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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

_____**7/3/2017**_____
DATE SIGNATURE

CASE NO: **SS77/2016**

DPP REF NO: **10/2/11/1-69 of 20-16**

In the matter between:

THE STATE

and

MKANSI: JOSIAS XANISEKA

Accused

JUDGMENT

OPPERMAN J

INTRODUCTION

[1] Mr Mkansi has been arraigned on sixteen (16) counts of rape, two (2) counts of committed rape and eleven (11) counts of robbery with aggravating circumstances. He pleaded not guilty and tendered no plea explanation as envisaged in terms of Section 115 of Act 51 of 1977 ("**CPA**"). The minimum sentences applicable in terms of Section 51(1) and 51(2) of Act 105 of 1997 ("**The Criminal Law Amendment Act**") were explained.

[2] An application was brought in terms of section 153(3)(a) of the CPA, which was not opposed. Such application was granted and it was ordered that all persons whose presence was not necessary, would not be present at the proceedings. The judgment in this matter shall not be delivered in open court as this court is of the opinion that the identity of the complainants would be revealed thereby. No person shall publish in any manner whatever any information which might reveal the identity of any complainant in these proceedings. Attention is drawn to the provisions of section 154(5) of the CPA which makes the publication of any information in contravention of orders granted in terms of sections 153(3) and 154(2), an offence. The aforesaid order shall not prevent the publication of information relating to the name and personal particulars of the accused, the nature of the charges against him (without disclosure of the identity of any individual mentioned in such charges), the plea and the verdict.

[3] In respect of 16 (sixteen) counts (25, 35, 38, 41, 43, 45, 50, 52, 54, 56, 59, 61, 62, 64, 66 and 69) the State alleges that Mr Mkansi contravened the provisions of Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment

Act, 32 of 2007 ("**Sexual Offences Act**"). The State alleges that these sixteen (16) offences all fall within the ambit of Section 51(1) of the Criminal Law Amendment Act.

[4] In respect of two (2) counts (47 and 48), the State alleges that Mr Mkansi contravened the provisions of Section 4 of the Sexual Offences Act. The State alleges that these two (2) offences fall within the ambit of Section 51(1) of the Criminal Law Amendment Act.

[5] In respect of eleven (11) counts (27, 36, 39, 44, 49, 51, 53, 55, 60, 68 and 70) the State alleges that Mr Mkansi committed robbery with aggravating circumstances and that these eleven (11) counts fall within the ambit of Section 51(2) of the Criminal Law Amendment Act.

CHARGES AGAINST MR MKANSI

Counts 25 and 27

[6] The State alleges that on or about the 7th September 2014 and at or near East Bank Park, Alexandra in the district of Johannesburg North, Mr Mkansi did unlawfully and intentionally commit an act of sexual penetration with M. A. M. (24 years old at the time) without her consent. The State further alleges that on such date, Mr Mkansi did unlawfully and intentionally assault M. A. M. and/or M. L. and did then and there and with force and violence take from them a cellular phone and two hundred rand (R200) in cash being their property, with aggravating circumstances as described in Section 1 of the CPA being present.

Counts 35 and 36

[7] The State alleges that on or about the 5th October 2014 and at or near Engen Garage in Tsutsumani, Alexandra in the district of Johannesburg North, Mr Mkansi did unlawfully and intentionally commit an act of sexual penetration with M. M. (36

years old at the time) without her consent. The State further alleges that on such date, Mr Mkansi did unlawfully and intentionally assault M. M. and did then and there and with force and violence take from her a handbag, seven hundred rand (R700) in cash and a Nokia cellular phone being her property, with aggravating circumstances as described in Section 1 of the CPA being present.

Counts 38 and 39

[8] The State alleges that on or about the 21st December 2014 and at or near Roosevelt Bridge, Alexandra in the district of Johannesburg North, Mr Mkansi did unlawfully and intentionally commit an act of sexual penetration with T. P. (23 years old at the time) without her consent. The State further alleges that on such date, Mr Mkansi did unlawfully and intentionally assault T. P. and/or D. S. and did then and there and with force and violence take from them a Nokia cellular phone and a Samsung cellular phone being their property, with aggravating circumstances as described in Section 1 of the CPA being present.

Counts 41, 43 and 44

[9] The State alleges that on or about the 10th January 2015 and at or near East Bank Cemetery, Alexandra in the district of Johannesburg North, Mr Mkansi did unlawfully and intentionally commit an act of sexual penetration with S. M. (15 years old at the time) without her consent and R. N. (19 years old at the time) without her consent. The State further alleges that on such date, Mr Mkansi did unlawfully and intentionally assault S. M. and/or R. N. and/or O. M. and did then and there and with force and violence take from them three (3) cellular phones being their property, with aggravating circumstances as described in Section 1 of the CPA being present.

Counts 45, 47, 48 and 49

[10] The State alleges that on or about the 8th January 2014 and at or near East Bank Park, Alexandra in the district of Johannesburg North, Mr Mkansi did unlawfully and intentionally commit an act of sexual penetration with D. M. (38 years old at the time) without her consent. The State further alleges that on the 8th January 2014 and at or near East Bank Park, Alexandra, Mr Mkanzi did unlawfully and intentionally commit an act of compelled rape by forcing P. M. to commit an two acts of sexual penetration with D. M. without her consent, (counts 47 and 48). The State further alleges that on such date, Mr Mkansi did unlawfully and intentionally and with force and violence take from D. M. and/or P. M. fifty rand (R50) in cash being their property, with aggravating circumstances as described in Section 1 of the CPA being present.

Counts 50 and 51

[11] The State alleges that on or about the 8th August 2014 and at or near West Bank Cemetery, Alexandra in the district of Johannesburg North, Mr Mkansi did unlawfully and intentionally commit an act of sexual penetration with Z. T. (16 years old at the time) without her consent. The State further alleges that on such date, Mr Mkansi did unlawfully and intentionally assault Z. T. and/or S. M. and did then and there and with force and violence take from them two (2) Nokia cellular phones, two (2) pairs of shoes and a sports hat being their property, with aggravating circumstances as described in Section 1 of the CPA being present.

Counts 52 and 53

[12] The State alleges that on or about the 17th August 2014 and at or near Bhekilanga School, Alexandra in the district of Johannesburg North, Mr Mkansi did unlawfully and intentionally commit an act of sexual penetration with M. M.(b) (16 years old at the time) without her consent. The State further alleges that on such date, Mr Mkansi did unlawfully and intentionally assault M. M.(b) and did then and there and with force and violence take from her a Nokia cellular phone being her property, with aggravating circumstances as described in Section 1 of the CPA being present.

Counts 54 and 55

[13] The State alleges that on or about the 5th November 2014 and at or near Far East Bank Alexandra Cemetery, Alexandra in the district of Johannesburg North, Mr Mkansi did unlawfully and intentionally commit an act of sexual penetration with R. M. (19 years old at the time) without her consent. The State further alleges that on such date, Mr Mkansi did unlawfully and intentionally assault R. M. and did then and there and with force and violence take from her a cellular phone being her property, with aggravating circumstances as described in Section 1 of the CPA being present.

Count 56

[14] The State alleges that on or about the 13th November 2014 and at or near Jukskei Park, Alexandra in the district of Johannesburg North, Mr Mkansi did unlawfully and intentionally commit an act of sexual penetration with P. R. (14 years old at the time) without her consent as described in Section 1 of the CPA being present.

Counts 59 and 60

[15] The State alleges that on or about the 27th November 2014 and at or near Engen Garage Tsutsumani, Alexandra in the district of Johannesburg North, Mr Mkansi did unlawfully and intentionally commit an act of sexual penetration with L. I. M. (23 years old at the time) without her consent. The State further alleges that on such date, Mr Mkansi did unlawfully and intentionally assault L. I. M. and/or M. J. R. and did then and there and with force and violence take from them cellular phones and four hundred and forty rand (R440) in cash being their property, with aggravating circumstances as described in Section 1 of the CPA being present.

Count 61

[16] The State alleges that on or about the 26th January 2015 and at or near East Bank Park, Alexandra in the district of Johannesburg North, Mr Mkansi did unlawfully and intentionally commit an act of sexual penetration with D. P. M. (14 years old at the time) without her consent.

Counts 62, 64, 66, and 68

[17] The State alleges that on or about the 5th January 2015 and at or near East Bank Park, Alexandra in the district of Johannesburg North, Mr Mkansi did unlawfully and intentionally commit an act of sexual penetration with Y. S. (16 years old at the time) without her consent.

[18] The State alleges that on or about the 5th January 2015 and at or near East Bank Park, Alexandra in the district of Johannesburg North, Mr Mkansi did unlawfully and intentionally commit an act of sexual penetration with L. M. (16 years old at the time) without her consent.

[19] The State alleges that on or about the 5th January 2015 and at or near East Bank Park, Alexandra in the district of Johannesburg North, Mr Mkansi did unlawfully

and intentionally commit an act of sexual penetration with V. M. (26 years old at the time) without her consent.

[20] The State further alleges that on such date, Mr Mkansi did unlawfully and intentionally assault Y. S. and/or L. M. and/or V. M. and did then and there and with force and violence take from them (4) four cellular phones, a pair of sneakers and one hundred and fifty rand (R150) in cash being their property, with aggravating circumstances as described in Section 1 of the CPA being present.

Counts 69 and 70

[21] The State alleges that on or about the 13th May 2015 and at or near East Bank Park, Alexandra in the district of Johannesburg North, Mr Mkansi did unlawfully and intentionally commit an act of sexual penetration with B. M. K. (22 years old at the time) without her consent.

[22] The State further alleges that on such date, Mr Mkansi did unlawfully and intentionally assault D. L. and did then and there and with force and violence take from him two (2) cellular phones being his property with aggravating circumstances as described in Section 1 of the CPA being present.

FORMAL ADMISSIONS

[23] During the course of the trial formal admissions in terms of Section 220 of the CPA, were made which admissions were received and incorporated into two separate documents marked exhibits "A" and "Q". Exhibit "A" recorded that Mr Mkansi admitted the correctness of the facts and findings contained in all the reports compiled by the medical practitioners who had performed medico-legal examinations on the victims reflected in such exhibits as well as the truth of the contents thereof.

The medical reports (hereinafter referred to as a “J88” or “J88’s”) were received as evidence and marked exhibits “B” to “P”.

