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REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: SS26/2023
NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
REVISED
15.09.23

In the matter between:

THE STATE

and

NCUBE MICHAEL

ACCUSED

JUDGMENT

DOSIO J:

Introduction

[1] The accused is arraigned on the following counts of (a) Contravention of section 4(1) read with sections 1, 2, 3, 11, 13(a), 14, 29, 30 and 48 of the Prevention and Combatting of Trafficking in Persons Act 7 of 2013 and read with sections 94, 256, 257, 261A(1) and (2) and

270 of Act 51 of 1977 and read with the provisions of section 51(1) of schedule 2 of the Criminal Law Amendment Act 105 of 1997 as amended (counts 1, 8, 15, 18, 21 and 24);

(b) Rape as contemplated in section 3 read with sections 1, 55, 58, 59 and 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 read with sections 92, 94, 256, 257, 261 and 281 of the Criminal Procedure Act 51 of 1977 and further read with section 51 (1) of the Criminal Law Amendment Act 105 of 1997 (counts 5, 6, 9, 11, 19 and 22);

(c) Sexual Assault as contemplated in section 5(1) read with sections 1, 55, 58, 59 and 60 and 94 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 read with sections 92, 94, 256, 257, 261 and 281 of the Criminal Procedure Act 51 of 1977 (counts 2, 3, 7, 16, 25 and 27);

(d) Assault with the intent to cause Grievous Bodily Harm (count 12)

(e) Assault (counts 10, 23 and 26);

(f) Kidnapping (count 13);

(g) Contravention of the provision of section 68(1) read with the provisions of sections 1, 5(2) and 29 of the South African Police Services Act No 68 of 1995. Impersonating a member of the South African Police service (count 4, 14, 17 and 20).

[2] Prior to the accused pleading, the court apprised the accused of the provisions of the minimum prescribed sentence of life imprisonment in respect to counts 1, 5, 6, 8, 9, 11, 15, 18, 19, 21, 22 and 24.

[3] The accused pleaded not guilty to all 27 counts and did not give a plea explanation in terms of Section 115 of the Criminal Procedure Act.

[4] Admissions in terms of Section 220 of the Criminal Procedure Act were made and confirmed by the accused. The admissions are as follows that:

(a) O.1 S S is a male with date of birth 17 November 2002;

(b) Professional Nurse, Refiloe J C, conducted a Medico Legal Examination on O.1 S on 25 September 2018;

(c) Professional Nurse Refiloe J C recorded her findings on a J88 marked as Exhibit "B";

(d) The facts and findings on Exhibit "B" are correct;

(e) T.1 M is a male with date of birth 10 June 2002;

(f) Dr M Hassan conducted a Medico Legal Examination on T.1 M on 22 April 2018;

(g) Dr Hassan recorded his/ her findings on a J88 marked as Exhibit "C";

- (h) The facts and findings on Exhibit “C” are correct;
- (i) B.1 B is a male with date of birth 22 October 2005 as indicated on his birth certificate which is attached as Exhibit “D”;
- (j) S.1 N is a male with date of birth 7 July 2005 as indicated on his birth certificate which is attached as Exhibit “E”;
- (k) Professional Nurse, Nozipho Ngubane, conducted a Medico Legal examination on S.1 N on 8 February 2022 and recorded her findings on a J88 marked as Exhibit “F”;
- (l) The facts and findings of Exhibit "F" are correct;
- (m) O.2 C is a male with date of birth 4 September 2007;
- (n) Professional Nurse, Refiloe J C, conducted a Medico Legal examination on O.2 C on 6 March 2022;
- (o) Professional Nurse Refiloe J C recorded her findings on a J88 marked as Exhibit “G”;
- (p) T.2 T M is a male with date of birth 7 January 2007 as indicated on marked Exhibit “H”;
- (q) K.1 D M is a male with date of birth 26 May 2011 as indicated on exhibit “J”;
- (r) Professional Nurse, Refiloe J C, conducted a Medico Legal examination on K.1 M on 6 March 2022;
- (s) Professional Nurse Refiloe J C recorded her findings on a J88 marked as Exhibit “K”;

[5] The state called the following witnesses;

O.1 S; T.1 M, M.1 M, T.3 M, B.1 B, N.1 P, S.1 N, N.2 M, O.2 C, T.2 M, R.1 C, K.1 M, J.1 M.2 and S.2 N. The State closed its case. The accused came to testify and the defence called police officer Lenyai in respect to the statement of B.1 B and police officer Mpiko in respect to the statement of S.2 N.

[6] This court will deal with the State witnesses in a chronological order according to the counts upon which the accused has been charged and not necessarily in the order they testified.

Counts 1-7

[7] These counts include on (count 1) trafficking in persons, namely O.1, from 2014-2018, (count 2) sexual assault in 2014 where the accused forced O.1 to masturbate the accused, (count 3) sexual assault in 2014 whereby the accused placed his penis between the thighs of O.1 and masturbation, (count 4) that during 2014-2018 the accused pretended to be a member of the South African Police Service, (count 5) rape in that in 2014 the accused raped O.1 by placing his penis into the anus of O.1, (count 6) that in 2015 the accused raped O.1 by placing his penis into the anus of O.1 and (count 7) sexual assault in 2016 where the accused forced O.1 to masturbate the accused.

[8] O.1 S testified that he started knowing the accused in 2014 when he was in grade 6 and 12 years old. The accused would play games with him and J.1 ('J.1') who is the accused's son and he became friends with J.1. As a result, he started sleeping over at the accused's house. J.1 would go to sleep but the accused would remain with O.1 showing him pornographic videos. This witness divulged his dire financial situation at home to the accused as his mom was unemployed and she had 4 kids and received a government grant which was insufficient for all their needs. In comparison, at the accused's house there was everything he needed. The accused started brushing his thighs, bum and genitalia and then would offer O.1 money.

[9] As regards count 2, O.1 stated this happened one day when the accused was taking him home. The accused stopped the car in the bushes, told O.1 he loved him and then pulled down his trousers, took the hand of O.1 and made him touch the accused's penis and masturbate him, causing the accused to ejaculate. The accused gave O.1 R20. O.1 did not tell anyone of this ordeal.

