CONSTITUTIONAL COURT OF SOUTH AFRICA

Cases CCT 323/18 and CCT 69/19

Case CCT 323/18

In the matter between:

JABULANE ALPHEUS TSHABALALA	Applicant
and	
THE STATE	Respondent
and	
COMMISSION FOR GENDER EQUALITY	First Amicus Curiae
CENTRE FOR APPLIED LEGAL STUDIES	Second Amicus Curiae

Case CCT 69/19

In the matter between:

ANNANIUS NTULI	Applicant
and	
THE STATE	Respondent

Neutral citation: *Tshabalala v The State; Ntuli v The State* [2019] ZACC 48

Coram: Mogoeng CJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Mathopo AJ, Mhlantla J, Theron J and Victor AJ

Judgments: Mathopo AJ (unanimous): [1] to [67]
Khampepe J (concurring): [68] to [78]
Victor AJ (concurring): [79] to [99]

Heard on: 22 August 2019

Decided on: 11 December 2019

Summary: Common law rape — Doctrine of common purpose — instrumentality

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ORDER

On appeal from the High Court of South Africa, Gauteng Local Division, Johannesburg, the following order is made:

1. In respect of the applications for leave to appeal in CCT 323/18 and CCT 69/19:
   (a) The applications for condonation for the late filing of the applications for leave to appeal are granted.
   (b) The applications for leave to appeal are granted.
2. The appeals of Jabulane Alpheus Tshabalala and Annanius Ntuli are dismissed.
3. There is no order as to costs.

JUDGMENT

MATHOPO AJ (Mogoeng CJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Theron J and Victor AJ concurring):

> "Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives."[1]

[1] The facts of this case demonstrate that for far too long rape has been used as a tool to relegate the women of this country to second-class citizens, over whom men can exercise their power and control, and in so doing, strip them of their rights to equality, human dignity and bodily integrity. The high incidence of sexual violence suggests that male control over women and notions of sexual entitlement feature strongly in the social construction of masculinity in South Africa. Some men view sexual violence as a method of reasserting masculinity and controlling women.

[2] This application concerns the proper application of the doctrine of common purpose to the common law crime of rape. Two principal issues for determination arise, namely whether the doctrine applies to the common law crime of rape and, if not, whether there is any rational basis for a distinction between the common law crime of rape and other crimes where the doctrine applies. The applicants' challenge is that under the common law, the crime of rape is an instrumentality offence which, by its nature, can only be committed by a male using his own genitalia, and not by an individual who is merely present when the offence is committed and by his conduct (through his association or active participation) either promotes, encourages or facilitates the successful commission of the offence.

[1] *S v Chapman* [1997] ZASCA 45; 1997 (3) SA 341 (SCA) at paras 3-4.

[3] The High Court of South Africa, Gauteng Division, Johannesburg, disagreed with the applicants' argument and convicted them together with the other co-accused of various charges, including the common law crime of rape on the basis of the application of the doctrine. The doctrine has been applied by various divisions of the High Court and the Supreme Court of Appeal differently. Some have found the doctrine inapplicable in crimes of an instrumental nature, committed by a group of persons with a mutual objective intended to produce a specific result against a targeted victim, whereas other courts have found the doctrine capable of application in the same context given that the requirements of the doctrine are met.

[4] The issue arises against the backdrop of an incident which occurred almost twenty years ago on 20 September 1998.

Factual background

[5] The full background facts were comprehensively set out by the High Court, which I adopt and briefly restate hereinafter. On 20 September 1998, late in the night, a group of men in their youth went on a rampage in the Umthambeka section of the township of Tembisa in Gauteng. Their violent rage lasted into the early hours of the next morning. During this time, they forced their way into several homes located on nine separate plots, in a neighbourhood inhabited by the marginalised and vulnerable members of our society. Once inside, the group ransacked, looted and in one case stabbed one of the occupants.

[6] The terror that poured out on this community was well orchestrated and meticulously calculated. A preordained pattern of attack was adopted by the men. On approaching some of the houses, they threw rocks and stones on the roofs, sowing confusion by masquerading as police and shouting out "Police! Police!". When their entry was refused, they broke down the doors and assaulted the occupants they found inside. Some of male occupants of the homes were attacked and made to lie on the ground with blankets covering their heads. This flurry of violence included the rape

of eight female occupants, some of whom were raped repeatedly, by several members of the group. The youngest of these victims was 14 years old. Another victim was a woman who was visibly pregnant, but this did not deter the group. Whilst some of the men raped the female occupants, other members of the group were posted outside to act as look-outs.

[7] In the weeks that followed, the members of the group were apprehended and charged. On 13 August 1999, they were brought before the High Court. The history of the litigation that ensued acts as a focus on the applicability of the doctrine to the common law crime of rape. It is to this issue, which I now turn.

Litigation History

High Court

[8] On 23 November 1999, Mr Tshabalala, Mr Ntuli and the other co-accused were found guilty of eight counts of rape respectively, seven of which were imposed on the basis of the application of the doctrine.[2] Both Mr Tshabalala and Mr Ntuli were identified at the scene of the violence by witnesses who the High Court found to be credible. Mr Tshabalala was identified in household eight where an attempted rape took place and was further identified at an outside toilet. Similarly, Mr Ntuli was identified at two locations – household two and household six. At household two he was seen going up to the kitchen door of the main house, shaking it, before about five of the other co-accused forced entry and at the latter it was said that the door of the shack was forcefully opened. While Mr Ntuli and the other co-accused entered, Mr Ntuli was seen holding a firearm, demanding money from the occupants. This was before the occupants were assaulted and the female occupant was raped by more than two men. The female occupant identified Mr Ntuli as one of the persons who entered her home on the night in question.

[2] For the present purposes, this judgment will only focus on Mr Tshabalala and Mr Ntuli who are the applicants in the matters before us. To the extent necessary, reference to the other co-accused in the High Court shall be made collectively as the "other co-accused".

[9] The High Court rejected the applicants' contention that the common law crime of rape is not an offence for which an individual can be convicted through the application of the doctrine.

[10] In determining that the doctrine applied to common law rape, the High Court evaluated the evidence and found that the group acted as a "cohesive whole" moving from one home to another at different times, and that the violence was committed in a systematic pattern. In support of its finding, it held that the fact that blankets were placed over the other members of the homes when the women and children were raped, and that some members of the group were posted outside as guards, inexorably pointed to one conclusion, that the attacks were not spontaneous but were planned. The High Court reasoned that a common purpose must have been formed before the attacks began and the rapes were executed pursuant to a prior agreement in furtherance of a common purpose.

