Case No 644/91

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

JOHN MORGAN..... First Appellant

XOLISWA FALATI.....___ Second Appellant

NOMZAMO WINIFRED MANDELA..... Third Appellant

and

THE STATE.....
.....Respondent

CORAM : CORBETT, CJ, BOTHA, SMALBERGER, MILNE et EKSTEEN, JJA.

DATES OF HEARING: 24, 25 and 26 March 1993

DATE OF JUDGMENT: 2 June 1993

JUDGMENT

CORBETT CJ/
.....

CORBETT CJ:

Introductory

The three appellants were charged before the Witwatersrand Local Division with four counts of kidnapping (counts 1 to 4 inclusive) and four counts of assault with intent to do grievous bodily harm (counts 5 to 8 inclusive). They all pleaded not guilty to all charges. After a lengthy trial, which commenced, effectively, on 11 February 1991 and concluded on 14 May 1991, the trial Judge (Stegmann J) found the first appellant guilty on the four counts of kidnapping, but not guilty on the assault charges; the second appellant guilty on both the kidnapping and the assault charges; and the third appellant guilty on the kidnapping charges and guilty as an accessory after the fact on the assault charges. The learned trial Judge sentenced the appellants as follows:

First Appellant: In respect of the four counts of kidnapping taken together, one year's imprisonment, suspended for five years on certain conditions.

Second Appellant: In respect of the kidnapping counts, taken together, four years' imprison ment; and in respect of the assault counts, taken together, two years' imprisonment; i e an effective sentence of six years' imprisonment.

Third Appellant: In respect of the kidnapping counts, taken together, five years' imprison ment; and in respect of the assault counts, taken together, one year's imprisonment;

i e also an effective sentence of six years' imprisonment.

With the leave of the trial Judge the appel-

lants appeal to this Court against their respective con victions and against the severity of the sentences severally imposed on them.

The Indictment

The appellants were originally charged together with five other persons. Four of these, who included one K.C. (about whom more anon) and all of whom were out on bail, failed to appear at the trial. Their bail was cancelled and the Court authorized the issue of warrants for their arrest. A separation of trials was ordered and the prosecution proceeded against the appellants and a fourth person, Nompumelelo Falati, the daughter of the second appellant. In the case of the last-mentioned person an application for her discharge at the end of the State case succeeded and a verdict of not guilty on all eight counts was entered. Where appropriate, I shall refer to the original accused, apart from

the appellants, as "the other persons".

The alleged victims in both the kidnapping and the assault charges were Kenneth Kgase ("Kgase"), then about 29 years old, Barend Thabiso Mono ("Mono"), then about 19, G.P.M. ("M."), then about 20, and J.M.S.Se. ("Se."), then about 14. (Although Seipei was murdered shortly after the kidnapping I shall for convenience refer to all four victims as "the complainants".) In the Court a quo the gist of the State case against the appellants was that (i) on 29 December 1988 and in pursuance of a common purpose (to which they and the other persons and one Jerry Richardson were party) they took the complainants against their will from the Methodist Church manse, in Orlando West, where they were living at the time, to a house referred to as 585 Diepkloof Extension, the residence of third appellant ("no 585"); (ii) there held them against their will and deprived them of their

liberty of movement, in the case of Se., until he was taken away and murdered on about 1 January 1989, in the case of Kgase until 7 January 1989, and in the case of Mono and Mekwe until 16 January 1989; and (iii) at no 585 and on 29 December 1988 assaulted the complainants with intent to inflict grievous bodily harm. As regards the kidnapping, it was alleged that first and second appellants, the other persons and Jerry Richardson were part of a group that fetched the complainants from the manse and took them to no 585. The third appellant was not alleged to have been part of this group, but was said to have been party to the common purpose. As regards the assault charges, it was alleged that the complainants were assaulted by a group of persons which included the second and third appellants, the other persons and Richardson. The first appellant was a member of this group, but it was conceded that he did not actively take part in the assault. In further

particu-

lars to the indictment it was specifically alleged that third appellant took part in the assault by punching or slapping the complainants and by hitting them with a sjambok.

Some Background Facts

The manse from which the kidnapping is alleged to have taken place is situated in Moema Street, Orlando West, next door to the Methodist church. It is a modest dwelling comprising a large living-room, three bedrooms, a study, a bathroom and a kitchen. At the material times the incumbent minister was the Rev Paul Verryn. On the initiative, it seems, of the Rev Verryn the manse provided accommodation, sometimes of a merely temporary nature, for a considerable number of young men (whose ages ranged from 12 to 29) from different parts of the country. This was in implementation of a

programme

initiated by the Witwatersrand Council of Churches for providing sanctuary for young people who for various reasons were homeless. According to second appellant, and her evidence in this regard seems to have been accepted by the trial Judge, when she came to live at the manse in November 1988 the number of persons staying there on a regular basis was 23, but that at times temporary sojourners caused the number to swell to about 35. These figures point to gross overcrowding in the house. The three bedrooms appear to have provided sleeping accommodation for six or eight of the residents and the remainder found what resting-place they could in the living-room and, on occasion, in the study. Those sleeping in the bedrooms shared the three available beds. According to evidence given by second appellant, which is not in dispute, the Rev. Verryn, who during the week worked at the offices of the Methodist Church in Pritchard Street, Johannesburg, would normally

leave the manse at between 07h30 and 08h00 and would not return until midnight or after. He was accordingly not in a position to supervise and maintain discipline at the manse. After she came to live there second appellant, who at the time was 35 years old, took these responsibilities upon herself and saw to it that the residents kept the house clean, took turns at cooking, etc and observed a code of behaviour.

Third appellant's residence, no 585, is em attractive-looking modern dwelling. The house itself comprises three bedrooms, a study, a dining-room, two rooms used as sitting-rooms, a kitchen and a bathroom. Attached to the house is a double garage. To the rear of the house are two detached rooms, or outbuildings. The one was designed as a change-room for a Jacuzzi bath situated in the patio behind the house (I shall call this "the change-room"); and the other consists of a bedroom with lavatory attached

("the outside bedroom"). Against

one of the walls of the outside bedroom is a tap, which assumed some importance in the case. During the relevant period the three bedrooms in the house were occupied respectively by third appellant, her daughter Zinzi Mandela, and a Mrs Gogo Mabuza. According to third appellant, and this evidence is not really in dispute, some 16 or 17 youths, mostly refugees or fugitives, occupied the two outside rooms. They constituted a floating population, the composition of which varied from time to time, but the numbers remained fairly constant. Amongst them was one S.B.M., the son of Mrs Gogo Mabuza. He was then 17 years of age. He was one of the persons who failed to appear at the trial.

At this point it is pertinent to make mention of the so-called Mandela United Soccer Club. According to the third appellant, prior to taking up residence at no 585, she had lived in a house in Vilakazi Street,

Orlando West. There were three rooms at the back of this house. Third appellant permitted youths, "refugees from one thing or another", to occupy these rooms. She provided them with food. As a result of a suggestion by third appellant that they "formalize their games" the aforementioned soccer club was formed and Jerry Richardson was appointed as its coach. Distinctive track-suits were acquired for the team. Some, but not all, of the members of the team lived at the back of the third appellant's house. In August 1988 third appellant's house in Orlando West was attacked and burnt down. It was then that she acquired and moved to no 585. At that stage the soccer club was defunct. The youths who came to live at the back of her new residence included one or two of the original soccer players. In addition, towards the end of November 1988 Jerry Richardson also came to stay there, with third appellant's permission, because his own house had been damaged "during a

shoot-out".

The State Case

The State case was founded mainly on the evi dence of two of the complainants, Kgase and Mono. The third surviving complainant, M., was also to have been called as a State witness, but at the commencement of the trial the prosecution announced that he had disappeared, the allegation being that he had been kidnapped the night before. Nothing further was heard of him during the course of the trial.

Reduced to its essentials, Kgase's evidence-in- chief was to the following effect. He went to live at the manse, at the Rev Verryn's invitation, on 3 November 1988. After his arrival there second appellant and her daughter also moved in; as also did Mono, M. and Se.. Another resident at the time was the aforementioned K.C. ("K."). On the evening of Thursday, 29 December 1988 Kgase was

sitting in the

living-room at the manse, playing cards with three others. All of a sudden a man dressed in an army overcoat (later identified by the name of "Slash" and also known as "Sledge") stormed into the room and ordered them to stand up and to go to the kitchen. They obeyed. There Kgase found a "well-built, middle-aged man" (later identified as Jerry Richardson), the second appellant, her daughter, C., and a number of strange men (whom he later identified by such names as Spokes, Scar, Black Sunday, Moss, Desmond, Isaac and Jabu). The house was searched and the residents rounded up. One Sello who tried to slip away was caught and slapped by Slash. Mono, M. and Se. were separated from the rest and someone said that they had to be taken away. As they were leaving Slash said "What about Kenny?" (referring to Kgase); and second appellant replied that he was "quite clever" and "might make some investigations". Slash then put his hand on Kgase's shoulder and ordered him to

come along. He (the witness) complied but did not go willingly. He did not know where they were supposed to be going; nor did he ask. At one stage Richardson said that they would be brought back "sooner or later". The complainants and their abductors went out of the house, through a hole in the back fence and walked for about two blocks to where a bus was parked. It is common cause that this bus, which is larger than a combi but smaller than the normal bus used for public transport, belonged to the third appellant. They all entered the bus and were driven to no 585. The driver of the bus was the first appellant. On the way there someone started singing and the complainants were ordered by Richardson to join in. Richardson also ordered them to sit separately. Kgase stated that at this stage he felt very nervous and scared.

At no 585 they were taken to the change-room. There they were given some food. Richardson

told them

that "they" were going to speak to them. In a private conversation with the witness Richardson told him that they had information that the Rev Verryn was interfering sexually with the young men staying at the manse and asked him about this. Kgase told him that he did once share a bed with Verryn and that after everyone was awake he found that the Rev Verryn was "tickling" him all over his body, but that there was nothing improper in this. After eating the complainants were ordered to hand over their watches. To Kgase it was then obvious that they were going to be beaten up.

Some time thereafter third appellant came into the room. She looked displeased. She kept quiet for a while and then said that the complainants were "not fit to be alive" and ordered them to stand up and identify themselves. At the invitation of third appellant, second appellant then spoke and made various allegations against the complainants: in Kgase's case, mainly, that

he was "protecting" the Rev Verryn, had reacted with indifference when she told him shortly before that K. had been "raped" by Verryn and had told her that he had "gay" friends and that it was normal for other people to be gay; in Se.'s case, that he was a police informer and a "sell-out"; and in the case of Mono and M., that they had sexual relationships with the Rev Verryn. The complainants denied these allegations.

Then all of a sudden, according to Kgase, the third appellant grabbed him by the hair and started punching him, one blow landing below his left eye. She then punched the other complainants in turn, demanding that they tell the truth about the allegations against them. This continued for some time and then there was what the witness described as "pandemonium" with Jerry Richardson and others, including K., joining in the assaulting of the complainants. It stopped for a while, during which

time the third appellant hummed a tune and

danced to its rhythm. She then produced a s jambok and assaulted the complainants by hitting them with this. Others joined in and the complainants were sjambokked, punched, kicked and lifted and dropped to the floor. At a certain stage, while the assaults were still taking place, third appellant disappeared from the scene. As a result of the assaults Kgase felt humiliated and "just terrible". He was in great pain; there were a "lot of wounds" and a"lot of blood". His left eye was bloodshot and the eye-socket discoloured and swollen.

Thereafter the complainants were ordered by Richardson to wash and then to make their beds with blankets provided in the change-room. Two people slept with them in the room. At that stage Se.'s condition was bad. He did not talk. The following day Richardson told them about "the rules of the house" and warned them about trying to run away. He said the position of Kgase, Mono and M. was different from that of

Se., who had done something that was "very, very wrong" and who would eventually have to be "dumped" (meaning that he "had not long to live"). They were also instructed to wash away blood-stains from the walls of the room and elsewhere.

Kgase further deposed to an incident which took place the following night (Friday 30 December 1988) when Se. was assaulted by a stranger in the presence of Richardson and as a result of what Richardson told the stranger about Se.. The next day Kgase noticed that Se. had a lump on his head. On Sunday 1 January 1989 Se. was taken away by Richardson. That was the last that the witness saw of him.

On about 3 January 1989 the three remaining complainants were taken out by Richardson and others on the pretence that they were going to play soccer. In the end it turned out to be an expedition to capture and murder a man known as

Ikaneng. After a search Ikaneng

was located and apprehended. He subsequently evaded his captors and ran away, but was recaptured. He was taken to an open piece of land, where he was stabbed by Richardson and another with the blades of a pair of garden shears. He was left for dead in a small, ravine, but in fact survived the attack. Acting on orders from Richardson, Kgase helped to throw Ikaneng into this ravine. He stated in evidence that he was "devastated" by this episode.

On Wednesday, 4 January 1989 the funeral of a Mr Mabuse, father of a well-known local musician, took place. Kgase and the other two complainants were told by Richardson that they had to attend the funeral and for the occasion wear track-suits of the Mandela United Soccer Club, which were kept in the garage. Others from the house also wore such track-suits. They were driven to the funeral in the same bus that brought them to no 585 on the evening of 29 December 1989. The bus was

again driven by the first appellant. Third appellant travelled on the bus between the church and the graveyard. Kgase sang at the graveyard and helped to fill the grave. He did not attend the funeral willingly.

On the next day Kgase and his fellow complain ants and two others were taken in third appellant's mini-bus to Richardson's house. Richardson and third appel-lant went with them and first appellant drove the mini-. bus. On arrival there they were told to clean up out-side the house. Richardson worked with them, but after having a look around third appellant went off in the mini-bus with first appellant. The latter later came to fetch them.

On the morning of 7 January 1989 at 04h00 Kgase was told to stand on guard to protect the house, together with one Isaac. Kgase took the opportunity that morning to escape from the house and run away. He took a taxi to the Central Methodist Church in Pritchard Street and

eventually made contact with the Rev Verryn. He told him his story. He was then taken to a doctor, Dr Martin Connell, who examined him; and after that to see a lawyer.

To complete this sequence of events, I might add that on 6 January 1989, the day before Kgase's escape, Se.'s dead body was found on an open piece of land in Soweto, about 4,8 kms from the third appellant's residence. Subsequently, in May 1990, Richardson stood trial in the_Witwatersrand Local Division on the charges of having kidnapped and assaulted the complainants, of having murdered Se. and of having attempted to murder Ikaneng. He was found guilty and sentenced in August 1990.

Kgase was comprehensively cross-examined by counsel for the appellants. During the course of this he was revealed as a very unreliable witness. Between the time of his escape from no 585 and the time when he

gave evidence in the Court a quo Kgase had, in relation to these events, given a number of interviews to the Press (which had resulted in published articles), had written an article for the English newspaper, the Sunday Telegraph, had deposed to an affidavit taken by his attorney and had given two witness's statements (one originally taken by his attorney) to the police. He had also given evidence in the Richardson trial. Dr Connell also gave evidence of certain statements made to him by Kgase at the time of his medical examination. This trail of previous statements made Kgase particularly vulnerable; or, to put it another way, they provided abundant material by which to test the accuracy of his evidence before the Court a quo. Numerous contradictions between his evidence and his previous statements were pointed out to him in cross-examination; in most instances he admitted that one or the other was inaccurate or untrue or simply stated that he had no

answer to the question. During the course of his cross- examination senior counsel for the prosecution, Mr Swanepoel SC, very properly made available to the defence the witness's statements made by him. Furthermore, in re-examination, Mr Swanepoel drew attention to the fact that whereas Kgase had stated in evidence that he had not received any payment for the Sunday Telegraph article, he had told counsel for the prosecution in consultation that he had in fact been paid. He was then asked what the correct position was; and he admitted that he had been paid. This was confirmed by Mr Peter Taylor, a defence witness.

The trial Judge made the following findings in regard to Kgase's evidence:

> "Kenneth Kgase was particularly thoroughly discredited. Inter alia, he departed from his statements.

By the end of the trial it was quite clear

> that I could not possibly rely on any proposition by Kgase that was disputed by any other witness, unless it was specifically and reliably corroborated by other dependable evidence. Kgase, like every other witness, swore to tell the truth, the whole truth and nothing but the truth. In Kgase's case it remains possible that his evidence included the truth, and perhaps even the whole truth, but what became clear beyond all question was that the truth alone was not nearly good enough for him.. He added in a great deal that was certainly not the truth. The result has been that it is an impossible task to sort out his fabrications from his true statements. With such a witness I find myself hesitant to place much reliance cm even those of his statements which were not specifically controverted by any other witness, save where there is appropriate corroboration."

