IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case Number: CCT 323/18 & CCT69/19

Ex SCA Case Number: 349/2009

Ex SGHC Case Number: 37/99

Case Number: CCT 323/18

In the matter between:

TSHABALALA, JABULANE ALPHEUS Applicant

and

THE STATE Respondent

COMMISSION FOR GENDER EQUALITY *Amicus Curiae*

CENTRE FOR APPLIED LEGAL STUDIES *Amicus Curiae*

and

CCT 69/19

In the matter of:

NTULI ANNANIUS

and

THE STATE

FILING SHEET: CALS' FINAL WRITTEN SUBMISSIONS, LIST OF AUTHORITIES AND PRACTICE NOTE

HEREWITH presented for service and filing:

1. The final written submission of the Centre for Applied Legal Studies;
2. List of authorities;
3. Practice note

Signed at **BRAAMFONTEIN** on the 11th of July 2019.

CENTRE FOR APPLIED LEGAL STUDIES
Attorney for *amicus curiae* applicant
1st Floor, DJ Du Plessis Building
West Campus, Witwatersrand
1 Jan Smuts Avenue
Braamfontein
Johannesburg
Tel: 011 717 8600
Sheena Swemmer
Email: sheena.swemmer@wits.ac.za
vuyolethu.mntonintshi@wits.ac.za
Ref: Tshabalala/Swemmer

TO: REGISTRAR OF THE CONSTITUTIONAL COURT
1 Hospital Street
Constitutional Hill
BRAAMFONTEIN

AND TO: LEGAL AID SOUTH AFRICA
Johannesburg Local Office
40 Fox Street
Marshaltown
C/O Impact Litigation Unit
29 De Beer Street
First Floor, Legal Aid House

BRAAMFONTEIN
Tel: 011 870 1480 / 011 877 2000
Siyabonga Keka
siyabongaK1@legal-aid.co.za
Ref: E Guarneri
Enrico Guarneri
EnricoG1@legal-aid.co.za
Nzame Skibi
Nzames@legal-aid.co.za

AND TO: DIRECTOR OF PUBLIC PROSECUTIONS, JOHANNESBURG
Innes Chambers
94 Pritchard Street
Johannesburg
Adv Johan Du Toit
Email: JJDuToit@npa.gov.za / KNgubane@npa.gov.za

AND TO: NORTON ROSE FULBRIGHT SOUTH AFRICA INC
Attorneys for the Amicus Curiae: The Commission for Gender Equality
Nicki van't Riet
By Email: nicki.vantriet@nortonrosefulbright.com

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case Number: CCT 323/18 & CCT69/19

Ex SCA Case Number: 349/2009

Ex SGHC Case Number: 37/99

Case Number: CCT 323/18

In the matter between:

TSHABALALA, JABULANE ALPHEUS Applicant

and

THE STATE Respondent

COMMISSION FOR GENDER EQUALITY *Amicus Curiae*

CENTRE FOR APPLIED LEGAL STUDIES *Amicus Curiae*

and

CCT 69/19

In the matter of:

NTULI ANNANIUS

and

THE STATE

CENTRE FOR APPLIED LEGAL STUDIES' WRITTEN SUBMISSIONS

Contents

Introduction

1. Late on a Sunday night and early on a Monday morning in September 1998, a group of young men rampaged through the Umthambeka section of Thembisa. They forced entry into several informal structures and once inside they assaulted, robbed and raped the occupants.[1] Mocumie JA in the SCA went on to state 'that events of that night were aptly described by the full court as a "reign of terror, an orgy of violence and pillage which included a paralysis of fear, morbidity, hopelessness and a psychosis of defenselessness" in the complainants'.[2]

2. The case of *Phetoe v S* forms the foundation of this case before the above Honourable Court insofar as Tshabalala and Ntuli ('the Applicant's) were part of the gang of young men that rampaged through Thembisa that evening, and were thus similarly found guilty with Phetoe, as co-perpetrators, in the commission of 8 rapes that evening.

[1] *Phetoe v S* [2018] ZASCA 20; 2018 (1) SACR 593 (SCA) para 4. This was confirmed as common cause.
[2] Phetoe v S, para 21.

3. In *Phetoe v S* the SCA found that there was insufficient evidence to show Phetoe had the intention to further the commission of the crime (common law rape) committed by someone else (a requirement of the doctrine of common purpose) and thus his conviction and sentence was set aside.[3]

4. The questions on which the current appeal is based, and which has been posed in relation to *Phetoe v* S, by the Honourable Court, is whether the doctrine of common purpose is applicable to the crime of common law rape and whether the SCA decision in *Phetoe v S* was correct, and if correct, whether anything distinguished the convictions the Applicant (Tshabalala at the time and Ntuli) put in dispute from which his co-accused, Mr Phetoe, was absolved?[4]

5. In relation to the above, the Applicants in this matter contend that the doctrine of common purpose does not or should not apply to the crime of common law rape. This is primarily based on the argument that the doctrine as it stands cannot be applicable to a crime based on instrumentality (also known as an autographic crime, or a crime which cannot be committed through the agency

[3] *Phetoe v S,* para 1 and 13
[4] Directions Dated 13 February 2019.

of another individual).[5] They further contend that the SCA was correct in finding a lack of intention with regard to Pheteo to be associated with the rapes. And that Tshabalala, who was found present at two of the rape incidents, should on the remaining counts be treated similarly to Phetoe, and have his convictions and sentences set aside.[6] It appears the Court is invited to accept the same line of argument in the case of Mr Ntuli.