[11] The factual findings made by the High Court were based on inferential reasoning or circumstantial evidence that the applicants (a) were at the scene of the crimes with the group; (b) were identified by some of the witnesses at the scene and also at the identification parade; (c) must have known, or were aware of, the group's *modus operandi* (mode of operation) to commit the crimes; and (d) did not disassociate themselves from the actions of the group.

[12] After a long drawn out trial the applicants were convicted and sentenced to effective life sentences. Both Mr Tshabalala and Mr Ntuli sought leave to appeal from the High Court, which was refused on 11 May 2000. Nine years later, on 26 August 2009, Mr Tshabalala petitioned the Supreme Court of Appeal for leave to appeal against his convictions and sentences. Mr Ntuli claims to have done the same, but his application was never received by the Registrar of the Supreme Court of Appeal. On 11 September 2009, Mr Tshabalala's application for leave to appeal was again dismissed. Distinctly, on 28 November 2012, Mr Phetoe, who was co-

accused number seven, was granted leave to appeal his convictions and sentence to a Full Court of the High Court.

Mr Phetoe's appeal to the Full Court

[13] The Full Court did not make any adverse findings regarding the credibility of the witnesses, nor did it reject their evidence. It reasoned that because of the State's failure to prove beyond reasonable doubt that each member of the group had raped the eight complainants, the convictions of rape based on the application of the doctrine stood to be set aside. It further held that the 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. This conclusion was made against its finding that Mr Phetoe had associated himself with a group that had subjugated the complainants to being raped. It further concluded that the association with group members who were terrorising and raping the complainants rendered him liable as an accomplice. Consequently, the Full Court altered his conviction to one of being an accomplice in respect of the common law crime of rape, and sentenced him to one term of life imprisonment.

[14] Dissatisfied with the decision of the Full Court, Mr Phetoe successfully applied for and was granted special leave to appeal to the Supreme Court of Appeal on 7 November 2016.

Proceedings before the Supreme Court of Appeal

[15] The Supreme Court of Appeal[3] disagreed with the Full Court and held that "to convict the appellant on the basis of his mere presence is to subvert the principles of participation and liability as an accomplice in our criminal law".[4] It reasoned further that there was no evidence to prove that Mr Phetoe was present at the scene of violence where the rapes, assaults, house-breakings and robberies were committed

[3] *S v Phetoe* [2018] ZASCA 20; 2018 (1) SACR 593 (SCA).

[4] Id at para 15.

other than at household three and thus concluded that no common purpose with the other members of the group was established.[5]

[16] The Supreme Court of Appeal disagreed with the High Court that there was a prior agreement to commit the crimes.[6] It concluded that Mr Phetoe ought not to have been convicted of all other charges except for the charge in count nine where he was positively identified. It accordingly, reversed the findings of the High Court on the application of the doctrine and of the Full Court on the finding that he was an accomplice. The Supreme Court of Appeal subsequently set aside the convictions and sentences relating to all the convictions on common law rape, save for the conviction in respect of count nine.

[17] Spurred on by the successful appeal of Mr Phetoe at the Supreme Court of Appeal, Mr Tshabalala applied to this Court in December 2018 for leave to appeal against his convictions and sentences.

In this Court

[18] This Court, after receiving Mr Tshabalala's application for leave to appeal, issued directions to a number of interested parties. The directions called on Mr Tshabalala and the respondent to address the following two issues:

> "1. Whether an accused can be convicted of common law rape on the basis of common purpose; and
> 2. whether the Supreme Court of Appeal decision in the case of the applicant's co-accused, *Phetoe v S* [2018] ZASCA 20; 2018 (1) SACR 593 (SCA) was correct, and, if correct, whether there is anything to distinguish the convictions that the applicant puts in dispute from those of which his co-accused, Mr Phetoe, was absolved."

[5] Id at paras 15, 17 and 20.

[6] Id at para 18.

[19] The directions also invited the remainder of the co-accused, including Mr Ntuli and civil society organisations who might have had an interest in addressing the above questions, to file written submissions to this effect.

[20] Mr Ntuli, previously unaware of either Mr Tshabalala's or Mr Phetoe's appeals, applied directly to this Court for leave to appeal. The Commission for Gender Equality (the Commission) and the Centre for Applied Legal Studies (CALS) applied to be admitted as amicus curiae. Both were admitted.

Jurisdiction and leave to appeal

[21] In order for this Court to grant leave to appeal the applicants must meet two requirements. The matter must fall within jurisdiction of this Court and it must be in the interests of justice to permit the granting of leave.[7]

[22] The issues raised in this matter involve the application of the doctrine to the common law crime of rape. It calls for us to determine whether a co-accused can be convicted of the common law crime of rape on the basis of the doctrine in circumstances where he did not himself penetrate the victim. This issue has engaged the attention of a number of courts which have in the past applied the doctrine differently. I set out in brief some of the conflicting decisions of various divisions of the High Court.

[23] In 2010 in *Moses*,[8] a Full Bench of the Northern Cape Division, Kimberley considered an appeal where the appellant was one of a group of accused charged with house-breaking, theft and rape. The Court grappled with the application of the doctrine in the context of common law rape. The minority per Kgomo JP held that the definition for a perpetrator for robbery and rape is the same, whatever means are

[7] See *General Council of the Bar of South Africa v Jiba* [2019] ZACC 23; 2019 JDR 1194 (CC); 2019 (8) BCLR 919 (CC) at para 35.

[8] *S v Moses* 2010 JDR 0851 (NCK).

employed to commit the crime. And that the distinction is artificial and more perceived than real. The minority held that the doctrine ought to apply.

[24] Two years later in 2012, the Eastern Cape Division, Grahamstown in *Kholosa*[9] decided an appeal regarding murder, kidnapping and rape. The Full Bench agreed that there was common purpose for the kidnapping and the murder. However, in respect of the rape, it relied on the instrumentality argument and cited *Kimberley*[10] with approval and agreed that the doctrine could not be applied to common law rape.

[25] More recently in 2018, in *Jaars*, the Gauteng Local Division, Johannesburg dealt with an appeal in which some of the rape convictions of the appellants were based on the doctrine. [11] The Court endorsed the instrumentality argument and agreed with the finding in *Kholosa*. It thus held that rape is a crime that can only be committed by the instrumentality of a person's own body.

[26] The respondent and both amici argued that this issue has been resolved by the appellate courts. Counsel for the Commission referred us to three decisions as authority for that proposition, namely *Mkwanazi*,[12] *Thebe*[13] and *K*[14].