[24] Exhibit “Q” also contained admissions relating to the crime kits (forensic specimens), which had been taken by the medical practitioners, reflected in the J88’s and which specimens had been delivered to the forensic science laboratory. The term “crime kit” was defined as *“specimens taken by the medical practitioners who completed exhibits “B” to “P” from the victims referred to in exhibits “B” to “P” with the seal numbers referred to in exhibit numbers “B” to “P””*.

[25] The admissions thus comprised, *inter alia*, the medical examinations of the complainants referred to in the rape charges (except the complainant in respect of count 43 as none was relied upon by the state in respect of her); the correctness of the J88 forms completed pursuant thereto; the collection of forensic specimens taken from the complainants’ genitals; the sealing of the samples in evidence-collection kits and the despatch to and receipt thereof at the Forensic Science Laboratory in Pretoria.

[26] Some of the victims did not testify but formal admissions were made in respect of the rapes perpetrated upon them which admissions have been included in the summary of the evidence.

[27] It was admitted that on 8 January 2014 and at or near East Bank Park in Alexandra, P. M. was compelled to commit an act of sexual penetration with D. M. on two occasions without his consent (Counts 47 and 48).

[28] It was admitted that on 27 November 2014 and at or near the Engen Garage, Tsutsumani in Alexandra, M. J. R. was in the company of L. M., and was assaulted and robbed of a cellular phone and four hundred and forty rand (R 440) in cash,

aggravating circumstances being present, in that a firearm and/or dangerous weapon was wielded.

[29] It was admitted that on 13 May 2015 and at or near East Bank Park in Alexandra, D. L., was assaulted and robbed of two cellular phones, aggravating circumstances being present, in that a firearm and/or dangerous weapon was wielded.

[30] In respect of all the incidents where the victims did not testify, it was admitted that the assailants had their faces covered with balaclavas.

[31] It was further admitted that a Buccal sample was obtained from Mr Mkansi on 8 June 2015 and that it was conveyed to the forensic laboratory on 10 June 2015 where it was duly acknowledged.

[32] It was further admitted that a Buccal sample of Mr Sinja Robin Mabitsela ("**Mr Mabitsela**") was obtained on 28 July 2015. That it was conveyed to the forensic laboratory and it was duly acknowledged.

[33] Buccal sample was defined as per Section 36A(1)(cB) of Act 51 of 1977 as amended by the Criminal Law (Forensic Procedures) Amendment Act 37 of 2013, as being a sample of cellular materials taken from the inside of a person's mouth.

ISSUES IN DISPUTE

[34] The sole issue for determination by this court is the identity of the perpetrator of the crimes that Mr Mkansi is charged with. The fact that the crimes were committed has not been disputed and can be accepted as common cause.

THE EVIDENCE

[35] This court will summarise the evidence chronologically with reference to the date of the perpetration of the alleged offences.

8 January 2014 (Counts 45, 47 and 48)

[36] D. M. M. (“**Ms M.**”) testified that on the 8th January 2014, she and her boyfriend P. M. (“**Mr M.**”) were sitting on swings in East Bank Park, Alexandra when two men clad in balaclavas approached them. Ms M. was grabbed by the taller of the two assailants. The taller man was in possession of a knife and the shorter man, a gun. The assailants searched Ms M. and Mr M.. Mr M. was instructed to hand his phone to the short man. They found one cellphone and some coins in Mr M.’s jacket. They did not take the phone as they said it was an old model. They took the money. The short man was more talkative and addressed the couple in the Sipeidi language. When the tall one spoke, he spoke in the Zulu language. The couple were instructed to walk to a cemetery. It was approximately 20h00. When they reached a tree in the cemetery, the short man ordered Ms M. to undress. He instructed her to put her dress on the ground and to lie on top of the dress. The two assailants conferred. The short man instructed Mr M. to have sexual intercourse with Ms M.. Mr M. complied with the instruction and was thereafter instructed to lie on the ground, face down and cover his head with his arms. They then covered Ms M.’s face with an item (some fabric). She managed to pull the item from her face and saw the tall man approaching her. He lay on top of her. He had sexual intercourse with her. Whilst the tall assailant was having sexual intercourse with Ms M., his shorter friend was watching. After the tall assailant had finished, he approached the short man, got the firearm from him and the short man then proceeded to have sexual intercourse with Ms M.. After he had finished raping Ms M., he instructed Mr M. to have sexual intercourse with Ms M. again. Mr M. complied with this instruction. Ms M. was shocked and shaken but Mr M. tried comforting her and told her to calm down as the two assailants were still

watching them. They enquired from him whether he was “done”, to which he responded that he was. They instructed the couple to get dressed and to leave.

[37] They found a taxi. Mr M. explained that Ms M. had just been raped and requested that the taxi driver take them to his residence to enable him to get money to proceed to the police station. They went to the police station, narrated the ordeal and opened a case. Ms M. denied having given consent to have sexual intercourse with either of the assailants nor with Mr M.. She didn’t know whether or not the assailants had worn condoms when they had raped her as she couldn’t see. They had covered her face. She explained that she had attended counselling. She was unable to identify her assailants.

[38] Exhibit “F” is the J88 relating to the medico-legal examination performed on Ms M. conducted by Dr A Sharif. Her account to him accords substantially with the version testified to in court. It records that she was examined by him at 01h25 on 9 January 2014 and that he had taken a forensic specimen from her which had been sealed with seal number 10D1AE6838. This specimen was handed to J V Makolwa.

8 August 2014 (Counts 50 and 51)

[39] Ms Z. T. (“**Ms T.**”) testified that she was born on 16 May 1998. At the time of her ordeal she was 16 years old. She explained that on 8 August 2014 at approximately 17h30, she was walking with her boyfriend S. M. (“**Mr M.**”) in the park next to the cemetery in Alexandra. A man appeared behind them and produced a firearm. He instructed them to look down and to follow him. When they reached the cemetery they were instructed to sit down. He was communicating with some other person on his phone. Another assailant came who was wearing a balaclava. This person was taller than the initial assailant. The short man instructed them to take off

their shoes. The taller assailant separated Ms T. from Mr M.. He took her aside, undressed her and then had sexual intercourse with her without a condom. She testified that whilst this was happening, Mr M. was crying. The short man hit Mr M. with the firearm. They then told them to leave and not look back. They ran to Mr M.'s place but he instructed her to wait next to a bakery. He ran to his brother who had a car. Mr M.'s father took her to the police station where she opened a case. She confided in Mr M.'s father as to what had happened to her. From the police station she was taken to the medical clinic where a medical examination was conducted. After the ordeal she received counselling.

[40] Annexure "G" being the J88 relating to Ms T., reflected that she had been examined by Dr Makunga at 01h15 on the 9th August 2014. Her account to Dr Makunga accords substantially with the version given in court. It appears from the J88 that prior to this date, Ms T. had not ever had consensual intercourse and was in fact a virgin. Dr Makunga recorded the following injuries, 0.5 x 0.5 centimetre tear on posterior fouchette and fresh tears on the hymen. He recorded the following "*these suggest vaginal penetration with possibly a blunt object. Fresh tears on hymen suggest that the act was quite recent, probably within 48 hours. Debris noted on perineum suggests that the penetration occurred outside, on the ground.*" These findings support the evidence given by Ms T. during cross examination when she was asked whether she had sustained any physical injuries. She had responded that she had. She said that she had cuts just outside '*her private parts and on both sides*'. The J88 records that she was 159cm tall, weighed 51 kilograms and her general body build was described as medium. Ms T., two and half years after the event, looked very young.

[41] Mr M. testified that he was born on 23 April 1997 and that he was 19 years of age on 8 August 2014. He explained that he was with Ms T. when a man came from “*nowhere*”. His hat had been pulled down over his face and he was wielding a gun. He instructed the couple to walk into the cemetery where the short assailant called his friend. After the second assailant arrived, Mr M. was ordered to lie on the ground. Prior to the second assailant’s arrival, the short man had told them that he had been watching them from 15th John Bond Avenue. He was making small talk with them, asking them where they lived and what Mr M.’s brother’s name was, when the tall man arrived. The tall man put his foot on Mr M.’s neck and told him to “*eat grass*”. He took Mr M.’s head and said his head was “*nice*”. The tall man then took Ms T. away. Mr M. heard her screaming and crying and as he tried to move to come to her assistance, the short man struck him on the head with a firearm. After a while the tall man and Ms T. returned and the couple were told to undress. The tall man was in a hurry so he took Mr M.’s shoes and hat off. They were told to face away from their assailants and not to look back. The tall man wanted to shoot at them but the short man told him not to.

[42] After they were released they ran away. Ms T. fell and because of this fall, Mr M. left her in a passage. He rushed home and called his father. His father arranged transport and they were taken to the police station. Statements were made. He was asked what Ms T.’s condition was when she came back having been away with the tall man for approximately 15 minutes. He responded that it “*appeared that she had felt the pain*”, “*she held my hand tightly and she was crying*”. He explained that she was still carrying her boots and trying to pull up her trousers. He says his shoes, trousers and phone were taken from him.

17 August 2014 (Counts 52 and 53)

[43] M. M.(b) (“**Ms M.(b)**”) explained that on 17 August 2014 she was 16 years old. She and her friend L. were on their way home. When they reached Bhekilanga School, Alexandra, they met up with 2 men who pointed firearms at them. Ms M.(b) handed her phone to one of the men. Her friend L. tried to run away but fell. She was followed by one of the assailants. Both of the assailants were wearing balaclavas. She said the one man was taller than the other. The short man followed L.. It was approximately 19h30 when they walked with them into the school and when they reached a certain place the tall one said to Ms M.(b) that he wanted to have sexual intercourse with her. He proceeded to undress her and to touch her private parts. She appealed to him not to do what he wanted to do. He forced her to lie down, undressed himself and proceeded to have sexual intercourse with her without the use of a condom. She explained that she had not given her consent.

[44] After the ordeal they ran to the security officer at the school who referred them to the police station. She told her friend L. that she had been raped and enquired from her whether she had been raped. She responded that she had not. She explained that after they had reported the matter to the police station, she was taken to be examined by a doctor. She also testified that she had not gone for counselling as she was afraid that she might be judged. She said that after this incident she didn’t even trust her brothers anymore. Whenever she caught a taxi, she became afraid.

[45] The J88 completed on behalf of Ms M.(b) described the events substantially along the same terms as the version advanced at court. Dr Makunga recorded the following: *“It is common that fully mature, fully sexual active females not suffer*

injuries during unconsented sexual penetration. Absence of gynae injuries can therefore not be used to dispute history given by client.” Forensic specimens were taken from Ms M.(b) and sealed with seal number 10D1AE4875.

