



**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE DIVISION, MTHATHA)**

<b>Case no:</b>	<b>CC03/2021</b>
<b>Date</b>	<b>heard:</b>
<b>19/07/2022</b>	<b>20/07/2022</b>
	<b>22/07/2022</b>
	<b>25/07/2022</b>
	<b>27/07/2022</b>
	<b>28/07/2022</b>
	<b>29/07/2022</b>
	<b>14/11/2022</b>
	<b>15/11/2022</b>
	<b>17/11/2022</b>
<b>Date</b>	<b>delivered:</b>
<b>27/01/2023</b>	

In the matter between:

**THE STATE**

and

**LOUIS PEPPING**

**ACCUSED**

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**JUDGMENT**

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**Notyesi AJ****Introduction**

[1] Rape is 'a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation'.<sup>1</sup> 'Rape is a serious offence. It is, in and of itself, a deeply destructive and dehumanising act. This crime is an inescapable and seemingly ever-present reality and scourge on the nation and the collective conscience of the people of South Africa'.<sup>2</sup>

[2] However, when a court is confronted with a case involving rape, a court should not overlook the right to innocence until proven guilty as well as the requirement that the charge of rape must be proven beyond reasonable doubt. In such circumstances, it is incumbent upon the State to adduce evidence which proves beyond reasonable doubt that the accused is guilty, as failure to do so must benefit the accused, for he does not have to prove his innocence.

[3] In view of these competing principles, the court must assess the evidence objectively to ensure that justice is carried out, be it justice for the complainant or justice for the accused. The court must decide whether the party who bears the onus has discharged such onus and whether the constitutional rights of the accused has been given effect, in each stage, prior and during the trial.

[4] The essence of the case are the allegations pertaining to the rape of a six year old child of Ngobozana Administrative Area near Mbila, Lusikisiki. Mr Pepping is alleged to be the person who raped the six year old and he, on the other hand, disputes such allegations. This Court will evaluate the entire evidence before it reaches a conclusion.

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<sup>1</sup> *S v Chapman* 1997 (2) SACR 3 (SCA) at 5b.

<sup>2</sup> *Ndlovu v S* [2017] ZACC 19; 2017 (10) BCLR 1286 (CC); 2017 (2) SACR 305 (CC) paras 50 & 53.

[5] For purposes of this judgment, the child shall be referred to as 'the complainant' and Mr Pepping shall be referred to as 'the accused'. At the outset, it is important to clarify or define some of the witnesses to avoid a confusion. The complainant has a great grandmother and a grandmother who have both testified during the proceedings. For the sake of convenience, the great grandmother of the complainant is referred to as 'Mangxabane' and the grandmother is simply referred to as 'grandmother'.

### **The particulars of the charge**

[6] The charge reads:

'The accused is guilty of the crime of rape in contravention of Section 3 read with Section 1, 56(1), 58, 59 and 60 of the Criminal Law Sexual Offences and Related Matters Amendment Act 32/2007:

IN THAT upon/or about the 1<sup>st</sup> of September 2019 and at/or near Ngobozana Administrative Area near Mbila, Lusikisiki in the district of Lusikisiki, the accused did unlawfully and intentionally commit an act of sexual penetration with "OP" (the complainant), a 6 year old girl, by having sexual intercourse with her without her consent and did rape her.'

[7] In the case of conviction, the State requests the Court to invoke the provisions of sections 51(1) and 51(2) of the Criminal Law Amendment Act 105 of 1997<sup>3</sup> respectively and to consider imposing the minimum sentence of life imprisonment as prescribed in the aforesaid sections. At the commencement of the trial, this Court advised the accused about the provisions relating to minimum sentencing. The accused confirmed that he was aware of the minimum sentences and that in the case of conviction, he would need to show that substantial and compelling circumstances exist which would justify a lesser sentence. *Mr Kekana*, counsel for the accused, also confirmed that he had advised the accused about the provisions of the Act and that he was satisfied that the answers proffered by the accused were in accordance with his instructions insofar as the accused is made aware about the provisions relating to minimum sentencing.

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<sup>3</sup> Hereinafter referred to as 'the Minimum Sentences Act'.

[8] When the charges were put to the accused, he pleaded 'not guilty' and invoked his rights to remain silent. He did not give a plea explanation. Consequent to the plea of 'not guilty', the State opened its case and several witnesses were called to testify on behalf of the State. The accused also testified in his defence based on a plea of 'not guilty'.

[9] This Court is indebted to both counsel for the State and the accused. They prepared extensive heads of argument which were most helpful in the preparation of this judgment. More than 20 witnesses have testified in these proceedings. The hearing of evidence commenced on 19 July 2022 and thereafter evidence was heard over a period of approximately five months.

[10] The delays in these proceedings were caused mainly by administrative challenges, such as the court machines not working, or the equipment for intermediary not available; and at times, the correctional services were responsible for the delays by failing to bring the accused before court for reasons that they have no vehicles available. This court was shocked to hear that there are only two vehicles at the Mthatha Prison Centre and that those two vehicles are servicing the entire area covering the jurisdiction of this court. This court, at times, had to issue orders calling upon the head of prison to appear in court and explain the absence of the accused.

[11] This state of affairs is shocking and undesirable. For this reason, a copy of this judgment shall be sent to the Minister of Justice and Correctional Services for his attention in relation to the state of affairs in the Mthatha Prison Centre. The proper functioning of the courts and the efficient administration of justice, stands at a risk of being compromised in circumstances where the Department of Correctional Service is failing to provide sufficient assistance and co-operation. The minister needs to investigate the reasons why the Mthatha Prison Centre does not have sufficient transport for prisoners who need to attend court. I have found this state of affairs extremely disturbing. On 17 November 2022, the deputy director at the Mthatha Correctional Centre, Mr Vuyisile Thembile, was called upon to appear before this court and he confirmed the allegations relating to lack of vehicles. That was the reason why the accused was often not brought before court, either on time

or at all. I have brought this challenge to the attention of the Judge President of this division. This court can only hope that solutions will be found.

## **The trial**

### ***The State's case***

[12] The complainant had testified that on 1 September 2019, being the date of the incident, she was at her home with Vuyolwethu Phimpi and her uncle, Yandisa. The grandmother, Mangxabane, had attended church. At about 16h00, her uncle, Yandisa, sent her to a spaza shop in order to buy chips for him. On her way to the shop, she met an unknown man.

[13] The unknown man approached her, asking that she should come to him. She refused. The unknown man started promising to give her eggs, sweets, naartjies and money should she come to him. She refused. The unknown man sought to snatch her. At that time, the complainant realised that she was in trouble and danger. She ran away. This unknown man chased her as she was running. He caught up with her after giving chase and outrunning her.

[14] Upon catching the complainant, he grabbed her and lifted her onto his shoulders. The complainant was taken to a certain homestead by this unknown man. The complainant did not know the homestead to which she was taken. Upon entering to a room in this homestead, the unknown man threw the complainant on the bed. He locked the door to the room. The man undressed the complainant by taking off her pants and the underwear. Throughout this period, the complainant was trying to resist and pleading with the man to stop what he was doing. According to the complainant, despite such pleas, the man aggressively persisted with what he was doing. The complainant's resistance was overcome by the man.

[15] The complainant testified that once the man had overcome her, he then took his 'urinating thing' and inserted into the complainant's 'urinating thing'. The man was undressed too, at this stage. The complainant testified that as the man was inserting his 'urinating thing' to her 'urinating thing', she felt heavy pains. She testified that her private parts were paining throughout as the man was inserting his private parts into

her. According to the complainant, the man, after inserting his private parts to her, started moving his body up and down on top of the complainant. The complainant had been forced by the man to lay on her back on the bed. She unsuccessfully tried to stop the man, but he refused and instead, ordered her to keep quiet. He promised that he would make eggs and give her money. The complainant felt pain throughout this ordeal.

[16] The complainant testified that whilst the unknown man was proceeding with his acts of inserting his private parts or 'urinating thing' to her private parts or 'urinating thing', a knock was heard. A person was knocking at the door and he then peeped through the window. She was unable to see this person who was knocking. As this person was knocking at the door, he shouted the name of Papa. He was saying 'Papa, vula!' which simply means 'Papa, open'. It was at that stage that the complainant learned the name of her attacker as Papa. The man who was knocking kicked the door open. It was at this stage that the complainant found an opportunity to escape, because when there was the knock at the door, the unknown man had stopped what he was doing to the complainant.

[17] The complainant dressed herself and left the place once the door was kicked open. The complainant testified that she did not notice whether the man who had kicked the door open saw her and she too did not identify that person. She only found an opportunity to escape from the ordeal. At the time when the complainant was getting off the bed and dressing herself, she noticed blood flowing in between her legs from her vagina. There was also blood on the sheet that she had laid on with the unknown man.

[18] On her way back home, she met up with her sister, Vuyolwethu Phimpi, also known as Olona. Olona observed blood stains from the clothes of the complainant and that she was crying. She enquired about what had happened. The complainant informed Olona that she had just been raped by a man called Papa. Olona took the complainant, held and comforted her. Olona took the complainant to a nearby homestead. Olona also called Mangxabane, who was not far away.

[19] The complainant was taken by Olona to the homestead of Lona Phikiso, which was a nearby homestead. Mangxabane, who had been called by Olona, also joined.