6. In response to the Applicants' arguments, CALS argues that the doctrine of common purpose is applicable to common law rape as well as all other sexual offences, and is in fact constitutionally required.[7] This position has been set out before in CALS' Submissions to the above Honourable Court as per the directions by the Chief Justice dated 13 February 2019. In these submissions we recanvassed the principle issues and expand on

[5] Applicants' Written Submissions Pursuant to Directions issued by the Chief Justice Dated 2 May 2019 page 16, para 49 and page 19, para 53. See also Applicant's Written Submission Pursuant to Directions Issued by Chief Justice Dated 13 February 2019 para 3 – 8.

[6] Applicant's Written Submission Pursuant to Directions Issued by Chief Justice Dated 13 February 2019, para 25 and 26

[7] It must be noted that the question of the applicability of the doctrine of common purpose to all other sexual offences is not currently before the court, yet CALS argues it is in the best interest of victim's of sexual violence, where these crimes are recognised under *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007 ("SORMA") or any other common law sexual offence to similarly benefit from the application of the doctrine of common purpose to the offences committed against them, if the facts support such.

the previous argument set out and/or respond to contention made by the Applicants'.

7. In these submissions, CALS addresses the following issues in turn:

   7.1. The nature and harm of rape being beyond penetration;
   7.2. The arbitrariness of applying the common purpose doctrine to some crimes and not others;
   7.3. Laws which impose positive obligations on individuals in terms of rape (and all other sexual offences);
   7.4. The test and establishment of a prior agreement in gang-related crimes;
   7.5. The 'weighing up' of the rights of the accused versus those of the complainant;
   7.6. Foreign jurisprudence around the doctrine of common purpose in rape cases (and all other sexual offences).

Request for Condonation

8. CALS became aware of the above Honourable Court's intention to hear the above matter, after having received submissions from

various interested entities including CALS, on 2 May 2019 through the Court's Directions Dated 2 May 2019.

9. CALS subsequently sent out its letter requesting consent to be admitted as an *amicus curiae* on 14 May 2019 and received consent from both the Applicant and the Respondent on 15 May 2019, as well as by the other *amicus curia*e on 27 May 2019.

10. CALS ought to have lodged the letters of consent with the Registrar of the Court on 22 May 2019, yet on approaching the Registrar on 21 May 2019; CALS was informed that the letters should rather accompany this application.

11. In relation thereto, we request condonation from the above Honourable Court for the late lodging of said letters.

Request to adduce new evidence

12. In addition to making the legal submissions described above, CALS seeks to adduce documentary evidence relating to

academic studies around the psychological experience of victims of sexual violence, as well as the nature, pervasiveness and risk factors associated with rape and other sexual violence crimes in South Africa.

13. The documentary evidence will include the following studies:

13.1. Africa Check 'FACTSHEET: South Africa's crime statistics for 2017/18' (2018). Available at https://africacheck.org/factsheets/factsheet-south-africas-crime-statistics-for-2017-18/.

13.2. G Cronje, PJ van der Walt, GM Retief & CMB Naudé The Juvenile Delinquency in Society (1982).

13.3. Gastrow, P "Organised Crime in South Africa: An Assessment of its Nature and Origins" Institute for Security Studies (1998). Available at https://oldsite.issafrica.org/uploads/Mono28.pdf

13.4. Machisa, M et al Rape Justice in South Africa (2017). Available at http://www.mrc.ac.za/sites/default/files/files/2017-10-30/RAPSSAreport.pdf.

13.5. Jewkes, R & Abrahams, N 'The epidemiology of rape and sexual coercion in South Africa: an overview' Social Science & Medicine (2002) 1231–1244. Available at http://isssasa.org.za/resources/academic-articles/rape/rape-in-ssm.pdf

14. Rule 31 of the Constitutional Court Rules, 2003 empowers this Court to allow *amici* to introduce 'documents lodged to canvas factual material'. Notably, the documents must be relevant to the determination of the issues before the Court, the material should not already be on the Court record, and the material should be common cause or otherwise incontrovertible or of an official, scientific, technical or statistical nature capable of easy verification.

15. In terms of the above CALS asserts the following in relation to the evidence which it seeks to adduce:

15.1. The documentation CALS seeks to be admitted are directly relevant to issues before this Court as they comprise of academic studies around the psychological experience of victims of sexual violence, as well as the nature, pervasiveness and risk factors associated with rape and other sexual violence crimes in South Africa, which needs to be considered in decisions around law relating to sexual violence.

15.2. None of the studies have been referred to by the Applicants, Respondent or the other amicus curiae in this matter.

15.3. The material referred to are all either verifiable studies by acknowledged research institutions or journal articles that have undergone a peer-review process, which is the accepted criteria for determining the reliability of information produced by an academic author.

16. CALS further submits that section 22 of the Supreme Court Act 59 of 1959, sates that this Court may grant leave to a party to

adduce further evidence on appeal in exceptional circumstances where it is in the interest of justice to do so and sufficient explanation has been given for the failure to lead evidence before the High Court. This principle finds support in the case of *Tofa v The State.*[8]

17. On this premise CALS respectfully submits that the requirements to adduce new evidence have been met in this case.

The nature and harm of rape as being beyond penetration

18. In deciding whether the doctrine of common purpose can apply to common law rape the Applicants correctly state that common law rape is "the (a) intentional (b) unlawful (c) sexual intercourse with a woman (d) without her consent"[9] yet assert that common law rape is not an offence for which an individual can be found guilty through the doctrine of common purpose. This is due to the assertion that common law rape is an offence which is committed

[8] *Tofa v The State* (20133/14) [2015] ZASCA 26 Unreported (20 March 2015) at para 4.

