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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. |

DATE

SIGNATURE

CASE NO: **A1895/15**

DPP REF NO: **10/2/11/1-191/15**

In the matter between:

THE STATE

and

MABULA: TEBOGO WILLIAM

Accused

JUDGMENT

MATSHITSE AJ

INTRODUCTION

[1] Mr Mabula has been arraigned on one (1) count of murder, four (4) counts of assault with intent to do grievous bodily harm, one (1) count of escaping, five (5) counts of kidnapping, six (6) counts of rape, five (5) counts of robbery with aggravating circumstances and one(1) count of attempted murder. He pleaded not guilty and tendered no plea explanation as envisaged in terms of Section 115 of Criminal Procedure Act 51 of 1977 (“**CPA**”). The minimum sentences applicable in terms of Sections 51(1), 51(2) and 51(2) of Criminal Law Amendment Procedure Act 105 of 1997 (“**The Criminal Law Amendment Act**”) were explained.

[2] In respect of count 1, the State alleges that Mr Mabula killed Phiwayinkosi Innocent Mthethwa and the said offence falls within the ambit of Section 51(1) of the Criminal Law Amendment.

[3] In respect of 6 (six) counts (8, 9, 13, 18 and 20) the State alleges that Mr Mabula 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 six (6) offences all fall within the ambit of Section 51(1) of the Criminal Law Amendment Act.

[4] In respect of count 22, the State alleges that Mr Mabula attempted to kill one Ms K K S. The State alleges that this offence falls within the ambit of Section 51(2) (c) of the Criminal Law Amendment Act.

[5] In respect of five (5) counts (10, 11, 12, 16 and 17) the State alleges that Mr Mabula committed robbery with aggravating circumstances and that these five (5) counts fall within the ambit of Section 51(2) of the Criminal Law Amendment Act.

CHARGES AGAINST MR MABULA

A. Count 1

[6] The State alleges that on or about the 16th March 2012 and at or near Ramaphosa Extension 2, in the district of Boksburg, Mr Mabula did unlawfully and intentionally kill Phiwayinkosi Innocent Mthethwa a male person.

B. Counts 2, 3 and 4

[7] The State alleges that on or about the 28th April 2012 and at or near Boksburg Police Station in the district of Boksburg, Mr Mabula did unlawfully and intentionally assault Kwená Bertha Nailana and Lebopo Mollo with intent to cause both of them grievous bodily harm. The State further alleges that on such date, and place Mr Mabula being a prisoner, did unlawfully escape from lawful custody.

C. Counts 5, 6, 7 8, 9, 10 and 11

[8] The State alleges that on or about the 09th July 2012 and at or near Rietfontein, Poortjie, in the district of Vereeniging, Mr Mabula did unlawfully and intentionally commit an act of sexual penetration with Ms G H M. (14 years old minor child at the time) without her consent. The State further alleges that on such date, Mr Mabula again unlawfully and intentionally commit an act of sexual penetration with Ms G.H.M (14 year minor child) without her consent. The State further alleges that on such a date Mr Mabula did unlawfully and intentionally deprive both Ms G H M and M S their freedom of movement by taking them to a plot and keeping them there without their consent, The State further alleges that Mr Mabula did unlawfully and intentionally assault Ms G.H.M and/or M S and did then and there and with force and violence take from them two pairs of trousers and cellular phone being their property, with aggravating circumstances as described in Section 1 of the CPA being present. The State further alleges that Mr Mabula did unlawfully and intentionally assault M S with intent to cause him grievous bodily harm.

D. Counts 12 and 13

[9] The State alleges that on or about the 27th January 2015 and at or near Comet Village, in the district of Boksburg, Mr Mabula did unlawfully and intentionally commit an act of sexual penetration with Ms C.L.E.C. without her consent. The State further alleges that on such date, Mr Mabula did unlawfully and intentionally assault Ms C.L.E.C and did then and there and with force and violence take from her a cellular phone, a pair of Nike running shoes and a cash amount of R100.00 being her

property, with aggravating circumstances as described in Section 1 of the CPA being present.

E. Counts 14, 16, 16, 17, 18, 19 and 20

[10] The State alleges that on or about the 11 February 2015 and at or near Reiger Park, in the district of Boksburg, Mr Mabula did unlawfully and intentionally commit two acts of sexual penetration with Ms S.R. M. without her consent. Counts 18 and 20). The State further alleges that on such a date and place, Mr Mabula did unlawfully and intentionally commit an act of sexual penetration with Ms Q. M. without her consent, (count 19). The State further alleges that on such date and place, Mr Mabula did unlawfully and intentionally and with force and violence take from both Ms R.S M and/or Ms Q. M. Thirty five Rand (R35.00) cash and two cell phones being their property, with aggravating circumstances as described in Section 1 of the CPA being present. The State further alleges that on such a date and place, Mr Mabula did unlawfully and intentionally deprive both Ms R S and Ms Q.M. of their freedom of movement by taking them to a plot and keeping them there without their consent.

F. Counts 21, 22 and 23

[11] The State alleges that on or about the 25 February 2015 and at or near Alexandra in the district of Alexandra, Mr Mabula did unlawfully and intentionally deprive Ms K K S (child of 2 years at the time) of her freedom of movement by taking her to a shack. The State further alleges that Mr Mabula did unlawfully and

intentionally attempt to kill Ms K K S a female person. The State further alleges that Mr Mabula did unlawfully and intentionally assault Ms M P S with intent to cause her grievous bodily harm.

[12] Accused pleaded not guilty to all charges with the exception of Count 22 wherein he pleaded guilty to the said charge. He exercised his right to remain silent. He did not give any plea explanation. Regarding count 22 he submitted his plea in terms of Section 112 of the Criminal Procedure Act at the end of the State case, which plea was accepted by the State.

FORMAL ADMISSIONS

[13] During the course of the trial formal admissions in terms of Section 220 of the CPA, were made which admissions were received and marked under exhibit "A" which incorporated exhibits "B" to/and "N". Exhibit "A" recorded that Mr Mabula admitted the correctness of the facts and findings contained in all the exhibits marked exhibits "A" to "N" which included 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 "E", "H", "K" and "N".

