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

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

25 March 2024

DATE

SIGNATURE

CASE NUMBER: SS13/2022

In the matter between:

THE STATE

and

SIYABULELA MANECOTSHWA

ACCUSED

JUDGMENT

DOSIO J:

Introduction

[1] The accused is arraigned on the following five counts. Count one is a charge of housebreaking with intent to rape and rape in that the State alleges the

accused broke into the house of Keikanetswa P[...] on 26 July 2022 and then raped T[...] P[...]. The provisions of s51(1) of the Criminal Law Amendment Act 105 of 1998 ('Act 105 of 1998') are applicable in respect to count one. Count two is a charge of attempting to murder T[...] P[...] on the same day as count one. Count three is a charge of robbery with aggravated circumstances in that it is alleged that on the same day as count one the accused robbed a cell phone from T[...] P[...], aggravating circumstances being that a knife was used. Count four is a charge of rape in that the State alleges that on 26 July 2020 the accused raped a minor female, namely R[...] T[...]. Count five is a charge of rape in that the State alleges that on 26 July 2020 the accused raped a minor child, namely K[...] J[...] M[...].

[2] The accused is represented by Advocate Greyling and the State is represented by Advocate Moseki.

[3] Before the accused pleaded, the Court explained the minimum prescribed sentence of life imprisonment in respect to count one, count four and count five. The Court also explained the minimum prescribed sentence of 15 years imprisonment in respect to count three. The accused understood and pleaded not guilty to all counts. In respect to count one to three, the accused stated that he relied on an alibi that he was at 7[...] E[...] B[...], S[...]. In respect to counts four and five, the accused denies he was at the scene.

[4] The following exhibits were handed in, namely:

- (a) A medical J88 in respect to the T[...] P[...] (complainant on count one), marked as exhibit 'A'
- (b) Fingerprints lifted from the property in count one, marked as exhibit 'B'.
- (c) Finger and palm prints of the accused marked as exhibit 'C'.
- (d) A comparison chart between the palm print lifted at the property on count one and
the comparison to the accused's palm print marked as exhibit 'D'.
- (e) The accused's palm print taken at court on 27 February 2024 is marked as exhibit 'E'.
- (f) A medical J88 in respect to Katlego Motlhe, (complainant on count 5) marked as exhibit 'F'.

- (g) Certificate of competency and court intermediary oath in respect to Paul Pitswane marked as exhibit 'G'.
- (h) Teddy Bear Clinic assessment report in respect to R[...] T[...], (complainant on count four) marked as exhibit 'H'.
- (j) Teddy Bear Clinic assessment report in respect to K[...] M[...], (complainant on count four) marked as exhibit 'J'.
- (k) Court intermediary oath marked as exhibit 'k'
- (l) A medical J88 in respect to R[...] T[...], (complainant on count 5) marked as exhibit 'L'.
- (m) Certificate of competency and court intermediary oath in respect to Getrude Sibanda marked as exhibit 'M'.
- (n) Certificate of competency and court intermediary oath in respect to Buyisile Meisie Khorombi marked as exhibit 'N'.
- (o) Teddy Bear Clinic assessment report in respect to K[...] Z[...] marked exhibit 'O'.
- (p) Registration of Mrs Khorombi as an intermediary marked as exhibit 'P'.
- (q) SAP 13 register marked as exhibit 'Q'.
- (r) Acknowledgment of receipt marked as exhibit 'R'.
- (s) Affidavit of Warrant officer Mmushi in respect to the analysis of DNA marked as exhibit 'S'.

[5] The State called the following witnesses, S[...] R[...] N[...], N[...] G[...] M[...], Thwaranelo P[...] ('Tshwaranelo'), K[...] A[...] P[...], Warrant officer Van Niekerk, warrant officer Moloi, Doctor Saiqa Kashif, R[...] T[...], V[...] T[...], Nonkhosi K[...] J[...] M[...], R[...] Chabalala, warrant office Mpiko, I[...] L[...], K[...] Z[...], warrant officer Khuse and warrant officer Mmushi. The State closed its case and the accused came to testify.

[6] The Court will summarise the evidence, not in the order that the witnesses were called, but chronologically, in respect to counts one to five.

