CASE NO.: SA 3/99

IN THE SUPREME COURT OF NAMIBIA

In the matter between

THE STATE	APPELLANT
And	
HUBERT SHIKONGO	FIRST RESPONDENT
VASCO DUMBA	SECOND RESPONDENT
NEROMBA DAVID	THIRD RESPONDENT

CORAM: Strydom, C.J.; Silungwe, A.J.A, et O'Linn, A.J.A. HEARD ON: 1999/10/04

DELIVERED ON: 1999/12/07

APPEAL JUDGMENT

STRYDOM. C.I.: The three respondents were arraigned before the High Court on three counts of rape and one of assault. In regard to count 4 (the assault charge) respondent no. 3 was acquitted after the State had closed its case. At the end of the trial all the respondents were acquitted on all charges still remaining against them at that stage. In terms of s 316A of Act no. 51 of 1977 (the Act) the Prosecutor-

General applied for and was granted leave to appeal to the Supreme Court against the acquittal of-the three respondents.on the rape charges, i.e. counts 1 to 3. The State was represented before us by Miss Tjipueja whereas Mr. Kauta appeared for the respondents *amicus curiae.* The Court want to thank him for his assistance in this matter. Mr. Kauta also represented the respondents in the Court *a quo.*

The grounds on which the appellant launched its appeal were the following:

> "...applicant wishes to appeal on the grounds that the honourable Court misdirected itself and/or erred in law and/or in fact:
>
> 1. by completely disregarding the record of proceedings in terms of section 119 of Act 51 of 1977.
>
> 2. by evaluating the evidence of the respondents and the State without having regard to the admissions made by the respondents in the section 119 proceedings.

3. by disregarding the admissions made by the respondents in the section 1 19 proceedings and thereby by holding that the State had not established the guilt of the respondents beyond a reasonable doubt as the versions of the respondents were reasonably possibly true."

The grounds of appeal are evidently aimed at attacking a finding made by the trial]udge in totally disregarding informal admissions made by each of the respondents in the s 119 proceedings when the respondents were required to plead before the magistrate at Rundu.

The record of the s 119 proceedings was handed in by counsel for the State seemingly in terms of the provisions of s 235(1) of the Act. No objection of any kind was raised by the defence when this record was handed in at the start of the trial. This handing in followed immediately upon explanations given by Mr. Kauta in terms of s 115(1). The gist of these explanations was that each of the respondents denied having had intercourse with the complainant in this case. These explanations were in direct conflict with what was said by each of the respondents when they were called upon to plead before the magistrate. On that occasion each one admitted having had intercourse with the complainant but stated that this was consented to by the complainant after they proposed to her.

The admissibility or otherwise of the s 119 proceedings was really only addressed by both counsel after evidence was completed and they were putting their final submissions before the Court *a quo.*

According to the evidence complainant is a scholar at the Dr. Romanus Kampungu School in the district of Rundu where she is also a lodger at the girls' hostel. The third respondent was also a scholar of the said school and was a lodger at the boys' hostel. The first respondent was attending another school and so was the second

respondent. Apparently the two hostels accommodating the scholars were on the same premises, but some distance apart. —-

On the night in question the complainant was in her room with her two roommates when four men came there. They were the three respondents and the witness Robert Muronga. The latter and the third respondent were in a room next door. First and second respondents firstly tried to take away Asteria Dominicus, one of the complainant's roommates. When the latter was not willing to go she was assaulted by the second respondent. Thereupon first respondent got hold of complainant and took her to an adjacent room and thereafter to the boys' hostel to the room of the third respondent, where, according to complainant, first respondent undressed himself and raped her. After first respondent completed his act the second respondent was admitted into the room and thereafter the third respondent who, all

of them, raped the complainant. First respondent again wanted to have intercourse with the complainant but this was interrupted by a group of students who arrived at the scene. Amongst these students were members of the S.R.C. and the complainant was taken to a teacher. Eventually she was examined by a doctor who found a redness of the mucous which might have been caused by some mechanical type of a rotation. The hymen was not intact which indicated some prior sexual activity. Vaginal smears were taken by the doctor which, on analysis, contained many intact spermatozoa which were microscopically observed. This latter information was contained in an affidavit which was handed in by the State in terms of the provisions ofs 212(4)(a) and (8)(a) of the Act.

Robert Muronga testified that he was in the room next door to that of complainant. First and second respondents were in the room of the complainant and third respondent, who is Robert's younger brother, was standing with him. The witness saw first respondent walking away with the complainant. They were holding hands. Later Robert stated that first respondent had his arm around the waist of the complainant. The witness went to his room next to the room of the third respondent. The witness saw first respondent enter third respondent's room with the complainant. The witness sat in the washing room where he was joined by second respondent. At one stage he went to urinate and on his return he heard first respondent asking second respondent why the girl was crying. From that he drew the inference that second respondent was with the complainant in the room during his absence. When Robert came from the toilet he also saw the third respondent enter the room. He thereafter left and went to the girls' hostel to warn the girls at complainant's room to leave there as he was afraid that some of the boys might return to also take them away.