[14] Exhibit “B” referred to the centralisation of certificate issued by the National Director of Public Prosecution Adv S K Abrahams, directing that all the above mentioned offences against accused be heard in this court;

[15] Exhibit “C” referred to post mortem report, chain statement and declarations of death of deceased referred to in count 1 ;

[16] Exhibit “D” referred to Photo Album -1 which are the pictures/photos relating to count 1(depicting the deceased with stab wounds);

[17] Exhibit “F” referred to photo album -2, Orange Farms Cas 498/07/2012 which are the pictures/ photos relating to count 5 to 11, which depicted the area at Poortjie where the incident in the counts 5 to 11 took place;

[18] Exhibit “G” referred to birth certificate of Ms GHM, counts 5 to 11;

[19] Exhibit “K” referred to photo album -3, which are the pictures/ photos relating to count 13 to 20, which depicted the area at Reiger Park where the incident in the counts 13 to 20 took place”;

[20] Exhibit “M” referred to Assessment report of K K S (Minor Child).

[21] The admissions thus comprised, *inter alia*, the medical examinations of the complainants referred to in the rape charges; 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.

ISSUES IN DISPUTE

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

THE EVIDENCE

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

16 March 2012 (Count 1)

[24] In this count the State evidence is to the effect that on this day at around 11 pm the deceased, Phiwayinkosi Innocent Mthethwa, and the three Khumalo brothers, the State witnesses, being Samukeliso Khumalo, Vincent Melusi Khumalo and Phakamani Moses Khumalo were at Ramaphosa squatter camp Extension 2, inside a tavern, called Mlundi's tavern.

[25] While there the deceased spoke with Samukeliso Khumalo about a girl, thereafter they proceeded outside to talk, while outside, the accused and one Siza, approached them, Siza scratched Samukeliso with a knife on his shoulder, and the accused was busy stabbing the deceased. He saw the accused stabbing the deceased on his chest on the front and somewhere at back of his head.

[26] Samukeliso then run inside the tavern to inform his brothers that deceased was being stabbed. Upon their exist the Khumalo brothers, Vincent and Phakamani saw the accused kicking the deceased on his legs and the deceased fell down and he continued to kick him on his body.

[27] The deceased then stood up from the ground tried going inside the tavern, he fell, he stood up then turned around going to where they were residing, which was next to the tavern. He hit the fence/ gate then fell on the ground and that is where he died.

[28] **Mr Mbhkeseni Nene** testified to the effect that his house is next door to the tavern, he was sited around afire inside his yard, when he saw people fighting, he saw Mashabutla, accused before court, stabbing the deceased. Then the deceased tried going to his home he hit the fence fell down.

[29] He approach where the fight was going on. He met up with accused, asked him does he see what he has done. Accused then run down the passage.

[30] The Khumalo's tried chasing him and they could not find him. They all agreed that the source of light at that tavern was globe which received its energy from a generator. The whole area of Ramaphosa squatter camp does not have any electricity.

[31] During their cross examination they were referred to their statements that they have made at the police, and that the contents of those statements where in conflict to what they were testifying. Among others it has been written that they have heard from someone that it was Mashabutla who had stabbed the deceased it meant that they did not personally witness the stabbing.

[32] They all confirmed that they knew accused by the name of Mashabutla, and they only knew him by sight, they knew he was residing somewhere at Ramaphosa squatter camp, but they did not exactly know where, they also knew he was a friend with one Siza. They denied that there was a game of dice which was been played next or at the tavern. There is no space to can play a game of dice there; secondly a game of dice is not allowed at the tavern. But there is a place, which is far from the tavern where the game of dice is usually played.

[33] **Dr Lydia Zanele Mandlazisa** in short testified that she did a post mortem upon the deceased, and she discovered that the deceased had various injuries, like lacerations, on his body and three serious stabbed wounds,

- (a) 6.6cm Linear penetrating incised wound over the back head at junction head and neck,

- (b) 2,5cm x 1,2cm penetrating incised wound over left upper back, 10cm from posterior midline, 6cm from tip of left shoulder and 147cm from the sole of left foot
- (c) 4,5cm ox 2cm penetrating incised wound left anterior chest, 3cm from anterior midline and 10cm from tip of left shoulder

[34] The cause of death she determined to be Multiple Sharp force injuries, she is the one who completed Exhibit "C" being post mortem report.

[35] Accused testimony in regard this count is to the effect that he was playing a game of dice around the back of the tavern, when they heard a noise and saw people fighting, he confirmed that the place was illuminated by a globe which got its electricity from a generator at the tavern, he came to look as to who were fighting then his girlfriend told him they should leave, they left, on their way they meet up with a certain unknown gentleman to him, who informed him that the Zulus are looking for him, and from the tone of his voice it was clear that the said people where in a fighting mood.

[36] He took the key of that gentleman's house and went and locked himself in his house. He requested his girlfriend to go back to the tavern, where the fight was held, and to go and check what was going on. His wife then called him and informed him that there is a gentleman who has died and it is alleged that he is the one who killed him or stabbed him.

[37] He then went out of that gentleman's house and proceeded to where he was residing. He left with that unknown gentleman's house keys and he also left his "wife" there.

28 April 2012 (Counts 2-4)

[38] In these counts the State evidence is to the effect that on the 27th April 2012 accused was arrested, in connection with the above mentioned charge of murder in count 1, by **Constable Phuthi Ephraim Mojela** and he was detained at Boksburg Police Stations holding cells. On the 28th April 2012 at night accused escaped from the Boksburg Police Stations holding cells.

[39] **Captain Fusi Thomas Miya** testified that on the 28th April 2012, at night, he was on duty as Relief Commander. On that day he received a request from Warrant Officer Mollo and Constable Nailane to the effect that they want to go and see a suspect at the cells. He was charged with a petty crime of theft to the value of R10.99.

[40] After 5 minutes he saw W/O Mollo coming and informed him that suspects have escaped. They found the main doors inside the cells been open and Constable Nailane was locked inside one of the holding cells. He observed that Constable Nailane was terrified and shivering and looking like someone who wanted to cry.

[41] He did a roll call and discovered that accused was among those who had escaped. According to him the distance between the holding cells and the charge

office is about 25 meters. If someone screams from the cells you could be able to can hear him while one is in the charge office. There is a siren down at the holding cells.