[9] *Masiya v Director of Public Prosecutions Pretoria (The State) and Another* (CCT54/06) [2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827 *para 26 ('Masiya').* This is the applicable offence for rape prior to the advent of SORMA, which has an expansive definition of rape (see section 3, SORMA).

through the instrumentality of a person's own body.[10] The instrument in this regard is the the male penis and the object being the female vagina.

19. CALS asserts that this view does not reflect the true nature of harm resulting from rape. This view is also unaligned with the victim-focused jurisprudence of the above Honourable Court in relation to the resultant harm of rape (and all other sexual offences), which will be set out in more detail below.

The patriarchal roots of the common law and the objectification or 'thingification' of women

20. The focus on the individual's body or body part (penis) as being central to the definition of common law rape is based on the patriarchal roots of the framing rape as an offence in our law. In *Masiya* the above Honourable Court acknowledged these discriminatory roots when it traced the offence's history and stated that "[t]he crime of rape in Roman law was based on a prohibition of unchaste behaviour" and "[p]unishment of non-consensual sexual intercourse protected the interests of the society in

[10] Applicant Written Submissions, page 14 – 19, para 41 to 53.

penalising unchaste behaviour, rather than the interests of the survivor".[11] This Court went on to state that during the period of Roman law, "patriarchal societies criminalised rape to protect property rights of men over women. The patriarchal structure of families subjected women entirely to the guardianship of their husbands and gave men a civil right not only over their spouses' property, but also over their persons".[12]

21. It can be seen from the above that women have been treated as 'objects' of rape where the interest being protected is not their human rights (to dignity, equality, or security and safety of the individual) but rather their chastity, or value as an object for their male 'owners' (fathers or husbands). It is then unsurprising that common law rape, which has its roots in patriarchal beginnings, would treat rape as a crime concerning an instrument (a penis) penetrating an object (a woman, and a vagina). This is an extension of the objectification or 'thingification' of women.[13]

[11] *Masiya,* para 20.
[12] *Masiya,* para 21.
[13] C, Adams *The Pornography of Meat* (2015), 21 – 22. Carol Adams explains 'thingification' as the process whereby a someone is seen as a something and their uniqueness is deleted so that they can be viewed as an object and subsequently harmed.

22. C R Snyman, whose conception[14] the Applicants' rely heavily upon, explains the harm or problem of rape is that "[p]enile penetration of the vagina may result in the woman's becoming pregnant… [where] the main or at least one of the main reasons for criminalising rape is to protect the woman from becoming pregnant without her will".[15] This conception of the harm of rape on the individual is erroneous, misogenistic and out of kilter with the values of the Constitution. The Applicants' reliance on this source to validate their view on common law rape lacks an understanding true effect of rape on individuals. More than that it does not give a true reflection of the law as indicated in the submissions of CGE as friends of the court. [16]

[14] The Applicants' rely on C R Snyman's view of the autographic nature of common law rape at page 16 para 49 of the Applicant Written Submissions and para 3 – 4, page 2 – 3 of The Applicant's Written Submissions Pursuant to Directions Issued by the Chief Justice Dated 13 February 2019.

[15] C R, Snyman *Criminal Law* (2008) 46.

[16] In the unanimous judgment of the Supreme Court of Appeal in K v Minister of Safety and Security, Scott JA made obiter comments which recognize that the doctrine of common purpose is applicable to common law rape. He observed that: *"The conduct of all three policemen was not only wrongful, it was criminal from the time they conspired to rape the appellant until the time the attack ended. Indeed, the inference is overwhelming that the three policemen formed a common intention to rape the appellant at some stage before the driver turned off the road leading to the appellant's house and drove to the spot where all three raped her. Each gave support to the others in committing the crime. If only one had physically raped the appellant, all three could nonetheless have been convicted of rape. They were at all times acting in pursuance of a common purpose."*

Rape and the assertion of power

23. Rape is the act of the need for power coupled with the assertion thereof against a victim. The relationship between rape and power must be considered when analysing whether the doctrine of common purpose can be applied to common law rape.

24. The above Honourable Court in *Masiya* explained that the historic definition of rape is one that concerns itself with "male dominance and power" over women.[17] This statement is supported by studies such as the Medical Research Council's *Rape Justice in South Africa* where it was stated that "[r]ape is predominantly an act of power or an accused's domination over the victim, although, obviously, it is a sexual act".[18]

25. With reference to the above, it would be a misunderstanding of the nature of rape, as an act of the assertion of power over an

[17] *Masiya*, para 24.
[18] M, Machisa et al *Rape Justice in South Africa* (2017), 18. Available at https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/RAPSSA%20REPORT%20FIN1%2018072017.pdf.

individual, to characterise it simply as an act of a man inserting his penis into a woman's vagina without consent.

26. In essence, an act of rape can be performed by more than one individual as long as the others have the intention to assert power and dominance over the victim, where the vehicle to achieve this violence then takes the form of rape (but could have taken the form of numerous other serious sexual offences). Thus, all individuals actively associated with the act and having the required intention should be found equally guilty of the act of domination which is rape.

