

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: SS 20/2022

(1)	REPORTABLE: Yes/No
(2)	OF INTEREST TO OTHER JUDGES: Yes/ No
(3)	REVISED: Yes/ No
<u>11/10/2023</u>	
DATE	SIGNATURE

In the matter between:

THE STATE

and

MODIMOKWANE, DAVID MNCEBISI

JUDGMENT

BHOOLA AJ

Introduction

- [1] Section 1 of the Constitution of the Republic of South Africa¹ provides that South Africa is one, sovereign, democratic state founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms. Section 10 of the Constitution² which deals with human dignity provides that everyone has inherent dignity and the right to have their dignity respected and protected. Section 35(3) of the Constitution of the Republic of South Africa regulates with the rights of an accused person at a trial.³
- [2] Mr. Modimokwane, David Mncebisi, the Accused, was arraigned of the following crimes:
- a. five counts of rape⁴ in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA). Section 3 defines the offence of rape as “Any person (‘A’) who unlawfully and intentionally commits and act of sexual penetration with a Complainant (‘B’) without the consent of B is guilty of the offence of rape”
 - b. two counts of pointing something likely to lead a person to believe it is a firearm.
 - c. two counts of kidnapping and.
 - d. one count of assault with intent to do grievous bodily harm.
- [3] Advocate Serepo represented the State and Advocate Nel represented the Accused throughout the proceedings.
- [4] The defence explained that the accused was informed of the prescribed minimum sentence that apply in respect of the provisions of section 51 of the CLAA as applicable to the respective charges, the competent verdicts that

¹ Constitution of the Republic of South Africa, 1996.

² Constitution of the Republic of South Africa, 1996

³ Constitution of the Republic of South Africa, 1996

⁴ read with section 51(2) of the Criminal Law Amendment Act 105 of 1997 (“CLAA”)

apply thereto and the provisions in terms of section 103 of the Firearms Control Act 60 of 2000. The accused confirmed that these rights were explained to him he understood them. As an added measure, I explained the import, and implications of the penal provisions of sections 51(1) and 51(2) of the CLAA, as well as the importance of admissions in terms of section 220 of the CPA, which he understood.

The plea

- [5] The accused, pleaded not guilty the charges, and exercised his constitutional right to remain silent. Advocate Nel confirmed that the plea was in accordance with her instructions, and she did not tender any plea explanation on the accused's behalf in respect of counts one to eight. The Accused admitted to having sexual intercourse with the complainant in counts 9 and 10, and stated that it was only once, and it was lawful.
- [6] Various evidential material such as admissions in terms of section 220 of the CPA, direct, circumstantial, and documentary evidence were admitted into evidence. The precise and concise nature of the evidential material will be apparent from the judgment.
- [7] The court directed in terms of S153 of the CPA, that the proceedings in respect of each of the complainants was to be held in camera as it was evidence of a sensitive nature.
- [8] The State and the Defence called numerous witnesses. in total there were 15 witnesses who were called to testify.

Common cause, admitted, or evidence not in dispute

- [9] The following facts were common course on the basis that they were either admitted and or were undisputed:

- a. the identity of the Accused was never placed in issue in each of the counts.
- b. the dates and places where each of incidents occurred were as reflected in the indictment.
- c. except for Ms TM [...] (the second complainant) , Ms T [...] (the first complainant), Ms F [...] (the third complainant) and Ms K [...] (the fourth complainant) were known to the Accused prior to date of the incident.
- d. that the first and second complainants' drove the Accused's motor vehicle, after the alleged incidents: The first complainant drove the Accused's motor vehicle without his consent whilst he was asleep, and it broke down whilst she was driving it. The second complainant collided with the Accused's motor vehicle.
- e. that each of the four complainants were medically assessed and the findings were medically and clinically recorded in the respective complainants J88⁵ medico- legal reports.
- f. that there was no DNA⁶ evidence linking the Accused with the alleged rape charges in respect of the first three complainants and there was DNA evidence linking the Accused in the alleged rape charge against the fourth complainant.
- g. that whilst the first complainant was at Leratong Crisis Centre for medical examination, she received information from Sergeant Au about the Accused was reporting a case of theft of a motor vehicle against her. She did not continue with her medical examination on the same day and decided to go to the police station where the case was being reported because she was in possession of the key to the motor vehicle.

⁵ A J88 is a pro-forma legal document used by the South African Police Services (SAPS) to document and identify injuries), which is completed by a medical doctor or registered nurse in instances where a case is opened and investigation is undertaken by the SAPS.

⁶ DNA results are conclusive proof that there was sexual intercourse between the parties from whom the specimen was obtained.

- h. that the Accused owned 2 x PAK Blank Pistols, which was seized from the Accused's mother's house on the 11th August 2021, prior to his arrest and in his absence.

The Evidence

Count one: Ms T [.....] (first complainant)

[10] The evidence of the first complainant related to an incident which occurred on the 29th of January 2017, at or near Apple Street, Toekomsrus, where the accused unlawfully and intentionally committed an act of sexual penetration with Ms T[...], by inserting his penis into her vagina without her consent.⁷

[11] The first complainant testified that she was at her home in Extension 12, on the 28th of January 2017, with the Accused's wife and other friends, watching the Accused's wedding. The Accused came to fetch his wife and suggested that they all go out to celebrate the success of their wedding. They all left to go out. The Accused dropped off the first complainant at Tso's pub to secure a place for the Accused and his wife, whilst they went to Green Village to drop off their son. The Accused returned after 45 minutes, alone. He reported to the first complainant that his wife decided to remain at home. Hearing that, the first complainant informed the Accused that she could not stay with him alone and requested that the Accused to take her back home, which he agreed to. Enroute to her home, he went to fill petrol. He passed the turn to the first complainant's home when she enquired why was he not dropping her at home. He informed there was something he needed to collect from Randfontein and requested the first complainant to accompany him to collect it. Since the car was in motion and they passed her street, she agreed to accompany him. They reached a house in Toekomsrus, the two gentlemen that were unknown to her left the house. The Accused requested the complainant to enter the house so that they could wait for what he had come to collect.

⁷ Rape in terms of section 3 of SORMA, read with section 261 of the Criminal Procedure Act 51 of 1977 and further read with 51(2) of the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentence Act).

[12] The Accused switched of his phone and informed the first complainant that they were at the house to sleep. His voice was loud, and he was angry. The Accused pulled her bonded hair, slapped her with open hands on her face, pulled and dragged her by her bonded hair to the bedroom and threw her onto the bed. He instructed her to undress and informed her they were going to sleep. She retaliated by hitting him on his chest and using her hands to cover her face to ward of the blows. She eventually gave up and the Accused undressed her. He pulled down her trousers and removed her underwear. She was menstruating at the time and pleaded with him to stop. He informed her that it was not the first time that he saw blood. He requested her to split her thighs and she said she could not, and at that stage he had already removed his jeans. He split her thighs and penetrated her by inserting his penis into her vagina. Thereafter he made thrusting movements and she was unable to say whether he ejaculated or not. He had non- consensual sex with her once. He then ordered her to sleep, and he fell asleep. She did not sleep, put her clothes on and sat on the bed until it was morning.

[13] At dawn, the two males returned. She did not report the rape to them because she was scared and shocked thinking that they may gang rape her. She requested them to take the Accused's vehicle out of the yard. Thereafter, she drove the car because she wanted to go home. Whilst driving at Extension 12, the car broke down. She locked the motor vehicle and took a taxi to her ex-boyfriend Mr. KM [...]. She reported to him that the Accused raped her from the beginning to the end. They both went to Kagiso police station where she reported the incident to Sergeant Au, who then took her to where the car was parked. They left her ex-boyfriend there to watch the car and Sergeant Au took her to Leratong Crisis Centre for a medical examination. Whilst she was talking to the nurses, explaining what had happened, Seargent Au received a call from the police station informing him that the person he was looking for was at the police station and he was there to lay a charge of car theft. She requested Sergeant Au to take her to the police station to give the Accused the keys to his motor vehicle which was in her possession, and they will return to the hospital for the medical examination.

- [14] When they arrived at the Kagiso police station they found the first complainant's mother, the accused's mother, the Accused's wife, and her x- boyfriend Mr. K [...] present. Everybody wanted to know what had happened. Both the Accused and the first complainant reported their versions to the family. She gave the Accused his car keys, explained to him that the car did not start, and that she will pay for the damages. According to the first complainant her mother and the accused's mother requested to meet the following day to understand what had happened. The Accused's mother said she will come to their home, and she did not come. Because she was hurt, she concluded that she would go to the hospital whether the families meet or not. According to the first complainant, the Accused corroborated her version that he returned to Tso's pub. He wanted something from Randfontein and did not want to go alone. Sergeant Au asked if he slept with the first complainant, and he apologised saying he was sorry.
- [15] She only went to Leratong Crisis Centre on the 30th of January 2017 because she was tired, and her trousers was blood stained. The medical examination was held in an office. She took a bath before the examination because of the blood on her and the fact that she had an awful smell. She gave the nurse the panty liner she had on, on the night of the incident. She was given tablets and returned home. Sergeant Au was called and informed that a case had been opened.
- [16] Under cross- examination what was relevant was that before going to Tso's place, the first complainant and the Accused's wife consumed alcohol prior to leaving her home, she consumed two glasses of wine. They did not go out to buy the alcohol, it was brought by the Accused's wife. The Accused did not consume the alcohol that they were drinking he came with a can of alcohol. She did not know the area where he had taken her to. When she drove back with his car, she followed the taxi route.
- [17] Mr. KM, who testified as first report, and was the ex-boy-friend of the first complainant. He corroborated the evidence of the first complainant regarding the chronology of the events reported to him. He also observed the first complainant was unhappy and scared.

[18] Under cross-examination he confirmed the complainant did not inform him that she consumed alcohol at her home prior to going to the pub. His testimony was that the complainant testified that she objected to be taken along to Randfontein, but the accused insisted that she goes along with him. He also recalled that the complainant informed him that the accused assaulted her by pulling her by her hair and there was no other form of assault.

[19] Ms Refiloe Joyce Chabalala, testified that she was a professional nurse based at Leratong Crisis Centre with extensive training and she saw an average of about 50 patients in a month. She examined the first complainant on the 30 January 2017 and recorded her findings on a J88, marked Exhibit "J." According to her, the first complainant was traumatized, and no history of alcohol could be found. She testified that the fact that the complainant bathed and was menstruating may have removed any traces of semen. She concluded that the gynaecological examination was normal, and that it did not exclude sexual penetration because sexual penetration does not always cause injuries. She explained that even forceful penetration may not cause genital injuries in instances where a woman had previously given birth. She testified that once a woman gives birth the orifice becomes roomy, and penetration can happen without causing injuries. She elaborated further that the orifice is naturally wet, thus providing lubrication which may alleviate injuries. According to her, she testified that the menstrual blood from complainant provided lubrication hence no injuries were caused. She collected samples and exhibits for DNA purposes from the complainant's genital area. The Accused in this matter was not linked by DNA.

[20] During cross-examination she confirmed the complainant informed her she was only being pulled by her hair and head and the injury on the knee was sustained whilst she was being pulled. During cross-examination she confirmed the complainant informed her she was only being pulled by her hair and head and the injury on the knee was sustained whilst she was being pulled. She conceded there were a few mistakes or omissions on the J88.

Counts 2 and 3: Ms TM [...] (Second complainant)

[21] With regard to the second complainant, and according to count two, the State alleged that on the 13th of April 2021, and at or near Street, Lewisham, Kagiso 1, the Accused did unlawfully point anything likely to lead a person to believe it is a firearm or an antique firearm or an airgun at Ms TM without good reason to do so. In count three, the State Alleged that on the same date and at the same place as alleged in count two the Accused, contravened section 3 of SORMA by unlawfully and intentionally committing an act of sexual penetration with Ms TM [...], by inserting his penis into her vagina without her consent.⁸

[22] These two counts arose from an incident on the 13th of April 2021, when the Accused called her to spend time with him. The Second complainant testified that she and the Accused had previously met each other for the first time on the 4th of April 2021 at a tuckshop in Kagiso. Prior to the incident she went out with him once at his cousin's place in Lewisham. When he called her, she informed him that she did not like the way he behaved when he was drunk, and he promised to behave. The first time they went out he tried to touch her inappropriately and tried to kiss her. He picked the complainant up from her parental home in the afternoon and they consumed alcohol on the street next to Mr. Siboku Ndaba's place. She consumed two 750 ml of black label beer. She drank one and the other remained in the motor vehicle. The accused bought the beers. He consumed two 750ml of Castle Light. The status of their relationship was that the accused was courting her, and she was interested in him. At all material times the second complainant was not drunk and could appreciate her surroundings. Around 15h40 on the same day, she requested the accused to take her home as her father would be returning home from work at 16h00 and he did not have any house keys on him. The accused had no problem taking her home. They got inside the motor vehicle and drove off. Enroute, whilst, the motor vehicle was in motion, the Accused requested that they pass by his cousin Mr Sibuko Ndaba's house first, as he wanted to have sexual intercourse with her once. She reminded him of her earlier warning about him previously making her feel uncomfortable and his promise not to do

⁸ read with section 261 of the Criminal Procedure Act 51 of 1977 and further read with 51(2) of the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentence Act).

so. He continued driving to the cousin's house. According to the second complainant, she did not agree to engage with him sexually. The Accused had earlier that day collected his "firearm" from his cousin's house. She described the firearm as black and approximately 20 cm. He placed the firearm in the door panel. She was certain it was a firearm, and she was he left it inside the vehicle when they were consuming alcohol.

[23] At the cousin's house, she removed her flip flops and requested to use the toilet. After using the toilet, she requested the Accused to take her home. The Accused ordered her to get inside the bedroom and undress. She refused, and that was when the Accused slapped her once with an open hand on her left cheek. She devised a plan to run away by sending him out of the house to light a cigarette and fetch a beer from the car. She was heartbroken at that stage. Only she and the Accused were in the house at that stage. When he went to the car, she went to the dining room and hid herself behind a sofa. When he returned to the house, she managed to run out of the house. There was no one on the street when she ran out looking for help. At the curve, she saw a tent and hid herself in it. Whilst in the tent, she saw him driving past, pursuing her, in possession of the black firearm.

[24] When he passed her, she quickly returned to the house to retrieve her cell phone which fell as she was running away. She found Mr Siboku Ndaba inside the house. She asked him about her cell phone, and she did not find it. After looking for her cell phone, she then went to the next-door neighbour to ask for assistance. While at the neighbours, the Accused returned and pointed her with the same firearm he fetched earlier at the back of her head. She was less than a meter away when she turned and saw it was a firearm. According to her he was upset that she ran away therefore he pointed her with the firearm, She was scared. He ordered her back to the house. She was frightened that he might shoot her as she could hear he was angry as he shouted at her. He made her walk in front and he was behind her.

[25] He took her to the cousin's house. The cousin followed into the house, but he did not enter the bedroom. He took her to the bedroom, placed the firearm on the dressing table, he undressed himself and then ordered her to undress. She

was wearing a pair of jeans and a top. She undressed by removing her jeans because she was frightened of the firearm. She complied with all his instructions because she was scared that he may shoot her. He pushed her onto the bed, she fell on her back, he removed her underwear. He penetrated his penis inside her vagina whilst he was shouting at her saying he must look for her up and down, that she pretended she did not want to have sexual intercourse, yet she wanted to. When she was in a supine position, the Accused opened her legs, and she offered no resistance because he assaulted her and placed the firearm on the table. After he penetrated her, he was thrusting inside her vagina, without wearing a condom. She lay there waiting for him to finish. He ejaculated inside her, got of the bed and got dressed. He penetrated her only once without her consent. After the intercourse he took her home. Enroute to her house he apologised and said that he loved her. He returned her cell phone. She was overwhelmed with emotions. She went into her father's room, took the pills, and attempted suicide by drinking an overdose of tablets. She was angry at herself because if she had come home early most of the things would not have happened. She could not bear the thought of telling her father what had happened. She was ashamed to tell him.

