Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

[Reportable paragraphs 64 - 70 only]

CASE No: A317/14

In the matter between:

LUBABALO FONGOQA	**First Appellant**
LWAZI YANGA MZITO	**Second Appellant**
DALUXOLO YABU	**Third Appellant**

Vs

THE STATE	**Respondent**

JUDGMENT DELIVERED ON 13 MAY 2015

HENNEY, J:

INTRODUCTION

[1] The three appellants were charged with **two counts** of **rape** each in

contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) 32 of 2007 Amendment Act, in the Khayelitsha Regional Court. The state alleged that the provisions of section 51 and Part 1 of Schedule 2 of the Criminal Law Amendment Act, 105 of 1997 are applicable to these two charges.

[2] In respect of both charges the state alleged that on or about 5 – 6 April 2008 near Khayelitsha, the appellants unlawfully and intentionally committed an act of sexual penetration with the complainant, [T…….] [S…….], an 18 year old female, by forcing off her clothes and having sexual intercourse with her.

[3] On 18 March 2011, the appellants pleaded not guilty but they were subsequently convicted, ostensibly on one count of rape only. I will refer to this aspect at a later stage.

[4] All three appellants were sentenced to eighteen (18) years' imprisonment. In respect of the first and third appellants, although Leave to Appeal was granted by the court *a quo* in respect of conviction and sentence, they abandoned their appeal against the conviction and only appeal against the sentence. The second appellant's appeal is against conviction and sentence.

[5] The second appellant maintains that the evidence of the complainant, a single witness, was not strong enough for the court to find that the state has proved its case beyond a reasonable doubt in order to sustain a conviction against him.

[6] Regarding sentence, it was argued on behalf of all the appellants that the court imposed a disproportionate sentence and that the court over-emphasized the seriousness of the offence.

THE APPEAL IN RESPECT OF CONVICTION IN RESPECT OF THE APPEAL OF THE SECOND APPELLANT

[7] The prosecution presented the evidence of 7 witnesses.

[8] The complainant, [**T……..] [S……**], was the only eye-witness to the incident. She testified that she was walking with a friend from J-section to D-section, Khayelitsha, between 5 – 6 April 2008. They met one of her friend's boyfriends. Suddenly a group of more than 10 people appeared. One of them, known as 50 cents, whom she did not know at the time but whom she later identified as the first appellant, said to her: "*let us go bitch*" and "*why are you looking at me bitch, I said come here*". He pushed her and walked off with her, while saying that she was his girlfriend.

[9] Second appellant's friend, [N……..], whom complainant later identified as the third appellant, intervened on her behalf. They argued. She then walked with the third appellant who told her that he was going to hide her at his house. She suggested to the third appellant that he should rather accompany her to her house, whereupon he said that they (presumably referring to the earlier group) would catch up with her in the field or forest and rape her. She kept quiet and walked with him to his house. They went into a shack attached to a main house

where a person was sleeping.

[10] The third appellant ordered the complainant to get undressed. When she refused, he threatened to stab her. He then undressed her, ordered her to get onto the bed, undressed himself and climbed on top of her before raping her, by inserting his penis into her vagina.

[11] She did not know the third appellant or where he stayed, but she had seen him in J-section, a couple of months before the incident.

[12] After the third appellant raped her, he told her that he was HIV positive and spat on her mouth. He got up and woke the person who was lying on the sofa and requested him to have sexual intercourse with her as well. The man refused, but he forced him to have sexual intercourse with the complainant, by pulling off the man's shorts. This man climbed on top of the complainant and also had sexual intercourse with her. Someone knocked on the door, who, according to the complainant, was the first appellant. She knew him as the man who had grabbed her earlier that evening. At about 23h00 the first appellant entered the shack through the main house. She assumed that the third appellant's mother opened the door of the main house, in order for the first appellant to enter the shack.

[13] When the first appellant saw her he remarked: "*Did I not say you are my girlfriend*". He wanted to assault her, but the third appellant intervened and said they should leave. He was afraid that his mother would wake up. The reason why she did not shout to the third appellant's mother for help, was because he told her

that his mother was going to chase her away and these people (with reference to the people who wanted to harm her earlier) were going to find her in the forest she had to walk through, and rape her.

[14] The third appellant wanted them all to leave and told her not to scream because his mother was going to wake up. They went outside. The first appellant got hold of her and they went to another shack situated in the same yard where the third appellant stayed.