[10] As regards count 3, whilst O.1 was visiting the house of the accused and once J.1 was asleep, the accused would invite O.1 to his bed and make O.1 take off his own trousers and then the accused would insert his penis between the thighs of O.1 and make up and down movements.

[11] As regards count 4, O.1 was informed by J.1 that his father was a police officer in Krugersdorp. O.1 himself saw that the accused had clothes which had the police emblem on them and papers in the police vehicle with the police emblem. In fact, O.1 believed the accused was a police right up to when he was told that the accused was not a police officer.

[12] As regards the two rape counts (Counts 5 and 6), O.1 stated that the accused did penetrate his anus with his penis and when O.1 cried due to the pain, the accused pulled his

penis out and then tried to insert it again. The accused then gave him money. O.1 stated that he took the money because it was the only way to pay himself. He stated that he felt destroyed when the accused would do these things to him and he started to spend more time with girls than boys. Even though the accused was doing these things to him he kept going back as the circumstances at his own home were tough. As he grew older he realised that he had to stop this from happening

[13] As regards count 7, he stated that this happened in the bushes where he was asked by the accused to masturbate him and that the previous incident in 2014 had happened at block 2 in Swaneville.

[14] O.1 stated he only told his mother in 2018 as the accused kept phoning him to come and visit him and he didn't want to. When his mother asked him why he did not want to go to the accused he told her why. The following day his mother went to the Kagiso court to get a protection order against the accused.

[15] O.1 only reported this matter when he heard that the accused had been arrested and that he was not the only victim.

[16] O.1 stated that he also saw T.1, (the complainant on counts 8-14) at the accused's house. He did not know B.1 (the complainant on counts 15-17) or S.1 (the complainant on counts 18-20) or T.2 (the complainant on 24-26) or K.1 (the complainant on count 27). He did know O.2 (the complainant on counts 21-23) as O.2 was schooling with him.

[17] During the cross-examination of O.1, he stated that when the incidents happened in the house, J.1 was also asleep on the bed with the accused and himself. He repeated that he continued to visit the accused at his house as the financial situation at his own house was dire and he was in need of the money that the accused gave him. His mother also allowed him to go and stay at the accused's house. He stated that he could not tell anyone as his only relative was his mother who has since passed away in 2020 as a result of a brain tumour. He agreed that he should have told his mother earlier, however he has learnt a lesson. He stated that on the two occasions when the accused did penetrate him, J.1 was not in the room. He stated that even though the accused never told him he was a policeman, O.1 did go with the accused to Krugersdorp where he saw that the accused was investigating foreign nationals and the accused would take them into his vehicle and ask them about their passports. If they did not have passports the accused would threaten to lock them up unless they offered him a bribe.

O.1 also stated that the accused had a black police mask which he kept in his motor vehicle and also a reflector vest which had the word 'police' written on it and it had the police emblem/badge on the chest. The badge was a yellow star with a flower inside. He also stated that the accused had dockets in his vehicle. The version that accused only got to know O.1 in 2017 was not accepted by O.1 as he stated he knew the accused before this date as the accused used to rent at his grandmother's yard. He denied the version that the accused in 2017 had a love relationship with his mother. He stated the accused only spoke to his mother telephonically and he never put his foot in their house. In addition, O.1 stated that his mother was having a relationship with another man at that time and not with the accused.

[18] O.1 was asked if he ever saw the accused urinating or naked to which he stated he only saw him naked when the accused sexually abused him. He stated the accused was hairy on his body and he was uncircumcised.

[19] The nurse C stated that not all sodomy victims will reveal injuries to the anus and that in the absence of injuries it does not exclude penetration. Nurse C has been working since 1988 as a nurse and has extensive experience in clinical forensic medicine. In addition, this Court notes that O.1 was examined in 2018 which is four years after the alleged rape occurred.

[20] The accused's version in respect to counts 1-7 is that he only got to know O.1 in 2017. He did agree he was renting at the premises of O.1's grandmother. He denied showing O.1 pornographic videos and denied sexually assaulting him or raping him. He stated that O.1 had a reason to falsely incriminate him. The reason given by the accused is that he had a love relationship with the mother of O.1 and this relationship ended in 2017 when the accused bought another house. There was another woman in his house hanging curtains and this resulted in the quarrel. He noticed on his cameras that O.1 came to his house and tried to hit the dogs and in the process damaged the window to his car. The next week the police arrived with a protection order against him to prevent any contact between himself and O.1. The accused denied raping O.1. He denied giving O.1 R20 and denied having any papers in his car which had a police emblem on them. He also denied confronting foreigners for their legal documents.

[21] It is true that O.1 did not report these incidents to his mother when they were happening however, this court accepts that due to his financial situation he decided to continue visiting the accused in order to experience a better life financially. The fact remains that he did eventually tell his mother who obtained a protection order against the accused in order that the

accused would stop harassing O.1. There is a contradiction between the evidence of O.1 and the accused's son, in that O.1 stated in his statement and in his evidence in chief that on the one occasion when the accused made him take off his trousers and then inserted his penis between his thighs J.1, the accused's son was on the same bed asleep. J.1 did not corroborate O.1 in this respect. The defence counsel contends this is a material contradiction, however, this Court finds that these incidents happened in 2014 which is almost 9 years ago. These incidents were ongoing and neither O.1 or J.1 can be regarded as wholly untruthful witnesses in this regard. O.1 impressed this Court.

Counts 8-14

[22] These counts relate to T.1 M and include (count 8) trafficking in persons, (count 9) rape read with the provisions of Section 51(1) of Act 105 of 1997, (count 10) assault with Intent to cause grievous bodily harm by causing T.1 to drink alcohol, (count 11) rape read with the provisions of Section 51(1) of Act 105 of 1997, (count 12) assault with Intent to cause grievous bodily harm, (count 13) Kidnapping, (count 14) impersonating a member of the South African Police Service.

[23] In order to prove the above counts, the state called T.1 M (hereinafter referred to as 'T.1'), T.3 M and M.1 V M (the first report).