[26] After taking the pills, her friend Ms L [.....] (to whom she made a first report) arrived at her home and could see that she was not okay. She requested to know what was wrong. She reported to her on the same day of the incident that the Accused phoned her, she spent time with him, and he forcefully slept with her. She could not recall how many times she was raped but she told her about the assault and the firearm. She also told her she drank a lot of tablets because the accused raped her. Ms C reported what had happened to her mother that was when the police were called, and she was then taken to Pedekraal hospital for treatment of the overdose of tablets. At the hospital, she slept for a few hours. During the early hours of the 14th of April 2021, she was taken to Leratong Crises Hospital to be examined and was then taken back to Pedekraal hospital. She was examined by a male doctor. Dr Hasan. She reported to him that there was a person who slept with her without her consent. She did not sustain any injuries from being slept. She did not give the Accused permission to point her with a firearm. she was raped but did not report to him

that she attempted to commit suicide because he had asked her why she attempted suicide and she informed him that she was raped. She sustained no injuries due to the slapping or assault. A weeks later, she filed a withdrawal statement because the police officers were struggling to find the Accused so she could point him out. She lost hope that they would not find him, he ran away, and they did not know his whereabouts. She subsequently re-instated the charges after the investigating officer approached her. She was not forced to re-instate the charges.

[27] Under cross- examination she testified that on the first occasion when she had gone out with the Accused and he requested to have sexual intercourse with her, she refused, and the Accused left it at that. She could not identify the address where the incident occurred. She conceded that the understanding was that they were going to Mr. Ndaba's place solely for the purpose of having one round of sex and the issue of going to the toilet only arose when they reached the place. She was also confronted about if the accused was naked why did not, she see the tattoos on his body she had no answer to the question. When confronted with the contradictions in her statement marked annexure "C" she conceded amongst other things that she shouted for help as she ran down the street, the cousin tried to stop the accused but was pushed by him, she did not mention that she was slapped by the accused or that he removed her panties in annexure." C" According to exhibit "D" in her withdrawal statement she mentioned she was raped about 15h50.

Ms. C [...]’s evidence

[28] Ms C [...] a friend and neighbour, who was the first report to the second complaint corroborated the evidence given by the second complainant’s version of her demeanour at the time when the second complainant reported to her that the Accused raped her. According to her testimony, the second complainant was angry, visibly upset and crying. She corroborated the second complainant’s version regarding the presence of the firearm, that the Accused assaulted her with open hands, the trick she employed trying to escape and the

fact that the second complainant informed her that she consumed a lot of tablets. She testified that she saw the boxes of tablets in the kitchen. According to her the second complainant became hysterical, so she reported the matter to her mother. An ambulance was called, and complainant number two was taken to hospital. She denied ever meeting the accused before the incident. Nothing of relevance turned from the cross examination.

[29] Dr Hasan who was the medical doctor testified he obtained his MBCHB degree in 1994 at the University of Natal. In 1997 he obtained his qualification in gynaecology and obstetrics from Dublin. In 2000 he obtained a diploma in HIV management from the college of South Africa. He was not permanently based at Leratong Crisis Centre. He only went there when he was on call. He examined about two to three patients per week on average when he was on call. On 14 April 2021 he examined Ms T [...] at Leratong Crisis Centre and recorded his findings on a J88, marked Exhibit "M." He found no physical or genital injuries on the patient. She reported that she was raped by a known male on 13 April 2021 at Kagiso. He concluded that there was no clinical evidence of forceful penetration. However, from exhibit "M", the doctor in the genealogical examination, under the schematic drawing of findings noted a slight semen like discharge. He concluded that despite the fact there was no forceful penis penetration into the vagina, this did not exclude the alleged rape. DNA samples were collected as per PW300093353320D1AC2080. The findings as per exhibit "O" was that not enough male DNA could be obtained from the exhibits.

[30] According to Dr Hasan, whenever a woman is penetrated forcefully, she will sustain injuries. He testified that when a woman is an unwilling participant to a sexual intercourse her genital area will be dry. He expressed his opinion that due to the lack of injuries he was of the view that she was a willing party to the intercourse. He testified if the woman was not aroused, there will always be injuries to the floor of the vagina. He maintained if a female does not want sex, she will have "vaginismus" and the opening will be constricted and cause injuries.

Counts 4 to 7: Ms F [...]’s evidence

[31] With regard to the third complainant the State proffered the following four counts against the accused:

- a. In count four, the State alleged that on the 10th of August 2021 and at or near Kagiso, in the district of Mogale City, the Accused did unlawfully and intentionally deprive Ms F [...], of her freedom of movement by forcefully taking her to Protea Glen in Soweto.
- b. In count five, the State alleged on the date in count four and at or near Protea Glen, in the district of Johannesburg Central, the Accused did unlawfully and intentionally assault Ms F [...] by tripping her and or hitting her with fists and or kicking her and or hitting her with open hands and or hitting her with a firearm and or similar object, with the intention to cause her grievous bodily harm.
- c. In count six the State alleged on the date and place mentioned in count five, the Accused did unlawfully point anything likely to lead a person to believe it is a firearm/ an antique firearm or an airgun at Ms F [...] without good reason to do so.
- d. In count seven, the State alleged that the Accused contravened section 3 of “SORMA”, in that on the date in count four and place alleged in count five the Accused, did unlawfully and intentionally committed an act of sexual penetration with the third complainant, by inserting his penis into her vagina without her consent.

[32] The third complainant testified that these charges arose from an incident that occurred on the 10th of August 2021, when she was at Shisanyama tavern in Kagiso, around 12h45 in the company of her friends, where they were consuming alcohol. The Accused, who was unknown to her approached her at Shisanyama about past two during the day. On his arrival he gave her his car keys and informed the people in her company that she was his girlfriend. She took the keys and went with him to his car to have a private conversation with him. She did not find this to be strange behaviour as most people were friendly to each other. She

also saw this as an opportunity to get a lift home as she was intending to go home as she left her children behind.

[33] As he was driving, she gave him directions to her home. To her dismay, he took a different direction and sped off with her. She pleaded with him to take her home to no avail. He was silent and then on the way he pulled out a firearm from the right side of his motor vehicle and started shooting in the air, outside the motor vehicle. She described the firearm as silver grey and about 20 centimetres long. She was frightened. The witness was very emotional and broke down in court during her testimony. She pleaded with him to take her home, he said she must relax as they were going home to exchange the motor vehicle. He took her to his parental home in Kagiso 1.

[34] He informed her his mother was at home. She requested to use the bathroom so that she could report the incident to his so that she could help her. She was still very shocked and frightened because the firearm was in a working condition. She wanted his mother to take the firearm away from him so she could run away. They both entered the house. His mother was in the kitchen. He introduced her to his mother as his girlfriend. As a result of the presence of the firearm, she shook her head in denial to his mother and did not speak loud as she was afraid of the firearm. The accused then went into a room and returned with another black firearm the same size as the first one. He placed both the firearms on the table. He had an argument with his mother about the firearms. His mother took the firearms and hid them. At that stage she walked out of the house on the street and the Accused followed her.

[35] He grabbed her and pulled her back into the yard. He demanded his firearms from his mother, but she did not give them to him. He then took the third complainant and put her inside the car. He reprimanded her to stop behaving like a child as she was his girlfriend. He returned inside the house to fetch his firearm. At that stage it was not possible for her to run away as the car was parked too close to the gate. He returned with both his firearms and drove with her to Soweto in Protea Glen. He drove around the location until he stopped at a certain house and informed her it was his parental home in Protea Glen. It was dark at this stage, and it was estimated to be around 19h00. The Accused alighted from the vehicle to open the

gate. She requested him for a cigarette to smoke so that she would not get inside the house. He gave her the cigarette and she stood on the street. While the Accused was parking the vehicle in the yard, two boys went past. She requested them to help her and informed them she was kidnapped and that he may cause her harm. They pulled her and tried to run away with her. However, the Accused chased after them, he was in possession of his firearm, so the boys left her and ran away. He tripped the third complainant and she fell to the ground.

[36] Whilst on the ground, the Accused assaulted her with the back of a firearm on her chest, on her left hand because he tried to strike her face and she blocked it with her left hand. He continued to kick her with booted feet on the right side of her ribs. He slapped her with an open hand on her right cheek whilst she was on the ground. She did not retaliate but kept on apologizing to him asking for forgiveness and saying she was sorry for running away with the boys.

[37] She sustained the following injuries: pain on her chest and was bleeding on her hand. He took her by her hand, and pulled her into the yard, inside one of the backrooms. There was no one in the main house it was dark, and the doors and burglar gates were closed. She asked him for the bathroom, and he refused. She asked him for water, and he went out to fetch it. She removed the key from the door and threw it under the couch to prevent him from locking the door.

[38] On his return to the room, he enquired about the key for the room. She told him that she did not know where it was. He looked for it without success. He ended up blocking the door with the couch. He undressed totally naked and went inside the blankets. She was seated on the couch, and he ordered her to join him, but she refused. He was angry. He approached her and slapped her on the left cheek. After being threatened by leaving the black firearm on the table, she apologised and went to sleep. She only removed her shoes and went inside the blankets with her clothes on. He told her she was provoking him as she went into the bed with clothes on. She then undressed herself naked and complied with his instructions as he was angry. At this stage she did not know where the silver firearm was, but the black firearm was on top of the table nearby. He climbed on top of her, and he inserted his penis inside her vagina without her consent. She was lying on her back in a supine position. She asked him to stop because she was dry and that they can

continue to try tomorrow. He used his tongue and saliva to try and lubricate her. Thereafter, he penetrated her again. At some point she managed to convince him to stop. That was before he could ejaculate. She assured him that they were a couple, and they would have sexual intercourse the following day as she was his girlfriend and will even go out on a date. She said this because she realised the firearm was inside the house and she was scared. She did not want him to harm or kill her. She wanted to get out of there safely. She did not want to engage in sexual intercourse with him.

[39] They left his home and drove back to Kagiso. Along the way she opened his cubbyhole and saw his names Mncebisi David Modimokwane on his driver's license. She directed him to Mr. M's [...] residence because she did not want him to know where she lived. They left at around 21h00 and they arrived at Mr. M's [...] place around 21h30. As soon as she entered the house, she requested him to write down the Accused's name David Mncedisi Modimokwane. She reported to him that the accused kidnapped and raped her at a house in Kagiso 1, in Protea Glen. They looked on Facebook to clarify who he was. She made a full report to Mr. M from the beginning to the end. She could not remember everything she told Mr. M on that day of the incident because she was still frightened and wanted him to take her to the police station. She also could not remember everything she told him subsequent to the arrest. She did not consent to any of the offences that was committed against her. Mr. M [...] then drove her to the Kagiso 2 police station to report the incident and to take her home.

[40] She was subsequently taken by a police officer to be examined at Leratong Crisis Centre. She was examined by Nurse Joyce Chabalala. She showed the sister her injuries. She had severe pains on her chest, she had a headache, her left hand was hit with a firearm and her left fingers and chest were swollen. She was given medication. She had a scar on the middle left finger. The scar on the middle finger was seen and measured to be 1cm long by 0,5mm wide. Two police officers arrived at the hospital and took her to Krugersdorp police station. From there she took the police officers to Kagiso 1 where the Accused's mother resided.

[41] The officers went inside the house, and they returned with two firearms together with the Accused's identity document. She identified the firearms as those which

the Accused possessed during the incident. While she was seated inside the police vehicle, she saw the Accused driving past his home. She identified him to the officers, whereafter he was chased and arrested.

[42] Under cross- examination the witness testified that that the Accused discharged numerous shots as opposed to one shot when she testified in her evidence in chief. It also became apparent that they stopped at a second tavern that evening, this was not mentioned in her evidence in chief. The witness was confronted with her statements marked exhibit "G" and "H" and the discrepancies raised in the statements

Mr. M [...]’s evidence

[43] To prove consistency, the State led the evidence of Mr. M [.....] who was the first report and friend of the complainant. Corroborating the third complainant, he testified that the third complainant arrived at his place crying and reported she was raped by the Accused, David Modimokwane. According to him she saw his name on his identity card or driver’s licence in his car. In essence, his testimony corroborated the third complainant’s narrative of what happened. He also testified that when the Accused applied for bail, he was on duty at Kagiso Magistrate’s court as a stenographer. He informed the Court that he was the first report in the matter. He left the court; a discussion took place amongst the parties involved. Shortly thereafter he was called back in, and the bail application continued in his presence. He confirmed that at the time of the bail application his statement had not yet been obtained by the police. However, what was written in his statement was what he recalled the third complainant reported to him.

[44] During cross- examination, he conceded that his statement was made long after the incident was reported to him and after he heard the evidence that was presented in court at the bail application. The issue regarding the accused full names was also raised during cross-examination that he was aware of it from the Court proceedings. He testified that the issue relating to them vising the second tavern was not mentioned to him.

- [45] Nurse Refiloe Joyce Chabala testified she examined the third complainant at Leratong Crisis Centre on 11 August 2021 at 15h19 and recorded her findings on a J88, marked exhibit "K". She testified that when she conducted the medical examination, she observed physical injuries on the third complainant's body which were consistent with the history of physical assault that the third complainant gave to her. She also found bruising and tenderness on her chest, both hands and shoulders and a linear laceration on her left hand. The gynaecological examination revealed extensive fresh abrasions on her posterior fourchette and vestibule fossa navicularis. These injuries were consistent with the history of a traumatic sexual assault. She collected DNA samples from her genital area. The accused did not use a condom nor was any lubrication used. The accused was not linked by DNA forensics.
- [46] Warrant Officer Nthebolang Petrus Lenone testified that he was a ballistic expert. He examined the accused's blank pistols. Both pistols had magazines which loaded blank cartridges. He did not find any cartridges in those magazines and could not say whether any blank cartridges were fired from those pistols. He testified that when he fired those pistols, they produced the same type of sound as a real firearm. Section 220 admissions were made regarding the firearm.
- [47] In substantiation that the firearms belonged to the Accused, Section 220 admissions were made as per exhibit "R." The accused admitted that the two objects resembling firearms which were confiscated upon the accused's arrest on the 11/08/20021, were the same objects referred to in the section 212 statement of Mr. Lebone marked exhibit "Q1," a ballistics expert who conducted a firearm mechanism examination and concluded both the firearms he examined were not firearms as contemplated in section 5 of the Firearm Control Act 60 of 2000. They were not designed, manufactured, or modified to discharge ammunition. One of the firearms resembled a 9mm parabellum calibre Smith and Wesson model M&P9 semi-automatic pistol and the other firearm resembled a 9mm parabellum calibre CZ model 75B semi- automatic pistol.

Counts 8 to 10: Ms. K [...] (fourth complainant)

[48] The Accused faced the following three counts in respect of the fourth complainant. In count eight, the State alleged that on the 8th of September 2021 and at or near Kagiso, in the district of Mogale City, the Accused did unlawfully and intentionally deprive Ms K [...] of her freedom of movement by forcefully taking her to Green Village. In counts and ten the State alleged that on the date and place alleged in count eight, the Accused, contravened section 3 of SORMA where he unlawfully and intentionally committed an act of sexual penetration with Ms K [...], by inserting his penis into her vagina without her consent.

[49] The fourth complainant testified that she knew the accused prior to the date of the incident as they had previously met in 2021, where they exchanged contact numbers. She knew him three months prior to the incident as they had previously dated. At the time of the incident, the Accused was proposing a love relationship to her which she rejected. The charges arose from an incident which occurred on the 9th of September 2021 at 08h00 in Zulu Jump in Kagiso. The fourth complainant was coming from her boyfriend, and she was on her way to the Spaza shop. She saw a silver vehicle behind her. She looked at the vehicle and noticed that the Accused was inside. He ordered her to get inside the motor vehicle, in a "cheeky manner" and threatened to kill her if she refused to do so. She was afraid of the Accused and complied with his instruction.