[15] When they entered the shack there were 3 other people inside. Third appellant instructed her to get onto a bed. An electric globe provided light in the shack. He ordered her to take off her clothes. The first appellant said the complainant was his girlfriend and that he was going to have sexual intercourse with her first. The third appellant did not agree, undressed himself and raped her again. In the meantime the first appellant was undressing. When the third appellant finished with the complainant, the first appellant took a condom and got on top of her. He slapped her and raped her.

[16] The third appellant then asked his friends to leave, but a person, known as [B…..], whom the complainant identified as the second appellant, said that he also wanted to have sexual intercourse with her. He was there with other friends, including two ladies. The complainant did not know him at the time. He put on a condom before raping her. The third appellant chased the two ladies away. A person by the name of [M……], who was present, was dissatisfied with the fact that the girls had been chased away. [M……] said he was also going to have

sexual intercourse with the complainant because the third appellant chased his girlfriend away. The third appellant did not want him to do that and went to knock on his mother's window to call the police. His mother told him to go away. When he returned he agreed that [M……] could have sexual intercourse with the complainant and [M……] also raped her.

[17] The third appellant once again undressed and raped the complainant, followed by the first appellant, who also raped her again.

[18] The complainant was eventually raped by 6 people: [M……] and a person called [L……], as well as a person whom she described as someone sitting on a chair, who raped her once. The three appellants each raped her twice. All these men then went to sleep on the bed. The third appellant ordered her to sleep on the floor with him. He ordered her to take off her clothes and to sleep facing him. At one stage she said that she saw something that looked like a baboon. She was scared and jumped up. The third appellant's mother was at the door of the shack at that stage. All the men jumped up and ran away. [M……], however, grabbed her and wanted to run away with her. The third appellant's mother shouted and swore at [M…….] and wanted to assault him. He then left the complainant. When everyone had run away the third appellant's mother took the complainant inside the house where they waited for the police to arrive. Third appellant's mother accompanied the police when they took the complainant home.

[19] The complainant testified that she did not tell the third appellant's mother that she had been raped at that stage, because she was scared. She further testified

that when they arrived at her house, the third appellant's mother said to her grandmother, "*Your grandchild has been raped by the kids who are known to me and my son is also involved*". Complainant confirmed this. She was taken to a doctor. She sustained injuries to her vagina. She then accompanied the police in order to point out the second and first appellants. She had earlier pointed out to the investigating officer the place where the incident took place. They found both the first and second appellant there.

[20] She was never the girlfriend of any of these men. There were also no problems between any of the men and the complainant before the incident. On the day of the incident she saw the first, second and third appellants for the first time ever. She heard the names of the appellants from the appellants themselves.

[21] Under cross-examination the complainant said that when the first appellant initially dragged her, she did not scream because she was scared and at that time her friends were standing nearby. When they walked away, he held her hand. She did not ask her friends to help her as she assumed they were going to assist her. It was only after they were out of sight that the third appellant appeared. He told the first appellant to release her and the two of them argued before the first appellant eventually released her. She asked him to take her home, but he said she must accompany him because the other men might follow them. When asked why she went with a stranger to a place that she did not know, she said when the third appellant was talking to her, he was holding her hand and pulling her. She did not scream because there was nobody to assist her.

[22] She did not see the third appellant carrying any weapon, but he was threatening her. When they arrived at the shack, the third appellant left the shack and went out for 5 minutes before returning but when he left he locked the door and ordered her to get undressed.

[23] She further stated that she was scared to scream as she did not want to attract the attention of the third appellant's mother. The third appellant kept on saying that he was going to stab her. When she was asked why she did not scream when they were walking through the main house, she answered that she thought that if she screamed, the third appellant's mother would come out and chase her away and the group the third appellant spoke about earlier, would follow her.

[24] She further testified that, after she and the third appellant entered the shack at the back of the yard, the first appellant followed them. At that stage he was looking for condoms. After she entered the room, the third appellant said she should get onto the bed, where after he got onto the bed. He took off both their clothes and raped her again. She did not struggle as she was scared. While this was happening the first appellant was standing in front of them on the side of the bed. Thereafter the first appellant proceeded to rape her. During the time the first and third appellant had sexual intercourse with her, the lights in the shack were on. She did not leave at that stage because she was scared. She did not tell the third appellant's mother when she later came to the shack in the yard that she had been raped.