The need for common purpose and the arbitrariness of applying the doctrine of common purpose to some crimes but not others

Response to the Applicants' – crime of instrumentality submission

27. The Applicants contend that common purpose cannot apply to *any* crime relating to instrumentality and state that CALS was incorrect in its submission asserting that the crime of unlawful

possession of a firearm was in fact an instance of the doctrine of common purpose being applied to a crime of instrumentality.[19]

28. The Applicant's incorrectly assert that the above Honourable Court has held that the doctrine of common purpose does not apply to the unlawful possession of a firearm (an instance of instrumentality) in the case of *Makhubela v S, Matjeke v S.*[20] On a close reading of the case, it can be seen that this Court does not state that the doctrine is not applicable to the unlawful possession of a firearm (and was not asked to make such a determination) and focused instead on the admissibility of out-of-court statements.[21]

29. On the issue of the unlawful possession of a firearm the Court had merely found that in this instance the accused persons had not had the requisite intention to exercise possession of the firearms on behalf of the group and thus common purpose could

[19] Applicant Written Submissions page 15 – 16, para 46 – 47. *Makhubela v S, Matjeke v S* (CCT216/15, CCT221/16) [2017] ZACC 36; 2017 (2) SACR 665 (CC); 2017 (12) BCLR 1510 (CC).
[20] Applicant Written Submissions page 15 – 16, para 46 – 47. *Makhubela v S, Matjeke v S* (CCT216/15, CCT221/16) [2017] ZACC 36; 2017 (2) SACR 665 (CC); 2017 (12) BCLR 1510 (CC).
[21] *Makhubela v S, Matjeke v S*, para 29.

not be said to have existed.[22] This was ultimately a question of whether the accused had met the criteria set out in *Nkosi* and not an invalidation of the principle's applicability to this crime. [23]

Instrumentality and arbitrariness

30. In reference to the above case of *Makhubela v S, Matjeke v S* the above Honourable Court has acknowledged that the doctrine of common purpose can apply to certain crimes requiring instrumentality.

31. From this it follows that if common purpose can apply to unlawful possession of a firearm (a crime of instrumentality) then common purpose must apply to common law rape.[24]

32. In the alternative, should the above Honourable Court deem the offence of common law rape to be narrowly defined as a crime which is dependent on instrumentality to be committed, CALS argues that even such similarly defined crimes requiring instrumentality can and have been subject to the doctrine of

[22] *Makhubela v S, Matjeke v S*, para 57.
[23] *S v Nkosi* 1998 (1) SACR 284 (W) at 286H-I.
[24] C R Snyman *Criminal Law* (2002) 266.

common purpose and it would be arbitrary and irrational not to extend the principe to common law rape.

33. We submit that to exclude common law rape from such application without justifiable reason (where no reason has been given by the Applicants) would suffer the charge of being arbitrary.

34. The above Honourable Court has stated that arbitrariness "inevitably, by its very nature, leads to the unequal treatment of persons. Arbitrary action or decision making is incapable of providing a rational explanation as to why similarly placed persons are treated in a substantially different way. Without such a rational justifying mechanism, unequal treatment must follow".[25]

35. Excluding common law rape from the doctrine of common purpose is an act of treating persons differently. In this instance it would primarily be treating women differently, as 94,1% of the victims of rape in South Africa are women.[26] If this crime was not

[25] *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) para 156.
[26] The Medical Research Council of South Africa found that 94.1% of persons raped in South Africa are women. M, Machisa et al *Rape Justice in South Africa* (2017), 17. Available at https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-

common law rape but a different crime such as possession of an unlawful firearm, the perpetrators could be charged and be found guilty of the crime. No rational justifying mechanism can or has been given for this different treatment and thus it must be seen as arbitrary.

36. From the rationale in *Levenstein* it can then be said that all sexual offences are seen by the above Honourable Court as equally serious, and furthermore that the trauma they cause can be equally harmful. This would be true whether there is unlawful, penetration by a penis or a different form of sexual abuse (such as sexual assault). Thus it would be irrational to assert that common purpose does not apply to sexual offences, or that common purpose can apply to some sexual offences but not common law rape, due to its definition.

Laws which impose positive obligations on individuals in terms of rape (and all other sexual offences)

entities/cals/documents/programmes/gender/RAPSSA%20REPORT%20FIN1%2018072017.pdf.

37. A research report by Women's Legal Centre and Rape Crisis Cape Town Trust titled 'Protecting Survivors of Sexual Offences: The Legal Obligations of the State regarding sexual offences in South Africa', finds that there is an "inordinately high prevalence of sexual violence against women and girls and wide spread domestic violence". Furthermore, such "violence appears to be socially normalised, legitimised and accompanied by a culture of silence and impunity" there is further thereto "low levels of prosecution and conviction" which indicates a cause for concern.[27]

38. South Africa as a country saw a staggering 40 035 rapes in the period 2017 – 2018 (in terms of the SORMA definition of rape). In relation to the scruge of sexual violence in the country considered with the vulnerability of the victims, CALS argues that a positive obligation on the individual to act against sexual violence should exist.[28]

39. We submit that although it is often held that South African criminal law does not place obligations on individuals to act

[27] Women's Legal Centre and Rape Crisis Cape Town Trust *Protecting Survivors of sexual violence: The legal obligations of the state with regard to sexual offences in South Africa* (2013) page 12. Emphasis is our own.
[28] *Africa Check 'FACTSHEET: South Africa's crime statistics for 2017/18' (11 September 2018). Available at https://africacheck.org/factsheets/factsheet-south-africas-crime-statistics-for-2017-18/.*

positively, other than where there is a duty to do so (such as a parent to their child, a teacher to a learner, a policeman to an individual seeking assistance), there are certain statutes which require positive action by individuals with regard to survivors of sexual violence.