[20] Upon arrival at Lona Phikiso's homestead, the complainant was asked what had happened to her. She was also inspected and checked by Mangxabane. The complainant was asked to lay on her back on a mattress. She was then asked to open her legs for inspection. Although the complainant laid on her back on the mattress, she was resisting to open her legs. The complainant testified that it was painful at the time. According to the complainant, she reported to both Mangxabane and Olona and Lona Phikiso that she had been raped by a person called Papa. According to the complainant, upon her report that she had been raped by Papa, Olona, Lona and community members, who had been called by Olona, Lona and Mangxabane, agreed to approach Papa at his place. Lona Phikiso and other community members knew who Papa was and the place where he lived. The complainant had testified that her uncles also took sticks and went to Papa's homestead. Only Mangxabane and the complainant remained behind.

[21] At a later stage, the complainant, together with Mangxabane, were called to Papa's place in order for the complainant to point or confirm whether Papa was the same man that had been caught up by her siblings and the community. On her arrival at Papa's place, she was asked to point the person who had raped her. The complainant pointed the accused person who is known as Papa. According to the complainant, Papa was assaulted by her relatives and the community members. The complainant testified that the assault of Papa was stopped by the sub-headman. The sub-headman had ordered that the accused should not be assaulted and that the police would be called. The police indeed were called. The complainant was taken by her grandmother to hospital. She was examined by medical staff and nurses at the hospital. The complainant testified that she was placed on medication since she experienced pain from her private parts.

[22] The complainant further testified that she was further admitted to Nelson Mandela Academic Hospital and remained thereat for some time. She could not remember the date of her discharge.

[23] During the proceedings, the complainant was asked by the counsel for the State to point out her attacker. She pointed the accused, Mr Pepping and identified him as her attacker.

[24] During these proceedings, the complainant was shown photo-albums. Exhibit 'A' contains photographs of the aerial view of the accused's home and the surrounding area. Exhibit 'D' contains the photo-album reflecting the outside and inside of the accused's home. The bed and the sheet in the accused's room is also reflected. These are not aerial view photographs. They therefore constitute admissions insofar as they reflect the accused's home, inside and outside. The photo-albums were admitted by consent as exhibits 'A' and 'D' in the proceedings. The photographs contained in the album under exhibit 'D' were confirmed to be the house of the accused. There was no dispute about exhibit 'A' and 'D'. When the complainant was shown the photographs, she identified the home, as the home where she was allegedly raped. She identified the sheet on top of the bed in the room where she was allegedly raped. She recognised what appeared to be blood stains on the sheet.

[25] The complainant was cross-examined. During her cross-examination, she was criticised for the reason that she did not cry on being chased by an unknown man. The counsel's suggestion was that she should have cried, and, that she did not, was indicative of a fact that she was never chased. In her response to this criticism, she explained that she did not cry because there was no-one who was going to hear her cry and that there were no persons within the vicinity.

[26] The other criticism against the complainant's evidence was that the person who had knocked at the door and also peeped through the window, was not suggested by other witnesses and that there was no evidence about that person at all. The complainant's response in this regard, was that a person knocked at the door and when knocking, shouted the name Papa. She maintained her version in this regard.



[27] The next witness was Mangxabane Phimpi, a 72-year-old woman and the great grandmother of the complainant. Essentially, Mangxabane confirmed the report of the complainant relating to her rape. Mangxabane's evidence is that on 1 September 2019, she had attended church. On her arrival back home, she found Olona, Yandisa and other children at her home. She heard that the complainant had gone to the shop to buy some snacks for Yandisa Phimpi.

[28] At approximately 17h00, she noticed that the complainant had not returned home. She started to panic and at that stage decided to instruct Olona to go and look for the complainant. According to the witness, it was becoming dark. Indeed, Olona left to look for the complainant. She had also instructed Yandisa to go and look for the complainant. Mangxabane also decided to go and look for the complainant, since Olona was also not coming back and it was becoming more dark. As she was about to cross a street leading to the neighbour's place, she saw Olona and the complainant approaching. At that time, Olona was holding the complainant's hand. During this stage, Olona called her and said that there was a problem with the complainant. She must come to them.

[29] Indeed, she approached them. On her arrival to them, she noticed blood running down the legs of the complainant. She was shocked and sought to establish what had happened. She was informed that the complainant had been raped. At the time, the complainant was wearing a navy coloured tight. They proceeded to a nearby homestead. On arrival at this home, she inspected the complainant. She first caused her to lay down on her back on a mattress. The complainant had reported to her that she had been raped by an old man called Papa. The complainant explained that she only learned the name when it was shouted by a person who was knocking at the door of the room in which she was raped. Mangxabane requested that her daughter, who is the grandmother of the complainant, should be called and informed about the incident and be requested to come over. The grandmother of the complainant is Ncediswa Soqinase.

[30] Mangxabane testified that Nosisa, Lona, Olona, Yandisa and all other persons who had arrived to the place, decided to proceed to Papa's place for making enquiries. She and the complainant remained behind, because the complainant was

weak and she too was still in shock and weak. At a later stage, they were called to Papa's home. When she arrived with the complainant, the complainant was asked to identify her attacker. She identified the accused. The police were called and they arrived. The angry community members wanted to go inside the room of Papa, however the police refused. The witness confirmed that the accused was assaulted by members of the community, although, the police stopped the assault and arrested the accused.

[31] The witness was cross-examined. The evidence of Mangxabane was straight forward and she did not contradict herself. During cross examination, Mangxabane was asked whether she had known the accused person before the date of the incident. She responded as follows:

Q: Mrs Pimpi, how long had you known the accused before Court in relation to the day of the incident?

A: I did not know him. I had just arrived in that locality. I had not even finished a year being there.

[32] The essence of the cross-examination of Mangxabane was to put the version of the accused in terms of which he deny that he raped the complainant. Mangxabane maintained her version that she received a report.

[33] The next witness was Ncediswa Soqinase, the grandmother of the complainant. She testified that on 1 September 2019, she received a call shortly after 18h00. She was informed that the complainant had been raped. According to this witness, the call was from Avelile. Avelile is the child of the witness.

[34] On the basis of that call, she rushed to Ngobozana Administrative Area, which is the place where the incident occurred. She attended to the scene and found the complainant with Nosisa. She had blood stains and even the small blanket that she had wrapped around her was having blood. On her arrival, she took the complainant from Nosisa. She took the complainant to hospital because she could see that the complainant was collapsing. On the way to hospital, she was with Lona and the

driver of the vehicle. On arrival at the hospital, she registered the complainant in order to get a card and they were told to attend to Thuthuzela Centre.

[35] On arrival at Thuthuzela Centre, the complainant was examined and the nurses observed that she had been ruptured and there was even flesh protruding out. The doctor examined the child and she was given medication. The police also arrived and requested the party of the complainant and the police officers took the party. After receiving medication, the complainant and her were asked to come back the following day. On the following day, indeed they returned to Thuthuzela Centre. On this day, the complainant was referred to Nelson Mandela Academic Hospital where she was ultimately admitted.

[36] This witness was not cross-examined and therefore, her evidence is common cause in these proceedings.

[37] The next witness was Vuyolwethu Phimpi, a 15-year-old female. The other name of Vuyolwethu is 'Olona Phimpi'. She has been referred by other witnesses as '*Olona*'. She testified that on the date of the incident, 1 September 2019, she was at home with the complainant and Yandisa Phimpi, who is their uncle. The complainant is a niece to the witness. There were other children at home, Zukhanye and Linamandla. The grandmother, Mangxabane, was not at home as she had attended church during that time.

[38] At approximately 17h00, the uncle, Yandisa Phimpi, sent the complainant to go and buy him some chips from the shop. Indeed, the complainant left for the shop to buy the chips for the uncle. The witness and other children remained at home. A long period of time passed by with the complainant not returning home. The grandmother, who had since returned from the church, panicked. She requested the witness to go and look for the complainant. Indeed, the witness went out to look for the complainant.

[39] As the witness was looking for the complainant, she saw her on the road next to the house where she had gone to buy the chips. The complainant appeared to be

walking slowly. On meeting with the complainant, the witness observed that she was shivering and nervous. She asked her why she took so long to return home.

[40] The complainant informed the witness that she was taken by a certain old man to his house, where she was raped. The unknown man had promised the complainant to give her eggs and money. The old man had instructed her to take off her clothes and when the complainant refused, he forcefully undressed her. Pursuant to the old man undressing the complainant, he also undressed himself, forced the complainant to lay on the bed and thereafter took his penis and inserted it in her vagina. The complainant informed the witness that she was raped by this unknown man.

[41] The complainant, according to the witness, was bleeding from her private parts. The witness inspected the complainant and noticed the blood coming from the complainant's vagina, down her legs. After talking to the complainant, the witness saw the grandmother, Mangxabane, and she called her and informed her that there was a problem with the complainant. She requested her to join them. Indeed, Mangxabane joined them. Mangxabane was informed that the complainant had been raped and that she had blood in between her legs. Mangxabane inspected the complainant. The complainant had informed the witness and Mangxabane that the name of the man who had raped her was Papa. The complainant explained that she heard that name when there was a person who was knocking at the door. That person had shouted the name Papa, whilst knocking at the door.

[42] The witness and Mangxabane went to a neighbouring homestead with the complainant. They found Lona Phikiso in that homestead. The uncle of the complainant, Yandisa Phimpi, had also been called, as well as other neighbours. Again, the complainant repeated her report that she had been raped by a person with the name of Papa. Those present, knew Papa and where he lived. The witness, Lona and the other persons proceeded to Papa's place, leaving Mangxabane and the complainant. Before the group left for Papa's place, the witness, Lona and Nosisa Sapho had inspected the complainant. The blood was dripping from the complainant's vagina and running down her legs. When the witness went to Papa's place, she was in the company of Yandisa, Avelile, Lindokuhle and Nosisa.