[24] T.1, a 21 year old male testified that he met the accused in September 2017. It was a Friday when the accused hooted in front of their house and his identical twin brother T.3 responded. The following day, being Saturday, the accused came again and T.1 realized that the accused was mistaking him with T.3. T.1 boarded the accused's motor vehicle whereupon the accused then invited him to his son J.1's birthday party in Swaneville. The accused was wearing a navy blue police golf t-shirt with a police logo and there was also a police jersey hanging at the back seat of the accused's car. T.1 stated that T.3 was also present and standing outside of the accused's motor vehicle, however, the accused left T.3 behind but later gave T.3 a lift. On arrival at the accused's place although there were people, it did not appear to him that it was a party as there was no music. That is when T.1 met J.1 for the first time. The accused told a certain person called Nhlanhla to take beers from the car whereupon T.1 saw there was a lot of brandy in the boot of the car.

[25] As regards count 10, T.1 stated the accused poured him a glass of brandy and he became drunk and wanted to sleep on the couch.

[26] The incident which forms part of count 9 arose when J.1 told him that he cannot sleep on the couch and further that he could not sleep in the other room because there were bed bugs. Nhlanhla gave him a blanket and he slept on the couch. The accused came, woke him up and told him to go and sleep with J.1. Whilst on the bed, the accused was sleeping between J.1 and himself. The accused passed his hand over J.1 and touched his private parts. He tried to remove the accused hands. The accused then moved his son to the other side and moved to the middle. T.1 stated that he started to panic but the accused started licking his face. The accused then removed his underwear and shorts. He turned T.1 onto his tummy. The accused applied Vaseline to his own penis and then put vaseline on T.1's anus and penetrated him. T.1 testified that he was crying and tried to stop the accused, but the accused was stronger than him and overpowered him. When he felt the accused penetrated deeper into his anus it was painful and he cried out that is when T.1 jumped up and stated that this is only the beginning, and that he would get used to this. T.1 felt something hot inside him and assumed that the accused had ejaculated. The accused then put R50-00 in T.1's trouser. The following morning T.1 went to his home and did not tell anyone. He stated that he did not consent to the accused having sexual intercourse with him. He was 15 years old at the time and this incident occurred in 2017.

[27] T.1 stated he never went to the accused's place again.

[28] As regards count 12, T.1 stated that the accused came to his place in 2018 wearing a police jersey. He accused T.1 of stealing his cellphone and he then kicked and slapped T.1. Count 13 refers to the kidnapping charge where T.1 states that the accused put him in his car and drove around with him looking for the missing phone and they went to T.1's cousin's place and that is where he met his father.

[29] As regards the second charge of rape, namely count 11, after assaulting T.1, the accused took him to his house and raped him in order to sort out the issue of the missing phone. T.1 stated that he did not consent to the sexual intercourse and even told the accused it was not ok, but the accused just ignored him as a result he realised it would be futile to resist. It is clear that the consent by the complainant was neither real, given voluntarily nor demonstrated tacitly. After raping him the accused said the phone issue was sorted and he was going to buy a new phone and told T.1 not to worry. T.1 realised he had to stop this and as a result he went to the police station to open a case.

[30] T.1 was convinced that the accused was a police officer which made him afraid to initially report this matter, however, after the second rape he decided to open a case anyway. T.1 did not report the first rape to the first reasonable available person namely T.3 or his sister, however, this Court accepts that he was afraid of the accused who had promoted himself as being a police officer. T.1 also told Dr Hassan who examined him, that the accused had threatened him, that if he told anyone he would get to know the accused very well. However, after the second rape, T.1 immediately reported this matter to the police station.

[31] In support of T.1's version, his cousin, T.3 M stated that he knew the accused worked as a police officer at Krugersdorp and also saw him in police uniform. He stated that the day T.1 went to the party at the accused's house he stayed over at the accused's house and never came to stay at his house again. T.1 never told him anything of what was happening to him. T.3 corroborated the version of T.1 that at T.1's house things were bad as there was no food and no adult supervision. T.1's sister would leave for months.

[32] The witness M.1 V M stated that she is a sergeant with 17 years experience in the SAPS. She stated that she took down the statement of T.1 as he came to the charge office crying and she had to calm him down. T.1 started by telling her that the accused had assaulted him and that the accused had also penetrated his anus forcefully. This witness realized that this was a rape case and that she needed a guardian for T.1. This witness and sergeant Coetzee went to fetch T.1's sister. T.1 then narrated his story and he told her that after the accused had raped him he was given R50. T.1 told her that the reason why he never reported the first rape is because he was poor and that by sleeping with the accused he got some money. This witness confirmed that she was the first person that T.1 told what had happened. This witness also confirmed when they went to the accused's house he had very big dogs. They asked the accused if he had a firearm as the allegation was that he was a policeman.

[33] The accused's version in respect to counts 8-14 is a complete denial. He stated that there was never alcohol at his house when T.1 came there and furthermore that he does not drink alcohol. He denied knowing T.1 through T.1's brother, namely T.3. He denied there was a party at his house when T.1 came there. He denied wearing police clothes. He denied giving T.1 a glass of brandy. He denied assaulting T.1. He stated T.1 only got into his vehicle once when he took T.1 to the police station.

Counts 15-17

[34] These counts relate to B.1 B ('B.1') and they include (count 15) trafficking in persons, (count 16) sexual assault of B.1 where the accused allegedly touched his penis and (count 17) impersonating a member of the South African Police Service.

[35] In support of B.1's version, the State called B.1, S.1 M N and N.1 J P.

[36] B.1 testified that on 27 November he was at home with his mother N J P. S.1 (the complainant on counts 18-20) arrived in the company of the accused in a white Mercedes Benz. At this time the accused was unknown to B.1. The accused's car was parked at a certain corner and S.1 approached B.1's mother and requested B.1 to assist him with moving some goods for his grandfather. It transpired later that the said request was false and merely a means of getting B.1 out of his home. The accused drove with B.1 and S.1 to the accused's house in Swaneville. On arrival at the accused's house, they found J.1, O.2 (the complainant on counts 21-23) and someone by the name of Search. The accused sent S.1 to go and buy dagga. The accused gave B.1 sleepers and shorts and ordered him to wash. The accused then took B.1 to his bedroom and made him smoke dagga. Thereafter, the accused slapped B.1's penis in order to trigger an erection. The accused then attempted to rape B.1, but B.1 refused. The accused then ordered B.1 to apply Vaseline to his own penis and penetrate the accused, however B.1 refused. In the accused's bedroom, the accused told B.1 that he was a police officer and pointed him with a gun. B.1 also saw a police identification card in the accused's bedroom. B.1 then screamed and called M but there was no response. B.1 demanded to be taken home and the accused in the company of some other guy accompanied him home at midnight. B.1 was still wearing the accused's shorts. B.1 reported the matter to his mother and to the police.