Evidence

Witnesses in respect to counts one to three

K[...] A[...] P[...]

[7] This witness testified that she is the grandmother of T[...] P[...]. She stated that she awoke hearing T[...] screaming and after asking her what happened, T[...] explained that a man had entered the house and raped her. This witness and T[...] sleep in the same yard but this witness sleeps in an outside room, as opposed to T[...] who sleeps in the main house. T[...] informed her that she had been stabbed on her neck, upper arm, underneath her armpit, on her thigh and inside her hands.

[8] This witness went into the main house and noticed the lights were on and the windows in the back of the house were open. T[...] informed her the man jumped out of the window of her room.

[9] This witness called the ambulance and the police.

[10] This witness later noticed fingerprints on the window where T[...] slept. She contacted the investigating officer, namely detective Khuse who called experts to come and lift the fingerprints.

T[...] P[...]

[11] This witness stated that she was in the house sleeping on 26 July 2022. Around midnight she heard footsteps in the kitchen. She then felt someone putting his hand on her mouth. The man then took the hoodie she was wearing and strangled her with it. The man then climbed on top of the bed and started stabbing her with a knife on her body. He stabbed her on her neck, left upper arm and under her arm pit below her breast. He also stabbed her on her left thigh and inside both hands.

[12] She tried to jump off the bed and tried to look for something to protect herself, but could not find anything. The man pushed her back on the bed and tried to remove her pantie. Whilst struggling with him, he threatened to kill her. He then climbed on top of her and inserted his penis into her vagina and raped her. The man took her cell phone and used a window to exit the house. She then went to report the

matter to her grandmother who was sleeping in the outside room. The police and ambulance then arrived.

[13] At the hospital the medical staff assisted her by stitching the open wounds. A tube was also inserted in her vagina to extract DNA. Tablets were administered to her and she received therapy.

[14] This witness was shown the J88 medical report and she confirmed the injuries reflected thereon.

[15] She confirmed that fingerprints were lifted from her bedroom window.

Warrant officer Van Niekerk

[16] This witness stated that he is a warrant officer in the SAPS with 36 years' experience based at the Local Criminal Record Centre ('LCRC') and that he is employed as a fingerprint expert. He stated that on 27 July 2022 he went to 2[...] T[...] S[...], S[...] to attend to a rape scene and to examine fingerprints. He found an identifiable palm fresh print inside the main bedroom window. He developed it with black powder and lifted it with scotch tape and marked it as 'S2'.

Warrant officer Moloi

[17] This witness testified that he is employed as a warrant officer in the SAPS and is based at the LCRC in Krugersdorp. He received training in respect to the comparison and detection of finger and palm prints. He was awarded expert status in this field in 2002. He stated that he received the finger and palm prints which were lifted by warrant officer Van Niekerk on 27 July 2022. He examined them on 29 July 2022. He compared prints 2020/R22 280 which were registered on the automated fingerprint identification system and found that they were identical to the palm prints of the accused. The fingerprints on exhibit 'B', lifted from the window in respect to count one, matched the palm prints on exhibit 'C', which are the palm prints taken from the accused. On exhibit 'D' which is a comparison of the prints on exhibit 'B' and 'C', he marked nine identifying similarities. He stated that there could be no

interference of the fingerprints whilst they were in safe keeping. This witness took the palm print of the accused once again in court on 27 February 2024 which was marked as exhibit 'E'.

Warrant officer Mpiko

[18] This witness stated that she is a warrant officer based at the Family violence and sexual offences unit in Krugersdorp and that she has 22 years experience in the SAPS and 18 years in this specialised unit. She is responsible for taking samples and booking them into the SAP 13 register. She testified that she collected this kit from Leratong Crisis Centre and transported it to Kagiso Police station. The SAP 13 number was 308/2022. The witness was recalled by the state, and she testified that she made a mistake by saying that she was the one that transported the crime kit in respect of count one. She testified that the crime kit in respect of count one was collected from Leratong Crisis Centre by Sergeant Khuse and she took it from sergeant Khuse and transported the crime kit to the Forensic Science Laboratory in Pretoria for analysis and she received an acknowledgment receipt.