[42] **Sergeant Nailane** testified that on this day she received an instructions from Captain Miya to go and verify a suspect address who was charged with an offence of theft of an item which was valued at R10.99. She was supposed to verify his address and thereafter release him on warning. She then requested W/O Mollo to accompany her down to the holding cells. They opened the main door of the cells, entered locked both doors, which were steel door and butler/security doors. They got inside the cells, opened one of the steel doors of the cells, but the butler/ security door was locked. They called Joseph Ramosiwa Sono who came stand at the open door, but butler door was still locked then W/O Mollo opened the door in order to let him out.

[43] Then someone came from nowhere pushed her aside and grabbed W/O Mollo, and they (W/O Mollo and that other person) started fighting for the keys to the cells, then one of the detained suspects came to her grabbed her by her neck strangled (throttled) her and closed her mouth, she was thrown inside one of the holding cells, she could not properly breath she then lost consciousness. After about 5 to 10 minutes she woke up and found the doors to the main cells been unlocked. She was found inside the main cells.

[44] The never went to see any doctor. She had a swollen chick. At the holding cells, the where two sections, one which was holding (housing) suspects with serious crimes, like robbery aggravating and/or murder. The other section was housing suspects who have committed petty crimes and female cells. Joseph Ramasiwa Sono was detained with offenders who have committed serious offences. She did not know why he was detained with suspects who were detained for serious offence. She estimated that the distance from charge office (CSC) to the holding cells was about 60 meters.

[45] **W/O Lebopo Piet Mollo** testified that on that day of the 28th April 2012 at around 21h20, he was on duty as charge office commander, Sgt Nailane came to him requesting his assistance by going to the holding cells, as she wanted a suspect by the name of Joseph Ramasiwa Sono, the purpose was that she wanted to go and verify his address. They entered the main cell area, by first opening the steel door thereafter they opened the butler door.

[46] Inside the holding cells, there is another cell with small cells inside. On that day he was also in charge of the cells. He went inside cell, opened the steel door and called Joseph Sono, as he was standing at the door, he then unlocked the security/butler door, in order to allow him, Sono, to get out.

[47] As he was still waiting for Sono to come out, one of the suspects then came hit him with something on his hand they then started fighting for the cell's keys. One of the suspects then went to Sgt Nailane, grabbed her by the neck, throttled her and

threw her inside one of the small holding cells. The doors to the small cells cannot be opened inside, once the door is closed, not even locked, you will not be able to can open same from inside.

[48] He was then kicked, that suspect who throttled Sgt Nalane, came and joined the one who was fighting with him for the keys in fighting him, he was hit with fist, they twisted his hand behind his back, placed against the wall and one managed get the keys from his hand opened the door, and thereafter came to join the one he was holding, they struggled with him up to the door, one went outside, the one outside kicked him on his leg and they managed to escape. Thereafter he went to call Captain Miya informed him that suspects have over powered them and they have escaped. Upon their return to the cell they found Sgt Nailane inside one of the small cells, she couldn't open the cell while she was inside it.

[49] He did have an interaction with one of the suspected that escaped that is Pitso Kofa, he wanted him to assist by calling his family members to bring him some clothes since he was only wearing bvd (under ware). This was during the time he was working on day shift. He has never meet accused and he also failed to can point him out from the identity parade. The distance from the charge office to the cells it is a distance of about 38.390 meters.

[50] **Sgt Khutso Naphtail Lefophane**, testified that he was the investigation officer on the charge of escaping. He managed to trace Mr Kofa at one of the hospitals, he interviewed Mr Kofa who informed him that he did not escape from

lawful custody, since he had an arrangement with W/O Mollo that he would let him go upon payment of an amount R5000.00, of which he made it sure that he got that payment.

[51] On the Night in question W/O Mollo let him free, he did not escape from custody. He did not get any confirmation or verification that in deed he had paid the said amount to W/O Mollo.

[52] Accused testimony in these counts is that he meet up with W/O Mollo, who said to him that he can be able to assist him, by letting him go home, but he must organise an amount of R5000.00. He spoke to his friends, and they did manage to arrange the said payment that is why after the weekend he was let out and told he is free he can leave.

09th July 2012(Counts 5-11)

[53] In these counts the State evidence is to the effect that on this day around 3 pm, M S and Ms GHM, who was 14 years old at that time, were standing next to ZCC church at around Poortjie in the district of Vereeniging. Then three males approached them, one held M with his waist, while the one who was wearing a black jacket then wrapped one of his hands around her, hugging her closer to him, then showed her a fire arm which was on his waist. The one with M then showed him a knife he was carrying.

[54] They walked in pairs in front it was M second was Ms GHM and the person who was wearing a black jacket at the end, he was walking alone. On the way the person who was with Ms GHM was talking to her nicely among others he asked if she was a virgin or not, she confirmed that yes she is still a virgin, but she testified that she then lied to him by saying that there is ceremony which is about to be held and they will be checking if she is still a virgin or not. She said she was doing this that perhaps he would not rape her. The one who was walking with M had cruel eyes. He even told Ms GHM that she should not look at him.

[55] They walked for quite some distance, passed some trees and came to a ditch or farrow. They then ordered them to undress, of which they did, but M only pulled off his trousers. Thereafter they told M to have sexual intercourse with Ms GHM. M refused to do, notwithstanding that Ms GHM said he must do that.

[56] Upon his refusal, he was hit with firearm on his back of the head. He was tied with cable ties on his hands and legs ordered to lie down facing the other direction.

[57] Then the person who walked with M ordered Ms GHM to put her hand (inside) on her vagina of which she did, then he took of his trousers came and inserted his penis inside her vagina had sexual intercourse with her, during the ordeal he told her to smile and to kiss him, of which Ms GHM complied with. She ask if she would not get pregnant or not, of which she was informed no, then that person when he was about to ejaculate he took out his penis from her vagina and ordered her to watch his penis as he was ejaculating. He ejaculated outside her vagina.

[58] Thereafter that person who walked with her also took off his pants, trousers, he was calling Ms GHM his wife, she also asked what if she should get pregnant, of which he replied that she would never get pregnant. He asked her to kiss him. Then he too came inserted his penis inside her vagina, once he was done, he stood up, and Ms GHM saw that he had blood on his front also on his trousers, as he had not completely taken off his trousers.

[59] Once they were done, they then pulled off M's trousers from his body, the person who walked with Ms GHM took his trousers out and put on M's one. They then took Ms GHM tied her also on both hands and feet, put her on top of M who was then ordered to lie on his stomach, but all along during all the time that Ms GHM was been raped he was lying on his side facing the opposite direction.