[43] As the witness, with the company, were approaching Papa's place, they saw Papa locking the door of his house. The witness and the group approached Papa and confronted him about the rape of the complainant. Papa denied the allegations against him. They assaulted him. They were joined by members of the community who live within the surrounding area. Papa continued to deny the allegations notwithstanding the assault and threats from the members of the community.

[44] During that stage, the community members insisted that the complainant should be brought to identify whether Papa was indeed the person who had raped her. Indeed, the complainant was brought by Mangxabane. The complainant was nervous, shivering and visibly scared of Papa. The complainant pointed out Papa, saying that he was the man who raped her.

[45] For the reasons that the complainant was scared, after pointing out Papa, she was then taken away. The grandmother, who lives in town, insisted that the complainant should be taken to hospital. The police had been called during that time by the sub-headman. The complainant was taken to hospital by her grandmother, Lona.

[46] After the complainant, Lona and the grandmother of the child had left, the members of the community demanded the key to Papa's house. Initially Papa refused to produce the keys, claiming that he does not know where the keys were. He was searched and the keys were found in the jacket that he was wearing and on the jacket he was wearing was written 'Education'. When his house was being opened, Papa ran away, but he was apprehended after a chase. The police eventually arrived.

[47] The witness was cross-examined. She maintained her version. The essence of her cross-examination was to put the version of the accused. Nothing turned out on the cross-examination of this witness.

[48] The next witness was Lona Pikiso, a 23-year-old woman. She testified that on the date of the incident, 1 September 2019, at about 18h00, she was at her home.

Whilst at home, she heard a knock at the door. She opened the door and noticed that the persons who had knocked, were the complainant's grandmother, Mangxabane, Vuyolwethu and the complainant. At the time of opening, Vuyolwethu was carrying the complainant. The witness also noticed that the complainant was bleeding. According to this witness, the complainant's pants was covered in blood. She then requested that the complainant should be put on her bed for examination. She inspected the complainant trying to check the injuries that she had sustained. The complainant refused to open her legs as she would close her legs. The witness called a neighbour, Nosisa Sapho. The brothers of the witness, Wandile Pikiso, Lindokuhle Pikiso, Yandisa Phimpi and Avelile Phimpi, were also at the premises. The complainant was asked who had injured or hurt her. She said it was Papa.

[49] The witness, together with her brothers, Wandile Pikiso, Lindokuhle Pikiso, Yandisa Phimpi, Avelile Phimpi and Nosisa Sapho, proceeded to Papa's place to confront him. The complainant and Mangxabane were left behind. As the witness and her group were approaching Papa's place, they saw him locking his door, preparing to leave home. They called on him to stop and approached him. Upon their arrival by him, Nosisa confronted him on why he had hurt the complainant. Papa denied the allegations and instead, told the witness and her company to go to court. Papa was then assaulted by some young persons. The reason why Papa was assaulted is because he was dismissive of the allegations and instead, telling the community to go to court. The incident was reported to the sub-headman. The sub-headman came with some other local men. He instructed that Papa should not be assaulted and that they should go back to his house. Papa refused to produce the keys to his house and instead, he attempted to run away. He was apprehended and taken back to his house.

[50] When Papa was taken inside his room, the witness observed a sheet that was blood stained. The sheet was on the bed. The photograph of the sheet was exhibited in court. It is a mustard coloured sheet and blood stains reflected on a part of the sheet. The sheet is part of a photograph-album which is exhibit 'D'. The photo-album is from Papa's house. It reflects the structure which is common cause to be Papa's house. There are other images from the album which reflects the sheet with the

blood stains. These were all submitted as exhibits. The sheet is depicted in the photo-album and there are visible blood stains from the sheet.

[51] The witness identified items from exhibits 'A' and 'D', that is the photo-album. She identified photo number 1 as the house of Papa. Photo number 2 were the items found in the house. Photos number 3 and 4 were items inside the house. Photos number 5, 6 and 7 she identified the sheet on top of the bed and blood stains on part of the sheet.

[52] The witness confirmed that the complainant was brought to Papa's place for purposes of identifying her assailant and she identified Papa. Subsequent to the complainant's identification of Papa, she was taken to the hospital by the grandmother, Soqinase. The witness had accompanied Soqinase and the complainant to the hospital. The witness had confirmed that there was only one person that she knew as Papa and that was the accused person before court.

[53] The witness was cross-examined. During cross-examination, this witness maintained that the complainant had informed her that she was sexually assaulted by an old man whom she later learned to be named as Papa. The complainant heard about the name Papa when a certain person had knocked at the door and window whilst the complainant was at Papa's place.

[54] The next witness was Nosisa Sapho, a 37-year-old woman. She testified that at approximately 17h00 she saw a young man with a white cap and that person was knocking at the door of Mr Pepping's house. Mr Pepping is Papa. She did not see the face of the person that was knocking at Papa's house. She was later told by Lona that the complainant had been raped and alleged that she had been raped by Papa. Upon being informed by Lona of the complainant's rape, she attended to Lona's place, where she found the complainant's grandmother, Mangxabane, the complainant, Avelile and Vuyolwethu. Upon her arrival, she saw Mangxabane crying. She then took the complainant, pulled the tight that she was wearing, as well as her panty. She noticed that the complainant had blood dripping down her legs. Although the complainant was refusing to open her legs, the witness saw and observed the blood in-between her legs.

[55] After inspection of the complainant, the witness, in the company of Avelile, Olona, Wandile, Lindokuhle and Yandisa, went to Papa's house to enquire about the sexual assault of the complainant. On their way to Papa's place, they saw Papa going out wearing a jacket with 'Education' written on it. They approached Papa and the witness enquired from him as to what he had done to the complainant. Papa denied the allegations and became dismissive. Out of the conversation and the attitude of Papa, the witness became angry and punched him. He was also assaulted by the children who had joined them at Papa's place. The local community members had joined at that stage. The young man, who was wearing a white cap that the witness had seen earlier on knocking at Papa's place, also joined. This young man happened to be Avela.

[56] The complainant was at a later stage brought to Papa's house for identification purposes. She identified Papa as the person who had raped her. The sub-headman was also at the scene. He instructed the members of the community not to assault Papa and instead, that the police should be called and indeed, they were called.

[57] The sub-headman directed that Papa's house should be entered for verification of some of the allegations. As a result of the sub-headman's advice, the keys to the house were demanded from Papa. He refused to hand over the keys, saying that he had lost the keys. He was searched and the keys were found from him. The house was opened and the witness, together with other persons, entered into his house. As they were entering the house, Papa attempted to run away. He was chased and apprehended. Once the witness was inside the house, she saw blood stains on a sheet which was on top of the bed. Other than the mustard sheet which was on top of the bed, there were also boxer shorts which were on the floor, a washing basin and a bush knife.

[58] Whilst the witness and the group were still at Papa's place, the grandmother of the complainant, Ncedisa Soqinase, had arrived. Ncedisa insisted that the complainant should be taken to the hospital and indeed, she took her to the hospital. The police later arrived. The police talked with Mangxabane and Olona and



thereafter took Papa and left with him. The witness confirmed that she had no bad blood relationship with the accused. She complained that when the accused was intoxicated or drunk, he would insult her, however, that did not result in a bad blood relationship.

[59] The witness was cross-examined at length. She did confirm that the accused had denied the allegations against him.

[60] The next witness was Mr Sicelo Ketho, a 56-year-old male. He testified that he is a sub-headman of Ngobozana Administrative Area. He confirmed that he knows the accused person, Mr Pepping. He is a resident of his locality. He testified that he had no bad blood relationship with the accused. He further confirmed that the other name of the accused is Papa and that there is no other person in the locality known as Papa. According to the witness, the name Papa is a popular nickname of the accused.

[61] The witness confirmed that on 1 September 2019, he was called to Papa's place. The time was between 19h00 and 20h00. He received a call from Avelile Phimpi. He was informed that there was a child who had been injured at Papa's house. He proceeded to Papa's house and found Papa and local residents. The girls who were among the community members suggested that Papa should be killed and he intervened and stopped them from assaulting Papa. He suggested that the police should be called so that they should take Papa. Indeed, the police were called and they arrived. It was alleged that Papa had raped a child. He did not talk to the complainant, however, he did ask Papa whether it was true that he had raped the complainant.

[62] The witness testified that Papa admitted to have raped the complainant and he offered a sum of R10 000 to the family of the complainant. The witness was unhappy with the response of the accused and he insisted that the police should be called.

[63] The witness was cross-examined and it was denied that the accused had raped the child and that he had apologised and offered R10 000.

[64] The witness insisted that the accused had admitted to the rape of the complainant and offered to pay R10 000 to the family.

[65] The next witness is Avela Ngobane, a 27-year-old male. He testified that on 1 September 2019, he attended a ceremony at the Ketyana's homestead. The home is within the Ngobozana Administrative Area. They were drinking umqombothi ('traditional beer') at that homestead. He stated that, although they were drinking traditional beer, he was not drunk. He was able to appreciate between right and wrong. As they were drinking traditional beer, he felt being cold. He then left for home. He was wearing a navy t-shirt, a pair of shorts and a white cap. On the way home, he met Papa. Papa is the accused person before this court. He confirmed that the well-known name of the accused is Papa. The witness testified that the accused is a person who likes to drink alcohol. On meeting him, he appeared to have consumed some drinks.