[25] It emerged during cross-examination that complainant made two statements to the police; one to a police officer, Khanyile, immediately after she was raped and one to a police officer, Ndlela. She testified that with respect to the first statement, to Khanyile, immediately after the incident, she could not recall whether the statement was read back to her. Regarding the second statement, made on 9 November 2008, to police officer Ndlela, she testified that she could not recall making it or whether this officer read the statement back to her.

[26] Complainant denied that she said to the police, during her first statement, that the first appellant, when he saw her for the first time while they were walking in the road, said to her, "*Come here bitch and if you don't come, I will kill you*." She denied that she told the police that when she was taken to the shack in the yard they switched the lights off and she denied that she told the police in her statement that she told the third appellant's mother that she had been raped. She also denied that, in her first statement she made to the police, she did not name any of the persons who raped her.

[27] She explained under cross-examination that the reason why there are differences between the contents of her statements and her evidence in court, was because the police did not record what she told them correctly.

[28] At the time when the three appellants took her from the shack attached to the main house, through the house, she rather chose to go with them, than complain to the mother of the third appellant, who she thought would have chased her away. She further testified when the second appellant raped her, he at all times wore a

condom.

[29] The next important witness is [**S……] [Y…..]**, the mother of the third appellant. She testified that all the appellants are known to her. The first appellant is her neighbour. The second appellant, who is also known to her, is a friend of the first and third appellant. At the time of the incident, she was at home. She heard what she described as a child screaming from a shack at the back of the yard. As she approached the shack, she saw this child, who was the complainant. The complainant told her that "they are raping me Mamma". Mrs [Y……] testified that she immediately called the police.

[30] She took the complainant into the main house where she lived, before going outside, to the shack, where she shouted at the three appellants. The other boys who were also in the shack with the appellants, ran away, jumping over a vibracrete fence. The three appellants wanted to follow them. The police arrived and she accompanied the police when they were taking the complainant home. When they arrived at the home of the complainant, she told the complainant's grandmother: "*Your child has been raped*". She told her that her own son (the third appellant) was also involved. She further testified that the third appellant and other men were involved.

[31] In cross-examination she stated that when she went outside, after she heard the screams, she found the complainant. She denied that the first appellant knocked on her door that evening. The incident allegedly happened between 1h30 and 2h00 am in the morning. She did not see what happened in the shack or

anyone raping the complainant. She also did not see the complainant earlier in her house and denied that the third appellant was in her house earlier that evening. She could not remember that she said in her police statement that after she heard a lady scream, she went outside, everybody was still in the shack and she shouted through the window to the people inside.

[32] [**J……] [S……]**, the complainant's grandmother, confirms the complainant's testimony that she arrived home one morning on an unknown date, with a woman who later became known to her as the mother of the third appellant, accompanied by a police officer. This lady told her that her child (referring to the complainant) had been raped in her shack by boys, including her own son.

[33] Constable **Brenda Ndlela** testified that she was the second investigating officer in this case. She took down a statement from the complainant. The method she followed was that the complainant would tell her something of what happened, and then she would first confirm what the complainant told her, before writing it down. The complainant would then go on with her statement, and she would repeat the process. She took down the statement in this manner because it was very lengthy. She did not read back the whole statement to complainant after she had taken it down for a second time. Accordingly the complainant would not be wrong in telling the court that she (investigating officer) never read the statement back to her.

[34] According to Ms [N…….] the reason why the complainant did not mention the names of any of the appellants in her first statement was because she was

confused and traumatised at that time to the extent that she could not continue taking a statement from her.

[35] [**T…….] [S……]** testified that on the evening of 5 April 2008 at 19h00, she was in the company of the complainant. They were walking from D-section to F-section, when they encountered a group of people. One of them was known to her as [M……], who said to the complainant, "Hey prostitute come here". She refused and he grabbed her by the arm and pulled her to one side. She could not hear what they were talking about. They pulled her away against her will and moved out of sight. She did not see the complainant again. According to this witness they thereafter went to the house of this person that was pulling the complainant and when they arrived there, the lights were off.

[36] **Dr Kathleen Murie** testified about her experience of examining victims of sexual violence. She examined the complainant on 6 April 2008 at 9h15 am and found that the complainant had a lot of tenderness around her vaginal area, with injuries in and around her vaginal area. She could not perform an internal examination because of complainant's tenderness and nervousness. Her findings were consistent with a history of sexual intercourse within the last 24 to 48 hours, judging by fresh tears.