7 September 2014 (Counts 25 and 27)

[46] A. M. M. (“**Ms M.**”) explained that on the 7th September 2014 she was 24 years old. It was between 17h00 and 18h00 when they were walking past East Bank Park in Alexandra. As they were walking two men approached them from behind. One was pointing a firearm at them and he instructed them not to scream or do something that was out of control. They instructed the couple to walk to the side of the cemetery where they were told to lift up their hands and face a wall. They were searched. They took a cellphone and two hundred rand (R200) in cash. Both assailants were wearing balaclavas. One man was tall and the other short. The tall man searched her boyfriend, whereafter he was instructed to lie down on the ground. They took her boyfriend’s waist belt and cap. The tall man instructed her to walk with him to the other side of the wall. He grabbed her by her throat and threw her down on the ground. He got on top of her and held his firearm behind her head. He undressed his trousers, moved her underwear to the side and proceeded to have sexual intercourse with her. He was not using a condom. She appealed to him to leave her but he reprimanded her and said if she dare scream, he would shoot her. The short man joined them. He said to her that he would like her to have oral sex with him. She refused. He then pushed her down onto the ground, undressed himself and proceeded to have sexual intercourse with her without the use of a condom. When he was finished, they went to the other side of the wall again where they found her

boyfriend lying on the ground. The couple were instructed to walk to the cemetery and not to look back.

[47] They ran into the cemetery. They shouted for help at a certain house. Some people came to their assistance and one man offered to look for transport to the clinic. They drove to Alexandra clinic but when they reached the clinic they were told that they were required to go to the police station. They thereupon went to the police station, made statements and were finally taken to Hillbrow clinic where Ms M. was examined by a doctor. She received counselling in Alexandra and testified that this ordeal has traumatised her a lot.

[48] Ms M. was examined by Dr A Sharif. The version of events as recorded by the medical practitioner in the J88, accords substantially with the version testified to in court. A forensic specimen was taken and sealed with seal number 10D1AE5720.

5 October 2014 (Counts 35 and 36)

[49] No evidence was lead in respect of these counts but in paragraphs 31 and 32 of exhibit "A", Mr Mkansi admitted that on 5 October 2014, M. M. ("**Ms M.**"), a female of 36 years of age was at or near the Engen Garage in Tsutsumani, Alexandra when an act of sexual penetration was committed upon her, without her consent. It was also admitted that Ms M. was assaulted and robbed of a handbag, seven hundred rand (R700) in cash and a Nokia cellular phone, aggravating circumstances being present in that a firearm and/or dangerous weapon was wielded. According to the J88 Ms M. was 36 years old at the date of her ordeal. She was examined by Dr Amma Ilunga at 01h30 on 6 October 2014. The doctor concluded that there was clinical evidence of recent vaginal penetration. A forensic specimen was taken and was marked with seal number 10D1AE7638.

5 November 2014 (Counts 54 and 55)

[50] Ms R. M. ("**Ms M.**") (19 years old at the time) testified that on 5 November 2014, she had left her granny's place at about 19h00 and was walking along the park next to the cemetery, when two men whose faces were covered with balaclavas, approached her. Both men were wielding firearms and ordered her to enter the cemetery. She described the one man as being taller than the other. Upon entering the cemetery, she was instructed to sit down. One of the assailants left and returned with another man and woman, two other victims. Ms M. and the other woman were instructed to undress whilst the other male victim, was ordered to lie face down. He was also ordered to take off his shoes. The tall man then had sexual intercourse with Ms M. and did not use a condom when doing so. The short man had sexual intercourse with the other female victim. Neither Ms M. nor this unidentified further victim consented to this sexual intercourse. Ms M. was then instructed to leave. She went home where she met her boyfriend, Mr S.. She told him what had happened and after approximately 20 minutes he received a whatsapp message which Ms M. read. It read: *"I've just had intercourse with your girlfriend – she was wearing a red dress"*. Ms M. confirmed that she was wearing a red dress on the given day. Two text messages were received. Mr S. tried to phone the number but by then the phone had been turned off. Mr S. accompanied Ms M. to the Alexandra police station. She was taken to the hospital where she was medically examined. She testified that she only went to counselling once. She explained that she was extremely traumatised and did not want to leave the house. She said that because the text messages had been sent to Mr S., she knew that the assailants had accessed her photo gallery on her phone and that the assailants were able to identify her. She felt particularly vulnerable as

she was unable to identify them. She said that this incident also caused her to leave her employment. She said that she had long hair at the time of the ordeal but, in an attempt to change her appearance, had cut her hair so that her assailants would not be able to recognise her. She was unable to identify any of her assailants.

[51] The J88 received as evidence reflects that Dr G Hutton had conducted a medical examination at 14h30 on 6 November 2014 and that a forensic specimen had been taken from Ms M. and had been marked with seal number 10D1AE6817JJ.

13 November 2014 (Count 56)

[52] Ms Pauline R. (**Ms R.**) did not testify but admissions in terms of Section 220 of the CPA were made in terms of which Mr Mkansi admitted that on 13 November 2014, Ms R. was 14 years old and that an act of sexual penetration had been committed upon her without her consent at or near Jukskei Park in Alexandra. It was further admitted that two assailants had committed the crimes mentioned in the indictment, upon her.

[53] The J88 reflects that she was examined by Dr Klisiewicz at 01h20 on 14 November 2014 who had concluded that there were signs of forced vaginal penetration. She had taken a forensic specimen from her and had marked the specimen with seal number 10D1AE7451. It was recorded that the offenders had taken her "panties". The J88 records that she was 161cm tall weighing 53.5 kilograms. It was recorded that she had deep fresh cracks with blood at 4 o'clock and 6 o'clock on her posterior fourchette, these tears were indicated on the J88 form, it was also noted that she was bleeding.

27 November 2014 (Counts 59 and 60)

[54] Ms L. I. M. (**Ms M.**), who was 23 years old at the time of her ordeal, described that on the 27th of November 2014, she was in the company of Mr M. J. R. (**Mr R.**), the father of her child. She was accompanying him to park his vehicle, as he is a taxi driver by profession. On their way to park the vehicle at the owner's house, they met two men. She doesn't recall how they were dressed nor did she see their faces. Mr R. had stopped to enquire from them where they were going and they responded that they were going to the Engen garage at Tsutsumani in Alexandra. They got into the taxi. Just before they reached the Engen garage the two men produced firearms and ordered Mr R. to drive to a shopping complex, which is no longer in use. Upon arrival they were ordered to alight from the vehicle whilst the firearms were still being pointed at them. The one assailant was tall and the other short. The short man walked Mr R. to the front of the vehicle. The assailants conducted a search of the couple and took their phones as well as cash. The tall man took Ms M. into the complex and instructed her to undress herself. She pleaded with him explaining that her child was only four months old and that she was still breastfeeding. He told her that she was lying and that she should express milk in order to prove that she was still doing so. He insisted that she take off her trousers and underwear and that she lie down. He thereafter lay on top of her and had sexual intercourse with her without a condom. After that he picked her up and they went back to the motor vehicle. Mr R. was, at that stage, still being held up by the short assailant. Mr R. tried to resist the attempts but was threatened that he would be shot. The short man and the tall man exchanged roles. The short man then took Ms M. back to the complex, the exact same room, where she pleaded with him to release them. He told her that he would shoot her. He said that she should undress her

trousers and underwear. He then had sexual intercourse with her without the use of a condom. They went back to the vehicle where they were asked to whom the motor vehicle belonged. Mr R. explained that he was a taxi driver and not the owner. The assailants left.

[55] Ms M. and Mr R. left the vehicle at the shopping centre and walked to the owner of the vehicle. They went to the police station and then to a clinic. She was asked whether she had received counselling to which she responded that she had not and could not do so at the time as she was employed and the employers did not afford her time off to attend the counselling sessions. She was unable to identify the assailants because she was ordered not to look at them. She had not consented to sexual intercourse with either of them.

[56] The J88 reflected that Ms M. had been examined by Dr Santana who had recorded that she had sustained abrasions on the fossa navicularis at 6 o'clock and the medical practitioner had recorded that such injuries were consistent with recent genital penetration. A forensic specimen was taken which was marked with seal number 10D1AE6816.

21 December 2014 (Counts 38 and 39)

[57] T. P. ("**Ms P.**") testified that on 21 December 2014 at approximately 18h00 when she was 22 years of age, she and her boyfriend Mr D. S. ("**Mr S.**") were walking past East Bank Park. She explained that she was dancing for Mr S.. They crossed the bridge over the Jukskei River when two men, whose faces were covered with balaclavas, approached them. They both produced firearms. One was taller than the other. She explained that they demanded their cellphones. As they were about to hand over their cellphones the short man said that they had a special place where

they searched people. They walked to a big wall in the park. When they reached this wall they both handed over their cellphones. The tall man approached her and pulled her boyfriend's t-shirt over his face. The tall man said: "*Voetsek and dunuza*". He instructed her to turn around and bend over. Because she didn't understand Zulu she kept looking at him. He repeated it and then pointed the firearm at her and turned her around, he bent her down and had sexual intercourse with her. The short man then came across to her and proceeded to have sexual intercourse with her. She testified that she had not consented to sexual intercourse with either of them and that neither had used condoms during the process. After the rapes, they took Mr S. and put him on a heap of sand. They said because he didn't have any money they were going to shoot at him. She had money hidden in her clothing and took three hundred rand (R300) out. They gave her twelve rand (R12) and took the balance. They instructed them that when they fired a shot they should leave. They then fired one shot.

[58] The couple went to the police station where they narrated their ordeal. Ms P. explained that she had seen a medical practitioner. She said that she had attended counselling but that this incident had damaged her so much. She explained that she didn't even tell her family. She was unable to tell anybody about what had occurred.

[59] The J88 records that Ms P. was examined by Dr Sharif who recorded that the absence of injuries did not exclude a sexual assault. He took a forensic specimen which was marked with seal number 13D1AC3420.

