



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

NOT REPORTABLE

Case no: 26/2023

In the matter between:

THE STATE

and

SONWABILE NTAKATSANE

Accused

JUDGMENT

Govindjee J

Background

[1] Mr Ntakatsane pleaded not guilty to raping NN, a 14-year-old girl, and AN, a 15-year-old girl on 25 August 2018 at Elliot ('the complainants'). In terms of s 220 of the Criminal Procedure Act, 1977,¹ he admitted that he had sexual intercourse with both complainants, indicating that he had done so with their consent.

¹ Act 51 of 1977.

The state's case

[2] AN, a 19-year-old female complainant ('the complainant'), testified in proceedings held behind closed doors. She lives with her sister, YN, and is the cousin of the other complainant ('NN'). During 2018, she and NN had been sent to a shop in the Old Location by Mr Ncise, who lived at a farm in Elliot ('the farm') where NN resided. Having not sourced the items they required, the two children went on to another shop. They encountered Mr Ntakatsane, who was walking towards them. He walked past them, stopped and called the complainant's name.

[3] The complainant had been told, sometime during the previous year, that she was related to Mr Ntakatsane. She had, however, never conversed with him. When called, she responded without stopping. As the children walked on, Mr Ntakatsane grabbed their clothing on the shoulder area.

[4] Turning around, the complainant noticed that he had a fixed-bladed knife in the hand that he held NN and asked him what he was doing. He swore at her and, still holding their clothing, took them to a bridge area approximately 30 metres away. There he told them to undress. The girls argued with one another as to who would do so first. He was right in front of them, still holding the knife and again instructed them both to undress. He proceeded to insert his fingers into both of their vaginas, without consent, causing the complainant to cry in pain. NN was also crying. He then told the complainants to dress and, holding both by their shoulders, said they should leave.

[5] Mr Ntakatsane lives in a shack ('the dwelling') constructed on the premises of his parental home ('home'). The complainants were taken there. Once they were all inside, he closed the door, latched it, and instructed them not to make any noise. The complainants were instructed to undress and again argued as to who would do so first, as neither wanted to undress. The complainant said she felt very scared.

[6] Once they had both undressed, Mr Ntakatsane instructed them to proceed to the bed. The complainants again argued as to who would do so first. When they did

so, the complainant was positioned in the middle. Both requested him to proceed with the other. In response, he jumped over the complainant and 'started with NN' by inserting his penis into her. It was dark inside the dwelling and the complainant testified that she heard what he had done to NN by her crying.

[7] Having finished with NN, he climbed on top of the complainant and inserted his penis into her. At some stage he fell asleep while lying on top of her. This enabled the complainant to move her hand slowly and poke NN, who was right next to her, and whisper to her to leave and look for help as he was asleep. NN did so after dressing.

[8] After some time, the complainant believed that NN was not returning. She pushed Mr Ntakatsane off her to the side of the bed, got up and looked for her clothes. She did not find her panty, put on her trousers, and left for the farm.

[9] The complainant was crying when she arrived, and, at the gate, called out for NN's mother. NN's mother and Mr Ncise appeared, and she informed them that they had been raped. She did not inform them of the identity of the perpetrator and explained that this had been due to her state of shock. NN's mother started to cry and they went inside the house.

[10] The complainant was still crying when NN and her sister PN and YN subsequently arrived. NN was also crying. The following morning, they were taken to the police station and to hospital for medical examination.

[11] The complainant admitted having consumed alcohol earlier that evening at the farm and had been tipsy and not drunk. She denied having consumed alcohol with Mr Ntakatsane, or that he had proposed love to NN. There was no stage where NN, who did not know Mr Ntakatsane, had been alone with him. She added that the complainants had screamed when they had first been grabbed by Mr Ntakatsane, but that none of the people nearby had attended to them. Mr Ntakatsane had been aggressive and not talking properly, and the complainant had been afraid to attempt escape earlier.

[12] The complainant confirmed, during cross-examination, that Mr Ntakatsane had been unaccompanied when they had met him and throughout the incident. She had not noticed him as he walked by, but he had called her by her name once they had crossed. The complainant had turned and looked at him before responding to him. She could not see him clearly and had not observed a knife. After being called, she had recognised him as the person previously pointed out to her as a relative. After replying to him he had said that the complainants should go to him. At that stage he was approximately eight metres away and the complainants continued walking while the complainant spoke to Mr Ntakatsane by turning and looking at him over her shoulder.