[66] He requested Papa to buy him alcohol. In response, Papa said he should go with him to his house because he had beer in the house. The witness did not immediately go with Papa to his house. He only followed Papa later. When he arrived at Papa's place, he found one of the two rooms closed and the other one was open.

[67] He went to the room that was opened and did not find Papa. He then went to the room that was closed. He shouted Papa's name, saying 'Papa, Papa, Papa, Magenge'. Those are all the names of the accused. The witness knocked at the door that was closed. It was locked. There was no response, however, the witness did notice that there was a person inside the room, but it was locked. He left because Papa was not opening the door for him and he was not responding when he knocked. He later heard that Papa was being assaulted for alleged rape of the complainant. He then went to Papa's place to find out.

[68] The witness was cross-examined. The essence of the cross-examination was to dispute the allegations against the accused. However, it was not denied that the other room was locked when the witness had attended to Papa's place.

[69] The next witness was Mrs Elizabeth McGowan, a 77-year-old woman. She testified that she knows the accused person, Mr Louis Pepping. She also confirmed that the other name of the accused is Papa. She confirmed that she is staying in the same locality as the accused and that there is no other person known as Papa, other than the accused in the locality. She further testified that she is a relative to the accused. The accused is the son to her brother. She confirmed that, upon the arrest of the accused, his clothes were brought to her home by her son, Roland McGowan. The clothes were brought in a plastic and that she could not see what was the type of clothing.

[70] The clothes were kept in Mrs McGowan's place until a police official arrived and requested to take the clothes for forensic examination. The police official, upon being given the plastic with the accused's clothes, first wore gloves and then opened the plastic to check the clothes. The clothes were handed by Mrs McGowan to the police officer. Upon opening the plastic, it was discovered that the clothes were a pair of short pants. The police officer took the clothes from the plastic with his hands covered in gloves and put it in a small plastic bag. He then took the clothes and left.

[71] The defence did not cross-examine this witness.

[72] The next witness was Roland McGowan, a 51-year-old male who testified that Mrs Elizabeth McGowan is his mother. He confirmed that the accused is his cousin and that they are staying in the same locality. He further confirmed that the other name of the accused is Papa and that there is no other person known as Papa in that locality.

[73] He testified that he was instructed by the accused, when they met in court, that he should collect his items from his place of residence. Indeed, he went to the accused's place, together with his cousin sister. Upon arrival, they removed the household contents, including clothes that were in a plastic and a bag. He then gave the clothes to his mother, Mrs McGowan.

[74] The witness was not cross-examined.

[75] The next witness was Dr Chukwuma. He holds MBCHB with Professional Council of South Africa board exams 2007 and is also an independent practice holder. He is currently a registrar at the Nelson Mandela Academic Hospital as a general surgeon. He testified about the medical records of the accused. He confirmed that the accused was also admitted at the hospital and he was treated in respect of injuries that he sustained from the assault by the community. He further confirmed that he took some blood samples from the groin area of the accused. He sealed those and handed it over to the investigating officer.

[76] The next witness was Nomphele Vellem, a registered nurse employed at Dora Nginza, Gqeberha (Port Elizabeth), Thuthuzela Centre as a forensic nurse. During the period of the incident, she was working at Thuthuzela Care Centre in Lusikisiki. She started working at Lusikisiki Centre in 2016. She did her four year diploma in nursing in Lilitha College of Nursing and in 2016, obtained an advanced diploma in forensic nursing at the University of Free State. Prior to 2016, she was working in a surgical ward at St Elizabeth Hospital, Lusikisiki. She obtained her first qualification during 2010.

[77] Her work involved examination of rape victims and preparation of J88 and other documents pertaining to examination and findings of such examinations in respect of rape victims. She examined the complainant and thereafter completed the J88 concerning the complainant in this matter. The J88 was completed at 20h45 of 1 September 2019. On the J88, she recorded the findings. For the reason that the J88 was not contested, I briefly summarize the findings recorded in the J88.

[78] The condition of the clothing was a navy track bottom, black and white panty, top with blood stains. Clinical findings were that the child was sexually assaulted. On gynaecological examination, these observations were made:

- (a) Breast Development – Tanner Stage 1-5 and it was 1;
- (b) Public Hair – Tanner Stage 1 – 5 and it was 1;
- (c) Mons pubis, it was normal;
- (d) Clitoris, it was normal;
- (e) Frenulum of clitoris, it was normal;

- (f) Urethral orifice, it was normal;
- (g) Para-urethral folds, it was normal;
- (h) Labia majora, it was normal;
- (i) Labia minora, it was normal;
- (j) Posterior fourchette, there was a tear at 7 o'clock.

[79] According to the witness, a tear at 7 o'clock indicated that there was a trauma and that means that there was a forced penetration which caused injury. The complainant was bleeding and the hymen configuration was inflamed. In other words, it was swollen. There was swelling and bruises. The bruises had occurred within 24 hours as they were still red. The forensic kit was taken and sealed under seal number of Evidence Collection Kit – PAD001480525. The forensic kit was sealed by the witness. Upon the kit being sealed, it was handed to Warrant Officer Musa Cyprian Mantshule. The conclusion consequent to the examination was that forced penetration could not be excluded. The schematic diagrams where the witness indicated the inflamed hymen and the tears in the posterior fourchette and fossa navicularis and also the redness in the perianal area, are reflected in section H of the J88. The J88 has a barcode which is 14D7AB8830JJ. The barcode is the seal number of the kit. The kit was put in a plastic bag which was sealed by the witness. The J88 was admitted by consent of the parties as exhibit 'K'. It also formed part of the record of proceedings. The paediatric sexual assault evidence collection kit was also put in a sealed bag by the witness. There are two barcodes which are – PA4002513561 and PAD001480525.

[80] The samples collected by the witness, sealed in a bag and handed over to Warrant Officer Cyprian Mantshule as evidence collection, were:

- (i) Swab number 1 – vulva swab;
- (ii) Swab number 2 – labia;
- (iii) Swab number 3 – perianal;
- (iv) Swab number 4 – there was nothing; and
- (v) Large bag – panty.

[81] All this evidence about the sexual assault evidence collection kit were prepared and sealed by the witness who has confirmed the correctness and truthfulness of the information contained in exhibits 'K' and 'L'.

[82] The witness was cross-examined. During cross-examination, the findings of the witness and the collection of the sexual assault evidence collection kit was not disputed nor contested.

[83] The next witness that was called by the State on aspects relating to photo-albums exhibits 'A' and 'D', was Constable Ashere Luyolo Faye. He testified that he is a member of the South African Police Service and attached to the Local Criminal Record Centre at Mt Ayliff. Prior to the period May 2021, he had been attached to the Lusikisiki Local Criminal Record Centre. Before 2013, he had been stationed at Germiston and was transferred to Lusikisiki on or about October 2013. His position at the Local Criminal Record Centre involves visiting crime scenes, uplifting fingerprints from the crime scenes, taking photographs and video graphing and checking the scenes if there are any exhibits that could be collected for testing. He received the necessary training for the position he holds and the responsibilities he performs.

[84] On 1 September 2019, he was requested by Warrant Officer Mantshule to attend to a crime scene at Ngobozana Administrative Area, Lusikisiki. Upon his arrival at the crime scene, he made some observations and took photographs. He prepared the key to the photographs. The key to the photographs reflects point A which shows a room where the incident is said to have occurred. Photograph 2 to photograph 5 shows the interior of the house where the incident had occurred. Photograph 6 and photograph 7 shows the alleged blood stains found on the sheet on top of the suspect's bed. He had compiled the albums and those were exhibited as 'A' and 'D' and thereafter he made a sworn statement relating to the photo-albums.

[85] According to the witness, Constable Faye, Lusikisiki Local Criminal Record Centre is servicing five stations and each police station would have its CAS number whether it is a Lusikisiki or Flagstaff. When a case is referred to the Local Criminal

Record Centre, it would register the case and the system would give the case its number, the Local Criminal Record Centre number regardless whether the case is coming from Port St Johns or Flagstaff. The aerial photos were not taken by the witness, but were photographed by a warrant officer from Bhisho using a drone in taking those photographs. The witness personally took exhibit 'D' which are the photographs relating to the interior of the house where the incident had allegedly occurred and photographs relating to the alleged bloodstains found on the sheet on top of the accused's bed. The witness had confirmed the accuracy of the photo-album, which is exhibit 'D'. Exhibit 'A' was not questioned by the accused.

[86] Constable Faye confirmed that the crime scene was pointed out by Warrant Officer Mantshule and that he took photographs as the scene was pointed out. He also collected from the crime scene a piece of a sheet which he had cut from the sheet that was on top of the accused's bed. The piece of sheet that he cut was the portion that had bloodstains. In terms of the photographs, the portion with bloodstains from that sheet is reflected in photographs 5, 6, and 7. Constable Faye indicated that he decided to cut the portion from the sheet because he intended to send that piece to Gqeberha (Port Elizabeth) for DNA testing.

[87] The constable wanted the laboratory to check if, what he had observed from the piece of the sheet that he had cut, was indeed blood and whether it has any link with the case. According to the constable, what he had seen from the piece of sheet that he had cut, appeared to be bloodstains and the DNA was necessary for such verification. The constable had cut the piece of the sheet which contained the bloodstain or something which looked like a bloodstain, because it was not necessary to take the whole sheet for DNA. The constable identified from photographs 6 and 7 the areas in the sheet which he had cut and those are the areas that contained something resembling bloodstains.

