

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape High Court, Kimberley)

Case No: K/S 38/10
Heard: 01-28/02/2011
01-22/03/2011
Delivered: 03/05/2011

In the matter between:

THE STATE

v

FRANS OLIPHANT

Accused

JUDGMENT

KGOMO JP

- 1] The accused, a 38 year old male of Galeshewe, Kimberley, is arraigned before me on ten charges. The eleventh charge, murder, which would have been the culmination of the kidnapping charge (Count 9) was withdrawn for tactical reasons at the inception of the trial. Adv (Ms) Catherine Jansen, a senior state advocate in the office of the Director of Public Prosecutions, represents the state and an experienced attorney attached to the Legal Aid Board, Mr Andries Van Tonder, appears for the accused.

- 2] Counts 1 to 7 relate to one complainant, Ms D, of Galeshewe, Kimberley, who was born in October 1986. She gave evidence in camera by virtue of the intimate details of a sexual nature in

respect of some of the offences (S153(3) of the **Criminal Procedure Act**, 51 of 1977 (CPA)).

- 3] It is common cause that during February/March 2006 the accused took a fancy to the then 20 year old Ms D and obtained her cellphone number from her after several attempts. This encounter developed into a love relationship and ultimately into a sexual relationship. There is a dispute between Ms D and the accused as regards when the first sexual encounter took place and when the love relationship was terminated. According to Ms D they were first intimate in late 2007 at a place called Frans' Farm next to Phutanang suburb and that their love relationship came to end in February 2009. The accused on the other hand contend that their sexual debut occurred in 2006 at the Karin Muir Swimming Pools and that they parted ways in September 2009. The above summary circumscribes the period within which the offences in Counts 1 – 5 are alleged to have taken place. Counts 6 (Arson) and 7 (Attempted murder) relate to offences which are said to have occurred on 14 November 2009.
- 4] I wish to state at this early stage that Ms D was an exceedingly good and honest witness. At no stage did she embellish her testimony, nor did she exaggerate same to portray the accused in a bad light. On the contrary, were it not for the police ineptitude in respect of the assault charge in Count 5 and the kidnapping of Rehanna Kwenia Moshoeshe (a 15-years old girl) (Count 9) pertaining to her disappearance on 21 February 2010, Ms D would only have pursued that assault charge as well as the Arson and Attempted murder offences in respect of which she had laid charges in November 2009. On the other hand, let it be said already, the accused was pathetic and a pathological liar as a witness. Therefore, unless Ms D's evidence is inconsistent

with the probabilities or displays clear error I will prefer her evidence above that of the accused when a conflict exists. This much Mr Van Tonder fairly conceded.

I now deal with the specific offences.

COUNT 1: Assault with the intention to do Grievous Bodily Harm.

- 5] The state alleges that during or about September 2007 the accused wrongfully and unlawfully assaulted Ms D in Galeshewe, Kimberley, with the intent to harm her seriously. Ms D testified that between 2006 and September 2007 the accused plied her with small gifts like airtime, chips and chocolates. They also went to places of entertainment around Kimberley. They would sometimes go to isolated spots where they would just make small talk, kiss and take leave of each other.
- 6] More pertinently, a momentous occasion was the day after the accused had taken Ms D out to the Choctow Spur in Kimberley where they had lunch and parted company around 13h00. The day after the Choctow Spur lunch between 10h00 and 11h00 he drove Ms D to the ABC Graveyard in Galeshewe. He locked or caused Ms D to lock all the vehicle doors. He slapped Ms D and caused her head to bang against the car window. He tugged at her braided hair. As he did so he enquired where she had been the previous day and what she had been up to. He punched her in the waist with clenched fists.
- 7] The accused also throttled the complainant intermittently and asked her whether she loved him. At times she lost her voice as a result of being throttled. When she could utter a word she told

him that she indeed loved him. He did not believe her because he demanded that she remove her panties for him to inspect her private parts. She disobeyed him. He did not insist because she asked for forgiveness although she had done nothing wrong. The accused admonished her not to anger "Papa" again and that he will refrain from repeating the assaults. He took her home. Her hips were painful where he pounded her and she sustained a swelling in the face. She did not report the incident to the police or to anyone else because the accused apologised and pleaded with her to keep the occurrence to herself.