[27] An analysis of these cases does not support the Commission's submission that the law is settled. *Mkwanazi* is a 1948 decision that is no clear authority as it found the conviction of assault with intent to rape on the basis of common purpose. The case therefore does not strictly concern rape on the basis of common purpose. The applicants correctly contended that this case was not on point.

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[9] *Kholosa v S* [2012] JOL 29149 (ECG).

[10] *S v Kimberley* 2004 (2) SACR 38 (E). In *Kimberley*, the Court said that the application of the doctrine is not applicable in cases of rape because by definition, as it was, rape is the unlawful and intentional sexual intercourse between a man with a woman without her consent. Therefore it follows from the biological fact that the act of heterosexual sexual intercourse involves one woman and one man exclusively, the act therefore cannot be imputed to any other person.

[11] *S v Jaars* 2018 JDR 1026 (GJ).

[12] *R v Mkwanazi* 1948 (4) SA 686 (A).

[13] *S v Thebe* 1961 PH H 247 (A).

[14] *K v Minister of Safety and Security* [2004] ZASCA 99; [2005] 3 All SA 519 (SCA).

[28] *K*, was a civil case that largely concerned the vicarious liability of the Ministery of Safety and Security for sexual offences committed by its employees. Whilst the Court said that "if only one had physically raped the appellant, all three could nonetheless have been convicted of rape and that they were at all times acting in pursuance of a common purpose", these statements made by the Court on the application of the doctrine were correctly conceded to be obiter remarks. More so, these obiter remarks were not endorsed by this Court on appeal.

[29] During the hearing it became clear that *Thebe* was the high-water mark for the Commission's precedential argument. The Appellate Division in *Thebe* held that the trial Court had correctly convicted the accused of rape as once it was established that the accused was in the motor vehicle at the critical times when the rape took place, then it should follow that the accused participated in the crime. Accordingly, the accused was convicted on the basis of the doctrine. *Thebe* is however not clear authority as the Court specifically dealt with the application of the doctrine where there was active association. In the present case, the High Court's factual findings rested on prior agreement or conspiracy.

[30] In light of the divergent decisions stated above and the uncertainty in our law, this is an arguable point of law which founds this Court's jurisdiction.

[31] Given the scourge of rape in this country, in particular group rape, a resolution of this issue will have an impact beyond the present litigation and will not only affect the immediate parties, but it will give decisive direction to cases of a similar nature and is therefore a matter of general public importance. It is undoubtedly in the interests of justice that this Court hears a matter of general public importance.

[32] Accordingly, this Court's jurisdiction is engaged as the matter before us raises an arguable point of law of general public importance and the interests of justice call for leave to appeal to be granted.

Merits – The applicability of the doctrine

[33] The applicants do not take issue with the procedural fairness of the trial before the High Court, but against the application of the doctrine to the common law crime of rape. The applicants contend that the doctrine does not apply to common law crime of rape because this crime, as defined, required the unlawful insertion of the male genitalia into the female genitalia.[15] On the applicants' submissions it is simply impossible for the doctrine to apply, as by definition, the causal element cannot be imputed to a co-perpetrator. This is referred to as the "instrumentality argument".

[34] This submission is supported by Snyman where the author states that:

> "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."[16]

[35] In further support of these submissions, reliance was placed on a number of decisions, many of which were extensively relied upon by the Full Court, namely *Gaseb*,[17] *Saffier*,[18] *Kimberley and Phetoe.* These decisions support the view that the High Court erroneously applied the doctrine and in the process incorrectly convicted the applicants without proof beyond reasonable doubt that they penetrated the eight complainants without their consent.

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[15] This definition is applicable to the current case, as the crimes were committed prior to this Court's ruling in *Masiya v Director of Public Prosecution (Centre for Applied Legal Studies and Another as Amici Curiae)* [2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827 and the enactment of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA).

[16] Snyman *Criminal Law* 5 ed (LexisNexis, Durban 2008) at 269.

[17] *S v Gaseb* 2001 (1) SACR 438 (NmS).

[18] *S v Saffier* 2003 (2) SACR 141 (SE).

[36] Finally, it was submitted by the applicants that the benefit which accrued to Mr Phetoe when his convictions and sentences were set aside should also apply to them because their positions are similar. More about this decision later.

[37] The respondent and the amici endorsed the factual findings of the High Court, that there was prior agreement on the part of the group, and that a common purpose must have been formed before the attacks commenced.

[38] The respondent supported the findings of the High Court that all the offences were committed in close proximity of each other and within a short space of time. In that time, a total of nine households were broken into and in each, victims were robbed, assaulted and some raped. It was urged upon us to accept that this was a single group which was responsible for the attacks and acted as a cohesive whole because some of the men kept guard outside the households while some entered the households.

[39] The respondent submitted that Snyman's views are fallacious when a prior agreement has been proved because the conduct of each accused in the execution of that purpose is imputed to the other. To buttress this argument, the respondent relied on the remarks by Theron J in *Jacobs* (a case dealing with murder by common purpose) that:

> "The operation of the doctrine does not require each participant to know or foresee in detail the exact way in which the unlawful results are brought about. The State is not required to prove the causal connection between the acts of each participant and the consequence, for example, murder."[19]

In the same case Froneman J said the following:

> "There is no dispute here about the content of the common law. Where there is a prior agreement between parties to a common purpose there need not be presence or

[19] *Jacobs v S* [2019] ZACC 4; 2019 (1) SACR 623 (CC); 2019 (5) BCLR 562 (CC) at para 70.

> participation by each when the fatal assault is administered. Where no prior agreement is established, presence at or before the fatal blow is necessary. Where the time of the fatal blow cannot be established then a finding of murder cannot follow – at most a finding of attempted murder or some other form of assault."[20]

[40] The respondent further contended that applying the doctrine is not out of the ordinary but is in keeping with modern international standards. In support of this proposition it relied on the practice in the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. It also relied on the International Criminal Court, where in Article 25(3)(a) and (d) of its Statute dealing with individual criminal responsibility and common purpose, it provides as follows:

> "In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person—
>
> (a) commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
>
> . . .
>
> (d) in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either—
>
> (i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> (ii) be made in the knowledge of the intention of the group to commit the crime."[21]

[20] Id at para 106.

[21] Rome Statute of the International Criminal Court, 17 July 1998.

[41] The respondent submitted that the above principles apply with equal force to the doctrine where participation in the common purpose has been proved through prior agreement or conspiracy.

