



**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)**

**NOT REPORTABLE**

Case no: 30/2022

In the matter between:

**THE STATE**

and

**NKOSIKHONA MADINGA**

**Accused**

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**JUDGMENT**

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**Govindjee J**

**The charges**

[1] Mr Nkosikhona Madinga pleaded not guilty to various counts of rape, robbery and housebreaking in respect of incidents that occurred between 2011 and 2017.

**Count 1**

[2] Mr Madinga was charged with rape in that on 5 March 2011 he unlawfully and intentionally committed an act of sexual penetration with NN, a 15-year-old girl, per vaginam without her consent. Mr Madinga made admissions to the effect that he was in a love relationship with NN at the time and that they had consensual sexual intercourse that day. NN testified that she had been walking with her ex-boyfriend, Khanyisa Madinga ('Khanyisa') after a sports event held at a school. She estimated that it was sometime between 18h00 and 19h00. She observed an obstacle in their path. It was a person, who called her by name. They gave way and veered in a different direction in order to pass the person. NN then noticed that it was Mr Madinga who had called out. She did not respond.

[3] Mr Madinga was known to NN because of the proximity of their villages, but there was no other connection between them. He instructed Khanyisa to leave, adding that he wanted NN. Khanyisa demurred, and NN asked Mr Madinga to leave her as she was in a hurry and wanted to leave. Instead, he approached her wielding a fixed-bladed knife. She retreated and he again told Khanyisa to leave. Khanyisa ran away and NN was left with Mr Madinga. He told her he had longed for her, asking her to accept his love. She refused to do so.

[4] NN and Mr Madinga were at that stage close to the river that separated their villages. He pulled her in the direction of his home. When she resisted, he broke a branch from a tree and assaulted her, causing her to cry. When she had subdued, he threw her onto the ground and held her throat when she screamed again. He then removed her pants and panty, instructing her to lie still and quiet and to open her legs wide. Mr Madinga then climbed on top of her, removed his pants and underwear and inserted his penis into her vagina. When she screamed, he drew his knife and held it close to her face, placing it near her head while continuing to have intercourse with her. She continued to cry.

[5] NN testified that she was raped again when she tried to walk home. On both occasions she had been on her back, a condom had not been used and she had not

given her consent. She had not been a willing participant and the incident had affected her badly.

[6] NN went to her late father's home after the incident. She cried upon entering. Her father left her alone and asked her what had happened the following morning. When she told him she had been raped, her father's initial response was to visit Mr Madinga's home to make enquiries. He was convinced not to do so by another person and NN was taken to hospital for medical examination and to the police so that a case could be opened. A J88 report, accepted into evidence by consent, reflects that the complainant was examined at 11h30 on 6 March 2011. Her panties were described as blood-stained, bleeding was observed at the perineum and her vagina was bruised with fresh tears, indicating recent penetration.

[7] The complainant could not explain the delay in bringing the matter before court. She had appeared on several occasions in a lower court prior to 2015, and the matter had been postponed on each occasion. She knew Mr Madinga given the proximity of their villages and he knew her by name. They had never conversed previously, even though Khanyisa was Mr Madinga's nephew. NN explained that she would typically stay at a friend's home if she was out after 20h00, as her father would be in bed. On this occasion, even though her curfew was long past, she had decided to go to her father's home because she had been raped and wanted to inform him about this. She had been so upset that she could not speak to him until the following morning.

[8] As to the incident itself, NN explained that she had been frightened when she had seen Mr Madinga produce a knife and approach Khanyisa. She had not thought about running away. She walked for some distance with Mr Madinga, while he insisted that they would go to his home and that he had long desired her. Eventually he grabbed and pulled her in that direction while she resisted. She admitted that her statement made to the police at the time of the incident only made reference to a single rape, but insisted that she had been raped twice. She had been frightened and upset and thought she had told the police about the second rape.

[9] NN denied that she had been in a relationship with Mr Madinga from January 2011. There had been no agreement, reached the previous day, to meet him after the sports event at the school. She had not seen Mr Madinga on the previous day. Sakhele had not been present when she and Khanyisa had come across Mr Madinga. She vehemently denied that she had agreed to have intercourse with him outside his sister's home and in the bushes. They had not been near that area and Mr Madinga was lying. She also denied that there had been an agreement for intercourse to take place at Mr Madinga's home, but that she had informed him that this was not possible because her father was waiting for her at home. She explained that her father was an elderly person, who had since passed away, who was always at home. She would never have reported the matter to the police if there had been any agreement on her part to be with Mr Madinga.

[10] Khanyisa was 15 at the time of the incident. He confirmed that the complainant had previously been his girlfriend. He had been walking with her when they had seen Mr Madinga, his uncle. Mr Madinga had called her and, when she did not respond, pulled her by the hood of her jacket. The witness noticed that Mr Madinga was carrying a fixed-bladed knife in his hand, which he held while wrestling with the complainant. When Khanyisa tried to intervene, he was told that he would be stabbed. Mr Madinga advanced upon him and slightly scratched and tore the school tracksuit he had been wearing, on the left chest portion. This prompted Khanyisa to leave the scene. Although he testified that he was concerned about the well-being of NN, he failed to report the matter to anyone. Khanyisa testified that he lived alone. He had unsuccessfully tried to locate his younger brother, to seek his advice, prior to turning in for the night.

[11] Khanyisa testified that there was no bad blood between him and Mr Madinga. He assumed that his relationship with NN was known to Mr Madinga and had never heard about any relationship between Mr Madinga and NN. During cross-examination, Khanyisa stated that Mr Madinga had repeatedly used a nickname for NN when he had called out to her. The knife used by Mr Madinga was a large, fixed-bladed knife, approximately 20 cm in length. Khanyisa had not heard NN cry prior to

his departure. He explained that his cell phone had run out of battery and could not be charged as there was no electricity at that time in his village.

[12] Despite being keen to rekindle his relationship with NN, Khanyisa's only attempt to assist her was to seek out his brother. He had been relatively young at the time and was frightened to walk around at night. The nearest police station was far away and he had not thought to visit a neighbour. He had not been thinking clearly, but thought that Mr Madinga would not harm NN since he knew that Khanyisa had seen him with a knife. He maintained that he had seen a knife but could not dispute whether NN was on friendly terms with Mr Madinga. He denied that Sakhele had been on the scene.

[13] Khanyisa testified that he had resumed the relationship with NN sometime after the incident. He had been on good terms with his uncle and visited his home after the incident. They had not discussed what had occurred. On his version, the knife had been wielded in his direction, rather than towards NN.

[14] Mr Madinga testified that the complainant had agreed to commence a relationship with him at the start of January 2011. They had met at her home on the day before the incident. Mr Madinga had wanted her to accompany him to his home to spend the evening with him, and she had suggested they do so the following day. They met after 18h00 half-way to the school. He was with Sakhele. Khanyisa was with the complainant and agreed to give them time together, before leaving. Mr Madinga was not in possession of a knife and had not threatened to stab Khanyisa.

[15] The complainant and Mr Madinga walked on, reaching the T-junction where the road split to their respective villages. The complainant did not want to go to his home for the sake of her father, who had returned early from a traditional ceremony. Instead of making another arrangement, the two walked on in the direction of her home. Mr Madinga doubted the presence of the complainant's father at home and sought confirmation from her. He then added:

'I saw she [was] serious when she said that we can do what we wanted to do even here.'

[16] He understood that she had not wanted to spend the night at his place, which might result in a quarrel with her father. They had been far from his home, and much closer to her home. Sexual intercourse in an open veld followed, after the complainant was asked to remove her clothing. He then accompanied her home and they separated on good terms.

### **Analysis**

[17] The court is faced with two irreconcilable versions of events. It is accordingly necessary to evaluate both versions against the inherent probabilities taking account of all the evidence.<sup>1</sup> This requires findings on credibility of the various factual witnesses, their reliability and the probabilities.

[18] The complainant is a single witness to the alleged rape. Conviction on the evidence of a single witness is, in terms of s 208 of the Criminal Procedure Act, 1977,<sup>2</sup> possible. It is this court's duty to weigh the evidence, consider its merits and demerits and, having done so, to decide whether it is trustworthy and whether, despite shortcomings, defects or contradictions, the truth has been told beyond reasonable doubt. The cautionary rule that the evidence of a single witness must be clear and satisfactory in every material respect has been held to be a guide to the right approach, but is not to be interpreted to suggest that any criticism, however slender, of the witness' evidence would justify an acquittal.

[19] Although now an adult, the complainant was a child at the time she was allegedly raped. The imaginativeness and suggestibility of children have been held to be only two of several elements that require that their evidence be scrutinised with care to the point of suspicion.<sup>3</sup> A trial court must fully appreciate the inherent dangers in accepting such evidence.

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<sup>1</sup> See the judgment of Wallis JA in *S v BM* 2014 (2) SACR 23 (SCA) para 8.

<sup>2</sup> Act 51 of 1977 ('the Act').

<sup>3</sup> *S v Mafaladiso en Andere* 2003 (1) SACR 583 (SCA) at 593e – 594h, as translated in BR Southwood *Essential Judicial Reasoning* (2015) (LexisNexis) at 77, 78.