[13] The complainant was surprised that he then followed them and grabbed them by their shoulders. He was holding a fixed-bladed knife and, because of that, she did not think to remind him of their family link. Despite the complainants' shouts for help and cries, none of the people who observed this came to their assistance.

[14] The complainant maintained that the knife had still been in Mr Ntakatsane's right hand while he had inserted a finger from each hand into each of the complainants. The knife was in the hand used to penetrate NN. She was unable to explain how this would have occurred and noted that it was dark at the spot this happened, near the bridge. The complainants had been standing on their feet while Mr Ntakatsane sat on the ground.

[15] Later, the complainant realised that they had been taken to his home. She had previously visited in the old location and his home had been pointed out to her given their family connection. The complainants did not raise any alarm. This is because they had been told not to make a noise and had been scared, only crying softly at the time. The complainant explained that she had been particularly frightened because Mr Ntakatsane had been in possession of the knife. Mr Ntakatsane's parental household had been dark, and nobody had been seen when they entered his dwelling.

[16] The complainant explained that she did not ordinarily reside in the area and was unfamiliar with NN's daily movements and with the name of the tavern to which Mr Ntakatsane appeared to be headed when they had come across him. She had never bumped into him since he had first been pointed out to her.

[17] The complainant testified that NN had cried while she had explained to YN and PN that they had been raped. NN also had the appearance of a person who had been crying. Her impression was that NN had already told them what had happened, and that they were merely seeking confirmation.

[18] Various discrepancies with the complainant's contemporaneous statement to the police were pointed out to her. While the complainant's statement indicated that Mr Ntakatsane had threatened to kill them prior to taking them to the bridge, this evidence had not formed part of her testimony in-chief. The statement contradicted her version, referring to Mr Ntakatsane taking out a knife only at the bridge. The complainant added that he had repeatedly threatened them, and poked the back of their heads with the knife. The complainant could not recall being told to make the bed at Mr Ntakatsane's dwelling. She could not recall telling the police that she and NN had been raped twice each. In addition, the statement made reference to Mr Ntakatsane waking up while on top of the complainant and asking about NN, and waking up when she tried to leave. The complainant had no recollection of this. Her explanation was that what was reflected in the statement demonstrated that the officer who had taken the statement had not understood her properly. She also could not recall what had happened to the money the complainants had been given by Mr Ncise.

[19] It was put to the complainant, and denied, that Mr Ntakatsane had told the complainants that he was going to Jazz tavern and that they had offered to accompany him. The complainant, while uncertain about whether they had screamed when accosted, was sure that Mr Ntakatsane had a knife with him at the time.

[20] Mr Gcobani Ncise testified that he was 58 years of age, and lived at the farm with his girlfriend, who was NN's mother. NN would visit the farm on weekends and

was close to her cousin, the complainant. Around sunset on 25 August 2018, the witness had given them R200 to buy meat and drink from the Lunch Bar Shop, approximately four kilometres away from the farm in the location. When the children did not return, Mr Ncise proceeded to the Lunch Bar Shop to look for them, before returning home. AN arrived in the early hours of the morning, breathing heavily and fast and shouting from the other side of the premises' locked gate. She appeared to be unhappy and in shock. AN told him that she and NN had been raped and it appeared to him to be clear that she had run away.

[21] NN and YN arrived after a while and reported the incident. NN, who was very young at the time, had cried. Mr Ncise advised them to sleep as he would accompany them to the police station the following morning. He had been given Mr Ntakatsane's first name when told about the identity of the perpetrator, but had not known him until he saw him at court in Elliot.

[22] Mr Ncise testified that the complainants were tiny at the time of the incident. Any passer-by would realise that they were children. He testified that he had not made a statement to the police, although it appears to be common cause that he did, and admitted that he may have made some mistakes because of a busy mind and inability to function correctly. It was a mistake to suggest that NN had returned to the farm before the complainant.

[23] During cross-examination, the witness stubbornly denied that the complainants could have consumed alcohol that evening, even when the complainant's admission to that effect was put to him. He explained that the man working at the Lunch Bar shop had told him that the complainants had been seen there, so that he returned home believing that they may have taken a different route back to the farm.

[24] When the complainant arrived, it became apparent that they had not bought the food or drink and she indicated that they had lost the money. Having heard from the complainant, Mr Ncise and NN's mother were still discussing what to do when NN and YN arrived. The complainant was then preparing a bed to sleep. NN's eyes

were bloodshot, and she cried when asked by the witness where she was coming from and told that the complainant had said that she had been raped.