Warrant officer Khuse

[19] Warrant officer Khuse testified that he collected the crime kit from Leratong Crisis Centre and booked it into his personal cabinet for safe keeping. He confirmed that Warrant Officer Mpiko transported the crime kit to Forensic Science Laboratory for analysis. The crime was first registered into the SAP 13 register with reference number 308/2022, and he signed for that crime kit in the SAP13 book. This crime kit was in respect to the complainant on count one. The crime kit was transported to Forensic Science Laboratory in Pretoria on 28 July 2022, a day after it was collected from Leratong Crisis Centre. A copy of the SAP13 was handed in and marked as exhibit 'Q'. Warrant officer Khuse further testified that he obtained a buccal sample from the accused for analysis and it was marked with seal number 22DBAA8023 and PA4005838598.

The medical J88

[20] The medical J88 was handed in by consent and advocate Greyling on behalf of the accused admitted the contents in terms of s220 of Act 51 of 1977. The medical report states that the complainant on count one presented with the following multiple injuries, namely:

- (a) abrasion noted to the left side of the neck posteriorly,
- (b) incised wound left upper arm on the lateral aspect,
- (c) incised wound lateral aspect of the left chest wall,
- (d) bruise to the right thigh,
- (e) abrasion to the left thigh,
- (f) abrasion to the base of the left thumb.

[21] The doctor who completed the J88 medical report stated that the multiple incised wounds were consistent with a history of being stabbed with a sharp object, to wit a knife.

[22] The doctor also took a vaginal swab which was marked with kit number 20D7AA0238.

Warrant officer Prince Eddie Neo Mmushi

[23] He testified that he is based at the Biology section of the forensic Science laboratory in Pretoria. He compiled a DNA result in respect to CA number 538/7/2022 which is in respect to count one. He received the samples on 16 December 2023 which included a swab marked CERVIS+OS PW300876169 (20D7AA0238) as well as a buccal sample marked PA4005838598 (22DBAA8023). The exhibits received could be used and he proceeded to write a DNA report. He compared the DNA profile from the swab, namely CERVIS+OS swab PW300876189 with the one from the buccal sample, namely PA4005838598 (22DBAA8023) and found it was a match. All the references on the buccal sample were present on the swab. He stated that it would be one in 53 million trillion people that would have that profile, which means only the donor of the buccal sample would have that profile. His report was marked as exhibit 'S'.

[24] The swab is from the complainant on count one and the buccal sample is the one taken by warrant officer Khuse from the accused.

Witnesses in respect to count four

R[...] T[...]

[25] This witness testified in respect to count four. She was assisted by an intermediary. She stated she was 12 years old. She did not understand the nature and import of the oath and as a result she was warned to tell the truth and the whole truth. She stated that on 26 August 2020 she was at Soul City with K[...], the complainant on count 5. They were walking in the park when they met a man who was sitting on a stone next to the road. With them were others called 'O[...] Z[...]' whose nickname is 'B[...]', 'I[...]' and 'K[...]', who is a boy. This man asked them to assist him to find wood. They walked with him. They found some wood but the man said it was not enough. He told them to accompany him further into the bush to find more wood. At this point this man chased B[...], I[...] and the male child called K[...] away. This man was now holding her and the girl child called K[...]. This man was wearing brown shoes, black trouser, black t-shirt and a brown beanie hat.

[26] The man undressed K[...] and made her lie down. He then climbed on top of her and started poking K[...] with his hand on her private part. This man then inserted his penis into the vagina of K[...]. K[...] was crying. K[...] started crying and this man hit K[...] with an open hand and fist. This witness stated that this man then ordered her to lie down and to take off her clothes. He then climbed on top of her and inserted his penis into her vagina. She was also scared and was crying when he did this. She cried because it was painful. The man did not hit her with fists, he only choked her by holding her neck whilst raping her. She stated that she was able to see the man's face.

[27] Whilst the man was raping her, the father of K[...] walked past and he ordered both K[...] and herself to put their heads down in the grass so no one could see them. K[...]’s father did not see what was happening. After the man left she

looked at her private part and noticed a lot of grass. A man then arrived and she asked him for help. This man helped them by calling the elders.