Asteria corroborated the complainant and Robert as to the fact that the respondents were at their room and how it came about that she did not go with the respondents. This witness stated that the complainant was pulled out of the room by the

first respondent.

All the respondents testified and denied that they had intercourse with the complainant. When confronted by their plea explanations as set out in the s 119 proceedings they each denied what was recorded and stated that they only pleaded

not guilty when the charge of rape was put to them. First respondent however admitted .that he went to fetch the complainant at her hostel and brought her to third respondent's room. She came however voluntarily and he left her in the room to go and buy some cooldrink and fruit. On his return to the room he found a lot of people standing outside and they accused him of raping the complainant.

Second respondent denied that he saw the complainant on the evening of the alleged rape. Although he was at one stage at the girls' hostel he had already left by 21 hOO. He further denied having known the complainant, Asteria or Robert before the alleged incident. That also goes for the third respondent. As far as the first respondent was concerned he knew him but they were not close friends.

Third respondent left the keys to his room with first respondent at the latter's house earlier that day. He then went into town to visit family. He returned to the hostel at about 20h00. He saw somebody lying under the blankets on his bed. When this person removed the blankets he saw that it was a girl. He questioned her and she said that she was brought there by the first respondent. Because they were not allowed to receive girls in their rooms he told her that she must go.

When they were about to leave the room he saw a crowd of people approaching. He was asked whether he was one of the people who raped the girl. The third respondent also denied that he was together with his elder brother, the witness Robert, on the day or night of the alleged rape.

The significance of the s 119 proceedings became apparent in the light of the evidence of all the respondents where they denied having had sexual intercourse with the complainant at any time. Dealing with the issue of the s 119 proceedings the learned trial judge stated that in terms of the provisions of s 122(1) of the Act the magistrate was obliged to act in terms of the provisions of s 115 of the Act. Because of the non-compliance with these provisions by the magistrate, none of the warnings and explanations normally given to an undefended accused under these circumstances, were given to the respondents. This led the learned judge to conclude as follows:

> "Had the magistrate in this case complied with the requirements of section 122 and acted in terms of section 115, the accused might have declined to outline the basis of their defence as they are entitled to do in terms of section 115. That failure which the magistrate admitted, destroys even the *prima fade* evidential value of the admissions purportedly made by the accused at those proceedings", (p. 171 of the record).

This finding by the Judge seems to convey that, bearing in mind the wording of section 122, a magistrate, presiding at s

119 proceedings where a plea of not guilty is recorded by an accused, is obliged to apply s 115 and because of that anything which was said is not of any evidential value unless the necessary warnings and explanations had been given to the accused. See in this regard Commentary on the Criminal Procedure Act by Du Toit et a/, para 18-6 to 18-7. The learned trial

judge, so it seems, accepted that such admissions, even if informal, are evidential material which should be considered together :with all other evidence, but ruled that in the present case the Court had to disregard it.

Counsel for the State, Ms. Tjipueja, strongly relied on the case of S v Sesetse 1981 (3) SA 353(A) where it was stated that where an accused made a spontaneous admission after he was required to plead in terms of s 119, but before the procedure prescribed by the Act was explained to him, such admission, if consented to, is deemed to have been made in terms of s. 220. Where the accused does not so consent, the admission should be treated as an informal one and forms part of the evidential material which the Court must consider.

Mr. Kauta in turn submitted that the Sesetse-case, *supra,* could be distinguished form the present case in that the Court there, in contrast with the present case, did comply with the provisions of si 15, sl21 and s 122. Counsel further submitted that the statement relied upon by the appellant is an *obiter dictum,* Mr. Kauta, however conceded that the appellant was entitled to use the s 119 proceedings for purposes of cross-examination.

As previously stated the s 119 proceedings were properly proved and handed in at the trial of the three respondents. At the time when the proceedings took place the respondents were only charged with the crime of rape. The relevant part of the record reads as follows:

"Accd informed that they have a constitutional right to be defended by a lawyer of their own choice and means. Both *(sic)* accd prefers *(sic)* to conduct their own defence.

PP inform *(sic)* court that it is a plea in terms of section of the criminal code.

Nature of the charge explained to accd and both *(sic)* accd understands *(sic).*

PP puts the charge.
Accd pleads *(sic)* as follows:

Accd 1: Not guilty, I proposed the lady and she accepted that I can have sex with her. I did that with her consent. I started to have sex with her first, then accd 2 and lastly accd 3.

Accd 2: Not guilty, I proposed her and she consented to sexual intercourse with her, because she consented thereto.

Accd 3: I am not guilty. 1 proposed her and she consented to sexual intercourse with her. This happened at Dr. Romanus Kampungu.

Section 11 5 Act 51 /1977 not applied.

Adj. 21/11/97 PG decision."

Section 1 19 of the Act requires an accused to plead in the magistrate's court on the instructions of the Prosecutor-General in those cases where the offence may only be tried in a superior court or where punishment may exceed the jurisdiction of the magistrate's court. Section 121 applies the provisions of s 112(l)(b) in circumstances where an

accused pleads guilty and s 122 applies the provisions of s 115 where the plea is one of not guilty.