[88] The witness testified that after he had cut the piece, he placed it in a forensic bag. Once the piece of the sheet was put into the forensic bag, he sealed the forensic bag and left the crime scene proceeding to Lusikisiki police station. The forensic bag was registered in the SAP register. He did not take the photographs of the sealed forensic bag. The explanation for not taking the photograph is that the

forensic bag was not going to be changed and that there were some threats of violence at the crime scene. Members of the community were demanding the accused and that led them to work under pressure so that they can quickly leave the crime scene before it became totally chaotic. The bag was not interfered nor tampered with from the time that he collected the exhibits, sealed in the forensic bag and took it to himself.

[89] Constable Faye personally registered the exhibit bag and made an entry in the SAP 13 register with the details of the case when he was at the police station and the opportunity had presented itself for the registration of the exhibit. The SAP 13 register was also submitted as an exhibit with the full details that reflect SAP 13 number, the description of the date when the entry was made, the date of registration, the occurrence book number. The item is described in the SAP 13 register as '1 piece of cloth in a seal bag number PW4000965682'. This is the number that was allocated to the sealed bag. The bag was sealed by the witness, Constable Faye, in person. The SAP 13 reflects that Constable Faye of LCRC Lusikisiki, seized from crime scene, residence of Pepping, Ngobozana AA, the item that is entered into the register.

[90] The witness, Constable Faye, after he made the entry and the exhibit was confirmed, took the exhibit and went to the Local Criminal Record Centre to make an entry in an exhibit. Throughout, the sealed bag was not interfered with and it remained in the control of Constable Faye. The sealed bag was handed over to Warrant Officer Dzingwe. It was sealed and closed, there was no interference with the contents of the bag. Warrant Officer Dzingwe took the bag to the storeroom for safekeeping. Constable Faye prepared the paperwork for the exhibit. The constable maintained that, even during cross-examination, the sealed bag was never interfered with and that it was stored in a safe with all the relevant markings and entry numbers and registration.

[91] During cross-examination, Constable Faye was criticized for not taking photographs of the place where he had cut the piece out of the sheet. The suggestion from counsel being that the portion or part of the sheet where the piece was cut from should have been photographed so as to reflect the hole in the sheet



after cutting. The constable maintained that it was not necessary to take photographs of the whole, nor to submit the entire sheet for DNA. The constable pointed to photograph 5 which reflects the entire sheet and the portion where, what appears to be a bloodstain, is located. The constable indicated that he was only obliged to cut out the portion or part containing what appears to be bloodstains. He took the piece and sealed it in a forensic bag. The constable testified that on the date of the incident, they completed the collection of evidence very late and at night. On the date of the incident, he kept the exhibit in the safe at his house. The exhibit was under his control and in a locked safe until the morning when he took it to the police station and handed over to Warrant Officer Dzingwe. That conduct was in accordance with the policies of the Local Criminal Record Centre. The constable maintains that there was nothing untoward in respect of his approach and that was in line with their manner of operation with regards to collection of exhibits. The constable was further cross-examined about the contradictions regarding his statements and he explained that the other statement was the typed version which he prepared later for the Investigating Officer. The contents of the statements do not materially differ.

[92] Warrant Officer Zwelidumile Dzingwe also testified. In his testimony he confirmed that he is employed by the South African Police Service. He has 18 years of work experience. He is attached to the Local Criminal Record Centre. He started working at the Lusikisiki Local Criminal Record Centre during 2013. Prior to employment at the Local Criminal Record Centre in Lusikisiki, he was employed at eLwandle in the Province of the Western Cape. He started working at North West and from there he went to Lusikisiki.

[93] He was a custodian of the exhibits under the LCRC number 16/9/2019. In relation to this case, he received an exhibit register from Constable Faye. He took the exhibit to the safe place where the exhibits are kept. The safe place is in the strong room. The strong room is always locked. There are only two access keys. The first key is kept by him and the second key is kept by the Commander. According to the witness, no person can place an exhibit in or remove an exhibit from the strong room without his knowledge. The Commander, who also has a set of keys to the strong room, cannot remove or allow in an exhibit without the knowledge

of Warrant Officer Dzingwe, according to his testimony. When the exhibits in this case were submitted by Constable Faye, he took them and locked them in the secured safe in the strong room. After some time, Constable Faye came back and requested to prepare the paperwork in respect of the exhibits and at that time, they were arranged to be taken to the forensic science lab. He took the exhibit and handed over to Constable Faye, however Constable Faye would not open the sealed exhibit, he would just attach the necessary papers. He does not take away the exhibits, except to stick the necessary information and hand it back to him for safe keeping.

[94] Throughout that process, Warrant Officer Dzingwe confirmed that he had never lost sight of the exhibits and he remained in control. When he handed over the exhibit to Constable Faye, he did not lose control and every process in relation to the exhibit was done in his presence. After Warrant Officer Dzingwe had prepared the paperwork, the exhibit was returned to him for safekeeping in the strong room.

[95] Once the exhibits were prepared, Skynet couriers were called to pick the sealed parcel containing the exhibits for transmission to the lab. Warrant Officer Dzingwe confirmed that he is the one who handed the parcel over to Skynet couriers and he took it from the strong room, where it had been stored. The exhibit was sealed when handed over to Skynet couriers and a receipt from Skynet was received. Prior to the exhibit being handed over to Skynet couriers, it was never tampered with. The receipt has a barcode. In respect of this exhibit, the barcode was 029908017045. The barcode is a unique number that normally assists to track the exhibit. The LCRC is also reflected and in this case, it is LCRC 16/9/2019. The significance of the LCRC is to know what document has been sent and when was it sent and also to understand that a certain exhibit with a number was sent to the lab. The receipt from Skynet was handed in as an exhibit by consent of the parties.

[96] The witness was cross-examined, counsel pointing out certain contradictions in the handwritten statements and typed statements of Constable Faye, which were commissioned by the witness. The witness conceded that there were some mistakes and that some of the statements were just a summary of the events.

[97] The next witness that was called was Warrant Officer Musa Sikhweba Mantshule. He is employed by the South African Police Service. On 1 September 2019, he was on duty. He was working nightshift. On the day he was assisting at the Community Service Centre ('CS'). He received a complaint that there was a rape of a child at Ngobozana Administrative Area. He received the call through the police station. He responded to the complaint, together with his colleagues. Among these colleagues were Sergeant Mqikela and Constable Mranqelwa. They had received a complaint at approximately 20h00 and they drove to Ngobozana Administrative Area where the incident was reported to have occurred.

[98] Upon their arrival at Ngobozana Administrative Area, they were directed to a home which consisted of a two roomed flat. They proceeded to the home and found community members already at the homestead. On their arrival, they were informed that a child had been raped. They talked to the sub-headman, Mr Sicelo Ketho. The sub-headman gave them a report that there is an allegation that a six year old child had been raped by Papa Pepping, the accused. Warrant Officer Mantshule confirmed that he knows Papa Pepping because he is an education inspector at Lusikisiki.

[99] The Warrant officer enquired about the whereabouts of the child and he was informed that the child had already been taken to hospital. He further asked whether there was any relative of the complainant present and he was pointed to the grandmother, Mangxabane. He also asked to talk to the accused and he was informed that he was inside the room. He went inside and found the accused sitting on the bed. He was with two men. He observed that the bed was not made up. The accused was wearing a pair of short pants. He introduced himself to the accused and requested the other two men to leave them inside. When he questioned the accused about the allegations of rape, the accused denied raping the complainant. The Warrant officer saw bloodstains on a mustard coloured sheet which was on the accused's bed. On the basis of the observed bloodstains appearing on the sheet, the Warrant officer called for the Criminal Record Centre and requested photographers to visit the accused's home and construct the scene.

[100] The Warrant officer had a suspicion that the bloodstains could be belonging to the victim that was allegedly raped in that room, according to the report he had received. The bloodstain on the sheet was in a form of a circle. They then arrested the accused person. The accused was taken to the police vehicle and the witness remained behind waiting for the photographers. The photographers came and Constable Faya was the photographer. The witness took him inside the room and showed him the bloodstains that he had seen. Constable Faya indicated that he would cut the piece with the bloodstains after taking the photographs. This witness then left Constable Faya to construct the scene.

[101] After leaving Constable Faya, the witness left and joined his colleagues in the vehicle. They proceeded to St Elizabeth Hospital. The accused was examined by Dr Chukwuma. The doctor indicated that there was blood between the accused's groins. On the basis of this information, the witness requested the doctor to take samples of the bloodstains between the groins of the accused so that he could put them in the plastic bag of the hospital. Indeed, samples of the bloodstains were taken and put into a plastic bag, which was then sealed. The sealed bag containing the samples of the bloodstains found on the groins area of the accused were given to the witness. The accused was admitted in the hospital.

[102] The witness proceeded to Thuthuzela Care Centre to meet with the complainant and collect the kit and the J88 form. At the Thuthuzela Care Centre, The witness met with Nurse Vellem. Upon meeting Nurse Vellem, he was informed that the examination of the complainant had been completed and that the kit was ready for collection. He was made to sign for the kit so that he could receive it. When the witness received the kit, it was sealed. The witness took the sealed kit, together with the one received from Dr Chukwuma and went to the police station. At the police station, the sealed bags were recorded, both of them on the SAP 13 book. At the police station, the exhibits were received by Sergeant Jiba. The exhibits were still sealed.

[103] The witness was also shown exhibit 'A' and 'D' which is the photo-album and the structure of the accused's residential place. He confirmed the place as the one he had visited and saw the bloodstains on the sheet. His attention was drawn to

photographs 6 and 7 appearing on exhibit 'D', which he confirmed to be the sheet that he saw with bloodstains at the accused's place.

