CASE NO.: SA 9/99

IN THE SUPREME COURT OF NAMIBIA

In the matter between

ANDRIES GASEB — FIRST APPELLANT

HARRY CLAASEN — SECOND APPELLANT

KARL GANASEB — THIRD APPELLANT

And

THE STATE — RESPONDENT

COR AM: Strydom, C.J., Dumbutshena, A.J.A. et O'Linn, A.J.A.

HEARD ON: 2000/04/14

DELIVERED ON: 2000/08/09

APPEAL
JUDGMENT

O'LINN.
A.J.A.:

A.
INTRODUCTION

The three,

appellants,

Andries Gaseb,

Harry Claasen

and Karl

Gawaseb,

appeal against

their

convictions

and sentences

in the High

Court.

They appeared in the High Court before Gibson, J. charged jointly with the following crimes:

1) Rape.

2) Rape.

3) Rape.

4) Rape.

5) Housebreaking with intent to commit a crime unknown to the prosecutor.

6) Attempted rape.

The wording of the four charges of rape was identical. But the State explained in its summary of substantial facts in terms of section 144(3)(a) of Act 51 of 1977 that:

> "During the early morning hours of Sunday 7 July 1996 in Donkerhoek, Khorixas, at about 04h00 the accused forced open the door of the house where Ria Gamiros, Eveline Gamiros and Olga Blad were sleeping.
>
> They dragged Ria Gamiros and Eveline Gamiros out of the house with the intention to have sexual intercourse with them. Eveline Gamiros escaped due to the intervention of some people.
>
> The accused proceeded to rape Ria Gamiros at a nearby shack each taking turns and assisting one another.
>
> Accused No. 1 then dragged Ria Gamiros away to his shack where he again raped her."

The State did not aver a prior conspiracy or other form of common purpose.

The basis of the first three charges of rape was that each of the accused had intercourse with the complainant. Accused no. 1 was the first to have intercourse with the complainant assisted by the other two; then after completion of intercourse by No. 1, No. 2 would commence and complete intercourse assisted by No. 1 and 3 and lastly No. 3 would commence and complete intercourse assisted by accused No. 1 and 2.

The roles and identity of perpetrator and assistant, therefore changed after each completed act of intercourse.

The fourth conviction of rape was based on accused No. 1 acting alone and committing this crime at a different place.

All the accused pleaded - "Not Guilty".

Accused no. 1, first appellant, was convicted and sentenced on four (4) counts of rape, one of housebreaking with intent to rape and one of common assault.

Accused no. 2, second appellant, was convicted of three (3) counts of rape, one of housebreaking with intent to rape and acquitted on the charge of attempted rape.

Accused no. 3, third appellant, was convicted of three counts of rape, one of housebreaking with intent and one of common assault.

The accused were sentenced as follows:

Accused no. 1: Ten years imprisonment on each of the first three counts of rape, but the sentence on counts two and three to run concurrently with that on count one. On the fourth count of rape - ten years imprisonment, five years of which to run concurrently with the sentence on count 1. On the count of housebreaking with intent to commit rape, three years imprisonment; on the count of common assault, one year imprisonment.

Accused no. 2: Ten years on each of three counts of rape, but the sentence on counts 2 and 3 to run concurrently with count 1. On the count of housebreaking with intent to commit rape, two years imprisonment.

Accused no. 3: Ten years on each of three counts of rape, but with the sentence on the second and third count running concurrently with that on the first count. On the count of housebreaking with intent to commit rape, three years

imprisonment and on the assault common, one year.

After conviction and sentence, the accused applied to the trial judge for leave to appeal against conviction and sentence, but leave was refused. Thereafter the accused applied to the Chief Justice for leave to appeal against conviction and sentence. Leave to appeal was granted by this Court against all convictions and sentences. In the order granting the applications the Court stated *inter alia:*

> "3. Without limiting the grounds of appeal, Counsel appearing must also address the Court on the following issues:

7) Where there is a multiple rape is it sound/acceptable practice to charge each accused with assisting in the rape of the other resulting in multiple counts? Or is such practice oppressive?

8) Was the medical report of Dr. Than properly admitted in evidence? If not what impact does the report and Dr. Mass' comments thereon have on the convictions?

9) The trial]udge found at page 26 of the Judgment that all three accused raped complainant. It was only after this finding that the Judge summarised, commented on and rejected the evidence of the second and third accused. Was this simply poor structuring or does it affect the verdicts in respect of those two accused?

10) Were the sentences, especially the sentence of 19 years on the first accused, too long?"

At the hearing of this appeal, appellant no. 1 was represented by Mr. Christiaans, the second and third appellants by Mr. Kauta, and the State represented by Ms. Verhoef.

B. THE LEGAL ISSUES RAISED MERO MOTU BY THIS COURT IN GRANTING LEAVE TO APPEAL

1. "WHERE THERE IS A MULTIPLE RAPE, IS IT SOUND/ACCEPTABLE PRACTICE TO CHARGE EACH ACCUSED WITH ASSISTING IN THE RAPE OF THE OTHER RESULTING IN MULTIPLE COUNTS? OR IS SUCH PRACTICE OPPRESSIVE?"

The problem raised above has been raised in our Courts and in South Africa over many years in regard to a great variety of crimes and offences as part and parcel of

the question whether or not there is an "improper splitting of charges". Since the decision of the South African Appellate Division in State v Grobler and Another, in 1966, the question for decision was "whether or not there is or has been an improper duplication of convictions"[1].

The Appellate Division in the aforementioned decision specifically dealt with the impact of section 314 of Act 56 of 1955 (similar to the former section 19 of Act 39 of 1926) on the issue of whether or not there is or has been an improper splitting of charges. It must be noted that the aforesaid sections 314 and 19 were the forerunners of section .83 of the Criminal Procedure Act 51 of 1977 which provides:

> "If by reason of any uncertainty as to the facts which can be proved or if for any other reason it is doubtful which of several offences is constituted by the facts which can be proved, the accused may be charged with the commission of all or any of such offences, and any number of such charges may be tried at once, or the accused may be charged in the alternative with the commission of any number of such offences.

Rumpff, J.A., one of the eminent judges in the aforesaid decision of State v Grobler explained:

> "The section deals, in my view, with the manner of charging and not the legislative and common law principles in regard to conviction and the

imposition of sentence. The consequence of this article, in my view, is that the State is free to draw up as many charges as are justified by the available facts. At the end of the case it is the task of the Court to

I) *t966(I) SA 507 AD*

> decide whether a crime has been proved and if so, which crime and how many crimes have been proved. Should it then for example appear according to the proved facts that two charges in the indictment embrace one and the same punishable fact, the Court will find the accused guilty only on one charge. The effect of the article is thus, *inter alia,* that, no objection can be made against the indictment at the outset of the trial should in terms of the indictment, one punishable fact is charged as multiple crimes."[2] (My free translation from the Afrikaans.)

Beyers, acting C.]., agreed with Rumpff and Wessels, J.A., who wrote the main judgment, put it as follows:

> "In the circumstances postulated the section has no doubt drawn a veil across the taking of exceptions of a technical nature directed to the formulation of the charges, but has not in my opinion affected the application of the rule in question in the field in which it was primarily designed to apply, i.e. in the field of punishment ..."[3]

As to prejudice to the accused in regard to the formulation of two charges rather than one in the case *in casu,* Wessels continued:

> "The formulation of the two charges did not prejudice, and could indeed not have prejudiced the accused in his defence. The prejudice arose upon the resultant duplication of convictions. If the magistrate were to have applied the rule and were to have convicted the accused on one charge only, there would have been no prejudice whatever..."

The ratio of the decision in S v Grobler was applied in South

Africa and Namibia repeatedly since its pronouncement except in a decision by Hannah,]. in the

IBID,
513/514
IBID. p.
522

Namibian High Court with which I will deal in due course.

In the Judgment of the Full Bench of three judges of the Namibian High Court given on review in the decision of The State v Moses Seibeb and Edward Eixab,[4] the Court held per Hannah, J. who wrote the judgment, that there were no duplication of convictions where the two accused were charged in the magistrates court with two statutory offences under the game laws, *viz* contravention of sections 30(1)(a) and 40(1)(a)(i) of Ordinance 4 of 1975 which made it an offence respectively to hunt huntable game without a permit and to hunt in a manner not authorised by a permit.

The Court dealt with the implication of section 83 of the Criminal Procedure Act and said in regard to the procedure:

> "And so, as was pointed out by White,]. in S v Tantsi, 1992(2) SACR 333 (TK), the term 'splitting of charges' is not really appropriate at this present point in time. The concern of the Court is not so much with a splitting of charges as with a duplication of convictions."

After applying the tests set out in several decisions and textbooks, the Court concluded that there was no duplication

of convictions in the case considered, even though it must have been a borderline case, to say the least.

4) Still unreported decision CR *81 jnd 82/97*

The first available report of a Namibian Court dealing with the procedure of charging and convicting in regard to the so called "gang rape" is S v David Garoeb &E 3 Others,[5] Frank, J. as he then was, made the following observation:

> "That is even more so when one is dealing with gang rape. Although the custom is to regard it as one rape - technically speaking each participant is guilty of more than one rape. Thus in the present case each respondent was a perpetrator of rape when he had intercourse with the complainant. In addition he was an accomplice to all the other rapes by assisting when holding the complainant down."