[37] Dr Murie further testified that the complainant told her that each of the persons who were present took turns to rape her and mentioned that she was raped 5 times in the missionary position and twice while she was on her knees. After being told that the complainant testified that she had been raped on 12 occasions, Dr Murie said that the clinical picture after examining the complainant

was consistent with such testimony

THE EVIDENCE OF THE SECOND APPELLANT

[38] The second appellant testified that earlier on 6 April 2008 he was with the first and third Appellant. He, together with some friends, took a taxi to the first appellant's house. Thereafter they went to a tavern where they started drinking. Third appellant later joined them. The atmosphere became unpleasant and the third appellant suggested, just before midnight, that they go to F-section in Khayelitsha. In their company were 3 ladies. Altogether they were 8 people. They left the tavern as a group. The third appellant, whilst walking with the first appellant, disappeared around a corner. Outside the house of the third appellant the first appellant joined them again. After a while the third appellant arrived with the complainant and he told the complainant, in the presence of the third appellant that she was beautiful. The girls that were in their company wanted to go to J-section. The second appellant, a person with the name of [L……], who was also part of the group, and the first appellant accompanied them. When they left, the third appellant and the complainant went into the yard of the house of the third appellant. After 25-30 minutes, the second appellant and the first appellant returned to the third appellant's place where, in a shack at the back of the yard, they found two of their friends [B……] and [S……], busy drinking.

[39] The third appellant and the complainant were not present. The others were informed that they were in the main house. After a while the first appellant went to join the third appellant in the main house. Thereafter the first and third appellants

returned to the shack. The third appellant then told them he would return to the shack with his girlfriend (referring to the complainant) which he did. Later they all sat together drinking. He did not notice anything wrong with the complainant, when she joined them. There were no girls in the room besides the complainant. The men started to mock the third appellant about the complainant and the fact that he finally found a girlfriend. He became angry and broke a window. The first and second appellants calmed him down.

[40] First appellant and their friend, [L……], then left. According to the second appellant, they left the place of the third appellant between midnight and 1h00 am in the morning. The third appellant, their friend [S……] and the complainant remained behind. When they were in the yard the mother of the third appellant came out of the house and started shouting at those persons who remained behind. Second and first appellants went to their girlfriends. He slept at his girlfriend's place and the next morning, a Sunday, he met up with the first appellant in Elitha Park. Thereafter they went to the house of the third appellant. A Golf vehicle arrived and the third appellant left, saying that he would be back. A person in the Golf vehicle asked them their names and explained that he was a detective.

[41] The detective asked second appellant about his whereabouts the previous day, whereupon he explained that he was at [B…….'s] place, whereafter he went to sleep in Elitha Park. Second and first appellants were arrested in the presence of the complainant and her grandmother by the detective, whose name was [K…...] the latter also enquired about the whereabouts of [M…...]

[42] In cross-examination second appellant denied an allegation made by the third Appellant that he and the first Appellant were already in the company of the complainant before they went to the third appellant's house and that it was at the same place the complainant said she met the first appellant, before she was taken to the house of the third appellant. He denied that the third appellant took the complainant away from him.

[43] Second appellant denied that at the time when the third appellant and the complainant came from the main house, there were three girls in the shack with him. He also denied that he and the first appellant returned and were present when the complainant screamed and that the complainant said at the time that everybody was having sex with her. It was pointed out to the second appellant that the first appellant said he never went inside the shack when they mocked or ridiculed the third appellant about him having a girlfriend. This they did while they were outside the shack.

[44] It was pointed out to the second appellant that his version differed in certain respects from that of the first appellant and the differences were pointed out to him. The second appellant could not explain why the first and second appellants' testimony differed from his own in several material respects.

[45] He denied the evidence of the mother of the third appellant that he was seen running away from the shack when the police arrived and testified that the complainant was not known to him prior to the incident and that she is lying if she says that he was present and/or that he raped her.

EVALUATION: CONVICTION OF THE SECOND APPELLANT

[46] Mr Paries, who appeared for second defendant in this court, argued that the Regional Magistrate did not sufficiently consider that the complainant was a single witness whose evidence stands uncorroborated. He further argued that in such a case the Regional Magistrate should have applied the cautionary rule before it could safely rely on the evidence of the complainant. He argued that this was especially so in this case where the complainant's version was riddled with discrepancies and contradictions. He argued that her testimony could not be relied upon.