[42] The Commission made two primary submissions. The first is that our law already allows for the doctrine to apply to common law rape and that the courts that have failed to apply the doctrine, offended the principle of stare decisis. On this point, two Appellate Division cases were relied upon, namely *Mkwanazi* and *K*. I have already dealt with the import of these cases.[22]

[43] The second argument raised by the Commission is that the instrumentality approach is fundamentally flawed. It is both artificial and unprincipled. It is artificial as there is no reason as to why the use of one's body should be determinative in the case of rape but not in the case of assault or murder. The fallacy in this approach, it was argued, seeks to carve out crimes of a sexual nature and to exclude the application of common purpose to such crimes. It was further argued that this inhibits the State's ability to prevent and combat gender-based violence, in accordance with its constitutional and international obligations. Finally, it was submitted that the instrumentality approach is not in keeping with the expanded definition of rape under SORMA. This is because SORMA's expanded definition of rape allows for the crime to be committed using not only one's body but any inanimate object.[23] If the argument of the applicants were to prevail, the doctrine of common purpose would apply arbitrarily. It would apply in the case where an inanimate object is used in commission of the crime, but not a body part, and for no principled reason. Such an approach according to the Commission defies logic and common sense.

[44] CALS sought to adduce new evidence in terms of this Court's Rules. The evidence sought to be admitted are academic studies that detail the psychological experience of victims of sexual violence and the risk factors associated with rape.

[22] See [27] to [28].

[23] Section 3 read with the definition of sexual penetration in section 1 of SORMA.

This evidence was not admitted by this Court. Their main submission pertained to understanding the patriarchal roots of the common law concerning rape and sexual violence. This includes an understanding that the harm caused by rape is something greater than non-consensual penetration. Instead, rape is the assertion of power and the exertion of this power is gendered as it is typically exerted by men at the expense of women.

[45] CALS also requested this Court to develop the common law requirements of the doctrine. This was to include a positive duty on everyone to either report or prevent the commission of the crime of rape.[24] An interrelated request was for this Court to develop the "active association" requirements of the doctrine, so as to include the injunction that a person must "actively dissociate" themselves from the commission of the crime in order to escape liability. At the hearing, counsel for CALS conceded, in my view correctly, that this might be a step too far. In order to determine how the common law should be developed it is necessary to determine and understand precisely what is wrong with the current position. Insofar as the doctrine is concerned there is nothing wrong with the current law, the problem relates to the application.

Common Purpose

[46] Burchell defines the doctrine of common purpose in the following terms:

> "Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their 'common purpose' to commit the crime."[25]

[24] It was argued that, as our law already imposes such a requirement on certain classes of persons, these duties should be expanded to everyone. See section 54 of SORMA which requires any person who has knowledge that a sexual offence has been committed against a child or persons who are mentally disabled, report such knowledge immediately to a police official. Further, section 110 of the Children's Act 38 of 2005 bestows the same obligation on certain listed officers and professionals who on reasonable grounds, concludes that a child has been physically abused, sexually abused or deliberately neglected, reports that conclusion in the prescribed form to a designated child protection organisation, the provincial department of social development or a police official.

[25] Burchell *Principles of Criminal Law* 5 ed (Juta, Cape Town 2016) at 477.

[47] Snyman elaborates that—

> "the essence of the doctrine is that if two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others".[26]

These requirements are often couched in terms which relate to consequence crimes such as murder.[27]

[48] The liability requirements of a joint criminal enterprise fall into two categories. The first arises where there is a prior agreement, express or implied, to commit a common offence. In the second category, no such prior agreement exists or is proved.[28] In the latter instance the liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind.

[49] It is trite that a prior agreement may not necessarily be express but may be inferred from surrounding circumstances. The facts constituting the surrounding circumstances from which the inferences are sought to be drawn must nevertheless be proved beyond reasonable doubt. A prior agreement to commit a crime may invoke the imputation of conduct, committed by one of the parties to the agreement which falls within their common design, to all the other contracting parties. Subject to proof of the other definitional elements of the crime, such as unlawfulness and fault, criminal liability may in these circumstances be established.[29]

[50] After a careful analysis of the facts, the High Court found that the applicants were part of the group that moved from one plot to another as per their arranged

[26] Snyman above n 16 at 265.

[27] Id.

[28] Burchell above n 25 at 477.

[29] Id.

sequence. The High Court further found that the group members must have been aware or associated themselves with the criminal enterprise. They must have hatched a plan before then, that they would invade different households. Included in that plan or understanding was the rapes of the complainants. No member of the group disassociated himself from the violent actions perpetrated by others in the group. The conduct of the other perpetrators was therefore imputed on the applicants.

[51] It cannot be suggested and it is difficult to fathom that the rape of the complainants were unexpected, sudden or independent acts of one or more of the perpetrators which the others neither expected nor were aware of even after it happened. It is also not probable that they were unaware of what was happening or about to happen. How the complainants were ordered to cover their heads and not look at the perpetrators is consistent with the notion that they were part of the criminal enterprise. It is necessary that the relationship between rape and power must be considered when analysing whether the doctrine applies to the common law crime of rape. To characterise it simply as an act of a man inserting his genitalia into a female's genitalia without her consent is unsustainable. In instances of group rape, as in this case, the mere presence of a group of men results in power and dominance being exerted over women victims. In his concurrence in *Masiya*, Langa CJ said the following:

> "Today rape is recognised as being less about sex and more about the expression of power through degradation and the concurrent violation of the victim's dignity, bodily integrity and privacy. In the words of the International Criminal Tribunal for Rwanda the 'essence of rape is not the particular details of the body parts and objects involved, but rather the aggression that is expressed in a sexual manner under conditions of coercion.'"[30]

[52] The facts of this case demonstrate that various households were robbed of their personal belongings, occupants attacked gratuitously and in some instances women were raped indiscriminately. Appallingly, one of the women complainants was

[30] *Masiya* above n 15 at para 78.

visibly pregnant. Another complainant was a young girl who was 14 years old. This cavalier attitude demonstrates callousness on the part of perpetrators. To jettison the sound doctrine as the applicants urge us to, would do a grave injustice to direct and indirect victims of gender-based violence. This would give power to men or perpetrators who have raped women with impunity in the knowledge that the doctrine would not apply to them.