[20] In this instance the complainant made a favourable impression, testifying guilelessly about what had transpired during 2011. The long period of time that has elapsed is a reality that cannot be ignored. Despite this, her evidence was consistent and clear in all material respects. The main issue raised by *Mr Erasmus* in argument is that her statement to the police at the time had not referred to two incidents of rape. The mere fact that there are contradictions between the testimony of a witness and their previous statement does not mean that the witness is not credible. Courts must be alive to the reasons for such differences, following the approach in *S v Mafaladiso en Andere* (footnotes omitted):<sup>4</sup>

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

[21] The variance in respect of the number of times the complainant was raped is notable, but must be evaluated in the context of all the evidence. Her age when making the statement cannot be ignored and her evidence that she had been frightened and upset at the time the statement was made is probable.

[22] The probabilities favour that, although she knew Mr Madinga, she was not in a relationship with him when he accosted her on the night in question. He forced her to

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<sup>4</sup> Ibid.

accompany him alone before raping her close to a river separating the villages, having assaulted her as she described in order to subdue her. This is not to suggest that the assault was serious or of the kind that would have left marks that would have been noted in the J88. I am unable to agree with the argument that the fact that the J88 makes no mention of this confirms Mr Madinga's version.

[23] The complainant's version of events was clear in all material respects and is supported by her conduct in the aftermath of the incident. She was heavily upset, went to her father's home and reported the matter to him the following morning. She was medically examined later that day, having not bathed, washed or changed clothing. Her panties were described as blood-stained and the medical report is consistent with forceful sexual penetration.

[24] The presence of the knife is also important in explaining how she accompanied Mr Madinga that evening. Khanyisa's evidence on that issue was clear, and corroborates the complainant's evidence that Mr Madinga was carrying a fixed-bladed knife when he accosted them. Khanyisa was threatened with the knife and his school tracksuit torn by it, prompting him to leave the scene. This is consistent with the complainant's version of how she ended up accompanying him alone. It must be accepted that the knife was later used to subdue her when she started screaming while being raped. Mr Madinga did so by placing it near her head. There was simply no reason for Khanyisa to fabricate the presence of the knife. He was on good terms with Mr Madinga, seemingly even after the incident, and, also bearing in mind his lack of action later that evening, had no special loyalties to the complainant. Mr Madinga did not suggest otherwise. When considering Khanyisa's failure to act, it must be emphasised that he was also a child aged 15 at the time of the incident, and that Mr Madinga was older than him and his uncle.

[25] Mr Madinga claimed for the first time during his testimony that the complaint was motivated by another family member, whose son had been convicted of murder in a case where he was called as a witness. He could not square that suggestion with the fact that the complainant had first reported the matter to her father, the morning after the incident. He also claimed to have had sexual intercourse with the

complainant on a previous occasion at his home, despite that not being put to the complainant. Whereas the version put was that the complainant and Mr Madinga went their separate ways immediately after intercourse, Mr Madinga insisted during his testimony that he had accompanied her home. That version must be rejected as not reasonably possibly true. His evidence on this count was replete with improbabilities and his testimony conveyed the impression of a person seeking to tailor his story to rebut the state's case, rather than an honest description of what had actually transpired.

[26] On a conspectus of all the evidence, including consideration of the evidence of the complainant with due caution, as a single witness to the rape, it must be concluded that the state has proved the charge in count 1 beyond reasonable doubt. Mr Madinga's version that he had been in a relationship with the complainant, that they had pre-agreed to have sexual intercourse and spontaneously decided to do so in open veld *en route* to the complainant's home is, considering the evidence in its entirety, simply not reasonably possibly true. In fact, it must be accepted that he came across the complainant and Khanyisa by chance, produced a knife in order to dispatch Khanyisa and raped the complainant when she failed to consent to his advances, drawing the knife and placing it close to her face and head when she started to scream, in order to force her into submission.

## **Count 2**

[27] It was alleged that Mr Madinga unlawfully and intentionally committed acts of sexual penetration with an 18-year-old girl by having repeated intercourse with her *per vaginam* without her consent. Mr Madinga admitted that he knew the complainant, 'NB', averring that they had been in a relationship from June 2009, including the time of the incident. He admitted having had sexual intercourse with the complainant on the evening of that day, and the following morning, with her consent.

[28] NB testified that sexual intercourse had occurred four times with Mr Madinga on 13 July 2012. She had previously been in a love relationship with him, but this had terminated before that date. Initially the relationship had been good, but she had

subsequently suffered abuse. NB had, as a result, told Mr Madinga that their relationship was over. He had not accepted this. Approximately a month had passed by time the incident occurred. By then, NB had informed Mr Madinga that she was in a different relationship.

[29] On the evening in question, NB had been walking with another female ('Ms Rona'). Mr Madinga, who was carrying a sjambok and a knife, had accosted them. Holding NB's hand, he had instructed Ms Rona to leave. When NB refused to accompany him, he began assaulting her with the sjambok, causing her to scream. She was hit all over her body, including her back and thighs. NB eventually sat on the ground and refused to accompany Mr Madinga. He produced a fixed-bladed knife and she rose. He dragged her towards his house.

[30] Ms Rona called to Mr Madinga and asked him what was happening. He told her to leave. NB's focus was on what was happening to her. She was told to undress and get into bed once they arrived at Mr Madinga's home. She had not wanted to do so but complied because of the knife, which was pointed towards her. Mr Madinga assisted her. When she was completely naked, Mr Madinga undressed himself.

[31] Mr Madinga enquired why NB was so quiet, suggesting that she planned to lay a complaint with the police, which she denied. He put on a condom and proceeded to have sexual intercourse with NB without her consent. The complainant experienced pain. Mr Madinga left the room. He returned after approximately ten minutes and told the complainant to open her legs wide. When she did not do so, he opened her legs and raped her again, this time without a condom. On both these occasions the complainant had been lying on her back. Mr Madinga again left the room and returned to rape the complainant again. This time he told the complainant that her facial expression should change, as it was clear that she did not want to have sex with him. She assured him that she would relax, being fearful and under the impression that he intended to beat her again. On this occasion she was told to lay on her stomach. The complainant maintained that she was not acting voluntarily, and had already made up her mind to lay a charge against him the following day. Mr Madinga again left the room thereafter, only to return and rape her for the fourth

time, despite her pleas of fatigue. When he had finished, he secured the doors in the house in a fashion that would prevent the complainant from leaving if he fell asleep, and returned to bed.

[32] NB testified that she was unable to leave during the night, as Mr Madinga was not fast asleep. He accompanied her the following morning until she requested him to turn back. She intended to visit her aunt so that she could be accompanied to the police station where a case could be lodged. She informed her aunt that she had been raped by Mr Madinga and a case was opened at a police station later that morning. A J88 medical report accepted into evidence reflects that the complainant was examined during the morning of 14 July 2012. Her labia minora was bruised and there were fresh tears on the posterior fourchette and bruising on the fossa navicularis. Her vagina was bruised and bleeding.

[33] The complainant explained that Mr Madinga's sister requested her to withdraw the case. One reason for this was that Mr Madinga was the only person at that parental home. His sister also promised to assist the complainant, who had dropped out of school, by pleading her case for readmission if she withdrew the matter. To make good on the promise, Mr Madinga's sister suggested that she accompany the complainant to the school before they went to withdraw the case. Mr Madinga's sister in fact pleaded with the school for her readmission, leading to the complainant deciding to uphold her end of the bargain. She testified that she would not have withdrawn the matter absent the sister's approach and felt bad about her rapes, which had been perpetrated absent her consent.

[34] During cross-examination, the complainant explained that she and Mr Madinga had been involved in a relationship from 2009, being from the same village. The relationship ended sometime during June 2012, approximately a month before the incident. Mr Madinga's attitude to the break-up was to indicate that he was not a person to be rejected. Thereafter, the complainant did see him from time to time and in passing, but had never visited him or conversed with him. She testified that she was scared to meet him at that time, based on his statement that he would assault the complainant if they ever met again.

[35] The complainant explained that she was on the way to a traditional ceremony, related to circumcision school, when she and Ms Rona met Mr Madinga. Sakhele, whose grandfather was married to the complainant's mother, was a friend of the complainant and was to join her in attending the function. The complainant and Ms Rona met him at his parental home prior to the function and spent approximately ten minutes with him. No alcohol was consumed. They left while he was locking the door and he indicated that he would join them on the way. Mr Madinga accosted them a minute or two away from Sakhele's place of residence. Sakhele was not on the scene. It was dark and Mr Madinga appeared suddenly, causing the complainant to shiver in fright. He was immediately recognisable. Without any conversation, Mr Madinga grabbed the complainant by the hand, pulling her away from Ms Rona, whom he instructed to leave. The complainant was then hit painfully with a sjambok, resulting in bruises and black marks on her body, with slight tears. She had screamed and cried and heard Ms Rona speaking nearby, asking Mr Madinga 'What are you doing to the child?'. In response, Mr Madinga had answered: 'Hey you, go'.

[36] The complainant did not notice any blood but observed, the following morning, that her skin had been cut. These injuries were not shown to the doctor the following day. The doctor's examination concentrated only on the complainant's private parts. The complainant maintained that she had mentioned her other injuries to the police, who had been communicating with the doctor. She had only communicated with the doctor directly in response to his questions relating to the rapes, but admitted that the personal information appearing on the J88 had emanated from her.