The other main State witness. Mono, also proved to be "a broken reed at best". His account of circum-

stances at the manse, of the happenings on the evening of 29 December 1988, of the subsequent assaults to which Se. was subjected, of Se. being taken away on Sunday 1 January 1989, of the Ikaneng episode, of the Mabuza funeral and of working at Richardson's house is in broad conformity with that given by Kgase in his evidence-in-chief. The trial Judge, nevertheless, made the following findings as to his credibility:

> "Thabiso Mono was unreliable for entirely different reasons. Whereas Kgase's main vice was false embroidery of the truth, Thabiso Mono's main shortcoming was suppression of aspects of the truth which must have been known to him and which he declined to disclose by claiming repeatedly, in ever less credible circumstances, that he could not remember. His reluctance to state aspects of the truth that must have been known to him, together with other more specific criticisms that were rightly made of his evidence, was such that I suspect his

selective memory

> of producing misleading half-truths which are really no better than downright untruths. In his case, too, I consider that I cannot safely rely on any of his propositions which were controverted by another witness except only for such of his propositions as are supported by appropriate corroboration."

In his evidence Mono further described Kgase's disappearance on the morning of Saturday, 7 January 1989. He and M., however, remained at no 585. Richardson told them that should one of them leave, the other would be in danger. On a certain day (from the evidence it seems probable that this was 13 January 1989) Mr Attorney Ismail Ayob, the legal representative of the Mandela family, came to no 585 and saw the third appellant. Mono and M. were called to the main house by Richardson, who identified them to Mr Ayob. On another day there was also a visit by Mr Attorney Krish Naidoo. Richardson told him and M. to come to the house to speak to

Mr Naidoo, but enjoined them to say nothing about the assaults and to tell Mr Naidoo that the reason why they left the manse was because "Paul used to sleep with us". For fear of Richardson they did as they were told. Mr Ayob came on a second occasion (probably on 15 January 1989). He spoke to second appellant and Richardson and told them that he had come to fetch Mono and M.. Second appellant and Richardson initially refused to permit them to go. Later they did take them to Mr Ayob, but eventually brought them back to no 585. On Monday 16 January 1989 Richardson took them to a Dr Nthato Motlana, who in turn took them to the offices of Mr Naidoo. Mr Naidoo telephoned Bishop Peter Storey, who that evening took them to a meeting in Soweto. At this meeting some 70 people were present and Mono told them what had happened to him, including the assaults. M. did likewise. On Wednesday, 18 January 1989 Mono and M. were taken to Dr Connell and examined by him.

Dr Connell was called as a State witness and he provided very important corroboration for certain aspects of the evidence of Kgase and Mono. At the same time he deposed to certain statements made to him by these witnesses which, it may be suggested, was at variance with their evidence before the Court a quo. Dr Connell confirmed that he medically examined Kgase on 7 January 1989 and Mono and M. on 18 January 1989. In the case of Kgase he found 9 "tramtrack" injuries on the back, 6 on the right arm and 4 on the left shoulder and arm. In a number of instances the skin had been broken and there had been bleeding. A tramtrack injury is one made by a flexible linear object and, in the doctor's opinion, the injuries could have been caused by blows with a sjambok. He also found a subconjunctival haemorrhage of the right eye (it seems likely that in fact it was the left eye), with peri-orbital haematoma, a laceration below the lower lip and

swelling and bruising

of the right side of the face. On Kgase's back he found an extensive haematoma, with lesser bruises over the left hip and left side of the chest. His findings were consistent with the injuries having been caused by an assault on 29 December 1988.

In the case of Mono, Dr Connell found 14 healing tramtrack abrasions characterized by "new slightly pinkish scar tissue" and a circular healing scar on the left wrist, also with slightly pink scar tissue. In the case of M. he again found tramtrack abrasions, six in number; recently healed abrasions on the right shoulder, midback and left thigh; an almost healed laceration on the forehead and recently healed scars on the left hand and left arm. In both cases the appearance of the injuries noted was consistent with their having been inflicted on 29 December 1988.

Dr Connell stated in evidence that at the time of the medical examination Kgase told him, inter alia,

and with reference to the assaults which caused his injuries, that third appellant struck him on the face with her hand: he did not tell the doctor that the third appellant had struck him with a sjambok or with her fist. Dr Connell also testified that in Mono's case the latter told him that he had been assaulted by members of the football team; he did not say, however, that third appellant had assaulted him in any way.

The remaining witnesses called by the State in presenting the case for the prosecution (I ignore for the moment certain evidence led in the attempted rebuttal of third appellant's alibi) were Dr Klepp, who performed the autopsy on the body of Se., Bishop Storey, Captain Dempsey of the South African Police, the investigating officer, and Major Claassens, a forensic expert.

When the autopsy was performed by Dr Klepp Seipei's body was in an advanced stage of decomposition, which to some extent hindered the

examination. The

doctor found, inter alia, three penetrating incised wounds of the neck; a fractured left clavicle; extensive contusion of the subcutaneous tissues of the lower back, buttocks, left thigh and right calf; and extensive contusion of the scalp. The cause of death was given as "penetrating incised wounds of neck, subcutaneous contusions". The injuries to the head could have caused swelling.

Bishop Storey is the bishop of the south western district of the Transvaal of the Methodist Church of South Africa. In his evidence he dealt, inter alia, with the position of the Rev Verryn in the Church, the situation at the manse in Orlando West and the rumours of alleged sexual misconduct at the manse. I shall con-sider some of this evidence later in the context of the issue of alleged sexual misconduct involving the Rev Verryn. In addition, Bishop Storey stated that on 9 January 1989 it was reported to him that the complainants

had been kidnapped from the manse on 29 December 1988. Between 9 January and 16 January 1989, when Mono and M. were freed, Bishop Storey was active in seeking to secure their release. He had numerous discussions with the Rev Verryn, with community leaders such as the Rev Frank Chikane and Dr Motlana, and with a body known as the "crisis committee"; and at one stage he took legal advice with a view to a habeas corpus application. Eventually on 16 January 1989 Mono and M. were released to him by Richardson at the offices of Mr Naidoo. He took them to a community meeting which was held that evening in Dobsonville at the instance of the crisis committee. At this meeting Mono and M. related what had happened to them. Neither second nor third appellant attended the meeting. I should here explain that the crisis committee was a body, consisting of community leaders, which was formed in order to deal with the crisis created by the destruction of third

appellant's

home in Vilakazi Street.

In his evidence Captain Dempsey stated that he had been appointed investigating officer on 9 February 1989 as a result of media reports concerning the disappearance of Se. and the kidnapping of the complainants. He eventually traced the surviving complainants and took statements from them on 17 February 1989. Two days later he was part of a team of policemen which went to investigate and search the premises at no 585. A number of objects were seized and these were later produced in Court as exhibits. They included a sjambok and a stick ("kierie"), found under a mattress in the change room; another sjambok, found in the garage, and two blankets and odd items of clothing.

Captain Claassens was also a member of the investigating team on 19 February 1989. He took from the premises objects and specimens which were later scientifically analysed. For present purposes his

most

important findings were: the presence of primatial blood on the walls and curtains of the change-room and the outside bedroom, and the presence on the two blankets seized of primatial blood which was of the same blood-grouping as a sample of blood taken from M..

This medical and forensic evidence, and the finding of the two sjamboks on the premises provided irrefutable corroboration of the evidence of Kgase and Mono to the effect that they were assaulted in the outside rooms at no 585 and that, inter alia, sjamboks were used in the assaults. Moreover, it is not in dispute that they were so assaulted shortly after being fetched from the manse on the evening of 29 December 1988 and that Richardson and other members of the group, loosely described as "the football team", participated in the assaults. One of the big issues, however, is what role, if any, the three appellants played in this connection.

As far as first appellant is concerned, an important piece of prosecution evidence in the case against him was a written statement which he made and subscribed before Lieut-Col Oosthuizen of the South African Police on 22 February 1989 (exh "AA"). The admissibility of this statement was contested by the defence on the ground that the first appellant had been coerced by assaults and torture to make it. After concluding a trial-within-a-trial the Judge a quo ruled the statement to be admissible. This finding is not challenged on appeal. Of course, the statement is evidence only against first appellant.

In his statement first appellant said that he was employed by third appellant as her driver, but did not sleep at no 585. On a day in December 1988 Richard-son instructed him, in third appellant's presence, to convey Richardson, second appellant, Sledge and another to the Methodist Church in Orlando West. He did so and

remained with the bus while the others went into the manse. After a short while they returned to the bus accompanied by Se. and three others. Everyone entered the bus and they returned to no 585. He then described how he was present while the complainants were interrogated and while three of them were assaulted in turn by Richardson and other persons present. He left before they turned their attention to the fourth victim. He said that he could no longer stand it. He stated that third appellant was present during part of the time when the interrogation and assaults took place and that she herself interrogated and assaulted Se., who was the second person to be so treated. After that she left.

The Defence Case

I turn now to the defence case, as presented by each of the appellants; and I shall thereafter indicate briefly how the trial Judge

dealt with each defence.

The first appellant closed his case without leading or giving evidence. His general contention was that the State evidence, including his statement to Lieut-Col Oosthuizen, was not sufficient to secure his conviction on either the kidnapping or the assault charges.

The second defendant gave evidence in her defence. In chief she stated that in 1987 she was doing social welfare work at the offices of the Anglican Church in Johannesburg. Through this work she met the third appellant and also the Rev Verryn. As a result of her house in Springs having been "bombed" she and her 18-year-old daughter, Nompumelelo, were taken in at the Methodist manse in Orlando West by the Rev Verryn. In her evidence second appellant described conditions at the manse when she arrived there at the beginning of November 1988 - the dirtiness of the place, the state of disorganization, the lack of discipline and the

overcrowding -

and the steps taken by her to try to rectify the situation. Prior to her moving to the manse she heard from the Rev Verryn himself that there were rumours in circulation to the effect that he (the Rev Verryn) was misconducting himself with young boys at the manse. She described how on one occasion after she had taken up residence in the manse Se. complained to her that Mono and M. and an unnamed third boy had made sexual advances to him in bed at night.

She also described an episode involving K.. He was then 20 years of age and a recent arrival at the manse. Because he was "a raw Zulu from Natal" the others laughed at him and he felt isolated and unhappy. Second appellant reported this to the Rev Verryn who invited him to share his (Verryn's) bed. This was two days before Christmas. The next day second appellant found K. in great distress. She could not discover what the problem

was. She took him to Verryn, who made

him a present of some shirts. The Rev Verryn went away for five days, returned briefly on 28 December 1988 and then went away again. K. was still in a distressed and emotional state of mind and was continuously saying that he would "kill a person". On 29 December 1988 second appellant eventually discovered what was troubling K.. He told her, with a certain amount of graphic detail, how while he was sleeping in the Rev Verryn's bed the latter attempted on three occasions to "rape" him. Second appellant was shocked and amazed. She consulted Kgase who appeared unsurprised. He said that this happened "to all of us here". He was not shocked because he was "used to it". -She also spoke to another resident at the manse, Aubrey Nxumalo (who figured as a defence witness), whose reaction was broadly the same. Second appellant decided to consult third appellant about this problem because the latter was a social worker and a community leader. During the after-

noon of 29 December 1988 she found third appellant at no 585 and informed her about the position at the manse. Third appellant's reaction was to exclaim "Is the reverend still doing this thing?". Third appellant then explained to second appellant that she was aware of a previous incident with a young boy aged 13-14. At third appellant's suggestion second appellant went to fetch K. and brought him to third appellant. He was confused and crying. Third appellant then suggested that they should take him to Dr Asfat, third appellant's personal doctor. This was done. After examining K. Dr Asfat advised that they should come back after 10 or 15 days so that he could arrange for K., as well as the Rev Verryn, to see a psychiatrist. He said that K. was mentally disturbed and the Rev Verryn needed treatment because of what he was doing.

They returned to no 585. Second appellant watched a video. She then went to the outside toilet

because the one inside the house was not functioning properly. There she ran into Richardson and she told him about K. and the Rev Verryn. They discussed the matter and she told him about "three others who do it right there" and about the incident involving Se.. She then suggested to Richardson that "these kids" should be "taken away" from the manse and brought to no 585, where they would be kept by him until the return of the Rev Verryn and the problem of "sexual activities" had been solved. Richardson said that he would talk to "the other boys". Second appellant went back into the house to tell third appellant of her suggestion, but found that she had left the house. She and Richardson - then agreed that the children should be fetched, that the bus would be used for this purpose and that first appellant (who happened to be at no 585) would drive the bus.

The expedition which then set off in the bus consisted of second appellant, Richardson,

Slash, Moss,

K. and the driver, first appellant. The bus stopped in a street which was not the street in which the manse was situated and they walked from there to the manse. On arrival at the manse second appellant called everyone to the kitchen and there she requested Kgase, Mono, M. and Se. to accompany her to the "leader' s house" and said that there was a problem which they were going to solve. They agreed and accompanied her back to the bus. No one was manhandled or assaulted. In the bus second appellant explained that they were going to try to solve "this Father Paul Verryn issue". On the return journey there was singing in the bus. At no 585 they went to the back room and sat down. Second appellant explained the reason why they had been brought there and requested Richardson to "keep" them, as third appellant was away. She said that she would come back once third appellant returned. She then left them in the back room with Richardson. She went into the

house and

for a while sat and watched a video with her daughter. The two of them then returned to the manse. While she was at no 585 she did not see anyone assault the complainants. The only thing that happened was that while second appellant was explaining to Richardson about "the Paul Verryn issue", Kgase laughed and Richardson grabbed him by the shoulder and pulled him forward.

On 30 December 1988 second appellant returned to no 585, looking for third appellant, but failed to find her. She went to the back rooms and found that all the complainants were busy cleaning the windows. She noticed that Kgase's right eye was red and swollen. A report was made to her by one Sibonelo as a result of which she, on the following day (31 December 1988), admonished Richardson not to assault "these children". Later that day (i e 31 December 1988) third appellant arrived back at no 585 from Brandfort (as the witness

later discovered). After greeting her second appellant

apologised to third appellant for having brought the complainants to her house, but explained that some of them were "the children who were being abused" and others were practising homosexuality amongst themselves. At this point Kgase was in the vicinity. Second appellant pointed out his red eye and told third appellant that she had been informed that he had been assaulted by Richardson. She further said to third appellant that "the issue of Father Verryn" had to be attended to and solved and that she (second appellant) had requested Richardson to keep the complainants at the house pending the Rev Verryn's return. Third appellant did not say much in response to these disclosures; she merely asked where Richardson was. Second appellant told her how she had scolded Richardson for what he had done. Eventually she left.

At that stage second appellant had left the manse and was living with a cousin in Pimville. From

time to time she returned to the manse looking for the Rev Verryn, but without success. On 13 January 1989 she went back to no 585. On arrival she was informed that Kgase and Se. had "left". In the house she found third appellant, who was not well. Among those present was Mr Ayob. At third appellants request second appellant explained to Mr Ayob what had happened at the manse "with the children" and how she had asked that they be kept at no 585. Mr Ayob told her to come back the next day and that he would arrange for the "ministers" and Dr Asfat to be present. She returned the next day (14 January 1989), but neither Mr Ayob nor the ministers nor Dr Asfat turned up. Dr Motlana did, however, arrive in the afternoon. Second appellant gathered from him that the ministers had been meeting at his house, which was just round the corner from no 585.

On the following day (15 January 1989) second appellant was called to no 585. There she

found Mr Ayob.

He informed second appellant and Richardson that he was going to take the "children" (meaning Mono, M. and K.) away and asked them whether they would accept this. They refused to do so. Second appellant took the children to Pimville, but later returned them to no 585. From there they went to Mr Ayob's flat in Braamfontein where she further discussed the matter with Mr Ayob, stressed the misconduct of the Rev Verryn and accused him and others of trying "to sweep this issue beneath the carpet". Eventually the children were returned to no 585 into the custody of Richardson. She denied ever having kidnapped or assaulted the complainants or to having conspired with first or third appellants to do so.

Second appellant was cross-examined extensively and at length by counsel for the State. This cross-examination made very considerable impact upon her credibility and partly resulted in the adverse findings

thereon by the trial Judge to which I will later refer. During cross-examination second appellant elaborated on the reasons why the complainants were taken away from the manse and kept at no 585. She contemplated a form of enquiry by the ministers of the Methodist Church and she wished the complainants to be available as witnesses in that enquiry and, in the interim, not to be subject to the influence of the Rev Verryn.