[28] Whilst the child was in the closed circuit room she identified the accused as being the man who raped her and K[...]. Although the accused was in the accused's dock, there were two other black men sitting behind the accused. She identified the accused as he had a mark on the left side of his nose closer to the base of the nose and black spots on his buttocks. She stated the man was tall and slender.

V[...] ***T[...]***

[29] This witness testified that R[...] is her daughter. She stated that R[...] had gone out that day to play with a friend. R[...] told her that on her way she was offered money by a man who asked her to pick up wood. There were two girls and four boys who were walking together. When this man and the children reached the bush area the man chased the boys away, walked deeper into the woods with the two girls and then raped them. This witness states that she was alerted to what was going on as the boys that were chased away came to make a report to her. This witness then called the members of the community and they went to the bushes to look for the two girls.

[30] R[...] told her that the man took off the panties of the two girls and made them lie on the ground and that he first raped K[...] and then R[...].

[31] This witness found the girls and they were bleeding from their private parts and their clothes were soiled as if they were rolling on the ground. R[...] was traumatised and was shaking. The ambulance was called and the girls were taken to the hospital where they received medical treatment.

[32] This witness did not know how the accused was arrested.

Refiloe Chabalala

[33] This witness stated that she is a professional nurse and midwife who was trained as a health care practitioner. Apart from obtaining a diploma in general nursing in 1987 she trained at the SAMS academy in Pretoria and obtained a diploma in primary health care in 2000. She has worked as a forensic health practitioner at Leratong crisis centre for the past 15 years and sees approximately 50 sexually assaulted patients per month. She stated that on 26 August 2020 she was on duty and she examined R[...] T[...]. The medical J88 form that she completed was marked as exhibit 'L'. She stated that the clothes of R[...] were stained with blood and the pants were soiled with grass debris. The patient was 10 years old. The child told her that she was strangled. This witness observed that there was tenderness of the neck and the child was battling to swallow. The child was very traumatised. This witness stated that the injuries she saw were consistent with strangulation. As regards the gynaecological examination, this witness observed that there was tenderness to the clitoris, There was bruising to the urethral orifice. The para-urethral folds were bruised and there was tenderness to the labia majora. There was no fresh tear, clefts or bruising to the hymen. This witness concluded that R[...] was sexually penetrated and that the version the child told her of being sexually assaulted confirmed the injuries observed by her. This witness did state that there was not full penetration but partial penetration.

Witnesses in respect to count five

K[...] J[...] M[...]

[34] This witness stated that on the day of this incident she was together with M[...], which is another name for R[...]. In their presence was I[...], B[...] and K[...] (a male). The man they met asked them to show him where he could find wood. After showing him where the wood was, this man said it was not enough and that he wanted the wood in the bush. They went further into the woods. This man then made them jump over a hole and the man held R[...] and herself. The man then pulled her, made her lie down and undressed her skirt and pantie. This man then put his hand in her private part. This man then inserted his private part into her private part. This witness then started bleeding from her private parts and she started crying. The man then moved over to R[...]. This man undressed R[...]’s pants and pantie and then put his hand in her private part. She later recalled that the man also inserted his penis

into R[...]’s vagina. R[...] told this man that her mother had told her that no one can do to her what the man intended doing. This man then inserted his hand in R[...]’s private part. At this point, this witness’ father walked past. K[...] tried to call out to her father and the man hit her and R[...] with an open hand. This man then fled. R[...] then saw a certain man and asked if he could help them. This witness then saw her mother who gave her a towel. An ambulance arrived and she was taken to hospital. This witness stated that she would not be able to identify the man who did these things to her.

S[...] R[...] N[...]