[60] Their assailants left them there. They ultimately managed to untie themselves; their assailants had left with their clothes. Prior to tying M, they had taken his T-shirt closed his mouth with it and wrapped, tied around back of his head. Then he give it to Ms GHM to wear it as she was completely naked. They then left that farrow at that time it was already dark. They ultimately found some help around there and opened a case against their assailants.

[61] They were able to can identify accused as one of their assailant, he was the one who was carrying a fire arm and the one who was walking with Ms GHM and talking to her nicely.

[62] On the 21 January 2016 Ms GHM attended an identity parade and it is where he identified accused from the line-up. Ms GHM also went to the hospital wherein she was examined and some samples taken from her vagina. She was injured inside her vagina.

[63] **Dr Kalain** testified to the effect that on the 10 July 2012 at around 00:15 he examined Ms GHM and took some samples from her private part, at the vulva, vestibula. Recorded some injuries on Exhibit "E" being the J88 relating to Ms GHM. Her account to Dr Kalain accords substantially with the version given in court. It appears from the J88 that prior to this date, Ms GHM had not ever had consensual intercourse and was in fact a virgin. Dr Kalain recorded the following injuries, urethral office swollen, labia minora: small tear on the upper outer surface on the left, posterior fouchette tears: deep lean extending to the perineum and fossa navicularis at 6 o'clock the Hymen severely swollen multiple deep tears diffidently bruised. Perinum tear superiorly at 12 o'clock from the posterior fouchette, smaller superficial tear just below. He recorded the following "*multiple, severe, genital injuries compatible with forceful penetration*".

[64] Forensic specimens were taken from Ms GHM and sealed with seal number 10D1AC7780, which was handed over to Warrant Officer Albertus Pelser.

[65] **W/O Albertus Pelser** confirmed that he did receive the crime kit which was already sealed, he kept same in the safe up until he give it over to the investigating

officer. He also accompanied Ms GHM and a photographer back at the scene of the crime. They took pictures as compiled on the exhibit “F” photo album -2.

[66] The investigating officer, **Edwin Hlazana**, confirmed that he received the sealed crime kit with seal number 10D1AC7780 from W/O Pelser, he kept it in the locked steel cabinet up until the time he delivered it at the Forensic Science Laboratory (FSL) at Pretoria on the 13 July 2012, still sealed.

[67] Accused version in this count is to the effect that he does not know anything about the said incident; he denies that he was in the company of anyone who robbed and raped the complaints. On the alleged date he was in custody at Modderbee prison as an awaiting prisoner on a charge of business robbery.

[68] The State called **Sgt Nkabinde** from Modderbee prison to come and testify with regard to the detention of accused during this period. According to Modderbee record the only time that accused was detained at Modderbee prison was on the 13 December 2010 up until the 21 July 2011, when he left to court and he never returned back.

[69] Accused then indicated to Mr Nkabinde that during that time he was detained under the name of Thabo Moloi. All the names Thabo Moloi which were found in the records of Modderbee prison did not reflect accused.

27 January 2015 (Counts 12 and 13)

[70] In these counts the State evidence is to the effect that on this day at around 08h00 Ms C.L.E.C got off from the Oos Rand train station on her way to work. As she was walking on a passage he felt someone taping her behind and telling her that she should not make any noise. He saw that person holding an old firearm. She then tried turning around grapping that person with his clothes around his neck. Then that person hit her on the head, she started bleeding.

[71] That person then started caressing her body, with one hand he unbuckled her belt trouser, pulled her trouser and under wear down up to her knees. He also undress put his trouser up to his knees. She bended her knees and that person then inserted his penis inside her vagina from behind. At one stage she ended up going down on her stomach. Once that person was down raping her, he searched his bag took out the R100.00 she had, she had a lunch box which was in a plastic which was also was inside her bag. That person then out that plastic inserted her running shoes, Nike, inside that plastic bag. He also took her cell phone. He ordered her not to look at him, but during the time she attempted to grab him by his collar and during the time he was searching his bag, she was looking at him and he managed to see that it was the accused before court.

[72] From there she went to the police station and she was taken to hospital, Bertha Gxowa Hospital, wherein she was seen by a nurse who did some examination on her and also took some samples from her private part.

[73] **Ms Mosima Rainy Radapa** testified that she is professional nurse working at Bertha Gxowa Hospital on this day she was on duty and she examined a patient by the name of Ms C.L.EC, she is the one who completed Exhibit “H” being J88, she discovered that the patient had a laceration on the right side neck which was about 1cm not deep but superficial, which was in keeping with been physically assaulted with hard sharp object by force.

[74] Upon gynaecological examination of Ms C.L.E.C she did not observe any injuries on her, but she noted tears on the posterior fourchette. Forensic specimens were taken from Ms C. L E.C and was sealed with seal number 13D1AE 0477, which was handed over to Warrant Officer M J Bopape.

[75] **Captain Bopape** came and testified that he did receive a sealed crime kit with seal number 13D1AE0477, kept same in his steel cabinet up until it was delivered at Forensic Science Laboratories at Pretoria still sealed on the 04 February 2015.

11 February 2015 (Count 14-20)

[76] On the above mentioned date at around 2pm Ms Q.M and Ms S.R.M alighted from a train at Oos Rand train station. They were on their way to school. As they were walking they observed a gentleman walking in front of them, but later they did not see him, but upon reaching a certain corner they found him there he then pointed them with firearm. He took their bags search same he took from Ms Q.M two

cell phones and amount of R10.00 and from Ms S.R.M he took an amount of R25.00. Thereafter he instructed them to walk into the bush and they reach a trench. He then took off their shoe laces tied each of them on his hands and legs. Thereafter he ordered Ms Q.M to lie down facing down that is with her stomach. He then loosened up Ms S.R.M trousers pulled it down together with her panty up to her knees, then ordered her to lie on top of Ms Q.M.

[77] Before he raped Ms S.R.M he ask them if they are aware of a certain girl who was from their school who got shot, he said he had to shot her as she was not cooperating with his instructions.