Section 122(4) provides -

> "The record of the proceedings in the magistrate's court shall, upon proof thereof in the court in which the accused is arraigned for a summary trial, be received as part of the record of that court against the accused, and any admission by the accused shall stand at the trial of the accused as proof of such an admission."

Proof of such record is facilitated by s 235(1) of the Act which provides that a copy of the record of judicial proceedings, certified in terms of the requirements laid down by the section, shall be *prima facie* proof of the correctness of what is recorded. There is no suggestion that the s 119 proceedings in this instance were not properly put before the Court *a quo.* This notwithstanding it is always open to an accused to attack the proceedings e.g. on the basis that admissions contained in it was not made voluntarily or that facts contained in it were not correct. (See Du Toit et a/. *Supra,* pa 24-109.) It was therefore open to the respondents to deny the correctness of the admissions contained in the record.

It is furthermore clear from the record that before the respondents were called upon to plead they were informed of their right to be legally represented, and there was no suggestion at any stage that the participation of the respondents in the s 119 proceedings was due to any coercion

or influence which may render it involuntary. The record also reveals that the charge to which the respondents had to plead, namely rape, was explained to them and that they indicated that they understood it. The reference of the magistrate to "both accused" is a mistake because it is clear that all three accused were present during the proceedings.

Taking into consideration the findings of the Court a *quo* and the submissions made by Counsel it seems to me that the following issues must be addressed to decide whether the trial]udge was correct to disregard the s 119 proceedings and if not, the effect thereof on the case, namely:

4. The peremptory nature of the provisions of s 122(1) and the effect if there was not full compliance therewith;

5. The absence, in the specific circumstances of this case, of any warnings or explanations of their rights given to the respondents before they made the admissions;

6. Whether such admissions, if correctly recorded, have any evidential value and should have been considered by the Court a *quo* together with all the other evidence; and

(4) The nature of the admissions made by the respondents and the attack on the correctness of what was recorded by the magistrate.

Regarding the first point referred to herein above it is so that s 122(1) provides that a Court before which an accused pleads not guilty to the offence charged in terms of s 119, "shall act in terms of section 115". The purpose of s 115 is to enable a Court to determine as far as possible which allegations contained in the charge are in dispute. By his plea of not guilty an accused places in issue each and every allegation

contained in the charge and s 115 empowers the presiding officer to question the accused, under the circumstances set but in the section, to narrow down the issues between the State and the accused. To this extent an accused may be asked to admit those issues which are not in dispute due to the plea of not guilty, and if such an admission is made it is deemed to have been made in terms of s 220 of the Act, which then shall constitute sufficient proof of the fact admitted. (See S v Seleke 1980(3) SA 745 (A).)

However, and although it may be mandatory to apply s 115 (see s 122(1)), s 115 itself is couched in permissive terms where it provides that an accused may be asked whether he wishes to make a statement indicating his defence (ss (1)) and the Court mav ask questions to clarify any matter raised under ss (1) or ss (2)(a). Accordingly Eksteen,], (as he then was) refused to follow S v Sepela, 1978(2) SA 22 (B) where the Court came to the conclusion that it was mandatory to question an accused who had pleaded not guilty. See S v Herbst 1980(3) SA 1026 (ECD) at 1031 A-C. See further N.C. Steytler: The Undefended Accused, p 126 and S.E. van der Merwe, et a/, Plea Proceedings in Summary Criminal Trials (1983) 80. In this latter work the authors pointed out that although it was mandatory to apply s 11 5 the section does not make it mandatory to interrogate the accused. In my opinion the

wording of s 115 makes this clear and no irregularity was committed by the learned magistrate when he did not question the respondents after their plea of not guilty. What was stated spontaneously by each of the respondents already limited the issues between the State and the defence. The magistrate could of course have applied ss 2(b) of s 1 1 5 by asking the respondents whether they were willing to admit that they

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S v HUBERT SH1KONGO SC 2 OTHERS

1999/12/07

Strydom, C.1 V Silungwe, A.J.A., O'Linn, A.J.A.

CRIMINAL PROCEDURE

Plea of not guilty

7. S. 119 proceedings - pleas of not guilty - must be dealt with in terms of s. 115 of Act 51 of 1977 - purpose of s. 115.

8. S. 115 couched in permissive terms - not irregularity if Court does not apply provisions of section and refrain from questioning the accused.

9. Court not required to give usual warnings where accused pleads guilty. Warnings can therefore only be given once an accused has pleaded not guilty.

10. Where accused pleads not guilty and simultaneously makes certain admissions concerning a matter which was put in dispute by the plea of not guilty, such admission admissible and forms part of evidential material which Court must consider at end of case - such admission regarded by Court as informal admission if not formally admitted i.t.o. s. 115(2)(b).

11. Accused can attack admission on various grounds - if this is the intention the State should be informed thereof as well as the grounds on which such attack are based.

had sexual intercourse with the complainant, that is after he had given them the necessary warning and explanations. Because of the fact that the respondents, at the trial, denied that they had made such admissions it seems to me that the magistrate, by not applying the subsection, acted to the advantage of the respondents.