[104] The witness was cross-examined.

[105] The next witness was Sergeant Khanyisa Jiba. She testified that she is employed by the South African Police Service and stationed at Lusikisiki Police Station. She confirmed receipt of the exhibits from Warrant Officer Mantshule. She confirmed that the exhibits were sealed when she received them. The exhibits were recorded in the SAP 13 book and in the occurrence book. The SAP 13 book and the occurrence book were submitted as evidence and thus form part of the record.

[106] The witness was not cross-examined on her evidence.

[107] The next witness was Zwelithini Gentsane, a member of the South African Police Service, holding the rank of a Warrant Officer. He is attached to the Family Violence Child Protection Unit and Sexual Offences under Lusikisiki. He testified that his involvement in the case was when he was instructed to take a rape kit to the Cape Town laboratory. He was given the instructions to send the kit to the laboratory by General Dladla. He was given a rape kit which was in a sealed forensic bag. He was accompanied by Warrant Officer Zide. They received the sealed rape kit and drove in a vehicle to Mthatha Airport. At the airport, they boarded the plane to Cape Town. The kit was still sealed and in the same condition it was received, when they handed over the kit in Cape Town. They were issued with a receipt confirming that the kit had been received. The kit was never tampered with at any stage from the time of receipt from Lusikisiki until it was handed over in Cape Town. They arrived in Cape Town after hours and had to sleep in a hotel. At the hotel he locked the kit in a safe until the morning, when he took the kit to the laboratory. The kit was received by a receptionist who issued the receipt confirming the handover of the kit.

[108] The second involvement of the witness with the case was when he went to the McGowan family at Ngobozana Administrative Area. It was on 25 September 2019. On this occasion, the witness had been requested by Warrant Officer Javu to collect a pair of boxer shorts that was worn by Mr Pepping, which boxer shorts was

in possession of the McGowan family. He proceeded to the McGowan family and he received the boxer shorts which was handed to him by Mrs McGowan. The boxer shorts was contained in a plastic. Although, Mrs McGowan had indicated that she does not know the boxer shorts, she confirmed that there were clothes of the accused at her house. When she brought the plastic with the boxer shorts, the witness saw it and decided to wear gloves and retrieve the boxer shorts. The witness testified that he sealed the boxer shorts in a forensic bag and took it, after informing Mrs McGowan.

[109] On arrival at the office, he was instructed to take the said pair of shorts to the laboratory. The witness proceeded with Constable Nyenyiso to the Gqeberha (Port Elizabeth) laboratory. They were driving a Volkswagen Polo vehicle and the exhibit was locked in the boot of the vehicle. No person had access to the contents in the boot of the vehicle.

[110] The sealed forensic bag, which contained the boxer shorts, was handed to the laboratory on 26 September 2019. The sealed kit was not handed in on 25 September 2019, for the reason that the witness arrived late in Gqeberha (Port Elizabeth) and the laboratory had already closed. Overnight, the sealed kit was kept in a safe at the hotel where the witness had slept. No person had access to the sealed kit. The witness confirmed that the seal was never tampered with. When the witness handed over the kit at the laboratory, he was issued with an acknowledgement receipt. The receipts were exhibited and they form part of the record.

[111] The witness was cross examined.

[112] The next witness was Warrant Officer Rebecca Kimberly Francis-Pope. She testified that she is employed by the South African Police Service at the Biology Unit in the Western Cape. She holds a BSc degree majoring in Biochemistry, Microbiology and Psychology as well as a BSc honours degree majoring in Biotechnology. She obtained both of her degrees from Rhodes University. She submitted two affidavits that she had compiled regarding the Lusikisiki CAS 05/09/2019. She is a forensic analyst and her day to day duties are a reporting

officer, which means that she received the case file once all the DNA analysis had been done and she makes interpretation of the results. In her evidence, she briefly explained the process of DNA:

'The process:

When a case is opened in the Eastern Cape, such as this one, usually the exhibits are sent to the Port Elizabeth laboratory. On receipt there, only exhibits that are contained in a sealed exhibit bag are received, so they must be in a sealed condition and an analyst there will break the seal and perform presumptive tests on the exhibits. For example, the analyst will take swabs of an exhibit to test, to check for skin cells, they will check for any blood or possible semen as well. Once the analyst has identified any possible blood stains or semen stains, they make cuttings of those stains, or they take the swabs that were looked at and place them into little envelopes which are then collated within the case file. That case file is then sealed and sent to the Western Cape where someone will break the seal, get the docket and submit the stains or swabs for DNA analysis. The DNA process involves taking, for example, an intimate swab taken from a victim and place the swab in a little Eppendorf tube which is then labelled with a unique barcode that allows the tracking of that sample all the way through the process. The DNA from the swab is then isolated, which is called extractions. The DNA is extracted from the cells, any human cells that may be on that swab, and then that extract is taken and specific locations on the DNA is then looked at and identified. Thereafter millions of copies are made through a process called a polymerase chain reaction and it is those specific areas that allow the development from sample numbers which make up a person's DNA profile. Once all those numbers have been retrieved and quality checks have been performed and passed, the case file will then be presented for comparison of reference samples from both the accused and the victim. That DNA is then compared to the reference samples from the exhibits like the rape swabs and then the results will be interpreted and the findings will then be compiled into a 212 report.'

[113] She further testified that when the exhibits are transported from Gqeberha (Port Elizabeth) to the laboratory, there are different ways of transportation. She was adamant that for this present case, it was done via courier, Skynet. Once the exhibits are received at the laboratory in Platteklouf, Cape Town, they will be received in the reception and they will then be transferred to a specific biology unit, which is within the same building. They would just be handed over manually. In circumstances where the exhibit bags are received opened or with some other defects, the laboratory will not take them for the reason that the integrity of the process would be

compromised. The result of not accepting the exhibits, is that samples would not be processed for reasons of tampering with the bag.

[114] In respect of the present case, the bags were received sealed and in an uncompromised condition. A statement in terms of section 212, basically a chain statement from the analyst, who received the sealed exhibit bag and break it to perform the duties, has been obtained and filed.

[115] In this case, the piece of sheet and the boxer shorts were analysed at Gqeberha (Port Elizabeth), the presumptive testing were done at Gqeberha (Port Elizabeth) and the files were then sent to the Western Cape where the submission officer in the Western Cape, opened the bags. The sexual assault kit was sent directly to the Western Cape laboratory. The bag was opened or the seal broken at the Western Cape laboratory and the presumptive testing also done in the Western Cape. The chain statement in terms of section 212 had been filed.

[116] The chain statements in terms of section 212 were filed by consent of the defence and no issue was raised concerning the statements. They were also read into record. I will not repeat the contents of the statements. All chain statements were admitted as exhibits to the proceedings.

[117] The witness testified that the DNA extraction is done using machines and the machines are calibrated. In this regard, she produced calibration certificates that are accompanied by the affidavits from the person who did the calibration.

[118] The conclusions of the witness, after analysis and reference to the tables that appear from her statement were that:

'From the results in Table 1 I can find the following findings:

- 4.1 The DNA result from the possible blood from piece of Sheet B PW400965682, matches the DNA result from the reference sample 17BBD0190 PA4003786318. The most conservative occurrence for this DNA result is 1 in 1.3 times 10 to the 5 trillion people.
- 4.2 The DNA results of the reference samples 17DBBD0190 PA4003783618 and 17DBAC2258 PA4003527430 are read into the mixture DNA result from the possible



high friction from piece of Sheet B PW4000965682. The most conservative occurrence for the DNA result for all the possible contributors to the mixture DNA result is 1 in 19 million people.'

[119] The witness concluded that the possible blood on the sheet matches the reference sample of the victim and the skin cells, the high friction on the sheet, both the donors of the accused's reference samples and the victim's reference samples can be read into that mixture as well. In other words, the DNA was positive for both of their DNA on the skin cells. Both of their skin cells were there and the victim's blood was there. These results are contained in the affidavit exhibits 'Y' and 'Z'.

[120] The witness was not meaningfully cross-examined. There was no dispute that the piece of sheet found from the accused's place was received by the laboratory and subjected to analysis. The witness, when asked whether the machines were in working condition at the time of DNA relating to this matter, she confirmed that the machines were working.

[121] The next witness was Warrant Officer Javu. He testified that he is attached to the Family Violence and Child Protection and Sexual Offences Unit. He is the investigating officer in the case. He took over as an investigating officer from Constable Nyenyiso. He took several statements from witnesses in connection with the case and he also took buccal samples from the accused and the complainant. He took the buccal samples twice from the complainant and twice from the accused.

[122] He was cross-examined in relation to the investigation and regarding the taking of the buccal samples from the accused.

[123] The next witness was Zithulele Moses Dladla. He testified that he is a deputy provincial commissioner for Crime Detection Station at Zwelitsha. He is responsible for all the detectives in the province of the Eastern Cape. This case was reported to him. On doing a follow up, he found that the exhibits were not yet sent to the laboratory, although they had been obtained and prepared. He instructed that the members must send the exhibits to the laboratory. He approved the flights for Zwelithini Gentsane and Warrant Officer Zide to Cape Town. He also signed for their

trip to Gqeberha (Port Elizabeth). He confirmed the correspondence written to the laboratory in the Western Cape, which accompanied the exhibits.

[124] The witness was not cross-examined.

[125] The next witness was Ms Sike. She confirmed the handing over of the exhibits. Nothing turns on the evidence of this witness.