[78] He then took out his penis inserted it inside the vagina of on Ms S.R.M, during this ordeal Ms S.R.M was silently crying not screaming. Once he was down raping her, he then assisted Ms S.R.M to stand up and ordered her to lie down like Ms Q.M was laying. Then tried inserting his penis inside Ms Q.M vagina, but he was unable to penetrate her, since he did not have an erection, thereafter he stood up, inserted his finger inside Ms Q.M's vagina, while he was doing that he was telling them why he is doing that, he was raised by his step-father and he was not properly raised. He was in custody and when he came out of prison he found that his girlfriend was impregnated by another boy. That is why he hates people and that is why he is doing this to them.

[79] He then realised that he had an erection he then penetrated Ms Q.M once he was done he stood up. Then covered them with their school bags and he left them

there. After 15 minutes they untied themselves. Continued to their school. At the gate they informed the security personnel what had just happened to them. They were taken to the school principal's office. At one stage Ms S.R.M fainted. She gained conscious, police were called and thereafter they were taken to hospital, at Bertha Gxowa Hospital. They were examined by Dr Mhlangeni. The person who had done all this was accused before court, they were able to recognise him because at the time he was searching their bags he was standing in front of them, at the trench they manage to see him when he was tying them with shoe laces and also at the time he was changing their position when he was raping them.

[80] **Dr Mhlangeni** testified that she completed the J88 exhibits "J and K" Exhibit in both exhibits she noted on general examination of both Ms Q.M and Ms S.R.M that they had linear bruises, (fresh) on both wrist left, right maroon in colour encircling the wrist. On the gynaecological examination of both ladies she noted in respect of Ms S.R.M (Exhibit "J") that Labia minora: fresh tear on Renner aspect at 8 o'clock position, Fossa navicularis: fresh tears at 6 o'clock position. Vagina capitious whitish discharge present (semen). She collected samples from her vulva, perineum and vagina sealed same in an evidence bag number 13D1AE0647. She concluded that injuries are consistent with recent forceful penetration of the vagina.

[81] In respect of Ms Q.M, exhibit "K" she noted vagina: blood in vagina, tears in the inner vaginal wall at 3 and 9 o'clock, and at perineum: tear (fresh) at 9 o'clock. She collected samples and sealed same inside the evidence bag number 10D1AE 4167.

[82] In both instances she concluded that Injuries are consistent with recent vaginal forced penetration. She handed both sealed crime kits to W/O L J Monyele.

[83] **Warrant Monyele** testified that he received both sealed crime kits number 13D1AE0647 and 10D1AE 4167 kept them in the steel cabinet in his office and registered same in the SAP 13. Thereafter on the 16 February 2015 delivered both sealed crime kits to the Forensic Science Laboratories at Pretoria.

[84] Regarding registering the exhibit in the SAP 13 books it is not necessary as long as the exhibit is kept in a secure safe place.

[85] Accused evidence in this counts is a bare denials, he has never forcefully taken the two ladies to any bushes and or raped them he does not have any knowledge of such acts.

23 February 2015 (Count 21- 23)

[86] In Count 21 the State led the evidence of a single witness, Ms Simangelo Mathebula, who testified to the effect that she knows the mother of the child. She was residing with them, mother and child, in one house. She knew accused as the boyfriend of the child's mother. But he, accused was not the father of the child. The father of the child was M K.

[87] On the day in question accused came looking for the child's mother at their place, he did not find her, he then said he is going to kill their child. He came later with the child who was wet and he tried giving her the child, she refused taking her, ask him to put the child on a sofa, of which he did, she then went upstairs to go and collect a blanket to wrap the child with it.

[88] Accused then chased both child's mother and father with stones. When he could not find them he then came took the child from the sofa and told her, she must tell them that he is going to kill the child. He grabbed the child with her collar, raised his arm in a stepping position but she reprimanded him, he then grabbed the child and run away with her. According to her the mother of the child never came back during that night.

[89] Regarding count 22 accused pleaded guilty to the said count and presented a statement in terms of section 112 of the Criminal Procedure Act. He admitted that he attempted killing his child by cutting her on her neck with a knife and left her bleeding and injured and admitted the injuries suffered by the child as reflected on J88 completed by Dr Ochse.

[90] Regarding Count 23 the state did not call any witness, the complainant in this count has since passed on.

The Arresting Officer

[91] **Captain Dason Magoro** testified that he is stationed at Sandton tracing unit, among others his duties is to trace suspect and apprehend them. On the 15 March 2015 he received information regarding a suspected in a matter of attempted murder from Alexandra, being Tebogo William Mabula, he traced him at Comet location. Boksburg, they knocked and saw accused trying to run away and they apprehended him.

Identification Parade

[92] **W/O Radebe** testified that he was asked by the investigating officer to assist him in conducting an identity parade wherein the suspect was Tebogo William Mabula on the charges of, Murder at Ext 2 Ramaphosa on the 2012/03/217 Cas 167/03/2012 Reiger Park, escaping from lawful custody at Boksburg SAP, at +21h20 on the 2012/04/28 Cas 339/04/2012 Boksburg, and Rape on 2012/07/09 at about 15h00 at Plot 93 Poortjie Rietfontein, Cas 498/07/2012 Orange farms.

[93] The identification parade was held at Boksburg Prison on the 18 January 2016. The investigating officer had informed the suspect about the date, time and place where the identity parade will be held. The investigating officer had arranged everything including the officer who was expected to take pictures. The identity parade was expected to start at 08h00.

[94] According to him upon his arrival at the place where the identity parade was to be held people were already lined up. Suspect was expected to choose his own people, who were more or less of his height size and complexion. He inquired from the suspect if he was satisfied with everything of which he responded by saying he was satisfied. At 09h00 the photographer had not yet arrived he then decided to continue with identity parade in the absences of the photographer.

[95] Mr Mabula was pointed out by Mr Samkeliso Khumalo on the charge of murder and also by Ms GHM on the charge of rape. W/O Mollo failed to point out any person, as a result he was never pointed out on the charge of escaping. The identity parade was held in accordance the rules. During his cross examination it was put to him that the people on the line up where not chosen by the accused, and also they were not of about same height or even complexion, they were more lighter than accused, accused was the only one who was much darker in complexion. W/O Radebe insisted that it was the accused that chose his own people and after speaking to him he said he was satisfied that is why he then proceeded with the identification parade.