[37] The witness N.1, who is B.1's mother then came to testify. She stated that a white car pulled up at her house and that M came out of the car. M is another name for S.1. She corroborated B.1's version that S.1 asked her if B.1 could come and help the grandfather. She went out to the white car but it moved away. She confirms that B.1 arrived at midnight and that he was wearing shorts which did not belong to him. She even showed the shorts to this court whilst testifying. She says the weather was cold that day and that when B.1 left her house earlier that day he was wearing long trousers. She saw B.1 crying and B.1 told her that the accused had given him toiletries and asked him to wash and then came back and the accused started hitting him on his groin. She stated that the accused promised B.1 the heaven and the earth. She corroborated B.1's version that the accused threatened him and pointed a gun at him. She stated that she spoke to S.1 why he was recruiting boys for the accused and S.1 stated that he was doing these things because the accused was threatening him as well. S.1

also told her that the accused had been sleeping with him as well but he no longer wanted him as S.1 used to urinate in the accused's bed. She even told S.1's mother what was going on.

Counts 18-20

[38] In respect to counts 18-20, the State called S.1. He testified that during January 2021, he was living in a shelter in Krugersdorp when he met the accused for the first time. During this discussion it transpired that the accused knew S.1's late father and his grandfather. The accused asked him to wash his car and whilst driving the accused touched S.1 inappropriately on his thigh.

[39] In respect to count 20, S.1 stated that the accused whilst driving informed him that he was a police officer. This witness believed him as he had a SAPS mask with the police emblem on it hanging on the rear view mirror. The accused then drove around with him to attend to some of his issues and he saw the accused stopping two foreign Nationals on two separate occasions. On the first occasion the accused demanded a passport from this foreign national and when the said person failed to produce same the accused took money from him. In respect to the second incident, the accused demanded from that person and that because that person had no legal documents the accused took that person's iphone. This witness stated that he came from a poor background.

[40] On another occasion in December 2022, S.1 testified that whilst on his bicycle he met the accused. The accused referred to him as 'Khumalo boy'. The accused followed S.1 to his grandfather's place where the accused asked S.1's grandfather to allow S.1 to visit him. S.1's grandfather agreed. They left and along the way the accused bought S.1 shorts and sandals at PEP Stores. The accused ordered S.1 to put on the new clothes as his own were dirty. S.1 complied. On arrival at the accused's place the accused ordered S.1 to take a bath. He then went to the accused's bedroom where the accused asked him to take off his t-shirt. S.1 stated that the accused showed him a firearm which was in a chest of drawers. The accused told S.1 that he knew his grandfather and that he must comply with his orders and should he tell anyone he would kill his grandfather. This witness also saw a police identification card with the accused's name on it. The accused gave S.1 vaseline to smear on his buttocks. The accused instructed him to take off his shorts and the accused used his hand to hit the penis of S.1 and started brushing his thighs. The accused then proceeded to rape him by inserting his penis into the anus of S.1. He stated he had pain in his buttocks while the accused was raping him. The accused then ejaculated on the thighs of S.1. Around 04h00 the accused told S.1 to leave as

his grandfather had phoned saying he was looking for S.1. The accused gave him R40. This witness never told his grandfather.

[41] He also stated that he ran away from the orphanage in February 2021 and he met the accused again in December 2021 at the taxi rank and he went with the accused to his house. When they got to accused's house there was a party and after a braai, the accused told him and O.2 (the complainant on counts 21-23) to go and sleep. He then went to the accused's room and went straight to the accused's bed as he was aware of the previous threat that the accused had uttered whereby if he did not comply with his demands the accused would kill his grandfather. The accused then took S.1's hand and put it on the accused's stomach. S.1 told the accused that he was not gay. He saw that on the floor was an axe to chop wood. The accused then took vaseline, smeared it on his buttocks and penetrated his anus with his penis. He did not see if the accused ejaculated. The next morning the accused took him back to Munsieville. After this incident, the accused stopped raping him and instead tasked him to lure other young boys. The next victim was Eddie and then B.1.

[42] There are some discrepancies between S.1's version in court and his statement to the police, namely that he told the police that the firearm that the accused took out was in the safe and not from a chest of drawers.

[43] The accused's version in respect to S.1 is a complete denial. The accused agrees that he knows S.1's grandfather, but he denied all the other allegations. He stated that S.1 made all these false allegations against him because S.1 stole his cell phone.

Counts 21-23

[44] In order to prove its case the State called O.2 C and Zola C.

[45] O.2 testified that he knows J.1 as his friend and the accused as Baba Mike and that he met the accused in the street in September or October 2021. The accused asked O.2 to go with him in order to wash his car. O.2 was already friends with J.1 but he did not know his father by then. At the accused's place they found J.1 and Prince. In January 2022, O.2 was staying at his home and sometimes at J.1's home. He stated that J.1 wanted him to stay at his home in order to assist him with the school work. O.2 testified that he was from a struggling family and sometimes there would be no food in the house, furthermore, due to the dire situation he was sharing a room with his sister's child. In November and December, he moved in at J.1's

because at J.1's place there was food and games. He testified that it was in December 2021 when J.1's father gave him a glass of brandy and promised to give him R100-00 if he drank it. He did drink it and he blacked out. He woke up next to J.1's father in his bedroom and noticed he only had underpants on. Next to him on the bed was the accused and he was wearing a t-shirt but below his waist the accused was naked. O.2 stated that he felt pain in his anus. He could not sit or walk properly. He suspected that something happened but he did not ask the accused. He did not tell J.1 or anyone.