- 8] The accused dismisses his implication in this occurrence as a total fabrication. His bland explanation is that not only did he not assault her but they never even went to the ABC Cemetery.
- 9] I am satisfied that Ms D did not make up the ABC Cemetery incident and that she was indeed assaulted and abused as she described. I am however, not entirely persuaded that the evidence establishes assault with intent to do grievous bodily harm. He is no doubt guilty of assault common.

ON COUNT 1: The accused is found guilty of Common Assault.

COUNT 2: Rape (Read with or as contemplated in S3 read with ss 1, 56, 58, 59 and 60 of Act 32 of 2007, and also read with S 51 of Act 105 of 1997)

- 10] The state indicts the accused with having committed rape in that during December 2007 in Galeshewe, Kimberley, he raped Ms D or committed an unlawful and intentional sexual penetrative act with her without her consent.

- 11] Ms D testified that during December 2007 the accused collected her by car from a pre-arranged place. She enquired from him where they were headed to. He informed her only that it would be convenient for them to park in the shade and out of sight. He drove to a place called Frans' Farm (the identity in names is fortuitous). They kissed and fondled. The accused proposed that they engage in sexual intercourse. Speaking in Afrikaans she gives this narrative (the translation is mine):

"I said no, but he insisted. I said no. He was adamant. He then said he provided me with everything that I asked of him but I refused to give him what he wanted. He said every time when we have to reach that point ("dat ons moet daar kom") then I always have stories.

PP: *When you reach what point? == When we come to the veld.*

PP: *Yes = = He insisted. I still refused. I ultimately submitted because we were in the veld and there was nothing that I could do. He undressed himself and put on a condom. I was wearing a short skirt. He simply pushed it up (to the waist). (She sobbs).*

PP: *Drink a bit of water. == He pushed my panty to a side and inserted his penis into my vagina. He held my hands tight. I told him that I will also hold him tight so that he could finish (quickly)."*

- 12] Ms D testified that after this unwelcome sexual encounter the accused drove her to an agreed place where she alighted. He phoned her later on to enquire whether she was well and whether she enjoyed the copulation. She told him she did not because he was too rough. She enquired why he was so rough. He told her it was because he had to wait so long (for this to

happen). Asked by state counsel why she refused to have sexual intercourse with the accused the complainant said she feared being caught in the act (by passers-by).

- 13] The implication seems to be that had the venue been more secluded or more conducive the consent outcome may have been different. What I also read into the situation seems to be more a case that the complainant relented rather than that she submitted, her actual words notwithstanding. She says: "Ek het ingege" (I gave in). The matter does not end there though. One has to look at indicators of what went before and transpired subsequently, which complicates a decision on this specific issue:
 - 13.1 The complainant did not lay a charge of rape until she was approached by the police in about February/March 2010 after the disappearance of Ms Rehanna Moshoeshoe on 21 February 2010. At that stage Ms D was 23 years of age. She says she did not lay a charge because the accused expressed contrition and she forgave his misdeeds.
 - 13.2 It was common cause that subsequent to the first sexual encounter (on either version) Ms D and the accused had consensual sexual intercourse on numerous occasions. They also continued with their love relationship until it was terminated by Ms D during February/March 2009.
 - 13.3 More pivotally, whereas the complainant initially evidently said no, and no means no, Ms D's hardened attitude seems to have mellowed to the point to which the accused may have interpreted her attenuated conduct as a change of mind and therefore consent to sexual intercourse. There was no assault. I am not in the least suggesting that an assault should be a prelude to a conviction on rape.
- 14] The accused's version, as pointed out earlier in para 3, is that

their first sexual rendezvous was at the Karen Muir Swimming Pool in 2006. According to him they never went to Frans' Farm and that the alleged act at this place was a figment of Ms D's fertile imagination.

I reject as false the accused's denial of the occurrences at Frans' Farm and I accept Ms D's account of the events. The question that remains for determination is whether the facts adverted to constitute the crime of rape. In my view the accused scorned the complainant; he abused her; he did not treat her like a lady. Her only complaint to the accused (and none to anyone else) when he phoned her was that he was over-exuberant during the sexual act. Notwithstanding the complainant's honesty and truthfulness and the accused's mendacity as a witness I find myself unable to find that the state proved its rape case in respect of Count 2 beyond a reasonable doubt.

VERDICT IN RESPECT OF COUNT 2: RAPE : The accused is found not guilty and is acquitted.