In the decision of the High Court in State v De Klerk and 3 Others/ Hannah, J. summarily quashed the 2nd and 3rd charges of rape on application by the defence counsel made before plea, where in a typical gang rape, four accused were charged with three counts of rape in one indictment.

The learned judge gave the following reasons:

> "The accused were arraigned on an indictment which contained three counts of rape. The prosecution case as set out in the summary of substantial facts is that the three male accused, with the encouragement

and assistance of the female fourth accused, each took turns to rape the complainant during the early hours of the 19th September 1996. That,

11) *CA 23/9S, p J, still unreported, refined to by Teek,].?., la Suit v Hihi K 3 others. CC 73/73, 8/3/99. still unreported.*

12) *CC 15/93, 13/2/93.*

> submitted Ms. Hendriks, on behalf of the State, if the case is made out, constitutes three acts of rape committed by each accused. Technically, that is correct but in reality what is alleged is one continuous single criminal transaction and in my view it would be oppressive for the accused to face the risk of three separate criminal convictions in such circumstances. The clear practice in England is to charge all concerned in one count of rape. See D.P.P. v Merriman, 1972(3) ALL E R 42, and in my opinion that is a practice which should be adopted in this country as well. For these reasons I quashed the second and third counts on the application of Mr. Potgieter who appears for the accused and they were required to plead to the first count only. That alleges that on or about the 19th September 1996 the accused unlawfully and intentionally had sexual intercourse with Leilly Scott, to whom I shall refer as the complainant, without her consent. To that count all accused pleaded not guilty."

It is clear from the above that Hannah,]. relied exclusively on the practice in England as set out in the decision in D.P.P. v Merriman for entertaining an application for quashing an indictment on the ground of an alleged "splitting of charges". The learned Judge consequently did not consider the decision in State v Grobler and all the decisions in South Africa and Namibia following thereon, and did not consider and even impliedly repudiated the Namibian Full Bench decision in the State v Seibeb & Eixab$_r$ *supn,* which judgment was written by himself. Similarly the decision of Frank, J. in S v Garoeb, *supn,* was not referred to and probably also not considered.

Hannah, J. was bound by the principle of *stare decicis*[7] and consequently not entitled to adopt an approach in conflict with the decision of the Full Bench in S v Seibeb &C Eixab.

7) Sfjce *v* K-irjnihi. *BCLR 2000(1) 405 (NmS)* JC *403* ■ *409; Nummiepo md Others* v *Commmdin* Officer. Windhoek Prison &: On, Nimibij High Court, unreported p. 30/31.*

Be that as it may, this Court on appeal can and should reconsider the issue, in view of the fact that it has been raised by this Court *mero motu* when granting leave to appeal..

1 have already referred *supra* to the decision in S v Grobler where it was pointed out that there was no prejudice in the charging in that case of two crimes being murder and robbery. The prejudice if any would have occurred if the accused were improperly convicted twice, not where they were charged twice.

In regard to the issue of prejudice, it is of some interest to note the remarks of Borchers,]. in the fairly recent South African decision of State v Blaatiw.'

The learned Judge pointed out that there may be a need in some cases to set out in the charge, the aggravating circumstances contained in Part 1 of Schedule 2 of Act 105 of 1997 in regard to charges of rape, where section 51, read with subparagraph (a)(i) and (a)(ii) of the said Part 1 of Schedule 2 of the said Act, provides for a minimum sentence of life imprisonment in cases where the rape was committed in circumstances where, e.g. the victim was raped more than once, whether by the accused or by any co-perpetrator or accomplice or by one or

more persons, whether or not such persons acted in the execution of a common purpose or conspiracy.

8) 1999(2) SACR 295 (W)

It seems that a single charge will probably suffice in cases of gang rape in South Africa, because the Court is nevertheless duty-bound to decide *inter alia,* whether or not the victim was raped more than once.

Nevertheless, there could be no impediment to level multiple charges against each accused in a gang rape, as has been done in Namibia since the decision in State v Garoeb and 3 Others, *supra.*

As a matter of fact more clarity and certainty will be achieved by making use of multiple charges and will leave the accused in no doubt of the case he or she has to meet. Multiple charges, will probably better serve the aim of preventing prejudice to the accused than one composite charge, because it will make it clear to each accused whether one rape or more than one rape will be held against him or her not only when convicted, but also when sentenced.

The decision in State v Blaauw dealt with the tests to be applied to decide whether one or more rapes were committed.

That issue is dealt with *infra.*

In the case of State v De Klerk and 3 Others, *supra,* the one charge left after the

Court quashed the second and third charges, was arbitrarily selected. The question arises: Why was the first count selected and not rather the second or third count? Furthermore the charge which remained stated that the accused, that is all the accused, including the woman Anne Drotsky, had sexual intercourse with the complainant, unlawfully, intentionally and without her consent. This is an absurdity because Anne Drotsky, being a woman, could not have had intercourse with another woman, but could only be an accomplice to the unlawful intercourse by the three male accused. Furthermore an indictment in such imprecise and vague terms, does not distinguish between perpetrator, co-perpetrator and accomplice and whether or not it is alleged that a particular accused had intercourse or were only assisting.

Separate charges in the same indictment for separate completed acts of unlawful intercourse, will as in the case of State v Grobler, not prejudice the accused. Again, as pointed out in State v Grobler. the only prejudice that can arise, would be an improper duplication of convictions.

Teek, J.P., considered the available decisions in his

judgment in the Namibian High Court in State v Haita & 2 Others[7] including the judgment of Hannah, J. in State v De Klerk at 3 Others.

9) CC 73/98, dated 8/3/99, unreported.

In regard to the issue of improper splitting of charges, Teek, J. (as he then was) stated:

> "It goes without saying that it is for the Prosecutor-General to decide as to whether or not to rely on the doctrine of common purpose and to charge the accused with multiple counts of rape in the case of an alleged gang rape would depend on the peculiar set of facts and the actual participation of the role played by each accused in the rape, ..."

Later in the judgment the learned Judge said:

> "... And whether or not the arraignment of the accused on the basis upon which they are brought before court by the Prosecutor-General in matters of gang rape is oppressive is better left to his discretion to decide upon due and diligent consideration of the relevant facts and the actual participation by the accused in the alleged rape..."

Teek, J.P., followed the ratio of the decisions in State v Garoeb and 3 Others and State v Eixab and Another on this issue.

In my respectful view his approach was correct.

The decision in P.P.P. v Merriman, 1972(3) All England Law

Reports, 42 relied on by Hannah,]., in State v Pe Klerk & 3 Others, *supra,* as setting out the practice in England, is not very helpful because the practice is stated in very general terms

whereas in South Africa and Namibia, the Courts as well as the authors of textbooks, have discussed the problem in depth and have extracted clearly defined principles and guidelines followed and to be followed in South African and Namibian Courts.

Furthermore the practice in England must always be seen in the context of the jury system not applicable in South Africa and Namibia as well as in the context of statutes applicable there which do not apply in South Africa and Namibia. Conversely, there is as far as I am aware, no provision or statute relating to criminal procedure which corresponds to section 83 of Act 51 of 1977 and its predecessors section 314 of Act 56 of 1955 and section 19 of Act 39 of 1926.

The aforesaid provisions have been instrumental in our Courts "drawing a veil" over the former practice of considering and deciding on objections against alleged improper splitting of charges *in limine,* i.e. before plea. The English decision in P.P.P. v Merriman. *supra,* obviously did not have to deal with provisions such as sections 83, or 314 or 19 above-mentioned. When Hannah,]. dealt with the issue in his judgment in State

v De Klerk, the learned Judge did not consider the authoritative South African and Namibian decisions as 1 have indicated at the outset, but he also did not consider section 83 of Act 51 of 1977 and its impact on the procedure to be followed.

It was not quite clear at the hearing of this appeal whether or not Mr. Christiaans, for 1" appellant, agreed that it was for the Prosecutor-General to decide whether or not to charge an accused with multiple counts of rape in the case of a gang rape.

But it seems that he agreed with the view that "oppression" is at least a ground on which the Court can rely in refusing to convict an accused on multiple counts. Mr. Christiaans also relied on article 12 of the Namibian Constitution which provides for a fair trial.

Ms. Verhoef for the State and Mr. Kauta for 2nd and 3rd appellants submitted that the charges were in order. Mr. Kauta stated:

> "In all fairness it would be difficult for drafters of charges to know what facts would be proven in Court. There is therefore nothing oppressive in being charged with multiple charges. However, it becomes the duty of the trial Court to ensure that an accused is not convicted twice on the same culpable facts."

"Oppression" raised by Hannah,]., as a ground for quashing

two rape counts in State v De Klerk, had not been raised in D.P.P. v Merriman and as far as I am aware, not in any other judgment referred to by counsel for the parties in the Court a *quo* or at the hearing of this appeal.