[35] This witness is the father of K[...]. He stated that on 26 August 2020 he received a report that a person took his child and his neighbour’s child so he went to look for the children. He testified that he went to where the mine dumps are and he realised the children had taken off their shoes and he followed the tracks of the footsteps. He then saw a crowd coming towards him making noise. He saw a man between himself and this crowd changing his directions running very fast and this witness gave chase. This man was running and hiding amongst the trees trying to hide from him. N[...] testified that the man was wearing a black t-shirt, a black trouser and a brown hood on his head. This man was trying to take off his top as he was running away from him. He further testified that the man out-ran him and he realized the members of community were closer to that man and decided to leave that man and go look for the children. He testified that the man was the only person that he could see at that stage. The children were found, and his daughter was bleeding from underneath. He later saw the man again and he recognised him as the man who was trying to take his top off. This man had been assaulted by the community. When he arrived the community had already taken his clothes off and he was naked. The ambulance arrived and took the children away. His child was in hospital for many days.

N[...] G[...] M[...]

[36] She testified that K[...] is her daughter and that on 26 August 2020, young boys came to call her to tell her that a man had asked them to help him to find planks

and that this man then took K[...] and R[...] away. She followed these boys and met the community who were blowing whistles. They found a man that was naked who was holding his clothes. Her daughter was also found and she was bleeding heavily from her private parts. She could not speak to her child as her child was crying bitterly and was in pain. After K[...] was discharged from hospital she told this witness that the man took off her trousers and inserted his fingers inside her private parts and then slept with her. This witness stated K[...] was in hospital for three weeks.

Doctor Saiqa Kashif

[37] Dr Kashif testified she examined K[...] on 26 August 2020 and that K[...] was six years old. The child was in terrible pain and was extremely traumatised. K[...]’s skirt was full of blood. The urethral orifice, para urethral folds were tender and bruised. The labia majora had blood stains and the labia minora was bruised, tender and blood stained. The posterior fourchette showed scarring and bleeding and there were tears at 6 o’ clock going down towards the anus. The fossa navicularis showed a laceration from the 6 o’ clock position going down to the anal area. The laceration was deep, it was bleeding and it was tender. The laceration was so deep that one could see the muscle tissue beyond the skin. There was also a swelling and a fresh tear at 6 o’ clock. The hymen was torn. Due to this laceration this witness was able to insert two fingers. In normal circumstances not even one finger could be inserted. She testified that due to the laceration K[...] sustained it could cause a deformity and that is why she recommended that the victim be referred to a gynaecologist for reconstruction, due to the severe injuries she sustained as a result of being raped. She confirmed that the victim was raped and that the penetration was consistent with forceful penetration.

I[...] L[...]

[38] This witness was in respect to count four and five. He stated that he accompanied K[...] and R[...] on the 26 August 2020. They met a man who wanted them to help him find wood. This man chased him and another boy away and the man remained in the company of K[...] and R[...]. The man was wearing a short

sleeve black t-shirt, black track pants, brown shoes and a brown hat. When this witness was asked if he could identify the man in court he was unable to.

K[...] Z[...]

[39] This witness was also in respect to count four and five. He testified that he too accompanied R[...], K[...] and I[...] and that the man chased I[...] and himself away and that the man remained in the presence of R[...] and K[...].

The accused

[40] The accused testified and his defence was a bare denial. He stated that he was at home on 26 July 2020 in respect to counts one to three and that he never committed the offences in respect to counts four to five. In respect to counts one to three he denied that the fingerprints found were his. He stated that on 26 July 2020 he was in Phase 2 at house number 7[...] E[...] B[...]. He could not remember his movements on the day of 26 July 2020. As regards counts four and five he was on his way to visit his friend Halelisani who lives in Mindalore. He was walking in the veld and he could not recall what he was wearing or whether there were people next to him. He stated that he was surprised when a group of people approached him and started hitting him with sticks. One of the patrollers sprayed him with pepper spray in his eyes. He ran towards the houses where a patroller caught him. He lost consciousness and woke up in Leratong hospital. He does not know the complainants in counts four and five.

Evaluation

Count one to three

[41] The witness K[...] A[...] P[...] corroborated the version of the complainant that the window of the house was opened and that the complainant reported to her that she was raped.

[42] The witness T[...] P[...] impressed this court. She was honest that she could not identify the man that raped her. All she could say about this man is that he was dark in complexion, of medium build with short hair and wearing a black jersey. The man was speaking to her in Setswana. She repeated that a knife was used to stab her, that she was raped and she added that the man tried to strangle her. She could not remember telling the doctor that she was hit with a fist or that the man was chubby. She also could not remember if the man put on a condom or whether he ejaculated. She stated that her cell phone was on her side table and that when she tried to take it the man pushed her on the bed, took her cell phone and jumped out of the window.