Three other aspects of her evidence under cross-examination merit mention at this stage. Firstly, it will be recalled that she visited no 585 on 30 December 1988 and found the complainants at the back of the house cleaning windows. She was questioned about this visit by counsel for the State. She stated that apart from Kgase's injured eye there appeared to be nothing wrong with the complainants. She did not speak to Kgase about his injury because she did not want to do so in the absence of Richardson and could not find the

latter on the premises. Initially she stated - or at any rate conveyed - that she did not speak to Mono, M. and Se.; later she alleged that she asked them whether they were well and they replied in the affirmative. Secondly, she repeated under cross-examination by counsel for the State what she had said in examination-in-chief about what she reported to third appellant immediately after the latter's return from Brandfort on 31 December 1988. During his cross-examination of her counsel for third appellant touched upon this topic, but did not in any way challenge the correctness of her evidence in this regard. And, thirdly, in answer to questions by counsel for the State, she said that on the way back to no 585, after having taken K. to see Dr Asfat on 29 December 1988, she did not tell third appellant what she had found out about Kgase and the other three. The reason she gave: "the worry was K.".

Third appellant gave evidence and six other witnesses were called on her behalf. In essence her defence was an alibi. She stated in evidence-in-chief that in May 1977 she was "exiled" to Brandfort in the Orange Free State and placed under house arrest. There she remained for nearly nine years. Nevertheless, while there she did form a number of friendships, one of her friends being a Mrs Nora Moahloli, a teacher at the local school. She also initiated and developed a number of social projects, including a mealie meal project, a soup project, a creche, which developed into a day-care centre, a sewing club, a clinic and a scholarship project. Her banning order- forbade attendance at gatherings and consequently she used other persons to act as her representative in attending meetings of these organizations. Of particular assistance to her in this connection was Mrs Moahloli. Towards the end of 1986 she returned to Johannesburg and lived in the

Vilakazi Street

house in Orlando West until the incident in August 1988 when it was destroyed by fire.

Third appellant had an office in Orlando East where she dealt with community problems referred to her by individuals and interviewed people who wished to see her. She had a secretary and "various employees". She first met the second appellant in about 1988 when the latter came to the office seeking assistance in regard to accommodation and her daughter's education. First appellant had been a neighbour in Vilakazi Street and she had known him for many years. Although not formally employed by her, first appellant did act as her driver whenever requested to do so. He drove a bus which had been donated to third appellant early in December 1988 and was acquired for the purpose of conveying children to school.

Third appellant affirmed that she was a member of the Methodist Church, which had assisted with one of

her projects in Brandfort. She had heard of the Rev Verryn, but did not know him personally. She knew of the programme for assisting refugees at the manse in Orlando West. In June 1987 a 13-year-old boy came to see her at her home in Vilakazi Street. (This boy later gave evidence and to protect him from general identification he was referred to in the Court a quo as "youth X".) Youth X was at the time staying at the manse and he reported to third appellant that he had been sexually abused by the Rev Verryn while sharing the latter's bed. He was emotionally disturbed. She provided youth X with accommodation at the back of her house; and she reported the matter to the Rev Frank Chikane, the general secretary of the South African Council of Churches, which organization financed the programme for assisting refugees at the manse and employed the Rev Verryn. The Rev Chikane appeared to be sceptical of the allegation, but promised to take it up. She left the matter in his

hands. She herself took no further steps. Youth X stayed at her house until the end of 1987, but did not return in 1988. In September of that year he came to see third appellant again. He told her that he had returned to the manse early in 1988 and that he had again been sexually abused by the Rev Verryn. Third appellant again reported the matter to the Rev Chikane. This time he was not as sceptical as he had been the previous year; and he indicated that he was in possession of other similar reports. He indicated that he was going to refer the matter to Bishop Storey. He subsequently indicated that the Church had advised the Rev Verryn to adopt certain -corrective measures. Youth X was again provided with accommodation at no 585.

On 25 November 1988 third appellant went to Brandfort to attend the funeral of one Teacher Menega. She spent the night of the 25th at the home of Mrs Moahloli and attended the funeral on the

26th. Mrs

Moahloli reported to her on the. projects which she had helped to establish in Brandfort during her period of exile there. From this report it appeared that several of them had "died off". Third appellant was concerned to hear this and she discussed with Mrs Moahloli the possibility of reviving them. To this end it was decided to have a meeting in Brandfort on the afternoon of 30 December 1988. Third appellant arranged to travel to Brandfort on 29 December 1988 and to return home on 31 December 1988.

On the afternoon of 29 December 1988 second appellant came to see her at no 585 and reported that one youngster staying at the manse had told her that he had been "raped" by the Rev Verryn. Third appellant was shocked and exclaimed: "Is the Rev Verryn still doing that?". She asked second appellant to bring the youngster to her, which she did. He turned out to be K.. Third appellant then proceeded to describe the

visit to Dr Asfat, as already recounted. The reason for the delay in making arrangements for a psychiatrist to see K. was the absence of most doctors on holiday during the festive season.

After their return to no 585 she made prepara tions to leave for Brandfort. She had planned to reach Brandfort between 19h00 and 20h00 in order to have dinner with Mrs Moahloli, with whom she was staying. It was a drive of 3½ to 4 hours. In the end, as a result of the K. affair, she set off only at between 18h30 and 19h00. She was driven in her kombi by one Thabo Motau (who also gave evidence). She arrived there after 22h00.

For reasons which will later emerge, I do not propose to narrate in any detail what happened on the visit to Brandfort. Suffice it to say that on the morning of Friday, 30 December 1988 she visited certain persons whom she had been assisting and in the afternoon

attended the meeting. During the morning of Saturday, 31 December 1988 she made a few visits in connection with the scholarship project. Thereafter she, driven again by Motau, returned to Johannesburg, arriving home at between 18h30 and 19h00.

At no 585 she found second appellant, who greeted her. There were others present. Second appellant made the following report to her (to quote third appellant's own words):

> "She said something like she was sorry she had brought some children there and she hoped that I would not mind."

According to third appellant, she could not recall second appellant mentioning anything about anyone's eye being injured. In reply to a question by her counsel specifically directing her attention to this matter, third appellant replied:

> "No, what I recall is her apologising for

> having brought some children in my absence and that was what was really uppermost to her, and I was in fact, I was very tired, I was arriving and the fact that she had to give me this report on my arrival, right at the entrance I really just listened to the apology she was making and did not attach any significance to any-
> thing else she said."

She did not see anyone with an injured eye.

Generally, in regard to the rooms at the back of the house, third appellant testified that she exercised no control over them. She did not visit them or look to the needs of those sleeping there. She did not have to do any housework, even in her own part of the house. She was aware of the fact that the young people living at the back of the house guarded the premises. After her return from Brandfort no one reported that anyone had been assaulted at the back of her house; and she had no reason to believe that anyone was being kept

there against his will.

She attended the Mabuse funeral and saw the group from the back of the house dressed in the football club track-suits. She did not know whether they included any of those brought to no 585 on 29 December 1988 by second appellant. She did not notice any injuries to members of this group. They danced and sang at the funeral.

In the second week of January 1989 (probably about the 9th) third appellant was visited at her home by members of the crisis committee. They told- her that there were allegations being made that she had kidnapped "certain children" from the Methodist manse in Orlando West and was keeping them at her house against their will; and also that these children had been badly assaulted. They further suggested that one had "escaped". Third appellant stated that her reaction to these allegations was that she was

"outraged" and

"furious"; and she denied that she knew anything about this. She asked who was making the allegations, but the crisis committee said that they could not disclose the sources of their information. This made her "more infuriated". She told the crisis committee that if the allegations had reference to the children who had been brought to no 585 by second appellant, they (the members of the crisis committee) were free to go to the back rooms and speak to them directly; or to take them to a venue of their choice. That day the crisis committee did not avail themselves of this invitation. Third appellant herself decided after this meeting not to speak to the people at the back of the house. She explained:

> " I was so outraged at such false and serious allegations that I told the crisis committee that in the light of what they had alleged, I would have no contact whatsoever with them, and that

they were free to have access to those children so

> that they should not charge us as having influenced them, because of the seriousness of the allegations."

After this she kept away from the back of the house. She did, however, speak to Richardson, told him of the allegations and asked him what had happened. Richardson replied that when the children first came there were "clappings or slappings" (by him) when he was questioning them. She "pulled him up" for this. She did not ask him whether the children had been kidnapped. She had no reason to believe that force had been used to take the children away from the manse. She also tried to speak to her attorney, Mr Ismail Ayob, but he was away abroad.

Shortly after the visit of the crisis commit tee, Dr Motlana, a family friend, one of the family doctors and a neighbour at the time, also came to see her. He told her that he was concerned about rumours to the effect that she had kidnapped

four youths from the

Methodist manse, that one (the youngest of the four) had disappeared and that another had escaped. In reply she told him of the visit of the crisis committee and what her attitude to them had been; and that she had decided not to have anything to do with these youths. She told Dr Motlana that he was free to go to see them at the back of her house. She also told him about the four youths brought to the house by second appellant and handed over to Richardson. She explained that she was going to have nothing to do with the youths, since if she went to see them it might be suggested ,that she was trying to influence them. She mentioned that she had been to the Mabuse funeral and seen no serious injuries on any one of the boys.

On 13 January 1989 Mr Ayob came to see her. She was unwell at the time. Mr Ayob raised the question of the same rumours and said that he understood that a habeas corpus application was to be brought against her

to produce the four complainants. She told him of the visits of the crisis committee and Dr Motlana and what her decision had been. She told him, too, that he was free to confirm that second appellant had brought the children to no 585 and that they were in the care of Richardson; and that she had decided not to have anything to do with them. By chance second appellant then arrived at the house and third appellant told Mr Ayob that he could take up with her (second appellant) the whole question as to what happened. Acting on advice, third appellant instructed Mr Ayob to see to it that the remaining boys at the back of the house were removed. She subsequently heard that they had left.

Third appellant was also comprehensively cross- examined by counsel for the State and on the whole fared badly. In her case, too, the trial Judge made adverse credibility findings to which I will later allude.

Two of the six witnesses called on third appel-

lant's behalf, Motau and Mrs Moahloli, were concerned
only with the alibi defence; two, Mr Taylor and Miss Devereau, were journalists who had interviewed Kgase;
and two, Aubrey Nxumalo and youth X, dealt mainly with
the Rev Verryn's alleged sexual malpractices at the manse. It is not necessary to review the evidence of these witnesses in any detail. There are, however, three points which should be mentioned. Firstly, Nxumalo deposed to having been present on the evening of
29 December 1988 when the complainants were taken away.
He was residing at the manse at the time. He was summoned to the kitchen by a stranger. There he found
second appellant and a number of strange people.

Second

appellant addressed those assembled in the kitchen and

> ".... said she is going to take some of the people amongst us."

She then mentioned the names of the four

complainants and told them to follow her. They would

be taken

"somewhere". She said that they would not "be long". Later, after her return to the manse, second appellant told him that the complainants had been taken to third appellant's "place" and that they would be back "as soon as possible". Secondly, youth X deposed to the two visits which he made to third appellant in 1987 and 1988, to the reports he made to her on those occasions and to his having stayed at third appellant's home during part of 1987. This has been narrated in reviewing the evidence of the third appellant. Thirdly, the trial Judge was not impressed by either of these witnesses. With regard to Nxumalo's evidence as to the removal of the complainants from the manse on 29 December 1988

he

remarked:

> "His evidence .... was remarkably laconic. I gained the impression that he was not prepared to reveal all that he knew about it."

As to youth X, the learned Judge stated:

> "Both by reason of what he said, and by reason of his demeanour in the witness- box, I formed the impression that youth X had been prevailed upon to allow himself to be used as a puppet in these proceedings, and that he was not trustworthy as a witness to the truth."

Essential Findings of the Trial Judge

I come now to the findings of the trial Judge. In brief, he held that it had been established beyond a reasonable doubt that the four complainants were taken from the manse to no 585 against their will and that they accompanied second appellant because they realised that resistance would be unavailing; that at no 585 and on the evening of 29 December 1988 the complainants were severely assaulted by being hit with sjamboks, by being kicked and by being lifted and dropped on the floor; and that the complainants were kept at no 585

against their

will: Se. until about 1 January 1989, when he was taken away and murdered; Kgase until 7 January 1989, when he escaped; and Mono and M. until they were released on 16 January 1989. The four counts of kidnapping and the four counts of assault with intent to commit grievous bodily harm were accordingly held to have been proved.

As to the participation of the appellants in these crimes, the trial judge made the following findings:-

(1) That at some stage during the afternoon of 29 December 1988 a number of persons, including the three appellants and Richardson, conspired together to mount an operation in terms of which first appellant was to drive second appellant, Richardson, Slash and Moss in third appellant's bus to the manse at the Methodist Church in Orlando West, there to seize such

youths as second appellant might indicate and to bring them back to no 585, whether they were willing to come or not, and to hold them as captives in the back rooms at no 585.

2) That it had not been established that this conspiracy contemplated from the outset severe assaults on the youths.

3) That it was reasonably possibly true that third appellant left no 585 for Brandfort between 18h30 and 19h00 on 29 December 1988, i e shortly before the conspiracy to kidnap was put into execution, so that she was away when it was carried out.

4) That between 19h00 and 20h00 on 29 December 1988 first and second appellants, Richardson and others went to the manse and, as planned, kidnapped the complainants and brought them to no 585.

5) That, acting outside the scope of the afore mentioned conspiracy, second appellant, Richardson and others then assaulted the complainants with a degree of severity that established their intent to do grievous bodily harm.

6) That third appellant returned from Brandfort to no 585 at about 18h30 to 19h00 on 31 December 1988; and that by 1 January 1989, at the latest, third appellant had knowledge of the serious assaults on the complainants and of the fact that Richardson and others living on her premises were the culprits, or at any rate she was by then "being diligent in preserving her ignorance". That, in either event, by continuing to hold the complainants and by continuing to give accommodation to the culprits responsible for the assaults, she

"assisted the culprits in a manner which showed that she associated herself" with the assaults committed by them; and that third appellant was accordingly guilty as an accessory after the fact to the assaults referred to in counts 5 to 8 inclusive. (7) That first appellant was responsible for depriving the four complainants of their freedom whilst driving them from the manse to no 585 and whilst observing their interrogation and the assaults on them later that evening. And that second and third appellants were responsible for depriving Se. of his freedom from 29 December 1988 to 1 January 1989; of depriving Kgase of his freedom from 29 December 1988 to 7 January 1989; and of depriving Mono and M. of their freedom from 29 December 1988 to 16 January 1989.

I shall deal seriatim with the appeals of the three appellants against their convictions. There are, however, certain findings by the Court a quo which are of fundamental importance in the case against each of them and which should first be considered. They relate to (a) the findings on the credibility of second and third appellants as witnesses; (b) whether the complainants were removed from the manse and kept at no 585 against their will, i e whether there was a kidnapping; (c) what the motive for the kidnapping was; and (d) third apppel-lant's alibi.

The Credibility Findings

Comments and findings adverse to the credi bility of second and third appellants are scattered throughout the judgment of the Court a quo. I do not propose to quote them all. In essence he held that second appellant was an unreliable witness

given to

advancing improbable propositions; that her evidence showed signs of "hasty and dishonest improvisation"; that she was quick-witted, plausible, "a clever resourceful and therefore particularly dangerous liar"; that she was garrulous to the last degree; that particular evidence given by her was a "piece of brazen dishonesty"; that she was vindictive towards the Rev Verryn; that in certain instances she lied in her evidence; and that she (and third appellant) were "not unfamiliar with intrigue nor above dissimulation".

In third appellant's case, the trial Judge found that parts of her evidence were disturbingly vague, equivocal and evasive; that she at times testified with "wariness", an "unwillingness to commit herself" and with "a remarkable absence of candour"; that awkward questions often elicited the meaningless reply "not necessarily"; that in one instance she conceded some part of the truth; that her evidence was in some respects contradictory;

and that one item was "patently false", another "brazenly untruthful". As to third appellant's demeanour in the witness-box, the trial Judge had the following to say:

> "Mrs Mandela is not of a shy or retiring nature. She is a mature woman, evidently experienced in the ways of the world, and very much in command of herself. Throughout the period of nearly five days that she spent in the witness-box she maintained her dignity and self-possession. She answered questions with very little, if any hesitation and her answers were deliberate and carefully formulated, though quite frequently equivocal or argumentative or otherwise evasive. She kept a pleasant expression on her face throughout, and generally maintained a reasonable tone of voice. She did not allow the expression on her face, or the tone of her voice, or any body language, to betray her feelings about the matter to which she testified. She was in fact poker-faced".