[25] Mr Ncise subsequently admitted to having erred in respect of his testimony about hearing the first name of Mr Ntakatsane prior to court proceedings in Elliot. The complainants had made no mention of a name to him. According to the witness, YN had told him that she had met NN running, and that it appeared to her as if NN had escaped from somewhere. He explained that he had been shocked by the incident.

[26] YN testified that she had been with her cousin PN, and PN's boyfriend, sitting outside Lombo's tavern on the evening in question. NN appeared running and crying, came to her, called her aside and told her that she and the complainant had been raped. YN asked her to point out the place where the rape had occurred and asked her if she knew where the complainant was. NN informed her that the complainant was still in the dwelling where she herself had been raped, and that the perpetrator was still busy raping her.

[27] NN took YN to Mr Ntakatsane's dwelling. YN was fearful and suggested that they begin at the main house. A lady named Nomawethu was inside and, having ascertained who was at the door, opened for them. Mr Ntakatsane's mother and father appeared to be drunk and his mother had passed out. Nomawethu subsequently declined to accompany the two to Mr Ntakatsane's dwelling, saying she was afraid to do so. PN appeared before they knocked on his door. Mr Ntakatsane recognised YN, who said that he should open, as they were looking for the complainant. After some discussion, he did so and YN realised that the complainant was not in his dwelling. NN remained silent during this time.

[28] NN, YN and PN then went to the farm and called for NN's mother. Mr Ncise opened for them and they discovered that the complainant was already there, under the blankets. She was crying and did not respond to a question asking when she had arrived at the farm. NN, who was in a state of shock, spoke to her mother and Mr

Ncise and informed them that she and the complainant had been raped by Mr Ntakatsane.

[29] YN explained that the Lunch Bar shop was next to Lombo's tavern. NN had not known that she had been at that tavern on the night in question, but they had been visible from the street as they sat outside the tavern. The shop and tavern were on the road between Mr Ntakatsane's dwelling and the farm.

[30] The witness confirmed during cross-examination that Mr Ntakatsane did not appear to be violent or aggressive when he opened the door. Her evidence was that she did not have time to confront him about what NN had told her. She denied that the farm was closer to the dwelling, compared to the distance between the dwelling and Lombo tavern. The street containing the tavern and shop was busy and people would see if somebody was attacked. *Mr Sojada* confirmed that there was no dispute that YN had enquired about the complainant. His client disputed the evidence about the state of intoxication of his parents at the time. Minor contradictions with her evidence and that of Mr Ncise and the complainant were pointed out, the witness remaining firm in her version of what occurred when she arrived at the farm.

[31] Dr Flannigan, a registered independent clinical psychologist employed at Fort England Hospital, explained her expertise and experience dealing with criminal capacity and victim impact assessments and out-patient psychotherapy. She had spent two hours assessing NN on 4 August 2023 but was forced to rely on collateral information from the child's mother and Mr Ncise, her stepfather. NN herself appeared perplexed and confused, having slow movements, laughing inappropriately and unable to provide relevant and logical responses to her questions. Her speech was impoverished, and she offered one-word answers, appearing anxious and struggling to concentrate.

[32] Mr Ncise had explained that the child's behaviour had been normal prior to the incident. She now required assistance in caring for herself. Their efforts to assist the child had included taking her to a clinic and to a sangoma.

[33] Dr Flannigan concluded that NN was disconnected from reality and not competent to testify due to psychosis, likely caused by trauma from the incident. She admitted that she had not been informed that the child had only been in grade four, despite being 14 years of age during 2018 and that she was already consuming alcohol. Importantly, however, she testified that her findings would remain unaltered, even though a formal diagnosis could not be confirmed. The child was unable to complete psychometric testing as she was unable to comprehend the instructions given to her and was easily distracted due to her current abnormal mental state. She was currently psychotic with below average intellectual functioning and requiring assistance with daily functioning. Dr Flannigan's professional opinion was that, even with assistance, she would not be able to testify.

The defence case

[34] Mr Ntakatsane testified that he had been with a friend coming from Lombo's tavern at approximately 20h00. They met the complainants, who asked where they had come from, noting that the men 'looked tipsy'. The complainants requested the men to 'try them', by which was meant that liquor should be shared with them.