Regarding the second point set out above I have already referred to the fact that the appellant relied heavily on the case of S v Sesetse, *supra.* Mr. Kauta's reply to this was that the Sesetse-case must be distinguished from the present case as it is clear that in that case the presiding officer at the s 119 proceedings did explain to the accused their rights in terms of s 115 and the other sections relevant to their pleas. This, counsel submitted, did not happen in the present instance. Furthermore counsel submitted that the statement relied upon by the appellant is an *obiter dictum.* If by this latter submission it is meant that this Court is therefor not bound by the decision then I must point out that since Independence this Court is no longer bound by any decisions of the South African Courts. That however, does not take away the fact that such decisions may still have persuasive value and are to that extent relevant.

In the Sesetse-case three accused appeared before a

magistrate on charges of murder and robbery and was called upon to plead in terms of s 119 of the Act. They all pleaded not guilty to the charge of murder and two pleaded guilty to the charge of robbery. After their pleas were recorded their rights in terms of s 115 and 121 as well as s 113 and 1 12(1) (b) were explained to them. Notwithstanding their pleas of guilty on the second charge the magistrate, after questioning, decided to record

pleas of not guilty. The third accused was not charged again when the matter came before the Supreme Court. In the Supreme Court a third charge of rape was added. In this Court the first accused now pleaded not guilty to all charges whereas the second accused pleaded not guilty to the first and third charges and guilty to the second charge of robbery. He however, denied that he took certain articles and the State did not accept his plea. Both accused were convicted. In regard to the proceedings in terms of s 119 the Court came to the conclusion that because the accused pleaded not guilty the s 119 proceedings did not prove anything and was of no evidential value.

Thereafter the matter went on appeal to the Appellate Division. In this Court it was pointed out that the convictions depended on circumstantial evidence and the inferences to be drawn therefrom. With reference to R v Blom 1939 AD 188 Wessels,]A, found that the proved facts did not exclude every reasonable inference save the one sought to be drawn, namely the guilt of the accused. The matter then turned *lateralis* upon the correctness or not of the finding of the Court a *quo* to ignore the statements of the accused made in terms of the s 119 proceedings. The court, after a review of other cases on this point, came to the conclusion

that an unfavourable admission, even though not formally admitted by an accused in terms of s 115(2)(b), is evidential material which should be considered by a Court together with all the other evidence. On page 376 A to C the learned Judge stated the following:

"Na my mening, is daar geen bepaling in die voormelde Strafproseswet en ook geen reel van ons gewone bewysreg wat die Staat verbied om erkennings van die aard waarna hierbo verwys is as getuiehis aan te bled in verband met die feit waarop dit betrekking het, mits daardie feit relevant is tot 'n feit wat deur die pleit van onskuldig in geskil geplaas is. Dit staan 'n beskuldigde vry om getuienis af te le ten einde die bewyskrag van die erkenning aan te veg, bv. Dat hy dit as gevolg van 'n dwaling aan sy kant of onder die invloed van dwang gedoen het. Aan die end van die saak oorweeg die Hof die bewyswaarde van die erkenning in die lig van die getuienis as 'n geheel."

(In my opinion, there is no provision in the aforesaid Criminal Procedure Act and also no rule of our ordinary law of evidence which would prohibit the State to tender in evidence admissions of the nature referred to aforesaid in connection with the fact on which it has a bearing, provided that it is relevant to a fact which was placed in issue by the plea of not guilty. An accused is free to give evidence in order to attack the cogency of the admission, e.g. by showing that he did so in error or that he acted under compulsion. At the end of the case the Court must consider the evidential value of the admission in the light of the totality of all the evidence.) (My translation.)

During the Court's discussion whether such admission would constitute evidence, the following remarks were made by the learned Judge of Appeal, see p. 373 H, namely:

"Nog 'n voorbeeld kan genoem word. Waar 'n beskuldigde ooreenkomstig die bepalings van art 119 van die Wet aangese word om op 'n aanklagte van moord te pleit, hy spontaan, en nog voordat die by art. 122 voorgeskrewe prosedure gevolg word, sou erken dat hy die oorledene met ƒn mes doodgesteek het, maar pleit dat hy nie aan moord skuldig is nie omdat hy nie wederregtelik opgetree het nie, daar hy

in noodtoestand of noodweer gehandel het. Ek weet van geen rede vvaarom so 'n erkenning nie by die verhoor as getuienis (in die sin van bewysmateriaal) kan dien in verband met 'n feit wat deur die pleit van onskuldig in geskil geplaas is nie, nl. Die feit of die beskuldigde die dood van die oorledene veroorsaak het."

(Another example can be mentioned. Where an accused is called upon to plead according to the provisions of s 119 of the Act on a charge of murder and he then, spontaneously, and before the prescribed

> procedure in terms of s 122 could be followed, should admit that he killed the deceased by stabbing him with a knife, but pleads that he is not guilty of murder because he did not act unlawfully/because he acted in a state of emergency or in self-defence. I know of no reason why such an admission cannot serve, at the trial, as evidence (in the sense of evidential material), in connection with a fact which was put in issue by the plea of not guilty, viz the fact whether the accused has caused the death of the deceased.) (My translation.)