And in the end he said that the -

> ".... conclusions which I set out earlier in this judgment were in various instances based on my assessment of Mrs Mandela's credibility as a witness. That assessment took into account the many untruths that have been brought home to her. She showed herself on a number of occasions to be a calm, composed, deliberate and unblushing liar."

These assessments are expressed in very strong language indeed. The trial Judge had the great advantage over this Court of having seen second and third appellants, for considerable periods of time, in the witness box. Accordingly his impressions of demeanour and his findings thereon are of considerable significance and must be respected. His findings based upon inference from the circumstances or the probabilities are however, matters of reasoning not solely dependent cm seeing and hearing

the witnesses and this Court may for

good reason differ therefrom.

Having carefully read and analysed the recorded evidence, I think that there is much substance in the learned Judge's general strictures upon the evidence of these two witnesses. I would not necessarily use exactly the same language to express my criticisms; nor would I necessarily endorse every factual finding by the trial judge adverse to their credibility (as this judgment will show). But that both these witnesses were on occasion evasive , untruthful, contradictory and capable of dishonest improvisation is, to my mind, beyond question. Instances of this will emerge from my more detailed treatment of the evidence. Neither can, therefore, be regarded as a truthful, reliable witness.

The Kidnapping

It is not in dispute that the complainants were taken from the manse to no 585 and that second

appellant

played a leading role in this operation. The essential question is whether the complainants went willingly or under duress. The trial Judge, having observed that all the witnesses to this event had been unsatisfactory, concluded:

> "Nevertheless, the circumstances which preceded Miss Falati's excursion from Mrs Mandela's house to fetch Kgase, Mono, M. and Stompie; the state of mind with which she set off; the fact that she took with her at least Jerry Richardson, Moss and Slash; the fact that the bus did not approach the front entrance of the manse openly; the fact that she did not disclose to the four where she wanted to take them or what problem she wanted to solve; and the fact that she either gave them a false assurance that they would return, or failed to tell them that they would not return, are all circumstances which, taken together, serve to convince me beyond any doubt that Miss Falati intended to take them whether they agreed or not; and that the manner and the

> circumstances of her arrival, and her request to the four to accompany her, had proclaimed to them (as she had intended that it should) that she would disregard any refusal and would exercise forcible compulsion if necessary. These circumstances constitute corroboration which makes it easy for me to accept, as I do, that Kgase and Mono both spoke the truth when they said that they had accompanied Miss Falati against their will and because they realised that resistance would be unavailing. Whatever other untruthful embroidery they may have added, the fundamental fact that they were taken against their will is unquestionably the truth."

This finding was attacked on appeal, particularly by counsel for second appellant. I do not propose to recount all the arguments advanced by counsel. I have considered them carefully, but I remain unpersuaded that the trial Judge's conclusion and, for the most part, his reasoning on this issue

was incorrect. To the extent

that second appellant's state of mind embraces the motive for the kidnapping, I do not agree with the findings of the trial Judge, for the reasons to be stated when I deal with that aspect of the matter. But otherwise his reasoning appears to me to be unanswerable. I consider, too, that although assaulting the complainants was rightly excluded from the conspiracy which the trial Judge found, the treatment meted out to the complainants after their arrival at no 585 is indicative of the frame of mind in which second appellant, Richardson and the others set off upon this expedition and lends support to the inference that they intended to remove the complainants from the manse nolens volens. Moreover, in all the circumstances it seems extremely unlikely that the complainants would have willingly agreed to a "request" to accompany this militant group at night to an undisclosed destination, for an undisclosed purpose and for an undisclosed period of time. Second appellant's

denial that the complainants were removed from the manse against their will must be weighed in the light of the aforegoing factors and her merits as a witness, as evaluated above.

As I have indicated, the trial Judge found that the detention of the complainants at no 585 endured until they, in their respective ways left those premises. It was argued, inter alia, that the complainants stayed willingly and that this was demonstrated by their attendance at the Mabuse funeral and their behaviour there and by the fact that they had ample opportunity to escape. I do not think that there is any substance in these arguments. I cannot imagine that after the very severe beatings to which they had been subjected the complainants would have wished to stay at no 585 under the menacing supervision of Richardson. Moreover, Kgase did escape and immediately went to complain about what had happened to him. The others

did not, but this

should not be attributed to a willingness to remain. It seems probable that after Kgase's escape the remaining two were subjected to increased surveillance and there appears to be no reason to reject Mono's evidence that Richardson threatened that if one of them left the other would be "in danger".

For these reasons I hold that the trial Judge's findings as to a kidnapping having taken place and as to the duration thereof cannot be faulted.

The Motive for the Kidnapping

According to second appellant the mainspring for the removal of the complainants from the manse was the belief, based upon various reports, that the Rev Verryn sexually abused young boys staying there and that homosexuality was being practised there by other inmates as well. Much of the cross-examination of State witnesses and some of

the evidence led by the defence was

directed at establishing the correctness of this belief. In a sense the Rev Verryn was put on trial. As the trial Judge correctly pointed out, however, he was not called upon to decide the guilt or innocence of the Rev Verryn in regard to the various allegations made against him: all that was relevant in the case which he had to try was whether the second appellant, or the third appellant, bona fide believed that the Rev Verryn had com-

mitted the acts of which he was accused. Subsequently in his judgment the learned trial Judge posed the relevant

issue in somewhat different terms, viz, whether the appellants ".... had credible grounds for believing that

Mr Verryn had done so". In so far as the credibility of

the grounds for believing is relevant to the question

whether the belief was in fact held, this statement is unexceptionable; but it must be borne in mind that the real issue is not whether the appellants had credible grounds for their belief, but whether they in truth

harboured the belief.

Having analysed the evidence, the trial Judge came to the conclusion (as expressed in the findings at the end of his judgment) that second and third appellants did not have any honest belief in the allegations of sexual misconduct levelled against the Rev Verryn, but that they both identified themselves with a rumour campaign one of the objects of which was to oust the Rev Verryn, for other reasons, from his position as the resident minister of the Methodist Church in Orlando West. It is of importance to see how the learned Judge developed the finding of this "alternative motive".

Initially he put it forward as a "hypothesis" in order to test the veracity of the "high-minded motive" put forward by second and third appellants. He did so partly, it would seem, on the strength of other cases in his personal experience where ministers had been unseated for ulterior,

undisclosed reasons; and because in the

present case it was -

> ". .. . by no means impossible that the campaign to discredit Mr Verryn is a smoke screen emitted in an attempt to disguise and conceal the true motives for the campaign and the true responsibility for both the kidnapping and assaults .... and the death of Stompie (Se.)".

Having considered the evidence of Bishop Storey concerning the rumours about the Rev Verryn being involved in homosexual conduct (to be referred to shortly), the learned Judge stated that -

> "....it is realistic to postulate the existence in Orlando West of an ambitious person or group, as yet unidentified, who were faced with a dilemma. On the one hand, their manse was being misused, and they wanted to see Mr Verryn and his houseful of refugees replaced with a minister who would live at the manse and minister to the needs of the congregation on a full-time basis. On the other hand,

they could not openly criticise Mr Verryn and the use to which he was putting the manse, because to have done so would obviously have given offence to powerful people in the S A Council of Churches and to those who supported its programme to which Mr Verryn had for the time being dedicated the manse. Such a person or group, if it existed, might be expected to pursue its ends by secret and devious means. It might, for example, promote a malicious campaign of false rumours aimed at discrediting and dislodging Mr Verryn from the manse, and also aimed at ensuring that the manse would at the same time be cleared of the riff-raff which Mr Verryn had allowed to accumulate within it.

I must make it clear that I do not suggest that the validity of this hypothesis has been proved. It certainly has not. Nevertheless I intend to keep it in mind when evaluating the high-minded motive claimed by the defence for Miss Falati and Mrs Mandela, simply for the purpose of assisting me to determine

whether there is not room for some such alternative motive which would explain the

> facts as well as, or better than, the motive claimed by the defence."

Although the trial Judge here makes it clear that this hypothesis had not been proved, at the end of his judgment, as I have indicated above, it figures as one of his findings.

In the course of his evidence Bishop Storey stated that in October 1988 the Rev Verryn, an ordained minister of the Methodist Church in charge of the church at Orlando West, approached him and told him that there were rumours circulating that there was "some kind of misconduct" in the manse. No one else came forward at the time with such or similar information. They discussed the matter. It transpired that the Rev Verryn had also reported the rumours to the Rev Frank Chikane, had discussed them with him and had been given some advice. Recognising that the Rev Verryn, as a single

person, was "vulnerable", Bishop Storey advised him, firstly, to make his bedroom a "no-go area"; and, secondly, to involve leaders in his congregation in the management of the young people at the manse. In mid-November 1988 Bishop Storey spoke to the Rev Verryn and was told that there had been a "considerable change" because second appellant and her daughter had come to stay there. The Rev Verryn said he felt "more comfortable" and he seemed "very happy".

Bishop Storey further described the community meeting which took place at a Catholic church in Dobsonville on the night of 16 January 1989. At this meeting the Rev Verryn was confronted about the allegations of sexual misconduct. He responded, and the meeting unanimously expressed confidence in him. Subsequently the Church investigated the allegations by means of a pastoral commission. The commission came to the conclusion that they were unfounded.

The true motive for the kidnapping is not directly relevant to the guilt or innocence of the appellants. Clearly the motive put forward by the defence would not in law justify the forcible removal and detention of the complainants. Nevertheless it is relevant to the question of the credibility of witnesses and it could also have a bearing on the gravity of the offence. Moreover a careful reading of the judgment of the Court a quo shows that this finding as to the alternative "true" motive for the kidnapping permeates much of its reasoning. It is, accordingly, necessary to examine the correctness of this finding.

The first point to be noted is that, as the judgment candidly concedes, there is no evidence whatever to substantiate the existence of this alternative motive or to identify the "ambitious person or group" which promoted the "campaign of false rumours aimed at discrediting and dislodging Mr Verryn from the manse".

Secondly, this alternative motive was never part of the State case in the Court below. This is common cause. Thirdly, the possible existence of this alternative motive was never put by the learned trial Judge to any of the relevant witnesses, including second and third appellants. It would seem to have been a theory evolved by the trial Judge at some later stage. Fourthly, the theory appears to have been founded, to some extent at any rate, on the learned Judge's personal experience in certain totally unrelated matters: with respect, an impermissible approach. And, fifthly, I am not able to agree that the evidence established that second and third appellants had no bona fide belief in the allegations of sexual abuse on the part of the Rev Verryn. This last point requires elaboration.

Taking the events chronologically, the evidence relevant in this regard commences with that of third appellant in regard to the visits of

youth X in 1987 and

1988 and the confirmation thereof by youth X in the course of his testimony. It is true that youth X proved to be an unsatisfactory witness, mainly because of the inconsistencies in his evidence as to the months of the year during which he visited third appellant and the fact that he described having visited third appellant and having stayed with her at no 585 in 1987, which was an impossibility. The corrections to his evidence which he made after a luncheon adjournment also did not redound to his creditworthiness.

I have already quoted the trial Judge's recorded impression of youth X as a witness. In the findings summarized at the end of his judgment the following paragraph appears:

> "3. Youth X testified before me. He was an untruthful witness. The circumstances surrounding his lies, and Mrs Mandela's unsatisfactory evidence of her own handling of the matter,

> satisfied me that Mrs Mandela cannot have had, and did not have, any honest belief in the allegations made by youth X against Mr Verryn."

I infer from this that the trial Court's finding was not that the visits and reports by youth X never took place, but that third appellant did not at the time believe in the truth of these reports. This finding appears to be based on the "circumstances surrounding his lies" and third appellant's "unsatisfactory evidence of her own handling of the matter". The "lies" referred to were those which youth X was said to have told in the course of his evidence. There is no suggestion that when youth X made reports to third appellant any such mendacity was, or should have been, apparent to her. Indeed the main criticisms of the evidence of youth X, viz his inconsistency about the dates, his evidence of visiting third appellant and staying with her at no

585 in 1987 and the

post-adjournment corrections of this evidence, are of necessity matters which could not have been apparent to third appellant in 1987 and 1988. Accordingly, the proposition that because youth X proved himself to be an "untrustworthy" witness in Court in these respects, third appellant should not have believed him, and did not believe him, when he reported to her in 1987 and 1988, is a manifest non sequitur. Another criticism levelled against the evidence of both third appellant and youth X by the trial Judge is that their respective versions at the trial of what was reported by youth X in regard to sexual abuse on the occasion of his first visit did not tally. And here I might interpolate to point out that their versions of what was reported on the second occasion did tally. I do not think that great importance should be attached to the inconsistency in their evidence as to what was reported on the first occasion. Obviously one of them was wrong about this; and there are many

possible explanations for the error. Whichever is the correct version, this does not appear to me to have any bearing on the question as to whether or not third appellant should have believed or did believe whatever report was in fact made.

Third appellant's evidence of her response to these reports to her by youth X, viz her approaches to the Rev Frank Chikane, appears to have been accepted by the trial Judge, for in para 2 of his summarized findings he states that third appellant "identified herself" with the rumour campaign against the Rev Verryn -

> ". . . . in terms of her evidence that she had received a report about Mr Verryn from (youth X) and had passed it on to the Rev F Chikane."

I agree with the acceptance of this evidence. I can hardly think that third appellant could have been so brazen as to fabricate this evidence, knowing that

it

could be refuted by the Rev Chikane himself.

The trial Judge's finding that third appellant's "unsatisfactory evidence of her own handling of the matter" was indicative of a lack of an honest belief in the allegations by youth X does not, however, appear to me to be well-founded. The very facts that on each occasion she reported the matter to the Rev Chikane and arranged for youth X to come to live at no 585 indicate to me that she believed at least that there might well be substance in the allegations. On the first occasion the Rev Chikane' s scepticism may have sown a doubt in her mind, but his reaction on the second occasion, as already detailed, would have tended to strengthen her belief in the truth of the allegations. It is true that, according to Bishop Storey, the Rev Chikane did not speak to him about the allegations by youth X, but this is not sufficient ground for rejecting third appellant's evidence as to the Rev Chikane's reaction

on the second

occasion. The third appellant was criticized by the trial Judge for not having done more, such as, for instance, reporting the matter to Bishop Storey on the first occasion. Bearing in mind the reaction of the Rev Chikane on that occasion, I do not think that any adverse inference can be drawn from her admitted failure then to report the matter to Bishop Storey.

Second appellant was not in any way privy to the disclosures made by youth X. She did, however, depose to various reports made to her while she was staying at the manse which indicated sexual abuse by the Rev Verryn and homosexuality being practised by certain persons living at the manse. It is true that one of her informants, Kgase, denied having said what she attributed to him, but even he deposed to an incident (the "tickling" episode) while sharing a bed with the Rev Verryn which smacks of a sexual advance. The most significant factor, as far as second appellant's state of

mind was concerned, was clearly the K. episode. The evidence of second and third appellants in regard thereto has been outlined. The trial Judge appears to have accepted as facts that K. did on 29 December 1988 make (to second appellant) accusations of homosexual conduct against the Rev Verryn; that second appellant reported this to third appellant; that K. was fetched from the manse; and that together they took K. to see Dr Asfat. If the learned trial Judge's conclusion is to be upheld, then this expedition was undertaken not because second and third appellants had any belief in K.'s accusations, but as part of an elaborate charade designed, presumably, to give colour to the "rumour campaign". I find this far-fetched and lacking in substantiation. In this connection it is also important to note that in par 12 of his findings the trial Judge stated:

"After the consultation with Dr Asfat, Mrs

> Mandela and Miss Falati, according to their own evidence, had reason to believe both that K.C. had imagined the homosexual attack by Mr Verryn which he had alleged, and that he should be seen by a psychiatrist."

This finding evidently refers to third appellant's evidence to the effect that Dr Asfat concluded -

> "....that even though the Rev Paul Verryn may have made those advances, there was no penetration because K. had imagined that this is what happened to him and he was almost hysterical. ."

Par 12 of the Court's findings appears to suggest that Dr Asfat had discounted the possibility of any sexual misconduct. This is ill-founded, as the quoted evidence shows. This apparent misconception on the part of the trial Judge affects his findings on the state of mind of the second and third appellants and the question of motive.