[35] As the men did not have liquor, Mr Ntakatsane thought about a former colleague and drinking partner, named Madala, who lived in town and could assist them with liquor. The complainants agreed to accompany them. Mr Ntakatsane's friend left them, and they proceeded with him to Madala's home.

[36] Mr Ntakatsane explained to Madala that he wanted assistance with the purchase of liquor. Madala was not interested in drinking but gave money to Mr Ntakatsane, who left with the complainants. The agreement was that they would go to the location where he stayed, as this was the closest area to Madala's home. At some point he suggested that they go to his home. This was because he realised that the R150 that he had received was insufficient and several people would want to drink with them if they all proceeded to the tavern.

[37] The route was uphill, and Mr Ntakatsane became tired when they arrived there. He asked who would go to the tavern to buy liquor, and the complainant volunteered. He gave her money, and she took a backpack and left to buy beers. She indicated to them that she would first pop by friends who would accompany her to the 'Noblade' tavern, some five houses away.

[38] Once the complainant had left, Mr Ntakatsane reminded NN that they had met previously, and he had proposed love to her. She had no problem with establishing a relationship but noted that her boyfriend stayed in that area. She told him the boyfriend's name, in response to a question. He knew the individual and she agreed with his suggestion that they should use any opportunity while keeping things secret from the boyfriend.

[39] They proceeded to have sexual intercourse twice. NN requested that they do so quickly before the complainant returned. After resting for a while, both realised that the complainant was not returning. NN decided to look for her and left him alone inside the dwelling.

[40] The complainant arrived alone and enquired about NN. Mr Ntakatsane wanted to sleep and was no longer interested in drinking. He told the complainant that she could leave him one beer and depart with the rest of the alcohol. As she proceeded towards the door, he asked her 'Are you going to leave me like that'. Mr Ntakatsane indicated that he merely wanted to see her reaction. She laughed and enquired what she was supposed to do. Noting her interest, he informed her that she could do whatever she wished and 'something that would make me happy'. She mentioned the possibility of NN returning but nonetheless closed the door and returned to have sexual intercourse with him. She then dressed, took the beers, and left.

[41] Mr Ntakatsane fell asleep and was woken by YN knocking on the door. She was looking for both the complainants and was in the company of an unidentified female. She and this person left immediately when told that the complainants were not there, and Mr Ntakatsane went back to sleep.

[42] He explained that he would see the complainants in the area 'because they were having an affair nearby my home'. The complainants and Mr Ntakatsane were used to one another, in the sense that they would talk, but he did not know their age. He had nonetheless not greeted the complainant by name and denied her version of events in its entirety. While he knew NN's name, the complainant was known by a nickname. He noted that YN and the complainant were related to his stepsister and that it was 'always light in my shack'.

[43] During cross-examination, Mr Ntakatsane testified that his plan, when leaving Lombo's tavern and before meeting the girls, was to look for Madala to see what he was doing. He clarified that he would first look for him on the way at Jazz tavern before proceeding to Madala's home and admitted having made a mistake in not mentioning this during evidence-in-chief. He subsequently indicated that whether he would drink at Jazz tavern, the venue mentioned by his counsel to the complainant, would depend on the 'vibe' there.

[44] The complainants had not approached him from the direction of the shop but 'from the back of the township'. Asked why he had taken them to his dwelling, he explained that 'one must first go via my place' when leaving Madala's place. He did not explain where they were headed, and then said that he had just wanted to rest having walked from Madala's place. He had been tipsy and not under the influence of alcohol.

[45] Mr Ntakatsane testified that he knew that the complainant would proceed to Noblades, a few doors down, to purchase the alcohol, when she left him with NN. He endeavoured to explain that the reason they had not all proceeded to that tavern was because of the amount of money they had and because they did not want other people joining in with their drinking. He subsequently testified that he and NN had not known whether she had proceeded to Noblade's tavern or had visited friends instead.

[46] NN had left his dwelling at approximately 22h00. When the complainant arrived and responded to his request to be given something, he testified that, because of his alcohol consumption, he did not have a choice but to go along with her lead. They had both initiated sexual intercourse and, having rested, he was no longer tired. When asked why he had not continued drinking with her upon her return, he said that he had wanted to sleep and that he was weak from his previous bouts of sexual intercourse. The complainant had subsequently left with his backpack. Had she had any complaint she should have reported to her father, who lived in the same area as Mr Ntakatsane.