5 January 2015 (Counts 62, 64, 66 and 68)

[60] Y. S. ("**Ms S.**") stated that her date of birth was 9 February 1999. She testified in this court on 10 February 2017. She had thus just turned 18. On 5 January 2015, Ms S. was 15 years of age and about to start grade 11. At about 18h00 she

was with a friend X., at the East Bank Park. A man, whose face was covered with a balaclava, approached them wielding two guns. He demanded that they hand over their cellphones and follow him. They followed him and met up with another couple who were also instructed to follow the gun wielding assailant. Both Ms S. and X. handed over their cellphones. He led them to a big wall in the park. He instructed them to lie down facing down. He proceeded to make a phone call in which he called someone else. After he had made the call, another male person arrived in the company of yet another couple, a man and a woman. They instructed the 3 couples to undress and to have sexual intercourse with one another. After a while they said that the men should stop what they were doing as they were not doing anything, and that they would do "*it*". She explained that there were two assailants, one was taller than the other and the person who had apprehended her and X., had been tall. The short man's face was also covered with a balaclava. She explained that it was the tall man with the two firearms, who had issued the instruction that they should exchange partners. It was also he who said that the men should stand down. The tall man approached Ms S. and proceeded to insert his fingers into her vagina. He asked her how old she was. She responded that she was 15. He then had sexual intercourse with her. After he had ejaculated he called the short man who then had sexual intercourse with her as well. Neither of the assailants wore condoms. She said that one of the other girls was crying as she was being assaulted with a belt by the short man. She explained that she had not consented to sexual intercourse with either of these two men.

[61] She went home and narrated the story to her sister who took her to the clinic. There she was told to go to the police station where she made a statement and finally

she went to the clinic where she was examined by a doctor, Dr Amma Ilunga. She found that her posterior fourchette had been bruised and concluded that the clinical evidence revealed recent vaginal penetration. This examination was done at 04h00 on 6 January 2015. A forensic specimen was taken and marked with seal number 10D1AE7055.

[62] Ms L. M. ("**Ms M.**") testified that her date of birth was 23 July 1998 and that she was 16 years old at the time of her ordeal. She was with her friend Mr T. M. ("**Mr M.**") at about 18h30 at the East Bank Park in Alexandra, when she was approached by three people, two men and one woman. The one man was wearing a balaclava and was speaking in the Zulu language. He took Mr M.'s phone and then ordered the couple to go behind a wall. Ms M. explained that this was a wall used for rock climbing. Counsel for the State and counsel for Mr Mkansi agreed that Ms M. had indicated a wall measuring about 5 x 4 metres. He said do something stupid if you want to die. The man was talking in the Tsonga language on his phone enquiring from the person he was speaking to where he was. He then instructed all those present to sit against the wall. The second assailant arrived, also wearing a balaclava and brought another couple. He was also wielding a firearm. There were now three couples, three woman and three men being held up by the two men, both wearing balaclavas, the one being taller than the other. They were instructed to undress. Ms M. refused. The tall man then kicked her and took her cellphone from her which, between her and Mr M., they had managed to hide until that stage but due to the tall man kicking her, the light had come on and he had noticed the phone. She took off her trousers. The tall man then instructed the couples to swop partners and to have sexual intercourse with one another.

[63] She told the man who was allocated to her not to insert his penis into her vagina. The two assailants kept walking around inspecting whether the victims were complying with their orders. Ms M. explained that she did not have sexual intercourse with the person allocated to her. The men were then told to stand aside. The tall man said that they were not done and that they were not to get dressed. The tall man then started raping someone to her left. Whilst he was doing that the short man called her across to him and reassured her that the tall man would not be doing anything to her and when they get home that day, they were to tell their parents that they don't listen. The short man then had sexual intercourse with her. She did not consent to this conduct. The short man did not use a condom. The short man raped the other two girls as well. Whilst this was happening the tall man was just watching. They were then told to get dressed and never to come back to the park again.

[64] Ms M. went home, told her mother what had happened and went to the police station where they found the other two women who had been raped. She explained that she didn't know the other women and that she had seen one the previous day at court. After they had made their report to the police she was medically examined by Dr Klisiewicz. Her J88 reflects that she was examined at 03h45 on 6 January 2015. The medical practitioner recorded that she had fresh tears at 4 o'clock, 5 o'clock and 6 o'clock on her posterior fourchette and concluded that there were signs of forced vaginal penetration. A forensic specimen was taken and marked with seal number 10D1AE7056.

[65] Mr M. testified that on 5 January 2015 at about 18h00 he was at the East Bank Park with Ms M.. He was 19 years old. A man wearing a balaclava and wielding a gun arrived. He was in the presence of another couple. He demanded their phones

and then ordered them to walk to the rock climbing wall. He was on his phone to his friend. His friend, who was shorter than him, arrived. There were now 3 couples, 3 men and 3 woman. The tall man instructed the men to have sexual intercourse with their partners. He had sexual intercourse with Ms M.. After this they were ordered to exchange partners. He did not have sexual intercourse with the person allocated to him. Whilst this was happening, both assailants were pointing firearms at them. The men were told to stand aside. Their faces were covered with their t-shirts. He knew the girls were being raped as he could hear them crying. At some point a person approached and a shot was fired. The approaching person ran away. Ms M. also told him that she had been raped.

[66] V. M. ("**Ms M.**"), 26 years old on 5 January 2015, explained that at about 20h30, she and her boyfriend were in the East Bank Park. Two men approached them and pointed firearms at them. One was sitting with other people. They were ordered to join the other people and instructed to hand over their cellphones. The one assailant was taller than the other. The shorter assailant assaulted her with a shambok as she didn't want to hand over her cellphone. She explained that there were three couples, three men and three women. They were ordered to exchange boyfriends and undress. Another man then had sexual intercourse with her. After the male victim had had sexual intercourse with her, the short man had sexual intercourse with her. She explained that she did not consent to this conduct and that the short man had not used a condom during this act.

[67] She reported this to the police and then went to a clinic where she was examined by a medical practitioner. The J88 received as evidence in respect of Ms M. reflects that she had an "*8 centimetre, red/ dark linear bruising and abrasion on*

her left shoulder” and that the medical practitioner considered this injury to be consistent with the version given to her. A forensic specimen was taken which was marked with seal number 10D1AE7052. She explained that she had not been for counselling but that she had been taken to a social worker in Alex who had guaranteed her that everything would be well. She explained that she was not well and that she had nightmares and heard the voices of her assailants almost on a daily basis.

10 January 2015 (Counts 41, 43 and 44)

[68] The rape victims in respect of counts 41 and 43 did not testify. However it was admitted that on 10 January 2015 acts of sexual penetration were committed upon, S. M. (“**Ms M.**”) who at the time was 15 years of age and who was in the company of R. N. (“**Ms N.**”) and O. M. (“**Mr M.**”), without her consent and that two assailants had committed such crime. It was also admitted that an act of sexual penetration had been committed upon Ms N. who was 19 years on 10 January 2015, at East Bank Cemetery and that two assailants had committed such crime. No J88 was received as evidence in respect of Ms N.. The J88 of Ms M. reflected that she was examined by a medical practitioner at 03h41 on 11 January 2015 and that the medical practitioner had recorded that Ms M.’s body build was petite, that she weighed 45.3 kilograms and was 1.54 centimetres tall. She recorded that a forensic specimen had been taken and that it had been sealed with seal number 13D1AC3412.

[69] Mr M. testified that on 10 January 2015 when he was only 16 years of age, he was in the company of his girlfriend, Ms M., and his sister, Ms N.. Two men confronted them, one was taller than the other and they were both wearing

balACLavas and wielding guns. They searched them, took Mr M. and Ms N.'s cellphones and ordered them to walk to a cemetery. When they reached the cemetery he was ordered to lie down and his face was covered with his shirt. The one assailant put his leg on Mr M.'s back and asked him whether he wanted a gun to which Mr M. responded that he did not. After approximately 30 minutes they released them. The incident was reported to the police and Ms N. reported to him that they (her and Ms M.) had been raped by these assailants.

26 January 2015 (Count 61)

[70] The victim to which count 61 relates, one D. P. M. ("**Ms M.**") was 14 years old at the time of her ordeal. She did not testify but admissions were made relating to her. It was admitted that on 26 January 2015 and at or near East Bank Park in Alexandra, an act of sexual penetration was committed upon her without her consent and that there was one assailant that had committed such crime.

[71] The J88 recorded that Dr Venkatesh had examined Ms M. at 13h05 on 27 January 2015. He recorded: "*She was sexually abused (vaginal penetration only) by an unknown black male, without using a condom, at about 19h00 on 26 1 2015, in a bush, inside a graveyard, in Alexandra. Coercion. Gun and a plier. Also was hit on the head with a gun.*" The medical practitioner had, in addition, recorded a tender left side of her head and approximately 5 centimetre long deep abrasion across the outer side of her right arm. He concluded that the soft tissue injuries were consistent with the history and the time of the incident as related to him by Ms M.. Ms M. was not sexually active and thus a virgin. A forensic specimen had been taken and was sealed with seal number 14D1AC1661JJ.

13 May 2015 (Counts 69 and 70)

[72] B. K. ("**Ms K.**"), who was 22 years of age on 13 May 2015, testified that she and her boyfriend, Mr D. L. had gone to the East Bank Park in Alexandra where they were sitting on a bench when a masked gunman approached them from behind. He instructed them to lie down on their stomachs and searched them for phones and money. He took both their cellphones, opened Mr L.'s wallet, which only had coins in it, and struck Mr L. with the wallet because it did not have anything more in it. They were then forced, at gun point, to walk to a cemetery where they were told to lie down on their stomachs. He tied Mr L.'s hands and feet with shoelaces. He then instructed Ms K. to lie on her back whilst pointing the gun at her. She told him that she was pregnant. She was approximately 3 months pregnant at the time. He nonetheless undressed her and proceeded to have sexual intercourse with her, without the use of a condom. The sexual intercourse Ms K. experienced as painful and she communicated this fact to him. After he had finished he stood up and left them where they were.

[73] She untied Mr L.. They went to the police station where she reported the incident and then went to the clinic where she was examined by a medical practitioner. The J88 which was completed in respect of Ms K. reflects that she was examined at 23h30 on 13 May 2015. The medical practitioner found several abrasions and bruising during her gynaecological examination and concluded that her injuries on her genitals were consistent with forceful penetration. A forensic specimen was taken and sealed with seal number 14D7AB7422.

The Arresting Officer

[74] Ms Nomsa Masuku ("**Ms Masuku**") testified that she is currently working at the Independent Police Investigative Directorate ("**IPID**"). She started working there

during May of 2016. Prior to that she was employed by the South African Police Services (“**SAPS**”). At the time that she left she was a sergeant and had 16 years’ experience as a police official. She was stationed at the Gauteng SAPS provincial office. She explained that prior to her leaving, she was the investigating officer in the case of Mr Mkansi.