It is appropriate to reiterate, as has been done in many decisions in the past, that the concept of a fair trial entrenched in Article 12 of the Namibian Constitution, does not mean that the trial must only be fair to the accused. The Court, as administrator of justice, must also ensure fairness to the State, to society and more specifically, to the victims of crime.[10]

I venture to suggest that when the question is raised whether or not multiple charges or multiple convictions are "oppressive" to the accused, the Court should not lose sight of the brutal and barbaric "oppression" of the victim when the victim has been subjected not to one rape, but repeated and multiple rapes over a period.

Mr. Christiaans also referred to Lansdown and Campbell, p. 227 where the learned authors deal with the objectionable features of a "splitting of charges". The learned authors create some confusion when they deal on page 227 with the problem and use the term "splitting of charges" in its headings "Obiections to the splitting of charges" and "Tests for an improper splitting of charges".

10) Scare v *Michel* Kjrjm□»j, *BCLR 2000(4) 405 (NmS)* Jt *418 - 419*

Sute v VJO *den Berg, 1995(4) BCLR 479 (Nm) J:495* F - */ olso reported in SACR 19 (Nm) 490* B - *491 B S v Strowitsky* 6f *Another, (NmHc), 15/7/96, unreported section* C. 5 v *Vries, 1996(2) SACR 639 Nm* JC *661 f-662c*

It is only on p. 232 where the authors clearly indicate, albeit under the misleading heading "Alternative charges", that the rules against "splitting of charges", become relevant and effective at the conviction stage. They state:

> "In S v Grobler. Wessels J.A. approved the view expressed in a number of cases subsequent to Moseme that section 314 of Act No. 56 of 1955 (now section 83 of Act No. 51 of 1977), was merely procedural and had not in any way modified the law and practice as laid down in fi v "lohannes. This section made it clear that no restriction was to be placed upon the number of charges which, in the light of the circumstances of the case, a prosecutor might formulate. It was left to the court to decide in the event of conviction whether the accused should be convicted and sentenced on one charge or on more than one. Section 83 of the Criminal Procedure Act, 1977, is primarily intended to deal with the procedure which may be adopted in the formulation of charges and is in any event limited to cases where there is uncertainty as to the facts which can be proved, or where it is for any other reason doubtful which of several offences is constituted by the facts which can be proved. The section has no doubt drawn a veil across the taking of objections of a technical nature directed to the formulation of charges, but has not affected the application of the rule of practice against splitting of charges in the field in which it was primarily designed to apply, namely, in the field of punishment. It was designed to prevent a duplication of convictions in a trial where the whole of the criminal conduct imputed to the accused constitutes in substance only one offence which could have been properly embodied in one all-embracing charge and where such duplication results in prejudice to the accused."

It must be pointed out however, that it is not only section 83 of the Criminal Procedure Act of 1977 which "drew a veil across the taking of objections" but also its predecessors. The decision in State v Grobler, *supra,* decided in 1966, "drew the veil" before section 83 was enacted. The Court based its decision on the

predecessors of section 83, viz section 314 of Act 56 of 1955 and its predecessor section 19 of Act 39 of 1926.

Du Toit et *al* in "Commentary on the Criminal Procedure Act, 82/83, correctly and succinctly set out the position as follows:

> "In most cases the person who is entrusted with the drafting of charge sheets or indictments will not, prior to trial, be exactly sure which facts will be accepted by the court as proven. To avoid this dilemma, s. 83 authorizes the drafter of a charge sheet or an indictment to charge an accused with all the offences which might possibly be proven by means of the available facts. This authorization is at the same time a sanction to include in the charge sheet all the charges which could possibly be supported by the facts, even if they overlap to such an extent that convictions on all or on some of the counts would amount to a duplication of charges. It is, however, the task of the court to see to it that an accused is not convicted of more than one offence if the crimes with which the accused is charged in the relevant charges rest on the same culpable fact. In short, it is the court's duty to guard against a duplication of convictions and not the prosecutor's duty to refrain from the duplication of charges (cf S v Grobler and Another, *supra,* 513E-H). The term 'splitting of the charges' appears, in the context, to be a misnomer, *as* the purpose of the principle involved is not to avoid multiple charges, but rather multiple convictions in respect of the same offence (S v Tantsi et Another 1992(2) SACR 333 (Tk) 334f)."

I have no doubt whatsoever that this Court should now lay to rest this issue and follow the decision in State v Grobler, S v Garoeb, State v Seibeb & Eixab. *supra,* and all the decisions holding in effect, as was done in State v Seibeb & Eixab that:

> "...the term 'splitting of charges' is not really appropriate at this point in time. The concern of the Courts is not so much with splitting of charges as with duplication of convictions."

It follows that the decision of Hannah, J. to quash two of the three charges of Rape in the case of State v De Klerk & 3 Others, was wrong.

It furthermore follows that the first question raised by this Court in granting leave to appeal, should be answered in the negative.

It is not an unsound and unacceptable practice in the case of multiple rape, to charge each accused with assisting in the rape of the other resulting in multiple counts. Such a practice in itself is not oppressive.

But the Court has a duty in such cases to consider and decide at the conclusion of the case for the State and the accused, whether or not conviction of each accused on the multiple

counts charged, would not amount to an improper duplication of convictions. The Court would then have to give effect to such finding.

When considering this issue, the Court will *inter aiia* take into account the principles and guidelines laid down when deciding objections on the ground of the alleged improper splitting of charges, prior to the decision in State v Grobler. *supra.*

2. THE QUESTION WHETHER THERE WAS A DUPLICATION OF CONVICTIONS

Although this question was not raised by this Court in granting leave to appeal, it is a relevant legal question which flows logically from the issue of "splitting of charges" dealt with under section B *supra.*

It may be argued that this Court should first deal with the evidence and then decide whether or not the Court *a quo* correctly found that there were several rapes committed by the three appellants, before deciding whether there was a duplication of convictions.

I find it more convenient and appropriate however, to deal

with this issue at this stage as a logical continuation of the consideration and analysis of the issue of "splitting of charges" dealt with under section B, *supra.*

For this particular purpose I will assume that the finding on the facts and the complicity of the three accused were correct. Only after dealing with the question of "duplication of convictions" and the other legal questions raised, will I deal with the findings of fact.

On this issue Ms. Verhoef submitted that there was no improper duplication of convictions. Both counsel for the three accused however, argued that the verdict of the Court *a quo* amounted to an improper duplication of convictions.

One must keep in mind at the outset as stated previously, that the principles and guidelines laid down in regard to the "splitting of charges" doctrine, remain relevant even though such principles and guidelines are now applied to the issue of whether or not there was an improper duplication of convictions, even if the Court a *quo's* findings of fact were correct.

The authors of Lansdown and Campbell in South African Criminal Law and Procedure, and Du Toit *et al* in Commentary on the Criminal Procedure Act, deal extensively with all the

tests to be applied and the difficulties involved. Too much space will be needed to quote and discuss these principles and guidelines in detail. But Hannah,]., who wrote the judgment of the Namibian Full Bench in State v Seibeb and Eixab, *supra,* summed up the position correctly when he said:

"There is no single test. This is so because there are a large variety of offences and each has its own peculiar set of facts which might give rise to borderline cases and therefore to difficulties. The tests which have been developed are mere practical guidelines in the nature of questions which may be asked by the Court in order to establish whether a duplication has occurred or not. These questions are not necessarily decisive. S v Grobler en 'n Ander 1966(1) SA 507(A); R v Kuzwavo 1960(1) SA 340 (A).

The most commonly used tests are the single intent test and the same evidence test. Where a person commits two acts of which each, standing alone, would be criminal, but does so with a single intent, and both acts are necessary to carry out that intent, then he ought only to be indicted for, or convicted of, one offence because the two acts constitute one criminal transaction. See R v Sabuvi 1905 TS 170 at 171. This is a single intent test. If the evidence requisite to prove one criminal act necessarily involves proof of another criminal act, both acts are to be considered as one transaction for the purpose of a criminal transaction. But if the evidence necessary to prove one criminal act is complete without the other criminal act being brought into the matter, the two acts are separate criminal offences. See Lansdown and Campbell: South African Criminal Law and Procedure (Vol V) at pp 229, 230 and the cases cited. This is the same evidence test.

Both tests or one or other of them may be applied and in determining which, or whether both, should be used the Court must apply common sense and its sense of fairplay. See Lansdown and Campbell (si/pra) at p. 228."

In the aforesaid decision the Court found that there was no duplication of convictions where the accused, having killed

a blue wildebeest with a spear, was charged and convicted of two offences viz:

13) Contravening section 30(1)(a) of Ordinance 4 of 1975 as amended by hunting huntable game without a permit granted by the minister and

14) Contravening section 40(1)(a)(i) by hunting huntable game without a permit authorizing hunting with a weapon other than a firearm.