40. Section 54 of SORMA for example states that any person who has knowledge of a sexual offence committed against a child has a duty to report such to a police official or to the Department of Social Development. Failure to do so is a statutory offence in terms of section 54(2)(b). Section 110 of the Children's Act 38 of 2005 sets out that individuals holding certain professional positions (such as teachers, medical practitioners and legal practitioners) also have an obligation to report sexual violence committed against a child.

41. This positive obligation we argue should, in fact, be extended to a certain degree of action when witnessing a sexual violation of females (not solely children). The mere inaction of an individuals in cases like that of Phetoe, we submit should in fact be considered as a failure to act in terms of that positive duty.

42. The approach of introducing a lower threshold for common purpose when concerning cases of sexual violence entails a balancing of both the right to fair trial as well as that of dignity, equality and safety and security of the individual. This is, of course, crucial in light of the vulnerability of certain groups, such as women and girl children.

43. The need of positive, horizontal application of rights in the Bill of Rights is not a novel one for example in the case of *Daniels v Scribante* that there was no constitutional bar on the imposition of a positive duty on a private individual.[29]

44. We therefore submit that the Court is well place to develop the law to require a lower threshold in sexual violent crimes and infect impose a positive obligation.

Development of the test applied in common purpose in gang related sexual violent crimes (prior agreement and active association)

[29] *Daniels v Scribante and Another (CCT50/16) [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC).*

45. We submit that the requirement of a prior agreement or active association as set out in *S v Mgedezi*[30] should be further developed in the cases of common law rape in terms of section 39(2)[31] of the Constitution to require a lower threshold in the establishment or determination of prior agreement and active participation in cases where sexual offences are committed by groups and in particular by gangs.

The victim-focused jurisprudence on sexual violence of the Constitutional Court

46. The above Honourable Court has previously held that rape must be viewed through the lens of the significant harm it causes the individual. In *Masiya* it stated that *"[d]ue in no small part off the work of women's rights activists, there is wider acceptance that rape is criminal* because it affects the dignity and personal integrity of women".[32]

[30] 1989 (1) SA 678I – 706C.
[31] When interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
[32] *Masiya*, para 28.

47. In *Levenstein and Others v Estate of Late Sidney Lewis Frankel and Others* the above Honourable Court acknowledged the intersection of violations of rape in so far as it also limits the individual's bodily integrity and psychological integrity.[33] This Court stated that it "accepts that all sexual offences are equally serious and that the harm they all cause is significantly serious" and that "[s]exual offences may differ in form but the psychological harm they all produce may be similar".[34] This Court went on to find that due to the similarity of harm experienced by individuals who have been sexually violated (irrespective of whether this was rape or another sexual offence) it would be irrational for a prescription period in terms of prosecution to lapse for some sexual offences and not for rape and compelled rape.[35]

48. The idea that sexual offences may require a lower threshold of action may be seen to have its basis in cases such as *S v Baloyi*,[36] and is thus not a novel one.

---

[33] *Levenstein and Others v Estate of Late Sidney Lewis Frankel and Others* (CCT170/17) [2018] ZACC 16; 2018 (8) BCLR 921 (CC); 2018 (2) SACR 283 (CC) para 27 ('*Levenstein*').
[34] *Levenstein,* para 3 and 59.
[35] *Levenstein,* para 59.
[36] *S v Baloyi and Others (CCT29/99) [1999] ZACC 19; 2000 (1) BCLR 86 ; 2000 (2) SA 425 (CC) ('Baloyi').*

49. We submit that the Court should adopt the approach considered in the case of *S v Nkosi*[37] whilst the facts are distinguished from the instant. We submit the test as considered and the issue in relation to the group must be decided with reference to the question of whether the state has established the facts from which it can be properly inferred by a court that the group had (a) the intention to commit the common law rape crime and (b) the actual detentors had the intention to carry out the crime on behalf of the group. Only if both requirements are fulfilled joint liability involving the group is attributed. We submit that this Honourable Court ought to find that the requirements were met, and that common purpose is applicable.

50. Furthermore, we submit that this gives this Honourable Court an opportunity not to pass the constitutional muster of the doctrine and bring some parity into our law in relation to the balancing of the rights of the victims as enshrined in the Constitution against those of the accused.

[37] *1998 (1) SACR 284 (W) at 286 H* – I.

51. In the light of the facts of this case, it is important to note that the common purpose doctrine as espoused in *S v Mgedezi* has been pronounced by the Constitutional Court to be constitutional.[38] The most critical requirement of active association is to curb too wide a liability. Current jurisprudence, premised on a proper application of *S v Mgedezi*, makes it clear that (i) there must be a close proximity in fact between the conduct considered to be active association and the result; and (ii) such active association must be significant and not a limited participation removed from the actual execution of the crime.

52. We submit with respect, that the test set in *Mgedezi* is too stringent when it comes to sexual violent crimes, and especially gang related crimes. We submit, that the law should rather be developed to protect women and children alike by creating a positive duty which requires positive action at the face of sexual violence. One would thus need to actively disassociate with the commission of the crime.

53. The inclination of a certain members of our society to watch as women and children are sexually violated either because they are

[38] *S v Thebus* above.

not required by law, cannot continue if we hope to ever curb sexual violent crimes. Sexual violence flourished in communities which keep silent and do nothing. Silence is condonation of interpersonal (family or community) violence.