[75] She was asked to explain the circumstances leading up to his arrest. She said that during 2015 they had received cases from Alexandra, which cases had been clustered together due to the perpetrators having used the same *modus operandi*. Upon perusal of these dockets they realised that none of the suspects could be identified as the victims explained that the perpetrators were wearing balaclavas. It became apparent that they had to rely on other aids such as the cellphones of the victims which had been robbed to attempt to trace the perpetrators. They started applying for Section 205 of the CPA authorisations in respect of such cellphones. On 4 June 2015 they managed to track one cellphone to the Randburg area. She phoned a user of a cellphone and advised her that she wanted to employ a domestic worker. The holder of the cellphone agreed to meet with Ms Masuku. Upon arrival Ms Masuku explained who she truly was and identified those with her as police officers. The woman explained that the phone was broken but that Ms Masuku and the other officers could accompany her to her home where she had kept the phone. Ms Masuku asked from whom she had received the phone and she replied that she had bought it from an African male who lived close to her. The woman then took Ms Masuku to the person from whom she said she had bought the phone. They were introduced to Mr David Mohale (“**Mr Mohale**”).

[76] Ms Masusku asked Mr Mohale whether he knew about the phone. He explained that he had received the phone from his brother-in-law who was staying in Alexandra. She asked whether Mr Mohale could take them to him and he agreed on certain conditions, saying that he was scared of him, because he was always armed with firearms.

[77] Ms Masuku requested the assistance of the technical response team. Mr Mohale remained with her. On arrival, Mr Mohale showed them the room where his brother-in-law stayed.

[78] Mr Mohale knocked at the door calling the brother-in-law's name being "Ace". The brother-in-law responded but he didn't open the door. He asked Mr Mohale what he was doing there as it was so early in the morning. Because of his reluctance to open the door, Ms Masuku ended up telling him that the police were outside. He did not open the door. The technical response team then forced the door open. When they opened the door, Mr Mkansi was sitting on top of the bed half naked. Because of this, only her male colleagues entered the room. They explained who they were and why they were there. They asked why he didn't want to open the door but he didn't give any explanation. They then asked for permission to search the room. He agreed. Two firearms and ammunition were recovered. He couldn't produce licences for them. He was asked for an explanation for the firearms but couldn't provide one. He was told that he was being arrested for the possession of unlawful firearms and ammunition. He was also showed the phone. He was then taken to the Alexandra police station. He appeared at Alexandra court on 8 June 2015. He pleaded guilty to firearm and ammunition charges, and received a suspended sentence whereupon he was released. Ms Masuku explained that they had to find another phone.

[79] She explained that this was quite a setback for the investigating team as they had assumed that he would be detained for at least 7 days which would afford them sufficient opportunity to investigate further. They were driven to trace another phone which they did and agreed to meet with another woman at Marlboro, in Alexandra. Ms Masuku identified herself to the holder of the phone as a police officer and explained to her that she was looking for her cellphone. The woman handed the phone to her and verified the IMI number.

[80] Ms Masuku testified that this phone had belonged to one of the rape victims although she couldn't recall which rape victim. The holder of the phone was asked to disclose from whom she had received the phone. The woman explained that she had received it from her boyfriend. She was initially reluctant to disclose the whereabouts of her boyfriend but when told that she would be arrested for possession of the cellphone, she took the arresting officer to Mr Mkansi's home. She pointed Mr Mkansi out. Ms Masuku explained to Mr Mkansi that they were arresting him for the cellphone. This all occurred on the afternoon of 8 June 2015.

[81] This time he appeared in court and was denied bail. During his incarceration a Buccal sample was taken and it was revealed that his DNA was linked to many of the rape cases. They dubbed him (and his accomplice) the "**Alexandra Balaclava Cemetery Serial Rapists**". There were initially 2 accused in the matter. The other accused's name was Sinja Robin Mabitsela ("**Mr Mabitsela**"). An informant had lead them to Mr Mabitsela as he had run away from his residence. She said that the informant had advised that Mr Mkansi and Mr Mabitsela were good friends. She did, however, independently witness that they were friends. She saw this from their exchanges in prison.

[82] She testified that Mr Mkansi was taller than Mr Mabitsela.

[83] During cross examination it was put to Ms Masuku that the police did not first knock at Mr Mkansi's door but that they had broken down the door as they arrived. Ms Masuku denied this and explained that Mr Mohale had called his name several times and had indeed called him by the name "Ace". It was only when he failed to open, that they needed to break open the door. It was put to Ms Masuku that nothing had been explained to Mr Mkansi when his Buccal sample was taken. She denied this and said that he had even signed the form which is contained in the Buccal sample kit. It was further put to her that during his second arrest he was driving home and when he got home the police were there. Ms Masuku denied this and said that he was home and he had already packed his bags, it was clear that he was leaving Gauteng. His electronic equipment had been taken from his room. During cross examination he was asked why Mr Mkansi was detained at Sandton. Ms Masuku explained that the community was up in arms about this matter. She said the case had been discussed on Carte Blanche and the community had complained that the police weren't doing anything to protect them.

[84] During questioning by the court for purposes of clarification, it transpired that Mr Mkansi was arrested for the first time on 5 June 2015, which was a Friday, in the early hours of the morning. His first court appearance was on 8 June 2015, on which day he was sentenced for possession of the firearms. He had received a wholly suspended sentence.

[85] She also explained that his constitutional rights i.e. his right to remain silent, his right to have a legal representative present, right to contact a family member and that anything he said could and might be used against him in a court of law, was

explained to him both in the Zulu language, by one of the other policemen and by herself, in English. These rights were explained before the room was searched. She also explained that he was asked about the phone but he couldn't provide an explanation. She explained that she witnessed the taking of the Buccal sample but doesn't recall when it occurred. Resulting from the questioning of the court certain further propositions were put. It was put to Ms Masuku that if the door were open one would not be able to see inside the room where Mr Mkansi was living as the wardrobe would obstruct the view. Ms Masuku denied this, explaining that the wardrobe was against the wall. It was put to her further that on the day of the arrest the bags were packed because the room was being tidied. Ms Masuku denied that the police had messed up the room and explained that the police had found the first firearm and that he had thereafter showed them where the second one was. There was no need to disturb the room to the extent suggested by the cross-examiner. It was further put that his rights were not explained to him, nor did he give permission for his room to be searched. It was further put to her that he was wearing his pyjamas and that he was not half naked.

[86] It was also denied that his rights had been explained to him. It is perhaps opportune to mention at this point that this line of defence was not pursued during either Mr Mkansi's evidence in chief or during closing argument.

David Mohale

[87] Mr David Mohale ("**Mr Mohale**") testified that he knew Mr Mkansi and that Mr Mkansi was his brother-in-law. He explained that during January 2015 he had received a telephone call from Mr Mkansi. Mr Mkansi had advised him to come over and see his new motor vehicle. Mr Mohale declined the invitation and said that he

was obliged to sign for his parole but that he would come over the following day. The following day he went to Randburg to sign for his parole and then went to Alexandra where he saw Mr Mkansi's vehicle. It was a bakkie. As he was about to leave, Mr Mkansi went inside the room and collected two phones, they were two AG's. Mr Mkansi gave Mr Mohale one and inserted a Vodacom sim card with twenty seven rand (R27.00) charge voucher into a phone and gave it to him. When he arrived home, he sold the phone to his neighbour. Subsequently he saw the woman to whom he had sold the phone in the company of police. The police enquired from him from whom he had received the phone. He explained that he had received it from his brother-in-law, Mr Mkansi. He accompanied the police to Alexandra where he pointed out Mr Mkansi's place of residence. Upon arrival the police knocked but Mr Mkansi did not respond. The police thereupon broke open the door. Mr Mohale says that he was not inside because after they broke the door, they locked Mr Mohale inside the car. He didn't know what had happened inside. He only heard that a lot of items had been found.

[88] He was asked whether he had been arrested for the phone and he responded that he had been arrested on 4 June 2015 and that he had been released on 26 August 2015. He was asked whether he was given a reason why he was being arrested and he responded that he was told that the police were still investigating the matter because the phone had been found in his possession. He was further asked during cross examination why he had decided to sell the phone and he explained that he did odd jobs and at that stage he did not have money for transport and he decided to sell the phone. He was asked whether he had knocked on the door and whether he had called out Mr Mkansi's name. He responded that he had. It was put to him

that Mr Mkansi had never given him a cellphone. Mr Mohale was very emphatic about the fact that Mr Mkansi had given him the phone. It was put to Mr Mohale that Mr Mkansi was never in possession of any AG phones and was asked what had happened to the cellphone and Mr Mohale had explained that it had been confiscated by the police.

Maria Ratiba

[89] Maria Ratiba (“**Ms Ratiba**”) explained that during 2015 she had been Mr Mkansi’s girlfriend. During about January 2015 he had given her a Blackberry phone. She used it for about two months whereafter it was no longer functional. He repaired the phone and returned it to her. She used the phone until around June 2015 when she was contacted and requested to meet with the police. They asked her from whom she had received the phone. She explained that her boyfriend had given it to her. She denied that she had taken the police to his home and explained that she had directed the police to his home. She said that she was arrested and detained for four days during which time she was taken to the Sandton police station where she had identified and pointed out her boyfriend, Mr Mkansi, who was the accused before court. She didn’t know Mr Mabitsela and she explained that after he had confirmed that he had given her the phone, the charges against her had been withdrawn. It was put to Ms Ratiba that he had told her that he had bought the phone from Mr Malisela who at the time was working at a casino, he later became a taxi driver. She denied this communication.

DNA EVIDENCE

[90] Veronica Letabo Thomas (“**Ms Thomas**”), explained that she was employed by the SAPS attached to the biology section of the forensic science laboratory as a

senior forensic analyst and reporting officer. She explained that she had twelve years' experience at the forensic science laboratory and five years' experience in the biological science's field. In total she had approximately seventeen years' experience in the biological sciences field. She has a BsC honours degree in microbiology obtained at the University of Limpopo. Her duties include monitoring DNA samples and reporting to the court in respect thereof. Before going to court she monitors samples, evaluates them and reports on them. She explained the general procedure when forensic specimens were received. She said that the receipt of forensic specimens was done by administration clerks. Before they accepted them, they are checked to see if there are any signs of tampering. They only accept receipt of the specimens if they are properly sealed and still intact. If there are any changes the investigating officer's will have to collect them, but if everything is found in order, these administration clerks issue acknowledgments of receipt. This then the first test that the forensic specimens must pass.