[53] The Snyman approach on which the applicants placed much stock in support of the argument is flawed. It perpetuates gender inequality and promotes discrimination. There is no reason why the use of one's body should be determinative in the case of rape but not in the case of other crimes such as murder and assault. I agree with the amici that the instrumentality argument has shortcomings because it seeks to absolve other categories of accused persons from liability, who may not have committed the deed itself (penetration) but contributed towards the commission of the crime by encouraging persons who fail to exclude themselves from the actions of the perpetrators. Permitting accused persons in similar positions as the applicants, and the other co-perpetrators to escape liability on the basis of common purpose is unsound, unprincipled and irrational.

[54] The instrumentality argument has no place in our modern society founded upon the Bill of Rights. It is obsolete and must be discarded because its foundation is embedded in a system of patriarchy where women are treated as mere chattels. It ignores the fact that rape can be committed by more than one person for as long as the others have the intention of exerting power and dominance over the women, just by their presence in the room. The perpetrators overpowered their victims by intimidation and assault. The manner in which the applicants and the other co–accused moved from one household to the other indicates meticulous prior planning and preparation. They made sure that any attempt to escape would not be possible.

[55] As a second string to their bows, the applicants indirectly sought to rely on the absence of the element of causation to escape liability. This argument has no merit.

In *Safatsa*[31] which dealt with common purpose in the context of a murder charge Botha JA said:

> "In my opinion these remarks constitute once again a clear recognition of the principle that in cases of common purpose the act of one participant in causing the death of the deceased is imputed, as a matter of law, to the other participants."[32]

He further held:

> "This remark [proving causation] has given rise to the question whether, in relation to cases of common purpose, some kind of causal connection is required to be proved between the conduct of a particular participant in the common purpose and the death of the deceased before a conviction of murder can be justified in respect of such a participant. In my view the clear answer is: No."[33]

[56] The object and purpose of the doctrine is to overcome an otherwise unjust result which offends the legal convictions of the community, by removing the element of causation from criminal liability and replacing it, in appropriate circumstances, with imputing the deed (*actus reus*) which caused the death (or other crime) to all the co-perpetrators.[34] By parity of reasoning, there is no reason why the doctrine cannot apply with equal force to the common law crime of rape.

[57] The applicants knowingly and with the requisite intention participated in the activities of the group and fully associated themselves with its criminal designs. It is disingenuous to now contend that because they did not physically penetrate the complainants they should not be found guilty on the basis of the doctrine. That argument loses sight of the fact that the main object of the doctrine is to bring into the net and criminalise collective criminal conduct and in the process address societal needs to combat crime committed in the course of joint enterprises. It is because of

[31] *S v Safatsa* [1987] ZASCA 150; 1988 (1) SA 868 (A).

[32] Id at 898.

[33] Id.

[34] Burchell above n 25 at 483.

that reason that the causal prerequisite in consequence crimes such as murder, robbery and assault were found to be ineffectual.

[58] Another reason which indicates why the doctrine should apply can be found in the degrading conduct on the part of the perpetrators when some of them wanted to penetrate one of the complainants simultaneously. It is hard to imagine the humiliation and the trauma that the complainant suffered at that time. Even though only one of them managed to penetrate her, to suggest that the other should escape liability merely because they did not get an erection is legally and morally unconscionable.

[59] There is no rationale for treating the one who penetrated differently from the others who did not. What is clear is that the other perpetrators, given their positive conduct and presence did not disassociate themselves from the conduct of the one who penetrated the complainant. As a matter of fact, they all played an active role. The High Court's conclusion that they acted in the furtherance of a common purpose cannot be faulted. To endorse or support Snyman's approach would defeat common sense and logic. I say this because it is not only the male anatomy that is critical, the presence of the co-perpetrators who encouraged and facilitated the commission of the crime is equally important. The perpetrators were all complicit and acted in cahoots. There is nothing in the record to suggest any form of disassociation on their part.

[60] If the doctrine of common purpose extends to crimes of murder, common assault or assault with intent to do grievous bodily harm, it is irrational and arbitrary to make a distinction when a genital organ is used to perpetrate the rape. The constitutional principles of equality, dignity, protection of bodily and psychological integrity, and not to be treated in a cruel inhumane and degrading way, should be afforded to the victims of sexual assault. It would be a sad day if courts were to countenance such an arbitrary distinction.

[61] I interpose to say that in 1997, Parliament took a bold step in response to the public outcry about serious offences like rape and passed the Criminal Law Amendment Act[35] which prescribes minimum sentences for certain specified serious offences. The Government's intention was that such lengthy minimum sentences would serve as a deterrent as offenders, if convicted, would be removed from society for a long period of time. The statistics sadly reveal that the minimum sentences have not had this desired effect. Violent crimes like rape and abuse of women in our society have not abated. Courts across the country are dealing with instances of rape and abuse of women and children on a daily basis. The media is in general replete with gruesome stories of rape and child abuse on a daily basis. Hardly a day passes without any incident of gender-based violence being reported. This scourge has reached alarming proportions. It is sad and a bad reflection of our society that 25 years into our constitutional democracy, underpinned by a Bill of Rights, which places a premium on the right to equality[36] and the right to human dignity,[37] we are still grappling with what is a scourge in our nation.

[62] In further response to such conduct the Legislature in 2017 introduced SORMA to address the concerns which were raised by society about violence against women and children. Under SORMA's defined crime of rape, instrumentality is no longer a requirement. The Legislature acknowledged that rape now encompasses more than instrumentality of male genitalia inserted into female genitalia. It therefore gave the definition of rape a wider meaning.

[63] This scourge has reached alarming proportions in our country. Joint efforts by the courts, society and law enforcement agencies are required to curb this pandemic. This Court would be failing in its duty if it does not send out a clear and unequivocal pronouncement that the South African Judiciary is committed to developing and implementing sound and robust legal principles that advance the fight against gender-

[35] 105 of 1997.

[36] Section 9 of the Constitution.

[37] Section 10 of the Constitution.

based violence in order to safeguard the constitutional values of equality, human dignity and safety and security. One such way in which we can do this is to dispose of the misguided and misinformed view that rape is a crime purely about sex. Continuing on this misguided trajectory would implicate this Court and courts around this country in the perpetuation of patriarchy and rape culture.

[64] Accordingly, the High Court's application of the doctrine cannot be faulted. The applicants' appeal must therefore fail.

Phetoe decision

[65] Before the hearing, the parties were invited to comment on the correctness or otherwise of the decision of the Supreme Court of Appeal in *Phetoe*. As stated earlier the approach of the Supreme Court of Appeal somewhat differed to that adopted by the High Court and the Full Court. It set aside all convictions against Mr Phetoe based on accomplice liability. The State elected not to cross-appeal the decision of the Supreme Court of Appeal with the result that this decision is not before us. This Court cannot pronounce on the correctness of that decision absent any cross-appeal by the State.