Although the available reported decisions and textbooks deal with the aforesaid problem in regard to many crimes and offences, the only readily available reported decisions relating to what is often referred to as "gang rape", are those of the High Court of Namibia in recent years. It may be that the reason for this problem being raised in Namibia in regard to "gang rape" only in recent years is that "gang rape" has only become prevalent in Namibia during the last decade. In South Africa the Criminal Law Amendment Act 105 of 1997 provides for certain minimum sentences in regard to certain crimes, including rape, but allows the Court a discretion not to impose the minimum sentence if the Court "is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed...". In that case the Court "shall enter those circumstances on the record of the proceedings...".

In regard to rape, a specified minimum sentence of life imprisonment is provided, subject to certain exceptions, where rape is committed *inter alia:*

(i) in circumstances where the victim was raped more than once whether by any co-perpetrator or accomplice;

(ii) by more than one person where such persons acted in the furtherance of a common purpose or conspiracy.

Although the aforesaid provisions do not prescribe the form of charge, it seems that it vvill apply whether or not the indictment contained only one count of rape or several counts of rape to cover the so-called "gang rape". However, subparagraph (i) at least provides for a finding of several distinct rapes or acts of rape.

The Court consequently has a duty, however charged, to consider and to make a finding whether or not the victim was raped once or more than once.

The decision in State v Blaamy, is a good example of how the Court should proceed to decide whether there was one or more rapes. The headnote correctly reflects what considerations are decisive. It reads as follows:

"Mere and repeated acts of penetration cannot without more be equated with repeated and separate acts of rape. A rapist who in the course of raping his victim withdraws his penis, positions the victim's body

II) 1999(2) SACR 29S(W)

> differently and then again penetrates her, will not have committed rape twice. Each case must be determined on Its own facts. As a general rule the more closely connected the separate acts of penetration are in terms of time (i.e. the intervals between them) and place, the less likely a Court will be to find that a series of separate rapes has occurred. But where the accused has ejaculated and withdrawn his penis from the victim, and he again penetrates her thereafter, it should be inferred that he has formed the intent to rape her again, even if the second rape takes place soon after the first and at the same place."

In this particular case, the accused was convicted of two (2) rapes. The trial judge explained:

> "The complainant was asked to explain how a simple act of rape took about two hours and she then proceeded to supply the details I have quoted above. She was describing, in my view, at least two separate acts of rape. The first was at the bridge and it was terminated by the accused's ejaculation and withdrawal. The second took place some undefined time later about 12 paces away and a different position was initially adopted by the accused. In my view, the difference in time, place and position between these two incidents is sufficient for them to constitute two separate acts of sexual intercourse and hence, two separate acts of rape."

It follows from the above that if the accused was charged on two counts of rape the Court would also have found that the accused was guilty of two counts of rape.

The first Namibian decision of which a report is available is the judgment of Frank,]. in State v Garoeb et 3 Others,

supra, a judgment by the Namibian High court on appeal, referred to *supra,* where Frank, J. who wrote the Judgment, justified multiple charges by implication not only against each accused, but multiple convictions of each accused.

The next available report is that of the decision of Hannah, J. in State v Pe Klerk &c 3 Others, *supra,* with which I have dealt adequately earlier in this judgment.

Then followed the decision of Teek, J.P. in State v Haita sr. 2 Others, dealt with *supra,* where the learned Judge dismissed the ratio applied by Hannah, J. in State v De Klerk & 3 Others, but applied the test formulated by Hannah, J. in the Full Bench decision in State v Seibeb and Eixab, as well as the dictum of Frank, J. in State v Garoeb. *supra.* Teek, J.P. said:

> "/n *casu* the one accused raped the complainant and after completing the crime assisted the soc/7 to commit the same crime with the same complainant. In other words, the one accused first completed his separate criminal act before embarking on the other criminal act of assisting the co-accused to rape the complainant. In the circumstances, the two unlawful acts are two separate criminal acts entailing two separate forms of intent and there can therefore, be no talk of duplication of convictions *strktu sensu.* ..."

After referring to the *dictum* of Frank, J. above-quoted Teek said:

> "/n *casu* therefore the rape each accused committed as a principal perpetrator was completed independently before the perpetrator assisted the

other co-accused to rape the complainant.

> 'If the evidence requisite to prove one criminal act necessarily involve prove of another criminal act both acts are to be considered as one transaction for the purpose of criminal transaction but if the evidence necessary to prove one criminal act is complete without the other criminal act being brought into the matter that two acts are separate

> criminal offences.* *Lansdown and Campbell South African Law Report, supra,* at p. 229 and 230.
>
> Clearer than that it cannot be stated. And whatever or not the arraignment of accused on the basis upon which they are to be brought before court by the Prosecutor-General in matters of gang rape is oppressive is better left to his discretion to decide upon due and diligent consideration of the relevant facts and the actual participation by the accused in the alleged rape. As stated hereinbefore the complainant in the present matter was raped once by each accused, each as a principal perpetrator, thereafter each aided and abetted the co-accused to rape the complainant either by doing or saying something and thus committed a separate criminal act as an accomplice to the rape of the co-accused and therefore each is guilty as a *socius* of rape committed by the co-accused."

I agree in substance with what Teek, J.P. said, except to say that whether or not conviction on multiple charges is "oppressive", if that is a relevant consideration, it would be relevant not only for the Prosecutor-General to consider, but also for the Court when deciding whether or not there is or has been an improper duplication of convictions.

I have already commented earlier in the judgment on the question of the use of the term "oppression" or "oppressive". I reiterate that this term has only been used by Hannah, J. *as* a ground of quashing charges perceived to be an improper splitting of charges. But that of course does not mean that a Namibian Court is not entitled to break new ground by making

use of this concept if appropriate.

It may for example be regarded as part and parcel of the consideration of fairness in convicting or not convicting on multiple charges. And when considering the

"fairness" whether under the name of "oppression" or not, I must repeat that fairness to the accused must be balanced with fairness to the State, to society and particularly to the victim.

Du Toit et *al* states in their book "Commentary on the Criminal Procedure Act, that the logical point of departure for an examination of the duplication of convictions is the definition of those crimes in regard to which a possible duplication has taken place". After referring to the many decisions in this regard the learned authors state:

> "Inferences in regard to duplication may be made from an analysis of the elements of a crime. Murder for example is the unlawful and intentional killing of another person. If someone places a time-bomb in an office building with the intention to kill as many people as possible, and ten people die as a result of the subsequent explosion, he commits by definition ten murders."[12]

It follows that in such cases, the single intention test, the "one transaction test", or "continuous transaction" or "same evidence test" are not applicable.

Following the above approach, I proceed to define the crime of rape:

"Rape is the unlawful and intentional sexual intercourse by a male person with a female person, without her consent."

/ 2) Commentary on the Crim/nj*/ Procedure Act by Du Toit et* J*/, / -t-6, section 83.*

Milton in S.A. Criminal Law and Procedure, defines sexual intercourse as: "Penetration of the vagina with a male penis ... sexual intercourse is a continuing act which only ends with withdrawal". IJ

It seems logical and in accordance with common sense and fairness, that once the evidence proves these elements of the crime in regard to a perpetrator and the accomplice or accomplices if any, then the crime of rape has been proved in regard to that perpetrator and the accomplice or accomplices if any.

Any repetition thereafter, fulfilling the same requirements, constitute further crimes of rape.

In this case a common purpose was not alleged by the state. But it should be noted that Snyman in his book on Criminal Law, makes the following point:

> "The common purpose doctrine cannot be applied to crimes that can be committed only through the instrumentality of a person's own body or part thereof, and not through the instrumentality of another. Rape as well as certain other sexual offences such as intercourse with a girl below the age of sixteen in contravention of section 14 of the Sexual Offences Act 23 of 1957 are good examples of such crimes. Thus if X rapes a woman while his friend Z assists him by restraining the woman but without himself having intercourse with her, Z is an accomplice, as opposed to a co-perpetrator, to the rape. Possible further examples of crimes that cannot be committed through the instrumentality of another are perjury, bigamy and driving a vehicle

under the influence of liquor."[14]

This approach further underlines the distinct and separate roles of the actual

13) Vol. 2, 3"edition.

I -i) Crimirul Uw by C.R. Snynun, p 254.

perpetrator, having intercourse and the accomplice, who assists. Each performs a different and distinct function with a different and distinct intention.

An accused in a so-called "gang rape" has the opportunity before switching roles from perpetrator to accomplice and Wee *versa,* to reconsider his actions. The perpetrator who was first in line after beginning and completing intercourse and satisfying his lust, now has to pause to reflect and to reconsider whether he must now assist another to begin and complete intercourse with the hapless victim. As a matter of fact, he has at least a moral, if not a legal duty, to do so.

The accused who has assisted, after completing his role of assistance having watched and assisted the first perpetrator, now has to decide whether or not to take on his new role and position as perpetrator also penetrating the victim. This process is repeated in a gang rape until all those who wish to satisfy their lust by intercourse have penetrated the victim.

From the victim's side, she must endure repeated rapes on every occasion, without her consent and with a different male. On each and every such occasion she probably hopes and

prays for mercy, for reconsideration, for help. And on every occasion when a new perpetrator commences intercourse, there is a new risk of being infected with H.I.V. The individual accused forms an intention on each occasion to have intercourse without consent or to assist another to have intercourse without consent.