[43] Warrant officer Van Niekerk impressed this court. He stated when he arrived at the scene, the palm print was still fresh and clear and that it was on the main bedroom window.

[44] Warrant officer Moloi also impressed this Court. He gave a detailed explanation how he positively compared the palm print lifted by warrant officer Van Niekerk to the palm print of the accused.

[45] Warrant officer Mpiko did not impress this court with the mistake she made, however, her explanation as to how the mistake occurred pertaining to the booking out of the samples from the hospital instead from sergeant Khuse is accepted as being a genuine mistake and not done male fides.

[46] The issue to be decided in respect of counts one to three is whether the accused is the person that unlawfully entered the house/bedroom of the victim in count one and stabbed, raped, and forcefully took her cell phone. The DNA results identified the accused as the person who raped the victim in count one and the palm-print that was found at the crime scene placed the accused as the person who was at crime scene on the night in question.

[47] The accused's counsel agreed that the accused's denial of his right palm print being found on the window is problematic and he could not submit that the accused's version was reasonably possibly true in this regard.

Count four

[48] The witness R[...] in respect to count four, stated during cross-examination that she could not distinguish between the morning and the afternoon, but she was adamant this incident happened in the day. She confirmed she did not know the accused prior to this incident. He was initially nice to them and after he chased the boys away his demeanour changed. She stated that they did not need to show this man where to go and look for the planks. They walked a far distance. She stated the man offered them R20 to pick up the wood. She stated the brown beanie the man was wearing only covered his head. The black t-shirt was a short sleeve. She estimated this whole ordeal took about two to three hours. She stated that she had a clear view and was not far away from K[...] and next to the man when he was raping K[...]. She stated the man also undressed himself by taking off his pants. She repeated that the man put his fingers into the vagina of K[...]. She also stated the man never put on a condom when he raped K[...] or herself. She stated the area where they were raped was near the mine dumps. There were bushes around them. The man told her that if she ran away he would kill her. When K[...]’s father walked past, they told this man it was K[...]’s father and that is when the man put on his pants and ran away. She was adamant it was the accused that raped K[...] and herself. This witness impressed this court. This witness stated in cross-examination that the man spoke to them in Setswana.

[49] The witness V[...] T[...] impressed this court. She merely stated what she was told and what she observed. She admitted she may have made a mistake by saying there were four boys who had accompanied the two girls. At no stage did she attempt to implicate the accused.

[50] The witness Refiloe Chabalala is a forensic practitioner who has considerable years of dealing with sexually assaulted victims. Her findings impressed this court. She stated that there was partial penetration because there was no injury to the internal parts of the vagina. There was only injury to the outside parts of the vagina which could have been caused by either penetration by a finger or penis. The tip of a penis would only injure the outer parts of the vagina. The

version of the nurse called Refiloa Chababala is corroborated by the version of K[...] who states that when this man inserted his hand into the private part of R[...], K[...] saw her father walking past and after she tried to call out to her father, the man stopped doing what he was doing to R[...] and ran away. This explains why there was no signs of full penetration in respect to R[...] as the man was interrupted from fully penetrating R[...].

[51] The witness S[...] N[...] impressed this court. During cross-examination the only difference between his evidence and that of the children is that he was told the man had asked the children to find planks and not wood, however, this is immaterial as the child I[...] said planks and wood are the same. This witness impressed this court.

Count five

[52] During cross examination, K[...] stated that this incident happened in the day around two in the afternoon and that it was not raining that day. This witness could not remember what language this man spoke to them in. She stated that when they met the man they were on their way to the swing and he was seated on stone near a tap. This witness stated that the man asked them for wood, not planks. This witness stated that the man inserted his hand in her private part. She remembered that the man's clothing was a brown hat, a black short sleeve t-shirt, a black trouser and brown shoes. As regards how long the man was in their company she stated it was for a while. She stated that man had a knife. This witness did contradict herself as she first stated the man inserted his hand in R[...]’s private part and then she stated the man did not put his hand in R[...]’s private part. This witness did not see the man strangling R[...] during the rape and neither did this man hit K[...] with a fist. She repeated that when this man was raping her her father passed by and she tried to alert him by screaming but the man slapped her with an open hand. She did not hear the man threatening R[...] that he would kill her if she tried to escape. She repeated she did not have a good look at the man. This witness also contradicted herself by saying that it was not R[...] who said her mother told her a man cannot do these things to her, it was herself who said it.