[37] The complainant testified further that she had been dragged to Mr Madinga's home, which was not very far away. No other people were observed during that time, including Mr Madinga's sister and her boyfriend. The complainant had been beaten and, when she tried to slow the pace, he had drawn a knife. This was close to the home's gate. Mr Madinga had still been holding the sjambok and had released the complainant when he drew out the knife, causing her to obey his commands. The complainant admitted that she had indicated to Mr Madinga that she was 'flexible' and that he 'must do whatever he wants to do' with her. She explained that this was

in response to Mr Madinga's remarks enquiring why she was 'upset and angry' and suggesting to her that she was likely to open a case against him. She had been under the impression that he would 'go and take' the knife, causing her to utter words indicating that she was 'flexible'.

[38] Mr Madinga's version was put to her as follows: he had been with Sakhele when Ms Rona and the complainant had arrived. At that stage the complainant was still in a relationship with him. Sakhele had washed himself and returned and the four had intended to go to the function together. They had not left Sakhele's home immediately because it was wet, cold and drizzling. When they did so, the complainant and Mr Madinga had walked slightly behind the other two. The complainant had agreed to accompany Mr Madinga to his home, so that they could sleep together given the weather. The complainant and Mr Madinga separated from the other two when they came to his home, meeting his sister and her boyfriend on arrival. Mr Madinga told the complainant that she could sleep while he spoke to his sister's boyfriend. This lasted for approximately ten minutes, and was followed by consensual sexual intercourse. The couple then slept until the following morning, and had consensual intercourse again, before departing for the complainant's aunt's home, where Mr Madinga left the complainant, proceeding to the function and becoming intoxicated. That afternoon, the complainant arrived at the function with some documentation, but Mr Madinga was unable to talk to her.

[39] The complainant dismissed much of this version as a fabrication. She could not explain why her police statement made no mention of a sjambok, but insisted she had told the police about this. Mr Madinga had not been at Sakhele's home. While it had been cold, she could not recall any rain. She and Ms Rona had chosen to be in Sakhele's company because of her fear for Mr Madinga. She had not agreed to go to Mr Madinga's home and had not met his sister or her boyfriend there. None of the sexual intercourse had been consensual. After raping the complainant, Mr Madinga would occasionally exit the house and return, but the complainant did not know what he did during that time. She had been unable to escape during the time that he was absent. She stood by the door trying to listen for movement, and could hear that Mr Madinga was walking around close by. The complainant had been

unable to sleep and was too scared to leave in case Mr Madinga woke up. He was a light sleeper and the door was secured with nails and a 30-centimetre iron rod and bolt, which was not easy to open without waking Mr Madinga. According to the complainant, she was told that any attempt would result in her physical injury. He had not accompanied her all the way to her aunt's home, acceding to her request that he turn back when he had wanted to do so. The complainant agreed that she had visited the festival on the afternoon after the incident. She did not give Mr Madinga the chance to talk to her, and ignored him.

[40] The complainant also offered an explanation for why she had decided to withdraw the matter, which she reiterated following a successful application for her recall for purposes of further cross-examination. Her withdrawal statement was accepted into evidence and indicated that no rape had occurred, the charges having been instigated based on the complainant's fear of her aunt. The evidence adduced to explain the withdrawal was based on the way in which Mr Madinga's sister communicated with her, which frightened her. His sister was elderly and the complainant had assumed that her words would carry more weight and would convince the authorities to readmit her to school. The sister had also suggested that Mr Madinga would be taken away from East London, if the case was dropped, so that the complainant could attend school freely. She had not spoken to the complainant in a friendly manner. The complainant also felt inclined to 'disappear' given her fear for him. He had assaulted her previously, resulting in a separate complaint to the police. Nonetheless, her family and Mr Madinga's sister's family had met at the complainant's home. Her step-father was a family member of Mr Madinga and the families had determined to resolve the issue amicably. It had been agreed that Mr Madinga should be taken away from the complainant. But once away from the family members, Mr Madinga's sister had spoken differently. The main reason for withdrawing the case had been Mr Madinga's sister approach to her family and the promise that she would intervene with the complainant's school to have her readmitted. His sister had also been present in the office at the time the withdrawal statement had been made to the police.

[41] The complainant testified that she had given birth to a child, fathered by Mr Madinga, during 2014. That child had since passed away and had been conceived without the complainant's consent. When asked why this had not formed part of her testimony, and in response to the contention that the two had been in a continuous relationship, the complainant stated as follows:

'No, the accused was continuously on occasion attacking me sexually. There was a time I laid a charge ... the same day he came to me and said "the police are not staying with you and they are my friends and I'll continue doing what I'm doing" – I then decided it was no use as I'm not getting any assistance'.

[42] The complainant had eventually travelled to the Western Cape to escape Mr Madinga, with the assistance of her mother's marital family. She explained that she had been unable to do so at an earlier stage as she had no family members in other provinces.

[43] During re-examination, the complainant clarified that her indication that Mr Madinga could 'do anything' to her was a statement of last resort, made because she felt that she would be assaulted otherwise. He had in fact continued to assault her even subsequent to the case being opened in July 2012. She had a boyfriend from another village at the time the child had been conceived during 2014. Mr Madinga would keep her captive if he came across her in the absence of any other people.

[44] Ms Rona testified that she had accompanied the complainant on the way to the function on 13 July 2012. While they were not friends, they were from the same village and school and had grown up in the presence of Mr Madinga, who was from the same village. The two had passed Sakhele's residence en route. He was relaxing and they requested him to accompany them, being scared to walk on their own. In particular, the complainant feared Mr Madinga. Sakhele agreed to accompany them, and promised to catch up with them after locking his premises. Mr Madinga appeared. He and the complainant had previously had an affair and the complainant was concerned that he would make her miss the function, where she was to 'share a blanket' with another person. The witness was uncertain whether the complainant and Mr Madinga were a couple at that time. Mr Madinga addressed her,

saying that she should 'lend him' the complainant. She agreed and the two moved away, while she sat and waited. She heard a scream, from a distance of approximately 25 metres, and made an enquiry from Mr Madinga, who told her to leave. The witness decided to leave because it was dark. The complainant stopped crying and Sakhele appeared. The complainant and Mr Madinga were still some distance away, and their voices could not be heard. The witness explained to Sakhele that the complainant had been taken away by Mr Madinga. Sakhele indicated that he would not do anything given that no screaming could be heard. She and Sakhele proceeded to the function, returning the following morning, by which time the incident had become known.

[45] The witness did not see Mr Madinga again that evening or the following morning. She did see the complainant the following day and was shown the marks on her back. The complainant had informed her that she had been beaten by the accused, who had 'wanted sexual intercourse with her forcefully, then he beat her and then had sex with her'. She had been told that this was on four occasions. The complainant was scared and had wanted to leave.

[46] Ms Rona testified that Mr Madinga and the complainant had been engaged in altercations during their relationship, and that Mr Madinga had assaulted the complainant previously. The witness had not had a problem with Mr Madinga previously, and could not comment on his state of sobriety. She testified that he had been carrying a sjambok that evening, and that the complainant had told her that he had used this on her, also carrying a fixed-bladed knife.

[47] During cross-examination, the witness explained that she knew about the relationship, and that Mr Madinga went around at night. He had not appeared to be angry when he asked her to 'borrow me' the complainant when they met that evening. She could hear some conversation, seemingly an argument, when she stepped aside. The witness was concerned as the complainant appeared not to be agreeing with Mr Madinga, who was being forceful. She heard her tell Mr Madinga that she did not want him anymore and that she was leaving for the function, but could not hear a response. She denied that Mr Madinga had been present at

Sakhele's house when they arrived there, maintaining that she and the complainant had left while Sakhele had been locking his home. The journey to the function passed Mr Madinga's place of residence. The witness had no knowledge of what transpired subsequently, but maintained that she had seen Mr Madinga carrying a sjambok. She had noticed that the complainant was in trouble when they had met Mr Madinga, but had assumed that everything was in order once they had become quiet, adding as follows:

'I have no other choice. I was worried but I couldn't go there to his house and take her away. I had no means to meddle with that situation.'

[48] Nomthandazo Sokuyeka testified that she was NB's aunt, living with her during July 2012. NB had arrived at the home during the morning and reported that she had been raped four times by Mr Madinga. The complainant had been crying and had bruises on her back, which she said had been caused by Mr Madinga with a sjambok when she refused to accompany him, and which she showed to the witness. The complainant had informed the witness that she had been forced to sleep with Mr Madinga because he had drawn a knife. The complainant had requested the witness to accompany her to the police station. After reporting the matter they had been referred to a doctor. Mr Madinga was known to the witness because her sister, the complainant's mother, had married into his family. According to the witness, the complainant's relationship with Mr Madinga was not good and he had assaulted her previously. Ms Sokuyeka had suggested to the complainant's mother that NB should stay with her, given the fear for Mr Madinga.

[49] Ms Sokuyeka indicated during cross-examination that only two bruises had been clear. These had been on the complainant's back. The witness had undressed her and observed that her body did not look 'right'. These injuries were shown to the examining doctor, who had commented that she was badly injured. The witness testified that she personally also told the doctor about these injuries. The doctor never examined the complainant's back and had concentrated on her private parts. The situation was, however, not normal, as both the complainant and Ms Sokuyeka had been crying. According to the witness this might have resulted in the injuries not being recorded.