[50] He took her to an outside room in Green Village, locked the door and left the key hanging on it. He informed her he wanted to engage in sexual intercourse with her. She did not respond because she was afraid of him as she at some stage heard he was in possession of a firearm. She complied with all his instructions. He ordered her to undress, and she removed her trousers and underwear. She got into the bed. The accused undressed, got on top of her, and penetrated his penis inside her vagina without a condom while she lay on her back. She was crying during the intercourse. He ejaculated inside her,

retreated and informed her that he was not done with her. He wanted another round after a nap. About 30 minutes later he woke up and ordered her to insert her finger inside his buttocks to get an erection. She complied and he did get an erection. He then requested her to kneel on the bed and he penetrated her vagina again with his penis from behind until he ejaculated. She cried once again. The accused was rough with her, he hurt her she told him so, but he did not care.

[51] After the intercourse he dropped her off at Chamdor, close to her home. She went to her boyfriend's place and did not tell him about the incident because she was scared and confused. When he asked her where she had been, she informed him she was with her friends. The following day she called her sister Ms N [...] and reported the incident to her. She told her that she was coming from a shop when the accused threatened to kill her. He took her to Green Village where he raped her. Ms N [...] reported the allegations to their brother and he went with her to the police station to report the incident. From the police station she went to Leratong Crisis Centre for a medical examination. On the 10th of September 2021 while Sergeant Mphiko interviewed her at Kagiso police station, she saw the accused walking past and identified him to Sergeant Mphiko as the perpetrator of the rape against her. Sergeant Mphiko went inside the police station and arrested him.

[52] During cross examination, it was contended that on the date of the incident, her the boyfriend did not go to work as usual. He was at home when she went to the Spaza shop at 08h00. He was at home when she returned at about 11h00 and she misled him that she was with friends. She did not report to him that she was raped. Furthermore, she did not initially tell the police that she knew the accused and that they had previously dated. She testified the accused did not threaten her in the room, she did not inform him that she did not want intercourse or tried to stop him. It was only in cross examination that she averred that she tried closing her legs. After the first round of sex she cried, the Accused did not threaten her and whilst the Accused was asleep, she remained naked as he informed her, he was not satisfied, and he wanted a second round of sex. She also confirmed the presence of an elderly gentleman seated

outside but she did not seek any help from him. She also conceded that Accused spoke to this gentleman whilst she entered the room on her own and she did not at any stage attempted to flee. She conceded that the key was left on the door when the accused was asleep. She testified that the Accused did not threaten her, she did not tell him she did not want sexual intercourse and neither did she try to stop him. During cross- examination her testimony was she only cried after the sex when the Accused was asleep. According to the complainant's statement marked exhibit "E" she was coming from the shop; the Accused's car was parked at the side of the road and the Accused was outside the yard. As she was passing the car, he called her in an aggressive manner and he told her to get into the car or else he would kill her, which she obliged.

Ms N

[53] Ms N [...] testified that she was the fourth complainant's sister. On the 9th of September 20021, she received a phone call from the fourth complainant, and she wanted to speak to their brother Joseph. However, Joseph was not at home. The complainant then made a report to her that she had been raped by a man who previously pointed children with a firearm. She could hear from the tone of the fourth complainant's voice that she was heartbroken. She requested that the fourth complainant to return home. When she returned home, she reported to her that she met the Accused on her way to the shops, he threatened her with a firearm and ordered her to get inside his motor vehicle. He took her to Green Village where he threatened to shoot her and himself if she refused to have sexual intercourse with him. He raped her but she did not specify how many times he raped her.

[54] During cross- examination, he conceded that his statement was made long after the incident was reported to him and after he heard the evidence that was presented in court at the bail application. The issue regarding the accused full names was given to him by the fourth complainant also raised during cross-examination. He testified the issue relating to the fourth complainant and the Accused visiting the second tavern was not mentioned to him.

Nurse Refiloe Joyce Chabalala

- [55] She testified that she was the nurse who examined the fourth complainant on the 10 September 2021 at Leratong Crisis Centre and recorded her findings on the J88, Exhibit "L". The fourth complainant reported to her that on the morning of the 8th of September 2021 she was abducted from Kagiso to Green Village by a man who was known to her. He sexually penetrated her without her permission and released her during the day. The perpetrator threatened to kill her with a firearm if she did not cooperate with him. He did not use a condom during the intercourse. Her clinical findings recorded was that there was no history of physical assault, no history of physical injuries and no physical injuries seen. Her conclusion was that normal genealogical findings did not exclude sexual assault.
- [56] Section 220 admissions as per exhibit "F" were made in respect of count 9 and 10 whereby the Accused admitted that on the date and place, he engaged in sexual intercourse with the fourth complainant. The Accused admitted the chain evidence and that a DNA sample that was collected from him and the complainant and admits the results of the said DNA as contained in exhibit "F" by WR Morojele in terms of section 212 of the CPA. Additionally, the Accused admitted that his DNA matches the results obtained.
- [57] During cross- examination, she testified that she did not note what the victim explained concerning how the physical assault occurred. She was unable to say whether the victim mentioned she was actually assaulted with the firearm or threatened with it. She recalled that the victim informed her that the incident took place during the day, and she could not comment on the age of the injuries. Her professional opinion was that a woman's vagina can accommodate any size of penis, and even during rough sex or vigorous sex, no injuries will be seen if the woman is ready or lubricated or had children. She however conceded that she made mistakes and omissions on the completion of the J88.

The Accused version

[58] Except for count nine and ten the Accused's version was a bare denial. The Accused made section 220 admissions as contained in exhibits "F" and "R."

Count 1

[59] The Accused testified that the first complainant was known to him. He went to her parental home to collect his wife on the night of the 28th of January 2017. According to him, the complainant approached him to take her out. He returned to the pub to pick up the first complainant. He informed her that he was going to Randfontein, and she insisted on going with him. On the way, the first complainant touched and kissed him in the car. She made derogatory comments about his wife, and how stupid he was for marrying her. At about 21h30 to 22h00 they arrived at his uncle's house in Mohlakeng. The complainant walked into the house on her own. There were other people present, they all drank alcohol and played music. He felt tired and told her he was going to sleep. She remained with the other men. He denied having had intercourse with her.

[60] Upon waking up in the morning, he was informed that the first complainant had left with his vehicle. He took a taxi to her house to find out if his car was there. He left informing her mother that the first complainant had taken his car without his permission, and that he was going to open a criminal case against her. He took a taxi back home and collected a different car and then he went to the South African Police Service (SAPS). He spent a lengthy time at the police station "opening the case" and he also left to go and see if his vehicle was at Extension 12. Upon his return to the SAPS, Sergeant Au was with the complainant. The Accused testified that their separate "cases or complaints" were not pursued on that day, due to the complainant informing him that she

will pay the damages, and the families were to speak to each other, He denied having raped the first complainant. He was not arrested on that day but only charged with this matter on the 20th of February 2017 by Seargeant Au, who obtained a warning statement as per Exhibit "S", which corroborated his oral testimony.

[61] During cross- examination, the State contended that it was not put to the fourth complainant that he knew her longer than five months and his response was he did not instruct his Counsel on that issue as he believed he would testify about the issue. According to him, he took the complainant's physical touching as indicative of her being interested in him and a possible romantic relationship. He remained firm that she was not arousing him or "throwing herself at him". He admitted that his version of him and the other people going to buy alcohol at "Killers Tavern" was never put to the first complainant. He disputed that the first complainant went from Mohlakeng straight to her boyfriend's place. According to the Accused, there was in his mind no need for the first complainant to commit an offence by taking his car, but he could not explain why she saw it necessary to do so. The Accused testified that e saw the first complainant had bloodstains on her back portion and that her hair was lose or untied. He also did not dispute that she had abrasions. According to him, he was the first to report the incident to the SAPS.

Counts 2 to 3

[62] The accused testified that he and the second complainant knew each other and had dated prior to the date of the incident. They differ on when they met and how many dates they went out. His version was that on the 13th of April 2021 he met up with the complainant and they ultimately went to a pub called Bombers. They drank alcohol and the complainant smoked weed. At about 15h30 or 15h35 the complainant requested of him to take her home as her father would arrive from work at 16h00 and she had the house keys. He agreed that they would return to the pub. Each one of them had a beer upon leaving and they took it along. On the way to her home, the complainant informed the

Accused that she needed to use a toilet and he stopped at his cousin Mr. Sibuko Ndaba's (Mr. Ndaba) house. He denied having requested the complainant to have sexual intercourse with him enroute to Mr. Ndaba's place.

[63] Upon entering his cousin's house, he found his Cousin Mr. Ndaba present. Whilst they sat in the lounge the complainant used the toilet. Mr. Ndaba went to the next-door neighbours. The complainant came and requested to use his cellular phone and he said that he did not have any airtime. It was already 15h45 and they had to leave. The Accused insisted that they should first finish their drinks. The complainant went outside. He waited for four to five minutes, then he went looking for her. He found her next door with the neighbour Mr. Tseki. Mr. Ndaba informed him that the complainant told them that the accused did not want to take her home, he denied that, and they left amicably.

[64] Along the way the second complainant complained about his driving. She took over the driving but ultimately bumped into a stationary vehicle of which the driver was one "James". This caused trouble between him, and the second complainant and she ended up offering to pay the damages caused to "James" motor vehicle. Eventually, he took the complainant home. He denied having assaulted or threatened the complainant or having sexual intercourse with her at all. He denied being in possession of a firearm or any other weapon on the day. He denied pointing of something likely to lead a person to believe it was a firearm.

[65] Under cross- examination, the Accused testified that he did not go to Ndaba's place prior to visiting the pub, he only went there afterwards. He could not explain how the second complainant gained knowledge of him having a black pellet firearm. According to him, the problems only started when he drove "roughly", and it became worse when the complainant lied and said she could drive and then bumped his car. The second complainant accused him of not caring for her and he left her not being "in a good state." There was no discussion on their relationship at that stage. The accused again confirmed calling her twice after the incident. He only spoke to her on the 14th of December 2021 and that was when she told him to leave her alone if he knew what was good for him. He was asked if he thought the complainant laid false

charges against him as she was not willing to pay the damages to “James” motor and he answered that he could only guess or speculate on that.

Counts 4 to 7

[65] The Accused testified that on the day of the incident, he went to Shisanyama at 17h00. The third complainant came to him they did not know each other. He had no interest in pursuing any relationship with her. He denied telling people that she was his girlfriend and denied giving her his car keys or agreeing to take her home. She requested him to hang out with them at Shisanyama and requested him to buy her a beer. When the accused mentioned that he was going to “Bomber’s Tavern” she wanted him to stay but due to him being insistent on leaving she accompanied him. Before going to Bombers Tavern, he drove to his mother’s home in Kagiso. He had a black pellet gun inside the cubby hole of the car but did not use it or take it out on the way to his mother’s home. Upon their arrival at his mother’s house, he took the pistol out of the cubby hole of the car, the third complainant got out of the car to go inside the house, but he told her to stay outside, because his mother was at home and the fact that she had a beer with her.

[66] She left the beer and followed him into the house. The third complainant informed his mother that she was the Accused’s friend, and she loved him. His mother told her that the accused was a married and she must leave him alone. Then the complainant told his mother she was “feared” and was “bored” with the Accused as he was carrying a firearm which he took from the cubby hole. His mother came to where the accused was counting his money and a verbal altercation ensued about the accused carrying a firearm whilst drinking. Ultimately his mother took both the pellet guns to a bedroom. He left without them. The third complainant was chased out of the house by his mother and ultimately, he also left. Whilst starting his car, she got inside, and they left.

Whilst driving, the complainant was angry, she took off her wig and hit him in the face with it because he embarrassed her in front of his mother and did not tell him that he was married. Her glasses fell off in the car. They eventually entered the pub, called Bombers. A further confrontation and verbal altercation took place between them at Bombers. She accused him of taking her to a low-class place and that she would not hang out there. The third Complainant said she wanted to leave after that. She poked him with her finger and said "I will show you...no one does that to me..." he walked out, and she followed him. The argument continued, even inside the car. She slapped him. She did not want to be dropped off at Shisanyama where he found her, and he ended up dropping her off at a house she pointed out to him that was in Extension 8 Kagiso.

[67] He then went to a place called "Do-it" and thereafter to his girlfriend Ms M [...]. He testified in detail as to how late he went there, what they did, where they went, etc. The Accused produced a slip according to him that was issued to him at a filling station on the 10th of August 2021 at 21h37. This filling station was approximately 10 km's from Ms M's [...] place. Unfortunately, this document could not be accepted as evidence due to having faded in time. His banking slip was also a photocopy. He denied having taken the third complainant to Soweto and having intercourse with her, he denied having fired any of his pellet guns whilst in her presence, nor did he assault her. The accused then explained in detail how he was arrested on the 11th of August 2021. He was not present at his mother's house when it was searched. He was not informed of any rights nor told why he was being arrested.

[68] Under cross- examination, the Accused denied being romantically interested in the third complainant. He could not give any reasons for the complainant misleading the court. According to him, he thinks the third complainant mentioned the firearm to his mother after being scolded and that he assumed she wanted attention and to "soften up" his mother as his mother told her the accused was a married man. He repeated that his mother was upset with him having possessed a firearm whilst he consumed alcohol

Counts 8 to 10: Ms. K [...] (fourth complainant)

[69] The Accused testified that he was in an on-off relationship for almost nine months with the fourth complainant prior to 8th of September 2021. They had engaged in sexual intercourse prior to the said date whilst visiting different places. They had a secret affair. He contended that on the date in question, they had an appointment to meet on the said day at 8h00 and spend time together at Boroko Bed and Breakfast. They met at Dinuzulu Street in Kagiso. The fourth complainant was very happy to see him, and they hugged. They could not go to Boroko because the fourth complainant's boyfriend did not go to work, therefore, she could not spend the whole day with him. They agreed to go to Green Village. The accused testified in detail on how he and the fourth complainant entered the house in Green Village, that his stepfather was present, and even the content of his conversations with the complainant. He remained firm in stating that she accompanied him freely and was there by choice and with full knowledge that they were going to engage in intercourse, which they did, once only and by consent. The Complainant never voiced her unwillingness, nor did she resist, nor did she complain. They parted ways with an agreement to meet up again on the 10th of September 2021. He dropped her off around 11h00 at Chamdor.

[70] Under cross – examination, the Accused confirmed that the complainant never laid charges on the other occasions when they had intercourse. According to the Accused, he phoned the fourth complainant on the 6th of September 2021 to make arrangements for them to meet on the 8th of September 2021. The State had incorrectly contended that the fourth complainant stated that she was with her boyfriend on the 6th of September 2021 when the appointment was made on the 6th of September 2021 for them to meet each other on the 8th of September 2021. The accused pointed out that he spoke to her on the telephone whilst she was at home on 6th of September.

Thabo Simon Au

[71] He testified that he was a member of the SAPS and made statement(s) as a

State witness in this matter. He confirmed recalling the incident and happenings of the 29th of January 2017 as he made a statement about it on 21st of February 2017. He recalled meeting the first complainant at the station, but he could not recall the time he met her there. He interviewed the first complainant and took her to Leratong Clinic for a medical examination. Whilst waiting there he was busy obtaining her statement when he received a call reporting that the families were at the station that the accused was opening a case of the theft of motor vehicle. At that stage, the accused was a suspect for the rape of the fourth complainant. He finalised the complainant's statement, but she had not been examined medically. She wanted to go back to the station as she said she had the keys to the car involved. At the police station he found the accused, some family members, inside an open plan kitchen. The complainant joined them. Ultimately on that day the complainant said she no longer wanted to open a case against the accused as the families wanted to talk. The Accused was therefore not arrested that evening and he did not proceed to open his case. He could not recall the Accused ever admitting to the rape, nor that he had apologised for the rape charges. He had no recollection of the involvement of another male (the complainant's boyfriend) and that he would have left him to guard the car. On the 30th of January 2017, he received a call from the complainant that she wanted to pursue the charges and they went to Leratong Clinic to proceed with the medical examination.