[53] The mother of K[...] impressed this court. She stated that K[...] told her that the man inserted his fingers and his private part into her private part.

[54] Doctor Kashif impressed this court and corroborates the fact that K[...] was raped.

Contradictions amongst state witnesses in respect to counts four and five

[55] There were some contradictions that were made by the state witnesses in their evidence. These contradictions pertain to the language the man was speaking, whether he was sitting or standing when he accosted these children, whether this incident happened in the morning or afternoon, whether the incident happened during a holiday or a weekend, who was grabbed first by the man and whether the black pants the man was wearing were track suit pants or trousers.

[56] R[...] and K[...] also contradict each other whether the man hit R[...] with a fist and whether the man was in possession of a knife or not.

[57] In the matter of *S v Gentle 2005*,¹ the Supreme Court of Appeal stated that if the evidence of the complainant differs in significant detail from the evidence of other State witnesses, the court must critically examine the differences with a view to establishing whether the complainant's evidence is reliable.²

[58] In the matter of *S v Oosthuizen*³ it was held that not every error made by a witness affects his credibility, in each case the trier of fact has to take into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness's evidence.⁴

[59] This court finds that the inconsistencies and difference were of a relatively minor nature and the sort of thing to be expected from honest but imperfect

¹ *S v Gentle 2005* (1) SACR 420 SCA at 430- 430c.

² *Ibid* at 430- 430c.

³ *S v Oosthuizen 1982*(3) SA 571 (T).

⁴ *Ibid* at 576 G – H.

recollections, observations and reconstructions. If anything, the contradictions point away from a conspiracy to falsely implicate the accused.

Count 4 and 5

[60] Regarding count 4 and 5, the question is whether the accused is the person who the complainants in respect of the said counts referred to. The state witness were credible witnesses in their testimony.

[61] Both rape victims in respect to count four and five corroborate each other that this man raped them.

[62] All these kids corroborate each other that the man that took K[...] and R[...] away was wearing a black t-shirt, black pants and a brown covering on his head. Some witnesses corroborate each other that the accused was also wearing brown shoes. Mr N[...] also saw the man was wearing the same clothing.

[63] I[...] told the court that the man that asked them to go and show him where he can get woods at the bushes had a gap in the front part of his teeth and a partially broken tooth. When the accused came to testify, it was confirmed that the accused did in fact have a gap in his upper front teeth and also a partially broken tooth on the upper front teeth. There is no way that I[...] could have seen this from the closed circuit room. In fact, the only way he could have remembered this is if he was very close to the accused when the incident happened. Prior to the accused testifying, no one could see this gap in his front teeth as the accused for most part of the trial had his head facing down and one would have to have been very close to the accused to be able to see this gap. I[...] also stated that he remembered this man had a faint white scar on the left side of his nose. This was also confirmed when the accused came to testify.

[64] The evidence of I[...] corroborated the evidence of R[...] who also remembered the man had a white scar on the left side of his nose. I[...] was a very good witness and impressed this court. It is clear that he was not told to point out the accused in court, in fact when asked if he saw the accused in court he said 'no'.

What is important of I[...]’s evidence is that when the accused was arrested by the community they brought the accused back to I[...] and asked him if this was the man that they had met and Iwe had confirmed it was the man. He also confirmed the man was naked when he saw him.

[65] R[...] is the only child who could identify the accused in court. In *S v Mthetwa* 1972 (3) SA 766 (A) Holmes AJ at 768 A-C commented that because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused’s face, voice, build, gait, and dress; the result of identification parades, if any; and of course, the evidence by or on behalf of the accused. This court finds R[...] was an honest child. She could even remember black spots on the buttocks of the accused as well as the white scar below his nose which suggests she must have had a good opportunity to observe him. Her identification of the accused is corroborated by I[...] which makes her identification reliable. R[...] on count four as well as the complainant on count one both state that the man who raped them spoke Setswana.