[91] The forensic specimens are then archived in exhibit storage rooms during which process they are allocated a unique number which is an LAB number. This, she explained, is the number which is used to communicate with the investigating officer. These exhibits are then allocated to an evidence recovery analyst who also does a quality check which includes confirmation that the seals are intact, the markings are intact and that there are no leakages. If the exhibits don't pass this test, the evidence recovery analyst issues a letter to the investigating officer, requesting him to fetch the exhibits and they are stored until he fetches them. This then the second test forensic specimens must pass.

[92] The analyst proceeds to do the evidence recovery. Before any examination starts the analyst ensures that she has put on personal protective equipment. This would include a laboratory coat, gloves, a hair net, a face mask and safety shoes. This is to ensure that no contamination from the analyst to the specimen occurs. The working station and utensils are cleaned with water and Jik.

[93] The analyst then proceeds to break the seals. The specimens are analysed according to the charge contained in the covering letter from the police station. In cases of rape, the analyst looks for “presumable semen”. At this stage the analyst is not sure whether the sample contains semen or whether it is any other body fluid. In cases of robbery, the analyst looks for blood or touch DNA. The analyst then reports their findings as to whether the specimen contains “presumable semen” or no semen.

[94] If no semen is detected a letter to that effect is issued to the investigating officer and no DNA analysis is done. If semen is found, the analyst proceeds with a DNA analysis. All specimens which are “presumably semen” are allocated a unique number. This case file is then allocated to a case officer.

[95] The DNA analysis process is a blind process, which means the analysis is done with a barcode and the DNA sample only, and not in the context of a case. The analyst does not know the identity of the individuals underlying the samples.

[96] The DNA is then removed from the actual sample and the amount of DNA is quantified. Some samples fail at this stage as no DNA can be found. Those samples with enough DNA to proceed, are then amplified by magnifying the DNA to millions for easier visualisation. Ms Thomas explained that this is done because one is working with minute volumes and one requires a million “copies” for the naked eye to

see. During this entire process, quality checks are also done. The specimens may fail if they don't reach a certain threshold.

[97] Ms Thomas is able to ascertain whether a specimen failed due to a particular reason and will also see whether the samples which were given, were usable. This analysis is then compared to a reference sample. It is termed a reference sample as it is from either a donor or a known source. Two profiles are compared to see whether they match and where samples don't match the reference sample, the laboratory issues an exclusion statement. For those samples which have insufficient DNA, such a statement is also issued. Similarly, for those samples where no DNA could be found, an exclusion statement is issued. When there is a match between a reference and the specimen, a statement is issued to that effect. Ms Thomas explained that there are different kinds of DNA profiles. She said there are two kinds of DNA profiles, a full DNA profile which is where only one donor has contributed to the sample/ specimen and a mixed DNA profile which is when there has been more than one contributor to the DNA. She explained that ten regions are used for DNA profiling. The first region is a gender marker which tells one whether the donor is male or female, the remaining nine regions are unique.

[98] Ms Thomas explained that DNA is unique to an individual. No two or more people have the same DNA except identical twins. She explained that a person's DNA did not change during their lifetime. She further explained that the DNA found in the body is the same in all the cells. The DNA in the blood is the same as the DNA in hair follicles which is the same as that found in soft tissue and the same in semen. DNA is hereditary. One inherits one half from your mother and the other half from your father but it will still be unique. Of the ten regions used at the laboratory, one

region is a gender marker. Male equals XY and female equals XX. The remaining nine regions are where the unique DNA comes in. A full DNA profile would be indicated by two characteristics per region. Those characteristics can be the same, meaning both mother and father contributed the same or they could be different. A full DNA profile would be indicated by two characteristics per region. It could be three or more per mixture depending on how many people contributed towards that mixture. When it comes to mixed DNA, when one characteristic is missing, the person thought to be linked can be considered excluded due to the fact that anyone could contribute to a mixed DNA profile.

[99] Once a profile is obtained, the laboratory also does a statistical evaluation to see how common the possible contributors to the DNA result is. The four affidavits in terms of Section 212 of the CPA were received as evidence and the content thereof confirmed by Ms Thomas. The relevant portion of each affidavit was carefully read into the record and the findings in respect of each region carefully placed on record. The Section 212 of the CPA affidavits, the content of which was confirmed by Ms Thomas under oath, revealed the following:

- 99.1. The reference samples of Mr Mkansi and Mr Mabitsela could be read into the mixture DNA result obtained from the vulva swab of Ms M. (Count 59);
- 99.2. The most conservative occurrence for the DNA result from the vulva swab of Ms M. for all the possible contributors to the mixture DNA result, is one in twelve thousand people.
- 99.3. The DNA result obtained from the following exhibits matched the DNA result from Mr Mabitsela:

- 99.3.1. The cervical swab taken from Ms M. (Count 35);
- 99.3.2. The cervical swab taken from Ms M. (Count 25);
- 99.3.3. The vaginal vault swab taken from Ms P. (Count 38);
- 99.3.4. The cervical swab taken from Ms M. (Count 59);
- 99.3.5. The vaginal vault swab taken from Ms M. (Count 41).
- 99.4. The most conservative occurrence for the DNA result obtained in paragraphs 99.3.1 to 99.3.5 above, is 1 in 21 billion people.
- 99.5. The DNA result obtained from the following exhibits matched the DNA result for Mr Mkansi:
 - 99.5.1. The cervical swab taken from Ms M. (Count 45);
 - 99.5.2. The vestibule swab taken from Ms T. (Count 50);
 - 99.5.3. The cervical swab taken from Ms M. (Count 54);
 - 99.5.4. The cervical swab taken from Ms R. (Count 56);
 - 99.5.5. The cervical OS swab taken from Ms M. (Count 61);
 - 99.5.6. The cervical swab taken from Ms S. (Count 62);
 - 99.5.7. The vaginal vault swab taken from Ms K. (Count 69).
- 99.6. The most conservative occurrence for the DNA result obtained in paragraphs 99.5.1 to 99.5.7 hereof, is 1 in 5.4 trillion people.

[100] Ms Thomas further testified that there are currently approximately six billion people on earth. Ms Thomas was asked how reliable the entire DNA process was. She explained that it was very reliable but not 100% fool proof as only the STR part of the DNA was done and not the entire DNA profile. She explained however that the chain is maintained, that there is no contamination and that each person working in the chains' DNA has been loaded on to the system and will be picked up if there has

been any contamination. She explained further that there are several quality checks along the way before results are released.

[101] She was specifically asked whether she was aware of any contamination or breaks in the chain in this matter and she explained that there were none that she was aware of. She was asked whether as a reporting officer she would be made aware of such occurrences. She explained that if any seals had been broken it wouldn't have been received at the reception desk but if, by virtue of human error, it did pass or slip through the process it would have been noticed when the seals were opened and it would have been placed in a case file.

[102] She concluded by testifying that the Buccal samples for both Mr Mabitsela and Mr Mkansi, were forwarded to her.

[103] During cross examination she was asked what a full DNA profile was and what a mixture DNA profile was. Ms Thomas explained that a single donor full profile is DNA that came from one donor only and it is represented by two characteristics in one region. One characteristic emanates from the mother and the other half from the father. They could be the same character or they could be different but it would mean that the one emanated from the mother and the other from the father. A mixture DNA profile would consist of more than two characteristics in one region, it tells one that there is more than one donor. She was asked whether there was a possibility that a mistake could arise during the analysis. She responded that in this case the error rate was nil.

[104] That concluded the evidence for the state.

Xaniseka Josias Mkansi

[105] Mr Mkansi testified that he had no knowledge of the counts against him. He acknowledged that Mr Mohale was his brother-in-law. He denied that he had given him a cellphone and explained that Mr Mohale had not come to his house on the day as testified to by him. He testified that he had come to his house on 29 May 2015. He denied giving him a cellphone. He was asked whether he knew of any reason why Mr Mohale would say so. He could not provide a reason. He was asked whether Mr Mohale was present during his arrest on 5 June 2015. He responded that he didn't know. He said that the police said that they were looking for firearms and that when they found the firearms he was arrested.

[106] He admitted that he had given a cellphone to Ms Ratiba and that it was a Blackberry phone. He stated that he had not told her where he had found it or from whom.

[107] The second time the police came to arrest him they told him that they were arresting him on a rape charge. They explained that it had occurred in the East Bank Park but they didn't mention when it had occurred. He said that the Buccal sample was taken on 8 June 2015. They didn't explain to him what the purpose of this was. He was visited in prison and told that his DNA was found in different rape victims. He explained that he didn't have any knowledge of these rapes. He couldn't explain why his DNA was found in the most intimate places of the rape victims.

[108] He asked whether it would be possible for him to see the cellphone which he had allegedly given to Mr Mohale. His legal representative brought an application for the State to produce the cellphone. The State undertook to obtain the cellphone and the cross examination of Mr Mkansi commenced.

[109] Mr Mkansi explained that during the period 2014 and 2015 he was self-employed as a motor mechanic and that he stayed at number [...], 19th Avenue, Alexandra. He worked from 08h00 until 18h00. He was assisted by his brother Derrik Mkansi. He explained that he was staying alone but that his girlfriend at the time, Delisile, would come around from time to time. About five times a week. She would arrive at around 19h00 because she finished work at 18h00. She would leave then as early as 04h00 as she had to report on duty at 06h00.

[110] He explained that he could see the East Bank Park very clearly from his property but that he had never visited the park. He only saw it when he walked past. He and Delisile never visited the park. He also saw the cemetery from his property and he would estimate that the distance of the park from his property to be about 1.5 kilometres. He explained that he had never been to the park at night. He said that he would not say that his house was across the road from the park because one had to go down to the Jukskei River, cross the river and then you would get to the park.

[111] He explained that he knew Mr Mabitsela well. They became friends when they did athletics together during 1988, 1989 and 1990. Mr Mkansi had put up a shack on Mr Mabitsela's property where his children resided. His property was close to Mr Mkansi's as it was in 20th Avenue. He explained that during 2014 or 2015 he still saw him as he would go and visit his children. He was asked whether Mr Mabitsela was employed, to which he responded that when he came out of prison during 2010, Mr Mabitsela was employed, but at that stage he had stayed in Tembisa it was only later that he moved to Alexandra. Initially he explained that Mr Mabitsela would never come to his residence but then explained that Mr Mabitsela would come

to have his car serviced and that he would sometimes come to him to complain about his children.

[112] He was asked to describe the East Bank Park and he said that it was a place where children played and there were things like swings. He was asked whether there was a wall structure and he said there was a wall where people climbed on. He was asked where the wall was in the park and he responded that it wasn't far away from the cemetery, in fact he said, it is where the graveyard starts.