[47] Mr Paries pointed out that the complainant made contradictory statements and the version as given in court differs from that which she gave in her two statements. It was also pointed out that her evidence in court is contradicted in certain respects by what she told the doctor during the physical examination. Complainant was further criticised that she did not scream when the first appellant initially dragged her and also when she walked through the house of the third appellant, while his mother was present.

[48] The (rather insignificant) contradictions in complainant's statements and testimony in court were pointed out, including that in court she denied that that when she made her first statement to the police she did not name any of the persons who raped her. She further said that she could not recall making a

second statement.

[49] It was pointed out that the complainant's evidence is contradicted by the evidence of [S……] [Y…..], the mother of the third appellant, who said the complainant told her that she was raped, whereas the complainant said she did not tell her. I will not repeat the main aspects of criticism levelled against the evidence of the complainant, as I do not deem these aspects material.

[50] Regrettably, the Regional Magistrate did not sufficiently deal with the shortcomings of the complainant's evidence in coming to a conclusion that her evidence should be accepted to prove the case against the appellants. He further did not say why he was convinced that the single evidence of the complainant complied with the cautionary rule before accepting her evidence.

[51] That does not mean that this court, on a conspectus of the totality of the evidence, should reject the evidence of the complainant. I say this for the following reasons: *Du Toit, De Jager, Paizes, Skeen and Van Der Merwe in Commentary on Criminal Procedure Act at ch 30 – 40* say the following on this point:

> *"If the trial judge or trial magistrate does not take advantage of the favourable position in which he finds himself, as far as considering the witnesses and the evidence is concerned, the court of appeal will be free to come to its own findings instead of those of the trial court. Then the entire case is retried in the sense that the court of appeal will attempt to establish whether the appellant is actually guilty beyond reasonable doubt, particularly in the light of the record of the evidence and the impression that the witnesses made upon the trial judge (R v Tusini & another 1953 (4) SA 406 (A) 412C–F)."*

[52] The fact that the evidence of the complainant in court differs in some respects from her allegations in her statements, is in my view not a sufficient reason to reject her evidence. It is not difficult to conceive that a young person in the position of the complainant, who had gone through an ordeal of being raped continuously by about 6 persons throughout the night, would be unable to give an accurate statement of what happened to her. It is in fact difficult to imagine a person who has been raped in such a horrendous manner, ever in her life being able to give an accurate and entirely correct recollection of what happened to her, especially as it must be an experience a person is likely to want to forget.

[53] Our courts have in the past warned of placing undue weight and emphasis on differences between the evidence given by a witness in court and his or her previous statements made to the police. In *S v Mafaladiso en Andere 2003(1) SACR 583 (SCA)***,** quoting from the headnote, the court said that a juridical approach should be followed:

> *"The juridical approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as, inter alia, between her or his viva voce evidence and a previous statement) is, in principle (even if not in degree), identical. Indeed, in neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what is the precise nature thereof. In this regard the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination,*

> *that there may be language and cultural differences between the witness and the person taking down the statement which can stand in the way of what precisely was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions - and the quality of the explanations - and the connection between the contradictions and the rest of the witness' evidence, amongst other factors, to be taken into consideration and weighed up. Lastly, there is the final task of the trial Judge, namely to weigh up the previous statement against the viva voce evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings.*

See also *S v Bruiners 1998 (2) SACR 432 (SE)*.

[54] I am not convinced that it was unreasonable for the complainant not to have screamed or shouted for help by calling out to the mother of the third appellant when she was raped. In fact, unbeknown to her, the mother of the third appellant heard her crying and suspected that something was wrong. The complainant emerged as a good witness despite being subjected to gruelling cross-examination by three experienced counsel over a number of days, and steadfastly and convincingly repeated her version.

[55] The strongest evidence that supports the complainant's reliability is that of the mother of the third appellant, who places the second appellant on the scene and said that when the complainant cried, the second appellant was still in the

shack. She also testified that he was one of the persons that ran away. This supports the version of the complainant, to that extent.

[56] The complainant's version regarding the presence of the second appellant in the shack during which time she alleges that he (second appellant) also raped her, is also supported by the third appellant, although he (third appellant) did not testify that he saw the second appellant rape her. The third appellant also confirms the version of the complainant that the first appellant came to the shack attached to the house.