54. We submit the lack of active association should no longer be an adequate escape route in our law in the face of sexual offences. A co-perpetrator cannot escape liability simply because all that was proved is they may have laughed, regardless of the act of complacency and the implications of the act of laughing during a rape.

55. The Constitutional Court's decision in *Minister of Justice and Constitutional Development & another v Masingili & Others*[39] defines an accomplice as:

> "An accomplice is someone whose actions do not satisfy all the requirements for criminal liability in the definition of an offence, but who nonetheless furthers the commission of a crime by someone else who does comply with all the requirements (the perpetrator). The intent required for

[39] 2014 (1) SACR 437 (CC) para 21.

accomplice liability is to further the specific crime committed by the perpetrator".[40]

56. Snyman,[41] defines accomplice liability as follows:

> "A person is guilty of a crime as an accomplice if, although he does not satisfy all the requirements for liability contained in the definition of the crime and although the conduct required for a conviction is not imputed to him by virtue of the principles relating to common purpose, he unlawfully and intentionally engages in conduct which furthers the commission of a crime by somebody else. The word "furthers" above includes any conduct whereby a person facilitates, assists or encourages the commission of a crime, gives advice concerning its commission, orders its commission or makes it possible for another to commit it".[42]

57. Applying this position to the facts of *Phetoe*, one quickly notes that the Supreme Court of Appeal held that the requirements for

[40] Emphasis is our own.
[41] C R Snyman Criminal Law 6 ed (2014) at 266.
[42] Emphasis is our own.

accomplice liability had not been met and that to base such liability on mere presence at a crime scene would not align with principles of criminal law.[43]

58. We submit that because rape is a power crime (a crime concerned with dominance and exertion of power). The mere presence of large group of men in a room naturally adds to the trauma and sense of powerlessness of the victim. We submit that for an accused to escape liability under common purpose in sexual offences they should actively distance themselves from the actual crime, a mere inaction does not suffice.

59. We further submit one's presence at a scene during sexual violence (even in cases of inaction) forms an intent to act in common purpose, because the person either has the direct intention or at least reasonably foresees the inevitability of the crime.

60. The Supreme Court compared the case of *Phetoe* with facts in *S v Kock en 'n ander*[44] where the appellant had stood guard with a

[43] *Phetoe* para 15.

panga knife during the rape of the complainant. The court observed that in the present matter, and stated the least that can be said about the appellant's conduct of laughing and doing nothing to prevent the rapes, is that it was morally reprehensible.

61. We respectfully disagree with the view of the Supreme Court of Appeal took in this regard.[45] We submit the liability generating from the mere presence during a rape does not differ or become materially lessened purely because there was no knife, the knife in itself is not what constituted the punishable conduct (the context is more important). On this premise CALS submits the mere presence, sitting on the bed and laughing or even standing guard of the other gang members during the rape, while it may equal to inaction, is not disassociation with the crime. Thus not being in possession of a knife or another weapon does not make the Mr Phetoe less guilty.

The 'weighing up' of the rights of the accused versus those of the complainant

[44] 1988 (1) SA 37 (A).
[45] *Phetoe* para 16.

62. In terms of the Constitution every individual has the right to equality and this includes equality before the law as section 9(1) reads that “[e]veryone is equal before the law and has the right to equal protection and benefit of the law”. Furthermore every accused person has the right to a fair trial as set out in section 35(3).

63. The question is whether having the doctrine of common purpose apply to instances of common law rape would be an unjustifiable limitation on the accused persons right to equality before the law and/or a fair trial?

64. The same question can be asked in considering whether the law ought to be developed the to create a positive obligations to act in at the face of sexual violence?

65. CALS argues that even if the above Honourable Court does find that there is a limitation on the accused person’s right to equality before the law and/or fair trial, it is justifiable to do so when one considers the vulnerability of the victims of sexual violence crimes.

66. Whilst it was held in *S v Saffier* [46] that rape (under the common law definition) is committed by only one man who personally has sexual intercourse with a woman in the absence of consent. The court, however, noted a problem with the common law definition which absolves an accused's liability from the crime of rape who compels another to have sexual intercourse. The court further noted that perhaps this was an issue which ought to be looked at by the legislature. The notes by the court in fact show us that the court acknowledged the difficulties posed by the instrumentality argument, when it comes to of common law rape, insofar as it exempts other categories of accused persons from liability, who may have not committed the deed *per se*, but contributed towards the commission of the crime and/or persons who did not exclude themselves from the actions of the perpetrators.

67. The above Honourable Court has dealt with such perceived limitations before in the matter of *Baloyi*.[47] Although this was a consideration of the constitutionality of section3(5) of the Family Violence Act of 1993, where the Applicant contended that the

[46] 2003 (2) SACR 141 (SEC).
[47] *S v Baloyi and Others* (CCT29/99) [1999] ZACC 19; 2000 (1) BCLR 86 ; 2000 (2) SA 425 (CC), para 26.

provision of the act was unconstitutional in so far as it placed an onus on him to disprove his guilt.[48]

68. Of specific importance was the statements by Sachs J which focused on how law under the Constitution must have a right-based perspective, which may come to challenge common law principles such as onus to prove one's 'innocence' and ask judges to weigh-up the competing rights of individuals. Sachs J states

> *"The Constitution embodies many enduring common law principles, especially those associated with personal freedom. The Constitution also articulates, however, new values and contains different emphases. As pointed out above, the Constitution and South Africa's international obligations require effective measures to deal with the gross denial of human rights resulting from pervasive domestic violence. At the same time the Constitution insists that no-one should be arbitrarily deprived of freedom or convicted without a fair trial. The problem, then, is to find the interpretation of the text which best fits the Constitution and balances the duty of the*

[48] *S v Baloyi and Others* (CCT29/99) [1999] ZACC 19; 2000 (1) BCLR 86 ; 2000 (2) SA 425 (CC), para 1.

state to deal effectively with domestic violence with its duty to guarantee accused persons the protection involved in a fair trial".[49]

69. Thus, CALS argues that if a right-based perspective is taken, any limitation of the accused's' rights to either equality before the law or fair trial is justifiable when one considers the rights of the vulnerable individual in cases of sexual violence.