[47] He maintained that YN had asked for both complainants upon her arrival. His explanation for how she would have known to look for them at his dwelling was that people would have seen them walking together in the township, and possibly told YN about this. He stated that NN should have proceeded straight to the farm, and not via Lombo's tavern, had she been raped. When asked why he had not told NN to wait for the complainant to return so that they could drink together, he said:

'I decided that no I can't drink with this one because the other one will be under the impression that we do not want her to take from the alcohol'.

[48] In response to questions from the court, Mr Ntakatsane confirmed that he had wanted to go to Madala's place when leaving Lombo's tavern. This was not to obtain alcohol. Having met them, he had thought that Madala could help him obtain alcohol. This was for NN's sake, and to demonstrate that he was serious about her, given his long-standing love interest. In fact, it had been five days prior to the incident that he had met NN and propositioned her.

[49] Mr Ntakatsane had wanted to make NN happy and she had said that she wanted alcohol. It was quicker to proceed to his residential area than go back to Jazz tavern once he obtained money from Madala. His home came before Noblades tavern and they had not proceeded there directly because NN's boyfriend resided in his area. The plan was to drink with them and then he would sleep. The complainants had wanted alcohol and he had not wanted to come across their boyfriends. He subsequently indicated that the complainant's boyfriend did not live in

that area. He also testified that he had heard about the complainant's boyfriend from NN on the day in question and had not asked her himself, as his interest was only in NN. Both complainants used to visit men in his location.

Analysis

[50] The court is faced with two irreconcilable versions of events. It is accordingly necessary to evaluate both versions against the inherent probabilities taking account of all the evidence.² This requires findings on credibility of the various factual witnesses, their reliability and the probabilities.

[51] The complainant in this matter is a single witness in respect of proving that Mr Ntakatsane's admitted sexual intercourse with the complainants was non-consensual. Section 208 of the Act provides that an accused may be convicted of an offence on the single evidence of any competent witness. There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness.³ The evidence must be weighed by considering its merits and demerits before deciding whether it is trustworthy and whether, despite shortcomings, defects or contradictions, the truth has been told.⁴

[52] The complainant provided a clear and consistent account of the main events of the night in question. The shortcomings in her testimony relate mainly to various inconsistencies with the statement she made to the police almost five years ago, and her inability to remember distances and times. The mere fact that there are contradictions between the testimony of a witness and their previous statement does not mean that the witness is not credible. Courts must be alive to the reasons for such differences, following the approach in *S v Mafaladiso en Andere* (footnotes omitted):⁵

² See the judgment of Wallis JA in *S v BM* 2014 (2) SACR 23 (SCA) para 8.

³ *S v Weber* 1971 (3) SA 754 (A) at 758.

⁴ See *S v Guess* [1976] 4 All SA 534 (A) at 537-538; *S v Singh* 1975 (1) SA 227 (N) at 228.

⁵ *S v Mafaladiso en Andere* 2003 (1) SACR 583 (SCA) at 593e – 594h, as translated in BR Southwood *Essential Judicial Reasoning* (2015) (LexisNexis) at 77, 78.

'The mere fact that there are self-contradictions, calls for a circumspect approach by the Court. Firstly, it must be carefully determined what the witness intended to say on each occasion, in order to ascertain whether there is in fact a contradiction and, if so, the extent thereof. In this connection the judge of fact must take into account that a previous statement is not obtained by way of cross-examination, that there may be language and cultural differences between the witness and the author of the statement which stand in the way of correctly recording what was intended, and that a deponent is seldom if ever asked by a police official to explain their statement in detail ... Secondly, it must be borne in mind that it is not every error and not every contradiction or deviation that adversely affects a witness' credibility ... Non-substantial variations are not necessarily relevant ... Thirdly, the contradictory versions must still be considered and evaluated in the context of all the evidence. The circumstances in which the versions were made, the proved reasons for the contradictions, the actual effect of the contradictions on the witness' reliability or credibility, and the question whether the witness had sufficient opportunity to explain the contradictions – and the quality of the explanations – and the relationship between the contradictions and the rest of the witness' evidence, *inter alia*, must be taken into account and assessed ... Finally, the ultimate task of the trial judge, to assess the weight of the statement against the *viva voce* evidence in these cases is correctly summarised in *S v Sauls and Others* ...:

"The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings and defects or contradictions in the testimony, he is satisfied that the truth has been told."