[46] On 15 January 2022, O.2 was with J.1. J.1 took a bath and it was raining heavily. O.2 went to watch the TV inside the accused's main house. The accused called him to his bedroom and touched him on his private parts and then took off O.2's trousers. O.2 resisted and cried out to J.1 but he does not think J.1 heard him as it was raining. The accused grabbed him and threw him on the bed and inserted his penis into the anus of O.2. The accused ejaculated on a sheet and O.2 dressed up and ran out of the room. The following day O.2 went back to his home. O.2 stated that the accused gave him 2 cellphones. O.2 gave one of the said phones to his mother.

[47] In cross-examination O.2 could not explain why he remained at J.1's place after these alleged sexual violations.

[48] O.2's mother namely Zola C testified that O.2 told her about one rape incident where he was intoxicated. She said the accused bought O.2 two phones, a computer and the head phones. She gave O.2 permission to stay at J.1's place. O.2 used to share a room with her. While O.2 was staying at J.1's place she was a security officer and was also receiving children grants.

[49] The accused's version in respect to counts 21-23 is a complete denial. He agreed that O.2 stayed at his house and that he gave him one cell phone, however, he could not remember since when O.2 was staying at his house. He denied giving O.2 alcohol which made him pass out and he denied raping him. The accused could not give a reason why O.2 would make these false allegations against him.

Counts 24-26

[50] In regard to counts 24 to 26, T.2 M was called.

[51] T.2 testified that he was 16 years old and that he knew J.1 and his father through S.2 his friend. He met J.1's father in October when he wanted to give him and S.2 a job at Phumlamqashi. He eventually met J.1 and used to visit J.1's home as J.1 wanted someone to keep his company. His mother agreed that he could sleep over on a Friday and Saturday in October 2021. During the said two days nothing happened to him and he was comfortable in J.1's father's presence. He stated that there was an incident where they were playing cards at J.1's home and present was the accused, J.1, K.1, Sipho and S.2 and other boys. The accused gave them loose change and T.2 lost the game.

The accused stood up and said to T.2 that he must go with him. T.2 followed the accused and the accused said to T.2 that he was lying and that he still had the money. The accused searched T.2 and in the process touched his penis and tried to determine how big T.2's penis was. After grabbing his penis, the accused made certain sounds. After that he decided to leave the house.

[52] In cross-examination, T.2 's statement to the police namely Exhibit "R" was put to him that he told the police that the accused stood up and went to the kitchen and that T.2 was coming back from the toilet when the accused touched him. T.2 conceded that his statement to the police and his testimony in court are contradictory.

Count 27

[53] In order to prove this charge the State called K.1 M and S.2 N.

[54] K.1 testified that he was at the accused's place to assist his friend S.2 to clean the yard. When it was time to leave the accused told him to remain behind. He agreed. K.1 went to drink water at the tap behind the accused's main house. The accused approached him and touched his private part. K.1 did not tell his grandmother or anyone about this. It was only after his grandmother and the police officer threatened to take him for a medical check-up that he told them that the accused had touched and rubbed his private parts.

[55] S.2 testified that he is friends with K.1 and that after cleaning the accused's yard S.2 left and K.1 remained behind at the accused's instructions and that K.1 related the sexual assault to him.

[56] In cross-examination, S.2 was confronted with his statement to the police Exhibit "Z" which says that he left together with K.1 and nothing was said to him about the rape. S.2 conceded that his statement to the police is the correct version.

[57] The witness J1 M.2 ('J.1'), who is the accused's son testified that he was residing with the accused when the said offences were allegedly committed. He confirmed knowing all the complainants except T.2 M. J.1 stated that except for O.2 all the other complainants were introduced to him by the accused. He testified that the accused used to bring O.1, T.1, and S.1. He saw B.1 only once in the company of S.1. As regards K.1 he used to come and clean the yard with S.2. As regards O.1, S.1, T.1 they used to sleep in the main house when they each visited his home. J.1 also stated that he was sleeping in the outside room.

[58] J.1 stated that he never witnessed any of the alleged rapes and sexual assaults allegedly committed by the accused. He stated that he was sleeping in the outside room and was not allowed in the main house when the accused was with any of the complainants. Further, that none of the complainants ever informed him about these offences except O.2 after the accused's arrest.

[59] J.1 also stated he never saw his father with any female girlfriends and that he suspected that the accused was molesting these boys. In addition, he stated that according to him the accused was a policeman as he had a firearm, a small card with a police badge on it, a police jersey and a police mask and many affidavits in his house.

[60] J.1 also stated that the accused would provide the boys that came to visit with everything they needed.

[61] The witness Mr M stated that he knew the accused as he met him 5 years back. According to him the accused was a policeman in Krugersdorp as he had a police identification card with his name on it. The accused also had a police reflector light and a blue light in the car. The accused had also told him that he used to work with young boys who were struggling with drugs. He stated the accused was always at his home in the company of boys and he never saw the accused in the company of female partners.

Evaluation

[62] When considering a criminal case, it is important to consider the totality of the evidence and then to assess the probabilities emerging from the case as a whole. The court must evaluate the evidence of the State and the defence.

[63] In the matter of *Stellenbosch Farmer's Winery Group Ltd and Another v Martel & Cie SA and others*,¹ the Supreme Court of Appeal held that:

'The technique generally employed by the courts in resolving factual disputes of this nature may be conveniently summarized as follows: To conclude on the disputed issues, a court must make findings on (a) credibility of the factual witnesses, (b) their reliability and (c) the probabilities. As to (a) the court's findings on the credibility of a particular witness will depend on its impression about the veracity of the witness.'²

[64] This Court has born in mind that in respect to the rape counts this Court is presented with the evidence of single witnesses. In terms of section 208 of the Criminal Procedure Act it is competent for a court to convict on the evidence of a single witness. Section 208 of the Criminal Procedure Act 51 of 1977 reads:

'An accused may be convicted of any offence on the single evidence of any competent witness.'

Evidence of a single witness must be clear and satisfactory in every material respect. This does not mean that such evidence must be flawless and beyond criticism.

[65] This Court is also aware that in many of the instances the reports were made after a long period. However, as stated in s59 of The Criminal Law (sexual offences and related matters) amendment act 32 of 2007, 'In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.'