[96] **Captain Chauke** testified that he is stationed at FCS unit at Johannesburg North. He had received training on collection of non-intimate DNA samples, like Buccal swap. He received instruction to collect buccal swap from a suspect in case of attempted murder, Alexandra North Cas: 693/02/2015.

[97] On the 14 March 2015 he went to Sandton police station meet with Tebogo William Mabula, the accused before court. He explained the purpose of his visit and that he had come to collect buccal samples. After collecting DNA buccal samples he sealed same in the presences of accused, under crime kit with seal number 13DBAB3486TF and put same under evidence bag number PA 50002253314.

[98] He then delivered the said crime kit at Forensic Science Laboratories at Pretoria on the 17 March 2015. He then received a preliminary report to the effect that the results of the DNA on the buccal swap link the owner of that buccal swap with other offence of which they did not had the suspects. He was requested to go obtain the confirmatory samples from the same person.

[99] He then proceeded to the accused at Alexandra court, wherein he again explained the whole purpose of coming to obtain again buccal DNA swaps from him. After explaining same he then took the buccal swap from accused sealed it in front of him under seal number 10DBAB 3071TF and he put same in evidence bag number PA 40002613399K thereafter he requested the accused to sign that everything was explained to him. During cross examination it was put to him that on his second visit to the accused he never explained to him about the reason why he had to obtain the second samples. He insisted that he did explain to him that is why accused had to sign the form. The said confirmatory samples where then delivered to Forensic Science laboratory at Pretoria on the 12 June 2015.

DNA EVIDENCE

[100] **Veronica Lethabo 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 has 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.

[101] 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.

[102] 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.

[103] 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.

[104] 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.

[105] 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.

[106] 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.

[107] 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.

[108] 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.

[109] 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.

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

110.1. The DNA result obtained from the following exhibits matched the DNA result from Mr Mabula:

110.1.1. The vaginal vault swab taken from Ms GHM. (Counts 8 and 9); (10D1AC7780)

110.1.2. The cervical swab taken from Ms C.L.EC (Count 13); (13D1AE0477)

110.1.3. The vaginal vault swab taken from Ms S.R.M (Count 18); (13D1AE0647).

110.1.4. The vagina swab taken from Ms Q.M. (Count 19); (10D1AE4167)

110.2. The most conservative occurrence for the DNA result obtained in exhibits “E”, “H” “J” and “K” above, is 1 in 61 billion people.

[111] Ms Thomas further testified 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.

[112] 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.

[113] Accused version in regard to his DNA been found in the private parts of the four ladies is to the effect that he does not know anything about that. That surprises him that his DNA could be found inside those ladies private parts since he was never in their company or even had sexual intercourse with them.

[114] That was the State case

Defence case

Tebogo William Mabula

[115] Since I have already referred to Mr Mabula's testimony or version during the summary of the State evidence, therefor I shall not repeat his evidence save to state that, his version in all charges with the exception of his plea explanation in terms of section 112 in respect of count 22, is a bare denial.

EVALUATION OF THE EVIDENCE

[116] 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.”

[117] 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:

117.1. 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 Mabula.

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

117.3. Ms Thomas correctly interpreted the results and such results were correctly recorded in terms of the provisions of section 212 of the CPA affidavit received as evidence and marked as exhibits “FF”.

The probability of the match or inclusion

[118] 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. ”

[119] 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.

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

The other evidence

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

- 121.1. In Count 11-20 the ladies were alighting from the train, at Oos Rand train station, which is in Boksburg;
- 121.2. In all cases all the victims were pointed with fire arms;
- 121.3. In case of Ms GHM she and M were confronted by more than one person and Ms GHM was raped by two men;
- 121.4. In all the incidents cell phones, money and cloths were demanded;
- 121.5. Mr Mabula resided at Comet in the district of Boksburg.
- 121.6. Mr Mabula was linked to all this crimes by DNA with the exception of count 1 murder.
- 121.7. In the count 1 it is clear that the witnesses knew, if not by sight, Mr Mabula, they even knew his nickname of Mashabutla.

121.8. Mr Mabula was pointed out from the identity parade by both Samkeliso Khumalo and Ms GHM notwithstanding the fact that both incidents took place during 2012 and the identity parade was only held on the 18 January 2016.

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

122.1. With regard to count 1, murder, he testified that as he was playing a game of dice he came from behind the Mlundi's tavern, to see who were fighting, but he meets up with his girlfriend, the girlfriend then said they must leave, of which they did. On the way home, they meet one gentlemen who is unknown to him, he informs him that the Zulus were looking for him, the question is how can that gentleman know that, since it looks like that gentleman was still on his way to where the fight was still taking place.

122.2. Accused was coming from that place and he did not see anyone that was looking for him. However that gentleman then give accused his house key to go and hide there. Why would accused hide if he did not do anything wrong, why send his girlfriend to go and check what was going on. After been informed that yes indeed there is a boy who was stabbed and has passed on and it is said he, accused, is the one who stabbed him and also the

Zulus are looking for him, he did not wait for his girlfriend he decide to run away to his place of residence. If really he did not do anything why not go back and personally confront those people who are wrongly accusing him or alternatively go and hand himself to the police.

122.3. In any way he was ultimately arrested for the same offence and he was detained at Boksburg police cells. According to him he was arrested around Friday and he meet up with W/O Mollo and made arrangement that can help him, in going home, but he must pay an amount of R5000.00. According to his evidence he used W/O Mollo's cell phone to arrange with his friends to raise the said amount. If he was innocent, with regard to count 1, as he was saying why spend so much money to pay a police officer to "help" to go home. Why not wait up until he appears before court and let the State proof that he really has killed the deceased.

122.4. During cross examinations of witnesses, more so of W/O Mollo it was put to him that accused was part of the people who have made an arrangement with him to release them upon payment of an amount of R5000.00 that they had to contribute towards the said amount of R5000.00, however as stated above he testified that W/O Molo requested the said money from him,.

122.5. Regarding counts 5 to 11 he denied ever going to Poortjie, and he does not know and has never lived at around Vereeniging, however on exhibit “EE1” Mr Nkabinde testified that according to Modderbee’s record accused has indicated that he was living at Vereeniging.

122.6. Secondly he indicated that during this time of the 09 July 2012 he was in custody, but when the State came with proof that he was not in custody during that time, he altered his version and said that no in actual fact he had used the name of Thabo Moloi, Still during his evidence in chief and also during cross examination he testified that since the said date was not important in his life he cannot recall where he was on that day.

