds of appeal against sentence are that the learned magistrate erred by not taking other sentencing options into account and or adequately into account. Even though life sentence is a minimum sentence, if it is disproportionate to the facts it should not be imposed, or if the court imposes it should not be imposed lightly. It is argued on behalf of the Appellant that by the time he is legible for parole he will be 68 years old and the offence does not call for a heavy sentence or the total removal of the Appellant from the community.

[50] Furthermore, that the court over-emphasised the seriousness of the offences committed by the Appellant and the interest of society whilst under-emphasising his personal circumstances. As a result, it imposed a sentence that is shockingly harsh and that induces a sense of shock. The court failed to show any mercy to the Appellant, the sentence being intended to break him.

[51] In order to ascertain that an appropriate sentence is imposed, the courts are guided by the Zinn triad (5 *v Zinn* 1969 (2) SA 537 (A) that refers to the offender, the offence committed and the interest of society being the factors to be considered in determining a proper sentence. The court looks at the circumstances surrounding the nature and extent or degree of each of these three factors, keeping in mind the purpose for sentencing that is retribution deterrence, prevention and rehabilitation.

[52] It is however trite that sentencing is within the trial court's province and the appeal court can only interfere with such discretion if it is not exercised properly and judiciously. The trial court would have failed to exercise its discretion as prescribed if it committed an irregularity or misdirected itself, or has imposed a sentence that is shockingly inappropriate or **out of proportion to the magnitude of the offence** (see *5 v De Jager and Another*

1965 (2) SA 616 (A) at 628H-629B) .

[53] During the sentencing of the accused there were therefore no sentencing options for the trial court to choose from nor did it have a discretion to start on a clean slate. The legislature had ordained minimum sentences to be imposed that it regarded to be proportionate to the magnitude of the offences committed by the Appellant by introducing the Criminal Law Amendment Act 105 of 1997 (the minimum sentence legislation). The legislature prescribed the circumstances under which the sentencing court may deviate from the prescribed minimum sentence, that is only if there are substantial and compelling circumstances that justifies such deviation.

[54] The trial court in determining whether the circumstances referred to in the Act as substantial and compelling do exist had the benefit of pre-sentencing reports that detailed the personal circumstances of the Appellant and the impact of the offence on the victims, namely De Klerk and the testimony of J.. The report however did not deal with all the victims as M. and the Appellant's wife and children could not be located.

[55] The fact that the Appellant had committed multiple offences falling under the legislated prescribed minimum sentences was appropriately taken into account by the trial court. Moreover that the offences are prevalent in our societies taking judicial notice that the courts are besieged with such offences on a daily basis, a state of affairs that is unacceptable. It indicated that the offences were committed for self gratification without a thought about the victim's circumstances. The Appellant also showed lack of consideration of the trauma and emotional heartache he was causing. His conduct and the nature of offences and the degree of its seriousness should attract a harsher sentence to deter and discourage him first as he seems to be unperturbed by his conduct and like-minded persons who might be contemplating committing the same offences. The court a quo rightly referred to the statement by Mohammed CJ on rape in *S v Chapman* 1997 (2) SACR 3 (A) on SB that;

"It is a very serious offence constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity on the person of the victim."

[56] De Klerk was severely traumatised to the extent that he left his work at the lodge even though he did not have a clue what he was going to do. He had to attend treatment for the injuries he sustained and therapy. J. had to go back to Port Elizabeth giving up on whatever plans that might have brought her to Gauteng. Her testimony on how the memories of the incident have become part of her daily life, seeing the Appellant's face, hearing her screaming children and the sense of complete helplessness indicates the depth of the affliction Appellant had caused her. Her son who was 9 years old at the time frightened to death and is extremely traumatised.

[57] The court took into consideration Appellant's personal circumstances that he had 4 children, but he seemed not to have been responsible for them. They were dependant on social grants. He did not even know the name of his first born child. He brought misery to his life too because his wife and children had to move from where they lived due to the crimes committed by their unrepentant father. He is a drug abuser, unemployed and has Standard 4 education. He has several previous convictions for housebreaking and has spent some time in prison as an awaiting trial prisoner.

[58] Notwithstanding his personal circumstances the court a quo correctly found that there are no substantial and compelling circumstances that justifies deviation from the prescribed minimum sentence. It is worrisome that he is unrepentant, very disrespectful to the women he raped, his attitude towards them denigrating. He persisted to lie about the rapes alleging that these women wanted to have sex with him. He attacked two of his victims in the sanctity of their homes. All this factors together cumulatively militates against the prospects of any rehabilitation and the granting of a lesser sentence. Only a harsher sentence is justified. His age as referred to by his Counsel in argument, that it should be considered as a factor to be considered in deciding on a proper sentence, in terms of his

legibility to parole is devoid of logic. The gravity of the offences he committed does not justify the emphasis the Appellant wants the court to put on his age.

[59] In *S v Vilakazi* 2009 (1) SACR 552 at p 554 f-g it was stated that:

> "Once clear that substantial jail term appropriate, questions of whether or not accused married, or employed or of how many children he had, largely immaterial. However they remain relevant in assessing whether the accused was likely to offend again."

[60] The reference to proportionality does not introduce a new factor to be taken into account outside what is provided for in the Act, that the sentence should be proportionate to the nature and degree of the offence, that is the circumstances of each case. Appellant in this matter is convicted of raping repeatedly, a young girl, seventeen years of age, just a shy away from 16, the threshold age. It cannot get worse than that, considering that a few months after that Appellant raped another person, and this time the victim raped in her own house, her children being within earshot. Both Complainants had to be subjected to a humiliating court process of having to relive the experience when he alleged that they consented to the sex. He even referred to M. as a meat that he had to eat, and to her aunts as loose imputing that she deserves to be regarded to be of loose morals as well.

[61] Under the circumstances I make the following order

> [1] The appeal against conviction and sentence on Counts 1,2,3, 5, 6 and and 7 is dismissed;
>
> [2] The Appeal against conviction on Counts 8 and 9 is upheld. The conviction and sentences imposed by the trial court on Count 8 and 9 are set aside. The sentences imposed on Count 2,3,5,6 and 7 to run concurrently with the sentence imposed on Count 1.

N V KHUMALO

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I concur

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J HOLLAND-MUTER

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

For the Appellant: MOENG

Instructed by: Legal Aid South Africa

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012 401 9200

For the Respondent: P W COETZER

Instructed by: The Director of Public Prosecutions North Gauteng: Pretoria

012 351 6700

Heard: 16 May 2017