[66] In conclusion, the doctrine of common purpose applies to the common law crime of rape and the applicants were rightly convicted by the High Court.

Order

[67] The following order is made:

1. In respect of the applications for leave to appeal in CCT 323/18 and CCT 69/19:
    (a) The applications for condonation for the late filing of the applications for leave to appeal are granted.
    (b) The applications for leave to appeal are granted.

2. The appeals of Jabulane Alpheus Tshabalala and Annanius Ntuli are dismissed.
3. There is no order as to costs.

KHAMPEPE J (Froneman J, Jafta J, Madlanga J, Mathopo AJ, Mhlantla J, Theron J and Victor AJ concurring):

[68] "Who knows what the black woman thinks of rape? Who has asked her? Who *cares*?"[38] This matter comes before this Court due to an abhorrent night wherein certain women in the Umthambeka section located in the township of Tembisa were raped by young men, some of whom were known to them, who broke into their homes.

[69] I have had the pleasure of reading the judgment written by my brother, Mathopo AJ. I fully agree with his reasoning and outcome. There is neither legal nor normative reason that would justify the exclusion of the application of the doctrine of common purpose to the common law crime of rape. I am prompted to write this concurrence as a result of some of the arguments advanced during the hearing and I believe that these arguments should be addressed in this judgment.

[70] Rape is often mischaracterised as being an act of sexual intercourse, absent of consent, committed by inhumane monsters. This is a dangerous mischaracterisation of rape. Words matter. Words give a construction of a certain viewpoint of the world,

[38] Walker "Advancing Luna – And Ida B. Wells" in her collection of short stories entitled *You Can't Keep A Good Woman Down* (Harcourt Brace Jovanovich, New York 1971) at 93. Rape is a scourge that affects women of all races, classes and sexual orientations, but we know that in South Africa rape has a pernicious effect on black women specifically. To erase the racial element in this epidemic is to erase the experiences of the women of that horrendous night. This "intersectional erasure" is a rhetorical gesture that not only negates the lived experience of women at these intersections of oppressed identities but also means that our response to the crisis will always be deficient and under-inclusive. Speaking of rape on these terms is not a preoccupation with personal identity but an analysis of the ways in which power impacts particular women. The quote's simple purpose in opening this judgment is to centre the experiences of the women in this case and also the most marginalised in our society.

and this viewpoint tends to be gendered.[39] Although rape is defined as an unlawful and intentional act of sexual penetration of one person by another, without consent,[40] it must be buttressed that the victim does not experience rape as being sexual at all. The requirement of sexual penetration is a legal requirement which relates to the biological element of sexual intercourse. For many victims and survivors of rape, they "do not experience rape as a sexual encounter but as a frightening, life-threatening attack"[41] and "as a moment of immense powerlessness and degradation."[42]

[71] To this end, the first judgment approvingly quotes Langa CJ in *Masiya*, where he stated that:

> "Today rape is recognised as being less about sex and more about the expression of power through degradation and the concurrent violation of the victim's dignity, bodily integrity and privacy."[43]

[72] In the same breadth, the Supreme Court of Appeal in *Chapman* elucidated on the nature of rape and held that "[r]ape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim."[44]

[73] Rape, at its core, is an abuse of power expressed in a sexual way. It is characterised with power on one side and disempowerment and degradation on the other. Without more being said, we know which gender falls on which side.

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[39] Modiri "The Rhetoric of Rape: An Extended Note on Apologism, Depoliticisation and the Male Gaze in *Ndou v S*" (2014) 30 *SAJHR* 134 at 144.

[40] Section 3 of SORMA above n 15:

> "Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape."

[41] Hall "Rape: The Politics of Definition" (1988) 105 *SALJ* 67 at 73.

[42] Modiri above n 39 at 145.

[43] Main judgment at [51], quoting *Masiya* above n 15 at para 78.

[44] *Chapman* above n 1 at para 3.

[74] The notion that rape is committed by sexually deviant monsters with no self-control is misplaced. Law databases are replete with cases that contradict this notion. Often, those who rape are fathers, brothers, uncles, husbands, lovers, mentors, bosses and colleagues. We commune with them. We share stories and coffee with them. We jog with them. We work with them. They are ordinary people, who lead normal lives. Terming rapists as monsters and degenerates tends to normalise the incidents of rape committed by men we know because they are not "monsters" – they are rational and well-respected men in the community. Yes, the abominable behaviour of these men is abhorrent and grotesque and the recognition that they are human does not seek to evoke sympathy – it serves to signify a switch from characterising rapists as out-of-control monsters, and centres the notion that rapists are humans who choose to abuse their power. The idea that rape is committed by monsters and animals may have adverse effects in that it may lead to the reinforcement of rape myths and stereotypes. For instance, labelling of this nature may lead to a cognitive dissonance when the actual rapist does not match the description of rapists. It has been said that this cognitive dissonance leads to the problematic questions like "person X is a good man, what happened to cause him to rape?" These questions have the effect of then centring the actions of the victims and not those of the actual rapist. This in turn reinforces the prevalent rape culture in South Africa and safeguards the patriarchal norms which normalise incidents of rape.

[75] Again, I underscore that I do not imply that rapists do not behave in a way that is heinous and inhumane. The moral repugnancy of the act is self-evident. The point is merely that you cannot tell that someone is a rapist by their mere physical appearance or their standing in the community or their relationship to you. This may obscure the wider targets of our response to the scourge by narrowing our focus onto abhorrent individuals as opposed to dismantling an abhorrent system.

[76] In 2018/19, the South African Police Service recorded 41 583 cases of rape, which is an increase from 40 035 cases of rape recorded in 2017/18. This indicates that approximately 114 cases of rape were recorded by the police each day in

2018/19.[45] In 2003, it was also alleged that a woman was raped every 36 seconds in South Africa.[46] This illustrates that rape is not rare, unusual and deviant. It is structural and systemic. Incidents of rape and the fear of rape are commonplace in the lives of women. Hall notes that rape is—

> "an act of violence and oppression against women. It is a sexual attack which expresses male dominance and contempt for women. Rape is not one form of attack, but a category of behaviour which is structurally generated (by the power imbalance between the sexes) and culturally sustained (in a male supremacist ethos). It constitutes only one of the many forms of violence against women.
>
> The origins of rape are anchored in the structured imbalance of power between men and women as social groups, that is, in their political relationship."[47]

[77] The importance of the proper construction and characterisation of rape cannot be gainsaid. This is because in all incidents of rape, there are two victims – the direct victim and the indirect victim. The former refers to someone who is actually raped whereas the latter refers to people who are affected by the rape incident and the treatment of that direct victim. Again, this reinforces that rape is systemic and structural. We ought to heed the warning by Sachs J, albeit in the context of domestic violence that:

> "The ineffectiveness of the criminal justice system . . . sends an unmistakable message to the whole of society that the daily trauma of vast numbers of women counts for little."[48]

[45] Africa Check "Factsheet: South Africa's crime statistics for 2018/19" (12 September 2019), available at https://citizen.co.za/news/south-africa/crime/2178462/factsheet-south-africas-crime-statistics-for-2018-19/.