122.7. Lastly he failed to can explain how his DNA was found inside the private parts of all four ladies.

[127] 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

[128] 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.”

[129] In respect of count 1 the State case rests in the evidence of the four witnesses, the court is mindful of the fact that this incident took place in March 2012 and it is only now that witnesses have come to testify. They are bound to make mistakes as to the sequence of the events.

[130] The Defence strongly criticised the evidence of the so called “eye witnesses” being Mr Samukeliso Khumalo and Mbhekiseni Alson Nene, alleges that the witnesses testimony is totally different from their own written statements and in total the witnesses did not see who actually stabbed the deceased. At the time Samukeliso Khumalo’s made his statement he was 16 years old and it is clear from the statement that he was not duly assisted by any adult, though he indicated that at the time he made the said statement his brothers were around, but he was speaking alone and directly with the police officer.

[131] In his statement he stated that while they were outside, that is himself and the deceased, Sisa came with his friend whom was unknown to him. That friend of Sisa scratched him with a knife on his shoulder, he then run away a few distance and upon his return he found Phiwayinkosi was stabbed and laying on the ground.

On his viva voce evidence he insisted that it was Sisa who scratched him and he saw Mashabutla stabbing the deceased that is why he run inside the tavern to call his brothers.

[132] Accused may be provisionally allowed to cross-examined on a document that has not been authenticated In order to discredit state witness on the basis of an affidavit it is necessary to show that any deviation from the statement in evidence is material before any negative inference can be draw.

[133] On other hand Mr Nene wrote on his statement that he saw two males approaching Phiwayinkosi , one held his hands at the back then Mashabutla stabbed

him on the chest, Phiwayinkosi run away and Mashabutla followed him stabbed him at the back, the Sfiso tried apprehending Mashabutla he stabbed him and he run away. On his viva voce evidence he insisted that he did not say another male person was holding the deceased hands at his back while Mashabutla was stabbing him.

[134] The other two witnesses, the confirmed upon coming out of the tavern they saw Mashabutla kicking the deceased.

[135] Samukeliso Khumalo made his statement while he was still a minor who was not duly assisted, notwithstanding the fact that his brothers were around but they were not involved at the time he made the said statement, he further explained that during the time he made the statement he was under the influence of alcohol, he was shocked and scarred, he just wanted to finish writing the statement and go and sleep.

The statement of Samukeliso Khumalo was provisionally admitted in court in order to allow the defence to cross examined on it.

[136] See **Carpede v Choene 1986 (3) SA 445 (O) 455A**. The accused/defence may therefore be provisionally allowed to cross-examine a state witness on the contents of a document which has not been authenticated, since the accused will only have the opportunity to authenticate the document after the conclusion of the state's case – **Swanepoel 1980 (1) SA 144 (NC)** However the said statement was never authenticated.

[137] Mr Nene explained in court that the some parts on the statement are wrong, and he might have forgotten somewhat he has written there, but one thing he is sure about is that Mashabutla is the person who stabbed the deceased.

[138] **S v Bruiners en Ander 1998(2) SACR 432 (SE)** “The purpose of an affidavit was to obtain the details of an offence, so that it could be decided whether a prosecution should be instituted against the accused. It was not the purpose of such an affidavit to anticipate the witness’s evidence in court, and it was absurd to expect of a witness to furnish precisely the same account in his statement as he would in his evidence in open court”

[139] **Mafaladiso v S 2003 (1) SACR 583 (SCA) (593j – 594a-g)** “Lastly, the witness’s statement to the police must be weighed up against the witness’s viva voce evidence”

[140] As a result when looking at the totality of the evidence of all four witnesses they did not fabricate their evidence, if they had planned their evidence there are strong possibilities that they could have conspired to testify, without any contradictions what happened and taking into account what was stated above in the above cases and taking the length of time since they, witnesses, made their statements and time of coming to testify, it cannot in my view be said that they were deliberately dishonest or contradicting themselves.

[141] Taking into account the inconsistencies and improbabilities of accused, as stated above more particularly in this count, I have come to the conclusion that it is accused who has stabbed the deceased. However it is my view that the said stabbing was not planned as a result the state has managed to prove beyond a reasonable doubt that accused stabbed the deceased with a knife, and the said stabbing caused the death of the deceased as read with the provisions of section 51(2) of the Criminal Law Amendment Act.

Count 2 to 4

[142] In these counts it is not in dispute that accused was properly arrested and detained at Boksburg Police stations holding cells and on the next day, after the escape, accused was not inside the police holding cells.

[143] The question which the court has to answer is did accused escape from the Boksburg holding cells and during the said escape did he assault the two complainants, police officers or not.

[144] It is not the duty of the accused to prove his innocence, he has to give a reasonable possible true statement. According to his version he had made an agreement with W/O Mollo to release him upon payment of an amount of R5000.00

[145] The evidence that is before court is to the effect that accused was detained with another person in his holding cell, Mr Kofa, who together with accused escaped

or walked away from the cells. Mr Kofa was arrested and he informed the then investigation officer on the case of escaping from lawful custody that “he had made an arrangement with W/O Mollo to let him escape (go home)”

[146] Nowhere in his statement did he mention that it was a collective arrangement which included accused. As mentioned above accused on his own evidence stated that it was “it was an arrangement between himself and W/O Mollo”.

[147] W/O Mollo failed to point out accused from a line up at the identification parade, which shows that he never meet the accused, accused was detained during the time he was not on duty, the night of the 28th April 2012, he also confirmed that he meet Mr Kofa some days before the alleged escape.

[148] Further there is evidence to the effect that Sgt Nailane was the investigating officer on a charge of petty crime, against Mr Sono. However she testified that she was instructed by Captain Miya to go and verify Mr Sono’s address. She and W/O Mollo allegedly went down to the cells at around 09h00 at night to go and confirm Mr Sono’s address.

[149] According to her testimony, suspects are detained in accordance with the type of offences they have committed. Suspects in serious offences are detained separately from suspects who have committed petty crimes. However W/O Mollo testified that since he was in charge of the cells he knew how he had detained the suspects.

[150] It makes more sense that suspects are detained in accordance with the type of offences they have committed. Therefore it did not make sense that a suspect in a petty crime should be detained with suspects who allegedly committed serious offences.