[72] Under cross- examination, he contended that the complainant was the first to report at the Police Station. He contended that the complainant said she was raped but the accused denied it. The complainant voluntarily said that she no longer wanted to proceed with the matter on the date of the incident as the families wanted to talk. At the time when she did not pursue the charges, it was not due to any form of agreement or force or threat.

Mrs. RB [.....] the Accused's mother

[73] Mrs. RB [....], the Accused's biological mother testified regarding what happened on the 10th of August 2021 when the third complainant arrived at her home. She

disputed making any statement to the police officers regarding the incident. She testified that she was given a blank page to append her signature on the side thereof. She disputed the signature which appeared on A5 and A6 of the docket was allegedly made by her. She interpreted the third complainant's use of the word "boring" as meaning irritated by the Accused having a firearm in his possession. She "disarmed" the Accused of both his firearms, and according to her, he left without them. She denied that the third complainant reported that the Accused had fired shots or that she was with him against her will. According to her, the third complainant ran back from the street to get into the Accused's car when the Accused left, and she did not report that she needed any help. She did not see the Accused again until he came the next morning at 5h00 and thereafter he left again. She further testified about the happenings on the 11th of August 2021 when the police came to search her house and ultimately left with this very same two firearms and the Accused's identity document. She testified the Accused was arrested on that day.

- [74] On questions by the Court the witness testified that the third complainant informed her that the accused had a firearm, and she was scared of him. She added that the complainant further informed her that she saw the firearm when they alighted from the car. In re-examination she again mentioned scared but also said "bored

Ms MK [...] Accused's ex-girlfriend

- [75] Ms MK testified that she was the Accused's ex-girlfriend during August 2021. She was residing in Zulu Jump Kagiso two at the time. On the 10th of August 2021, she got a call from the accused informing her he was outside of her house. It was at about 20h20 or 20h25 at the end of an episode of "Generations" a show that she was watching. About 20 minutes later she got into the Accused's car, she had a beer and they drove off. Along the way they went to a filling station close to Leratong hospital. It took five to ten minutes to drive there. The Accused poured fuel into his car and also bought some energy drinks and airtime. They ended up at his house in Green Village. She was not 100% sure but thought the accused paid with a card at the filling station. She testified that it was possible that it could have been at about 21h37 because she just estimated the time when leaving her home.

She knew the Accused's mother's house is in Kagiso one and driving from there would take approximately five to ten minutes to her house.

[76] During cross-examination, the witness remained firm that the Accused definitely was in her company at 21h30. The only discrepancy between her evidence and that of the Accused was that the Accused did not make mention of buying airtime. It was submitted this was not a material contradiction and in fact serves as proof that she did not collude with the accused to provide false evidence.

Mr. Sbuko Ndaba

[77] Mr. Ndaba testified that he is a friend and cousin to the Accused. He was also previously a State witness. He testified that he had two consultations with the State Counsel and on both occasions, he was confronted with written "statements" the content which he did not agree with. The events and words contained in the statement did not come from him and he was almost "forced" to confirm that they were indeed his version of the events. A document: A8, was shown to him and he denied that it contained his signature. He contended that it looked like his signature, it might be or not be. He could not recall signing a written statement. The State did not enter into a trial within a trial to prove the admissibility of the statement. He testified that the time that the second complainant left the house, he went next door, and returned a minute or two later. According to him, the Accused did not have a firearm or any other weapon. The second complainant and the Accused both left. She was in front, and the Accused followed. They went to his house and within minutes they left together, in his car. He was there when they arrived, and he saw them when they left. He conceded that he confronted the accused by saying "this child said you don't want to take to her home." and the Accused asked the complainant why she said that. He however did not hear the rest of their conversation as they had turned around and went back.

[78] During cross-examination he stated that the incorrect information in A8 would be that he spoke Zulu. He testified that the time the complainant had spent inside his house was not more than five or six minutes; and that there was a

fight that took place. The time spent next door as well as his signature was not correct in his statement. He remained firm in stating that the statement was not read back to him and when he was told what it contained, he was not satisfied as it was not what happened.

[79] Importantly on answering the court's questions, he said he did not want to be a witness, but he decided to testify as he wanted the Court to know he was threatened, and his rights were infringed upon. The State Advocate and police wanted to force him to say things he did not agree to.

[80] That was the evidence for the defence

Disputed Issues for determination

[81] The following are the issues to be determined in this matter:

- a. Whether the Accused sexually penetrated the first, second and third complainants without their consent.
- b. whether the Accused assaulted the third complainant.
- c. Whether the Accused pointed a weapon resembling a firearm at the second and third complainants.
- d. Whether the Accused kidnapped the third and fourth complainants.
- e. Whether the Accused penetrated the fourth complainant more than once.
- f. Whether the fourth complainant consented to the sexual intercourse.

Applicable legal principles and authorities

The burden of proof and onus

[82] It is trite that in criminal proceedings the State is burdened with the onus to prove the guilt of the Accused beyond a reasonable doubt. No onus rests on

the Accused.⁹ The Accused's version cannot be rejected solely on the basis that it was improbable, but only once the trial court has found on credible evidence that the explanation was false beyond reasonable doubt.¹⁰ The corollary is also true in that, if the Accused's version was reasonably possibly true, the Accused is entitled to an acquittal.¹¹ In *S v Qhayiso*¹² it was made clear that the "onus " placed on an accused person to provide an explanation that is reasonable, was not an onus to prove his innocence.

[83] In *Mia v S*¹³ Mlambo JA held :

" The proper approach in a criminal case, is that evidence must be considered in its totality. It is only in so doing that a court can determine if the guilt of an Accused person has been proven beyond a reasonable doubt. Should a trial court, in the process of assessing the evidence before it, find that a particular witness is unreliable and reject his version for that reason, that evidence plays no further part in the determination of the guilt or innocence of the Accused in the absence of satisfactory corroboration."¹⁴

[84] When dealing with sexual assault cases, certain principles and decisions cannot be ignored and are important. In *Otto v S*¹⁵ the Supreme Court of Appeal held:

"The onus rests on the State to prove all of the elements of the offence of rape, including the absence of consent and intention¹⁶. That is so even where, as in this case, the version put to the complainant by the Accused's legal representative was a denial of any sexual contact with her."

[85] Therefore, the onus rested on the State to prove all the elements in respect of complainants one to three and consent in respect of the fourth complainant.

Single witnesses and the Cautionary Rule and sexual offences

⁹ *S v Mokoena* 2006 (1) SACR (W) ; *S v Sithole and others* 1999(1) SACR 585 (WLD) ; *R v Difford* 1937 AD 370 and *S v Mhlongo* 1991(2) SACR 207 (A), *S v Van der Meyden* 1999 1 SACR 447 (W) 448 F-H

¹⁰ *S v V* 2000 (1) SACR 453 (SCA) at 455B.

¹¹ *S v Van der Meyden* 1999 1 SACR 447 (W) 448 F-H

¹² *S v Qhayiso* 2017 (1) SACR 470 (ECB)

¹³ *Mia v S* 2009(1) ALL SA 447 (SCA)

¹⁴ *S v Van der Meyden* 1999(1) SACR 447 (W)

¹⁵ *Otto v S* [2017] ZASCA 114,

¹⁶ *Mugridge v S* (657/12)[2013]ZASCA 43, 2013 (2) SACR 111 (SACA), *Loyiso Choko v S* (Eastern Cape Local Division, Grahamstown (CA&R 219/2020)

[86] It was common cause that the evidence in the counts of the rape charges were all single witnesses. Section 208 of the CPA provides: “an accused person may be convicted of any offence on the single evidence of any competent witness.

[87] The following guidelines and principles must be adhered to by the court if a conviction on the evidence of a single witness should follow. In *S v Webber*¹⁷ the court held that:

“A conviction is possible on the evidence of a single witness. Such witness must be credible, and the evidence should be approached with caution. Due consideration should be given to factors which affirm, and factors which detract from the credibility of the witness. The probative value of the evidence of a single witness should also not be equated with that of several witnesses”.

[88] The test to be applied when dealing with single witnesses was set out in *S v Sauls*¹⁸ where the court held that:

“There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness. 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 or defects or contradictions in the testimony, he is satisfied that the truth has been told”.¹⁹

89] In *S v Jackson* :²⁰ the Supreme Court of Appeal (the SCA) stated:

"In my view the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the state to prove the guilt of an accused beyond reasonable doubt - no more and no less."

[90] However, I am aware of the caution issued to Judicial Officers in various authorities to be vigilant in the assessment and evaluation of evidence where there is insufficient evidence²¹. Consequently, our law no longer recognises the cautionary rule which enjoyed unwarranted prominence in sexual cases.²² Section

¹⁷ *S v Webber* 1971 (3) SA 574 (A).

¹⁸ *S v Sauls* 1991 (3) SA 172 (A).

¹⁹ See also: *S v Webber* 1971 (3) SA 754 (A) at 758; *R v Mokoena* 1956 (3) SA 81 (A) at 85)

²⁰ *S v Jackson* (35/97) [1998] ZASCA 13; 1998 (4) BCLR 424 (SCA) ; [1998] 2 All SA 267 (A) (20 March 1998)

²¹ *R v Van der Ross* 2000 (2) SACR 362 (C), *S v J* 1998 (1) SACR 84 (C), *S v K* 2010 (2) SACR 467 (SCA), *S v GS* 2001 (4) SA 1 (SCA)

²² *Mailia v The State* (429/2022) [2023] ZASCA 3 (23 January 2023)

60 of SORMA, codified what was stated in *S v Jackson*²³. which provided that:

“Notwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court, with caution, on account of the nature of the offence.”

- [91] When evaluating the evidence, the single witnesses’ evidence, after having been tested through rigorous cross-examination should be sufficient evidence to convict and the evidence should be clear, satisfactory credible and reliable. The evidence does not need to be clear and satisfactory in every material aspect as is notionally believed.²⁴
- [92] Evidence that is reliable should be weighed against the evidence that is found to be false and the process measures against probabilities. In the final analysis the court must determine whether the State has mustered the requisite threshold which in this case was proof beyond reasonable doubt.²⁵ Put differently, the proper approach would be to weigh up all the elements that point towards the guilt of the Accused, against those that are indicative of his innocence, taking proper account of inherent strengths and weaknesses, and probabilities as well as improbabilities on both sides.²⁶
- [93] In *R v Abdoorham*²⁷ the Court held that a court is entitled to convict on the evidence of a single witness: “if it is satisfied beyond reasonable doubt that such evidence is true. The court may be satisfied that a witness is speaking the truth notwithstanding that he is in some respect an unsatisfactory witness.”
- [94] in *S v M*²⁸ the court held that the fact that the complainant had been shown to be an unreliable and, in some respects, an untruthful witness, was a factor that might prompt a court to adopt a cautionary approach and to look for some supporting material for acting on the impugned witness’ evidence.

²³ See footnote 20.

²⁴ *S v Sauls* 1981 (3) SA 173 (A) at 179G-180G quoting *R v Mokoena* 1932 OPD 79 at 80. See BR Southwood, *Essential Judicial Reasoning*, LexisNexis at page 71, para 9.9

²⁵ *S v Trainor* 2003(1) SACR

²⁶ *S v Chabalala* 2003 (1) SACR 134 (SCA).

²⁷ *R v Abdoorham* 1954 (3) SA 163 (N) at 165.

²⁸ *S v M* 2000 (1) SACR 484 (W)

[95] The approach summarily, then in sexual offences cases are that the evidence of the single witness must be considered holistically. This means that at the end of the case when both State and Defence versions are before the court, after the single witnesses' testimony was tested through rigorous cross examination, whether such evidence was substantially satisfactory and there was corroboration which in many respects, should consist of independent evidence. It must be emphasised that by corroboration is meant for other evidence which supports the evidence of the complainant, and which rendered the evidence of the accused less probable. Once this has been done, a court is bound to accept the evidence as satisfactory in all respects after weighing it against the Accused's version. Satisfactory in all respects does not mean the evidence line by line but when considering the overall evidence, accepted the discrepancies that may have crept in, that the evidence can be relied upon to decide upon the guilt of the Accused.²⁹

Mutually Destructive Version

[96] Essentially, the Court is sitting with two mutually destructive versions. "Logic dictates that where there are two conflicting versions or two mutually destructive stories, both cannot be true-only one can be true. Consequently, the other must be false. However, the dictates of logic do not displace the standard of proof required in either civil or criminal matters. In order to determine the objective truth of the one version and the falsity of the other, it is important to consider not only the credibility of the witnesses, but also the reliability of such witnesses.

The Complainants' reaction in sexual offences cases.

[97] The scourge of gender based violence is escalating astronomically in our country. The dignity and freedom of woman and girls has to be preserved and protected by the delivery of value judgments in advancing the rights as enshrined in the Bill

²⁹ *Mailia v The State* (429/2022) [2023] ZASCA 3 (23 January 2023) at para 18. See also *S v Hadebe and Others* 1996 (1)SACR 422 (SCA)

of Rights. The rights of the victims must be balanced with that of the Accused to ensure that those who are burdened with the onus has discharged the onus. The court in *S v K*³⁰ emphasised the consideration that complainants in sexual cases who happen to be most vulnerable members of our society “*should not be allowed to be a substitute for proof beyond reasonable doubt or to cloud the threshold requirement of proof beyond reasonable doubt.*” It also emphasised that “*judicial officers ought to and are expected to evaluate evidence properly and objectively as a whole and against all probabilities in order to arrive at a just and fair conclusion.*”

[98] Judicial Officers are to be mindful of integrating the rights as enshrined in the Bill of Rights in their judgments and produce value judgments. Such considerations would be the right to dignity and advancing gender justice whilst being fair and justified that the Accused’s Constitutional rights in terms of section 35(3) are not violated and compromised in any way whatsoever, in the interest of justice.

[99] There are a wide range of possible reactions to violence by victims which I am mindful of. In the handbook for the Judiciary of effective criminal Justice, Woman and Girls by the United Nations³¹ on drugs and crime it was stated:

“Victims respond in various ways to sexual violence. Their behaviour may seem illogical or irrational to a Judge. The fact that a victim ceased resisting the assault for fear of greater harm or chose not to resist at all does not mean that the victim gave consent. If victims assess that they are not in a position to remove themselves from danger, they often submit to violence in order to avoid unnecessary or escalation of injuries. Each rape victim does whatever is necessary to do at the time in order to survive.” A victim’s response can therefore vary depending on the scenario, the victim herself and how she perceives the perpetrator which will ultimately result in a decision to resist and fight back, freeze by becoming powerless passive and unresponsive or disassociate themselves from the trauma they are experiencing. Victims who were drugged or perhaps inebriated maybe frozen with fear some don’t have the strength to resist and be malleable as the victim believes that if she does not resist she will be likely to survive the violence or trauma and she allows her body to yield to the attack in which ever form it may occur.”

[100] From the facts discussed below it was clear that each victim reacted differently.

[101] In so far as, the contradictions are concerned the key aspects for consideration

³⁰ *S v K* 2008 (1) SACR 84 (C) at para 6

³¹ UNODC Handbook for the Judiciary on Effective Justice Responses to Gender based Violence against Women and Girls at 25

are:

- a. the evidence of the complainant as a single witness.
- b. the evidence of the Accused where he contradicted the complainant.
- c. the evidence of the Accused as he denied the offence.
- e. the evidence of the first report.
- d. and the evidence of the medical evidence providing corroboration of objective independent evidence.