[57] The third appellant further confirmed the evidence of the complainant that the first appellant referred to her as his girlfriend, that the first appellant was aggressive towards her, that when the two of them appeared in the shack at the back of the yard they found the second appellant there, and that the first and second appellant ran away when the third appellant's mother came out of the house.

[58] Mr Paries was constrained to concede that it was not the case of the second appellant that the complainant was not raped. The second appellant therefore does not dispute complainant's evidence that she was raped by the other appellants and or individuals that were present in the shack. He however denied that the second appellant was involved in the rape. This fact further strengthens the version of the complainant. The above aspects of the evidence of the complainant do not serve as direct corroboration that she was raped by the second appellant, but are so-called pointers to the truth of her version and are indicators of trustworthiness, while supporting the reliability of her version.

[59] The Regional Magistrate also, rightly in my view, rejected the version of the second appellant which made much of the fact that no DNA evidence was found to link him to the crime. This argument in my view is of no moment, for the very reason that the complainant said that every time he had raped her he wore protection.

[60] The garbled version of the second appellant, as the Regional Magistrate correctly pointed out, is not convincing. His evidence as to his presence in the shack is contradicted by the third appellant, whose version supports that of the complainant about his presence in the shack. He also failed to show why the mother of the third appellant, who also implicated her own son in the rape of the complainant, would place him in the shack while the complainant was there crying. This is a further indicator of the trustworthiness of the complainant's version as mentioned earlier.

[61] The version of the second appellant is contradicted in certain respects by the first appellant. The court *a quo* rightly found that the version of the second appellant was not reasonably possibly true and accepted the complainant's evidence that he was one of the persons who raped her. I am therefore of the view that the court, in relying on the evidence of the complainant, together with all the other evidence as presented, was correct in finding him guilty of rape.

THE ABSENCE OF A VERDICT ON ONE OF THE CHARGES TO WHICH THE APPELLANTS PLEADED

[62] Before dealing with the appeal against sentence, I think it would be appropriate to deal with an important procedural aspect of this case, which the court *a quo* omitted to deal with. It is trite that this court has an inherent power to correct proceedings of an inferior court at any stage if it appears in the interest of justice in doing so. Especially where a lower court committed a patent error, which if left unattended, would create an impression that a court on appeal would condone such an error. This is especially so where such error relates to an important procedural aspect which has to be complied with in terms of the law. In this regard, see *S* v *Lubisi 1980(1) SA 187(T); Wahlhaus & Others v Additional Magistrate, Johannesburg and Another 1959 (3) SA 113 (A)*. In this particular case, as referred to earlier, the appellants were asked to plead on two charges of rape but a verdict was ostensibly only delivered on one of those charges.

[63] The prosecutor chose to formulate only two charges of rape against the appellants, although, on the accepted evidence of the complainant, they together with another man had committed multiple acts of rape. The reason why the prosecutor made this decision is not known and not important at this stage. What is of concern to this court is that, despite the appellants having been asked to plead to two charges, the court *a quo* only gave a verdict on one of those charges.

[64] Section 106(4) of the Criminal Procedure Act 51 of 1977 deals with the procedure a court has to follow after an accused person has pleaded. It reads as follows:

> *"An accused who pleads to a charge, other than a plea that the court has no jurisdiction to try the offence, or an accused on behalf of whom a plea of not guilty is entered by the court, shall, save as is otherwise expressly provided by this Act or any other law, be entitled to demand that he be acquitted or be convicted."*

[65] Section 81(1) of the Criminal Procedure Act permits that a number of charges may be joined in the same proceedings against an accused person at any time before evidence is led. Where several charges are so joined, each charge shall be numbered consecutively (own emphasis). The piece-meal adjudication and disposition of each charge on which an accused pleaded would amount to a gross irregularity. The court *a quo,* by omission, only convicted the appellants on one charge. It is not clear whether such conviction was given on the first or second charge. The overwhelming evidence would justify a conviction on both charges. This appeal however, only deals with conviction and sentence on one charge of rape. The court is therefore bound to assess the appeal on the charge the appellants were convicted on.

[66] The appellants must be given the benefit of this omission and this court in correcting the error and after having regard to the provisions of Section 106(4) can therefore only acquit the appellants on the other charge they have not been convicted on.