I do not propose to dwell on the evidence of Nxumalo at any length. There are significant discrepancies between his evidence and that of second appellant, but it does clearly appear from his evidence, for what it is worth, that on one occasion he found K. crying and threatening to stab someone to death and that later K. told him that the Rev Verryn had made sexual advances to him.

For these reasons I am of the opinion that it was not established that second and third appellants had no belief in the allegations of sexual misconduct on the part of the Rev Verryn made to them. I am also of the view that it is reasonably possible that such a belief motivated the kidnapping. I find no support for the alternative motive found by the trial Judge.

It may be asked what the actual object of the kidnapping was: what the kidnappers hoped to achieve. Second appellant, though obviously not conceding that

there had been a kidnapping, indicated in evidence that the complainants were taken from the manse to be kept there until the return of the Rev Verryn so that they could testify against the Rev Verryn in an enquiry by the Church into the allegations of sexual abuse against him. Once the "alternative motive" is discarded there does not seem to be any valid ground for rejecting this evidence.

Third Appellant's Alibi

I have described, in very broad outline, the third appellant's evidence as to her visit to Brandfort, which, if accepted, meant that she had an alibi for the period ± 18h30/19h00 on 29 December 1988 to about the same time on 31 December 1988. Without giving full reasons the trial Judge found that it was reasonably possibly true that third appellant did go to Brandfort over that period and that she left no 585 prior to the assaults on the complainants taking place. I think it necessarily

follows, too, that it is reasonably possible

that third appellant was not present when the kidnapping expedition set forth at (as found by the trial Judge) between 19h00 and 21h00.

The acceptance by the Court a quo of this alibi naturally created a significant breach in the State case against third appellant. It added to the general unreliability of the State witnesses, who deposed to her having taken part in the assaults upon the complainants, and it removed her from the scene at the time when the crimes were committed. It did not affect the verdict on the kidnapping counts because, as I have indicated, the trial Court found that prior to her departure for Brandfort third appellant had become party to a conspiracy to kidnap the complainants. But it did affect the verdict on the assault counts. In effect the third appellant was acquitted on the charges of being a co-perpetrator of these assaults and, on a largely different set of facts, was found guilty of being an

accessory after the fact to the assaults.

On appeal counsel for the State asked this Court to reverse the decision of the trial Judge on the alibi and to change the convictions on the assault charges to ones of guilty as charged. Counsel submitted that this Court was empowered to do so on the authority of the case of S v E 1979 (3) SA 973 (A). In the Court's judgment in that case the following statement appears (at 977 D-F):

> "Hoe dit ook al sy, meen ek dat waar 'n Appelhof oortuig is dat die verhoorhof, weens of 'n verkeerde feitebevinding of 'n regsdwaling, die appellant skuldig bevind het aan 'n minder ernstige misdaad as die waaraan hy, ingevolge die akte van beskuldiging, skuldig bevind behoort te gewees het, die Appelhof die bevoegdheid het, kragtens die huidige Strafproseswet, om die skuldigbevinding dienooreenkomstig te verander. In so 'n geval het die Appelhof ook die bevoegdheid om die tersaaklike vonnis tersyde te stel en

of

> om die saak na die verhoorhof te verwys vir die oplegging van 'n gepaste vonnis of om self vonnis op te lê. Dit sal van die omstandighede afhang watter een van hierdie twee keuses in 'n besondere geval deur die Hof uitgeoefen sal word."

This statement was founded on certain previous decisions of this Court and on the provisions of sec 322 of the Criminal Procedure Act 51 of 1977, the relevant portions of which read:

> "(1) In the case of an appeal against a conviction or of any question of law reserved, the court of appeal may -
>
> (a) allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice; or
>
> (b) give such judgment as ought to have been given at the trial or impose such punishment as ought to have been

imposed at the trial; or

(c) make such other order as justice may

require:

Provided that, notwithstanding that the court of appeal is of opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect.

(6) The powers conferred by this section upon the court of appeal in relation to the imposition of punishments, shall include the power to impose a punishment more severe than that imposed by the court below or to impose another punishment, excluding the sentence of death, in lieu of or in addition to such punishment."

The previous decisions of this Court must be

seen against the background of the pertinent legislative enactments. The formula in sec 322 (1) that the court of appeal may, inter alia -

> "give such judgment as ought to have been given at the trial" -

is one of long standing. It may be traced back as far, at least, as sec 36 of the Better Administration of Justice Act 35 of 1896 (Cape) and was incorporated in sec 374(d) of the Criminal Procedure and Evidence Act 31 of 1917. In 1935, by the General Law Amendment Act 46 of 1935, the formula was expanded by the addition of the following:

"....or impose such punishment (whether more or less severe or of a different nature than the punishment imposed by the court below) as ought to have been imposed at the trial...."

In 1948, however, and in terms of the Criminal Procedure Amendment Act 37 of 1948 sec 374 of Act 31 of 1917, as

amended, was reformulated. In the result the formula was amended by the omission from sec 374(1)(b) of the words in parenthesis; and in sec 374(5) the court of appeal was expressly prohibited from imposing "any punishment more severe than the sentence imposed by the court below". This change in the law was criticized by this Court in R v Naicker 1950 (3) SA 721 (A), at 722 A -C. Despite this criticism, sec 374 of Act 31 of 1917, in its amended form, was re-enacted (with minor non-relevant differences) when the Criminal Procedure Act 56 of 1955 was passed: see sec 369 thereof. In 1963, however, sec 369(5) was amended so as to empower the court of appeal to impose -

> "....a punishment more severe than that
> imposed by the court below or another punishment in lieu of or in addition to such punishment."

Sec 322 of the current Criminal Procedure Act

reproduces

the formulae formerly contained in secs 369(1)(b) and 369(5), save that by sec 13(c) of the Criminal Law Amendment Act 107 of 1990 the sentence of death was expressly excluded from the other punishment which the court was empowered to impose.

Prior to the enactment of Act 51 of 1977 the Magistrates' Courts Act 32 of 1944 contained in sec 98(2), read with sec 103(4), provisions conferring on the "court of appeal" (which included the Appellate Division, see R v Theunissen 1952 (1) SA 201 (A)) in criminal matters commencing in the magistrate's court the power to give such judgment or impose such sentence (including the power to increase the sentence or impose another sentence in lieu or in addition thereto) as the magistrate's court ought to have given. In 1977 these powers were incorporated in Act 51 of 1977 (see secs 304 and 309).

One of the cases referred to in the judgment in 5 v E (supra) was R v V 1953 (3) SA 314 (A). In this

case the appellant had been charged in the magistrate's court with, inter alia, the offence of sodomy (the main charge) or alternatively with a statutory offence relating to aiding or being party to the commission by any male person of any act of gross indecency with another male person. The magistrate acquitted the appellant on the main charge, but convicted and sentenced him on the alternative charge. On appeal this Court (a five-judge bench presided over by Greenberg ACJ) held that the evidence did hot support the conviction on the statutory offence and that the magistrate's verdict should be set aside. The Court, nevertheless, held (acceding to a contention by the prosecution) that the evidence did establish at least an attempt by the appellant to commit sodomy and that a verdict to this effect (on the main charge) should be substituted. It so held in pursuance of the powers conferred by sec 103(4), read with sec 98(2), of the Magistrate's Courts Act 32 of

1944, which, in addition to the powers referred to above, also authorized the court of appeal when quashing a conviction on one count to convict the appellant on an alternative count.

It was argued by counsel for the appellant in that case that it was not competent for the Court to do this where the appellant had been acquitted in respect of the charge on which the prosecution sought a conviction; it could only do so where the magistrate had returned no verdict on this charge. Counsel based his argument on the contention that it is "a fundamental principle" of our law that once an accused person has been acquitted on a charge the matter is finally concluded and no court of appeal can alter that acquittal to a conviction. On this argument Greenberg ACJ (who delivered the judgment of the Court) passed the following comment (at p 322 G):

"But this sacrosanctity of an acquittal

has been encroached upon by the Legisla-

> ture; sec 104 of the Act entitled the Court of appeal to reverse a decision on a point of law which has resulted in an acquittal by a magistrate, and sec 103(4) provides that on an appeal on facts, the Court of appeal may increase the sentence which, apart from special legislation, had enjoyed the same security, in regard to an increase as an acquittal. The reason advanced therefore affords no ground for not giving the passage in regard to alternatives their plain meaning and this meaning does not justify the distinction contended for."

This "fundamental principle" was recently adverted to by this Court in the case of Magmoed v Janse van Rensburg and Others 1993 (1) SA 777 (A), at 815 J -816 J. in the passage from the judgment referred to a dictum of Solomon JA in R v Gasa and Another 1916 AD 241, at 246, is quoted. This dictum includes an allusion to -

> ".... the long-established practice that

> an acquittal by a competent Court in a criminal case is final and conclusive, and that it cannot be questioned in any subsequent proceeding."

In Gasa's case (supra) this Court presumed that this practice would have been present to the mind of the Legislature when it enacted sec 1 of Act 1 of 1911 and on this basis interpreted the enactment restrictively. This general approach was endorsed by this Court in Magmoed's case with reference to the interpretation to be placed on sec 319 of the Criminal Procedure Act 51 of 1977.

Just as it was held in R v V (supra) that this practice, or principle, relating to acquittal had been encroached upon by the Legislature when it enacted secs 103(4) and 98(2) of the Magistrates' Courts Act, so also must it be acknowledged that a similar encroachment results from the provisions of sec 322 of Act 51 of 1977. However, in determining

the extent of the powers of the

court of appeal under sec 322, the background presence of this principle must be borne in mind. It is true that in the technical sense the Court a quo did not acquit the third appellant on any of the charges preferred against her; but the Court's verdict in respect of the assault charges (based on an acceptance of her alibi) did, as I have said, amount in effect to an acquittal on the charges as formulated in the indictment and to the return of competent (but lesser) verdicts on those charges on the strength of different facts. It seems to me that in such a case, too, one should not lose sight of the aforementioned practice.

I return now to S v E (supra). In that case the appellant had been charged, firstly with the kidnapping, or alternatively the abduction, and, secondly with the rape, of a 10-year-old girl. The evidence clearly established - and the trial Judge found - that the complainant had been kidnapped and raped by the same

man. The appellant disputed the identification of himself as the guilty party and also raised the defence that on the night in question he was so drunk that he acted involuntarily and as an automaton ("willoos en soos 'n outomaat"). The trial Judge found that the appellant had been correctly identified as the culprit in respect of both charges, but held that it was reasonably possible that owing to intoxication the appellant acted involuntarily. He was accordingly found guilty of kidnapping and of indecent assault (and not rape since, the Court reasoned, that required a specific intent).

Prior to the hearing of the appeal the appel lant was notified that this Court wished to hear argument on the questions whether the conviction for indecent assault should not be altered to one of rape and in any event whether the sentence in respect of this conviction should not be increased.

At the hearing of the appeal the appellant

raised the same defences of mistaken identity and auto matism. This Court upheld the trial Judge's identification of the appellant as the guilty party, but overruled the finding that the appellant acted involuntarily and as an automaton. The Court further held that by reason of this latter conclusion and in pursuance of the powers accorded to it under sec 322(1)(b) and (6) it should find the appellant guilty of rape; and that an increased sentence should be imposed.

As to this Court's finding that the appellant did not act involuntarily during the period in question, the appellant had, it is true, testified to having consumed a large quantity of liquor that evening and to being unable to remember anything after a certain point. The judgment of this Court pointed out, however, that an averment of amnesia is not sufficient proof that the person concerned acted as an automaton during the period of amnesia. The judgment further emphasized that auto-

matism was a defence which should be carefully scruti nized and should usually be supported by expert medical evidence; and that no such supporting evidence had been adduced. Further reasons for rejecting the defence of automatism included:-

a) the actions and operations carried out by the appellant during the relevant period which were not in dispute and which appeared to belie both the allegation of automatism and also his evidence as to the amount of liquor he had consumed that evening; and

b) the evidence of persons who saw him at various times during the relevant period and gave their impressions as to his state of sobriety.

This Court's finding was thus based upon a consideration of what must in law be established in order to raise the defence of automatism and inferences to be drawn from evidence which was substantially not in dispute.

In the present case the position is very different. A number of witnesses gave evidence relevant to the third appellant's alibi defence. Some of this evidence was mutually contradictory. In order to decide the issue the trial Judge had to consider the relative credibility of these witnesses, the cogency of certain documentary evidence placed before the Court, and the effect thereon of certain expert evidence led by the State in rebuttal; he had to weigh the various probabilities and improbabilities; and he had to decide in all the circumstances whether there was a reasonable possibility that the alibi was true. If this Court were to accede to the State's invitation to re-open the question of the alibi, it would have to re-assess the evidence of all these witnesses, resolve evidential conflicts and consider the probabilities. It would have to do so without the assistance of the trial Judge's full reasons for accepting the alibi, his impressions of the

witnesses concerned, his views of the cogency of the evidence for and against the alibi and his weighing of the probabilities. In my view, the Court should be loath to undertake such a task; and I am not persuaded that the powers conferred by sec 322(1)(b) and (6) were ever intended to be exercised in such a case.

I have examined all the decisions of this Court which appear to be pertinent to this question (viz R v Sanderson 1941 AD 121; R v Von Elling 1945 AD 234; R v Mkwanazi and Others 1948 (4) SA 686 (A); S v V, supra; S v Du Toit 1966 (4) SA 627 (A)). In all of them the Court substituted a conviction for a different (and often more serious offence) generally on the basis of the facts found by the trial Court, or the undisputed facts or the appellant's own evidence. In no case did the Court (or was it asked to) completely overturn the trial Court's findings of fact, its assessment of the credibility of witnesses and its weighing of the probabilities. The

furthest the Court went was, in the case of R v Mkwanazi and Others, supra, to draw a different inference from the evidence as a whole. And that is essentially what happened in S v E (supra). In R v Sanderson (supra) the Court exercised its powers under sec 374(d) of Act 31 of 1917 to alter a finding of guilty as an accessory after the fact to theft to one of guilty of receiving stolen property well knowing it to have been stolen. Centlivres JA said (at p 124):

> "In my opinion this is clearly a case where the Court should exercise the power conferred on it, for on the accused's own showing, as appears from the extracts from his evidence given above, he was guilty of receiving stolen property well knowing it to have been stolen."

For these reasons I do not regard the present case as one appropriate for the exercise by this Court of the powers accorded it in terms of sec

322(1)(b) and (6).

The trial Court's finding in respect of third appellant's alibi must consequently stand.

The Appeal of First Appellant against his Convictions

Postulating, as I have held, that the evidence established a kidnapping, the essential question in first appellant's case is whether he became party thereto to the extent found by the Court a quo. He was, of course, acquitted on the assault counts. First appellant's participation as the bus-driver in the expedition to the manse and back is not in dispute. In his statement (exh "AA"), the details of which are set forth above, he admitted that he was. He, therefore, played an important role in the initial kidnapping. The crucial enquiry is whether he knew from the start, or at some stage during the expedition became aware of, what the true nature of the expedition was. His

statement does not deal with this explicitly, but the trial Judge

interpreted it (probably correctly) as suggesting that when he drove the bus he was innocent of any knowledge that the complainants were being taken away from the manse against their will.

First appellant was at the time a man of 61 years of age. He had been a friend of third appellant's family for over 30 years. He was evidently a frequent visitor to no 585 and would sit and watch television there. The trial Judge rightly rejected as false the suggestion in his statement that he was no more than a servant, employed by third appellant from time to time as a driver. He was present at no 585 when the conspiracy to kidnap was formed and the trial Court was of the view that it would have been "far too risky" to employ as driver a mature and independent man who was unaware of the essentials of the plan. Taking into account the first appellant's failure to testify, the Court concluded that it was not reasonably possibly true that first

appellant drove the bus without knowing from the start the full purpose of the expedition; and that in any event, even if he was ignorant at the beginning, the clandestine manner in which the operation was conducted, the number of persons who accompanied second appellant and the circumstances generally must have alerted him to the truth. The case on the kidnapping charges was established, so held the Court, beyond a reasonable doubt.