Returning to the present appeal it seems to me that the duty of the Court to inform an accused of his right to remain silent, only arises once an accused has pleaded not guilty. Only after an accused has pleaded would the Court know what explanations and warnings should be given. In S v Mabaso and Another 1990(3) SA 185 (A) the following was stated by Hoexter,]A, for the majority of the Court. See p. 201 C-E:

> "The purpose of the pre-trial procedure, the rights of an accused thereunder, and the status and evidential cogency of admissions made by an accused in the course thereof have been considered in a number of decisions by this Court. See S v Seleke en 'n Ander 1980(3) SA 745 (A); S v Sesetse en 'n Ander 1981 (3) SA 353 (A); S v Daniels en 'n Ander 1983(3) SA 275 (A); S v Nkosi en 'n Ander 1984 (3) SA 345 (A). In the last-mentioned judgment this Court stressed the significant difference between the respective situations of (1) an accused who, having pleaded not guilty in s 119 proceedings, is questioned as to the basis of his defence under s 1 15 and (2) an accused who, having pleaded guilty under s 119, is questioned in terms of para (b) of s 1 12(1). It was held that in the latter situation it is unnecessary for a magistrate to advise the accused of his right to remain silent. The reason is that by his plea of guilty the accused has admitted the whole of the State's case. Any warning to the

> accused at that stage so it was held, would be contrary to the spirit of s 119 read with s 121(1) and 1 12(1)(b); and it would be calculated to thwart its object/'

Where, as in this case, the respondents together with their pleas of not guilty, spontaneously admitted a fact which was put in issue by the plea of not guilty,

namely the fact whether they have had sexual intercourse with the complainant, I can also think of no reason why such admissions should be ignored. I know of no rule of evidence which would make such evidence inadmissible, except if it were made under compulsion but that was never even suggested. As was stated in the Mabaso-case, *supra,* p 206 F the general rule is that all relevant evidence is admissible unless it is prohibited by a specific rule of the law of evidence.

For the reasons set out above I respectfully agree with what was stated in the Sesetse-case, *supra,* and the other cases referred to above and from this it follows that the Court a *quo* was wrong to summarily disregard the informal admissions made by the respondents when they pleaded at the s 119 proceedings. The magistrate was only obliged to give the necessary explanation and warning after it became clear what the respondents were going to plead. They pre-empted this by making the admissions together with their pleas.

The third point referred to by me above, and which must be considered, was answered during the discussion of the second point above i.e. that admissions which are unfavourable to an accused and not confirmed in terms of s 115(2)(b) are regarded as informal admissions and form part of the evidential material which must be considered together with

all the other evidence. See further in this regard S v Mioli and Another 1981(3) SA 1233 (A) at 1238 D - E; S v Daniels en 'n Ander 1983(3) SA 275 (A) at 300 E - F; S v Mabaso and Another, *supra,* at 209 I; S v Shivute 1991(1) SACR 656 (Nm) at 659e and S v Cloete 1994(1) SACR 420 (A)at424d-g.

Looking at the admissions as contained in the s 119 proceedings they seem to me to be incriminating in part and exculpatory in part. In S v Cloete, *supra,* 425ff it was stated that a Court, in convicting an accused, cannot rely on the incriminating parts only and ignore the exculpatory parts where they were not repeated under oath. In S v Shivute. *supra,* p 659f - g, O'Linn, J also pointed out that where a defence is raised in the exculpatory part, it may be necessary for the State to negative that defence to the extent of a *prima facie* case. In the present instance all three the respondents gave evidence under oath. In their evidence they flatly denied that they had made the statements contained in the s 119 proceedings and now also denied that any one of them had sexual intercourse with the complainant.

There is then fourthly the question of the correctness of the record of the s 119 proceedings. To this extent s 235 of the Act provides that the record shall constitute *prima facie* proof that any matter it contains was properly so recorded. The three respondents dealt with the s 119 proceedings when they gave evidence under oath. First respondent stated that at the time he pleaded not guilty and was then asked by the magistrate whether he proposed the complainant. This he confirmed. Nothing more was said by him. However, the magistrate also told him to be careful, and that the case

will be sent to Windhoek to the High Court. The other two respondents testified that they only pleaded not guilty and did not say anything else.

When the s 119 proceedings were tendered by the State in the Court *a quo* no indication was given by the defence of the basis on which they would challenge the

proceedings. On the strength of the Mabaso-case, *supra,* p 205 A - C Mr. Kauta argued correctly that the Court a *quo* could not set aside the s 119 proceedings. That does however, not mean that there is not a duty on the defence to inform the State that they are going to challenge the proceedings and the basis on which they are going to do so. In my opinion the plea explanations given at the start of the trial also did not inform the State of the basis of the challenge as it was still open to the respondents to say that what was recorded in the s 119 proceedings was correct but that the admissions set out therein were not voluntarily made or that they were coerced in making false statements. This much must have been clear also to Counsel for the defence.

In the end the stance taken by the respondents in denying that they had ever made the admissions implies that what was recorded was due either because of a wrong interpretation or was a deliberate attempt by the interpreter or the magistrate to fabricate false admissions. Apart from the fact that this is highly improbable there was not the faintest suggestion of improper conduct on the part of the Court officials and the respondents mostly were content with bare denials.