[50] Mr Madinga confirmed that he had been in a relationship with the complainant since May 2009. On the night of the incident, he had been with Sakhele at the latter's home, when the complainant and Ms Rona arrived. The four decided to proceed to the function together. After Sakhele had taken a bath, and once the rain had settled, they left through the gate. Mr Madinga walked ahead with the complainant, with Sakhele and Ms Rona some 15 metres behind them. It was then that the complainant agreed to accompany Mr Madinga to his home. They waited for the others near the gate of his home and he informed Sakhele of their plan. While conversing, he looked towards his home and saw his older sister with her boyfriend ('Mr Ndileni'). They were inside the premises in front of the rondavel. His evidence proceeded as follows:

'As I opened the gate, my sister's boyfriend called out for Sakhele and started a conversation with him. I went inside, opened my flat and went inside with N ... after we entered the rondavel, I left N there and went out to my sister's boyfriend there at the rondavel...he said that he was going to buy me some beers ... I said that that was not a problem but that he should allow me to inform N ... I got to her [after two minutes], informed her that I am just going to spend a few minutes [with my sister's boyfriend] ... She said I can go ... I got to my sister's boyfriend; we consumed four beers ... it was the two of us, my sister and my sister's son ... after consuming beers, I went back to my flat. [I was gone] between 35-40 minutes.'

[51] Mr Madinga's evidence was that he had closed only the lower half of the stable door when he first left the complainant in his room, which was for a period of two minutes. He then returned to her to inform her that he would be spending time with Mr Ndileni. He then asked her to close the (entire) door from the inside and seemingly informed her that he would knock when returning. He was specific in testifying that he had told her to close the door to prevent the wind coming in. After returning, Mr Madinga and the complainant proceeded to have consensual sexual intercourse thrice before the following morning, when he accompanied her towards Ms Sokuyeka's village. As his relationship with her was not good, he turned around halfway, hugging the complainant before leaving her. He was surprised to learn of the allegations of rape. Charges with withdrawn on his second court appearance and

he resumed a relationship with the complainant during 2013. He was then informed that the charges had been instigated by Ms Sokuyeka.

[52] During cross-examination, Mr Madinga explained that he had requested a moment alone with the complainant as they were leaving Sakhele's home, while he was busy locking up. He refuted the complainant's version in part on the basis that she could have screamed for help when she entered his home.

[53] Mr Z Ndileni testified on his behalf. He confirmed that NB had been in a relationship with Mr Madinga. The witness had visited his wife on the day of the incident and was drinking beer with her while seated in the front of the rondavel when Mr Madinga and the complainant had arrived around dusk. His evidence proceeded as follows:

'On their arrival, they went into the gate talking with each other. And they went to the back room of [Mr Madinga]. After a while, he left his room and he came to me. On his arrival he joined me in drinking this liquor. We then went inside the rondavel and finished the beers I was drinking. He left and went back to his room.'

### ***Analysis***

[54] As with count 1, the same cautions must be applied to the testimony of the complainant. She was also a single witness to the alleged rapes and, although not a child, only 18 years of age at the time. Again, an inordinate amount of time has elapsed since the incident.

[55] The court is again faced with two irreconcilable versions of events. The complainant's overall version of events finds support in the testimony of both Ms Rona and her aunt. Mr Rona, in particular, impressed the court as a witness who had no reason to deliver false testimony. She was more of an acquaintance of the complainant's than a friend and certainly did not attempt to embellish her recollection and version of events. While she may be criticised for not having done more to assist the complainant at the time, she testified with apparent honesty about her recollection of events, and her decision not to interfere with a volatile situation. The

complainant was herself an excellent witness, openly acknowledging the circumstances that resulted in her previous withdrawal of charges against Mr Madinga, which I accept. Her testimony about her fear for Mr Madinga at the time, which is linked to the reason for seeking to be accompanied by Sakhele, was emphatic. Considered together, their evidence of the material events was coherent and consistent and, as will be illustrated, accords with the probabilities.

[56] It must be accepted that the complainant and Mr Madinga had, at the very least, a tumultuous relationship. It is improbable that he was in the company of Sakhele when the complainant and Ms Rona passed by. Instead, the evidence suggests that he accosted the two, wielding a sjambok, and an altercation ensued, causing the complainant to cry out. The presence of the sjambok and confirmation of the complainant's cry supports the complainant's version that she was forced to accompany Mr Madinga to his home, and that he produced a knife, which Ms Rona would not have seen earlier, to ensure her compliance. The absence of other people at Mr Madinga's home at the time that they arrived there, and the complainant's account of the repeated sexual intercourse that followed, is equally probable, together with her reasons for not trying to escape.

[57] Considering the evidence in its entirety, it must be accepted that the complainant, as per her testimony, did not mention the injuries caused by the sjambok to the doctor the following day. Ms Sokuyeka's testimony in that respect, including that she had told the doctor about those injuries, is rejected. Despite this finding, and notwithstanding her latent bias in favour of her niece, I accept her testimony that the complainant reported her rape upon arrival, and that she showed her bruises to her, informed her about the sjambok and knife and requested Mr Sokuyeka to accompany her to the police station. Those aspects of the evidence are supported by either the complainant or, in respect of the presence of the sjambok and the display of bruises it had caused on her back, Ms Rona. Non-consensual sexual penetration is also consistent with the contents of the J88. Notwithstanding application of the necessary caution to the complainant's testimony, her evidence that she was raped on four occasions by Mr Madinga is accepted, beyond reasonable doubt, as being true.

[58] The fundamental discrepancies between Mr Madinga's version and that of his witness support this assessment. For example, Mr Ndileni made no mention of a discussion with Sakhele, or the presence of his wife's child, which formed part of Mr Madinga's testimony but was not put to the complainant. On the version put to the complainant, Mr Madinga had told the complainant she could sleep while he spoke to Mr Ndileni. The impression created was that she had proceeded without him. His testimony explained that he had taken her into his room and left her there for a couple of minutes, returned to her and then left her for approximately 35-40 minutes. Importantly, on his own version he had, when departing on the second occasion, told the complainant to close the entire door. On Mr Ndileni's version, the to-and-fro had not occurred. He also testified implausibly, considering the lapse of time, about having observed the exact manner in which the stable door had been half closed before Mr Madinga joined him to drink. He explained that this was because Mr Madinga's room was opposite where he had been in the rondavel. Nonetheless, it contradicts Mr Madinga's version of events in this respect too. Mr Ndileni's testimony lacked candour and his demeanour was not that of a person testifying honestly about events within his recollection. His bias in favour of Mr Madinga, given their family connection, cannot be ignored. Aspects of his version were improbable and contradicted established facts. Considering the quality, integrity and independence of his stated recollection, it must be concluded that Mr Ndileni was an unreliable witness whose testimony may be rejected.

[59] Mr Madinga's version of events on this count therefore stands alone. Considering the evidence of Ms Rona, and the quality of her testimony in support of the complainant's version, coupled with the favourable credibility assessment of her evidence, Mr Madinga's version of events appears to be wholly improbable. This is evinced by the contradictions in the defence version put to the complainant, compared to Mr Madinga's own testimony and that of Mr Ndileni. On the version put to the complainant, Mr Madinga had walked with her slightly behind Sakhele and Ms Rona when they left Sakhele's home. When he testified, the procession had reversed its order. There were also inconsistencies as to where he had spoken to the complainant about accompanying him to his home. His version as to what

happened near his home is even more unlikely, involving Sakhele leaving the company of Ms Rona to have a conversation with Mr Ndileni while he took the complainant inside. That version was never put to the complainant. Nor was his version that they had only had sexual intercourse thrice and not four times, or that the charges had in fact been instigated by Ms Sokuyeka. These issues cumulatively affect the credibility of the version presented, which, it must be concluded, is not reasonably possibly true and is rejected. Whether a relationship resumed after the night in question does not alter this assessment of the evidence.

### **Counts 3-5**

[60] Mr Madinga was acquitted and discharged in respect of these counts in terms of s 174 of the Act.

### **Counts 6 and 7**

[61] The accused is charged with unlawfully and intentionally breaking into and entering the house of the complainant, SF, on 29 January 2017, with the intention to commit rape, and rape. It is alleged that Mr Madinga repeatedly raped the 24-year-old complainant per vaginam without her consent having broken into her home.

[62] The complainant, who is now 30 years of age, testified that she lived alone in a two-room brick house, containing one bedroom and a lounge. She had closed and locked the door and windows of the house before going to bed on the evening in question. A young man arrived, saying 'sister, sister, open otherwise I'll shoot you'. He would run to the back of the home and then be quiet. During this time the complainant tried to send a 'call back' request to a man in a nearby village, in the hope that he would arrive quickly and assist her.

[63] The complainant was unable to recognise the voice of the person outside her home. The man opened the large bedroom window, which had been tied with a piece of wire. He entered the home, grabbed the complainant and threw her out of the window. Outside, the assailant, who was a stranger to the complainant, was on top of her. He held her by the throat and dragged her towards the gate. The complainant pleaded with him not to hold her throat, promising to accompany him. He took her to nearby veld, also asking her clan name, and indicating that he did not want anybody who may be looking for them to observe what they were doing. The complainant was on her feet when she said to him that she would not cry or scream.