On appeal first appellant's counsel argued that his client' s complicity in the kidnapping was not the only reasonable inference to be drawn from the circumstantial evidence. I cannot agree. It seems to me that, having regard to all the circumstances attending this expedition and the manner in which it was carried out, as detailed above, it is extremely unlikely that first appellant was unaware of the true purpose of the expedition from the start or at any rate that he did not

become aware of it during the course of the expedition. He, after all, was instructed to fetch the bus and drive the second appellant and her co-conspirators to the manse at a fairly late hour that evening; to park the vehicle some blocks away from the manse; and to drive them all, together with the complainants, back to no 585. It seems extremely unlikely that he would have done all this without at some stage asking: "Why? What are we doing?" If in such circumstances he was not told the truth, then he should have informed the trial Court of this. Indeed, his failure to enter the witness box to explain his role in the kidnapping and to establish his innocent state of mind is, in my view, the fatal weakness in his case. Another matter which called for an explanation from him was his presence in the outside rooms while the complainants were being interrogated and assaulted. It must by then have been crystal clear to him that the complainants were being held against their will. The

fact that he then did not protest or in any way query the conduct of Richardson, second appellant and the others or actively disassociate himself from it, suggests willing complicity in the kidnapping from an earlier stage. Again there was no evidence from first appellant to gainsay this.

The argument of first appellant's counsel tended to take each damning factor by itself and seek to explain it or reconcile it with innocence or show that guilt was not the only reasonable inference. But, in my view, it is the cumulative effect of all these factors, together with the circumstances as a whole, and importantly, the first appellant's failure to give evidence, that must be weighed. Having done so, I conclude that the trial Judge correctly held that the case against first appellant in regard to counts 1 to 4 inclusive had been established beyond a reasonable doubt, but that his complicity and responsibility were limited

to the period while he drove them from the manse to no 585 and observed the interrogation and assaults. First appellant's appeal against these convictions must accordingly be dismissed.

The Appeal of Second Appellant against her convictions

I have already dealt fully with the issue as to whether the removal of the complainants from the manse constituted a kidnapping and whether their continued presence at no 585 constituted a continuation of their detention, and have concluded that they did. It necessarily follows that second appellant as one of the instigators and leaders of the whole operation was guilty of kidnapping, as found by the trial Judge. It is true that second appellant did not stay at no 585 and did not personally participate in keeping the complainants under surveillance and ensuring that they did not escape from their detention, but the evidence, as

recounted above,

satisfies me that she was well aware of such continued detention, that this was part of the scheme which she had devised and that those who actually detained the complainants acted with her approval and on her behalf. Her appeal against the kidnapping charges can, therefore, not succeed.

The position in regard to her conviction on the assault charges is, however, not so straightforward. Kgase's evidence is that second appellant was present throughout the interrogation (in fact she conducted most of it) and most of the period during which the complainants were assaulted. He could not remember whether second appellant actually assaulted him, but he saw her beating Se. with a sjambok. Mono confirmed that second appellant was present when the assaulting commenced, but could not recall whether she participated therein. Their evidence was, of course, found by the trial Judge to be unreliable and unacceptable without

corroboration.

As I have indicated above, second appellant's evidence-in-chief was to the effect that she simply went to the back room with the complainants and the others, that she explained to them why they had been brought there, that she requested Richardson to keep them there, as third appellant was away, and that she thereafter left the back premises and went and watched a video inside the house. She did not witness any assault, save that Richardson grabbed Kgase by the shoulder and pulled him because he laughed while second appellant was speaking about "the Paul Verryn issue". Under cross-examination she deviated somewhat from this by saying that she was also present while Richardson interrogated each of the complainants to obtain details from them of the sexual abuse by the Rev Verryn. The trial judge categorized this deviation as a lie and from this and other factors, such as the fact that second appellant was "an effective

disciplinarian by nature", that she was disgusted by homosexual conduct, and that she "wanted evidence that would serve to discredit Mr Verryn", drew the inference that she was lying in order to conceal her guilt. He accordingly found that her lies provided the corroboration that enabled the Court to conclude that -

> ".... unsatisfactory witnesses though Kgase and Mono were, their evidence that Miss Falati [second appellant] participated in the assaults on them was beyond doubt the truth".

And, as I have indicated, in summarizing his conclusions the learned Judge stated that acting outside the scope of their conspiracy with third appellant, second appellant and others assaulted the complainants with a degree of severity that established their intent to do grievous bodily harm.

Second appellant's counsel attacked the

validity of this finding and argued that there were insufficient grounds for inferring the guilt of the second appellant.

It seems to me that there are reasons additional to those mentioned by the trial Judge for concluding that, at least, second appellant was present while the complainants were being seriously assaulted. I have referred to the Court a quo's adverse findings in regard to the general credibility of second appellant's evidence, with which I am in broad agreement. Moreover, in my view, her evidence in regard to the question of the assaults upon the complainants was particularly bad and is indicative of her guilty knowledge in this regard. Second appellant claimed not only not to have been present when the complainants were assaulted on 29 December 1988, but also to have been unaware at the time that this had taken place. There are improbabilities in both these claims. As I understand the evidence the

assaults followed on the interrogation of the complainants. I find it passing strange that second appellant should have chosen that moment of transition from interrogation to violence to remove herself from the scene. I would have thought that she would have stayed until the end of whatever was to happen in dealing with the complainants, whom she had brought there, before leaving. The medical evidence indicates how prolonged and violent the assaults must have been. It seems to me to be improbable that second appellant sitting in the house a few yards away could have remained oblivious of what was happening. The noise of the assaults and the cries of the victims must surely have penetrated the ambit of her awareness. These improbabilities suggest that she was where the assaults were taking place and not in the house.

But the improbabilities do not end there. Second appellant testified that on the following day she

came to see the complainants and found that there was "nothing wrong with them". They, including Se., were cleaning windows. In view of the injuries inflicted by the assaults I find this evidence improbable. If they were cleaning windows, then one imagines they would have looked unhappy or uncomfortable and would have voiced their complaints, had second appellant not been present when they were assaulted. The one exception was Kgase, whose eye was bloodshot and swollen. She ascertained from one Sibonelo that Richardson had hit him. Although this caused her to be "foaming", or "furious", she did not speak to Kgase about this. Questioned about this she explained, unconvincingly, that Richardson was not there and she wanted to talk to Kgase in the presence of Richardson and added (referring to Kgase):

> "I did not want to trouble him, I know that if a person has been troubled, worried by something, if another person should afterwards come and ask you about

that, you become even more troubled."

The absurdity of this reply alone speaks volumes. After seeing Kgase's injured eye she also did not ask the other complainants whether they were still happy about staying there or ascertain whether they perchance had also been assaulted. The reason given (equally absurd) was:

> "I saw them being busy, they were cleaning and I decided not to trouble them and decided that I will call them once Jerry is present."

At this stage of her evidence second appellant appeared

to be improvising from question to question, for shortly

after giving the above-quoted reply she contradicted

herself by alleging (with reference to Mono, M. and

Se.) -

> "I did ask them: Are you well? They said, yes, we are well, that was all."

This appears to be a blatant lie, compounded by her

answer to the next question:

> "This is something new now?— You did not ask me in details. This is the first time that you said, in details, in finer details."

Moreover, I cannot believe that second appellant, who emerges from the record as being a strong, forceful, outspoken, voluble and impulsive person, would not have investigated the whole question of Kgase's injury - and the possibility of the other complainants also having been injured - on the spot, if this was her first intimation that anyone had been assaulted. I think that the simple answer is that it was not her first intimation: she knew all about it.

According to second appellant, she did, on 31 December 1988 confront Richardson with the assault on Kgase in the presence of all the complainants. He admitted the assault; but she did not speak to Mono,

M. and Se. because they showed no injuries. If this confrontation did take place (significantly it was not put to either Kgase or Mono by second appellant's counsel), it seems most improbable that none of the other three (Mono, M. or Se.) would have complained about his own injuries; and that second appellant would not otherwise have become aware that one or more of them had suffered injury. The inference is strong that this evidence is untrue and that second appellant was well aware of their injuries and the cause thereof.

For these reasons I am satisfied that second appellant was indeed present while the complainants were being assaulted and was well aware that they had suffered injuries. It is possible that she left shortly before the assaults ended, but that is of no great moment. The State evidence as to her actual participation is weak and, in my view, cannot be relied upon. Nevertheless, having regard to the leading role played by her in the

kidnapping, the fact that she had taken charge of the complainants and had brought them there and her personality generally, it is to be inferred beyond a reasonable doubt either that the assaults were part of a pre-conceived plan to which she was party or that, at any rate, she approved of and associated herself therewith. In the circumstances she rendered herself guilty on counts 5 to 8 inclusive and her appeal against these convictions must fail.

Appeal of Third Appellant against her Conviction on the Kidnapping Charges

As I have stated above, the third appellant was convicted on the kidnapping charges on the basis that before she left for Brandfort she became part of the conspiracy to remove the complainants from the manse and keep them at no 585. It was third appellant' s case -and she testified to

this effect - that prior to her

departure for Brandfort on 29 December 1988 she was not told about the plan to "fetch" the complainants from the manse and was in no way party to this conspiracy. In this she was corroborated by second appellant who stated in evidence that in mounting the operation to fetch the complainants she acted without the prior knowledge and consent of third appellant.

The trial Judge rejected this evidence, remarking that -

> "To imagine that all of this took place without Mrs Mandela as one of the moving spirits, is like trying to imagine Hamlet without the prince."

His conclusion was:

> "At some stage during that Thursday afternoon a number of persons, who

included Mrs Mandela, Miss Falati, John Morgan and Jerry Richardson, conspired together to mount an operation in terms of which Morgan was to drive Miss Falati,

> Jerry Richardson, Slash and Moss in Mrs Mandela's bus to the manse at the Methodist Church in Orlando West, there to seize such youths as Miss Falati might indicate, and to bring them back whether they were willing or not, to be held captive in the back rooms at Mrs Mandela's house."

One of the factors pertinent to this issue (and relied on by the learned trial Judge) is the evidence given by second and third appellants as to what information was conveyed by the former to the latter about the position at the manse on 29 December 1988. It will be recalled that in her evidence second appellant stated that on this day she told third appellant only about K., what was alleged to have been done to him by the Rev Verryn and K.'s reaction. She was asked by counsel for the State whether at the same time she told third appellant about the other evidence of sexual abuse or malpractice arising from what she had previously

been

told by Se., K. and Kgase and she replied that she "did not tell her a thing". She was cross-examined at length about this, but stuck to her guns.

The trial Judge held that there was "grave improbability" in her "claim to reticence" about these matters. I fully agree. On the two occasions when second appellant saw third appellant on 29 December the whole question of sexual abuse and sexual malpractice at the manse was very much on her mind. In fact that very morning Kgase had indicated to her that these practices were widespread at the manse. Her emotional reaction to these disclosures was profound and she was determined to take action. It is true that her immediate attention was concentrated on the plight of K., but his case was merely a manifestation of a more generalized evil. In the circumstances it seems improbable that she would not have fully unburdened herself to third appellant at some stage during the considerable time they were

together on 29 December. Indeed, third appellant's initial reaction to second appellant's allegations about K. on the occasion of her first visit on 29 December ("Is the reverend still doing this thing?") would seem almost to have compelled, or at least invited, disclosure of the general position at the manse. Furthermore, as I shall show, second appellant's evidence in this regard was, in the end, refuted by that of the third appellant.

Third appellant's evidence on this topic is most revealing. I must preface reference thereto by pointing out that a statement made by her in terms of sec 115 of the Criminal Procedure Act (exh "A") contained, inter alia, the following three paragraphs:

> "3. During the end of December 1988 I was approached by Xoliswa Falati (Accused No 6). She informed me that she was looking after a number of youths at the Methodist Church Mission House in Orlando

West; that the Reverend Paul Verryn was sexually abusing a number

of the youths that had taken refuge at the Mission; that some of the youths were following Paul Verryn's example in indulging in homosexual practices; that one of the youths, K.C. (Accused No 3) had, as a result of indecent assault by Verryn on him, become mentally disturbed; that Paul Verryn had gone away and that she (Xoliswa) required assistance from me.

4. I suggested to Xoliswa Falati that she should bring the youth (K. C.) to me and that I would make arrangements for him to consult a doctor.

5.- On 29 December 1988 Xoliswa Falati,

K.C. and I visited the rooms of Dr Abu Bakar Asfat, who examined K.C. and recommended that both he and Paul Verryn should seek psychiatric treatment as soon as it could be arranged."

And in his opening address senior counsel appearing on behalf of third appellant stated:

> "She will confirm the contents of her statement Exhibit "A". What is said in paragraphs 3 and 5 occurred on the same day, December 29, but separated in time by Ms Xoliswa Falati having gone to fetch K.C.."

At the commencement of her evidence-in-chief the third appellant did indeed confirm the correctness of exh "A" in general terms. Later she was asked by her counsel (with reference to 29 December) whether second appellant told her (third appellant) that K. was an isolated problem or whether she said there were other people at the manse about whom she was concerned. To this pointed question third appellant replied:

> "No, we did not discuss anything else. We discussed the question of K.."

Under cross-examination on this topic third appellant prevaricated, vacillated and contradicted herself. Having been questioned about what was discussed on 31 December 1988, third appellant was asked whether there was any "other occasion" (i e other than 31 December 1988) on which second appellant informed her that the four complainants were involved in "certain things" (clearly a reference to the sexual malpractices) at the manse. To this third appellant replied:

> "I think that was on the 29th, when she could have made reference to that. I am not sure if she did also refer to that on the 31st."

Counsel followed this up:

> "So on the 29th, she spoke about K. and she mentioned that other youths were also involved in the sexual abuse?— That was just in passing. There was no concern at that stage over the others."

The contradiction of her evidence-in-chief contained in these answers is obvious. The cross-examination as to what she was told about the position at the manse continued for some time. During the course of it third appellant was asked whether second appellant, after being told about the youth X incidents, then told her that K. was not an isolated incident but that there was other information of sexual abuse. She replied that it was possible, but she could not say so definitely. She was asked whether there was any other occasion on 29 December when second appellant could have told her this; to which she replied: "To my recollection we concentra-ted on K. at that stage". Second appellant's version was put to her and her response was: "That is why I am not absolutely certain at what stage she told me, if that is what she said".

Third appellant was then confronted with exh

"A" and by what her counsel had said in his opening address. She continued to prevaricate and to suggest that it was merely "possible" that on 29 December she was told about K. and about sexual abuse of other youths. When asked whether her evidence was that the events described in paras. 3 and 5 occurred on the same day (as stated by her counsel and as is obvious from exh "A" itself) she sought refuge in the formula "not necessarily". Later she conceded that the two paragraphs could be "read together".

Third appellant later stated several times that second appellant's report about sexual abuse of a number of other youths was merely "mentioned in passing"; that -she did not remember her mentioning on 29 December that some of the youths were following the Rev Verryn's example and indulging in homosexual practices (cf par 3 of exh "A"), but that this could have occurred on 31 December when second appellant -

> ".... rattled off a lot of information about youths she had brought home".

She followed this up by saying that this could only have occurred on 31 December. She also stated that on 29 December second appellant did not request third appellant's assistance in regard to the other youths (cf par 3 of exh "A"); and that they did not discuss her allegations of sexual abuse of the other youths because she (third appellant) "concentrated on K.". This seems improbable. Moreover, she was questioned about her statement that homosexual practices amongst the youths were mentioned only on 31 December:

> "And are you sure now that the homo
> sexual practices amongst the youths was only mentioned on the 31st, definitely not
> on the 29th?— I did not say that.
> Well, I am asking for your version
> once again?— My version remains the

same.

And what is it?— It may have been

mentioned slightly on the 29 th and it could have been mentioned also on the 31st.

You are sure now that it could have been mentioned on one or the other of the occasions, or on both, or not?— I have stated it could have been mentioned on the 29th and could have been mentioned on the 31st as well.

Now this was obviously a serious new allegation. What you knew at that stage was that Verryn allegedly abused the youths. This was something new, is that correct?— I do not understand, what was new?

The allegation that the youths them selves were now practising homosexual acts?— I do not recollect hearing of that on the 29th.

You only recollect hearing that on the 31st?— Yes."

This evidence in regard to information about homosexual practices (upon which exh "A" is quite explicit) well illustrates the third appellant's capacity

for being evasive, equivocal, vacillating and contradic tory in her testimony. Moreover, it seems clear from exh "A" that second appellant did cm 29 December convey to third appellant all the information referred to in par 3 thereof; and that her attempts to suggest that some of this information, viz that concerning youths other than K. and concerning homosexual practices amongst the youths themselves, was conveyed only on 31 December were deliberately untruthful. One then asks oneself why did third appellant deviate in this way from exh "A" and tell these untruths? Third appellant's counsel spoke of her having "fudged" her evidence in this regard. According to the Oxford Dictionary the verb "fudge", when used transitively, means -

> "To fit together or adjust in a clumsy, makeshift or dishonest manner; to patch or 'fake' up; to 'cook' accounts."