COUNT 3: Rape - (Read with or as contemplated in S3 read with ss 1, 56, 58, 59 and 60 of Act 32 of 2007, also read with S 51 of Act 105 of 1997).

15] During or about December 2008 Ms D and her two friends, Ms Motlalepule and Ms Kgalapa, accompanied the accused to an entertainment event at the Kimberley Show Grounds where they met Ms D's ex-boyfriend by chance. Ms D exchanged greetings with him. This excited the ire of the accused so much so that he promptly ordered that they leave; prematurely. They dropped off Motlalepule and Kgalapa (who are sisters) at their home.

16] Whilst the two were driving back home (so to speak) the

accused slapped Ms D in the face. She was a front passenger. She asked him to allow her to alight. The accused on the contrary drove faster and told her to alight with the car speeding. He insulted her, calling her a prostitute and pummeled her with clenched fists in the hip. She screamed and cried. He pulled her hair and raved on until they reached an open veld beyond a place called Club 3000. It was then already after 24h00 at night or the early morning of the night before. He ordered her with menaces to undress. As she did so he continually assaulted her. He threatened to kill her and said she did not listen to him and cannot refrain from staying away from other men. He asked her whether he does not satisfy her sexually.

- 17] When they were both undressed, Ms D wearing only her brassiere (bra), he asked her to mount him. She refused. He pulled her braided hair, jerking her head backwards. He then gratuitously inserted his finger into her private parts. She tried to break the grip on her hair. The accused simulated sexual thrusts with his finger in her private parts. He instructed her to suck his penis. He was not wearing a condom. She refused. He then banged her head against the steering wheel.
- 18] The accused thereafter insulted the complainant and ordered her out of his vehicle. Except for her bra and shoes she was still naked. She left the car in that state. When she was some distance away he ordered her back, again with menaces. She boarded the vehicle because, she says, her clothes were in the vehicle. She dressed up and the accused drove her to her place.
- 19] Ms D testified that the accused was still very angry when they arrived at her place. He ordered her there to undress, which she

did. She remained only with her bra. The accused undressed himself. He made her lie in contorted positions. She did what she was told because she feared being assaulted once more. She cried. He covered her mouth and scolded her: "You making noise, bitch!" He muffled her cries so that Ms D's landlady should not be alerted. The accused later penetrated her sexually from the rear. No condom was used. He hurt her. When she complained he told her that is what she was looking for.

- 20] When the accused was through he took her cellphone and locked her in her room. She asked him why he did so. He said he would be back and warned her not to raise the alarm. It was then around 03h00 in the morning. She was unable to escape. She feared that the accused would return at any time and harm her. She cried and was fearful. The accused returned at 06h00. He handed back her phone. He asked her whether she was alright. She complained of a headache. He went to a nearby shop and bought her headache tablets.
- 21] Ms D states that her "pre-rape" afflicted bladder was aggravated as a result of the sexual assault on her. This may even have been a sequel to the fist blows to the hip. Her private parts were painful as a result of the unlubricated sexual intercourse and the inconsiderate manner in which the accused went about the encounter. She sustained a lump to her forehead which resulted from the accused bumping her head against the steering wheel. The injury was painful. Motlalepule Makena noticed the injury and enquired what happened. Ms D told her that she fought with the accused. She did not elaborate. Motlalepule urged her to press charges. Ms D was reluctant because the accused threatened to harm her if she did.

- 22] Motlalepule corroborates in broad outline the account given by Ms D on the events that took place in her presence. In particular that the accused abruptly terminated their excursion to the Kimberley Show Grounds. She also observed an abraded lump on complainant's forehead and stated that the complainant reported that the accused drove her into the veld and assaulted her, but did not expatiate.
- 23] The accused denies that he assaulted the complainant on the occasion of the Kimberley Show Grounds excursion. In fact he states that he never went to such a place with the complainant, Motlalepule and Kgalapa. He says they went elsewhere and there was a fifth person, a male, with them. He further denies that he drove complainant into the veld in the vicinity of Club 3000 where it is alleged he indecently assaulted her. He also denies that he raped the complainant on that occasion.
- 24] This alleged rape incident is different from what occurred in respect of the rape charge in Count 2 on which the accused has already been exonerated. In respect of Count 3 what stands out is that the accused was angry that Ms D exchanged greetings with her ex-boyfriend. He cut their night out short. He dispatched complainant's friends unceremoniously so that he could be alone with her. He assaulted her as punishment. Matlalepule confirmed the visible injury. He indecently assaulted her in the veld at Club 3000; then drove her to her residence where, far from being loving, displayed some sadistic sexual deviant behaviour. After ravaging her he incarcerated her from 03h00 to 06h00 and removed her means of communication – her cellphone. He threatened to harm or kill her if she reported the incident. She screamed and cried at all these places where he maltreated her. She clearly and unequivocally said "NO" to