[67] In *S v Sithole and Others 1999 (1) SACR 227 TPD* at *229h – j*, it was held by *Jordaan AJ*, referring to section 106(4), that:

> *"The language used in the section is clearly peremptory. It therefore follows that all the accused who had pleaded to certain charges but in respect of which no judgment was given by the magistrate should be acquitted on all those charges."*

Jordaan AJ specifically states that where an accused pleaded to certain charges, but no judgment is given in respect of such charges, the accused should be acquitted on such charges. In my view, this can only happen where such an accused pleaded not guilty in respect of such charges and contested the allegations to which he had pleaded not guilty, and where a court did not deal with those allegations and failed to pronounce a verdict. In my view, however, the correct approach on appeal would be that the court determines whether an accused's right to a fair trial was infringed where he or she pleaded on a charge, but no verdict was delivered on that charge.

[68] It may well be that an accused pleaded guilty to a charge in terms of Section 112(2) or 112(1)(b) of the Criminal Procedure Act or admitted all the allegations in terms of the provisions of Section 220 of the Criminal Procedure Act and the court may have omitted for some reason or another to arrive at a verdict under such circumstances. It would in my view not be in the interests of justice to acquit such a person, unless such plea of guilty or admissions were improperly made.

[69] In this case, however, the state asked the appellants to plead to a second charge. The appellants pleaded not guilty and disputed the allegations levelled against them. No cross-appeal by the state was lodged based on the fact that on the available evidence the appellants should have been convicted on both charges. They were entitled to a verdict in terms of the provisions of Section 106(4) of the Criminal Procedure Act. No verdict was given on that charge, and there are no good reasons emanating from the record why their plea of not guilty should not be upheld.

[70] In the case of the second appellant, he launched an appeal against the (one) conviction and the sentence imposed. In the case of the first and third appellants, their appeals were against sentence upon conviction on the one charge. The appellants did not direct their opposition to this appeal against this issue raised. In this particular case it would therefore be appropriate to grant an order which would benefit the appellants, given the circumstances of this case. It would be appropriate to correct the proceedings and hand down an order that the appellants be acquitted on the charge upon which no verdict was pronounced, as the court *a quo* should have done in terms of the provisions of Section 106(4) of the Act.

SENTENCE

[71] The appellants argued that the sentence imposed by the court *a quo* was disproportionate to the offender, the crime and interests of society. The first appellant was 19 years old at the time of the commission of the offence and was 22 years of age when sentenced. He is not married and has no children. He left school during Grade 10 in 2007. He has no previous convictions. The second appellant was also 19 years of age at the time of the commission of the offence and he was 21 years of age at the time of sentence. He is not married and has no children. He was unemployed, but was busy with a certificate course in carpentry at the Cape College in 2007. He has no previous convictions.

[72] The third appellant was 27 years of age at the time of the commission of the offence and 27 years of age at the time of sentence. He is not married but has one child who was 9 years old at the time of sentence. He was employed during the time of arrest and earned R520,00 per week. He left school in Grade 10. He also has no previous convictions.

[73] It is not disputed that the appellants were convicted on a serious charge. Although each appellant was convicted on one count only, the complainant was brutally and savagely raped by more than one person during the course of the evening. She was threatened and humiliated by especially the first and third appellants.

[74] This is one of the most serious rape cases this court has dealt with. It was a rape as contemplated in Schedule 2 Part 1 where the victim was raped more than once, whether by the accused or by any co-perpetrator or accomplice or by

more than one person, where such person acted in the execution or furtherance of a common purpose. In such a case the legislature, in terms of the provisions of Act 105 of 1997, prescribed a sentence of life imprisonment, unless the court finds that there are substantial and compelling circumstances to deviate from such a sentence.

[75] The court *a quo,* correctly in my view, found that there were substantial and compelling circumstances to deviate from the prescribed sentence. These include that the appellants were relatively young, had no previous convictions, their low level of education and the poor socio-economic conditions they lived in.

[76] Given the serious nature of the offence and the manner in which the appellants conducted themselves, the prevalence of the offence and the interests of society, I am unable to agree that the sentence imposed was disproportionate or unduly severe. On the contrary, the appellants are fortunate that the sentence imposed was only 18 years. I do not believe that this court is at liberty to interfere with the sentence.

[77] I would therefore make the following order:

1. That the second appellant's appeal against conviction is dismissed.

2. That the three appellants are acquitted on the charge of rape on which the Magistrate pronounced no verdict;

3. That the appeal against sentence is dismissed.

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HENNEY, J

Judge of the High Court

I agree, it is so ordered.

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STEYN, J

Judge of the High Court