I am not sure that this is what counsel intended to

convey, but on reflection it seems to me that "fudge" is indeed a good description of third appellant's evidence on this aspect of the case. And to answer the question posed at the beginning of this paragraph, it seems to me that this evidence shows that third appellant was desperately anxious to distance herself from the "other youths" (i e the complainants) and from any knowledge of a general problem affecting them prior to her departure for Brandfort. I think, too, that it may be inferred that the probable reason for this attitude on third appellant's part is the realisation that if she admitted that the position of the other youths had been discussed on 29 December, the next logical questions would be: what did you and second appellant then decide to do about them? and did you not agree to and plan this "rescue" operation, spearheaded by second appellant and Richardson? This possibility was canvassed with her in cross-examination:

"So Mrs Falati did not, she came to you for assistance relating to K. but she did not require assistance relating to the others?— She did not request our assistance for the others on the 29th.

And you took no initiative by saying: well, Verryn has done it before, let us hear from all five; you are taking my Combi, you might as well bring them all?— No.

Did she say to how many other youths it had been done?— No.

Did she say what had been done to them?— No.

Did you ask any questions about her allegation relating to the other youths?— No.

Why not?— I was dealing with the question of K.. I had my own things to attend to."

To say the least, this evidence is not convincing. According to second appellant homosexuality is completely alien to the African culture and strongly disapproved in

African society. In a media interview given well after the event (see par 1 of exh "AE") third appellant stated that she had spoken to " the youths" involved in the assaults and that they had admitted "clappings" when questioning a boy about "indulgence" in what they regarded as -

> "... utter filth, the fact that the situation in Paul Verryn's house had so deteriorated that they were now sleeping with each other, and that is alien to our culture, we thought something was drastically wrong."

Under cross-examination third appellant stated that this reflected the views of the youths, but there is no reason to believe that she did not share them. In the circumstances one would have expected her reaction to the information conveyed to her by second appellant on 29 December to have been more interested, positive and constructive than the above-quoted evidence seeks to

suggest.

Another factor, or series of factors, empha sized by the trial Judge were the circumstances (i) that the vehicle used to transport the expedition to and from the manse belonged to third appellant; (ii) that the bus was driven by first appellant who from time to time drove for third appellant; and (iii) that the complainants were brought to third appellant's home and "accommodated" there. Bearing in mind third appellant's political and social position within the community and the fact that, according to third appellant, second appellant did not know her well, it would have been extremely presumptuous for second appellant to arrange and do all this without any prior permission from third appellant. Moreover, one wonders why first appellant and Richardson should have agreed to participate in this expedition at the behest of second appellant who at the time does not appear to have known first appellant and whose

acquaintanceship with Richardson was slight (she did not even know his surname) . The same goes for Slash and Moss. It would have been different had they received orders from third appellant. It is true that when it came to the eventual release of Mono and M. second appellant and Richardson appear to have adopted an independent and unyielding attitude, contrary to that of the third appellant and contrary to instructions given by her to Mr Ayob for the release of the youths. By that stage, however, they had become partners in crime and had reason to be reluctant to see Mono and M. released and able to tell their story to the world.

The trial Judge expressed scepticism about the series of "curious chances" which, according to second appellant, led to the expedition taking place, viz the faulty inside toilet; the chance presence of Richardson and the conversation with him which led to the sudden decision to remove the

complainants from the manse; the

prior, unannounced departure of third appellant for Brandfort; Richardson's willing co-operation; the ready availability of the bus and its driver, first appellant, and his willingness to assist; the fact that Slash and Moss wished to come for the "pleasure of the ride"; and so on. I tend to share this scepticism. The whole story sounds contrived. Third appellant's evidence as to what she was told by second appellant on her return from Brandfort on 31 December 1988 is also very unsatisfactory. Her laconic version in evidence-in-chief has been quoted above. It was simply to the effect that second appellant said she was sorry that she had brought some children to no 585 and hoped third appellant would not mind. This is patently untrue. It conflicts sharply with what second appellant stated in her evidence and, as I have indicated above, second appellant's evidence in this regard was not challenged in cross-examination by third appellant's counsel. More importantly, however, it

is irreconcilable with par 7 of exh "A", which reads:

> "On my return home from Brandfort on 31 December 1988 Xoliswa Falati informed me that she had in my absence arranged with Jerry Richardson who, together with other youths, had been staying in rooms at the back of my house, to bring 4 of the youths from the Mission House to prevent Paul Verryn, upon his return, from frustrating an investigation into the truth of the allegations that homosexual practices were taking place at the Mission House, and to prevent the spread of homosexual practices amongst the youths staying there."

Under cross-examination she slowly conceded, bit by bit, that what was stated in par 7 was correct. Initially she was only prepared to admit that par 7 was to some extent correct, but later, and with slow and painful reluctance, she conceded that second appellant had told her that she had arranged with Richardson to bring the youths to no 585; that there

were four youths; and that

they had been brought to prevent the Rev Verryn, on his return to the manse, from frustrating an investigation into the truth of the allegations about homosexual practices at the manse and to prevent the Spread of homosexual practices amongst the youths staying at the manse.

Again one asks oneself: why the initial untruths, why the conflicts with the evidence of second appellant, why the reluctance to admit to the correctness of the document which was drawn up on her instructions shortly before the trial? No ready answer springs to mind. It certainly may be inferred that third appellant was attempting, falsely, to distance herself from the complainants and to disclaim knowledge at that stage of the reasons why the complainants had been brought to no 585 and were being accommodated there. Possibly she thought that the less she knew, or admitted to knowing, about them, the more difficult it would be to establish

complicity on her part in the continued detention of the complainants at no 585. At all events, one can with justification say that this aspect of third appellant's evidence displays on her part a serious lack of candour and a willingness on occasion to resort to untruths.

The undisputed facts of what happened after 31 December 1988 reveal a curious attitude and course of conduct on the part of third appellant. In the first place, she never had any contact with the complainants from the day she returned from Brandfort until the day that the last of them, Mono and M., were removed from no 585. She saw Se., briefly and from a distance, washing himself at the tap attached to the outer wall of the outside bedroom on the day she returned from Brandfort. That was all. A question to her in cross-examination, whether she ever went to "those back rooms", elicited the curious response, "Not necessarily". Asked to explain, third appellant said that there was no need

for her to do so and that she "respected the privacy" of those living there. Be that as it may, I find it strange - and indeed improbable if her story is true -that third appellant, having been informed on her return from Brandfort (as she eventually admitted) that the complainants were youths from the manse who were involved in the allegations of homosexuality against the Rev Verryn and that they had been brought there to prevent the Rev Verryn from frustrating an investigation and to prevent the spread of homosexual practices at the manse, would not have been interested to speak to these youths and to hear what they had to say, if not there and then, -at least during the ensuing few days. She had taken a keen interest in K.'s case; second appellant intended an investigation into this whole matter to take place and wanted third appellant to take part in it and she conveyed this to third appellant; and third appellant herself wanted an investigation into the affair,

though her concept of the type of investigation required may have differed somewhat from second appellant's. Third appellant was cross-examined about her apparent lack of interest in the complainants after her return from Brandfort. Her replies were unconvincing: all that she was prepared to say was that "there was no need" and that she "was waiting for Paul Verryn to return". Secondly, second appellant's statement in evidence (referred to above) that on third appellant's return from Brandfort on 31 December she pointed out Kgase's injured eye and told her that, according to a report, Richardson had assaulted him, was put to third appellant in cross-examination. Third appellant initially reacted by saying that second appellant "may" have told her this; then confirmed that she heard second appellant saying this; immediately thereafter she stated that second appellant "possibly said words to that effect"; and some time later testified that "if she said so, I

did not

hear"! So at that stage, according to third appellant, she "did not know that an assault had taken place". This cross-examination, read in its full context, is a good illustration of third appellant's capacity for evasiveness and self-contradiction. It also, together with the evidence of second appellant, satisfies me that the third appellant was informed of the injury to Kgase. In the circumstances it seems odd that she did not seek out and speak to Kgase about this.

Thirdly, when third appellant was visited by the crisis committee and told of the allegations of kidnapping and serious assault, she still did not make any contact with the remaining complainants to hear for herself what their story was. Her explanation, as quoted above and as elaborated in cross-examination, was that she was "outraged" and knew that the allegations were untrue, but did not wish to be accused of having "influenced" the

complainants. Assuming ignorance of

the original plan to kidnap on the part of third appel lant, I find this explanation to be plausible, but improbable. The same comment applies to her explanations for inaction after the visits of Dr Motlana and Mr Ayob. And, I might add, when cross-examined about the visit of Dr Motlana third appellant contradicted herself badly. During evidence-in-chief, in answer to a question, she stated that Dr Motlana had told her that he had heard that "the youngest of the four" (obviously a reference to Se.) had disappeared about a week before he (Motlana) came to see her. Under cross-examination she stated twice (in answer to plain questions) that Dr Motlana had not indicated when the one youth was supposed to have disappeared. Confronted by the conflict with her evidence-in-chief, the third appellant then said that she had not understood the questions. After further questioning she agreed that Dr Motlana had said "something like that".

To sum up the position, I am of the opinion:

(1) That the evidence establishes beyond a reasonable doubt that at some stage during the afternoon of 29 December 1988 second appellant conveyed to third appellant the information referred to in par 3 of exh "A" and detailed above. This indicated that K.'s case was not an isolated one but that there was a general problem concerning homosexuality at the manse.

(2) That in her evidence second appellant lied about this; and that third appellant lied about it in her examination-in-chief and to some extent under cross-examination. It was only after prolonged cross-examination that third appellant conceded that

certain of the information in par 3

of exh "A" indicating a general problem may have been "mentioned in passing" or "mentioned slightly", on 29 December.

3) That when the information contained in paras 3 and 5 of exh "A" was conveyed by second appellant to third appellant the probabilities indicate that they would have discussed the problem and how it should be tackled.

4) That the general circumstances and the nature of the expedition to fetch the complainants from the manse reveal a strong probability that second appellant could, and would, not have acted on her own initiative but only in pursuance of a plan evolved by (at least) the two of them and authorized by third appellant.

5) That the probabilities are reinforced by the improbable and apparently contrived account given by second appellant as to how the operation originated and was carried out.

6) That third appellant initially lied about what information was conveyed to her by second appellant on her return from Brandfort on 31 December 1988 and again only after lengthy cross-examination admitted the correctness of par 7 of exh "A".

7) That third appellant's conduct and general attitude towards the complainants and their presence at no 585 after 31 December 1988 and until their release (as detailed above) is, to say the least, very strange.

> It indicates a determination on her part to distance herself from the complainants, even after the visits of the crisis committee, Dr Motlana and Mr Ayob and after she had been informed about the assault on Kgase. This is readily explicable if she was party to their kidnapping, but is difficult to explain or understand if she was innocent of any complicity in their removal from the manse or detention at no 585.

I come now to the critical question: does all this establish beyond a reasonable doubt that third appellant was party to the plan to kidnap the complainants? The fact that third appellant's denial of complicity is backed by second appellant does not, in my view, carry any weight. Second appellant was, as I have

indicated, shown to be a totally unreliable witness and she lied blatantly in regard to what she told third appellant on 29 December about the situation at the manse. On the other hand, there is no direct evidence of third appellant's complicity. The State case against her and her conviction by the Court a quo rested on inference. And, of course, in a case which depends upon inference the well-known rules of logic for the drawing of inferences as expounded in R v Blom 1939 AD 188, at 202-3 come into play.

The seven points which I have summarized above consist of (a) certain findings of fact beyond a reasonable doubt, (b) probable inferences to be drawn from these findings or from the undisputed circumstances and (c) instances where the third appellant gave untruthful evidence. In determining the question of the third appellant's complicity it is not necessary that each such finding or inference or circumstance should establish

such complicity beyond a reasonable doubt. The cumu lative effect of a number of probabilities pointing in the same general direction may be such as to establish the guilt of an accused beyond a reasonable doubt (cf R v Mtembu 1950 (1) SA 670 (A), at 680, per Schreiner JA; S v Smith en Andere 1978 (3) SA 749 (A), at 755 A - B). The consequences of, and the inferences to be drawn from the fact that an accused has given untruthful evidence are difficult matters (see S v Mtsweni 1985 (1) SA 590 (A), at 593 I - 594 E, and the authorities there cited). Much depends upon the particular facts and circumstances of each case. In the present case, as I have explained, the untruthful evidence referred to in the above-stated seven points has in each case a bearing upon the third appellant's complicity in the operation to fetch the complainants from the manse and to keep them at no 585. Furthermore the untruthful evidence does not stand alone. It is reinforced by the various probabilities to which I

have referred.

For these reasons, I have come to the conclu sion that the evidence did establish beyond a reasonable doubt that on the afternoon of 29 December 1988 second and third appellants did discuss, inter alia, the situation at the manse in general terms in the light of the information conveyed to third appellant by second appellant (see finding (1) above); that together (and possibly with others) they formulated the plan to remove the complainants from the manse and bring them to no 585; that they contemplated the possibility that the complainants, or some of them, might object to leaving the manse, but decided that the operation would proceed regardless of whether the complainants were willing to come or not. It was suggested in argument that while the third appellant may have planned or sanctioned a rescue operation, it was not shown that she had been party to a scheme to remove the complainants from the

manse and detain them against their will. This argument is not well-founded. Firstly, there is no evidence to support it, nor is it capable of reasonably being inferred. It is true that third appellant's general line of defence precluded her from throwing any light on this aspect of the matter, but this should not redound to her benefit (cf R v Mlambo 1957 (4) SA 727 (A), at 738 B - D). Secondly, as I have held, the operation was certainly executed on the basis that the complainants were to be brought to no 585 nolens volens and the natural and logical inference is that it was executed according to plan. Thirdly, the argument postulates, as it was put, that second appellant "had an agenda of her own", which she concealed from third appellant. Having regard to the relationship between the parties and third appellant's general status this seems improbable. Fourthly, if, as I have held, third appellant's complicity and assistance was probably necessary to

secure the participation of Richardson, Slash and Moss, third appellant must have known that they were to be part of the expedition and that their function was to "persuade" the complainants to do what they were told, should they prove uncooperative. Fifthly, third appellant's general attitude to the complainants after 31 December 1988 seems more consistent with the belief that they were being detained rather than that they were willing sojourners.

For these reasons I am satisfied that the Court a quo correctly convicted third appellant on the kidnapping counts.

Appeal of Third Appellant against her conviction on the Assault Charges

In the Court below the acceptance of third appellant's alibi meant the failure of the case which the State presented against her on the assault

charges. The

State did not press for a conviction of being an accessory after the fact to assault. Indeed I understand the position to be that the question of criminal responsibility on this basis was raised for the first time by the trial Judge during the argument of third appellant's counsel at the end of the case. It was consequently not canvassed in evidence. In the circumstances it seems to me that the Court should be cautious about drawing inferences adverse to the third appellant in order to establish a case against her of responsibility as an accessory after the fact.

The authors Burchell and Milton in their work Principles of Criminal Law define an accessory after the fact as -

> "... someone who unlawfully and inten tionally, after the completion of the crime, associates himself or herself with the commission of the crime by helping the perpetrator or accomplice to evade

justice."

As the authors point out, the case law would seem to indicate two different approaches to the definition of an accessory after the fact: a wide approach which merely requires that the accessory should have associated himself in a broad sense with the offence committed; and a narrower approach which requires that the association takes the form of helping the perpetrator to evade justice. The authors appear to favour the latter approach and the definition which they give is based on it. These two different approaches were described by Preiss AJA in S v Nkosi and Another 1991 (2) SACK 194 (A) and the learned Judge there referred to most of the leading cases on the subject. He did not, however, find it necessary to consider whether there is any real conflict between the authorities or whether the wider or narrower approach should be adopted. The topic is

discussed by Snyman Strafreg, 3 ed, at 294-5, who also expresses a preference for the narrower approach and defines accessory after the fact ("begunstiger") as -

> "....iemand wat wederregtelik, opsetlik en met die doel om die regspleging te verydel of te belemmer, iemand anders wat reeds die misdaad gepleeg het, help om aanspreeklikheid vir sy daad te ontduik."

In so far as it may be necessary in this case to do so I would express a preference for the so-called narrower approach and would endorse the definitions compiled by Burchell and Milton and Snyman. (See also De Wet en Swanepoel Strafreg, 4 ed, at 202.)