[126] The next witness was Afika Nyenyiso. She testified that her involvement in the case was to take the exhibits from the SAP 13 at the charge office. The exhibits were the rape kit of the complainant and the buccal samples of the accused. She received the exhibits from Sergeant Jiba. The exhibits were sealed which she received from Sergeant Jiba. The exhibits pertained to CAS 05/9/2019. Her evidence relates to the chain of evidence at Lusikisiki police station and the Criminal Record Centre. There was no dispute about her evidence.

[127] She was not cross-examined.

[128] The State also submitted the victim assessment report and various exhibits on the chain of the exhibits and the photo-albums. The DNA chain statements were also submitted. All exhibits were submitted by consent. The State submitted two reports which were compiled by a social worker regarding the assessment of the complainant. The reports were also read into record. Nothing turns on those two reports at this stage.

[129] The State's case was thereafter closed.

### ***The Defence Case***

[130] The accused, Mr Pepping, was the only witness who testified in his defence. In his testimony, he denied raping the complainant. Before his testimony, the accused requested to read a document. He read the document in which he largely suggested ulterior motives both in his arrest and prosecution. He accused the National Prosecuting Authority of having prejudged him. He alleged political

motivations for the allegations against him. It was at that stage that this Court requested the accused to focus on the present case and he then allowed his counsel to lead him.

[131] The central defence of the accused is the denial of the allegations against him. He accepted that his popular nickname is Papa. He said that on the day when he left his house, it was unlocked and the keys were inside. On the day he was drinking with some friends out of his home. He only came back to his house between 16h00 to 17h00. He was seen locking his door. He disputed all the allegations by the complainant, including the suggestion that the complainant heard his name from a person that was knocking at the door and peeped through the window. He confirmed that he is well known in the community and that children who go to the crèche usually greet him saying 'good morning Papa'. He suggested that the complainant always knew him as Papa because children between the ages of three and four, who live within the area, knew him.

[132] He confirmed that he is a school subject advisor who regularly visit schools at Ngobozana Administrative Area and he is known as Papa. He disputed that the complainant did not know his name before this incident. He insisted that it would be strange for him to lift a young girl on his shoulders in a public road and take her to his room. He testified that the sub-headman was living closer to his house and would have heard the complainant when crying and he would have been seen when carrying the complainant over his shoulders. He disputed that his door was kicked open.

[133] When asked about the positive DNA results, he pointed out that on the day in question, he was assaulted by members of the community and he was forcefully asked to strip off all his clothes, leaving underpants and told to sit on the sheet. He was forced to lay on his stomach. In relation to his clothes that were taken by his cousin, Roland, he suggested that the clothes were in possession of Roland for a long time, which was about three and a half weeks to a month. He also suggested that Roland is one of the committee members of the sub-headman. He complained that the clothes were in a transparent plastic bag and were not kept by his aunt in her room and that Roland had access to the clothes. Regarding the piece of sheet

that had bloodstains that was cut by the police, he was not present. The accused suggested that the police had not properly investigated the case on the basis that they should have investigated the man that was knocking at his door and do his DNA test. He questioned why the police would only cut a specific piece from the sheet.

[134] The accused suggested that one of the witnesses by the name of Lona had a grudge against him, because she used to work for him. He fired her and hired another helper. He further suggested that all the statements and evidence of other witnesses were a mere fabrication of their imaginations.

[135] He was cross-examined extensively by the State. He was asked whether the complainant has ever visited his place and his answer was that she has never visited his place. When he was invited to comment on the complainant's statement that he did not know him until she heard his name shouted by the person knocking at the door saying Papa, the accused gave an answer that he does not know that.

[136] The accused was confronted with a question on how he explains the presence of the complainant's blood on the sheet on his bed in his room, if she was not raped in that room. His answer was that there were two people who were seen at his door, the first person was seen by Nosisa and at that time his door was not locked as he had deliberately left the keys when he went to spend time with his friends. The accused suggested that somebody must have raped the child in his room and all what the court needs to find out is who raped the child. He then asked a rhetorical question which was 'how would he leave a mess in his bed if he had raped the child in his room?'

[137] The accused suggested that the complainant was raped by somebody else in his room and he is being falsely implicated. When it was put to him that he is just trying to justify the presence of the complainant's blood on his sheet and the DNA results, his response to the State counsel was 'if you say so'. The accused did not dispute the evidence of Avela Nqobane that he had met him at about 16h00 going home and that he appeared to have consumed alcohol.

[138] After cross-examination, the defence's case was closed.

[139] That was the totality of the evidence presented by the State and the defence.

### **The common cause facts**

[140] It is common cause that the complainant was raped on 1 September 2019. It is also common cause that bloodstains were seen on a sheet in the accused's room. The sheet was on top of the accused's bed. It is also common cause that a piece of the sheet was cut by the photographer and sent to the laboratory for analysis and DNA testing. The DNA test results were positive in that they confirmed that the bloodstain were that of the complainant. Several admissions regarding the chain of evidence regarding the exhibits and the DNA results were made. It is also common cause that it is the complainant who reported the incident of rape to her siblings and neighbours. It is not denied that the complainant, at the time of reporting the rape incident, had blood dripping down her legs from her vagina and staining her clothes.

[141] It is also common cause that the complainant is a single witness in relation to the act of rape and that she is a minor.

### **The issue for determination**

[142] This Court must determine whether the accused is the person who raped the complainant. In determining this question, this Court must evaluate the evidence in its totality.

### **Evaluation of evidence and the applicable law**

[143] In *S v Trainor*<sup>4</sup> Navsa JA quoting from the judgment by Nugent J held: 'The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case, will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit), must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be

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<sup>4</sup> *S v Trainor* [2002] ZASCA 125; [2003] 1 All SA 435 (SCA); 2003 (1) SA 11 (SCA) paras 8-9.

unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored. . . A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently, verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any, evidence must of course be evaluated against the onus on any particular issue or in respect of the case in its entirety. The compartmentalised and fragmented approach of the magistrate is illogical.’

[144] In *S v Singh*<sup>5</sup> Leon J, even before the advent of the Constitution, held:

‘ . . . it would perhaps be wise to repeat once again how a court ought to approach a criminal case on fact where there is a conflict of fact between the evidence of the State witnesses and that of an accused. It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of the State witnesses that, therefore, the defence witnesses, including the accused, must be rejected. The proper approach in such a case such as this is for the court to apply its mind, not only to the merits and demerits of the State case and the defence witnesses, but also to the probabilities of the case. It is only after so applying its mind, that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt. The best indication that a court has applied its mind in the proper manner, is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses.’

[145] In *S v Shackell*<sup>6</sup> Brand AJA, as he then was, held:

‘The court does not have to be convinced that the accused version is true. If the accused’s version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version. Of course it is permissible to test that version against inherent probabilities. But, it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.’

[146] In this case, the State was required to adduce credible evidence that would render the version of the complainant more likely that it was the accused who sexually assaulted the complainant; and the accused’s version less likely that he is not that person who sexually assaulted the complainant.

<sup>5</sup> *S v Singh* 1975 (1) SA 227 (N) at 228.

<sup>6</sup> *S v Shacknell* [2001] ZASCA 72; [2001] 4 All SA279 (A); [2001] (2) SACR 185 SCA at 194*g-i*.

[147] It is not in dispute that the complainant was sexually assaulted on 1 September 2019. That is common cause between the parties. At issue is whether the complainant did identify the person who sexually assaulted her. In evaluating the evidence of the complainant, this Court takes into account that she is a minor and that she is a single witness in relation to the act of rape. I also take into account that the identification of the accused is circumstantial for the reason that she relies mainly on the name that was shouted by the person who was knocking at the door and peeping through the window and the subsequent DNA test results.

[148] Insofar as the evidence of children, in *R v Manda*<sup>7</sup> it was said that:

‘The imaginativeness and suggestibility of children are only two of a number of reasons why the evidence of children should be scrutinised with great care amounting, perhaps, to suspicion.’

[149] In *S v V*,<sup>8</sup> Zulman JA held:

‘In view of the nature of the charges and the ages of the complainants it is well to remind oneself at the outset that, whilst there is no statutory requirement that a child’s evidence must be corroborated, it has long been accepted that the evidence of young children should be treated with caution . . .’

[150] In this case the complainant’s evidence was simple and fairly straight forward. She had been sent to buy chips by the uncle, Siyanda Phimpi. She met an unknown person along the way. This person asked her to come to him, promising eggs, money and naartjies. She refused to heed the call of the unknown person. This person chased her until he caught up with her, grabbed her and lifted her to the shoulders. All this time, the complainant did not know who this person was. She only heard the name from a person who was knocking at his door, where the complainant was raped. There is no denial that there was a person who knocked at the door of the accused. The accused did not dispute that there was a person who had knocked at his door.

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<sup>7</sup> *R v Manda* 1951 (3) SA 158 (A) 163. See also S Van Der Merwe *Principles of Evidence* 3 ed at 551.

<sup>8</sup> *S v V* 2000 (1) SACR 453 (SCA) para 2.

[151] The complainant was searched for by the siblings when she did not return home. She met with her sister, Olona, along the way back home. Olona observed blood dripping down the complainant's legs and enquired what had happened to her. It was only at that stage that the complainant, on her own, reported that she had been raped by a man unknown to her. She only learned about the name of that man when there was a knock on his door and shouting of the name Papa. In this instance, it cannot be suggested that the name Papa was suggested or imagined by the complainant. Admittedly, the complainant did not even know the name Papa before the incident.