When the test of whether or not the evidence requisite or necessary to prove one charge of rape, necessarily involves proof of the other, is applied, the answer again is in the negative. That is so because for every act of rape or charge of rape, intercourse without consent must be proved in the case of the perpetrator and in the case of each accomplice his acts and omissions, constituting his complicity, must be proved. If one act of intercourse or charge of rape is proved, that does not necessarily prove that there was a second or third act of intercourse, without consent.

Similarly, when one act of assistance and complicity is proved, that does not necessarily prove the second or the third accused's complicity in the sense of being an accomplice; the proof of complicity of one accused in one act of intercourse without consent, does not at the same time necessarily prove the complicity of the same accused in the second or third act of intercourse. In the instant case one can also say that the evidence necessary to prove one criminal charge is complete without the other criminal act or charge necessarily being brought into the picture; alternatively the evidence necessary to establish one charge does not at the same time establish the other.

It must be pointed out in this regard that it is irrelevant for the purpose of the aforesaid test, that one witness is able to give some evidence in respect of all the charges. That is a far cry from saying that the evidence necessary to establish one charge at the same time establishes the other.

The acts of rape committed by a gang constitute the most cowardly, vile and despicable oppression of the victim and the repeated and deliberate violation of her constitutional rights.

Gang rape is not a distinct crime under our common law or statute. The concept should not become a substitute for charging and convicting a number of gangsters for one crime, where each of them has in fact and in law committed several crimes or offences.

Should the number of accused participating then be charged and convicted of multiple counts of rape based on the number of times one of them had intercourse with the victim and one or more of them had switched his role deliberately, each of them only has himself to blame for continuing with a series of rapes or allowing it to continue or assisting in its continuation.

In my respectful view, the concept of fairness will be prostituted, if an accused is allowed to escape conviction and punishment for a series of voluntary, deliberate and separate criminal acts, on the pretext of "fairness to the accused". The application of common sense does not lead to a

different conclusion.

Consequently, in my view, there would be no improper duplication of convictions in this case, should this Court conclude that the findings of fact of the trial Court should not be disturbed.

3. WAS THE MEDICAL REPORT OF DR. THAN PROPERLY ADMITTED IN EVIDENCE? IF NOT. WHAT IMPACT DOES THE REPORT AND DR. MAAS'S COMMENTS HAVE ON THE CONVICTIONS?

This point was also raised *mero motu* by the members of this Court when leave to appeal was granted because from the judgment itself it was not clear how such evidence was received by the Court *a quo.*

Mr. Christiaans on behalf of first appellant, contended that the report of Dr. Than and consequently also the evidence of Dr. Maas, based thereon, were inadmissible. Consequently, there was an irregularity in the proceedings sufficient to vitiate the convictions. Mr. Kauta for the second appellant, found nothing wrong with the admission of the report and the evidence of Dr. Maas, because he had consented to the admission on behalf of his client and actually relied on the report to indicate conflicts between the injuries indicated on the report of Dr. Than and the evidence of the complainant. Ms. Verhoef originally agreed with the point of view of Mr. Christiaans in so far *as* he had contended that the said admission of the report and the evidence based thereon were inadmissible and constituted an irregularity. She went further by submitting that the evidence of Dr. Maas

was also inadmissible on the additional ground that no evidence was led as to his qualifications and experience and thus, so it was contended, his evidence was irrelevant. However, Ms. Verhoef withdrew the latter contention in her oral argument before this Court. It must be mentioned that Ms. Verhoef did not appear for the State in the Court a *quo.*

In view of the conflicting attitudes of counsel for the appellants, a difficult situation has developed because the report of Dr. Than was clearly admissible against 2nd and 3rd appellants and the only question is whether it was admissible against first appellant.

The point originally taken by Ms. Verhoef in regard to the failure of the State to place the qualifications and experience of Dr. Maas on record, can be dealt with first.

The omission to lead this evidence when Dr. Maas testified was an oversight by Ms. Schnecker, who appeared as counsel for the State at the trial in the Court *a quo.* She was negligent in not following this elementary procedure.

But in my respectful view, no prejudice was caused to the accused by this omission. None of them objected or raised such a point in the Court *a quo* or in the hearing of this appeal before us.

Before Dr. Maas was sworn in, state counsel had indicated that she was going to call him to comment on the report of Dr. Than, the doctor who had examined the complainant, but

was unavailable because he had returned to India after his spell of duty in Namibia. Ms. Schnecker had also informed the Court before Dr. Maas was called that he was the "local" from Otjiwarongo, meaning the local doctor. Dr. Maas then commenced and completed his testimony without objection.

It was clear from his testimony that he was conversant with medical examination of this nature and that he had knowledge of the subject on which he was testifying. No one then or now ever doubted that he was the medical doctor practicing as such at Otjiwarongo.

In the circumstances it would be a failure of justice to exclude Dr. Haas's evidence on this extremely technical ground. The alternative is to remit the case to the trial Court to recall Dr. Maas merely to put his qualifications on record. None of counsel suggested such a course and none of counsel relied on the point originally taken by Ms. Verhoef. Consequently the point falls away.

The further point raised was whether or not Dr. Maas, accepting that he was properly qualified, could comment and explain in his testimony, the alleged findings of fact regarding the injuries seen on complainant by another medical practitioner, Dr. Than. This issue also apparently troubled the presiding trial judge in the Court *a quo.*

It is trite law and everyday practice for one expert to comment or voice his opinion on the factual findings, and

even the expressed opinions, of another expert provided the said findings and/or opinions of the other expert have been placed before Court *inter alia* by *viva voce* testimony by such other expert or by consent of all the interested parties.

As I have Indicated above, there Is no doubt that counsel for 2nd and 3rd appellants had consented to such admission.

Accused no. 1 however, was not represented by a legal practitioner at the trial. He was offered a legal representative through the office of the Legal Aid Directorate but he declined and throughout the trial persisted in conducting his own defence. In this regard the presiding trial judge assisted him by explaining to him from time to time, the procedure applicable.

State counsel informed the Court that Dr. Than was not presently available because he had returned to India after his spell of duty in Namibia and that it would be costly and would entail a long delay in the proceedings to attempt to arrange for his return to Namibia just to testify *viva voce* on his findings regarding the medical examination of the complainant. State counsel suggested that the report be handed in by consent, but only for the limited purpose of proving the injuries found by Dr. Than and not for the purpose of placing his opinions or comment relating to the injuries, before the Court.

It was further suggested by State counsel that an available

medical practitioner practicing ^*s* such at Otjiwarongo will be called to explain, interpret and comment on the finding of Dr. Than relating to the injuries found on complainant during the medical examination.

There was ample evidence on record that Dr. Than was a medical doctor who practiced in Namibia as such and who had examined the complainant and had completed from J.88, the usual official report in such cases, in the course of his duties.

Gibson, J. the trial judge, took pains to explain the above position to accused no. 1 and to accused no. 2 and 3 and their counsel and enquired whether they would consent to the admission of Dr. Than's report in the abovestated circumstances on the clear understanding that his report will only be admitted for the purposes of placing on record the injuries if any, found on the complainant by Dr. Than at the time of his physical examination of the complainant.

There was some discussion on the issue between the presiding judge, the prosecutor Ms. Verhoef, and Mr. Kauta. At one stage the presiding judge asked whether accused no. 1 understood the situation but before he or the interpreter could answer, she asked counsel for the State and accused 2 - 3 to address her on the question whether or not the suggested procedure would be permissible.

State counsel replied that she could not refer to any

authority and Mr. Kauta again did not object. The interpreter then said: "Accused no. 1 do understand". The Court then put the following question to accused no. I: "Does he object or is he happy? Counsel for accused no. 2 and 3 with a lot of experience, he has no objection." Accused no. 1 then said: "I have no objection, My lady".

This was in my view, an unequivocal answer by accused no. 1, consenting to the procedure discussed.

Hereafter the Court adjourned until the next morning when Dr. Maas was called and examined by the State, and cross-examined by both accused no. 1 and counsel for accused 2 and 3.

Accused no. 1 even pointed out an alleged discrepancy between the report of Dr. Than and the complainant and the Doctor gave a reply favourable to accused no. 1. The question and answer were put as follows:

> "Question: Doctor, I do not understand about the injury, the abrasion on the knee of the complainant. Because complainant testified that I shot her on the knee with a so-called kettie and is the injury on the knee consistent with one with a person shot with a kettie?
>
> Answer: An abrasion on the knee would be more consistent with a dragging injury like the judge described and not with shooting a stone with a kettie."

Mr. Kauta then thoroughly questioned Dr. Maas. Accused was thereafter allowed further cross-examination and put the following question:

"Doctor, complainant consented to sex and I had sex with complainant with her consent and according to the opinion given by the doctor, doctor stated that the injuries were not consistent with consensual sex, and so from the sperms that were taken for examination, is there a difference, is there actually a difference between sperms of consensual sex and sperms of sex without consent?"

The answer was again favourable to the accused.

There then followed re-examination by Ms. Schnecker, one question by the Court, further re-examination by Mr. Kauta and then two further questions by the Court. Accused no. 1 was then given a further opportunity to cross-examine Dr. Maas arising from the two questions put by the Court.