The accused

[66] He could not explain to the court as to why he was linked to the offences that were preferred against him by the witnesses that testified in court. His evidence was full of improbabilities.

[67] He disputed that he is the perpetrator in respect to count one to three. However, he could not explain during cross-examination how his prints landed on the window where they were lifted. The accused could not explain why the state witnesses on count one would want to falsely implicate him. The accused also could not explain why he never opened a case of assault against the people who assaulted him in respect to count four and five.

[68] When considering a criminal case, it is important to consider the probabilities from the case as a whole to determine whether the State has proved the guilt of the accused beyond reasonable doubt. This means a court must look at the evidence of the state witnesses as well as that of the accused.

[69] The state witnesses impressed this court. This court cannot find any reason why the state witnesses in respect to count one to three, with specific reference to warrant officer Moloi would say it is the accused's finger prints. The complainant on count one could not identify the perpetrator. So there was no collaboration between the complainant and warrant officer Moloi. The fact that the fingerprints of accused were found on the window pane is because he touched that window. As regards the DNA results, it is true that there is no proper evidence pertaining to the chain of the buccal sample of accused one, however, the analysis of his buccal sample and the swab taken from the complainant on count one is conclusive in that they are a match. The accused's buccal sample and the numbers of the evidence bag and the serial number of the buccal sample matched the information on exhibit 'S' which warrant officer MMushi analysed. This means the accused did not use a condom when he raped the complainant on count one. The accused's denial of ever being at the premises of the complainant on count one to three is rejected as false and not reasonably possibly true.

[70] In respect to counts four and five, this accused was identified by R[...] and the evidence of I[...] explaining the white scar below the accused's nose to the left, corroborates the evidence of R[...]. I[...] also confirmed the accused was the man immediately after he was arrested. If I[...] had been coached to point out the accused in court he would have done that. Yet he did not do it. However, his recollection of the gap in the teeth and the partially broken tooth of the accused shows beyond doubt that the accused before court is the man whom these children saw on 26 August 2020. The accused's version is rejected as false and not reasonably possibly true on all the counts.

Findings

[71] In respect to count one this court finds that the accused broke into the house and that he raped the complainant. The defence counsel disputes that count two is a separate offence. This court disagrees. It is clear that after the accused entered the room, he first stabbed the complainant. After the complainant jumped off the bed to go and look for something to protect herself, the accused pushed her back onto the bed and then raped her. It is clear this is a separate offence and not a continuing offence. It is also clear that in respect to count three the complainant states that she tried to reach her cell phone to prevent the accused from taking it. It is at this stage that he pushed her back onto the bed and took the phone. It is clear that there was force used to remove the cell phone from the complainant's possession and that due to the accused being in possession of a knife that the state has successfully proven that there was robbery with aggravating circumstances.

[72] In respect to count four, it is clear that partial penetration is sufficient for the purposes of rape as defined in s3 of the Sexual Offences and Related Matters Act 32 of 2007. In respect to count five there is no doubt that there was full penetration of the complainant's vagina.

[73] Accordingly the following finding is made:

- (a) In respect to count one the accused is found guilty of housebreaking with intention to rape and rape and that the rape falls within the provisions of s51(1) of Act 105 of 1998 in that there was the infliction of grievous bodily harm.
- (b) In respect to count two the accused is found guilty of attempted rape.
- (c) In respect to count three the accused is found guilty of robbery with aggravating circumstances.
- (d) In respect to count four the accused is found guilty of rape.
- (e) In respect to count five the accused is found guilty of rape.

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JUDGE OF THE HIGH COURT
JOHANNESBURG

Date Heard:	19 March 2024
Judgment handed down:	25 March 2024

Appearances:

On behalf of the State:	Adv. E Moseki
Instructed by:	Office of the DPP, Johannesburg
On behalf of the Accused:	Adv. R Greyling
Instructed by:	Legal-Aid SA