[102] In order for the State to discharge the onus that it is burdened with; the following requirements must be proved:³²

- a. there must be compliance with the principle of legality in that the conduct the accused is charged with are recognised crimes by the prescripts of law. it was common cause that all the crimes that were proffered against the accused are recognised crimes in terms of the Criminal Justice System.
- b. the Accused must have committed an act. To discharge this burden, the State must comply with each definitional element of the all the counts the Accused is charged with.
 - i. According to section 3 of SORMA the definitional elements of rape which is a statutory offence; is the unlawful, intentional sexual penetration without consent. Important considerations in this regard are:
 - (aa) section (1)(1) of SORMA defines "sexual penetration" as "any act which causes penetration to any extent whatsoever by : (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person."
 - (bb) Section 1(2) of SORMA provides amongst other things, that for the purposes of the offences in section 3 (rape) consent means "voluntary or uncoerced agreement."
 - (cc) Section 1(3) of SORMA provides for circumstances in which a complainant does not voluntarily or without coercion give consent to sexual penetration. Amongst

³² Snyman Criminal law Workbook, Juta, First Edition page 21

other things, subsection 1(3) provides consent cannot be said to be given by the complainant where a complainant submitted or subjected to such a sexual act as a result of the use of force or intimidation by an accused person or a threat of harm by the Accused against the complainant.

- ii. The definitional elements of pointing something likely to believe it is a firearm, are unlawfulness, pointing anything likely to lead a person to believe it is a firearm/antique/an air gun.
 - iii. The definitional elements of kidnapping are unlawful, intentional deprivation of freedom of movement forcefully and
 - iv. The definitional elements of assault with intent to cause grievous bodily harm are unlawful, intentional assault causing grievous bodily harm.
- d. On the issue of unlawfulness, no grounds of justification has been raised by the Accused in counts one to eight. The Accused in counts 9 and 10 alleged that the Accused's acts were lawful in that the fourth complainant consented to sexual penetration.
- e. the unlawful act must have been committed with culpability in that the accused was endowed with the necessary criminal capacity and possessed the necessary intention. Culpability entails criminal capacity and the forms of culpability. For the Accused to possess criminal capacity, the State must prove that he had the ability to appreciate the wrongfulness of his conduct and the ability to conduct himself with the appreciation of wrongfulness of conduct. Mentally ill persons youth and non-pathological criminal incapacity has not been raised as a defence therefore the Accused possessed the necessary culpability and criminal capacity. Intention comprises of the knowledge and will and can take the form of *dolus directus*, *dolus indirectus* and *dolus eventualis*. In rape matters, intention and consent are usually interrelated. I shall deal with this below.

Evaluation of evidence.

- [103] Considering the aforesaid principles, the State contended that all four complainants testified in a clear and logical way and there were no improbabilities in their testimonies. The State also submitted that all complainants were corroborated by objective evidence in a form of the first reports and or the objective medical evidence either in the form of the J88 (regarding the first three complainants) and DNA (regarding the fourth complainant). The State conceded there were discrepancies but contended that they were not material.
- [104] The Defence contended: that there were material contradictions in the complainants' evidence, and this affected the credibility of the State's witnesses and therefore the Accused should be acquitted on all counts.
- [105] Regarding the first complainant's version, the Defence submitted that the contradictions in her evidence were so numerous and material that it affected her credibility. The Defence submitted that the manner in which she was assaulted was contradicted by both the J88 and the nurse. Furthermore, the first report and the nurse also made no mention that the complainant was slapped with open hands. Additionally, the complainant never testified how the injury to her knee could have or would have been caused by the Accused and she did not testify that any of her hair was totally pulled out by the Accused. Furthermore, no DNA forensic results linked the accused despite a panty liner been worn after the alleged intercourse.
- [106] It is so neither the first report nor the 'J88" made mention of the slapping of the first complainant. The issue of the pulling of the hair was corroborated. The question remained whether this was material and relevant since the definitional elements for rape did not include assault as alluded to above. Consequently, even if the evidence of the manner in which the first complainant was corroborated regarding the slapping, it would have no impact on the relevance of the rape charges. I find that there were indeed contradictions regarding the slapping, the bonded hair been loosened and injuries to the knee, but these contradictions were not material.

- [107] On an analysis of the totality of the first complainants evidence her testimony relating to the alleged unlawful intentional sexual penetration remained consistent. I disagree with the defence that the contradictions of her oral testimony and of her statements in exhibits “A” and “B” are so numerous that it affected her credibility. The thread of what happened on the night of the incident was consistent in her oral testimony and her statements.
- [108] Regarding the contradictions and inconsistencies pertaining to the injuries, I am guided by the decision of *Sithole v The State*³³ where the SCA stated that: *“It is trite law that not every error made by a witness will affect his or her credibility. It is the duty of the trier of fact to weigh up and assess all contradictions, discrepancies, and other defects in the evidence and, in the end, to decide whether on the totality of the evidence that state has proved the guilt of the accused beyond reasonable doubt. The trier of fact also has to take into account the circumstances under which the observations were made and the different vantage points of witnesses, the reasons for the contradictions and the effect of the contradictions with regard to the reliability and credibility of the witness”.*
- [109] Considering the probabilities and improbabilities, the defence submitted that it was highly unlikely that the Accused’s wife was to return with him to the pub because there would have been no one to take care of their son if both parents went out at the same time. It was common cause before leaving the first complainant’s parents’ home there was an agreement that everyone that left the house were all going out to celebrate. If I had to accept the Accused’s version that her parents were reluctant for her to go out it does not make sense, why they will let her go out alone with a married man alone knowing she has a little child and was given two hours to return by her parents.
- [110] The State submitted that it was highly improbable that when the first complainant was dropped off at Tso’s pub, that the Accused’s wife would not return because she left her home for the sole purpose of them taking her out. She left her home because she wanted to spend time with them. She expected them to spend money on her. She even went through the trouble of convincing her parents to release her for a few hours. Her testimony was the plans changed in the car and she was dropped off at Tso’s pub to secure a table for them because it was a busy pub. I am of the view had she known

³³ *Sithole v State* (2006) SCA 126 (RSA)

that the Accused's wife was not going to return, surely, she would have requested them to drop her off at her home first, as she had no intention of going out with the Accused alone. Furthermore, if the Accused had no intention to stay at Tso's pub and was going to his friends in Randfontein, in the vicinity of where he lived, then it was improbable that he would come back Tso's pub just to drop the first complainant off at her home. What was probable was if all the female folk changed their minds to go out, then they would have dropped her off at home before going to Randfontein. I find she was dropped off at Tso's pub to reserve a table with the hope that the Accused was returning with his wife.

- [111] The defence then raised the issue that the first complainant consumed alcohol before leaving to go out. This was not a material issue because in spite of the first complainant having consumed alcohol, she was rigorously tested under cross examination and explicitly stated that the alcohol had no role to play in her error of judgement. There was no problem with her recollection. Additionally, the J88 reflected that there were no traces of alcohol so she could not have been inebriated.
- [112] The defence then raised the issue that Apple Street was not clarified by the State. The complainant testified that she did not know the precise address as she had not been there before and was not familiar with the area. However, she was certain it was in Lewisham. It was so that in cross examination she conceded that if the evidence were not led, she would not have known it was Apple Street. This remained an undisputed issue between the parties that they were together on that night at the said address. Her testimony was that it was dark, and she was unfamiliar with the area and that she had been there for the first time. The State submitted this was a common cause fact.
- [113] The next probability related to the first complainant having kissed and touched the Accused whilst he was driving. I find this to be highly improbable as the car was in motion and that would have endangered the first complainant's life as well.

- [114] When I consider the first report and the medical evidence The fact that the first complainant was menstruating can be accepted that there were no traces of semen as testified by the nurse. The nurse concluded her gynaecological examination revealed no injuries, but she did not exclude vaginal penetration. I am mindful the examination was concluded the day after the incident occurred. It is so that the Accused was not linked to the offence by DNA forensic results as the panty liner with blood was handed in to the nurse. This was not a prerequisite for a conviction but to establish independent corroboration. I find the objective medical evidence corroborated that of the first complainant.
- [115] The Accused's version was that the first complainant was insistent to go along with him at Lewisham. At the house, she consumed alcohol and weed. He left her sitting there enjoying herself with all the other men and he went to sleep. If I have to accept the Accused's version that the first complainant asked him out, then it was improbable that he would leave her sitting with other men and go to sleep. He was aware of the curfew imposed by the first complainant's mother and should have offered to take her home before going to sleep.
- [116] It was only in the morning that he learnt that the first complainant drove away with his car. The question to be asked was if the first complainant were with the Accused voluntarily then why she would take his car and leave without his permission. Her evidence was she just wanted to get out of there and go home. This behaviour was not consistent with someone wanting to spend time with the Accused.
- [117] Sergeant Au corroborated the chronology of events that led to the rape charges by the first complainant. There were discrepancies but they were not material. The important part of his testimony was that he was with the first complainant at the hospital, waiting for the medical examination. It was improbable that the Accused first laid charges because when Sergeant Au received the phone call he was already with the complainant at the hospital for a medical examination. This to me indicated the investigations were already in progress.

[118] On a conspectus of the totality of the evidence, I find the first complainant, even though she was a single witness, was a credible witness who withstood rigorous cross examination very well. Her evidence was sincere, credible, satisfactory, and reliable. In so far as the rape charges were concerned on the material aspects there was corroboration with her oral testimony and her statements, as well as the report she made to the first report and the nurse. I considered the probative value and weight of the material, relevant and objective evidence of both versions in totality. I have no doubt, that the evidence against the Accused was overwhelming and the evidence supported the States version I find that the Accused's version was inconsistent and unreliable. It simply could not be accepted as reasonably possibly true. His testimony was improbable and rejected as false beyond reasonable doubt. I find that the State discharged the onus placed on it beyond a reasonable doubt in respect of the first complainant.

Counts two and three

[119] The State submitted in argument that the second complainant did not contradict herself in any way. She gave her evidence in a forthright manner. She would not have attempted suicide for no reason. Furthermore, Ms C[...] confirmed the report she made to her in material respects. It was submitted that the version of the Accused that the second complainant laid false charges against him because of the costs for repairs to James's motor vehicle was absurd. If that were the case, she would have indeed laid false charges

[120] The Defence argued that the second complainant cannot be a credible single witness on these counts in that she contradicted herself on material aspects and the medical evidence contradicted her version. Counsel submitted :

- a. The State failed to lead any evidence regarding the second complainant's attempted suicide as a result of the alleged rape incident and that she was hospitalised and treated for such suicide. Even if the evidence for the attempted suicide was before the court, it would have not affected the definitional elements of the charges faced

by the Accused. In any event the evidence of the first report, Ms C[...] corroborated the evidence of suicide by the second complainant. The witness testified that she saw the boxes in the kitchen, the second complainant became hysterical, she then called her mother, and the ambulance was called, and the second complainant was taken to hospital. This was not challenged or rebutted by the defence and the court finds that it established consistency and corroboration.

- b. The defence then argued that the State failed to call Mr. Ndaba as its witness because he did not corroborate the State's version and his version contradicted that of the second complainant on numerous material aspects. It was apparent from Mr. Ndaba's demeanour in which he testified that he was not co-operative with the State Counsel. His tone when he answered the State Counsel, and the Defence counsel was completely juxtaposed. He was antagonistic and hostile in his responses to the State Counsel and obliging and pleasant towards the defence Counsel. I find that Mr. Ndaba although he was aware of the facts that materialised on the day in question, he was evasive and when it was convenient for him, then he did not hear or did not see what transpired. For example, he testified about confronting the Accused as to why he did not want to take the second complainant home and his response was that "*he did not hear the rest of the conversation*". To me this was rather improbable and absurd because he asked the question the question surely, he had to get an answer, but he chose not to hear the rest of the conversation.
- c. Furthermore, it was the State's prerogative as to who the State wanted to call as its witness. All witnesses were made available to the defence. When the State elected to prove Mr. Ndaba's statement he was adamant that "*the signature in his statement might or might not be his signature.*" The State had to weigh whether it tendered sufficient evidence to prove its case beyond a reasonable doubt. His evidence was designed and tailored to suit the Accused's version. He was not forthcoming but was defensive. It was apparent that in his evidence he

protected the Accused, who was his cousin. The salient portion of his evidence was that he was present when the second witness and the Accused arrived and when they left, He was adamant that the Accused did not have any weapon with him. I cannot find his testimony to be satisfactory credible and reliable but rather false beyond a reasonable doubt.

- [121] The Defence Counsel contended that the State deliberately avoided calling Sergeant Mphiko to testify to prove the trial within the trial and the fact of the Sergeants interference in this matter regarding “James.” This witness was made available to the defence and if the defence felt the need to call this witness, they had the prerogative to do so as they did with Sergeant Au and Mr. Ndaba.
- [122] The Defence further contended that the State failed to provide answers to the court by the investigating officer regarding the intimidation of the witness “James”. “James’s” evidence bears no relevance to the charges that the Accused was facing. He was involved after all the alleged incidences occurred and his testimony would not have taken the case any further as there was no relevance. Furthermore, the State did not dispute the motor collision. Presuming, that James was present at court and the court accepted James’s testimony regarding the motor collision, the probative weight would not have affected the definitional elements of the charges faced by the Accused.
- [123] According to the second complainant’s oral testimony, the Accused collected his “firearm” from his cousin’s house which they visited before going to the pub and placed it inside the door panel of the vehicle. She described the firearm as being a black firearm which was the size of a police firearm. She described it to be about 20 centimetres long. At all material times, according to her, the firearm was inside the vehicle when they were at the drinking place. The reason she did not object when he told her he was going to Mr. Ndaba’s place to have one round of sex was because of the presence of the firearm. She was threatened by its mere presence. Furthermore, the second complainant’s statement corroborated her oral testimony in this regard as her statement contained an averment which substantiated her testimony

regarding going to the cousin's house to fetch the firearm because the Accused informed her that *"he put it there recklessly, when he left it there in the morning."*

[124] From a thorough analysis of the evidential material, I find that regarding the issue of pointing something likely to believe it is a firearm, the definitional facts are unlawfulness, pointing anything likely to lead a person to believe it is a firearm/antique/an air gun. I accept the second complainant's version even though she was a single witness. She was clear and satisfactory in all material respects. I find her testimony was credible can be relied upon.

[125] In summary, Mr Ndaba corroborated the complainant's version regarding the fact that she informed him that the Accused did not want to take her home and he confronted the Accused about it, but unfortunately, he testified that he did not hear what the Accused said. He denied that the Accused was in possession of a firearm. He also corroborated the complainant's version that the Accused and the second complainant returned to his home after the complainant informed them that the Accused did not want to take her home but added that they left soon thereafter.

[126] Turning now to the Rape charges, It was correct that the second complainant's statement did not contain specific details such as the Accused slapped the second complainant and removed her underwear. In this regard the witness was privy to the Accused being in possession of the firearm. The question remained, whether the statement lacked these particularities in the bigger scheme of things. To me it was not material as different people react differently to secondary trauma. There will be errors, contradictions, and discrepancies. The absence of the slapping and who removed her underwear was indeed not in her statement. This was not indicative of the fact that she was not telling the truth.

[127] It was contended that the discrepancies and omissions pointed were immaterial and had no bearing on the second complainant's credibility as a witness. It was submitted that the purpose of an affidavit was to obtain the details of an offence, so that it could be decided whether a prosecution should be instituted against the

Accused. It was not the purpose of such an affidavit to anticipate the witness's evidence in court, and it was absurd to expect of a witness to furnish precisely the same account in the statement as she would in her evidence in open court.³⁴ I find that these contradictions does not affect her credibility as they are not material to the charges.³⁵

[128] There are no set rules that can be formulated in deciding on the credibility of a witness. The way in which credibility was handled will depend on the prudence of the presiding officer. The number of and importance of contradictions and their bearing on the rest of a witness's evidence should all be taken into account.

[129] I have considered the State's as well as the Defence's versions holistically, and applied my mind to all the contradictions, before deciding whether the contradictions are material to warrant a rejection of the second complainant's evidence.³⁶ The contradictions between the *viva voce* evidence of the second complainant and the evidence contained in their written statement(s) must be scrutinized with great circumspection in order for it to have an adverse effect on the witnesses' credibility. I have done so and was mindful that the second complainant was a single witness. It is trite law that contradictions per se do not lead to the rejection of a witness's evidence.³⁷, they may simply be indicative of an error.³⁸ Not every error made by a witness affects credibility; in each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witnesses' evidence.