The accused then put the following question:

"But doctor, you were not present when the examination was conducted, it
was conducted by another doctor, so how can we believe then that what is
stated there by the doctor *as* to her injuries that it is

the truth that is the way

how she was injured?

Answer: That is the Court's job to interpret the

findings, I just read them

out."

Thereupon the presiding judge gave accused no. 1 another opportunity to consider his position. She said:

> "We proceeded on the basis that the injuries reflected in the report, were as found by the examining doctor. And Dr. Maas is only being brought to try and explain the findings. If you now want to challenge the findings as made in form B by Dr. Than, then you would have to cross-examine him and he is not in the country. He has gone back to India and it may take 6 months or a year or more to track him down and bring him back at very considerable expense to the taxpayer. If that is the course you want to adopt. Then this trial will not be completed for a very long time. And you will have to await the result thereafter. And it may take a year or 2, because of the backlog in the High Court. So you think about it..."

Dr. Maas was then excused and the medical report handed up by the prosecutor.

Accused thereupon addressed the Court as follows:

> "Your worship, it is not necessary to call the doctor from India, your worship. We can proceed with the

trial."

This again was an unequivocal consent. Nevertheless the presiding Judge gave accused another opportunity by saying:

"You see accused no. 2 and 3 through their counsel, had been prepared to admit that these findings reflected here are as they were found by Dr. Than. So, I will note that you also would be prepared then to accept that."

Accused No. 1 then responded: "Yes my lady." So, again there was an unequivocal consent by accused no. 1.

But the presiding Judge still took another precaution when she enlisted Mr. Kauta, to assist. The record reads as follows:

"Presiding ludge: Perhaps I could ask Mr. Kauta, if accused consents, to talk to accused no 1 and just to explain the report and so on. Mr. Kauta: "Yes, My Lady, I will do that.

Presiding ludge: In the light of the advice you gave to your clients, so that he understands the position. I mean there are the ways of attacking the findings and the report and criticising it. Not just suggesting to a doctor that he has made this up.

Mr. Kauta: Yes, I will do that, My Lady.

Presiding ludge: Which is highly improbable if it happens. Now then, that is the State case."

The Court then proceeded with the case for the defence. After a lengthy

explanation by the presiding Judge of the procedure to be followed, the case proceeded and the accused testified.

It must be presumed that Mr. Kauta again explained the situation to accused No. 1 in regard to Dr. Than's report as requested by the presiding Judge and that accused no. 1 remained satisfied and persisted with his admission.

It must also be accepted that if accused no. 1 gave any indication of a change of mind, the presiding Judge would have reconsidered the whole question.

There were several letters addressed to the Registrar and to the Court in an effort to appeal. In some of these letters grounds of appeal were set out. However, none of the accused ever suggested as a ground of appeal that they were dissatisfied with the handing in of Dr. Than's report to prove the injuries.

Furthermore, when the accused appeared in person before Gibson, J. to argue their application for leave to appeal, neither accused no. 1 nor accused no. 2 and 3 gave the slightest indication that they were dissatisfied with the handing in of the report of Dr. Than and/or with the

admission of the evidence of Dr. Maas.

This course of conduct shows convincingly in my view, that accused no. 1 persisted with his consent to the admission of the above evidence and even up to and including the hearing of the appeal before this Court. This course of conduct cannot be said to

be based or to have been based at any stage on ignorance on the side of accused no. 1. The whole situation was repeatedly and clearly explained to him during the trial.

He was at all relevant times an adult, aged 25-27 and as the trial Court found, an intelligent person, who deliberately declined legal representation, obviously because he believed that he could do it as well and had the confidence to conduct his own defence.

The point was obviously only argued in this appeal before us, because the Judges of this Court in granting leave to appeal, raised this ground *mero motu* and ordered it to be argued by counsel at the hearing of the appeal.

Mr. Christiaans who appeared *amicus curiae* for accused no. 1, submitted that a Court must act with caution when relying on an accused's consent to admit hearsay when the accused is a "lay person who is unrepresented, particularly when he is an uneducated accused. Indeed, it is submitted that even where the agreement is express, court should act with caution where accused persons are unrepresented and rather have regard to considerations contemplated by s. 3(1)(c)".

Mr. Christiaans relied on the learned authors Hoffmann & Zeffert - S.A. Law of Evidence, 4th ed. p. I 30. Mr. Christiaans further submitted that:

"Apart from the warnings about unrepresented accused agreeing to hearsay being admitted first appellant clearly indicated his reservations about the so-called report of Dr. Than.

First appellant, with all due respect, was subsequently convinced by the Court to allow the hearsay report to be admitted as evidence.

The report of Dr. Than should accordingly be disallowed and the expert opinion of Dr. Maas disregarded, as being irrelevant."

Mr. Christiaans obviously meant that the presiding Judge applied pressure amounting to undue influence on accused no. 1.

These points can be dealt with *seriatim:*

(i) The passage from Hoffmann sr. Zeffert sets out the law correctly.

(ii) However, the presiding judge did deal with the matter not only with

the utmost caution, but with the utmost patience.

The whole procedure was explained repeatedly, (iii) The accused was a lay person, but he was an adult about 25-27 years of age at the relevant time, intelligent and confident who had deliberately rejected legal representation in his defence. According to

him he had failed Std. VIII but continued taking night classes and was studying to become a lawyer, (iv) The consent by accused no. 1 was express, and repeated expressly three times. In addition, as appears from those parts of the record quoted *supra,* the accused consented tacitly or impliedly, (v) First appellant did not first clearly indicate his reservations and was not "subsequently convinced by the Court to allow the hearsay evidence to be admitted as evidence".

What happened as shown by the parts of the record quoted by me *supra* was that, after the situation was explained in Court, the accused no. 1 expressly consented to the procedure envisaged.

Only when he had a further opportunity after questions by the Court to cross-examine Dr. Maas, did he suggest that he had a problem with Dr. Maas's evidence because he, Dr. Maas, could not say whether the findings in regard to injuries were

correct.

Then the situation was once again explained to accused and he then expressly confirmed, twice in succession, that Dr. Than need not be called and that he consented to the admission of the report.

(vi) The presiding Judge did not unduly pressurize the accused and certainly did not unduly influence him.

The Judge, as did the prosecutor before her, explained the alternatives with which the Court, the Prosecution and the accused were faced. These were the realities and the alternative courses open to the Court, the State and the accused.

These alternatives were hard choices, but the Court was duty bound to spell it out for all concerned.

If the accused did not consent, the State would have been compelled to ask for the case to be remanded in order to set in motion legal and administrative procedures to bring Dr. Than from India to testify in Namibia and that delay would have been prejudicial to all the accused as well as the complainant and costly to the State.

The alternatives were:

(a) To let the case proceed with no evidence regarding injuries. That would have prejudiced the State in its commitment to society and the victim; or

(b) To allow the report of Dr. Than, but only and strictly limited to

- his enumeration and description of the injuries on the victim. In this regard the Court had to keep in mind as it apparently did, that the chances of accused no. 1 showing, should Dr. Than be called, that the injuries recorded did not exist or was a figment of his imagination or that he was lying in this regard, were extremely remote

The presiding Judge referred in Court to the attitude of counsel for accused no. 2 and 3, clearly not intending to influence accused no. 1 unduly, but because the attitude of counsel for accused no. 2 and 3 was also a relevant consideration.

The Court did not only have to consider the interests of accused no. 1, but also that of accused no. 2 and 3 as well as that of the victim, society and of course that of the State.

Mr. Christiaans was correct in mentioning the unhappiness in

legal circles with the hearsay rule. In South Africa the rather technical approach relating to admissions of hearsay has already been radically changed by statute. Section 9 of Act 45 of 1988 has fundamentally changed section 216 of the Criminal Procedure Act 51 of 1977. The effect is that the Court retains an overall discretion to admit hearsay in the interests of justice.

If that amendment was applicable in Namibia, the Court a *quo* would have had no difficulty in the circumstances herein set out to admit Dr. Than's evidence.

Similar new provisions were proposed in 1997 by the "Judicial Commission of Enquiry into Legislation for the more effective combating of crime in Namibia" under my chairmanship, but unfortunately no new legislation has yet been enacted in this regard in Namibia. The dilemma for Courts in Namibia to give effect to outdated laws in regard to the hearsay rule, thus continue.

The change of the law by our neighbour South Africa already 12 years ago demonstrates how the tide has run against the retention of these outdated provisions and is also relevant to demonstrate the change in the norms of southern Africa in this regard. This change in southern Africa again is consistent with similar changes in many other democracies with which we share legal values.

I have no doubt that justice was done when the presiding judge, Gibson, J. allowed the statement of Dr. Than and the subsequent evidence of Dr. Maas.

The point raised *mero mow* by this Court in this regard must therefore, in my respectful view, be answered as follows:

The report of Dr. Than was correctly admitted.