Furthermore the admissions, and more particularly that of the first respondent, contain detail which, in my opinion, could

only have come from him. I refer in this regard to his statement that he was the first to have sexual intercourse with the complainant and that thereafter second and then third respondents also had sexual intercourse with her. This co-incides fully with the evidence of the complainant which was given at the trial and the sequence of events admitted to by the first

respondent was confirmed by her. See also the evidence of Robert Muronga. This admission made by the first respondent/was made in the presence of the second and third respondents and neither of them objected thereto or denied that that was so. In fact they confirmed by their admissions that they had sexual intercourse with the complainant.

I am therefore of the opinion that the State proved beyond reasonable doubt that the respondents indeed made the admissions set out in the s 119 proceedings and that their belated denials are no more than an attempt to avoid a situation which could be problematical for them. From the above it also follows that I am of the opinion that the learned Judge a *quo* misdirected himself when he concluded that he was not entitled to regard the s 119 proceedings and the statements made therein as part of the evidential material which had to be considered together with all the other evidence put before the Court.

Mr. Kauta was of course correct when he submitted that these admissions, not having been confirmed by any of the respondents in terms of s 115(2)(b) of the Act, did not relieve the appellant from proving any or all of the elements of the crime of rape. Because of the misdirection committed by the Court a czuo this Court is now at large to disregard

the findings on fact of that Court even though based on credibility and must come to its own conclusion based on all the evidence. (See R v Dhlumayo and Another 1948(2) SA 677 (AD) at p 705 to 706.)

The first issue which must be considered in my opinion is whether the three respondents had sexual intercourse with the complainant on the evening of 10

August 1997. It seems to me that the evidence in this regard is overwhelming and that the complainant's evidence is supported in many ways by other evidence directly or indirectly.

There is first the evidence of Dr. Tchekashkine who saw the complainant early on the morning of the 11 August. He found a local redness and swelling of the mucous which was a result of some mechanical type of a rotation. This was further explained by him as giving the impression of some manipulation of the genitals. Furthermore vaginal smears taken by the doctor showed on analysis many spermatozoa. Although this evidence cannot and does not point out the three respondents the fact of the matter is that it is at least highly supportive of the complainant's evidence of sexual intercourse on this evening and carries with it a high degree of cogency of that evidence.

To the above evidence must be added the evidence of Robert Muronga and Asteria Dominicus who testified that all three the respondents were present or in close proximity when the complainant was taken away. It is also common cause that she was eventually brought to the room of the third respondent where, according to complainant's evidence, all three had sexual intercourse with her.

In this latter regard the evidence of the complainant is again supported, to a high degree, by the evidence of the witness Robert Muronga who testified that he saw the first and third respondents entering or coming from the room where the complainant was taken. Although he did not see the second respondent entering or coming from

the room, because he had left the scene to urinate, he heard, on his return, first respondent asking second respondent why the girl was crying. From this the witness inferred that second respondent was also in the room with the complainant, seemingly during the time that he was away. In the light of all the evidence it seems that Robert came to the correct conclusion and that the second respondent was indeed also cloistered with the complainant in third respondent's room. If this was not so then first respondent's question to second respondent made no sense. Much was made of the fact that according to Robert's estimation he was only away from the scene for a minute but, again in the light of all the evidence, I am satisfied that the witness could have been mistaken and that he was away for longer than what he thought. However, any uncertainty in this regard was cleared up by the admissions made by the three respondents at the s 119 proceedings and I have already pointed out that these admissions do not only support complainant's

evidence as to the sexual intercourse but that first respondent's admission went further and also supports her in regard to the sequence in which the three respondents had such intercourse.

Considering all the above evidence I am satisfied that the appellant proved beyond reasonable doubt that all three the respondents had sexual intercourse with the complainant on the evening of 11 August 1997 and that there is no reasonable possibility that the denials by the three respondents concerning this issue could be true.

The next issue to be considered is whether the complainant consented to the sexual intercourse. The way in which the complainant came to be in the room of the third

respondent is in my opinion important. According to the complainant she and Asteria were ordered to go there by the second respondent who also grabbed Asteria and pushed her on her bed in the room. The complainant herself was eventually pulled out of the room by the first respondent and taken away. She said that first and second respondents were in the room and that the witness Robert Muronga and the third respondent were in an adjacent room. Robert said he heard a girl crying in the room next door and when he went outside he saw first and second respondents standing with a girl. First respondent and the girl, who proved to be the complainant, then left whilst second respondent remained behind.

According to Asteria she saw the three respondents as well as the witness Robert. After asking them what they were doing the boys left but returned again and second respondent then ordered her to come with them. The witness refused and was then pulled as a result of which she hurt herself against the bed. When the witness sat down she was once kicked by the second respondent on her leg and she then started to cry. She was thereafter left alone and first respondent then told complainant to come with him. When complainant got up she was grabbed and pulled out of the room by first respondent.

The versions of the respondents differ completely from that

of the State witnesses. First respondent said that he went to the girls' hostel where he asked one Katiki where he could get hold of the complainant and he sent her to look for the complainant. He was later informed that she was not there. On his way back home he saw complainant and one Katjamuise together. They were necking and kissing.