[66] The son of the accused, namely J.1 impressed this Court. It is clear he loves his father and that he would lose a lot if his father went to jail. Yet, he stated that the accused never had any female girlfriends and that the accused was a policeman. His version in regard to this remains unshaken. The accused's version of not owning a firearm and not keeping affidavits in his house is rejected as false and not reasonably possibly true.

[67] The witness Mr M impressed this Court. This Court can find no reason why he would say the accused was a policeman and that he always had many boys at his house. The accused version of not being in possession of the police items as stated by Mr M is rejected as false and not reasonably possibly true. J.1 and Mr M both corroborate each other that they never saw the accused in the company of woman.

¹ *Stellenbosch Farmer's Winery Group Ltd and Another v Martel & Cie SA and others* 2003 (1) (SA)11(SCA).

² Ibid para 5.

Probabilities**Counts 1-7**

[68] This court finds that the version of the accused in respect to the reason why O.1 lay these charges against him is improbable and not reasonably possibly true. If there was a quarrel between accused and the mother of O.1, it is more likely the mother would've opened up a charge against the accused, and not O.1. O.1 was asked whether there was any other occasion where he had an opportunity of viewing the naked body of the accused and he stated there was not. However, he was able to explain that the accused has an uncircumcised penis and that he has hair all over his body. In the accused's version he admits that he is uncircumcised and he stated that O.2 and S.1 knew that he was uncircumcised because at the time of his arrest he had to urinate into a bucket and the kids saw his uncircumcised penis. O.1 was not mentioned as one of the children who saw his penis at the time of his arrest, so the recollection of his uncircumcised penis means he saw it at another time, which supports his version of events. O.1 would not have been able to explain the penis of the accused in such detail having not actually seen it. It is true that when O.1 was examined by nurse C in 2018 no injuries were seen on his anus, however this is not uncommon as the right incident on count five had occurred as far back as 2014. The defence argued in their heads that there is no corroboratory evidence to suggest O.1 came from a poor home. This Court accepts that if his mother was doing voluntary work and she was a single mother of 4 children, who received a social grant, that life was indeed tough and that the financial circumstances at the home of O.1 were dire. The accused's version that the mother of O.1 was employed permanently as a nurse and that she on occasion would lend him money is equally uncorroborated and is rejected as false.

[69] O.1 was vulnerable. He was a child in Grade 6 and only 12 years old, when the exploitation started. The accused met him when the accused was renting at his grandmothers' residence and he gained O.1's trust by inviting him over to his place and playing games with him. He transported O.1 to his house, gave him a place to stay, harboured and sheltered him and gave him refuge. By moving O.1 over to his house, the accused deprived O.1 of his familiar environment thereby increasing the vulnerability of O.1. The sexual exploitation which ensued thereafter was then easily carried out by the accused. A child of 12 years old cannot consent to his own exploitation, in fact O.1 did not even realise he was being exploited sexually until much later, when he made a concerted effort to break away from this exploitation, thereby informing his mother.

[70] This court is satisfied that the state is proved the guilt of the accused beyond reasonable doubt in respect to counts 1, 2, 3, 4, 5, and 7. Although O.1 mentions in his statement that he was raped in 2015, this was not well verbalized when he testified in court. In fact, the state advocate accepted that O.1 was only penetrated fully once. As regards count six this court does not find that the state proved beyond reasonable doubt the second count of rape which is alleged to have occurred in 2015.

Counts 8-14

[71] It is true that T.1 states that J.1, the accused son must have seen the accused raping him. There is no corroboration in this regard by J.1, or that T.1 slept on the same bed as J.1 when these incidents happened, however, once again, both T.1 and J.1 were testifying about incidents that happened as far back as 2018. It may at the outset seem to be a material contradiction, however, bearing in mind that these incidents happened long ago when these witnesses were still very young, the court does not regard it as so material to totally reject the version of T.1 in its entirety.

[72] The accused did not impress this Court. No logical reason is given by him why T.1 would fabricate all this evidence against him. If T.1 wanted to falsely implicate the accused, it would have been simple for him to report him for the assault. Boys are reluctant to report rape as they feel emasculated. It is clear that T.1 was extremely traumatised when he reported this rape at the police station. There is no suggestion that T.1 was having sexual relations with any other man. The *modus operandi* of the accused in treating the boys well and then approaching them for sexual favours now starts to become a trend as the evidence of the various boys unfolded. In addition, the medical injuries sustained to T.1's anus were fresh. Even though Dr Hassan completed the J88 form, nurse C gave her opinion that the rim of the anus of T.1 was swollen and thick. The swelling was caused by an injury. She stated that the funnelling that was observed indicates that there had been repeated penetration in the anus. She stated that Dr Hassan also observed reflex dilatation to the anus which means that due to the repeated penetration of the anus the muscles were weakened and if pressure was applied to the orifice it would open quickly exposing the contents of the rectum. The medical report was marked as exhibit 'C'. The last rape occurred in April 2018 and T.1 was examined on 22 April 2018 which is shortly after this rape occurred and confirmed the injuries sustained as a result of the rape. It is clear that the medical report corroborates the version of T.1 that this sexual intercourse was traumatic.

[73] In regard to count 8 Thsepang was a child as he was under the age of 18. He was vulnerable as he came from a home where his basic needs were not met. This is confirmed by T.3. T.1 did not have parents and was living with his sister. T.1 testified that he wanted to join the feeding scheme at school, but his sister refused to sign. T.1's sister left him, as a child, at home to take care of her child on a few occasions. As a result, the money that the accused gave him after exploiting him sexually was used to buy food in his house. This is typically known as a child headed household and it is clear that the accused was able to spot these vulnerable boys who were struggling and like in this instance offered T.1 a new home where he would not be short of anything, provided of course he complied with the sexual requests of the accused. On count 8 the accused is found guilty of trafficking.