Foreign jurisprudence around the doctrine of common purpose in cases of rape (and all other sexual offences)

70. The common purpose doctrine is not only found in South African law, in this section we consider varying versions of the doctrine and where our doctrine features comparatively.

71. Whilst we note that such foreign jurisprudence has no binding effect on this Honourable Court, we do acknowledge that it should in fact be considered when faced with developing the common law in terms of s39 of the Consitution.

[49] *Baloyi*, para 26

72. The origin of this doctrine is found in the English case of *Macklin, Murphy and Others*[50] where Judge Alderson stated:

> *"it is principle of law, that if several persons act together in pursuance of a common intent, every act done in furtherance of such intent by each of them is, in law done by all"*

73. Later in the case of *R v Swindall & Osborne*[51] where two cart drivers participated in a race and a pedestrian was killed, it was unknown which driver had driven the cart that caused the mortal injuries. Since both drivers equally participated it was held to be immaterial which driver was responsible for the death and were held to be jointly liable.

74. Other common law jurisdiction like Australia and Canada have essentially followed the English approach on the subject of common purpose (or also known as joint enterprise). Both these jurisdictions require that there must be a prior agreement followed by soactions by all participants in the joint enterprise.

75. In Canada, section 21 (2) of the Canadian Criminal Code states

[50] (1839) 2 Lewin 225 ER 1136.
[51] (1846) 2 Car & K 230.

“where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence”.

76. The English stance on negating actions to a conspiracy was quoted in a Zambian decision in *S v Beahan*[52]. In *R v Powell*[53] where Lord Steyn in his judgment stated that *"if the law requires proof of the specific intention on the part of the secondary party, the utility of the accessory principle would be greatly undermined".*

77. In the case of R v Rook[54] the court held that

> *"in the case of joint enterprise where both parties are present at the scene of crime, it is not necessary for the prosecution to show that a secondary party who lends assistance or encouragement before the commission of the crime intended for the victim to be killed, or to suffer serious injury provided it was proved that he foresaw the event as a real or substantial risk and nonetheless lent assistance."*

[52] 1992 (1) SACR 307 (ZS).
[53] [1991]1 AC 1.
[54] (1997) Cr App. R 327.

78. Ultimately many similarities abound between the South African position of common purpose and other foreign jurisdiction. We submit however, our form of liability accords with that of the English version of joint enterprise, to which Judge Moseneke relied upon in support of his decision in the case of *Thebus and Another v State*[55] and stated that the doctrine of common purpose should apply across the crime divide. He states, "*[c]ommon purpose does not amount to an arbitrary deprivation of freedom. The doctrine is rationally connected to the legitimate objective of limiting and controlling joint criminal enterprise. It serves vital purposes in our criminal justice system. Absent the rule of common purpose, all but actual perpetrators of a crime and their accomplices will be beyond the reach of our criminal justice system, despite their unlawful and intentional participation in the commission of the crime. Such an outcome would not accord with the considerable societal distaste for crimes by common design. Group, organised, or collaborative misdeeds strike more harshly at the fabric of society and the rights of victims than crimes perpetrated by individuals. Effective prosecution of crime is a legitimate, 'pressing social need'. The need for 'a strong deterrent to violent crime' is well acknowledged because 'widespread*

[55] CCT 36/02; [2003] ZACC12; 2003(6) SA 505 CC.

violent crime is deeply destructive of the fabric of our society'. There is a real and pressing social concern about the high levels of crime. In practice, joint criminal conduct often poses peculiar difficulties of proof thereof the result of the conduct of each accused, a problem which hardly arises in the case of an individual accused person. Thus, there is no objection to this norm of culpability even though it by passes the requirement of causation."

Conclusion

79. It is common cause that, Mr phetoe was at least present during the rape which took place in the one shack where three complainants were raped and he was aware of the assault as it was inside the single room shack.

80. He showed common cause with the perpetrators, through the act of laughing at the scene when asked why they were raping the complainants; furthermore, he did nothing to dissociate himself from the actions of the perpetrators;

81. He had the requisite *mens rea*, in that he must have witnessed the events of the evening and must have foreseen the possibility of the commission of at least more rapes after the first.

82. *S v Phetoe* forms the centre of this appeal. We note, that there are distinguishable elements in the case of Phetoe, Tshabalala and Ntuli. The Applicants' case is different in that the question of whether or not the trial court was correct in finding that there was a prior agreement to the remaining seven counts of rape, has not been settled. This is differentiated from Phetoe's matter where it was held by the Supreme Court that there was no prior agreement proven, we of course disagree with the Supreme Court.