As the above-quoted definitions show, intention or dolus is an essential element of the offence of being an accessory after the fact. It follows that it must be shown by the prosecution that

the accused, the alleged accessory, knew that the person whom he helped had

committed a crime; and I shall for the purposes of this case accept that in this connection dolus eventualis is sufficient to render the accused criminally responsible (see R v Jonqani 1937 AD 400, at 405, 406; S v Jonathan en Andere 1987 (1) SA 633 (A), at 643 I - J). This would mean that if the accused had knowledge of facts which indicated to him the possibility that a crime had been committed by X, and the accused proceeded to help X, reckless of what the position was and with the required object, he would be guilty as an accessory after the fact.

The trial Judge found:

(a) that third appellant knew by 1 January 1989, at the latest, that Richardson and others living in the outside rooms had on 29 December 1988 committed the assaults referred to in counts 5, 6, 7 and 8 of the indictment;

b) that she knew that the victims of these assaults, the complainants, were being held cm her premises against their will by Richardson;

c) that she knew that she could order Richardson to release the complainants and that he would have no choice but to obey her;

d) that she knew that, but for their captivity, the complainants would have been free to pursue remedies of the criminal and civil law against Richardson and the others who assaulted them;

e) that by continuing to cause or allow Richardson to hold them captive third appellant assisted Richardson and the other assailants to escape (at least for a time) the consequences of their crimes;

f) that by continuing to allow Richardson and the

other assailants to live on her property, she assisted them to postpone or avoid discovery of the crimes of assault they had committed; and

(g) that in the circumstances third appellant was guilty as an accessory after the fact in respect of the assaults charged in counts 5 to 8 inclusive.

With regard to third appellant's knowledge of the commission of the offences, the trial Judge's conclusion was that she either knew well, from information conveyed to her, that the assaults had occurred and that Richardson and the other assailants had committed them; or else -

> "..... she noticed enough to appreciate the nature of the crimes and the identity of the criminals which inquiry would have been bound to reveal, and she then delibi-rately forebore to make the obvious inquiries which any reasonable man would

> have felt bound to make in the circumstances, and by that sedulous avoidance of all avenues to the truth she may have managed to preserve what she now represents as ignorance on her part of the crimes in question."

He further held that it made no difference which of these two situations was the truth: in either case the third appellant was criminally responsible. He stated:

> "You cannot escape your responsibilities in law by the stratagem of deliberately avoiding knowledge which you would gain in the ordinary course. For the answer of the law is to treat you in the same way as if you had the knowledge which you took care to avoid."

It is not clear to me what principle or legal concept the trial Judge intended to express in the two passages I have quoted. If he intended dolus eventualis, then I would prefer the formulation

which I have essayed

above. If he intended some form of imputed knowledge not subsumed by dolus eventualis, then, with respect, I am not aware of any valid basis for such principle.

The learned trial Judge listed a number of grounds or circumstances for his conclusion as to the state of third appellant's knowledge in regard to the assaults. I shall consider these seriatim.

1. While the assaults were being administered in the outside rooms the probabilities are that persons in the main house would have become aware of the noise and commotion associated therewith and would have realised that assaults were taking place. I agree as regards persons in the rooms at the back of the main house, but it does not necessarily follow that they would have known who the assailants and who the victims were.

2. Present in the house at the time were third appellant's daughter and grandchildren and Mrs Gogo Mabuza. As regards third appellant's daughter, this finding is not in accordance with the evidence: according to third appellant she was elsewhere "preparing to write some examination". Third appellant did say that when she left for Brandfort Mrs Mabuza and her three grandchildren were in the main house. There is, so far as I am aware, no evidence to show that they were still there, and if so in what part of the house they were and what they were doing, when the assaults took place.

3. Mrs Mabuza's son, S.B.M. (otherwise known as "Scar"), was one of those alleged to have participated in the assaults. Indeed he was one of the original accused in the case.

4. It was likely that Mrs Mabuza, third

appellant's daughter and the grandchildren would have heard the sounds of the assaults; that this would have excited their curiosity; and that they, or at least Mrs Mabuza, would have enquired from B. next morning what had happened. 5. On 31 December 1988 the wounds suffered by the complainants, or some of them, would have been visible even though the complainants were clothed; and their wounds would have made them sensitive to clothing so that they would have tended to carry themselves carefully and not to move with "care-free abandon". The learned Judge conceded that there was no evidence to establish this and that in so concluding he was drawing on his own experience. I would respectfully suggest that it ventures into the realms of speculation.

6. Third appellant would have become aware of the assaults from these various sources of information.

Third appellant's evidence was that, apart from Kgase's injured eye (which I have dealt with above), her first intimation that the complainants might have been assaulted was when she was told of this allegation by the crisis committee. She then invited the members of the crisis committee to go to speak to the two remaining complainants. After this visit she spoke to Richardson (and S.B.M.) and received their versions of what happened. By that stage the allegations of assault were common knowledge in the community. Kgase had escaped and told his story to the Rev Verryn and others; Bishop Storey, Dr Motlana, Mr Ayob and many others were aware of the situation and they were endeavouring to secure the release of Mono and M.; and there were the

subsequent visits by Dr Motlana and Mr Ayob, who were also invited to speak to Mono and M.. After the visit of the crisis committee there was, therefore, no question of third appellant's conduct, or inaction, helping to conceal the crimes committed by Richardson and others or of her intending to do so. The critical question, therefore, is whether between the time of her return from Brandfort and the visit of the crisis committee the third appellant became aware that the assaults had taken place or had acquired sufficient knowledge to found dolus eventualis on her part.

Reduced to its essence the finding of the trial Court is that there were two possible sources of such knowledge, viz (i) information passed on to her by Mrs Mabuza, her daughter and/or her grandchildren and (ii) her own observations of the injuries sustained by the complainants; and that, despite her denials, it is to be inferred beyond a

reasonable doubt that she had the

knowledge.

I have carefully considered this line of reasoning and have come to the conclusion that it is ill-founded. There may well be grounds for suspecting that third appellant might have acquired such knowledge at some stage between 31 December 1988 and 9 January 1989 (probable date of visit of crisis committee); but suspicion is not proof beyond a reasonable doubt. As I have indicated, third appellant's daughter was probably not on the premises at the time. As regards Mrs Mabuza, one has to postulate that she herself acquired the knowledge (probably from S.B.M.) and that she passed it on to third appellant. As to both of these postulates, B.'s possible involvement in the assaults could have constituted an inhibiting factor. I do not think that the grandchildren, whose ages are not on record, can be taken seriously as potential informants. The other source of knowledge, third appellant's own

observation of the injuries, is, in my view, equally uncertain. It is common cause that third appellant did not visit the back quarters of no 585 during the relevant period. On the one of two occasions shortly after the assaults (on 4 January 1989) when third appellant must have seen the complainants, viz the Mabuse funeral, they were dressed in track-suits and they danced and sang. Apart from Kgase's injured eye, there was evidently nothing to be seen. On the other occasion, the trip to Richardson's house to work in the garden (on 5 January 1989), there is no evidence to suggest that injuries were obvious. Nor do I think that any clear inference can be drawn from the evidence that third appellant saw Se. washing himself at the tap.

For these reasons, I am of the view that the evidence falls short of establishing the requisite knowledge in regard to the assaults to render third appellant liable as an accessory after the fact, even on the basis

of dolus eventualis. It is accordingly not necessary to consider the further problems as to whether mere inaction could in the circumstances found criminal responsibility; and as to whether third appellant's object in conducting herself as she did was to help the parties guilty of assaulting the complainants to evade justice. In regard to this latter problem, the question could arise as to whether her object was not to protect herself and, if so, whether this would exculpate her from criminal responsibility as an accessory after the fact.

Third appellant's convictions on counts 5 to 8 inclusive as an accessory after the fact must consequently be set aside. I turn now to the question of sentence.

Sentence

First appellant did not appeal against sentence and so his case need not be considered. Second

appellant's appeal against her convictions having failed in respect of all eight counts, her appeal against the sentences imposed in respect of the kidnapping and the assaults now arises for decision; as also does the appeal against the sentence imposed in respect of third appellant's conviction on the kidnapping counts.

The kidnapping in this case is of a very unusual nature. This is emphasized if one has reference to the precedents mentioned by the learned trial Judge in his judgment on sentence, viz R v Lentit 1950 (1) SA 16 (C); S v Levy and Another 1967 (1) SA 351 (W); R v Long (2) 1969 (3) SA 713 (R); S v Naidoo and Others 1974 (3) SA 706 (A). In the last-mentioned three cases the kidnapping was committed with the object of extorting large sums of ransom money. In each case a child was involved, in one case a mother and child. In these cases substantial prison sentences were imposed. In Lentit's case, supra, no extortion was involved. A 17-

year-old girl was the victim and she was removed from the custody of her parents and detained for about three weeks. The object of the kidnapping appears to have been relatively innocent and a fine of £20 was imposed. In another case, S v F 1983 (1) SA 747 (0), the accused kidnapped a child aged 2 years and 10 months in order to commit an immoral act with her and detained her for about 40 minutes. On appeal his sentence was increased to twelve months imprisonment, half of which was suspended on appropriate conditions.

In the present case the purpose of the kidnapping was - so it has been held - to remove the complainants from the manse where homosexuality was being practised so that they could give evidence of what was happening there and so that in this way a stop could be put to this evil. It is true that the kidnappers rode roughshod over the wishes of the complainants, but the initial kidnapping was not

accompanied by violence. It

is also true that some of the persons who carried out the kidnapping viciously and callously assaulted the complainants once they had arrived at no 585, but the assaults were not part of the original kidnapping plan and formed the subject of separate criminal charges. The occurrence of these assaults should not, therefore, be allowed to colour the original kidnapping or enhance its gravity. The assaults did, of course, provide an additional reason for those who had participated therein to extend the period of detention in order to prevent or postpone detection of their crimes; and this applies specifically to second appellant and Richardson, but not to third appellant.

Kidnapping is always a serious offence since it involves deprivation of liberty, particularly freedom of movement, freedom to be where one wants to be, freedom to do as one wishes. The degree of seriousness of the deprivation nevertheless depends on the period of

detention, the conditions of detention and the circumstances generally. In the present case the periods of detention varied from about 2 days (Se.) to about two weeks (Mono and M.). The living conditions at no 585 do not appear to have differed much from those at the manse. Although the complainants were generally confined to no 585, this was not always so (e g the Mabuse funeral); and, in any case, they were apparently all unemployed and even life at the manse was probably for the most part uneventful and confined largely to the church premises. Apart from the initial assaults (and leaving aside the case of Se.) and apart from being confined, the complainants do not appear to have been maltreated in any way at no 585. Indeed, they seem to have been generally absorbed in the little community which lived in the outside rooms.

In his judgment on sentence the trial Judge referred very briefly to the aim of the kidnapping in

this case. This reference must be seen against the background of his finding of an "alternative motive", discussed and overruled above. This alternative motive is a discreditable one and would render the offence substantially more serious than is actually the case. The sentences imposed for the kidnapping by the trial Judge are consequently vitiated by this incorrect finding and this Court is at large on the question of sentence.

In his judgment on sentence the trial Judge stated the following:

> "The thrashings constituted distinct crimes for which separate punishments are to be. imposed. I shall not duplicate the punishment for the assaults by also allowing for them in the punishment for the kidnappings. Nevertheless, it is important to recognise that after the assaults, the purpose for which the victims were held captive was no longer merely to give evidence of what they knew: thereafter they were held captive to give

> 'evidence' in which they were to repeat what they had said under interrogation whilst being thrashed. As a result of the thrashings, therefore, the captivity acquired a new and more sinister dimension which must be taken into account at this stage."

In view of the Court' s finding that it has not been established that third appellant knew of the assaults prior to the visit of the crisis committee, this factor would not seem to have any relevance in third appellant's case.

As regards the assaults, the trial Judge found that second appellant had actually participated personally in the severe thrashings administered to the complainants. As I have already indicated, the evidence in fact falls short of proving actual participation. This difference in findings makes it necessary for this Court also to determine punishment for the assaults

afresh. For convenience I shall start with the third appellant's sentence on the kidnapping counts.

In appropriate cases, the Court should always consider the possibility of alternative sentences to imprisonment. After careful and anxious consideration I have come to the conclusion that this is such a case. And, in my opinion, a punishment consisting of a substantial fine, coupled with a sentence of imprisonment suspended on condition that, inter alia, the third appellant pay substantial amounts in compensation to the surviving victims of the kidnapping, would at the same time achieve a measure of social justice and fit the crime. I have no reason to believe that in this instance it would be futile to impose a fine and a condition for the payment of compensation because of inability on the part of third appellant to pay these amounts. The amount of the compensation for the wrongful detention of the complainants cannot be

calculated; it is at best an estimate and I consider that this Court has before it all the information necessary to make that estimate. There is one practical problem in this connection. I do not know the present whereabouts of Kgase, Mono and M. or how easy, or difficult, it may be for the payment of the compensation to be made to them. Because of this I propose to order that the amounts in question be paid to the Registrar of the Witwatersrand Local Division to be held by him until payment can be made to the complainant concerned; that the Registrar immediately take all reasonable steps possible to locate the individual complainants and to effect payment of the compensation to them; and that in the event of it proving impossible to achieve a particular payment within a period of three years, the amount in question be forfeited as bona vacantia to the State.

I turn now to the position of second

appellant. As regards the kidnapping, her culpability was in some

respects more serious than that of the third appellant. She (the second appellant) actually led the expedition to fetch the complainants from the manse and set the general tone thereof. Whereas third appellant merely contemplated the possibility of the complainants being fetched against their will, second appellant translated this possibility into reality. And second appellant proved particularly recalcitrant when it came to releasing Mono and M.. As regards the assaults, account must be taken, on the one hand, of the viciousness thereof and, on the other hand, of the fact that she did not personally participate. Nevertheless an effective sentence of imprisonment is imperatively called for. Having regard to the close interrelationship between the kidnapping and the assaults I think it would be appropriate, in this Court, to take all the counts (both kidnapping and assault) together for the purposes of sentence and that an appropriate punishment would be four years'

imprisonment. In view, however, of her clean record and other personal circumstances two years will be suspended.

The following order is made:

1) First appellant's appeal against his conviction on counts (1) to (4) inclusive is dismissed.

2) Second appellant's appeal against her conviction on counts (1) to (8) inclusive is dismissed.

3) Second appellant's appeal against her sentence is allowed in part, the sentences imposed by the trial Judge are set aside and there is substituted a sentence on all counts taken together of four years' imprisonment of which two years' imprisonment is suspended for five years on condition that she is not convicted of

any of the following offences committed during the period of suspension: kidnapping or an offence involving violence to the person of another for which she is sentenced to a term of imprisonment without the option of a fine.

(4) Third appellant's appeal against her conviction

cm counts (1) to (4) inclusive is dismissed,

but her appeal against her conviction as an accessory after the fact in respect of counts

(5) to (8) inclusive is allowed and her conviction and sentence on counts (5) to (8)

are set aside.

(5) Third appellant's appeal against her

sentence

on counts (1) to (4) inclusive is allowed in

part, the sentence of the trial Court is set

aside and the following sentence is substi

tuted:

"(a) A fine of R15 000 or in default of payment thereof one year's imprisonment; and 2 years' imprisonment suspended for 5 years on the following conditions:

(i) that third appellant is not convicted of the crime of kidnapping committed during the period of suspension; and

(ii) that third appellant pays to each of Kenneth Kgase, Barend Thabiso Mono and G.P.M. ("the complainants") compensation in the sum of R5 000 (i e R15 000 in all) in accordance with the requirements of par (b) of this order.

b) The aforesaid compensation (totalling R15 000) shall be paid to the Registrar of the Witwatersrand Local Division of the Supreme Court ("the Registrar") within 30 days of the date of this order.

c) The Registrar is to hold the aforesaid compensation until the individual amounts of R5 000 have been paid to each of the complainants.

d) Immediately upon receipt of the aforesaid compensation the Registrar shall

take all

reasonable steps possible to locate and identify the individual complainants and to effect payment of compensation to each of them.

(e) Should it prove impossible to effect payment of the compensation to one or more of the complainants within a period of three years after the receipt of such compensation by the Registrar, the sum or sums in question shall be forfeited to the State."

M M CORBETT

BOTHA JA)
SMALBERGER JA) CONCUR
MILNE JA)
EKSTEEN JA)