[64] The assailant insisted that they should continue walking, even when the complainant expressed fatigue and pain. At some point she said to him that whatever he wanted to do should occur where they stood. The complainant explained that she had done so because it was night time and she was concerned that he would injure her. He then told her to sit and undress. She was wearing an underwear dress and T-shirt and, knowing his intentions, asked him if he had a condom. The assailant placed a fixed-bladed knife on the ground not far from the complainant, lowered his pants and underwear, put on the condom and penetrated her per vaginam. She asked him why he had not approached her and requested a love relationship instead of forcing her when she did not want to have sexual intercourse with him. The complainant confirmed that she had not voluntarily agreed to intercourse taking place, and that she was questioning him about his conduct while it occurred, explaining as follows:

'I was asking why are you doing such a thing and you are so young, you took me out there, you could have approached me and we agree on terms and then we could have agreed on a love relationship.'

[65] When asked whether she would have agreed to have intercourse with the man if he had approached her in that fashion, however, the complainant indicated that she would never have done so. Intercourse was painful. The perpetrator removed the condom once he had finished and placed it in his pocket. The complainant pleaded with him again, with reference to a proper approach and

relationship. He requested a call back to prove that she was serious, taking her phone and doing this himself.

[66] The complainant subsequently pleaded with the man to 'go up to the house and do what we have done here, nicely here in the house because I'm not even aware of the area where you have brought me'. She explained that she had done so because she was in a strange place and did not know his intentions. The man agreed and they walked normally, talking casually to one another. Sexual intercourse followed in the home, after the man was asked to wear a condom. The complainant testified that this was involuntary on her part. The man fell asleep and the complainant took a photograph of his head and shoulders, intending to use this to identify him. He awoke and asked what time it was before leaving the premises through the door. It was 04h30. The complainant broke down once he had left, screaming and crying, shocked, as she put it, by what had happened to her throughout the night.

[67] The complainant's sister-in-law had received a call back request from the complainant and called her later that morning. The complainant reported what had occurred. Her mother also called her, having heard from her sister-in-law what had transpired. Family members arrived from the village and took the complainant to the police station, where a case was opened against the accused. The photograph that had been taken was shown to people from the village. Mr Madinga's uncle, one Zenayi, was able to identify Mr Madinga as the person in the photograph. The complainant reiterated that she had only given into his requests for sex out of coercion.

[68] During cross-examination, the complainant explained that she had married a man named Unathi through arrangement and that her husband worked in Gauteng at the time of the incident, which was a month after the marriage. She had been new to the area and was only acquainted with people living on the premises.

[69] The complainant had not realised, prior to the incident, that her window, which was steel-framed, was tied with wire. She had never inspected it prior to the incident.

The man had been able to pull the wire open, without assistance, from the outside as it was not tied tightly to the frame. The complainant had been inside the home at the time and seen him do this. When the complainant paid attention to the window, subsequent to the incident, she realised that the wire had been stretched.

[70] Given the nature of the dwelling, the complainant had been unable to make any escape at the time that she heard the man speaking to her from outside, threatening to shoot her. It was approximately 02h00 and she had been woken from her sleep by the noise from outside. She explained that once inside, he had pushed her up against the window before throwing her out, resulting in a fall and abrasions on her arm. The complainant had also suffered nail marks on her neck from when her assailant had dragged her. She had been barefoot and her feet were painful as she was dragged to the bushes. The doctor or nurse who subsequently examined her had not noted any injuries other than to her private parts, and the complainant could not recall if she had told the person about such injuries.

[71] The complainant explained that she had deliberately pretended as if she would engage in a love relationship with her attacker during the incident. When they returned to the dwelling she had entered through the window and opened the front door for the man. When asked why she had done so, she indicated as follows:

'[It's] obvious. I'm under duress. ... nothing else I can do. He will again use that window and come to me if I don't do that. And no one can help me. And then he will kill me.'

[72] The person had wanted to have sex with her once he entered her home for the second time. She maintained that she would not have done so willingly and felt under duress. The main reason for this, she explained, was the knife that had been drawn and placed next to her while the attacker had raped her in the veld, even though she did not know where that knife was when he subsequently re-entered the premises.

[73] The other homesteads were, according to the complainant, far away. She did not know her neighbours and was fearful that she would be hurt if she was caught

seeking help during the time that the man had slept. She had no airtime, which resulted in her deciding to send call back requests earlier that evening.

[74] The complainant refuted Mr Madinga's version, which proceeded on the following lines. It was put to the complainant that Mr Madinga had passed by the home previously, conversed with the complainant and discovered that she was unhappily married by arrangement, which had occurred through pretence. The complainant had given him her cell number and the two had communicated telephonically, resulting in a relationship. It was the complainant that had invited Mr Madinga to the home that evening and made arrangements with him. As the front door key had been misplaced, the complainant had opened the window from the inside. Mr Madinga had assisted the complainant to find the key, after which sexual intercourse had taken place by consent. This had been pre-arranged by way of a whats app chat. Mr Madinga had fallen asleep and the complainant had taken a photo of him to show him how deeply he had been sleeping. The complainant had laughed when showing this to him. It was almost sunrise and he had left, after which the complainant had attended a village festival. Mr Madinga was shocked to hear that he was being sought in connection with the rape of Unathi's wife. In refuting this version, the complainant added the following:

'At that moment when he was there at the window, I knew someone was there, but the name Nkosinathi Madinga I only started knowing it when members of the community came the following day and when the police came to me about the case and mentioned his name. I did not know him when I saw him at the window.'

[75] The complainant vehemently denied that the sexual intercourse had been consensual, pointing to the fact that it would be strange for Mr Madinga to have arrived at 02h00. She highlighted the state of the window when the police had investigated, and that she had led them to the place in the veld where she had been raped.

[76] Ms Nontsikelelo Mxhamli, the complainant's sister-in-law, confirmed that she had received a call back request from the complainant on 29 January 2017. When she called the complainant she heard her crying. The complainant told her that an

intruder had arrived, taken her and 'pulled her into a hill'. The witness dropped the phone and ran to communicate the incident to her mother. She told her mother that the complainant was crying and that her mother should call her. Her mother did so in her presence, also calling two uncles who lived in the village to report the matter. During cross-examination, the witness confirmed that she had only seen the call back request at approximately 05h00, some three hours after it had been made.

[77] Ms Zandile Mpongo, the complainant's mother-in-law, confirmed Ms Mxhamli's testimony as it related to her. The complainant had told her telephonically that an intruder had entered through her window. One of the people she had called, Usinayi Madinga, was her cousin and an uncle of the accused, whose father was the witness' cousin. The witness explained that the complainant was new to the area and did not know people in the vicinity. She had not mentioned the name of the intruder when speaking to the witness. Once the witness saw a picture taken by the complainant, she realised that the intruder was Mr Madinga.

[78] Mr Bongani Tengwa testified that he had received a call from Ms Mpongo and met with the complainant, who was his nephew's wife. The complainant appeared frightened and scared. He had observed damage to the premises and called the police. The complainant had explained that the intruder had entered by opening the window, which had been tied with wire. She said she had been raped outside of the house at a nearby hill. The man who had been with Mr Tengwa was Mr Madinga's uncle and confirmed that the photograph that had been taken depicted his face, after which the police were called.

### ***Analysis***

[79] It is common cause that the complainant and Mr Madinga had repeated sexual intercourse on 29 January 2017, and that the complainant had taken a photograph of him at some point during the early hours of that morning. The key

issue is whether this intercourse occurred with the complainant's consent. On Mr Madinga's version, he had been invited to the complainant's home and arrived at approximately 21h00, after which repeated consensual intercourse took place. The complainant had been coerced into reporting the incident as rape only because Mr Madinga's uncle had seen him leaving her home, and there was bad blood between their families.

[80] The court is again required to resolve the contrasting versions, applying the necessary caution to the testimony of the complainant, who was a single witness to the alleged rapes. The complainant conveyed the impression of a person testifying honestly. Her version finds support in the testimony of Ms Mxhamli, who was also a good witness, and, to a lesser extent, that of the other state witnesses as to what really occurred. Ms Mxhamli received a telephonic report of the incident from the complainant, and advised her mother to contact the complainant, who had been crying. Significantly, her evidence confirms that the call back request had been sent at approximately 02h00, the time that the complainant indicated that the incident had commenced. That evidence, led by both the complainant and Ms Mxhamli, was left unchallenged. Yet Mr Madinga testified and maintained that he had arrived at approximately 21h00.

[81] The probabilities are overwhelmingly in favour of the complainant's version of events in respect of these counts, including the manner in which Mr Madinga entered her home. It is common cause that the window was fastened with a wire and, considering the evidence in its entirety, this manner of affixation facilitated forced entry. The messages that she sent to her sister-in-law in the middle of the night are consistent with a person who was desperate and fearful and unable to obtain assistance from people in the area. The photograph that she took was not as a souvenir of a secret, consensual tryst. She clearly hoped to be able to use it to identify a person hitherto unknown, who had broken into her home and raped her. The J88 medical report is also supportive of forceful sexual penetration, reflecting the presence of genital injuries. It is so that the J88 makes no mention of the abrasions that the complainant alleged she suffered when pushed out of the window.

While there may be various explanations for this omission, this is a factor that must be considered as part of the overall assessment.