[113] He was asked whether he or Mr Mabitsela were the taller person. He said he didn't know but he thought that they were the same height. He said he never thought of taking notice of who was taller. He was asked whether he could dispute what the arresting officer had said i.e. that he was taller than Mr Mabitsela and he responded that he could not dispute that because he has never made measurements.

[114] He was asked whether he and Mr Mohale had a good relationship during 2014 and 2015. He explained that they had never sat down after he came back from prison. They only used to meet when they signed for parole. He then explained that there was a problem between the families. He said that Mr Mkansi's wife had passed away shortly after he came out of prison.

[115] During cross examination Mr Mkansi stated that Mr Mohale had never visited him during January 2015 but that he had done so during May 2015. It was put to him that Mr Mohale was thus mistaken about the dates. He said this was not a misunderstanding, Mr Mohale had changed the dates intentionally. He was asked what the purpose was of the visit on 29 May and he explained that the reason was because he wanted Mr Mkansi to keep the firearms. It was then put to Mr Mkansi that none of this was traversed during cross examination of Mr Mohale. He responded to

say that he did tell the police about this but he didn't tell his legal counsel about this because he thought that he would have an opportunity to testify.

[116] He was also confronted with the failure to dispute the date that Mr Mohale had said he had received the phone from Mr Mkansi which is during January 2015. He was asked why it was not put and he said that he didn't want to intervene while the proceedings were happening. He was asked whether he had disclosed the fact that he had been visited in May rather than January to his counsel and he stated that he had. He was asked whether he thought that Mr Mohale had told the police that Mr Mkansi had given him the phone because of the death of his wife and he responded that he didn't know.

[117] He was confronted with the fact that according to him the relationship between him and Mr Mohale was not good. Yet Mr Mohale trusted Mr Mkansi with the firearms, he didn't answer the proposition but merely stated that he had been requested by him to do so because there were boys that knew where he kept the guns.

[118] In respect of the second phone, i.e. the Blackberry, he explained that he had bought the phone during January 2015 from Mr Malisela who worked as a security guard at the casino.

[119] He was asked why it hadn't been put to the arresting officer that the police were looking for firearms and he said that he told himself that he would be afforded an opportunity to speak in due course. He also said that he didn't tell his counsel about this fact. He testified that when he was asked where the firearms were, he said he didn't have any firearms. He lied to the police because he was protecting the owner of the guns. He also explained that the wardrobe fell onto the floor and that is

when the police saw the firearms and took them. He testified that they then started searching the room and turned everything upside down. He was asked whether he was informed during his first arrest whether rapes were also being investigated. He responded that he was not so informed.

[120] He further explained that the Buccal sample was taken on 8 June 2015 at about 08h00 at the police station. He then corrected this to explain that it was actually taken at court. When asked what the police said during the second arrest, Mr Mkansi said that they indicated that they were charging him with rape and it was at that stage that they disclosed to him that Mr Mohale had told them that he had given Mr Mohale a cellphone.

[121] He was asked why his DNA was found in the most intimate parts of these complainants. He couldn't explain this. He further confirmed that he didn't know any of the complainants who testified and that all the complainants are strangers to him.

[122] Mr Mkansi was confronted with the proposition which was put to Ms Masuku that the second arrest occurred after he had been driving home. He was asked what he meant by that. Mr Mkansi responded that after his first arrest, his motor vehicle was collected by his brother and after his release he had gone to fetch his car. He said that it was past 7 in the evening. He was then asked how he knew that the police were following him and he responded that he didn't know but after he had parked his car, that is when he saw the police. They followed him inside. It was then put to him that he had explained the bags in the bedroom. It was put to Ms Masuku that he was tidying up after the police had turned everything upside down. He then said that it wasn't him that had been tidying up the house but rather his girlfriend and his brother. He was then confronted with the contradiction that he had previously not

mentioned either his girlfriend or his brother. He then denied that his bags had been packed at all and said that his clothes were merely put together.

[123] After the court had asked a few questions for clarification purposes, Mr Mkansi's case was closed. At this juncture the State made the cellphone available that Mr Mkansi had requested to view at the end of his examination in chief. It was agreed that Mr Mkansi's case could be reopened and Mr Mkansi was again sworn in. He viewed the phone and testified that he did not recognise it but agreed that it was an AG phone. He was asked why he wanted to see the phone. He responded because the police had made mention of it. He said the police had made mention of it during his first arrest. He was asked what the police had said about it during his first arrest and Mr Mkansi responded that they had wanted to know what he knew about the phone with the four starter packs, ie four sim cards. He was asked whether the police had told him whether the phone had been robbed from a rape victim. He responded that they had not said that. The court asked Mr Mkansi whether the phone was shown to him during his first arrest. He responded that it had not been shown to him. The court then inquired why it was necessary for him to see a phone he had never seen before. He said that he was just interested in seeing the phone that was causing so much trouble for him.

[124] The court also inquired why he had previously during his evidence in chief and during cross-examination never mentioned that the police did in fact ask him about the phone. He could not respond to this. That concluded the case for Mr Mkansi.

EVALUATION OF THE EVIDENCE

[125] Evidence that the DNA profile of an accused person matches that of a sample taken from a victim, or can be included therein, is circumstantial evidence. The weight thereof depends on a number of factors listed by Van der Merwe AJA (as he then was) in *S v SB*, 2014 (1) SACR 66 (SCA) at para [18]:

“Evidence that the STR profile of an accused person matches that of a sample taken at the scene, or can be included therein, is circumstantial evidence. The weight thereof depends on a number of factors. These include:

- (i) The establishment of the chain evidence, ie that the respective samples were properly taken and safeguarded until they were tested in the laboratory.
- (ii) The proper functioning of the machines and equipment used to produce the electropherograms.
- (iii) The acceptability of the interpretation of the electropherograms.
- (iv) The probability of such a match or inclusion in the particular circumstances.
- (v) The other evidence in the case.”

[126] The form of DNA analysis used in this matter is called STR (Short Tandem Repeat) profiling. The unchallenged and undisputed evidence given by Ms Thomas, read with the affidavits received in terms of section 212 of the CPA which include an appendix (confirmed under oath by Ms Thomas) amplifying the science behind the process and the formal admissions made, reveal the following:

126.1. The respective samples were properly taken and safeguarded until they were tested in the laboratory – this relates to the forensic specimens taken from the complainants as well as the Buccal samples taken from Mr Mabitsela and Mr Mkansi.

126.2. There is no suggestion in this case that the machines and equipment used in this case were not functioning properly;

126.3. Ms Thomas correctly interpreted the results and such results were correctly recorded in the section 212 of the CPA affidavits received as evidence and marked as exhibits “R” to “U”.

The probability of the match or inclusion

[127] In assessing the DNA evidence it should be borne in mind that if there is a match or an inclusion, it means no more than that the accused person cannot be excluded. It is useful to quote paras [20] and [21] of *S v SB* (supra) –

“[20] If the STR profile of an accused person in fact differs from the profile retrieved from the sample taken at the scene, even in respect of only one allele, the accused person must be excluded as a source of the crime- scene DNA. However, the converse is not true. Because only a limited number of STR loci are analysed, an STR profile cannot identify a person. Therefore the weight to be attached to evidence of an STR profile match or inclusion in the first place depends on the probability of such a match or inclusion occurring in a particular population. Without such evidence the STR profile match or inclusion means no more than that the accused person cannot be excluded as a source of the crime-scene DNA.

[21] If the profile in question may be found in many individuals, a match between the profile of the accused person and the crime-scene DNA will have little or no probative value. This is of particular importance where the crime-scene DNA is a mixture, which increases the likelihood that the profiles of other members of the population can be read into the mixture. On the other hand, an extremely rare profile will strongly point to the involvement of the accused person. This essential component of DNA evidence is usually presented in the form of statistical analyses of a population database. ”

[128] All statistical calculations are based on accepted population genetics theory and are utilised according to the specifications of the ‘*National Research Council Committee of Forensic DNA Analysis*’, USA, 1996. The statistical calculations are processed by using the National DNA Statistics Database for the four main population groups in the RSA, namely: Black, Caucasian, Coloured and Asian. The

most conservative occurrence of the DNA result in the four population groups is recorded in the section 212 of the CPA affidavits.

[129] The statistical analysis and results found to exist, were not challenged or disputed.

The other evidence

[130] The incidents the complainants describe bear striking similarities. They include:

130.1. In all but one of the incidents (counts 59 and 60), the assailants wore balaclavas;

130.2. In all but one of the incidents (count 61), there were two assailants;

130.3. In all of the incidents referred to in para 130.2, the one assailant was taller than the other;

130.4. Of the 13 incidents, 9 occurred either in the East Bank Park or in the cemetery next to the Park, in Alexandra;

130.5. Of the 13 incidents, all occurred in Alexandra;

130.6. In all the incidents cellphones and money were demanded;

130.7. In all the incidents firearms were used;

130.8. In many incidents the one assailant would phone the other assailant once he had contained his victims.

[131] Mr Mkansi lives very close to East Bank Park. He can see it from his home. He lives in Alexandra. Mr Mabitsela lives very close to East Bank Park. He lives in Alexandra. Mr Mkansi and Mr Mabitsela are good friends.

[132] Mr Mkansi was traced with reference to cell phones emanating from him.

[133] Mr Mkansi denied any involvement in the crimes. His evidence did not impress me at all. It contained numerous contradictions, inconsistencies and improbabilities. I refer to a few:

133.1. During his evidence in chief, he testified that during his first arrest the police arrived searching for firearms and no more. He had no inkling that they were there because of a cell phone which had belonged to a rape victim and was somehow being linked to him. He testified that he was completely oblivious to the fact that he was a suspect in a rape investigation. This version he maintained during cross-examination. It was only after his case was re-opened and he looked at the phone, that he conceded that the phone had been discussed with him (not shown to him) but then only for the limited purpose of establishing whether he knew anything about 4 starter kits in relation to such phone. He denied any knowledge of the starter kits. The police did not probe this response according to him. They were more concerned about the firearms. The multiple rapes which had occurred in Alexandra was given to a special unit within the police force to investigate. Ms Masuku was the officer in charge of this investigation. It is inconceivable that she would not have focused on the cellphone and Mr Mkansi's connection to the crime she was investigating being the Alexandra Balaclava Cemetery Serial Rapists but have, instead, decided to focus on firearms only. The whole purpose of confronting Mr Mkansi was to establish whether he was one of the Alexandra Balaclava Cemetery Serial Rapists. That she

would not have explored his connection to the phone which she testified came from a rape victim, is so preposterous that it can be rejected without hesitation.