[46] Itano "South Africa Begins Getting Tough on Rape" (24 February 2003) available at https://womensenews.org/2003/02/south-africa-begins-getting-tough-rape/.

[47] Hall above n 41 at 81.

[48] *Baloyi (Minister of Justice Intervening)* [1999] ZACC 19; 2000 (2) SA 425 (CC); 2000 (1) BCLR 86 (CC) at para 12.

[78] Addressing rape and other forms of gender-based violence requires the effort of the Executive, the Legislature and the Judiciary as well as our communities. The structural and systemic nature of rape emphasises that it would be irrational for the doctrine of common purpose not to be applicable to the common law crime of rape, while being applicable to other crimes. For these reasons, I concur in the judgment of my brother, Mathopo AJ

VICTOR AJ:

[79] I have had the privilege of reading the main judgment of my brother, Mathopo AJ, and the concurrence of my sister Khampepe J. I agree with the proposed order and reasoning in both judgments but I write this concurrence for two reasons: the first is to engage with insights from feminist legal theory that were raised during argument which seek to centre the debate on the dignity and privacy of women. The second is to interrogate the use of international law in pronouncing on the development of common purpose. I express gratitude to the cogent perspectives in the main judgment and those of my sister Khampepe J.

The discourse of rape in South Africa

[80] This case has finally provided certainty on the common law crime of rape by common purpose. This outcome has resulted from years of infusing our procedural rules with constitutional values. As stated in the main judgment, rape by instrumentality and the inconsistent application of the common purpose doctrine have been a blight on our jurisprudence and have no place in our modern society.[49] A historical overview of these legal barriers in our South African jurisprudence demonstrates a number of embedded patriarchal gender norms in the procedural rules of evidence in relation to rape. This Court has recognised this, for example in

[49] Main judgment at [54].

Masiya,[50] where Nkabinde J referred to the statutory developments in the definition of the crime of rape in recent decades.[51] In 1993, for example, the rule that a husband could not rape his wife, the so-called marital rape exemption, was abolished.[52] Other legal impediments to the conviction of a rape offender included excessive shielding of the perpetrator, the medieval hue and cry rule,[53] and the cautionary rules[54] and as relevant in this case the concept of instrumentality and common purpose in the crime of rape.

[81] Feminist writers have for some decades urged the elimination of the various barriers to convicting the offender. Gruber referred to this by stating that "sexist gender norms were woven into the very fabric of rape law in the form of iniquitous obstacles to prosecution such as resistance and corroboration requirements."[55] In hindsight jurists as recently as the 1980s cautioned that rape complainants could be "motivated by spite, sexual frustration and other unpredictable emotional causes".[56]

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[50] *Masiya* above n 15.

[51] Id at para 28.

[52] Section 5 of the Prevention of Family Violence Act 133 of 1993. The marital rape exemption was premised on the private versus public dichotomy. See Charlesworth "What are 'Women's International Human Rights?'" in Cook (ed) *Human Rights of Women: National and international perspectives.* (Penn Press, Pennsylvania 2016) wherein it was stated that—

> "[the public and private dichotomy] assumes a public sphere of rationality, order, and political authority in which political and legal activity take place, and a private, 'subjective' sphere in which regulation is not appropriate. Domestic, family life is typically regarded as the center of the private world. A passage from the 1957 British Government's Wolfenden Committee's Report on Homosexual Offences and Prostitution illustrates this well: "there must remain a realm of private morality and immorality, which is, in brief and crude terms, not the law's business."

[53] This rule provided that the victim must make a loud outcry immediately after being raped.

[54] The origin of the cautionary rule is a warning to judicial officers that the evidence of certain witnesses, such as complainants in sexual cases could not be safely relied upon without corroboration. See *S v Jackson* [1998] ZASCA 13; 1998 (1) SACR 470 (SCA) at 474F-475D.

[55] Gruber "Rape, Feminism, and the War on Crime" (2009) 84 *Washington Law Review* 581 at 588.

[56] Hoffman and Zeffertt *The South African Law of Evidence* 3 ed (Butterworths, Durban 1983) at 455 wrote:

> "Experience has shown that it is very dangerous to rely upon the uncorroborated evidence of a complainant unless there is some other factor reducing the risk of wrong conviction in cases which involve a sexual element – a view that is currently enraging feminists and which has, as a result, led to rejection of the need for caution by some lawyers, who should know better than to pander to trendy and emotional protests, but which, nevertheless, seems to have been justified from as early as Joseph's troubles with Potipher's wife. The bringing of the charge may have been motivated by spite, sexual frustration or other unpredictable emotional causes.

[82] Other archaic evidential obstacles were the adherence to the prompt complaint rule, multiple witness consistency, and the identification of the first witness to whom the rape was reported. All of these underpinned the continued gender bias against the victims of sexual assault.

[83] It is against this context that the uncertainty relating to the doctrine of common purpose and instrumentality illustrates that sexist gender norms were embedded in our law of rape and were an obstacle to conviction. The introduction of various statutes and the development of the common law is necessary to overcome reliance on existing rules of evidence and procedure. Continual vigilance within a constitutional context is necessary in relation to any remaining obstacles.

[84] In the past, courts have been overly concerned with false convictions which have resulted in low convictions in sexual matters.[57] There has been indifference to the gender-based crime of rape at the expense of the victims. This is changing. Our society has begun taking the crime of rape seriously. A notable development by the criminal justice system is the imposition of heavier sentences through the promulgation of the Criminal Law Amendment Act imposing a legal regime of mandatory minimum sentences in respect of certain serious offences.[58]

[85] Many civil society organisations have been vocal in the field of rape activism and the increased focus on this scourge can be considered as one of feminism's greatest successes. McGlynn states that—

> "[j]ustice for rape survivors has become synonymous with increased punitive state punishment. Taking rape seriously is equated with convictions and prison sentences

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> If a question of paternity is involved, the complainant may even have a financial motive in wishing to implicate someone who will be able to support the child."