[82] Accepting Mr Madinga's version is fraught with difficulties. Had the complainant been interested in Mr Madinga since their alleged meeting, it is unlikely that the two would have waited so long to meet again, bearing in mind that the complainant lived on her own and that it was suggested that they had been in regular telephonic contact. Even accepting that this was so, the pace of events on the night in question is improbable. Mr Madinga omitted to put to the complainant aspects of the version that emerged during his testimony. This includes that the two had tied the wire to the window again after he had entered through it. Why they would have spent time bothering to look for the key together was unexplained. He could simply have exited through the window. In any event, it is improbable that the complainant would not have made arrangements to find the key and be ready to open the security gate for Mr Madinga had she truly been awaiting his arrival. Mr Madinga's version that the complainant had, upon his arrival, taken out the clothing that she had worn when first arriving to that home, tried this on and then voluntarily undressed before sexual intercourse occurred, was not put to the complainant and appears to be completely fanciful. Mr Madinga's testimony regarding his lack of reaction to the photograph taken of him is also highly improbable. So too was his testimony about the manner in which the police had handled his mobile phone, considering the importance of that object to support his version of events when confronted with allegations of rape. Likewise, the testimony regarding the reasons for opening the case, involving Mr Madinga's uncle, was farfetched and again not put to the complainant. Other more minor issues support this assessment. The defence failed to put Mr Madinga's version that the complainant had given him a slightly different name when they had first met. During cross-examination in respect of count two, he maintained that he and the complainant had remained in telephonic contact with one another after he had been released following arrest. Considering that this was not put to the complainant, it appears to have been a fabrication. Mr Madinga's demeanour, when testifying in respect of these counts, was, perhaps unsurprisingly given what has been described, also not that of a person speaking truthfully. He spoke softly, looked down frequently and appeared unconvinced by his own account, which must,

considering the preceding assessment of the evidence, be rejected as not reasonably possibly true.

[83] The shortcomings in the complainant's testimony are of the kind that might be expected considering the nature of the events in question, and the period of time that has elapsed. This includes the J88's failure to detail any bodily injuries other than those to the labia minora, in contradiction to the complainant's version. It may be accepted that those injuries were minor, and that the focus of the medical examination was on the alleged rapes. The complainant testified truthfully about the manner in which Mr Madinga was able to access her home, and the presence of the knife that caused her to subject herself to him in the veld. No doubt with her own safety in mind, she had the presence of mind to engage with him and cause him to take her to the relative safety of her home, where she was raped again. It may be accepted that she may have spoken to Mr Madinga with a level of familiarity in order to coax him to take her back home. Nonetheless, her version accords with the probabilities and the balance weighs so heavily in favour of the state's case that any reasonable doubt about Mr Madinga's guilt in respect of these counts may be excluded.

### **Counts 8-11**

[84] The state alleges that the accused raped two ladies, MF and LT, on 23 August 2017, also robbing them of their property with aggravating circumstances in that a knife was wielded in the process.

[85] LT testified that she had grown up with MF and that they had become close friends. She and MF had been together and required transportation on her birthday during August 2017 and had approached a taxi. The accused and another man were seated in the backseat. The driver indicated that he could take the ladies to Morningside and that the two men would alight on the way to Amalinda.

[86] LT requested the driver to stop at McDonalds, the men at the back indicating that they had no objection to this. At McDonalds the two men exited the vehicle and

stood talking towards the back of the car before re-entering. The driver indicated that the men would alight at Rosedale but started driving aggressively as they turned into that area. At some point the person sitting next to the accused produced a knife. The driver was speaking and there was a commotion. The accused, who was seated next to LT, told her to be quiet. The vehicle turned into an open parking place. The accused grabbed LT's bag and the other person went to the front seat and took the belongings of MF, before robbing LT of her phone. The accused was sitting on the bonnet of the car as the other man dragged MF out of the car towards a bushy area, leaving LT in the car with the driver.

[87] Approximately 10 to 15 minutes later the person who had dragged MF away opened the door where LT was seated and dragged her out of the vehicle. She could see MF walking back to the vehicle, crying and hysterical, followed by the accused, who had risen from his seat on the bonnet some time earlier. The other man held a knife to LT's neck and raped her before calling the accused, who did the same.

[88] The two men subsequently ran into the bush and the driver left the two ladies 'in the middle of nowhere'. While walking home, MF explained to LT what had happened to her. She had been raped twice by the accused's companion, followed by the accused, who had a dangerous look in his eyes and who took his time in raping them.

[89] The accused's face had been extremely close to LT during the time she was raped by him, and was clearly recognisable:

'I did see him, he [was] right next to me, and even when [they] got out at McDonalds I could see his face.'

Visibility at McDonalds had been aided by a floodlight. The accused, who had been seated in the middle of the backseat, had been wearing a K-Way beanie, and a sweater or windbreaker with a backpack, while the other man was skinnier. There was less visibility as the vehicle travelled into Rosedale. By time the vehicle stopped, and at the scene of the rapes, it was darker, but not dark because of moonlight and

the outside lights of the nearby houses. The witness explained that 'You could see a person that is right in your face, [a] person [that is] 10 metres away you can't see their features, [it was] not as bright'.

[90] LT explained the various items, including her phone and money, that were taken from her by Mr Madinga and his friend. Given their demeanour and long conversation outside McDonalds, she opined that the two knew each other and had worked together. Once the other man had drawn the knife, the accused had been quick to grab LT's bag and tell her to keep quiet. The two had also been observed leaving the scene together.

[91] During cross-examination, LT testified that she had consumed one drink before boarding the vehicle. She had clear sight of the accused during the journey, as he was seated next to her. There was lots of light at McDonalds in the parking lot and the men had stood chatting for approximately 15 minutes, and were visible. LT explained her recollection as follows:

'If someone raped you that picture doesn't go away. That picture I want to forget but I can't, so I do [have a mental picture of the face of the perpetrators]...'

[92] MF testified that she and LT had flagged down a taxi on the day in question. MF had sat in front with the driver and LT had sat behind her with two young men to her right. The ladies requested the taxi to take them to a McDonalds drive through, and LT ordered food. During this time the two male passengers stood towards the back of the vehicle, underneath a lamp post, and possibly urinating. Their faces were visible to MF. The driver remained in the vehicle. Near Rosedale, one of the passengers produced a knife and instructed the driver to stop the vehicle near a busy area. One of the men robbed MF of her possessions and took her bag. He pulled her out of the car, pushed her towards the bushes and proceeded to rape her *per vaginam*. He did so after instructing her to undress, pushing her to the ground, instructing her to lie there, undressing her when she was slow to do so, and by pressing his forearm on her neck when she wrestled to get on her feet.

[93] Once he had finished doing so, Mr Madinga came to that spot and forcefully penetrated MF without a condom. The complainant explained that she was able to recognise him even though the lighting was dim because his face had been very close to hers at the time of the incident. He had been one of the two passengers that she had observed during the motor vehicle journey, and who had been present at the McDonalds.

[94] The accused had been inside the car when MF had been robbed. At that time there were no street lights, but lights from nearby houses faced towards the bushy area where the incident occurred. The accused was visible to MF. At the place where the rape occurred, the lighting was not good, a lamp from a nearby house providing some light. She had been able to recognise the accused because of the proximity of his face to hers. The men had, according to MF, worked together during the robbery. The way that they spoke to one another, also at McDonalds, created that impression, and the first person who had raped her had also spoken to the accused, just before the accused raped her.

[95] MF explained that she had observed the men in the back when she spoke to the driver of the taxi before boarding the vehicle in Oxford Street. She explained that a light shining in front of an Oxford liquor store shone towards the vehicle, which was situated at its entrance. Even though that light shone upwards at a different height to the vehicle, MF testified that it was not that dark and she was able to observe the face of the accused. While conceding that the lighting inside the car was poor, MF indicated that she had observed the men at McDonalds because they had stood under a lamp. They had exited the vehicle when the order was placed and stood waiting under the lamp. MF indicated as follows:

'No, I saw them because I turned around and looked back when LT was asking [the driver] where are these gents going to get off because you said they are going to get off on the way – and I could see them there in that light ... I looked to those guys direct.'

[96] MF explained that the distance between her and the men at the time she observed them was not far. While their backs were towards the vehicle, their faces had turned towards one another and she also observed them as they approached

the vehicle to re-enter. She explained that she had viewed them with suspicion and was concerned about when they would leave the vehicle.

[97] At some point during the journey MF had turned around and observed the accused holding LT on her shoulder, and telling her to be quiet. The other man had a knife. The accused had been seated in the middle seat and she saw the side of his face. The car stopped in a dimly lit area outside of a house with a floodlight. MF indicated that she could recognise the accused at that point too, as he had also been outside the car when the other man had taken her phone. By time the second man raped her, her spectacles had fallen off and, given the darkness, it was difficult to see what was happening. Nonetheless, MF maintained that she could identify Mr Madinga as one of the men who had raped her. Her spectacles, she said, were only to assist with viewing objects in the distance, and there was enough time to make a positive identification. She added, during re-examination, that she had been in the presence of the men for a period of about an hour during the journey. Her eyes had been open when she was raped and she testified that it was a face she could never forget.

[98] Mr Madinga denied being one of the people who had perpetrated the crimes in question. His version was that he was the victim of mistaken identity. He had only been identified because he was seated in the dock and had not been subjected to an identification parade.