He followed them back to the girls' hostel where, again with the help of Katiki, he found complainant's room and called her out. This he did by calling her through the window. She came out and first respondent told her, it seems there and then, that he needed her and loved her. The complainant reacted favourably to his declaration of love and he decided to take her to the third respondent's room. At the room he gave her the keys to the room and told her to lock it whilst he went off to buy some cooldrinks, biscuits and apples. Second and third respondents denied that they were with first respondent at the room of the complainant and Asteria. In fact second respondent testified that he had not seen complainant that evening and also did not know her as he was not a scholar of that school. He, the second respondent, was attending another school but visited the Dr. Romanus Kampungu School for purposes of study and sometimes he handed over examination papers and memoranda to girls asking for it. He also denied that he knew the witness Asteria or the third respondent and only saw them, it seems for the first time, at the magistrate's court.

The third respondent testified that he on the afternoon of the 10th of August went into town to visit his family. He first of all went to the house of first respondent where he left his keys with him. When the respondent returned to his room at

about 20h00 be found somebody lying on his bed covered completely by a blanket. When this person removed the blanket he saw that it was a girl. He asked her with whom she came there and she said with first respondent. He ordered her out of the room because he realised that if she was found there he could be expelled. The complainant did not want to go and said that she would like to wait for first respondent. He, the third respondent, refused this request and as they were about to

leave the room he saw a crowd of people coming towards them. Some of these people asked him if they were the persons who raped the girl. The third respondent confirmed that he did not know the second respondent and also denied that he had seen the witness Robert Muronga that evening. He and Robert are brothers. The first observation I wish to make in connection with the above evidence is that nothing which was testified to by the three respondents in the Court a *quo* can be reconciled with their admissions made at the s 119 proceedings. The evidence given by them at the trial is a complete about face where first respondent, although he admitted having taken the complainant to third respondent's room with her consent, then disappeared from the scene and only reappeared once the crowd of people confronted the third respondent. Second respondent removed himself completely from the scene and third respondent only entered the scene shortly before the confrontation by the crowd.

On the other hand, the versions of the State witnesses, with the possible exception of the exculpatory part of the s 119 proceedings, fit in with what was admitted by the respondents at such proceedings. The first respondent's version of how he removed the complainant seems to me highly unlikely. According to him he had only seen her some three days before the incident for the first time. When he called her out she

willingly came and also accepted his declaration of love. That was immediately after she had just returned with another boy with whom she was on quite a friendly foot. First respondent had, however, great difficulty in explaining why he took the complainant to third respondent's room. This so-called safe place proved to be anything but safe and if he wanted the complainant all for himself because of his love

for her how did it happen that the two other respondents also ended up In bed with her.

It was further testified by first respondent that he heard some people in the crowd telling the complainant that she should say that she was raped because otherwise she could be expelled for being found in a boy's room. This could in certain circumstances of course be a strong inducement for a girl to falsely implicate one or other person to save herself. However, in the circumstances of this case I am of the opinion that this possibility can safely be rejected. Firstly this very important piece of evidence was never put to the complainant. What was in fact put to complainant was quite the opposite. During cross-examination Counsel for the defence stated that the third respondent would say that when he and the complainant were confronted by the crowd in connection with the rape both third respondent and the complainant denied that anything of the sort had happened.

Secondly, and if complainant was only looking for a scapegoat to save herself then she rather over-did it by implicating three persons where one would have sufficed. This then included the second respondent who, on his evidence, did not know the complainant and was also nowhere near the scene. How

and for what reason complainant would involve him falsely, when she already had two other ready made scapegoats on the scene, remains a mystery. According to the second respondent the complainant should not even have been aware of his existence.

Third respondent also had great difficulty in explaining away conflicts and discrepancies in his evidence. He locked his room and left the keys with first respondent at the latter's home. When he returned to his room he did not go and collect his keys but went straight back to his room. When asked under cross-examination to explain this he said that he thought that probably first respondent might have gone to his room because on previous occasions he had slept there. When pressed further he said that he knew that first respondent was at his room and on the next question he said that first respondent had told him that he was going to sleep there. Within a few questions the third respondent moved from a mere probability to certainty.

In his evidence in chief this respondent said that when he switched on the light he saw somebody lying on his bed but could not make out who it was as the person was completely covered by a blanket. Under cross-examination, and mindful of what he had testified about the first respondent, he now said that he thought that the person lying on his bed was maybe first respondent. However, when giving the plea explanation, Counsel for the defence informed the Court that when third respondent saw the person lying under the blanket he thought that it was his brother. When this explanation was put to him third respondent denied it.

The Court a *quo* stated in its evaluation of the evidence of the respondents that they, and more particularly respondents one and three, were not impressive witnesses. 1 think, as 1 have tried to show, that it went much further than that and that they have lied to the Court in various respects. This, so it seems to me, was necessitated by the

respondents* denial in the Court *a quo* of the admissions made by them during the s 119 proceedings, and the necessity to adapt their evidence to the new stance taken by them.