[53] Many of the discrepancies pointed out by *Mr Sojoda* are non-substantial and not of the kind that affect the complainant's credibility, particularly when evaluated in the context of all the evidence and bearing in mind the typical considerations that result in such differences and the period that has elapsed. The complainant's explanation that the police official who took her statement may not have understood what she intended to convey highlights her conviction in her recollection of events as expressed in court. It is also of relevance that she was a child of 15 at the time that statement was made. Her inability to estimate distances and times, including the time it took for Mr Ntakatsane to rape NN, must also be considered. Importantly, these contradictions and inadequacies do not disturb the core of her version relating to the non-consensual sexual penetration of both complainants, the preceding events and the complainants' escape from the dwelling and reporting of the incident.

[54] This is not to suggest that her evidence was without blemish. The complainant acknowledged that she had consumed alcohol on the evening in question and had been tipsy when she came across Mr Ntakatsane. She was unable to provide a detailed explanation of the complainants' reaction to seeing the knife, how they had screamed or shouted or how they could have been grabbed simultaneously while Mr Ntakatsane held a knife in one of his hands. The same difficulty confronts her evidence of the events at the bridge.

[55] Although now an adult, the complainant was a child at the time she was allegedly raped. The imaginativeness and suggestibility of children have been held to be only two of several elements that require that their evidence be scrutinised with care to the point of suspicion.⁶ A trial court must fully appreciate the inherent dangers in accepting such evidence. Even though she became exasperated, and appeared tired on occasion during cross-examination, she conveyed the impression of an honest witness recalling events of some five years ago, indicating when she was unable to recall a particular occurrence. Considering that lapse of time, and her age at the time of the incident, it is unsurprising that her evidence contains gaps and contradicts aspects of her statement. Crucially, however, her evidence as to how she and NN were forced to enter the dwelling and were raped one after another, before Mr Ntakatsane fell asleep on top of her, was consistent and unshaken. She certainly did not seek to embellish her testimony. Ultimately, her evidence must be considered in the light of all the evidence and not in isolation. On my assessment, she testified truthfully and provided a credible account of events which is supported by the mosaic of evidence presented and accords with the intrinsic probabilities.

[56] The complainant's version is supported by Mr Ncise, to whom she reported the incident once she had managed to leave the dwelling. While he admitted to some errors in recollection, notably in respect of having heard Mr Ntakatsane's name at the time, and was stubborn in his approach to certain propositions put to him, I am satisfied that he testified truthfully about his recollection of the key events in question. He appeared to be unsophisticated and guileless and referred to his age and state of mind to explain gaps in his recollection. It is so that he appears to have

⁶ *Ibid.*

forgotten that PN accompanied YN and NN when they arrived at the farm sometime after the complainant, and therefore contradicts YN's evidence on the point, which I accept. He also denied having made a statement to the police, possibly because of a concern that it did not accord with his recollection. Nonetheless, his evidence confirms that the complainant had arrived at the farm in the early hours of the morning, breathing heavily and fast, seemingly unhappy and in shock and keen to draw the attention of the adults. Reporting of the incident occurred immediately thereafter and was confirmed, in his mind, when NN arrived, leaving him with a sense of shock. Leaving aside the presence of PN, that evidence accords closely with the complainant's version of events at the farm immediately after the incident, including NN's emotional state, and the presence of YN.

[57] YN was an excellent witness whose testimony was unshaken during cross-examination. NN had seen her sitting outside Lombo's tavern and reported the incident to her, taking her straight to Mr Ntakatsane's home. That the two would have proceeded there is understandable considering what YN had been told by NN, namely that the complainant was still at the shack being raped. Her conduct in proceeding straight to Mr Ntakatsane's dwelling, which is not disputed, supports her version as to what NN told her when they met, and NN's emotional state at the time. It must accordingly be accepted that that meeting occurred soon after sexual intercourse took place. YN's evidence is diametrically opposed to the suggestion that NN had consensual intercourse with Mr Ntakatsane and left to find the complainant. In fact she was running home in an emotional state and came across YN by chance. Her testimony supports the state's case that NN had left the dwelling while Mr Ntakatsane was still on top of the complainant. NN told YN that the complainant was still in the dwelling being raped, and they understandably decided to proceed there. Importantly, it was not disputed that NN had been with YN when Mr Ntakatsane opened the door to his shack to them sometime later, or that YN had enquired only about the complainant. This is a matter to which I will return. Considering the preceding events, and their concerns about their own safety, it is unsurprising that NN did not speak to Mr Ntakatsane at the time. YN's testimony also provides strong support for the complainant's evidence as to the sequence of events. That evidence,

which finds further support in the testimony of Mr Ncise, is that the complainant arrived at the farm before NN and her companions.