### ***Analysis***

[99] The witnesses who testified were single witnesses as to their alleged rape. Again, it is necessary to apply caution before accepting their evidence. Where the identity of the perpetrator of a crime depends on human observation and is in dispute, the court must exercise further caution in carefully considering all the surrounding circumstances before deciding whether the state has proved beyond reasonable doubt that the accused is the perpetrator. Reliability of observation is also of fundamental importance. As the Court held in *S v Mthetwa*.<sup>5</sup>

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<sup>5</sup> *S v Mthetwa* [1972] 3 All SA 568 (A); 1972 (3) SA 766 (A) at 768A-C.

“Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused’s face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities...”

[100] Both witnesses had no prior knowledge of Mr Madinga and identified him in the dock in the absence of a prior identification parade. There is ample authority for the proposition that a dock identification by itself, without more, has limited evidential value. The position is different where in-court identification by a complainant is based on independent recollection by a credible witness who had ample opportunity for accurate observation at the scene.<sup>6</sup>

[101] Notwithstanding application of the necessary caution, it is clear that LT was certainly one such witness. She was sitting in the back of the vehicle with the two men throughout the journey, and had ample opportunity to observe them exit and re-enter the vehicle at McDonalds, where the lighting was good and the scene was relatively slow-moving. Their presence was at extremely close quarters, also when her bag was grabbed and, particularly, when she was raped. She was an excellent witness who testified clearly in respect of the events that occurred and her identification of Mr Madinga. She had no difficulty in acknowledging that she had consumed alcohol and that it was darker at the site of the rape. She demonstrated an insightful appreciation of the men’s friendship based on their demeanour and behaviour prior to committing the offences. She explained why she could not forget the faces of the perpetrators in convincing fashion, even though there was no single distinguishing feature to describe.

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<sup>6</sup> See *S v Bailey* 2007 (2) SACR 1 (C) para 17.

[102] LT's identification of Mr Madinga as one of the men who had raped her finds support in MF's evidence. MF had been seated in the front of the vehicle and had less opportunity to observe the two men. She could only have glanced at them briefly when speaking to the driver before boarding the vehicle and acknowledged that the lighting inside the vehicle was poor. But she was suspicious of them and anxious as to when they would leave the vehicle after the McDonalds stop and observed them there, where the lighting was better. It must be accepted that she therefore paid attention to them, even though she could only see the side of the face of the person seated in the middle of the backseat when she turned around during the journey. Even though her spectacles had fallen off, and in dim lighting, she had the opportunity to observe the men who raped her at close quarters and was unshaken in identifying Mr Madinga as one of the perpetrators. The entire incident had lasted approximately an hour and her testimony supports the state's case against Mr Madinga.

[103] It is necessary to weigh both witnesses' evidence carefully before making a determination as to their evidence as to identification. Both were clearly honest in seeking to put words to their recollection, but more is required considering the factors enumerated in *S v Mthetwa*. LT's impressive testimony, in particular, coupled with the evidence of MF, in the light of the totality of evidence and probabilities, results in the conclusion that the state has succeeded in proving the identity of Mr Madinga, as one of the two men who raped both the complainants on the night in question, beyond reasonable doubt.

[104] The evidence demonstrated that it was the other man that produced the knife in the vehicle. In the absence of charges relating to robbery with common purpose, and considering the elements of this crime, I am unable to conclude that the state has proved its case in respect of the alleged robberies with aggravating circumstances, so that Mr Madinga is found not guilty of counts 8 and 9.

### **Counts 12-17**

[105] Mr Madinga was charged with five counts of robbery with aggravating circumstances and rape of MM on 2 September 2017 near Beacon Bay. The alleged aggravating circumstances refer to the wielding of a knife at the time that the accused unlawfully and intentionally assaulted the complainant as well as Yonwabo Sifo, Somila Tanase, Zintle Mazaka and Liziwe Vanda. *Mr Mgenge* conceded that the state had failed to prove the charges of robbery detailed in counts 13, 14, 15 and 16, so that Mr Madinga is found not guilty on those counts. As will become apparent, there is also insufficient evidence to convict Mr Madinga of robbery with aggravating circumstances in respect of MM, so that he is found not guilty of count 12. The remaining issue pertains to the alleged rape.

[106] Mr Sakhumzi Benya ('Mr Benya') testified that Mr Madinga was a childhood friend. The two knew one another for more than a decade and had also met in East London, when Mr Benya had driven a taxi. The men had met during the early hours of 2 September 2017 in Quigney. Mr Madinga had been with two other men, Lunyiko and Sabelo Mafanya ('Sabelo'), in a separate vehicle, and he had been with his friends. Lunyiko was known to the witness and used to spend time with him, but they were no longer on speaking terms. Sabelo, the witness, and a man known as Onke, were all from the same village area.

[107] Lunyiko and the witness had started an argument outside an establishment known as 'Blue Horse' on the evening in question. Mr Benya subsequently drove to the BP garage. Onke wanted to obtain something to drink. He returned with Lunyiko, Sabelo and Mr Madinga.

[108] Lunyiko suggested that they should travel to Beacon Bay. Ladies in the vehicle driven by Lunyiko, unseen by the witness at that stage, apparently did not want Sabelo and Mr Madinga to travel with them, so the witness was asked to transport the two men in his vehicle. An agreement was reached and Mr Benya transported the men in exchange for the promise of petrol money and alcohol.

[109] Mr Benya's vehicle, following Lunyiko's vehicle, and now occupied by his friend Ande, Zola, Sabelo, Mr Madinga and Onke, developed a puncture close to the

Sasol garage en route to Beacon Bay. Sabelo and Mr Madinga alighted and started running after Lunyiko's vehicle, which was some distance away at that point, with hazard lights that were on but disappearing into the distance. Onke was subsequently sent to look for help, and later returned alone. It was approximately 02h00 and the witness did not see Mr Madinga again that evening. He had met him once after the men were subsequently arrested but had not spoken to him.

[110] Mr Benya explained during cross-examination that there was no bad blood between him and the accused before or after the incident, although they were not as close as they had been and he ignored Mr Madinga and did not chat to him like before. He had been intoxicated that evening but could still remember what had transpired. This included Lunyiko and the accused coming to his vehicle outside Blue Horse and speaking to him. He was certain that Ande, Onke, Sabelo, Zola and Mr Madinga had been in the vehicle from Fleet Street en route to Beacon Bay, Ande seated in the front while the witness drove. He denied Mr Madinga's version that he had spent the entire evening with his girlfriend at home, maintaining that he knew him well and was certain he had been present.

[111] Ande Bhungane testified that he was a friend of Mr Benya and knew Mr Madinga through him from 2015, when they would drink together. Mr Bhungane knew Mr Madinga's residence and his sister. He had been with Mr Benya on the night in question in Quigney, drinking with Onke and Zola. He had seen Mr Madinga, who was in the company of Sabelo and Lunyiko, sometime between 10 and 11pm at Blue Horse. The witness knew Mr Madinga and Lunyiko and met Sabelo for the first time that evening. It had been some time since he'd seen Mr Madinga, having previously met him two or three times over weekends. He emerged from a red vehicle driven by Lunyiko, who was a taxi driver. The visibility was good at the time the occupants of the red vehicle approached in order to greet the occupants of the car in which he was seated with Mr Benya.

[112] Later during the evening the witness observed Lunyiko in Fleet Street opposite the BP garage, where they were parked. Lunyiko and Mr Benya arranged that Mr Benya would transport Sabelo and Mr Madinga because Lunyiko was

overloaded. Some ladies had paid for a trip and would not agree to be squeezed into his vehicle. Mr Benya agreed and they were later joined by Sabelo and Mr Madinga, whose faces were clearly visible, and proceeded to Beacon Bay, following Lunyiko's vehicle.

[113] The witness explained that he was intoxicated but was able to recognise and observe everything that had occurred. Mr Madinga, he said, was sober. Lunyiko's vehicle was still visible on the N2 highway when their vehicle had a puncture. While he and Mr Benya were trying to telephone Lunyiko, Mr Madinga and Sabelo alighted from the vehicle at approximately midnight or 01h00, and ran towards Lunyiko's vehicle, which was situated at a walking distance. Mr Madinga and Sabelo never returned to the vehicle in which Mr Benya and the remaining passengers were seated. The witness testified that he was certain that it was Mr Madinga who had been travelling with them that evening and that there was no bad blood between them during the two years they had known one another.

[114] ZM was one of the ladies in the vehicle driven by Lunyiko when he claimed to have run out of petrol. Two minutes after the vehicle stopped, two men opened the back doors of the vehicle and robbed the occupants of their possessions, while one man proceeded to rob MM, who was seated in the front seat. The witness described the goods that were taken from her, and explained that her assailants had been carrying a screw driver or knife. The person with MM pulled her out of the vehicle and they were all told to exit the vehicle in order to be searched. MM was taken to nearby bushes, and the others had followed. It was clear to the witness that MM was being raped by a man who was on top of her and clearly having intercourse with her close by. The other ladies were told that they were also going to be raped in the bushes.

[115] ZM pointed out Mr Madinga as the person who raped MM. She explained that she had seen him at the time when they had been taken to the bushes, and that after he had raped MM he had come to the others while they were seated, asking who was to be raped next. The driver had asked him not to do so. Mr Madinga had tried to make conversation after having raped MM, asking where the ladies lived and their

names. Being right next to them, he had been observed clearly and could be identified, also considering that there was possibly a full moon, cars passed by the spot every ten minutes and it was not very dark. He had been working with the other men in robbing the female occupants of the car.