83. In light of the above and the incorrect finding of the Supreme Court. We submit, the above Honourable Court ought to find that the appellants, presence at the scene, their own conduct along with the proven *modus oporandi* of the group be accepted as proof beyond a reasonable doubt that the appellants had given prior consent (although not verbally) and that their presence at the various scenes of the crimes without active disassociation from the crime, be accepted as proof that they had the necessary

intention or at least had reasonably foreseen the rapes were going to take place and reconciled themselves with the harm.

84. In TRUE essence, we submit that an act of rape can be performed by any individual if they have the intention to assert power and dominance over the victim, wherein the vehicle used to achieve this violence is in the form of rape. Individuals actively failing to disassociate with the act, having the required intention should be found equally guilty of the act of rape.

85. We verily believe the decision handed down by the SCA in *Phetoe* was incorrect, and impress upon this court not to follow the rationale but rather to develop the common law and enhance the Courts jurisprudence on sexual violence and advance on the laws protecting women's and children's rights to dignity, safety and security.

86. CALS holds the view based on the above submission that the doctrine of common purpose can and in fact must apply to common law rape and sexual violent crimes at large. On this premise we submit the appeal should be dismissed.

Lerato Phasha

Loyiso Mnqandi

Johannesburg

11 July 2019

List of Authorities

Legislation

Children's Act 38 of 2005

Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

Prevention of Family Violence Act 133 of 1993

The Prevention of Organised Crime Act 121 of 1998

Case law

City Council of Pretoria v Walker (CCT8/97) [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257

Daniels v Scribante and Another (CCT50/16) [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC)

Levenstein and Others v Estate of Late Sidney Lewis Frankel and Others (CCT170/17) [2018] ZACC 16; 2018 (8) BCLR 921 (CC); 2018 (2) SACR 283 (CC)

Masiya v Director of Public Prosecutions Pretoria (The State) and Another (CCT54/06) [2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827

Makhubela v S, Matjeke v S (CCT216/15, CCT221/16) [2017] ZACC 36; 2017 (2) SACR 665 (CC); 2017 (12) BCLR 1510 (CC)

S v Makwanyane and Another [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC)

S v Mbuli 2003 (1) SACR 97 SCA

S v Nkosi 1998 (1) SACR 284 (W)

Phetoe v S 2018 (1) SACR (SCA)

Thebus and Another v State CCT 36/02; [2003] ZACC12; 2003(6) SA 505 CC

Foreign case law

Macklin, Murphy and Others (1839) 2 Lewin 225 ER 1136

S v Beahan 1992 (1) SACR 307 (ZS)

R v Powell [1991] 1 AC 1

R v Rook (1997) Cr App. R 327

R v Swindall & Osborne (1846) 2 Car & K 230

Journal Articles

R, Jewkes & N, Abrahams 'The epidemiology of rape and sexual coercion in South Africa: an overview' Social Science & Medicine (2002) 1231–1244

K, Phelps 'A dangerous precedent indeed – a response to C R Snyman's not on Masiya' SAJHR (2008) 648 – 658

Studies

M, Machisa et al Rape Justice in South Africa (2017). Available at http://www.mrc.ac.za/sites/default/files/files/2017-10-30/RAPSSAreport.pdf.

Books

C R Snyman *Criminal Law* (2008)

C R Snyman *Criminal Law* (2002)

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case Number: CCT 323/18 & CCT69/19

Ex SCA Case Number: 349/2009

Ex SGHC Case Number: 37/99

Case Number: CCT 323/18

In the matter between:

TSHABALALA, JABULANE ALPHEUS Applicant

and

THE STATE Respondent

COMMISSION FOR GENDER EQUALITY *Amicus Curiae*

CENTRE FOR APPLIED LEGAL STUDIES *Amicus Curiae*

and

CCT 69/19

In the matter of:

NTULI ANNANIUS

and

THE STATE

CENTRE FOR APPLIED LEGAL STUDIES
PRACTICE NOTE

---

1. **DATE OF HEARING**:

   22 AUGUST 2019

2. **COUNSEL FOR CALS:**

   Adv L Pasha

   N Mnqandi

3. **NATURE OF THE PROCEEDINGS:**

   CRIMINAL

4. **ISSUES THAT WILL BE ARGUED:**

   4.1 The arbitrariness of applying the common purpose doctrine to some but not to rape;

   4.2 Laws which impose positive obligations on individuals in terms of rape (and all other sexual offences);

   4.3 Development of the test and establishment of prior agreement and active assistance;

   4.4 Weighing up the right of the accused versus those of the victim; and

   4.5 Application to adduce evidence.

5. **PAPERS TO BE READ**

   5.1 CALS AMICUS BUNDLE (annexures excluded);

6. **ESTIMATED DURATION OF HEARING:**

   6.1 15 MINUTES

7. LIST OF AUTHORITIES THAT WILL RELY ON DURING ARGUMENT:

7.1 Masiya v Director of Public Prosecutions Pretoria (The State) and Another 2007 (5) SA 30 (CC);

7.2 Makhubela v S 2017 (2) SACR 665 (CC);

7.3 Matjeke v S 2017 (12) BCLR 1510 (CC);

7.4 Phetoe v S 2018 (1) SACR (SCA);

7.5 Levenstien and Others v Estate of Late Sidney Lewis Frankel and Others 2018 (2) SACR 283 (CC);

7.6 S v Nkosi 1998 (1) SACR 284 (W);

7.7 Thebus and another v S 2003(6) SA 505 (CC);

7.8 S v Baloyi and Others 2000 (2) SA 425 (CC);

7.9 S v Kock en ’n ander 1988 (1) SA 37 (A); and

7.10 R v Powell [1991]1 AC.