[130] The approach in these instances was laid down in the case of *R v Mlambo*³⁹ where the court stated:

³⁴ S v Bruiners en 'n Ander 1998 (2) SACR 432 (SE)

³⁵ S v Mthethwa 2015 (1) SACR 609 (GP), S v Mafaladiso 2002 (4) ALL SA 74 (SCA)

³⁶ S v Nyembe 1982(1) SA 835 (A) S v Mafaladiso 2002 (4) ALL SA 74 (SCA)

³⁷ S v Mkhohle 1990(1) SACR 95 (A) at 99F-G

³⁸ S v Oosthuizen 1982 (3) SA 571 (T) at 576B-C, S v Mafaladiso 2003 (1) SACR 583 (SCA).

³⁹ 1957 (4) SA 727 (A), at 738 A-C was per Malan JA

"In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man after mature consideration comes to the conclusion that there exists no reasonable doubt that the accused has committed the crime charged. He must in other words, be morally certain of the guilt of the accused. An accused's claim to the benefit of the doubt that may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable influences which are not in conflict with or outweighed by the proved facts of the case."

[131] The approach to follow when evaluating the evidence of a single witness was set out in *S vs Banana*⁴⁰ where the court held "Where the evidence of the single witness is corroborated in any way which tends to indicate that the whole story was not concocted, the caution enjoyed may be overcome and acceptance facilitated. But corroboration is not essential. Any other feature which increases the confidence of the court in the reliability of the single witness may also overcome the caution."

[132] Applying the aforesaid case, the purpose of the evidence of a first report and the medical evidence was to establish consistency and corroboration in the version of the accused.

[133] *In the case of S v Gentle*⁴¹ the Honourable Justice stated:

"by corroboration is meant other evidence which supports the evidence of the complainant, and which renders the evidence of the accused less probable on the issues in dispute. Thus, in the present matter for example as in the case at hand evidence that the appellant had sexual intercourse with the complainant does not provide corroboration of her version that she was raped as the fact of sexual intercourse is common cause. What is required is credible evidence which renders the complainant's version more likely that the sexual intercourse took place without her consent and the appellant's version less likely that it did not"

[134] The first report, Ms L corroborated the second complainant's version in material aspects in so far as the chronology of the narrative. Additionally, She saw the boxes of tablets lying in the kitchen and she was not challenged about this during cross examination. She was forthright and honest. She did not say how many times she was informed by the complainant that the Accused raped her. To me she came across as a good witness she corroborated the evidence of the complainant on all material aspects and

⁴⁰ *S vs Banana* 2000 (2) SACR 1 (ZSC)

⁴¹ *S v Gentle* 2005(1) SACR 420 (SCA) on page 431

expressed herself clearly and concisely. Consequently, this established consistency in the second complainant's evidence.

[135] I turn now to deal with the medical evidence. It was so that Dr Hasan's testimony was that there was sexual intercourse and in his professional opinion there was no forceful penile penetration into the vagina. According to his findings, amongst other things, he corroborated the complainant's version on the J88 in respect of what transpired in respect of the alleged rape. Furthermore, the J88 reflected that the complainant reported she that she was raped twice: once with a condom and once without a condom. According to his oral testimony he testified that the second complainant was a willing party because he did not note any physical injuries. Importantly, the J88 recorded that the doctor noticed a slight semen like discharge. The gynaecological examination was normal, and he found no physical or genital injuries. He concluded that there was no clinical evidence of forceful penis penetration. However, according to the J88, he did not exclude the alleged rape. DNA was collected but no positive results were obtained.

[136] The defence contended that there were discrepancies in the medical evidence of Dr. Hasan and Nurse Chabalala and the court should in all counts consider the findings of Dr Hasan and not Nurse Chabalala. When I consider the experience of both these medical practitioners, Dr Hasan saw approximately 3 cases per week which amounts to 12 cases per month and Nurse Chabalala saw approximately 50 cases per month. Dr Hasan's testimony was if there was non-consensual sexual intercourse there will always be injuries and Nurse Chabalala testified that that was not the position. Despite the different expert views, Dr Hasan did not rule out the alleged rape in his J88.

[137] In the dissenting judgment of *MM v S*⁴² the court held that where there was no direct evidence establishing the fact, it was necessary that, on a conspectus of all the circumstances, the only reasonable inference was that penetration had occurred. The question then was whether the contradiction in the "J88" of the doctor's report was overcome by the complainant's evidence. I find that the evidence of the second complainant cannot be

⁴² *MM v S*(542/11) [2021] ZASCA 5

rejected as it was corroborated both by the first report to some extent by the J88.

[138] The definitional elements for rape are unlawfulness, intention, and sexual penetration. Medical evidence is not a prerequisite for proving the charges of Rape but is required for purposes of corroboration. What is required is penetration of the labia by the penis albeit to a slight extent.⁴³

[139] The discrepancy regarding the evidence on the J88 by Doctor Hassan was that the Accused was allegedly raped twice. Once with a condom and once without a condom. The indictment indicated that the Accused faced one count of rape charges by the second complainant. The oral evidence that was led was that the Accused faced one count of rape. The first report testified that the second complainant did not inform her how many times the Accused raped her. However, the rest of the evidence was consistent. I find the discrepancy in the complainant's oral testimony and the evidence of Dr. Hassan could have been an error or a mistake and as explained above does not result in a credibility issue but a genuine mistake. I find the overwhelming evidence was that there was only one count of rape charge levelled against the Accused in this regard. From considering the testimony holistically, I accordingly find that the accused was charged for only one count of rape by the second complainant as it appeared from the indictment.

[140] The Accused's version must be evaluated in conjunction with the State's case. The Accused testified in his own defence, he gave a detailed version of the events that resulted in his arrest, essentially, his version as alluded to above was a bare denial.

[141] The defence alluded to the fact that the complainant knew she was going to Mr. Ndaba's house for the sole purpose of having sexual intercourse and yet she continued. Her testimony was that the Accused had the black firearm in the panel of the door. She was afraid and frightened because of the presence of the firearm. One has to have been in her position to subjectively experience her fear and inhibitions. This simply cannot be ignored.

⁴³ *South African Criminal Law and Procedure* 3 ed (by J R L Milton) Vol II 448, fn 122 and the authorities there cited.

[142] I cannot accept the Accused's version that the second complainant requested to go to Mr Ndaba's house to use the toilet. Mr Ndaba corroborated the complainant's version that the Accused did not want to take the complainant home. However, he did not see any firearm. I find that the issue of the toilet only arose when they reached Mr. Ndaba's home and not that the second complainant requested to use the toilet when they left the pub to go home. This version by the Accused was to justify the Accused taking the second complainant to the Accused's cousin's home.

[143] When I consider the evidence in totality, The second complainant was an honest witness. She was sincere and forthright who withstood rigorous cross-examination very well. Her actions on the day in question when she tried to escape from the house, running to the neighbours for assistance and after she returned home, demonstrated that she had no intention to be present at the Accused cousin's house. The presence of the firearm prevented her from screaming and shouting for help as she was fearful. The version of the state witnesses was more plausible than the Accused's version.

[144] In the analysis of all the evidence, the Accused's testimony appeared to be unreliable. As mentioned in *S vs Mtsweni*⁴⁴

"caution must be exercised not to attach too much weight to the untruthful evidence of the accused when drawing conclusions and determining guilt".

[145] The court was satisfied that the Accused's version of the events cannot be reasonably possibly true and was improbable.

[146] On a conspectus of the totality of the evidence, I find the second complainant, even though she was a single witness, was a credible witness who withstood rigorous cross examination very well. Her evidence was sincere, credible, satisfactory, and reliable. In so far as the rape charges were concerned on the material aspects there was corroboration with her oral testimony and her statements, as well as the report she made to the first report and the nurse. I considered the probative value and weight of the material, relevant and objective evidence of both versions in totality. I have no doubt, that the

⁴⁴ *S vs Mtsweni* 1985(1) SA590(A)

evidence against the Accused was overwhelming and the evidence supported the States version I find that the accused's version was inconsistent and unreliable. It simply could be accepted as reasonably possibly true. His testimony was improbable and rejected as false beyond reasonable doubt. I find that the State discharged the onus placed on it beyond a reasonable doubt in respect of counts two and three.

Count 4 to 7

[147] In support of the conviction of the four counts, by the third complainant, the State submitted that the third complainant testified in a clear and logical way. The State submitted there were contradictions between her two affidavits (Exhibits "G" and "H") regarding how the incident commenced. She explained that when she gave her first statement she was in hurry and the statement was not read back to her.

[148] The State further contended that the third complainant did not know the Accused prior to the date of the incident. Her testimony was if the Accused did not take her to Soweto, she would not have known that he had a home in Soweto. She testified that the property she was taken to comprised of the main house and outside room(s). Inside the room she was taken to, there was a bed and a couch. This was the same description of the property given by the fourth complainant in Green Village. The State contended It was clear from the medical evidence that she was indeed raped and assaulted. It was highly improbable that she would falsely implicate the Accused solely because he took her to a low-class pub and let the real perpetrator go unpunished. Even the Accused's mother confirmed that she reported to her that she feared the Accused. This aspect clearly showed that the Accused did something to scare her.

[149] The Defence Counsel submitted that the cross examination of the first report was curtailed. It was indeed curtailed to the extent that the evidence of the witness was completed, and the witness was requested to be confronted with the third complainant's version and to comment on the third complainant's

version. Both the third complainant's testimony and the first report's evidence were completed before the court in total. There was no prejudice to any of the witnesses regarding their testimonies. To me requesting the first report to comment on the third complainant's testimony was irrelevant and a matter was for argument by Counsel. In no way was the Accused's rights compromised or prejudiced.

[150] The Defence counsel, Advocate Nel contended that there were contradictions in the complainant's version in that the statements differed from her oral testimony. On an analysis of her statements and her oral testimony, her narrative remained consistent that she was raped. The State conceded discrepancies and submitted that they were not material. On perusal of exhibit "G" paragraph 15 the third complainant stated "*He started to rape me, and I had to pretend that everything is fine as I was scared that he was going to be angry and may kill me or maybe dispose of my body, and no one will know where I am. I just needed someone to know and see me and help me.*" This to me illustrated extreme levels of secondary trauma, fear and desperation just to be alive. No person deserved to experience such levels of trauma. As alluded to above, statements are intended to determine a prosecution and not as a replacement for evidence. From both the statements it was clear she was raped.

[151] The Defence raised various improbabilities regarding this complainant's version:

- a. Turning to the count on kidnapping, the defence submitted that it was highly improbable that the complainant agreed to be taken home by an unknown male. It was the third complainant's testimony that when the Accused threw his keys on the table and requested a private conversation with her at the car, she agreed to talk to him as she saw it as an opportunity to get a lift home. According to her testimony, there was nothing strange about it because people are friendly at the tavern. There was nothing improbable or untoward about that. I find that the third complainant voluntarily entered into the Accused's motor vehicle. However, the purpose for her entering into the motor vehicle was

solely for the Accused to take her home and not for him to take her to Protea Glen in Soweto against her wishes.

- b. The Accused's version was that the third complainant wanted him to stay with her at Shisanyama and he wanted to go with to Bombers. According to the third complainant, she did not give him permission to take her anywhere else but to her home in Mogale City. From her actions, there was turmoil the moment he fired the shots in the air. She was afraid and scared of the Accused. Her testimony was that at his mother's home when his mother hid the firearms the third complainant tried to flee when she left the yard, however he followed her, pulled her back into the yard. He parked the motor vehicle close to the gate and near the kitchen door so that she could not escape. She tried again to make a further escape when the two males assisted her to run away that was when he chased her and assaulted her. From the third complainant's actions she repeatedly tried to escape from the Accused, but he prevented her from leaving and kept her captive against her will. I therefore find that the third complainant's evidence was sincere, clear, satisfactory, and plausible. It was credible and can be relied upon despite the fact she was a single witness.
- c. The evidence was that the Accused requested the third complainant to accompany to the car so that she could have a conversation with him at the car, She saw an opportunity to get a lift home and the accused agreed to drop her off at home. She entered into his motor vehicle voluntarily. The accused then ignored her directions, followed a different route , produced a firearm, and shot outside the vehicle. Essentially the evidence remained the Accused took her against her will.
- d. The issue remains what was the purpose of the kidnapping and whether kidnapping took place within the broader context of rape. It is trite that the Accused cannot be charged twice of the same offence. The State is not barred from putting charges that may be tantamount to duplication of convictions however, it is the duty of the trial court to

guard against convicting an accused of charges that constitute a duplication of charges.⁴⁵

- e. The “test for splitting” also known as duplication of charges is set out as follows⁴⁶

“There is no universally valid criterion for determining whether there is splitting. In *S v Davids* 1998 (2) SACR 313 (C) the topic is discussed afresh, and the most important decisions are usefully summarised. The courts over the course of time developed two practical aids (*S v Benjamin en 'n Ander* 1980 (1) SA 950 (A) at 956E-H):

(i) If the evidence which is necessary to establish one charge also establishes the other charge, there is only one offence. If one charge does not contain the same elements as the other, there are two offences (*R v Gordon* 1909 EDC 254 at 268 and 269). This can be called 'the same evidence test'.

(ii) If there are two acts, each of which would constitute an independent offence, but only one intent and both acts are necessary to realise this intent, there is only one offence (*R v Sabuyi* 1905 TS 170). There is a continuous criminal transaction. This test is referred to as 'the single intent test'.

- f. The general rule is the factual interrogation will dictate which one of these two tests applies. The SCA referred to the “single intent test” with approval in *S v Dlamini*⁴⁷ however, it added:

“ there is no all – embracing formula. The various tests are more guidelines, and they are not rules of law, nor are they exhaustive. Their application may yield a clear result but if not, a court must apply its common sense, wisdom, experience, and sense of fairness to make a determination.”

- g. Whether the “same evidence test”, the “single evidence test” or common sense approach is applied, the Accused kidnapped the third complainant solely for the purposes or intention of raping her. Without the kidnapping there would be no rape. The two offences are inextricably integrated together. They are both time bound and coupled with the treats it constituted a single criminal act. The evidence required for the kidnapping was also required to sustain a rape

⁴⁵ *S v Grobler en 'n Ander* 1966 (1)(SA) 507.

⁴⁶ See section 83 of Hiemstra's Commentary of the CPA

⁴⁷ *S v Dlamini* 2012(2)SACR 1 (SCA)

conviction. Consequently, the conviction on the charge of kidnapping amounted to a duplication of convictions (splitting of charges) within the context of the rape conviction.⁴⁸

- h. Turning to the charges of pointing of something likely to lead a person to believe it was a firearm, the third complainant testified that the accused did not point a firearm at her but instead fired shots in the air. It was very easy for the third complainant to testify that he pointed the firearm at her but she did not. I view this as credible and satisfactory evidence that can be relied upon. The State conceded that the State did not discharge the onus on this count.
- i. In evaluating the assault with intent to do grievous bodily harm charges, the defence counsel raised the issue that the indictment mentioned that the third complainant amongst other things had been “punched” and the third complainant did not testify that she was punched. A cursory overview of the indictment revealed that the indictment mentioned “tripping her and or/ hitting her with fists, and or kicking her and or hitting her with open hands and or hitting her with a similar object, with the intent to cause her grievous bodily harm.” From the perusal of the indictment, it was clear the words “and” and “or” appeared with regard to the manner of the assault. The fact that there was no “punching” or “hitting with fists” was inconsequential. In any event if the argument were accepted, the provisions of section 86 and 88 of the CPA would have cured that defect.
- j. The first report and the medical evidence corroborated the fact that she was assaulted but did not corroborate the fact that the third complainant was slapped. The J88 also corroborated her version in respect of the assault and the threat of the firearm. (albeit no details were provided of the assault). The injuries sustained were specifically recorded in the J88. I found that after a very emotive and rigorous cross examination by the defence counsel, the third complainant was sincere, forthright, and honest with regard to the assault charges. The

⁴⁸ Khuzwayo Mboneni v State Gauteng Local Division, Johannesburg Case A46/2021.

failure to mention that she was slapped to the first report and the nurse was a simple error and from the wording on the indictment, it cannot be considered as a material contradiction because of the use of the word "or" in paragraph "i" above.