4. THE QUESTION WHETHER THE TRIAL 1UDGE. WHEN FINDING AT PAGE 26 OF THE JUDGMENT THAT ALL THREE ACCUSED RAPED THE COMPLAINANT AND ONLY THEREAFTER SUMMARISED. COMMENTED ON AND RE1ECTED THE EVIDENCE OF SECOND AND THIRD ACCUSED. WAS SIMPLY BADLY STRUCTURING HER VERDICT OR DOES IT AFFECT THE VERDICT IN RESPECT OF THOSE TWO ACCUSED

This point was also raised *mero motu* by the Judges of this Court in granting leave to appeal.

The passages relied on by the honourable Judges in raising this question, appears on p. 458/9 of the appeal record. The reference to p. 26 was based on the numbering of the pages of the judgment by Gibson, J. which record was before the judges who considered the application for leave to appeal.

The passage referred to reads:

> "However, having reflected on all the evidence, in particular the arrival and presence of all three accused persons deposed to by all the witnesses the entry of accused no. 1 into the girls room, the sight of the girls fleeing into the room next door and the attack on the room with stones by the accused persons and, the

fact that all three accused persons were seen before, and

> were present during and shortly after the attack, that all three, and accused no. 2 in particular even though accused no. 2 was standing a little apart from the other two accused persons nonetheless accused no. 2 remained in the company of the group, when it was obvious what accused no. 1 and 3 were intent upon. I was satisfied beyond doubt that the three accused persons, including accused no. 2, had made common cause at the scene of the attack on the house, if not before."

In my respectful view the presiding Judge did not refer only to the evidence by the State witnesses but also evidence on behalf of the defence, even though she had only dealt expressly with the evidence of accused no. 1 and his 2 witnesses.

Furthermore, it seems to me, that the passage quoted was restricted at that stage to a finding that the accused had made common cause at "the scene of the attack on the house". It was not a finding that they had made common cause in the subsequent rape.

The trial Judge certainly erred in expressing herself in the manner aforesaid, without first referring to and analysing

the evidence of accused no. 2 and 3.

She however, continued immediately after uttering the aforesaid words, with a further analysis of the evidence of accused no. 2 and 3 and their witnesses and

compared their evidence with that of the State witnesses and then expressed her conclusions as follows:

> "So in all, having regard to all the evidence in the case, I am satisfied beyond all reasonable doubt that the State had proved its case. I was satisfied beyond reasonable doubt that I could trust the evidence of Ria Gamiros, the evidence of Evelyn Gamiros and all the other witnesses who had confirmed her version."

The learned Judge specifically rejected the evidence of accused no. 2 as false. She held that the evidence against accused no. 2 "has not been shown to be possibly true." It is clear from the context however, that she meant that "the evidence on behalf of accused no. 2 was not possibly true". This *inter alia* appears from the sentence immediately following: "The State case is overwhelming".

Looking at the picture as a whole, it seems to me that the passages referred to amounts to "bad structuring" and should not, in itself, affect the verdict on accused no. 2 and 3.

C. THE MERITS IN REGARD TO THE CONVICTIONS

Mr. Christiaans for first appellant relied in the first place on the legal issues raised by

the judges who granted leave to appeal. These grounds have already been disposed

of.

The argument of Mr. Christiaans that complainant is a single witness because the report of Dr. Than and the evidence of Dr. Maas were not admissible, consequently falls away.

The said medical evidence, based on the type of injuries found on complainant's private parts, and the abrasion on her knee, was proof of forcible sex, strongly corroborating complainant that she had been raped by accused no. 1 and two others.

The evidence of several witnesses regarding the throwing of stones and housebreaking, the forcible removal of complainant and Eveline Gamiros by three persons including accused no. 1, from the house where they were sleeping in the early morning hours, were in any event extremely strong corroboration of complainant. This evidence showed that the whole story of accused no. 1 of having picked up complainant at a club the previous evening and of having been with her at accused's home the whole night and of having had intercourse with complainant with consent at his home, was a fabrication.

Accused's explanation of plea in the magistrate's court was as follows:

"the complainant is my girlfriend and I have sex with her permission. I did not rape her, we used to do it all the time."

According to the story at his trial, he never had sex with complainant prior to the evening of the alleged rape. He probably realized at that stage that he had to explain the genital and extra-genital injuries found on complainant when examined and the best he could think of was to suggest that the first intercourse with a virgin could also cause those injuries.

There was no possible motive for complainant to falsely incriminate two other persons, even if she wanted to incriminate accused no. 1. Similarly Eveline and the other State witnesses had no reason whatever to fabricate a story about the stoning and breaking into their home in the early hours of the morning and the forcible removal of Eveline and complainant.

They also reported this incident to the police immediately afterwards.. The police found the stones, the damaged house and found complainant at the home of accused no. 1. The semen found in complainant's vagina was established by the forensic

report to have originated either from accused no. 1 or accused no. 3 or both.

The probabilities were very strong against the version of accused no. 1 and in favour of the version of the State witnesses. The Court analysed the evidence in detail,

found accused no. 1 a liar and correctly accepted the evidence of the State witnesses and found accused no. 1 guilty on all charges.

The Court was also entitled to find that accused no. 1 was accompanied by two other persons when he, and one or more of them, stoned and broke into the house where complainant and Eveline were sleeping; when he and these two persons took complainant and Eveline from the house and subsequently raped complainant in another shack, each of them taking turns, and thereafter accompanied accused no. 1 for some distance on his way to the shack where accused no. 1 was staying.

The only problem was whether accused no. 2 and 3 were correctly identified as the two persons who had so accompanied accused no. 1.

The complainant testified that she only knew accused no. 2 by sight before the night when she was raped. She had apparently not seen accused no. 3 before the night of the rape.

On the other hand, even though there apparently were no lights in the house where complainant and the other State

witnesses Eveline, Olga, Emma and Alfred slept when the house was attacked by the three men and also no lighting outside the house or in the shack where complainant was raped, she had the opportunity over a considerable period to see and observe them.

Constable Amporo testified that complainant told him at the stage when she came out of the house where she was found, "that Boetietjie and his friends Harry and Ou Karl had raped her".

In the written statement by her taken by Cst. Amporo the same day, complainant says that she pointed out the person who had raped her on the same morning when Cst. Amporo arrived at the shack where she was raped the last time. It is common cause that that person is accused no. 1. However, even though her statement was fairly detailed, she never mentioned any names in her statement. She only described the three accused by colour and height.

If she was able to mention any names, Cst. Amporo would certainly have written down the names, in this case the same names as she is alleged to have mentioned to him earlier that morning - namely Boetietjie, Harry and Ou Karl.

In her evidence during the trial of the accused, complainant again only used descriptions of her attackers - not names. According to her she had seen accused no. 2 before the night of the rape but did not know him by name.

This important discrepancy was never cleared up by counsel for the State or the Court as they should have done. This again is unfortunate.

It seems to me that Cst. Amporo was confusing the witness Eveline with the complainant in this regard. It is common cause that it was Eveline who gave the names of all three accused to the police when the matter was reported and actually pointed them out that very morning. There is therefore no reason to hold this discrepancy against the complainant.

There was no indication that Amporo had made a written statement before the trial setting out his investigation. If he had done so, discrepancies such as the above would probably not have occurred because then he would have been able to refresh his memory beforehand, instead of giving his *viva voce* evidence without such aid. This type of conflict sometimes result in the complainant and State witnesses to be discredited, unnecessarily and wrongly.

Complainant was often confused during her testimony between the roles of accused at any particular stage, because she attempted to identify them by reference to their colour and length - i.e. whether the particular person was black or brown and short or tall.

Complainant was adamant that accused no. 2 and 3 before Court

were the two persons with accused no. 1. The trial Court however, correctly pointed out that even though she could be criticised for not being able to say consistently who was first or second or third in having intercourse with her, that can be understood when the traumatic experience which complainant, a young 14 year old girl had to endure,

is considered. What she was adamant about was that the three accused before Court had raped her, each taking turns at the shack.

Nevertheless, was it not for the evidence of Eveline, accused no. 2 and 3 could not have been convicted.

It appears from a reading of the record that Eveline was a good witness. She knew all three accused well as confirmed by the fact that she could point them out and give their names to the police from the beginning as the persons who stoned and broke into the house where she, complainant and others were sleeping and as the persons who had forcibly dragged her and complainant away.

Eveline could consequently not have made a mistake. But of cause, she could lie and give false evidence. But there was not the slightest indication of motive to incriminate accused no. 2 and 3 falsely.

The trial Court considered all the evidence and rejected the alibi's of accused no. 2 and 3.

In my respectful view there are no proper grounds for

interfering with the findings of the trial Court in this regard.

Consequently the convictions of all three accused should in my view be confirmed.

D. THE SENTENCE

The honourable Judges who granted leave to appeal also formulated the following question in regard to sentence:

> "Were the sentences, especially the sentence of 19 years on the first accused, too lone?"

Counsel for accused no. 1, Mr. Christiaans, as well as the legal representative of accused no. 2 and 3, both submitted that the sentences imposed on their respective clients, should be set aside and more lenient sentences imposed. Counsel for the State, Ms. Verhoef, however, supported the sentences.