133.2. A number of things were not disputed when the witnesses testified. This despite an express warning by the court that Mr Mkansi should listen very carefully to every word said by the witnesses and that he should tell his legal representative if he differed from their versions. They include:

133.2.1. When Mr Mohale testified, Mr Mkansi did not dispute that Mr Mohale had visited him during January of 2015. However, during his evidence he stated that it was on 29 May 2015 that Mr Mohale had visited him.

133.2.2. It was never put to Mr Mohale that he had given him firearms for safe keeping;

133.2.3. It was never disputed that Mr Mkansi had called Mr Mohale to look at his new bakkie;

133.2.4. It was never put to Mr Mohale that there were ill feelings between them due to Mr Mohale's sister passing away during 2011.

133.3. A number of things were put to witnesses which changed when Mr Mkansi testified. This includes:

133.3.1. When Mr Mkansi's girlfriend testified it was put to her that Mr Mkansi had told her that he had bought the Blackberry

phone from a Mr Malisela who works at a casino. During his evidence in chief he said that he had not told her.

133.3.2. Ms Masuku had testified that during the second arrest, it was evident that Mr Mkansi was preparing to leave Gauteng as all his electronic equipment had been taken and his bags had been packed. It was put to her that the police had made a big mess of his room when they had searched it and that his things had been placed in bags in order to tidy up. During his evidence he stated that no bags had been packed and that his clothes had been put into a heap on his bed.

133.4. Despite living very close to the East Bank Park, he denied ever having visited it. He also distanced himself from any knowledge relating to the Park. When probed he agreed he could see the rock climbing wall and the fact that there was a cemetery next to it. It is also strange that, although he had been a friend of Mr Mabitsela's since 1988, he could not tell the court which one of them were taller. It appears as though Mr Mkansi is reluctant to commit himself to anything that might be incriminating.

133.5. It is highly improbable that Mr Mohale would just pitch up at the doorstep of Mr Mkansi, having not seen him for months, and then ask him to look after firearms under circumstances where, as suggested by Mr Mkansi, the family blamed him, Mr Mkansi, for the death of Mr Mohale's sister – Mr Mkansi's ex-wife -- who passed away during January 2011. Mr Mohale's version is quite evidently more probable

ie that he had been called by Mr Mkansi to come and look at his new bakkie and that Mr Mkansi had then decided to give Mr Mohale a phone.

[134] The court is conscious of the caution heeded in *Ndwambi v The State* 611/2013 [2015] ZASCA 59 at para [30] -

“It is, however, trite that the fact that the accused is an unsatisfactory - even a lying witness - does not necessarily justify the conclusion of his guilt. Care must be exercised in not drawing an inference of guilt merely because he was lying. Ultimately, guilt is about the inferences that, as a matter of logic, may be drawn. Inference must carefully be distinguished from conjecture or speculation.”

APPROACH TO THE EVIDENCE

[135] In *S v Nyembe*, 2014 (1) SACR 105 (GSJ) Van Oosten, J held as follows at para [8] –

“...In *S v S*. [2012] ZASCA 85 the Supreme Court of Appeal held:

'A court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt nor does it look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true. The correct approach is set out in the following passage from *Mosephi and Others v R* LAC (1980 – 1984) 57 at 59F – H:

The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful guide to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a

detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.”

[136] The State’s case rests on circumstantial evidence. Courts, where a case is based on circumstantial evidence, are guided when determining the issues, by well-known principles of logic set out in the case of *R v Blom* 1939 AD 188 at 202-203.

These are that:

“(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.

(2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct ”.

[137] Zulman AJA (as he then was) in *S v Reddy & others*, 1996 (2) SACR 1 (A) at 8 h - j said:

“A number of circumstances, each individually very slight, may so tally with and confirm each other as to leave no room for doubt of the fact which they tend to establish...Not to speak of greater numbers, even two articles of circumstantial evidence, though each taken by itself weigh but as a feather, join them together, you will find them pressing on a delinquent with the weight of a millstone”.

[138] Wills on Circumstantial Evidence, 7th ed. at 46 and 452-60 is quoted with approval in *S v Reddy (supra)* at 9d:

“That network may be a mere gossamer thread, as light and as unsubstantial as the air itself. It may vanish at a touch. It may be that, strong as it is in part, it leaves great gaps and rents through which the accused is entitled to pass in safety. It may be so close, so stringent, so coherent in its texture that no efforts on the part of the accused can break through. It may come to nothing-on the other hand it may be absolutely convincing...The law does not demand that you should act upon

certainties alone....In our lives, in our acts, in our thoughts we do not deal with certainties; we ought to act upon just and reasonable convictions founded upon just and reasonable grounds....The law asks for no more and the law demands no less”.

[139] The State must prove the guilt of an accused beyond reasonable doubt. If the accused's version is reasonably possibly true he must be given the benefit of the doubt and be acquitted. The accused's version should not be rejected only because it is improbable. The Court, however, is entitled to reject such version if it is evident that the version is improbable and beyond doubt false. See *R v Difford* 1937 AD 370 at 373; *S v Van der Myden* 1999 (1) SACR 447 (W) at 448 and *S v V* 2000 (1) SACR 453 (SCA) at 455A-C.

[140] Mr Mkansi's DNA was found in the most intimate parts of 9 complainants. He has no explanation for this. He was unable to furnish any explanation whatsoever for the presence of his DNA found within the bodies of 9 complainants who, on his version, he does not know at all and who do not know him. The court is entitled to, and indeed does, have regard to Mr Mkansi's inability to provide an explanation for this. See *Mudau v The State*, [2012] ZASCA 56 at para [11].

[141] The complainants testified there were two assailants. One was tall and one was short.

[142] I accept the evidence of Ms Masuka that Mr Mkansi is taller than Mr Mabitsela.

[143] The following complainants testified that they were raped by the tall assailant and Mr Mkansi's DNA is matched or can be read into their DNA samples:

143.1. Ms M. (Count 45)

143.2. Ms T. (Count 50)

143.3. Ms M.(b) (Count 52)

143.4. Ms M. (Count 54)

143.5. Ms M. (Count 59)

143.6. Ms S. (Count 62)

143.7. Ms K. (Count 69)

[144] Formal admissions were made about the following complainant as well as that there were two assailants and Mr Mkansi's DNA is matched or can be read into her DNA sample: Ms R. (Count 56)

[145] Formal admissions were made about the following complainant as well as that there was one assailant and Mr Mkansi's DNA is matched or can be read into her DNA sample: Ms M. (Count 61).

[146] The following complainants testified that they were raped by both the tall and short assailants and Mr Mabitsela's DNA is matched or can be read into their DNA samples:

146.1. Ms M. (Count 25)

146.2. Ms M. (Count 59)

146.3. Ms P. (Count 38)

[147] Formal admissions were made about the following complainants as well as that there were two assailants and Mr Mabitsela's DNA is matched or can be read into their DNA samples:

146.4. Ms M. (Count 35)

146.5. Ms M. (Count 41)

[148] Of considerable significance in this case is the fact that Mr Mkansi *and* Mr Mabitsela's DNA samples could be read into the DNA Vulva swab obtained from Ms M. (count 59) who had testified that she had been raped by both the short and the tall

assailant. Although the most conservative occurrence for the DNA result for all the possible contributors to the mixture DNA result is only 1 in 12 thousand, it is the type of evidence referred to by Zulman AJA in *S v Reddy* (supra) which 'taken by itself weigh but as a feather, join them together, you will find them pressing on a delinquent with the weight of a mill-stone'

[149] Upon a consideration of the totality of the facts and circumstances of this matter which includes, the DNA results obtained, the absence of an explanation by Mr Mkansi for his DNA being present in 9 of the victims, the statistical probabilities, that in all but one of the incidents (counts 59 and 60), the assailants wore balaclavas, that in all but one of the incidents (count 61), there were two assailants; that in all of the incidents where *viva voce* evidence had been led, the one assailant was taller than the other; that of the 13 incidents 9 occurred either in the East Bank Park or in the cemetery next to the Park; that all of the incidents occurred in Alexandra; that in all the incidents cellphones and money were demanded; that in all the incidents firearms were used; that in many incidents the one assailant would phone the other assailant once he had contained his victims; that Mr Mkansi lives very close to East Bank Park, that Mr Mabitsela lives very close to East Bank Park; that Mr Mkansi and Mr Mabitsela are good friends and that Mr Mkansi was traced through cell phones which were linked to the crimes, I find that the state has proved beyond a reasonable doubt that Mr Mkansi was the perpetrator in counts 45, 47, 48, 50, 52, 25, 35, 54, 56, 59, 38, 62, 41, 43, 61 and 69 (being the rape and compelled rape counts). I also find him guilty of all the robbery with aggravating circumstances counts.

[150] I should make it express that in all the cases where the DNA evidence links the victims to Mr Mabitsela (the short assailant as he has come to be known in these

proceedings) i.e. the complainants mentioned in counts 25, 35, 38 and 41, I find that the only reasonable inference to draw from the facts and circumstances is, that the other assailant was Mr Mkansi. Also, there is no DNA evidence linking either assailant to Ms N. (count 43). Mr M. (Ms N.'s brother) testified and explained how 2 gun wielding, balaclava covered men, the one tall the other short, had accosted them. The formal admissions made in respect of the victims referred to in counts 41 and 43 leads to only one reasonable inference and that is that Mr Mkansi was the perpetrator in respect of count 43.

[151] In so far as it is necessary to say so expressly, I find that Mr Mkansi's testimony insofar as it conflicts with that presented on behalf of the state, is rejected as false beyond a reasonable doubt.

[152] In respect of counts 64 and 66, the victims testified that they were not raped by the tall man but by the short man. Mr Mkansi is accordingly acquitted on these two charges.

[153] In the result I make the following order:

153.1. Mr Mkansi is found guilty on counts 25, 35, 38, 41, 43, 45, 47, 48, 50, 52, 54, 56, 59, 61, 62 and 69, as charged.

153.2. Mr Mkansi is found guilty on counts 27, 36, 39, 49, 51, 53, 55, 68 and 70, as charged.

153.3. Mr Mkansi is found guilty on count 44 of two phones and count 60 of two phones and R440 in cash.

153.4. Mr Mkansi is acquitted on counts 64 and 66.

I OPPERMAN
Judge of the High Court
Gauteng Division, Johannesburg

Heard: 3 February 2017 to 27 February 2017
Judgment delivered: 7 March 2017
Appearances:
The State: Adv M Bayat
For the Accused: Adv Mabapha