[74] As regards counts 9 and 11 which are the counts of rape, T.1 was asked whether the accused ever showed his naked body to him besides the times when the sexual exploitation occurred and T.1 was adamant he only saw the naked body of the accused when he had sexual intercourse with him. He was adamant that the accused's penis was uncircumcised and that the accused never wore a condom when he raped him. The accused's version of a complete denial in raping T.1 is rejected by this Court as false and not reasonably possibly true. This Court is satisfied that there was no consent granted by T.1 and that the accused had the intention in the form of *dolus directus* to rape T.1. His actions were unlawful and he is found guilty on counts 9 and 11. It is noted by this Court that the accused admits that he is uncircumcised, but his version is that O.2 and S.1 saw his penis at the time of arrest as he wanted to urinate and the police told him to urinate in a bucket. If this is the case, T.1 who was not present at the time of his arrest would not have seen his penis, Both O.1 and T.1 corroborate each that the accused's penis was uncircumcised.

[75] As regards count 10 which is a charge of assault with intention to do grievous bodily harm by giving him alcohol, the State has referred this Court to the case of *S v Helm*,³ where the case of *S v Marx*⁴ was referred to. In the case of *S v Marx*⁵ the deliberate administration of alcohol to children which causes them physical harm is an assault on them. The assault requires that the aggression is forcible. The State argued that the force applied was the pressure that the accused placed on T.1 to drink. This Court disagrees. T.1 in his evidence in chief was asked 'Did you want to drink' and he replied 'Not really, but because I was told it was

³ *S v Helm* 2015 (1) SA 550 (WCC).

⁴ *S v Marx* 1962 (1) SA 848 (NPD).

⁵ *Ibid*.

his child's birthday I then drank.' There was no force applied to make T.1 drink. He drank the alcohol of his own accord. On Count 10 the accused is acquitted.

[76] In respect to count 12, T.1 stated that the accused slapped him in the face, tripped him and when he fell the accused put his feet on T.1 and kicked him in his ribs and stomach. This court finds the accused had no grounds of justification to assault T.1 and that his actions were unlawful and he is accordingly found guilty of assault with intention to do grievous bodily harm. Due to the fact that the accused forced T.1 into his vehicle and drove him around, it is clear that T.1 was deprived of his freedom and accordingly on count 13 he is found guilty of kidnapping. The similar fact evidence which O.1 spoke about, namely that the accused had police clothes makes him guilty of impersonating a member of the South African Police and on count 14 the accused is also found guilty.

Counts 15-17

[77] The accused's version is a complete denial of having done anything to B.1. In fact, he states that he has no knowledge of these incidents. B.1 never entered his bedroom and he never gave B.1 dagga to smoke or shorts to wear. He also had no reason why B.1 would come and say these things.

[78] This court rejects the accused's version as false and not reasonably possibly true. B.1 was an honest and reliable witness. He too stated that he does not come from a rich family. B.1 did not have a father in his life and by removing him from his home and taking him to the accused's house, B.1 was vulnerable and the accused became in control and attempted to exploit B.1 sexually. It is clear that the accused asked S.1 to find him more boys and unfortunately for B.1 he was one of these boys recruited. B.1 was able to describe the accused's penis as being uncircumcised and he would only be able to have seen this if the accused was naked.

[79] It was contended by the counsel for the accused that there are some discrepancies in the versions of B.1, J.1, S.1 and B.1's mother regarding the car B.1 was transported with, the people who slept in the main house, the people who left with B.1 and the issue pertaining to the shorts. It is true that B.1 did not tell the police that the accused had told him that he was a police officer, however, the fact that a police identification card was found in the accused's room and the fact that the accused pointed a firearm at B.1 would lead any reasonable person to believe such a person was a police officer. It is true that a firearm and the police card allegedly seen by

B.1 at the accused's place were never found by the police during the police search, however this Court does not regard this as so material to place a question mark on the evidence of B.1 in totality. This Court does not find that the allegation by B.1 of the accused impersonated a police officer is an after-thought.

[80] The witness impressed this court. It is clear that B.1 was angry at the accused and S.1 for 'selling him out'. This witness impressed this court. He too mentions that the accused gave him some vaseline and that he was given a cell phone and told not to tell anyone what had happened.

[81] As regards count 15 this court is satisfied that the State has proven the charge of trafficking of persons. In respect to count 16 this Court is satisfied that the accused had no grounds of justification to touch B.1's penis and that his actions were unlawful. He is accordingly found guilty on count 16. In respect to count 17, it is clear that the accused threatened B.1 and that B.1 had a police identification card in the accused's room and that the accused pointed him with a firearm.

Counts 18-20

[82] As regards the version of S.1, his version is corroborated by B.1. S.1 states that B.1 was very angry with him for taking him to the accused, however he softened up when S.1 told him that he had to recruit other boys otherwise the accused would have killed his grandfather. Even though there are some discrepancies between the version to the court and what S.1 told the police, this Court does not regard this as material contradictions.

[83] The accused's complete denial of the charges reflected in counts 18-20 is rejected as false and not reasonably possibly true. The medical report which was compiled by nurse Ngubane, who is also a professional nurse, and who has worked with nurse C in similar type matters for 3 years, was handed in marked exhibit 'F'. This report corroborates the version of S.1 that his anus was penetrated. Nurse C, who was called to give an opinion in respect to this medical report confirms that there was sexual penetration to the anus of S.1. She stated that the clinical findings showed that there were healed scars at 12 and 6 o'clock on the anus of S.1. The finding made was that the sphincter was injured and that the anal area opened spontaneously. This nurse stated that when there is traumatic penetration the muscles of the sphincter are injured. She explained that with a normal sphincter there will be resistance when you try to open

it, yet in a case like S.1 the findings were that if pressure was applied to it, it opened automatically with no resistance.

[84] The same *modus operandi* was used by the accused in respect to S.1 and T.1 in that the accused used the excuse on both cases to say that because these two victims had stolen his cell phones this is the reason why they were making these false allegations against him. This court rejects this as false.

[85] In respect to count 18 this Court finds that the accused recruited S.1 for the purpose of sexual exploitation. He threatened the life of the only family member that S.1 had and he exploited his vulnerability as a child who came from very poor economic circumstances. S.1 testified that he believed he had no option but to submit to the will of the accused, he stated that he became the accused's slave. S.1 testified that they relied on the pension that his grandfather received and when there was no money his grandfather would approach 'loan sharks'. S.1 was further vulnerable as he did not even attend a main stream school. He could not read or write properly. The accused lured him to his house offering him many things that S.1 did not have. This Court is satisfied that the State has proven the charge of trafficking of persons on count 18.