[57] See *S v Snyman* 1968 (2) SA 582 (A); [1968] 3 All SA 18 (A) at 585C-H.

[58] Section 51 read schedule 2 of the Criminal Law Amendment Act.

> and consequently most feminist activism has been focused on reforming the conventional criminal justice system to secure these aims."[59]

[86] One of the remaining obstacles to rape convictions will be eradicated by the acceptance of the doctrine of common purpose. This case may herald the end of sexism in rape trials.

[87] In a prescient judgment on common purpose in *Thebus*, Moseneke DCJ stated that:

> "Common 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. The need for 'a strong deterrent to violent crime' is well acknowledged because 'widespread 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 of 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 bypasses the requirement of causation."[60]

Recognition of this form of culpability does not compromise the rules of evidence and does not subvert the accused's right to a fair trial.

[88] In *Baloyi*, this Court stated that where the criminal justice system is ineffective, it "intensifies the subordination and helplessness of victims . . . [and] sends an unmistakeable message to the whole society that the daily trauma of vast numbers of women counts for little." [61]

[89] Our jurisprudence in the context of rape has moved in an inexorable direction consonant with our constitutional norms and values. There is however still a lot of

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[59] McGlynn "Feminism, Rape and the Search for Justice" (2011) 31 *Oxford Journal of Legal Studies* 825.

[60] *Thebus v S* [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) at para 40.

[61] *Baloyi* above n 48.

work to be done. It is a method of conscientisation of gender inequalities in society and the commencement of raising questions that could influence thought and societal practices.

[90] At the hearing, CALS drew attention to the fact that historically, women have been objectified in relation to the crime of rape, where the interest which was to be protected was not their human rights to dignity, equality, security or safety of the person but rather their chastity or value as an object for their male owner. In alignment with our constitutional framework, all this is changing. The prosecution of gender-based violence has acknowledged a victim-centred approach whilst at the same time not losing sight of an accused's rights to a fair trial.

[91] Over the past several years, feminism has been increasingly associated with crime control and the proper conviction and incarceration of men. Feminists have advocated a host of reforms to strengthen state power and punish gender-based crimes. Feminists' feelings of some progress are certainly understandable, given the widespread implementation of rape and domestic violence reforms and the shift in mind-sets on gendered crimes during the late twentieth century. Deconstruction of patriarchy should not only be a victim-centred societal project but it should also break down structures that enhance patriarchal practices that in turn give rise to gender-based violence.

[92] This means focussing on the intersectionality of categories like gender, race, age, class, and ability in relation to rape. Crenshaw argues that fundamentally the violence that many women experience is often shaped by other dimensions of their identities, such as race and class.[62] She notes further that "ignoring differences *within* groups frequently contributes to tension *amongst* groups."[63] This is recognised in the

[62] Crenshaw "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Colour" (1990) 43 *Stanford Law Review* 1241 at 1242.

[63] Id.

first concurrence. Feminist writers have also conceded that ultimately without a change in societal values, high prison sentences alone will not solve the scourge of rape.

The influence of international law

[93] At the hearing, the Commission drew attention to the fact that South Africa has acceded to multiple binding international instruments, which includes CEDAW.[64] CEDAW condemns discrimination against women in all its forms and obliges States Parties to take all appropriate measures to eliminate discrimination against women by any person, organisation or entity.[65] CEDAW further compels the modification of social and cultural patterns of conduct to remove stereotypical gender roles.[66] All this, in addition, has become part of customary international law.

[94] The CEDAW Committee has released several recommendations to strengthen its provisions. This has involved increasing recognition of the need to tackle gender-based violence, culminating in the extensive obligations on States Parties in terms of General recommendation 35.[67]

[95] The Commission also argued that the Maputo Protocol[68] was promulgated to supplement and provide focus on the rights of women and to protect them against all forms of violence. The Maputo Protocol also requires States Parties to enact and enforce laws to further the aims of the Protocol.[69]

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[64] United Nations Convention on the Elimination of all Forms of Discrimination against Women, 18 December 1979 (CEDAW).

[65] Article 2(e) of CEDAW.

[66] Article 5(a) of CEDAW.

[67] General Recommendation No. 35 on Gender-Based Violence against Women, updating General Recommendation No. 19, 14 July 2017 as adopted. For over 25 years, the practice of States Parties has endorsed the Committee's interpretation. The *opinio juris* and State practice suggest that the prohibition of gender-based violence against women has evolved into a principle of customary international law. General Recommendation No. 19 has been a key catalyst for this process.

[68] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July 2003 (Maputo Protocol).

[69] Article 4(2)(a) of the Maputo Protocol.

[96] Whilst recognising the role of our constitutional values, the National Executive has the responsibility of entering into international agreements[70] and customary international law is recognised as law in South Africa unless it is inconsistent with the Constitution or an Act of Parliament.[71] Furthermore, international law perspectives are relevant in developing our common law and interpreting the rights enshrined in the Bill of Rights.[72]

[97] The infusion of our international obligations, into our law in relation to sexual offences is manifest if regard be had to the preamble of SORMA where it is stated:

> "Whereas several international legal instruments, including the United Nations Convention on the Elimination of all Forms of Discrimination Against Women, 1979, and the United Nations Convention on the Rights of the Child, 1989, place obligations on the Republic towards the combating and, ultimately, eradicating of abuse and violence against women and children."

This statute marked the elimination of instrumentality in our law on rape. This is an additional justification for extending the doctrine of common purpose in the common law crime of rape.

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[70] Section 231(1) of the Constitution provides:

> "The negotiating and signing of all international agreements is the responsibility of the national executive."

[71] Section 232 of the Constitution provides:

> "Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."

[72] Section 39 of the Constitution provides:

> "(1) When interpreting the Bill of Rights, a court, tribunal or forum—
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> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
>
> (b) must consider international law; and
>
> (c) may consider foreign law.
>
> (2) 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."

[98] These instruments illustrate the universal importance of protecting and enhancing domestic laws that protect the most vulnerable members of our society. The common law crime of rape is one that has to be developed to meet the obligations imposed by international law. These protocols place an obligation on the State, including this Court, to develop the domestic laws to ensure that women are protected from sexual violence. In *Carmichele*, this Court held:

> "South Africa . . . has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights."[73]

Conclusion

[99] In conclusion, our constitutional duty and international obligations provide the legal and logical basis to confirm the application of the doctrine common of purpose to the common law crime of rape.

[73] *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 62.

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