- k. The Accused's version in so far as the assault with intent to do grievous bodily harm was concerned was a bare denial. His version was that the complainant was upset that he embarrassed her at his mother's home and did not inform her that he was married. He alluded to the fact that she assaulted him with her wig in the car and she slapped and threatened him. He ended up dropping her at Extension 8 in Kagiso, went to a place called "Do -it" and then went to his girlfriend. I shall deal with the defence of the alibi under the rape charges.
- l. The scene relating to the assault of the third complainant did not seem improbable to me. It remained uncontested and unchallenged that the second complainant, ran away with the assistance of the two males and the Accused chased after them. Both the males fled the scene and the Accused tripped her, she fell, and he assaulted her with the firearm on her chest, tried to strike her face and she blocked with her hand, he kicked her with booted feet and slapped her with an open hand. She testified and showed the Court a scar that she sustained which was one centimetre by 0.5 millimetre wide.

[152] I find that the Accused's version when considered holistically and compared to the third complainant's version was improbable. I reject his version as false beyond doubt regarding the assault with intent to do grievous bodily harm as false beyond reasonable doubt. I accept the third complainant's version, even though she was a single witness and when I exercised the caution, I find that her evidence was satisfactory in material respects, was credible and reliable.

[153] Turning now to the rape charges, there can be very little doubt that the third complainant was sexually penetrated. The first report and the medical evidence carried out after the incident supports her oral testimony that she was sexually assaulted. The defence relied on the alibi defence and submitted

that due to the timeline it was highly improbable that the third complainant could have been raped. When considering the timelines, both the State's and the Defendant's versions regarding the timelines were based on an estimation of times. There was no secondary evidence submitted to corroborate the oral testimonies.

[154] When one considers the timelines on the day of the incident. Both the State and the defence relied on the estimation of time and there was no evidence to support the time estimation besides the third complainant's statements made for purposes of investigations. The complainant's oral testimony was she went to Shisanyama tavern about 12h45 on the date of the incident. The Accused arrived at the tavern at 14h00. The accused contradicted this and testified he arrived at Shisanyama at 17h00. She did not testify about what time they left Shisanyama although she mentioned it was shortly thereafter. The Accused then took her to Protea Glen. He sexually penetrated her without her consent. They left there at 19h00 and arrived at the house of the first report ,Mr. M [...] at approximately 21h30.

[155] According to exhibit "H" the statement by the third complainant, was made on the 11th of August 2021 at 01h00. The time provided in the Statement that the incident occurred at 20h00. The defence requested for the statement to be provisionally admitted into evidence. In the absence of a trial within a trial in respect of exhibit "H" the defence argued that the affidavit be admitted into evidence. The admissibility requirements regarding the statement were challenged by the third complainant. She testified that the statement was not read back to her before she signed it. She provided an explanation that she was tired. When one considers what transpired on the day in question, I am mindful of secondary trauma, the statement was made on the day of the incident at 01h00. The fact that the statement reflected that the incident occurred at 20h00 does not mean that the first complainant was lying. In the absence of a trial within a trial being entered into to clarify this aspect, I considered it to have been an error or a mistake. If the defence were adamant that this was a material contradiction, they would have certainly entered into a

trial within a trial. In the absence of the admissibility requirements being complied with, I cannot admit the statement finally as evidential material.

[156] Exhibit "G." was also a statement by the third witness. This statement was thorough and gave a detailed account of what materialised. The statement was written the day after the incident on the 11th of August at 14h42. The recording of the timeline was that the third complainant was at the Shisanyama tavern at 12h45. She was approached by the accused at 15h00. After the sexual penetration when she enquired of the Accused what was the time, he informed her that it was 21h00 and she was dropped off at the first reports residence at 21h30. The first report corroborated her version that she arrived at his house at approximately 21h30. Exhibit "G" reflected that the nurse saw her on the 11th of August at 15h19.

[157] The chronology of the events that materialised remained consistent in her oral testimony and both exhibits "G" and "H". The statements differ to the extent one is more detailed than the other. This usually happens in investigation. To me it illustrated that investigating officers require specialised training on how to particularise the details of their statements in sexual offences matters. In so far as exhibit "H" was taken on the day of the incident, and exhibit "G." was taken the following day after the incident. The main contention being the time of the incident in exhibit "H" being 20h00. This could be attributed to secondary trauma in that it was quite an ordeal for the third complainant considering the timeline. The chronology of the narrative did not differ on the material aspects when I compare her oral testimony with that of her statements. There were indeed discrepancies which I find were not material.

[158] The first report corroborated the third complainant's version in all material aspects in that she made a report to him that she was raped. The purpose was to establish consistency. There were aspersions by the defence that the first report only knew the accused's full names because he was present during the court proceedings, and that might be so. I find that it was not a material issue because the identity of the accused was never placed in issue.

- [159] Turning to Nurse Refiloe Joyce Chabalala evidence, and the J88 medical report. it also corroborated the third complainant's version on all the charges except for the pointing of the firearm. The J88 recorded that amongst other things, the unknown male also physically assaulted her and threatened her with a gun.
- [160] The clinical findings on the J88 corroborated the third complainant's version in that the third complainant presented with the following injuries and the clinical findings were: bruising and tenderness on the chest, bruising and tenderness on hands, bruising and tenderness on both shoulders and linear laceration on left hand and swelling with tenderness. According to the nurse, there was presence of extensive fresh abrasions on her posterior fourchette and vestibule fossa navicularis. The gynaecological findings on the J88 depicted a schematic drawing of the findings. The conclusion arrived at by the nurse was as follows: the presence of physical injuries is consistent to the history of physical assault given above and presence of extensive fresh abrasions was consistent with the history of traumatic sexual assault. She collected DNA samples from her genital area. The accused did not use a condom nor was any lubrication used. The accused was not linked via DNA. The evidence was that the accused penetrated the third complainant, but he did not ejaculate. I find that the J88 and the medical evidence by the nurse provided objective evidence that corroborated the third complainant's version.
- [161] The defence contended that the evidence of the third complainant did not support the averment in count seven of the indictment. The defence argued at most, this was only an attempted rape. The definitional elements of rape are unlawful, intentional, sexual penetration, and without consent. The key issue of contention was what constituted rape. According to section 1(1) of SORMA, "*Sexual penetration*" means any act which causes penetration to any extent whatsoever by(a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person." The complainant testified that the Accused inserted his penis into her vagina. Her testimony was "he got on top of me and inserted his penis inside my vagina.... I was asking him to stop..... as I was still dry and not ready as I was not thinking of

sexual intercourse He used his tongue and saliva in my private part to make me wet....he penetrated me again he agreed to stop and said we will see tomorrow as it didn't work.”

[162] This satisfies the definition of sexual penetration. Section 1(2) of SORMA deals with consent and provides amongst other things that for the purposes of the offence in section 3, (rape) consent means “voluntary or uncoerced agreement. Section 1 (3) of SORMA provides circumstances in which a complainant does not voluntarily or without coercion give consent to sexual penetration. When I apply these definitions to the facts of the case, I am satisfied that the State satisfied the definitional elements requirement as encompassed in the indictment.

[163] The defence then raised the issue if the Accused was naked, why did she not mention the numerous tattoos on his entire body. The third complainant requested not to be present when the Accused removed his shirt for the tattoos to be viewed. When confronted with this aspect the third complainant testified that she could not take note of everything. Once again different women react differently when placed in such circumstances. This to me was a subjective test especially when she was cross-examined on this issue her demeanour was quiet and subdued. She had no answer. Since the accused's identity was not in dispute, I do not find this to be a material issue.

[164] The Accused relied on the defence of an *alibi* and that he was with his girlfriend at the time of the alleged rape. The Accused testified that he was issued with a slip at a filling station on the 10th of August 2021 at 21h37. No documentary evidence was tendered into court as it was faded. Neither was his bank statement tendered into evidence as it was a photocopy. The accused was legally represented from the date of his arrest. These documents could be given to his attorneys to be preserved so that they could be admitted into evidence. The bank statements could easily have been obtained. Being in custody was no excuse for non-production of documentary evidence. However, I am mindful that the Accused bears no onus of proof.

[165] The Accused's *alibi*, Ms M Kubeka testified that she resided at Zulu Jump Kagiso two at the time of the incident. The Accused called her at 20h20 or

20h25 informing her that he was outside her house. According to her they could have been at the petrol station around 21h37. She testified she remembered the time because she was watching Generations.

[166] The first complainant and the first report corroborated each other in that the complainant was dropped off at first report's home at approximately 21h30. The Accused and his *alibi* corroborated each other that he called his girlfriend between 20h20 and 20h25, picked her up and they were at the garage at 21h37. At the end this boils down to two mutually destructive versions which ultimately be relied upon a credibility finding, considering the totality of the evidence. According to the third complainant, the discrepancy on the timeline evidence was a simple explanation that she made a mistake and had forgotten that they had stopped at a second tavern that evening. Her first report corroborated the fact that she arrived at his house at 21h30. Interestingly, the first report Mr. M also lived in Kagiso 2.

[167] In *Maila v The State*,⁴⁹ the SCA referring to the case of *Tshiki v S*⁵⁰ held:

"[20] It is trite that an accused person is entitled to raise any defence, including that of an alibi – that at the time of the commission of the crime, they were not at the scene of the crime but somewhere else. They can also lead evidence of a witness(es) to corroborate them on their whereabouts at the critical time. Nevertheless, it is trite that an accused person who raises the defence is under no duty (as opposed to that of the State) to prove his defence. If the defence is reasonably possibly true, they are entitled to be discharged and found not guilty."

[168] The Court went on to explain that the correct approach is that an *alibi* must be considered in the light of the totality of the evidence in the case, and the Court's impressions of the witnesses.' An *alibi* may only be rejected by court where it was proven beyond reasonable doubt that it was false.⁵¹ The effect of a false *alibi* is that an accused is placed in a position as if he has not testified at all.⁵² If there is evidence of an accused person's presence at a place and at a time making it impossible for him to have committed the crime and if in the totality of the evidence there is a reasonable possibility that the *alibi* evidence is true, the effect is that there is a possibility that he has not committed the

⁴⁹ *Maila v S*(429/2022) [2023] ZASCA 3

⁵⁰ *Tshiki v S* [2020] ZASCA 92 (SCA)

⁵¹ *Shusha v S* [2011] ZASCA 171 para 10 and *S v Musiker* 2013(1) SACR 517 (SCA) para 15-16.

⁵² *S v Liebenberg* 2005 (2) SACR 335 (SCA)

crime.⁵³ The onus does not change; however, it was observed that the vulnerability of an unsupported *alibi* defence in that case will depend on the court's assessment of the truth of the accused's testimony.⁵⁴

[169] The alibi defence has received the attention of our courts, in particular that of the Constitutional Court in *Thebus v S*⁵⁵, where it is stated:

'... [A] failure to disclose an alibi timeously has consequences in the evaluation of the evidence as a whole [and] is consistent with the views expressed by Tindall JA in *R v Mashelele*. After stating that an adverse inference of guilt cannot be drawn from the failure to disclose an alibi timeously, Tindall JA goes on to say:

"But where the presiding Judge merely tells the jury that, as the accused did not disclose his explanation or the alibi at the preparatory examination, the prosecution has not had an opportunity of testing its truth and that therefore it may fairly be said that the defence relied on has not the same weight or the same persuasive force as it would have had if it had been disclosed before and had not been met by evidence specially directed towards destroying the particular defence, this does not constitute a misdirection."

[168] I found the third complainant to be an impressive witness. She gave her evidence in a calm and dignified manner notwithstanding rigorous cross-examination and the fact that it must have been a traumatic experience for her to testify about what happened to her that day. It was a long day and a long night for her. The impression which she gave me was that of an honest witness who was doing her best to assist the court. She made no attempt to exaggerate the events, so much so that she quite candidly stated that the firearm was not pointed at her in the motor vehicle. She answered questions without hesitation and her demeanour in the witness box was good. She conceded when she made mistakes, which mistakes to me was not material. I am satisfied that the third complainant was an honest and reliable witness and that I can place reliance on her testimony. I have considered the evidence regarding the discrepancies with great circumspection and find such discrepancies as there may be in her evidence is not sufficiently material to

⁵³ See *R v Biya* 1952 (4) SA 514 (A) at 521E-D

⁵⁴ *S v Mathebula* 2010 (1) SACR 55 (SCA) para 11

⁵⁵ *Thebus and Another v S* [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC).

affect her evidence to be rejected.⁵⁶ I have also considered the chronology of her narrative and the degree of force and threats that were used by the Accused so that she succumbed. Duress, which resulted in a person's will being overborne, vitiates consent. For example, the application or threatened application of physical force constitutes the clearest illustration of the vitiation of consent on account of duress.⁵⁷

[169] If I accept the Accused's version and that of his alibi as being reasonably possibly true then it will mean that the State's version was flawed, and that the first complainant fabricated her evidence, and then I must reject it. It was common cause that the Accused and the third complainant were together on the day of the incident. If I accept the Accused's version, then there was no explanation of how the injuries which are corroborated by the J88 was sustained by the complainant. The defence argued that the State failed to prove that the defence of the alibi was false beyond a reasonable doubt. There was evidence during the State's case that the Accused was going to raise the defence of the *alibi*. If the Accused was certain about his alibi defence this should have been made available to the State during his arrest or even sooner so that the State could have the *alibi* defence investigated. There was no mention of the *alibi* defence at the plea explanation stage. I cannot accept that the alibi defence when I consider the evidence in totality. The Accused on the night of the incident, also testified and confirmed that he saw the third complainant's injuries. The alibi relied on her time estimation after having watched Generations.

[170] The complainant's evidence was corroborated in several material respects by the first report and the medical evidence. The discrepancies can be attributed to secondary trauma and the other discrepancies were not material. I find that the complainant was a credible witness who withstood rigorous cross examination very well. I am mindful that this was an emotive and traumatic situation for the complainant. There were a few minor contradictions in the States version which I find were not material when consideration was given to the jurisdictional elements of the charge of rape and looking at the evidence in

⁵⁶ S v Mafaladiso en Andere (13/2002) [2002] ZASCA 92; [2002] 4 All SA 74 (SCA)

⁵⁷ Stal SJ "Does Mistaken Belief in Consent Constitute a Defence in South African Rape Cases?" PER / PELJ2023(26)-DOI<http://dx.doi.org/10.17159/1727-3781/2023/v26i0a15002>

totality. The probative value and weight of all the evidence before me revealed that the evidence overwhelmingly supported the States version.

[171] On a conspectus of the totality of the evidence, I find the third complainant, even though she was a single witness, was a credible witness who withstood rigorous cross examination very well. Her evidence was sincere, credible, satisfactory, and reliable. In so far as the rape charges were concerned on the material aspects there was corroboration with her oral testimony and her statements, as well as the report she made to the first report and the nurse. I considered the probative value and weight of the material, relevant and objective evidence of both versions in totality. I have no doubt, that the evidence against the Accused was overwhelming and the evidence supported the States version I find that the Accused's version was inconsistent and unreliable. It simply could not be accepted as reasonably possibly true. His testimony and that of his alibi were improbable and rejected as false beyond reasonable doubt. I find that the State discharged the onus placed on it beyond a reasonable doubt.

Evaluation Counts 8. to 10 :

[172] The Accused faced three counts with the fourth complainant. Count eight related to the charge of kidnapping where the fourth complainant testified that the Accused spoke to her in a cheeky manner and in an aggressive tone. He ordered her to get into the car on the day of the incident and he threatened to kill her if she did not do so. He raised his voice, and she was afraid of him because she once heard that he possessed a firearm. She was afraid and therefore entered into his vehicle. He then took her to Green Village to a back room and sexually penetrated her twice and then dropped her off at home.