[58] As for NN's failure to testify, *S v Kelly*⁷ is authority for the proposition that the state has an unfettered discretion as to its choice of witnesses. At most it may result in an adverse inference being drawn in certain circumstances.⁸ Considering the testimony and professional opinion of Dr Flannigan, which I accept, it would be inappropriate to draw an adverse inference from the state's failure to call NN in circumstances where it must be accepted that she has been assessed as psychotic and unable to testify.

[59] Mr Ntakatsane vacillated as to his intentions when leaving Lombo's tavern. His version of meeting the complainants in the company of another man does not accord with the probabilities considering the evidence led as to the events that followed. Neither his real reason for supposedly visiting Madala with the complainants, nor the haphazard reference to Jazz tavern, where Madala may have been, was clarified. The inconsistencies in respect of the visit to Madala were palpable.

[60] Accepting in his favour that the complainants were keen to drink with him would explain why he visited Madala and tried to obtain liquor or money for liquor. But subsequent events fail to support that version. Even accepting that the closest tavern to Madala's home was Noblades, Mr Ntakatsane contradicted himself as to why the three had not proceeded straight to that tavern once they had received the money from Madala. Initially he blamed this on insufficient funds to drink with others at the tavern, later mentioning a desire to avoid both the complainants' boyfriends at Noblades. He also suggested that they had gone to his dwelling because he was tired. On his own version, subsequent events, including three rounds of sexual intercourse, gainsay that averment. His professed seriousness about a relationship with NN and alleged efforts to impress her by obtaining alcohol for her emerged during cross-examination and is unsupported by his conduct towards her after sexual intercourse, and his suggested consensual intercourse with the complainant.

⁷ *S v Kelly* 1980 (3) SA 301 (A) at 311A – H.

⁸ See *S v Teixeira* 1980 (3) SA 755 (A) at 764A – B.

[61] There are also apparent contradictions in respect of his familiarity with the complainants and their boyfriends, which is difficult to reconcile. While his version at one point was that he did not wish to proceed to Noblades in case he met the complainants' boyfriends, or at least NN's boyfriend, at another point he indicated that he only became aware of NN's boyfriend's identity later once he was alone with her in the dwelling and then asked her about the boyfriend's name. He subsequently indicated to her that he knew the person and they should keep their relationship a secret. By that time, he had already decided to avoid going to Noblades personally and had been happy for the complainant to purchase the alcohol for them. It follows that even on his own version, the boyfriend whose identity was unknown to him could not have deterred him from proceeding to Noblades instead of taking the complainants to his dwelling. The suggestion about inadequate money and not wanting to drink with others is nonsensical when assuming that the complainants were keen to drink with him, absent any concern about meeting a boyfriend at the tavern. The suggestion that he was tired after walking up the hill to his location is far-fetched considering his version as to his own subsequent conduct. Had that been the case, he would have been unlikely to have given the complainant money and a backpack to purchase alcohol or to have failed to object when she indicated that she would first visit friends. Had he in fact merely wanted to be alone with NN, to pursue a romantic interest, he would likely have behaved and communicated very differently towards the complainant. Had that really been the case, it is extremely unlikely that, tired as he was, he would have proceeded to risk having sexual intercourse with the complainant, having just had sexual intercourse with NN twice. Considering the time of night, and her youthfulness, the likelihood was that she would have quickly looked for the complainant at Noblades, five doors down the road, before returning. That aside, the inherent probabilities do not support the complainants willingly wandering alone in the area considering their age, the time of night and the fact that the adults would have been waiting for them to return with the items from the shop.

[62] The contradiction in Mr Ntakatsane's testimony with what was put on his behalf when YN appeared at the shack is also significant. His testimony that YN had been with an unidentified individual and had asked the whereabouts of both

complainants was an afterthought. In fact, accepting YN's evidence, as I do, she had been accompanied by NN and had enquired only about the complainant's whereabouts. There was no difficulty with that evidence when YN testified, counsel confirming her version that she had enquired only about the complainant and putting specifically that 'he told you he does not know where she is', to which the witness agreed. There can be no doubt that that version changed materially when Mr Ntakatsane testified.