[86] As regards count 19, this Court is satisfied that the accused did not consent to the sexual intercourse in both occasions. Even though the accused was charged with only one count of rape, this court finds the accused did penetrate S.1 on two occasions. Due to only being charged for one count, he is found guilty on count 19.

[87] As regards count 20, this Court finds the State has proved the guilt of the accused of impersonating a police officer beyond reasonable doubt.

Counts 21-23

[88] The accused denies raping O.2, yet the medical evidence corroborates the version of O.2 that he was indeed sodomised. Nurse C testified that she completed the medical examination on O.2 and she observed healed abrasions on the anus of O.2 at 12 and 6 o'clock. She noticed depigmentation at 12 and 6 o'clock which is a discoloration of the skin surrounding the anus which is caused when there is an injury. She also observed slight relaxation regarding dilatation which is indicative that the sphincter was already weakened. When she applied pressure to the orifice it dilated automatically.

[89] Although the accused denies raping this child, O.2 was able with clarity to say that he saw the accused's uncircumcised penis. The only way he would have seen it is if the accused was naked and next to him.

[90] The mother of O.2 also confirms that when the police came and told her that O.2 had been found with the accused and after discovering that O.2 had been raped she did ask O.2 what happened and he told her that the accused had raped him.

[91] It is true that J.1 never saw any brandy and that O.2 never told J.1 what had happened, however, it is clear O.2 was embarrassed about what J.1's father had done to him as he stated 'I'm a boy and he is a male, we can't have sex'. It is not unnatural for a 15 year old child to be afraid to tell anyone about what had happened to him. It is also true there are contradictions between O.2's version and that of his mother as to how many times he was raped, however apart from these contradictions this witness still impressed the court. The accused on the other hand did not impress this court and his complete denial is rejected as false and not reasonably possibly true.

[92] As regards count 21 O.2 stated that the financial situation at home was dire and that his mother used to do temporary jobs at school and that he used to share a room with his sister. In comparison to his house, the accused's house offered him everything he needed. He had his own bed, food and money which allowed him even to buy data which assisted with his school work. O.2's mother confirms that the money she was earning was not enough to cater for all her needs and that they were struggling. It is clear that O.2 was vulnerable and by the accused removing him from his own home O.2 became less powerful allowing the accused to exploit him sexually. In respect to count 21 this Court is satisfied that the State has proven the charge of trafficking in persons.

[93] In respect to count 22, this Court is satisfied that O.2 did not consent to the sexual intercourse on both occasions. Even though the accused was only charged for one count of rape, this court finds that on both occasions O.2 did not consent and that the accused penetrated the anus of O.2 unlawfully and that he had the intention to rape him.

[94] As regards count 23 which is a charge of assault, where the State alleges the accused assaulted O.2 by giving him alcohol to drink, the situation in this instance is markedly different to the situation pertaining to T.1 in respect to count 10. In the case of O.2, the accused encouraged O.2 to drink the brandy and if he did he would give him R100. At the outset this may not appear

as if the accused forcibly made O.2 drink, however, as stated in the matter of *S v Helm*⁶ the Court held;

'The leading judgment on the point is *S v Marx* [1962 (1) SA 848 (N)] in which the accused was charged with common assault after he gave a 7-year-old girl and a 5-year-old boy intoxicating liquor to consume. The matter came before the full court on review and was fully argued by both counsel for the state and an amicus curiae. After considering the common law *D Williamson JP* (with Henning J concurring) came to the following conclusion at 853C et seq: '...If a person prepares a trap for an unwary drinker by placing stealthily in his drink some substance which will cause the drinker bodily harm, albeit internal harm instead of external harm, I can see no reason for saying that he has not indirectly by force invaded the integrity of the body of his victim. The fact that the direct application of the harm to the body was brought about by the voluntary act of the victim himself in drinking unwittingly from a glass with a noxious substance in it, ... [is]...an attack by the plotter upon the victim's body by a force indirectly applied from within the latter's body; he could in my opinion be charged with an assault and convicted thereof.'⁷ [my emphasis]

[95] This Court finds that in respect to count 23 the accused prepared a drink for O.2 by placing stealthily in his brandy some substance which caused O.2 bodily harm in that he blacked out and became unconscious allowing the accused to do with him what wanted.

Counts 24-26

[96] As regards the evidence of T.2, this Court finds no reason why he would too falsely incriminate the accused. In fact, the accused states he has never seen T.2. It is true that J.1 cannot remember having seen T.2 at the house of the accused, however, due to so many boys frequenting this house it is not at all unreasonable that J.1 would not remember him. It seems as if many boys stayed over. T.2 was a credible and honest witness and he impressed this court. The accused's complete denial is rejected as false and not reasonably possibly true.

[97] As regards counts 24 and 26 this Court does not find that the State has proved the crime of trafficking in respect to T.2 or an assault. There is no evidence that he came from a poor background, was exploited sexually or that he was given alcohol to consume. In respect to counts 24 and 26 the accused is acquitted.

⁶ *S v Helm* (note 3 above).

⁷ *Ibid* para 40.

[98] In respect to count 25 this Court finds that the accused did touch T.2 on his penis and that there was no consent or grounds of justification for the accused to have done this. On count 25 the accused is found guilty of sexual assault.

Count 27

[99] The witness K.1 impressed this court. There is no reason for him to falsely incriminate the accused.

[100] Accused's version in respect to count 27 is that he knew K.1 as he used to come to his home, however he denied all allegations of sexually assaulting him. He merely stated that K.1 was instigated by the police to lay this charge. This Court regards the accused's denial as false and not reasonably possibly true.

[101] In respect to count 27 this Court finds K.1 gave no consent and that the accused touched him unlawfully and intentionally.

Findings

[102] In the result, the accused is found guilty on counts 1, 2, 3, 4, 5, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25 and 27. In respect to counts 6, 10, 24 and 26 the accused is acquitted.

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JUDGE OF THE HIGH COURT
JOHANNESBURG

Date Heard:	14 September 2023
Judgment handed down:	14-15 September 2023

Appearances:

On behalf of the State:	Adv C. Ryan
On behalf of the Accused:	Adv L. Mqongozi