The Namibian Courts have in recent years generally passed heavy sentences in regard to the crime of rape in an attempt to stem the tide of escalating heinous crimes such as murder, rape and robbery. The courts have also taken note and given weight to the outcry in society for drastic action by the courts.

This tendency can also be seen in South Africa, our neighbour. This is a relevant consideration for Namibian

Courts, particularly because our problems relating to crime are similar and our legal and moral norms and values and legal systems correspond.

After the abolition of the death sentence by the Constitutional Court, the South African Parliament enacted the Criminal Law Amendment Act 105 of 1997 to provide for the punishment of crimes such as murder, rape and robbery.

In the case of rape, it is mandatory to impose a sentence of life imprisonment, subject to certain exceptions, in the following circumstances:

(a) When committed:

(i) in circumstances where the victim was raped more than once, whether by the accused or by any co-perpetrator or accomplice; (ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy; (iii) by a person who has been convicted of two or more offences of rape, but has not yet been sentenced in respect of such convictions; or (iv) by a person, knowing that he has the acquired immune deficiency syndrome of the human

immunedeficiency virus;

(b) where the victim:

(i) is a girl under the age of 16 years;

(ii) is a physically disabled woman who, due to her physical disability, is rendered particularly vulnerable; or

(iii) is a mentally ill woman as contemplated in section 1 of the Mental Health Act, 1973.

(c) Where the crime involves the infliction of grievous bodily harm.

The Court is given a discretion not to impose the above sentence, if it is satisfied that substantial and compelling circumstances exist which justify a lesser sentence.

The minimum punishment shall not apply in the case where the accused is under the age of 16 at the time the act which constitutes the crime was committed.

If these provisions applied to Namibia, life imprisonment would have been mandatory subject to the exception specified above, because not only one, but at least 4 of the aggravating circumstances stated above would apply.

It must be noted that multiple rape or the so-called "gang rape", or rape of a person under 16 years of age, constitutes

circumstances that make life imprisonment mandatory.'[s]

15) See in this regsrd the decision in S v B/JJUW, / 999(2) SACR 295(W) referred to suprj.

In the instant case the accused at night stoned and broke open the abode of a family, which was sleeping peacefully. They removed female members by force, assaulted one and raped a girl aged 14 repeatedly. Accused no. 1 was still not satisfied and took this child to his shack and raped her once more.

Consequently life imprisonment would have been mandatory if the South African Law applied in Namibia.

The trial Court considered all the circumstances, imposed a moderate sentence on each count of rape, ordered the rape sentences on the first three counts to run together, but did not do so in regard to the 4th count on which accused no. 1 was convicted.

The accused acted as gangsters. Their crimes were cowardly, merciless and barbaric. They acted without any respect for the fundamental rights of the victims in this case. They showed no remorse. It is trite law that a Court of appeal can only interfere with the discretion of the trial Court regarding sentence on very limited grounds, *viz:* When the trial Court has not exercised its discretion judicially or properly. This occurs when the trial Court has misdirected

itself on facts material to sentencing or on legal principles relevant to sentencing. This will also be inferred where the trial court acted unreasonably and it can be said that the sentence induces a sense of shock or there exists a striking disparity between the sentence passed and the sentence this Court would have passed or if the sentence appealed against appear to

O'LI

this Court to be so startlingly or disturbingly inappropriate as to warrant interference by this Court.[14]

In my respectful view, there are no grounds for such interference.

Consequently, the appeal against convictions and sentences of all three accused should be dismissed.

16) S v Wyk, 1992(1) SACR. H7(Nm)up. 165.

I agree.

□= =**=3-^-

STRYDOM, CJ.

I agree.

DUMBUTSHENA,
AJ.A.

/mv

COUNSEL ON BEHALF OF THE FIRST APPELLANT: Adv. W.T. Christiaans

(Amicus Curiae)

COUNSEL ON BEHALF OF THE 2ND AND 3RD APPELLANT: Adv. P. Kauta

(CONRADIE ex DAMASEB)

COUNSEL ON BEHALF OF THE RESPONDENT: Adv. A. Verhoef

(PROSECUTOR-GENERAL)

STRYDOM. C.I. : I agree with the reasons and judgment of my brother O'Linn. I would however like to add the following in regard to the first legal question raised in this appeal namely whether the method of indicting the three appellants and charging each one of them also separately in respect of the roles they played as accomplices, is permissible. There can be little doubt that since the decision in S v Grobler and Another 1966 (1) SA 507 (AD), and the long list of cases in which the principles enunciated therein have been applied, that s. 83 of Act 51 of 1977, and its predecessors namely, s. 314 of Act 56 of 1955 and s. 19 of Act 39 of 1926, leave it in the hands of the State, in our case the Prosecutor-General, to indict an accused on as many charges as may be justified on the facts of the particular case (see p. 513F). In regard to s. 19 of Act 39 of 1926 de Villiers,] A in *Ex parte* Minister of Justice: *In re:* Rex v Moseme 1936 AD 52 posed the following question, namely:

> "On the facts of it the section is couched in wide terms, and the question may well be asked, whether it does not draw a veil over the whole series of decisions dealing with 'splitting of charges'." (p 60)

Dealing with a similar provision, now set out in s. 314 of Act 56 of 1955, Wessels,] A, answered the above question affirmatively. (S v Grobler, *supra,* p 522 F). As was pointed

out by the learned judge of Appeal s. 314 was intended to deal with the procedure to be adopted in the formulation of charges and was limited to cases where there was uncertainty as to the facts which could be proved or where it was doubtful for any other reason which of several offences was constituted by the facts (p522 D-G).

At p 523 A the learned]udge pointed out that it is not the formulation of more than one charge which prejudices an accused but the duplication of convictions. The duty is therefore that of the Court to ensure that there is not a duplication of convictions and the Court exercises this duty when, at the end of the State's case or after the case for the defence it has become clear, that evidence does not support one or more charges or that at that stage a duplication of convictions has been demonstrated. In the light of the provisions of s 83 of Act no. 51 of 1977, and previously those other provisions referred to, the State is given the power to charge accused persons with all or any of the offences when there is uncertainty as to the facts which may be proved or the offences so constituted by those facts and it seems to me that a Court would not be entitled to quash such indictment before evidence is led and on a basis that the indictment is oppressive as was held in the De Klerk-case, *supra.*

As was pointed out by my brother O'Linn the question which arises logically from the one previously answered is whether, on the evidence put before the Court a *quo,* there was a duplication of convictions. The answer to this question, as was also pointed out by the learned Judge, is not always easy

to determine. Various guidelines or tests have been devised by the Courts. The two most commonly used are certainly the single intent test and the same evidence test. In the application of both these tests regard must be had to the definition of the crime.

Rape is defined as the "unlawful and intentional sexual intercourse by a male person with a female person, without her consent". (See] R L Milton: South African Criminal Law and Procedure: 3fd Ed Vol. II p 439.) The crime is defined in terms of heterosexual sexual intercourse (p 441) and the slightest penetration by the male organ into the vagina is sufficient to constitute the crime. (See R v V 1960 SA 117 (T).) The *actus reus* is committed when there is penetration and cannot be committed through the agency of another person. (See Snyman: Criminal Law: 3rd Ed p 254; Du Toit *et a*\ Commentary on the Criminal Procedure Act p 22-10: the same situation is also accepted for English Law, see Smith K Hogan: Criminal Law. 8th Ed by J.C. Smith p 128.) Anyone assisting the perpetrator short of penetrating the victim would be guilty as an accomplice to the crime of rape. That includes a woman rendering assistance to the actual perpetrator.

In the present matter each of the appellants had sexual intercourse with the complainant without her consent so it follows that the action and intention of each appellant satisfy the definition of the crime and each one of them is therefore a perpetrator of the crime of rape, and is therefore liable to be charged as such.

In so far as the appellants assisted each other in the commission of the crime by one of them, those assisting were accomplices to the crime committed by the perpetrator.

Applying the abovementioned tests to the facts it seems to me that the intent to assist and the intent to rape are distinct. The acts necessary to carry out the intent to

assist were not necessary to carry out the intent to rape or *vice versa* and it can therefore not be said that the different acts constitute one criminal transaction. Similarly the application of the same evidence test does not show a duplication of convictions as the evidence necessary to prove that the appellants were accomplices does not thereby prove that they also committed rape and Wee *versa.*

It is of course the choice of the State how they charge offenders. However, where the facts of a particular matter fall within the ambit of s. 83 the State would be entitled to charge as they did in the present matter. Furthermore if such indictment does not result in a duplication of convictions a Court would be entitled to convict on all or any of such charges found to be proved.

STRYDOM, C.J.

DUMBUTSHENA A J A,

I have had the privilege of reading the judgment prepared by my learned brother O'Linn and the concurrence of the learned Chief Justice. For the reasons that they give I too agree that this appeal should be dismissed. I, however, reserve my opinion on the import or otherwise of the English practice and the decision in the English case of D P P v Merriman® when compared to the South African and Namibian practices and cases on the question of indicting accused persons who are jointly charged.

® Director of Public Prosecutions v Merriman [1972] 3 All E R 42 (HL)