[151] During the allege escape, it is not clear how the two suspects over powered the two officers, Sgt Nailane testified that she was standing back, after W/O Mollo had opened a security door to let Mr Sono out, when he saw a person passing W/O Molo at the gate and grappling him and they fought over the keys to the cells. It is not clear whether W/O Mollo after unlocking the security door and while still holding the door the keys were in his hands or in the key hole.

[152] He was hit on the hand then the said person started wrestling with him, and the other one rushed to Sgt Nailane grabbed her around her neck, how did he manage to see that while he was wrestling with the other person, on the same breath he also manage to see Sgt Nailane as she is thrown inside the holding cell and the door is closed behind her.

[153] Sgt Nailane upon seeing that W/O Mollo is being attacked why not scream or rush to press the siren which was inside the holding cells. At one stage she was losing breath and lost consciousness for a period of about 5 to 10 minutes. When she regained consciousness, she let herself out of the holding cell. W/O Mollo testified

that she was found inside the holding cell, because he testified that once the door to the holding cell is closed the person inside that cell will not be able to can open it.

[154] After being so assaulted none of the officers decided to go and consult a doctor, one would have expected that at least Sgt Nailane to have gone for some check-up, more so her chick was swollen and at one stage she had lost some consciousness for such a long period.

[155] I belief the said police officers were not assaulted during the alleged escape.

[156] Regarding the count 4, if one looks at the totality of the evidence one can see that the story of Mr Kofa is reasonably possibly true, of having made an arrangement with W/O Mollo to let him go upon payment of an amount R5000.00. Accused was never part of the said deal. However I belief that accused took the advantage of the said arrangement, and unlawfully walked out of the holding cells of Boksburg Police Station. As a result I have come to the conclusion that with regard to count 2 and 3 the state failed to proof the case beyond a reasonable doubt.

[157] However regarding count 4 based on the stated improbabilities of accused version regarding his arrest and escape the State managed to proof the charge against accused beyond a reasonable doubt.

Regarding Counts 5-20

[158] **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”.

[159] **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”.

[160] 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.**

[161] Mr Mabula DNA was found in the most intimate parts of 4 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 4 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 Mabula's inability to provide an explanation for this. **See *Mudau v The State*, [2012] ZASCA 56 at para [11].**

[162] In order for Mr Mabula to commit some of the offences he had to force his victims to walk to a certain place, he deprived them of their liberty.

[163] 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 Mabula for his DNA being present in 4 of the victims, the statistical probabilities, that in all these incidents, with the exception of Ms C L E C wherein the incident happened just where she was accosted, he forced all his victims to walk to secluded places before he committed those offences, he took their cell phones, money and cloths, in all the incidents firearms were used and also in count 7 complainant M, was assaulted with a fire arm on the head.

[164] The State did correctly concede that count 20 should read Ms Q.M and not Ms S.R.M and further that the said offence was a continuous offence of count 19, and such accused should be found guilty of that count. I find that the state has proved beyond a reasonable doubt that Mr Mabula was the perpetrator in all these counts 5-19.

[165] I therefore find Mr Mabula guilty of all the kidnapping, rapes, the robbery with aggravating circumstances and assault with intent to cause grievous bodily harm charges in counts 5-19

[166] In so far Regarding Counts 21-23, more particularly in count 21 the State called the evidence of a single witness, the court has to approach the said evidence with caution. During the testimony of Ms Simangele Mathebula she testified among others that accused came with the child put him down on the sofa, the ne later came took the child again wanted to stabbed her, and she reprimanded him.

[167] She did not know where did accused get the child from, was the child originally under his care and since he did not find her mother then he became angry and said he is going to kill their child. That is the child of the late Ms M S and M K.

Since the charge is that of kidnapping of a child, the State alleges that the minute accused left the child in the sofa he was no longer in control and care of her and Ms Mathebula now the child was in her care. From the evidence Ms Mathebula never took physical control of the child, she only provided a blanket to cover a wet child.

Therefore one cannot conclusively say she was in control and care of the child.

S v Artman and Another 1968 (3) SA 339(SCA) Holmes JA Single witness – required that her testimony should be clear and satisfactory in all material aspects.

On the other hand accused stated in his plea explanation, on count 22 which is linked to count 21, that the child his, the State accepted that plea notwithstanding its reservation with regard to that fact.

[168] The State submitted that the court should not accept that accused attempted kill his own child.

[169] I belief that once the State had accepted that explanation it is bound by its contents.

[170] Even if the court should accept that request that accused was not the father of the child, I belief here we are talking of being the biological father, since Ms Mathebula knew that accused and the mother of the child where in a relationship one can to the conclusion that he was the step-father of the child.

[171] Further I am not satisfied with the evidence of Ms Mathebula, as indicated above, her evidence had to be dragged out of her and if one applies the above case of **S v Artman and Another** I come to the conclusion that her evidence was not clear and satisfactory in all material fact, as such I belief that the State has failed to proof its case beyond the reasonable doubt when it comes to count 21.

[172] Coming to count 22 accused has pleaded guilty to the said count and give an explanation in terms of the provisions of Section 112 of CPA and the State accepted same and also the court is satisfied that all the elements of the crime has been admitted and as such I accused is found guilty of that count.

[173] Regarding count 23 the compliant has since passed on and the State did not call any witness in this matter as such accused is found not guilty of this count

174] **Ferreira and others v S [2004] 4 All SA 373 (SCA) Marais JA 387i-j:** When assessing the credibility of witnesses, the subjective state of mind of an accused person, the honesty of a professed belief, or the probability or improbability of alleged conduct, courts have always had to take into account such matters as age, gender, stage of development, level of education, state of health, life experience, temperament and personality of the person concerned. The list is not exhaustive.

[175] I therefore find that Mr Mabula's testimony insofar as it conflicts with that presented on behalf of the state, is rejected as false beyond a reasonable doubt.

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

153.1. Mr Mabula is found guilty on counts, 1, 4, 5, 6, 7, 8 ,9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 22 (that is Count 1, 2-19 and 22) as charged.

153.2. Mr Mabula is acquitted on counts 2, 3, 20, 21 and 23.

C K Matshitse
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

Heard: 24 April 2017 to 25 May 2017

Judgment delivered: 29 March 2017

Appearances:

The State: Adv Ndou

For the Accused: Adv Qoqo