[152] The other witnesses, such as the grandmother, Mangxabane, Vuyolwethu, Nosisa, Siyanda, Lona, only received a report from the complainant about the name of the person that had raped her. They inspected the complainant and saw for themselves the blood that was flowing from the vagina of the complainant. It was only then that they decided to approach the accused since they only know him as Papa.

[153] There is no motive which had been suggested by the accused that would have caused the complainant to mention his name as the person who raped her. In his own version, the accused stated that the family of the complainant was new in the area and he, personally, had never seen the person of the complainant. The question that this Court asked itself, in these circumstances, is how it can be safely suggested that the complainant might have imagined or suggested the name of Papa?

[154] The accused has given a proposition that he could not have lifted the complainant to his shoulder and the complainant was criticised for not crying when she was chased and grabbed by the unknown man. The complainant has given an explanation in this regard and her explanation was that there was no one in the vicinity who could have heard her crying. I accept this explanation, taking into account the age of the complainant. Insofar as the evidence that the complainant heard about the name of the accused whilst she was at the accused's place, I accept that version. I cannot find fault.



[155] The complainant's evidence, in my mind, was clear and satisfactory in all material respects. She heard the name Papa whilst she was in the room of the accused. The evidence of the complainant is corroborated by the DNA insofar as the blood of the complainant was found in a sheet on the bed of the accused. The trite law is that circumstantial evidence rests on two cardinal rules<sup>9</sup> of reasoning which are:

- '(a) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.
- (b) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct.'

[156] The proved facts are:

- (1) Both the accused and the complainant did not know each other prior to the incident;
- (2) The complainant did not know the house of the accused;
- (3) The complainant has never been in the house of the accused;
- (4) Blood stains were found in the room of the accused on a sheet in his bed;
- (5) The DNA confirmed the blood stains to be the blood of the complainant;
- (6) The question would be how the blood of the complainant found its way to the house of the accused and to be on the sheet on top of the bed of the accused;
- (7) The inference is irresistible on the conspectus of facts that she was brought by the accused to his house.

[157] I reject the suggestion of the accused that the complainant may have been brought by another person to his room and that he had left the room unlocked. The accused did not challenge the evidence of Avela Nqobane. Avela had testified that he went to the accused's house for a beer. He found the house locked and they had just met when they agreed that he should visit the home of the accused for a beer. The accused had also not answered the presence of the complainant's blood stains in his sheet. He only sought to attack the evidence of the DNA on the basis that he did not see the photographer when he cut the piece of the sheet. There were no

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<sup>9</sup> *R v Blom* 1939 AD 188 at 202-3.

questions put to Warrant Officer Francis-Pope that she received a piece of the sheet that had samples of blood stains.

[158] The chain of evidence from the time the piece of sheet was cut at the accused's place until it reached the laboratory, was never meaningfully challenged. The suggestion by the accused that somebody else must have taken the complainant to his house and raped her is farfetched and inherently improbable, and stands to be rejected as false. The accused himself, when he was cross-examined on this aspect, gave a vague answer. A question was put to him as to how does he explains the presence of the complainant's blood on the sheet in his room and the DNA results and a proposition was put to him that he was just unable to answer the question. His answer was 'if you say so'.

[159] I am acutely aware that the identification of the accused at the time when he had been assaulted, and the community members had already caught him, is unreliable. I also put no weight to the identification of the accused during court proceedings for reasons that it could be dangerous to rely on such identification. My view is that the evidence is overwhelming that the accused's name was heard by the complainant when he was shouted at by the person knocking at his door; the blood samples of the complainant were found in a sheet which was on the bed of the accused in his own room; and that there is no evidence to suggest that the name of the accused had been suggested to the complainant nor that the blood stains were planted in the house of the accused. I cannot imagine of any person who would, without knowing, grab a minor and take that minor to somebody's house to rape without even knowing where the owner of the house is or whether there is anybody in the house.

[160] The accused has not even suggested that there was a person who had access to his house and that person knew his whereabouts on the day and when he would return home.

[161] The State witnesses who are siblings and community members, merely corroborated the report of rape. I cannot fault their evidence and for that reason, I accept the evidence of all those State witnesses. The police officials from the

Lusikisiki Criminal Record Centre and the investigating officer merely testified about the investigations and the chain of exhibits, I find no reason to fault their evidence. There was no suggestion from the accused that all those witnesses had conspired and concocted evidence against him. I found no reason why the police officials would fabricate the evidence against the accused. The affidavits from the laboratory were admitted in terms of section 212 and the witness, Francis-Pope, was never questioned in terms of her analysis of the DNA. I accept the DNA test and the accompanying affidavits. The State witnesses were credible.

[162] The DNA test results corroborated the evidence of the complainant that she was raped in the room of the accused. I disagree with the submission by *Mr Kekana*, counsel for the accused, that the evidence of the complainant should be rejected, for reasons that she is a single witness and a minor. There is enough corroboration in support of the complainant's version. Corroboration means other evidence which support the evidence of the complainant, and which renders the evidence of the accused less probable on the issues in dispute. There is no explanation why the blood of the complainant was in the room and the bed of the accused. The only conclusion is that the complainant was raped in that room. Regarding the complainant being a single witness, in *S v Webber*<sup>10</sup> it was held:

"The evidence of a single witness should be approached with caution and such evidence ought not necessarily be rejected merely because the single witness happens to have an interest or bias to the accused. The correct approach is to assess the intensity of the bias and to determine the importance thereof in the light of the evidence as a whole."

[163] In *S v Sauls*<sup>11</sup> it was held that there is no rule of thumb test or formula to apply when it comes to the consideration of the credibility of a single witness. The trial court should weigh the evidence of the single witness and should consider its merits and demerits and, having done so, should decide whether it is satisfied that the truth has been told despite shortcomings or defects or contradictions in the evidence.

[164] The complainant gave a clear and satisfactory evidence. She was corroborated by the DNA, which is an independent evidence. The complainant did

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<sup>10</sup> *S v Webber* 1971 (3) SA 754A

<sup>11</sup> *S v Sauls* 1981 (3) SA 172 (A), see also *S v Oosthuizen & Another* 2020 (1) SA 561 SCA, see also Principles of Evidence Third Edition Shwikkard Van Der Merwe at p 552

not contradict herself in her evidence. There was no suggestion of bias towards the accused. She admittedly did not know the accused. Her family was new in the locality. There are no suggested bad relations or grudges between the accused and the complainant's family in which it could be said that somebody suggested the name of the accused. There are no facts upon which it can be suggested that the complainant had imagined the name of the accused. I agree with *Mr Nyendwana*, counsel for the State, that there are no basis to fault the evidence of the complainant.

[165] In *S v Artman & Another*<sup>12</sup> it was stated:

“When dealing these witnesses, the court must guard against the inherent dangers in these witnesses’ evidence and require some safeguard to reduce the risk of a wrong conviction. Accordingly, if corroboration is relied on as a safeguard, then such corroboration must implicate the accused in the commission of a crime.”

[166] I have no doubt that the DNA sufficiently implicates the accused in that the blood of the complainant had been found in a sheet which was in the room and on the bed of the accused. That corroboration should be enough to support the complainant who had testified that she was sexually assaulted in that room and on that bed. The evidence is that on the same day, blood was seen on the bed of the accused. The accused did not deny the presence of the blood, instead, he suggested that it was his blood since he had been assaulted.

[167] In summary, I reject the evidence of the accused for various reasons, which include that the evidence of the accused was inherently improbable. The accused was not a good witness. He was not answering questions. He was evasive. He avoided questions that were put to him. He introduced new evidence during cross-examination of which no version was put to witnesses. The explanation in this regard by the accused that he had informed his legal representative is also rejected. The accused is a highly learned person. He was testifying in English. Many times, he would raise his hand and speak for himself to this court. I had allowed him to ensure fairness. He cannot raise as justification a suggestion that his lawyer did not ask

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<sup>12</sup> *S v Artman & Another* 1968 (3) SA 339 (A)

certain questions or put up his version. At one stage, the accused asked for permission to present a long statement, which this court permitted.

[168] The accused had suggested that Lona Phikiso had a grudge against him, because he once fired her. There is no basis for this, because it was not Lona who made allegations of rape against the accused. Lona merely heard a report from the complainant. Lona is not even a family member of the complainant. She is a neighbour. The witness, Avela Nqobane had testified that he met the accused when he was on his way home. The accused did not dispute the version of Avela Nqobane in this regard. Most importantly, when the keys to the room of the accused were demanded from him in order to enter into his room, he denied possession and suggested that they had been lost. When he was searched, the keys were found in his jacket. It also bears to mention that the accused attempted to flee the scene when the witnesses and the sub-headman asked to enter his room. The question which could not be answered is why he ran away, instead of just opening the room. The irresistible inference in this regard is that he knew that some evidence linking him to rape would be found and he sought to avoid such eventuality.

### **Findings**

[169] I am convinced that the State has proved its case beyond reasonable doubt and I do find that the accused is the person who raped the six year old complainant on 1 September 2019. I have already rejected the version of the accused. The evidence against the accused is overwhelming whilst his version is fraught with inherent improbabilities. The accused should be found guilty of the crime of rape of the complainant.

### **Order**

[170] In the results, I make the following order:

- (1) The accused is found guilty for the crime of rape as charged.

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**M NOTYESI**

**ACTING JUDGE OF THE HIGH COURT**

Counsel for the State : *Adv Nyendwana*  
: *The DPP*  
Mthatha

Counsel for the Accused : *Adv Kekana*  
Attorneys for the Accused : *Legal Aid*  
Mthatha