In regard to the evidence of the two main State witnesses, namely the complainant and Robert Muronga, the learned trial Judge expressed certain reservations and pointed out some unsatisfactory aspects. Although the Court a *quo* did not reject their evidence in so many words it came to the conclusion that the appellant did not prove its case beyond reasonable doubt. In its reasoning the Court a *quo* accepted that there was a reasonable possibility that the versions of the three respondents could be true.

1 agree with the learned trial Judge that the evidence of the State's witnesses is not free from criticism. However, much of the criticism leveled at the evidence of the complainant and Robert concerns what had happened after the complainant was taken away from her room and the question whether the respondents had sexual intercourse with her. Had the Court not misdirected itself on the issue of the s 119 proceedings and allowed itself to properly evaluate the statements made therein by the respondents, most of the difficulties which the Court have had would either have fallen away or become

insignificant. In this regard it is therefore necessary to consider some of the criticism of the complainant and Robert Muronga by the Court *a quo.*

Dealing with her evidence the Court a *quo* referred to the fact that the complainant testified that first respondent said that if she refused to have sexual intercourse with the third respondent she must leave the room. The Court then points out that she was not asked why she then did not leave. The implication may be that she thereafter voluntarily remained in the room. However, in my opinion this piece of evidence cannot be seen in isolation and must be considered together with the other evidence of the complainant in this regard. She testified that first and third respondents were both in the room at that stage. Notwithstanding the fact that she was crying and that she told them that she may be injured, third respondent took off her panties and had sexual intercourse with her. Whatever was said by first respondent did not influence the third respondent and he was intent on having sexual intercourse with the complainant and that was what he did. In regard to what was said by first respondent on this occasion the complainant testified under cross-examination that he told her that if she was not willing to sleep with third respondent they would sent her away alone and she would also be raped by other boys.

Another aspect of the evidence of the complainant which weighed heavily with the Court a *quo* was her evidence that at one stage the third respondent asked her who had brought her

to the room. This, the learned Judge found as some support for the evidence of third respondent that he posed this question when he found the complainant lying under a blanket on his bed when he entered the room. Again, so the learned Judge found this may also support the evidence of the first respondent that he went to buy refreshments and could therefore not have had sexual intercourse with her. For the reasons set out herein before I am of the opinion that

the Court *a quo* would have come to a different conclusion if it had not misdirected itself on the issue of the s 119 proceedings. There are many reasons why such a question could have been asked by the third respondent. One such reason, may be, as was also pointed out by the Court *a quo,* is that he was not present when first respondent took the complainant to his room.

In regard to the evidence of Robert Muronga it is so that he testified that initially he did not suspect any foul play. This was based on the impression he gained when he saw first respondent and complainant walking to the boys' hostel as he said hand in hand or with first respondent's arm around complainant's waist. In this regard complainant also testified that she did not put up any resistance when she was taken to the boys' hostel. She was crying at one stage but was told to stop and was told by first respondent that they were not going to do anything bad to her. What is however, significant of the evidence of Robert is that when he realised that things were not so kosher, probably when he heard first respondent asking second respondent why the girl was crying, he thereafter went to warn the girls to leave their room. This was also testified to by Asteria. The evidence of Robert also, in regard to the sequence of events at third respondent's room, coincides with that of the complainant and the statement of first respondent

made at the s 119 proceedings.

In many respects the evidence of the complainant is supported by other witnesses and/or objective facts such as the presence of spermatozoa found in the analysis of the vaginal smear. Not least of all are the statements made by the three respondents

that they in fact had sexual intercourse with the complainant on the evening of the 11th August 1997. Considering ail the evidence I am satisfied that there is not a reasonable possibility that the versions of the three respondents may be true and I find that the appellant proved beyond reasonable doubt that the three respondents had raped the complainant.

The three respondents were charged on three counts of rape seemingly on the basis of assistance rendered by the other two respondents to the one who was raping the complainant at the time. The question arose whether this was correct to charge the accused in this way. As counsel were not previously alerted to this problem they were not in a position to argue the matter. As I have come to the conclusion that, on the evidence, the respondents are only liable on one count of rape it is not necessary to decide this point.

When application for leave to appeal was made before the Court a *quo* leave for the acquittal on the fourth count namely assault, was included. However, a reading of the grounds of appeal set out thereafter are all but clear. All of the grounds of appeal dealt with the ruling by the Court a quo to disregard the s 119 proceedings and the effect thereof on the evaluation by the Court of the evidence put before it.

During the s 119 proceedings there was no charge of assault put to the respondents and nothing said or done by respondents concerned the charge of assault. Although it may have been the intention to appeal also against the acquittal on the fourth count none of the grounds of appeal covers in my opinion the fourth charge. This is further brought out by the fact that although the third respondent was already

discharged on this count at the end of the State's case no specific grounds of appeal to cover such acquittal appear in the notice. Consequently there is no appeal before us concerning the acquittal on the assault charge.

In the result the following order is made:

12. The appeal succeeds to the extent that the first, second and third respondents are convicted of the crime of rape.

13. The matter is referred back to the Court a *quo* to sentence the respondents after hearing evidence and/or argument in that respect.

STRYDOM, C.J.

I agree S1LUNGWE,

A.J.A.

I agree

O'LINN, A. J.
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