[116] During cross-examination, the witness explained that they had been left with Mr Madinga, who was asking them questions, when the other men left the scene of the crime. They had been with him for about 10 minutes, and that is how she was able to recognise him in court. The witness could not recall whether she had told the police that she would be able to recognise the perpetrators, and an identity parade had not been called. Despite acknowledging that the event was traumatic, that it was dark, that she had consumed liquor and that the incident had occurred a few years previously, the witness indicated that she was certain in her identification of Mr Madinga. In response to Mr Madinga's counsel's suggestion that her description of the person was vague, she testified as follows:

'I understand. But I saw his face at that time. I'm sure of that, the guy's face ... I understand where you are going ... [but] I know for a fact that I'm not making a mistake... there is not even a slight possibility that he is not the person – he is the man that I saw that night ... I saw his face ... which is the same face I'm seeing in court today.'

[117] ST was another of the ladies in the red vehicle on 2 September 2017. She confirmed much of the testimony of ZM and took time to provide a description of the people who had approached the vehicle from the outside. She had been able to observe the person who had opened the front passenger door of the vehicle when they had been taken out of the motor vehicle. He was not tall, did not have a small body, was average in height and was 'darkish' in complexion. His focus had been on the front passenger seat. He had asked MM her clan name and told her that he was fond of her as she was not causing any trouble, before taking her out of the vehicle and body searching her. LV had also been taken out of the vehicle, followed by the witness, who managed to run away after having been searched and touched. She was caught by one of the other men and taken back to the crime scene. On the way, she saw MM lying on her back, her dress pulled up towards her face, with a man on

top of her and raping her. She noticed that it was the same person that had searched MM and pointed out Mr Madinga as the perpetrator.

[118] ST testified that there was a sense of 'clearness and light' at the scene, and that motor vehicles drove past the area, casting some light. She had seen Mr Madinga clearly when she had been taken out of the vehicle, and there was sufficient light to observe him raping MM. Part of the reason for this, she explained, was that the terrain was slightly inclined, so that motor vehicles passing by shone their light on the scene enabling her to see.

[119] The witness conceded during cross-examination that not many vehicles were travelling on the road at that time of the day, and suggested that only a half moon was visible. It was not pitch dark when she had been sent out of the vehicle and was standing outside. She had told the police that the man who had been with MM was not at the police station sometime later, and was certain she had informed them that she was able to identify him. She had spoken to ZM after the incident and they had agreed that they would both be able to recognise the perpetrator of the rape. When asked how she was able to still do so, her response was as follows:

'I did not see this person under normal circumstances where I went to buy bread. This person robbed me of items and spent a few minutes in my presence, causing trauma. What would make me to forget him ... I will never forget it ... [it was the ] worst thing that happened to me.'

[120] ST indicated that she had consumed little liquor that evening, and had eaten. She had informed the police that she would be able to identify the assailants, even though this did not appear in her written statement. The women had been made to sit underneath some bushes and Mr Madinga had returned and been with them for a few minutes.

[121] LV testified that she had been a passenger together with other ladies travelling to a club in Beacon Bay, also describing what occurred when the car stopped on the highway, apparently running out of petrol. Two men had been engaged in robbing the back seat occupants of their possessions, and the witness explained the possessions taken from her. Another male was in the front seat, 'busy

with MM'. While the witness indicated that she did not see him properly, she was able to indicate that he was chubbier than the other men and of average height, wearing a short-sleeve shirt, beanie and flared, oversized pants. She recalled that it had been a full moon and that certain events were lit up by passing cars. The chubbier person who had seemingly robbed MM had taken her away, and brought her back. MM had not said anything about what had occurred, but had reported at the petrol station, sometime later, that she had been raped by the person who had robbed her. It appeared to the witness that the three men had been acting in cahoots. Only some of the possessions taken from her were eventually recovered.

[122] Dr Teeka Kharel confirmed that he had examined MM on 2 September 2017, and completed the J88 report. She had been sad, distraught and worried. She had superficial eternal injuries, possibly caused by dragging. Gynaecological examination revealed fresh injuries, likely caused within the past 12 hours, consistent with sexual penetration.

[123] Mr Madinga acknowledged that he was familiar with the two men who testified that they knew him and placed him near the scene on the night of the incident. He had grown up with Mr Benya and had met Mr Bhungane through him. He described Mr Benya as having been his friend. He struggled to explain the reason that the two had testified against him, but alluded to various possibilities. His first explanation in this respect was particularly difficult to understand, suggesting that items taken from the complainants had been taken to his place of residence by Sabelo and Lunyiko. He had requested his neighbour to keep the items in return for payment upon collection from these two men. Secondly, he sought to dispute their testimony on the basis that they had continued to keep each other's company even after the incident. Thirdly, he mentioned some involvement of Mr Benya's brother in his own brother's passing and suggested that their relationship had soured during June 2016. He also offered an alibi explanation, saying that he had been asleep with his girlfriend on the night of the incident.

### ***Analysis***

[124] It may be accepted that MM was raped on the side of the road sometime after Lunyiko stopped his vehicle. ZM and ST had both observed this and Dr Kharel confirmed that she had been sexually penetrated. The factors identified in *S v Mthetwa* are to be applied to the evidence of ZM and ST in answering the question whether the perpetrator was Mr Madinga. Both these witnesses testified that they observed him raping MM, who did not testify. LV could only provide a general description, broadly in support of parts of their description of their ordeal and identification of Mr Madinga, but without identifying him directly. Her evidence does support the general visibility and lighting at the time, including the positive effect of passing vehicles in that respect.

[125] Both ZM and ST had been seated in the backseat of the vehicle. It must be accepted that their initial focus would have been on the men that robbed them of their possessions, and that their observances occurred during the course of a traumatic experience. This affects the outcome in respect of count 12. MM was taken away from the vehicle towards nearby bushes. ZM had seen Mr Madinga both then and when he had returned, enquired who was to be raped next and made conversation with the ladies. She had been close to him and had the opportunity to observe and identify him. Although it must be accepted that it was dark, and that she had consumed liquor, there was sufficient moonlight and light from passing vehicles for her to do so. Importantly, she had been in close proximity to him for approximately 10 minutes and was convinced that she was identifying the correct person.

[126] ST, who had not consumed much alcohol, confirmed much of her testimony. She was able to recall aspects of what the person busy with MM had discussed with her and could recall his appearance. She later observed the same person on top of MM and raping her. The visibility and light were sufficient and her explanation for recalling the face and build of the person in question was convincing. Her testimony was clear and coherent and supports ZM's evidence that Mr Madinga had returned to the women after raping MM and had then been in their presence for a few minutes. At that time the scene was relatively static.

[127] Any doubts about the identification of Mr Madinga are removed when considering the accepted evidence of Mr Benya and Mr Bhungane, and the poor assessment of Mr Madinga's contrived attempts to avoid admitting that he was on the scene.

[128] Mr Madinga conceded that he would continue to fraternise with Mr Benya between June 2016 and the incident and that there had been no visible signs of any problem. Yet he continued to concoct an explanation to gainsay the testimony against him, despite this not having been put to Mr Benya. There was no serious explanation offered for why Mr Bhungane would have lied under oath to implicate him. Considered together, and despite having been under the influence of alcohol at the time, it is apparent that both men observed Mr Madinga as they described that evening. Even leaving aside the evidence of the complainants who testified, for present purposes, their testimony was consistent in material respects and accords with the probabilities. Both conveyed the impression of speaking truthfully about events within their recollection. They both had adequate opportunity to identify Mr Madinga clearly, bearing in mind that both men knew him well. Considering the extent of their acquaintance, there could be no mistaking him. Mr Benya certainly spoke to him, and Mr Bhungane, if not participating in the discussion, overheard parts. There can be no doubt that it was Mr Madinga and Sabelo that were eventually transported in Mr Benya's vehicle, and that, once it punctured, they alighted and ran towards the vehicle transporting the complainants in the early hours of the morning.

[129] Their evidence, together with that of the three complainants who testified, is such that it must be accepted as proven beyond reasonable doubt that Mr Madinga was the person who raped MM as charged. His various attempts to distance himself from the scene, including the supposed alibi, were implausible, unsupported and likely the figment of his imagination. Those versions must each be rejected as not reasonably possibly true.

## **Order**

[130] It is ordered:

1. Count 1: The accused is found guilty of the crime of rape (of 'NN') as charged;
2. Count 2: The accused is found guilty of the crime of rape (of 'NB') as charged;
3. Counts 3-5: The accused is found not guilty;
4. Count 6: The accused is found guilty of housebreaking with intent to commit rape as charged;
5. Count 7: The accused is found guilty of the crime of rape (of 'SF') as charged
6. Counts 8-9: The accused is found not guilty;
7. Count 10: The accused is found guilty of the crime of rape (of 'MF') as charged;
8. Count 11: The accused is found guilty of the crime of rape (of 'LT') as charged;
9. Counts 12-16: The accused is found not guilty.
10. Count 17: The accused is found guilty of the crime of rape (of 'MM') as charged.

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**A. GOVINDJEE**

**JUDGE OF THE HIGH COURT**

**Heard:** 22, 23, 25-26, 29-31 August 2022;

1 September 2022;

23-25 & 30 January 2023;

1-11 May 2023;

21-24 August 2023

**Delivered:** 29 August 2023

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