[173] Regarding the charges on kidnapping, the evidence was that the fourth complainant entered the car only because the Accused spoke to her in a cheeky manner and his tone was aggressive. She felt threatened and was afraid. Consequently, she was intimidated because she was aware that he possessed a firearm, albeit he did not threaten her with it, and she did not see

it. Essentially, she got into the car and accompanied him under duress and by threat. I am of the view for the reasons advance above that charges of kidnapping amounted to “splitting of charges” (duplication of the rape charges.)

[174] Count nine and ten related to the charge of statutory rape in terms of section 3 of SORMA. The Accused made admissions in terms of section 220 of the CPA marked exhibit “F.” According to exhibit “F” the Accused admitted that on the said date and place in counts nine and 10, he had engaged in sexual intercourse with the fourth complainant. The DNA forensics results which were positive was also admitted. His version was the intercourse was consensual, and sexual penetration only occurred once.

[175] The question to be considered is whether the fourth complainant’s actions and silence can be taken as if she tacitly agreed to sexual penetration.

[176] Regarding the two counts of rape, section 3 of SORMA punishes the unlawful, intentional sexual penetration without consent. Section 1(2) of SORMA deals 'with consent and provides amongst other things that for the purposes of the offence in section 3 (rape) consent means “voluntary or uncoerced agreement.” Section 1(3) provides for circumstances in which a complainant does not voluntarily or without coercion give consent to sexual penetration. Section (1)(3)(a) provides where (the complainant) submits or is subjected to such a sexual act as a result of –

“(i) the use of force or intimidation by a (the Accused person) against B, C (a third person or D (another person) or against the property of B, C or D; or

(ii) a threat of harm by A against B, C or D or against the property of B, C or D”

[177] The State’s version on counts nine and ten were that the Accused took her to an unknown house in Green Village to a back room and told her he was going to have sex with her. She did not respond due to fear. He ordered her to undress and due to his tone and voice, she was scared and removed her trousers. He penetrated her, had full intercourse with her and she was crying during the time. Whilst he fell asleep for 30 minutes, she could not run away because she did not know where she was. Upon waking he penetrated her

again. She was crying again as he was rough with her, he hurt her, she told him so, but he did not care. Her testimony was she was not a willing participant, but she never said so or voiced it due to been afraid of him.

- [178] The Accused's version was he was in an on- off relationship for almost nine months with the fourth complainant. They had engaged in sexual intercourse prior to the said date whilst visiting different places. According to him they had an appointment to meet at 08h00. He corroborated her version that she never voiced her unwillingness, nor did she resist, nor did she complain. According to exhibit "R" the accused made section 220 admissions regarding both counts nine and 10 yet during the proceedings, he requested to consult with his counsel and alluded to the fact he was only engaged in intercourse once which contradicts his section 220 admissions in terms of the CPA.
- [179] When considering the fourth complainant's oral testimony and her witness's statement, marked exhibit "E" there were material contradictions in her oral testimony she testified that she was raped twice, and, in her statement, she referred to the fact that she was raped. Furthermore, she did not inform the Accused she did not want to have sexual intercourse with him. She did not stop him.
- [180] The first report, who was the fourth complainant's sister, was not informed by the fourth complainant that she previously knew the Accused and that she had previously dated him. She also did not inform her that there were two rounds of sexual penetration that occurred that evening.
- [181] When Nurse Chabalala, examined the fourth complainant she reported to her that on the morning of the 8th of September 2021, she was abducted from Kagiso to Green Village by a man who was known to her. He raped and released her during the day. The perpetrator threatened to kill her with a firearm if she did not co-corporate with him. He did not use a condom during the intercourse. She did not find any genital injuries upon examination. According to the J88, marked exhibit "L", the fourth complainant presented herself with no history of physical assault, no history of injuries and no

physical injuries were seen. The genealogical findings were normal. However, the J88 did not exclude sexual assault.

- [182] The defence's version was that he and the Complainant made arrangements on the 6th of September 2021 to meet on the 8th of September 2021 to go on a date as they usually did. The plan was to spend the day together. However, since the fourth complainant's boyfriend did not go to work on the day in question, they could not spend the day together and she had to return early. Consequently, they did not go out as planned but went to the Accused's parental home where his step-father lived.
- [183] The question remained that he fell asleep for thirty minutes, the key was on the door and why did she not flee? Furthermore, the elderly gentleman was outside and why did she not say something to him. She could flee. To be this is a subjective test. As alluded to above, different women react differently. She was aware of that fact he was in possession of a firearm, albeit that she did not see it, When considering the definition of consent in terms of section 1(3) of SOMA, I find that she was threatened and did not vocalise anything due to the fear and the fact she was afraid.
- [184] The defence raised the issue that the fourth complainant testified that she was raped twice but her statement alluded to the fact that she was raped once. On an analysis of her testimony, and a perusal of her statement, the word "once" was not mentioned in her statement. She was a lay person and did not know the technicalities involved. To me it calls for specialised training that is required when taking statements of such a nature. More is expected from stakeholders in ensuring that the investigation is thorough. To a layperson rape could mean the entire ordeal. However, her oral testimony was clear that there were not just two acts of sexual penetration but two counts.
- [185] The State Counsel submitted that the fourth complainant testified in a clear and logical way. She submitted there were some minor contradictions between her evidence and that of her first report. The presence of discrepancies does warrant rejection of her evidence. It was submitted that the probabilities of the case do not favour the Accused's version of

consensual sexual intercourse. It was highly improbable that the fourth complainant would lay rape charges against the Accused after having fun engaging therein a day later. According to the Accused they had previously engaged in sex, but no charges were reported. It was further submitted that the absence of contact between the parties after the incident was a clear indication that they were not in a love relationship as alleged by the Accused.

[186] On a conspectus of the totality of the evidence, I find the fourth complainant, even though she was a single witness, was a credible witness who withstood rigorous cross examination very well. Her evidence was sincere, credible, satisfactory, and reliable. In so far as the rape charges were concerned on the material aspects there was corroboration with her oral testimony and her statements, as well as the report she made to the first report and the nurse. I considered the probative value and weight of the material, relevant and objective evidence of both versions in totality. I have no doubt, that the evidence against the Accused was overwhelming and the evidence supported the States version I find that the accused's version was inconsistent and unreliable. It simply could be accepted as reasonably possibly true. His testimony was improbable and rejected as false beyond reasonable doubt. I find that the State discharged the onus placed on it beyond a reasonable doubt in respect of all the counts of rape.

Consent and intention in respect of all Counts.

[187] The State bears the onus of proof, including that the Accused did not believe that he had the consent of each of the four Complainants. Accordingly, a person accused of a sexual offence can claim they believed the complainant consented even if the belief was unreasonable or irrational. Many of these "beliefs" perpetuate myths and stereotypes about sexual violence, including that victims must resist sexual violation by force. This clearly violates the Constitutional rights to equality, dignity, and access to courts by victims of

sexual violence cases as proving such offences will be onerous on the victims.⁵⁸

[188] It was common cause that the consent was not explicitly given regarding the fourth complainant. The Accused relied on the fact that she did not say no, she did not stop him and neither did she object to them having sexual intercourse. According to him, he tacitly believed that consent was given by the conduct of the complainant.

[190] How should consent be established. According to Snyman, consent may operate as a ground for justification in respect of certain offences. The SCA in *S v Nitito*⁵⁹ endorsed the views of the author CR Snyman, in the following manner in relation to the issue of consent:

"[8] The author Snyman, states:

'For consent to succeed as a defence, it must have been given consciously and voluntarily, either expressly or tacitly, by a person who has the mental ability to understand what he or she is consenting to, and the consent must be based on a true knowledge of the material facts relating to the intercourse.'

[191] It was submitted by the State that it was trite law that the onus rested on the State to prove its case beyond reasonable doubt. Proof beyond reasonable doubt does not mean that the State has to eliminate every hypothesis, which was inconsistent with the Accused's guilt.

[192] The Defence contended that the evidence of each of the complainants were unreliable and not credible and it could not be said that the Accused's version of each of the incidents were not reasonably possibly true. The Defence attacked each of the reports made to the first reports.

[193] With regard to the fourth complainant the defence argued that she returned to her boyfriend and did not make a report to him as she was confused and only reported to her sister the following day what had happened. This is normal will be discussed below.

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⁵⁹ *S v Nitito* (123/11)[2022]ZASCA 198 (23 November 2011)

[194] In *Coko v S*⁶⁰ the Court dealt with an appeal against conviction and sentence on a rape which dealt with the issue of consent. In that case, the court referred to *Otto v S*⁶¹ where it was decided :

"The onus rests on the State to prove all the elements of the offence of rape, including the absence of consent and intention. That is so even where, as in this case, the version put to the complainant by the appellant's legal representative was a denial of any sexual contact with her." The court correctly found that the State bore the onus to prove absence of consent and where there was no express rejection of the sexual act, the court then proceeded to refer to *Mugridge v S*⁶² where the SCA commented as follows :

"[37] In law, consent has the following requirements:

- (a) the consent itself must be recognised by law.*
- (b) it must be real consent; and*
- (c) it must be given by a person capable of consent.*

[38] The question of whether consent in the context of sexual offences will be 'recognised in law' is determined with reference to considerations of public policy,"

[195] On a rape charge, it is trite that if the State cannot prove non-consent beyond reasonable doubt, the prosecution must fail and the victim's consent was assumed so that the Accused should be acquitted.⁶³ The true enquiry, it has been suggested, was whether the coercion overcame the victim's opposition to the sexual penetration. The fact that a complainant did not physically resist, or otherwise submitted to intercourse or penetration was not directly relevant to the central question of whether she or he voluntarily consented.⁶⁴ A mere submission does not necessarily include consent. Submission without consent was held to have occurred and this aspect was dealt in *Rex v Swiggelaar*⁶⁵, where the court commented as follows:

⁶⁰ *Coko v S* (CA & R 219/202)[2021]ECGHC 91;[2021] 4 All SA 768(ECG);2022(1) SACR 24 ECG(8/10/2021)

⁶¹ *Otto v S* [2017] SCA 114

⁶² *Mugridge v S* (657/12)[2013] ZASCA 43; 2013(2) SACR 111 (SCA)

⁶³ South African Criminal Law and Procedure – Volume III: Statutory Offences RS 24, 2014 chE3-p9.

⁶⁴ See footnote 63

⁶⁵ *Rex v Swiggelaar* 1950(1) PH HG1(A) at 110

'The authorities are clear upon the point that though the consent of a woman may be gathered from her conduct, apart from her words, it is fallacious to take the absence of resistance as per se proof of consent. Submission by itself is no grant of consent, and if a man so intimidates a woman as to induce her to abandon resistance and submit to intercourse to which she is unwilling, he commits the crime of rape. All the circumstances must be taken into account to determine whether passivity is proof of implied consent or whether it is merely the abandonment of outward resistance which the woman, while persisting in her objection to intercourse, is afraid to display or realises is useless.'"

[196] It is clear that a man that intimidates a woman to the extent that she is induced to abandon her resistance and submit to intercourse or penetration, for which she would otherwise have been unwilling, commits the crime of rape.⁶⁶ The definition of coercive circumstances in the Act extends beyond such cases of actual force or intimidation. It included instances where the complainant was inhibited from expressing unwillingness or resistance to sexual penetration, or unwillingness to participate therein.

[197] When I applied the legal principles to all the complainant's evidence on consent as highlighted above, I find that the consent by the complainants were neither real, given voluntarily nor demonstrated tacitly. The Accused irrespective of denying intercourse with the first three complainants could not have reasonably believed that the fourth complainant had consented to the sexual penetration.

[198] All the complainant's felt threatened including the fourth complainant where the Accused alleged the sexual penetration was consensual. I find that the Accused acted both unlawfully and had the requisite intention to rape each the complainants.

[199] The question whether there was intention for the offence of rape arises in connection with the element of lack of consent. X must know or foresee the possibility that Y was not a consenting party, and yet proceeded with sexual penetration.⁶⁷ Put differently, if X genuinely believed that Y consented (whether because of Y's conduct, active or passive, or otherwise), then, even

⁶⁶ Footnote 63

⁶⁷ R v K 1958 (3) SA 420 (A) at 421-2, 423

though his belief was unreasonable, he lacked intention.⁶⁸ This aspect is determined from the factual position as discussed in each of the counts.

[200] During cross-examination, the fourth complainant conceded she saw an elderly gentleman outside talking with the Accused whilst she was inside the room. According to her, after the first round of sexual penetration, the Accused napped for 30 minutes. During that period, she lay naked in the bed waiting for him to wake up. The key was hanging on the door, and she did not make any attempt to flee because the Accused informed her, he was not satisfied.

[201] Each of the complainants discussed their subjective fears at the time sexual penetration took place. They were either threatened with a firearm or subjected to threats.

[209] Could the fourth complainant's silence be interpreted that she consented to sexual intercourse? In *Maila v S*⁶⁹ it was stated: , "Authors and experts in the field of psychology and criminology state that '[e]ach victim reacts differently after a violent act. [They] may try to dismiss or ignore what happened and even normalise it by having contact with the perpetrator in the future. [They] may only decide to report once [they are] supported by a family member or when a friend confirms that this behaviour is indeed wrong. If the perpetrator is considered as a trustful person, victims may take years to link their situation to violence and recognise it as such. Sexual violence victims often experience a profound sense of shame, stigma, and violation'. [13] What is important is that the first report is made at the first opportunity available to the victim of sexual violence. In most cases, when they feel safe to do so, or they do not fear reprisals. Failure of the complainant to report an alleged rape as soon as possible cannot be 'the benchmark for determining whether or not a woman has been raped'

[210] I find that from a conspectus of the evidence in its totality, I have considered the fact that each of the complainants' were afraid, scared, threatened and intimidated by the Accused as discussed under each count.

[111] On a conspectus of the totality of the evidence, I find that each of the complainants, even though they were single witnesses, they were credible witness all who withstood rigorous cross examination very well. Their

⁶⁸ S v B 1996 (2) SACR 543 (C).

⁶⁹ *Maila v S* (429/2022) [2023] ZASCA 3 , *Monageng v S* [2008] ZASCA 129; [2009] 1 All SA 237 SCA

evidence was sincere, credible, satisfactory, and reliable. In so far as the rape charges were concerned on the material aspects there was corroboration with her oral testimony and her statements, as well as the reports they made to the first reports and the medical practitioners. I considered the probative value and weight of the material, relevant and objective evidence of both versions in respect of all complainants in totality. I have no doubt, that the evidence against the Accused was overwhelming and the evidence supported the States version I find that the accused's version was inconsistent and unreliable. It simply could not be accepted as reasonably possibly true. His testimony was improbable and rejected as false beyond reasonable doubt. I find that the State discharged the onus placed on it beyond a reasonable doubt on all the counts that the Accused was convicted of.

Order

[212] In the result, I make the following orders:

- a. Count 1 : Rape the Accused is found guilty as charged.
- b. Count 2: Pointing anything likely to lead a person to believe it was a firearm the Accused is found guilty as charged.
- c. Count 3: Rape the Accused is found guilty as charged.
- d. Count 4: Kidnapping the Accused is found not guilty and is acquitted.
- e. Count 5: Assault with intent to do grievous bodily harm the Accused is found guilty as charged.
- f. Count 6: Pointing anything likely to lead a person to believe it was a firearm the Accused is found not guilty and acquitted.
- g. Count 7: Rape the Accused is found guilty as charged.
- h. Count 8: Kidnapping, the Accused is found not guilty and acquitted.
- i. Count 9: Rape, the Accused is found guilty as charged.

- j. Count 10: Rape, the Accused is found guilty as charged.

**CB BHOOLA
ACTING JUDGE OF THE HIGH
COURT JOHANNESBURG**

Appearances

Date of hearing: 23/01/2023, 25/01/2023, 26/01/2023,
30/01/2023, 31/01/2023, 02/02/2023,
03/02/2023, 19/06/20203, 20/06/2023,
21/06/2023, 26/06/2023, 27/06/2023,
31/07/2023, 18/09/2023, 29/09/2027,
03/10/2023, 06/10/2023, 11/10/2023

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