[63] There are other, more minor difficulties in accepting his version. The suggestion that he knew the complainants and was used to them, yet did not greet the complainant by name, was contrived. Various matters, such as the use of the backpack, the direction from which the complainants had been travelling, the possibility that YN had heard from people in the street that he was with the complainants at his dwelling and the light in the dwelling, were not put to the relevant witnesses.

[64] In sum, Mr Ntakatsane's evidence was at times evasive and contradictory. On occasion, as reflected above, he tied himself in knots and the resultant evidence was incomprehensible and inconsistent. Absent a coherent and forthright explanation of events, it is unsurprising that he did not impress the court as trustworthy. His version of events was in many respects at odds with the probabilities. It may be added that his demeanour in the witness box, even bearing in mind the usual stresses and strains that a person would experience when testifying as an accused in court, was not that of a person speaking honestly.

[65] The cautionary rule that the evidence of a single witness must be clear and satisfactory in every material respect does not mean that any criticism of that witness' evidence, however slender, precludes a conviction.⁹ The exercise of caution cannot be allowed to displace the exercise of common sense.¹⁰ The court is entitled to convict on the evidence of a single witness if it is satisfied beyond reasonable doubt that such evidence is true, and notwithstanding that the testimony was

⁹ *R v Bellingham* 1955 (2) SA 566 (A) at 569, quoting *R v Nhlapo* (AD 10 November 1952).

¹⁰ *S v Sauls and Others* [1981] 4 All SA 182 (A) at 187.

unsatisfactory in some respect.¹¹ Before rejecting an accused's version on the probabilities, the court must be able to find, as a matter of probability, that the accused's version is simply not reasonably possibly true.¹²

[66] It is necessary to adopt a holistic approach to analysing the available evidence in this matter.¹³ In *S v Chabalala*,¹⁴ the Supreme Court of Appeal explained this as follows:

'The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper count of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.'

[67] That the complainant was a single witness who was a child at the time of the incident must be emphasised and the necessary caution applied. Despite the various shortcomings in the complainant's testimony, the court is satisfied that the complainant's evidence that she and NN were each raped once by Mr Ntakatsane at his dwelling was true. Despite NN's failure to testify, this is the consequence of the acceptance of the evidence of the complainant that she and NN were threatened with a knife and forced to accompany Mr Ntakatsane first to the bridge and then to his dwelling, where the complainant heard him raping NN before he raped her. On the accepted evidence, Mr Ntakatsane did not know NN and was not alone with her at any point on the night in question. Any protestations would have been muted given the presence of the knife, which I accept was shown to the complainants when they were accosted. This also explains why the complainant would have been unlikely to have thought to mention her family link with him. This is not to suggest that it is probable that the knife was always held at times when Mr Ntakatsane grabbed the complainants by their shoulders and inserted his fingers into them. It is apparent that by time they entered his dwelling it had been put away. By then, they

¹¹ *R v Abdoorham* 1954 (3) SA 163 (N) at 165, as quoted in *S v Sauls supra*.

¹² *S v Shackell* 2001 (2) SACR (SCA) 185 para 30: it is permissible to test the accused's version against the inherent probabilities, but it cannot be rejected merely because it is improbable. It can only be rejected based on inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.

¹³ *Van Aswegen supra*.

¹⁴ 2003 (1) SACR 134 (SCA) para 15. Also see *S v Dlamini* 2019 (1) SACR 467 (KZP) para 25.

had already submitted to him and been violated at the bridge. In addition, Mr Ncise's evidence that they had the appearance of children accords with the inherent probabilities and Mr Ntakatsane's suggestion to the contrary must be rejected. The complainant's evidence accords strongly with the mosaic of evidence presented by the state, and any doubts that exist as to what transpired are dispelled when considering the evidence in its totality. The assessment of the strengths and weaknesses of that evidence, with the necessary caution applied, reveals that the state has proved Mr Ntakatsane's guilt beyond reasonable doubt. On my assessment of all the evidence, and for the various reasons already advanced, his version is wholly improbable and cannot reasonably possibly be true. It must be rejected. The order to follow reflects that Mr Ntakatsane, despite his admission to the contrary in respect of NN, is only convicted of having raped each of the complainants once.

Order

[68] It is ordered:

1. Count 1: The accused is found guilty of the rape of NN, a 14-year-old girl, in that he had sexual intercourse with her per vaginam without her consent and against her will.
2. Count 2: The accused is found guilty of the rape of AN, a 15-year-old girl, in that he had sexual intercourse with her per vaginam without her consent and against her will.

Makhanda
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