his sexual approaches but he nevertheless imposed himself upon her. The mandatory corroboration in sexual cases was outlawed in **S v Jackson** 1998(1) SACR 470 (SCA) at 474f – 477j.

- 25] Complainant clearly did not consent to sexual intercourse on this occasion. In any event there is no way that she could have given any valid consent under the circumstances already described.

VERDICT in respect of Count 3: Rape: The accused is found guilty as charged.

COUNT 4: RAPE (Ditto).

- 26] The state accuses the accused that he raped Ms D on numerous occasions between January 2009 and April 2009. The evidence at some point became blurry because it was common cause that on occasion the pair had consensual sexual intercourse during this period.
- 27] To illustrate my point I quote excerpts that reflect the most crucial portions of Ms D's evidence. In fact, outside of these quotations there is very little to discover that is material to this charge.
- 28] Ms D secured a detached fairly decent dwelling at Retswelele, Galeshewe, which she rented from Ms Sandra Pholo. The year was 2008. The couple's relationship had in the meantime soured to the point of being stormy and sometimes even acrimonious. Ms D explains (the translation is mine):
- 29.1 "**PP**: *If you say it got worse, what got worse = = Frans phoned me incessantly enquiring whether I was home. If I was at work he wanted to know what time I will be home.*

If I received calls he wanted to know who called and what we discussed.

PP: *How did he know you received calls? == He always inspected my cellphone to check who called and what time the call was made.*

PP: *Yes == He carried on like that. When I arrived home I found him there. Waiting for me.*

PP: *Yes == Sometimes before I departed for work he was already there even when I reported on duty at 06h00 in the morning ---.*

PP: *He would arrive before that time (06h00)? == Before it, yes, so that we could have sex before I go to work ---.*

PP: *When it came to the sexual relations what was your feeling? == I would say no, I am tired. I would say I am about to report for duty. He would say no, I will be quick. If I told him I don't want to have sex he would say who should he get sex from; I am his girlfriend. I must give him what he wanted.*

PP: *What would you then do? == He always pinned me down, always. If I cry he tells me to shut up.*

PP: *When he pins you down like that what then follows? == I would push him away. He would grip my hands. He would then perform quick sexual thrusts. I would then just lie still so that he could finish.*

Court: *Who undresses who? == He undressed himself--.*
He would lift my nighty (nightdress) and remove my panty. We always fought when we reached that stage.

29.2 **PP:** *This practice where the accused just comes and demands sex and you refuse and he nevertheless proceeds to have sex with you, for what period did this endure? ==*

From late December (or from just after December) 2008 until February 2009.”

29] During February 2009 the accused pestered the complainant so badly – morning, night and day – that she decided that she has had enough and terminated the relationship. She did so in no uncertain terms: by telling him it was all over; by not answering his calls; by not opening for him except when he collected his personal belongings or when she later had the security of her new boyfriend, Mr CT. She also emphatically rejected any sexual advances or sweet talk.

30] In my view the evidence in this respect is too diffuse and fluid to enable the accused to make or advance a proper defence. This is so because apart from what has been addressed in this rape charge (Count 4) it was common cause that the couple intermittently had consensual sex. These latter escapades, and they were escapades, were not identified or isolated either by way of occurrences or by specific or approximate dates. Inherent in this portion of Ms D’s evidence is serious prejudice to the accused. For this reason there is no need to deal with the version or the defence of the accused on this charge which, anyhow, amounts to a lukewarm bland denial.

COUNT 4: RAPE – The accused is found not guilty and acquitted.

COUNT 5: Assault with the intent to do Grievous Bodily Harm.

31] In this count the accused is said to have assault Ms D in her residence described in Count 4, above. Ms D testified that on a

particular day in June 2009 (at least three months after she had broken off their love relationship) Sandra Pholo (her landlady) phoned her at work to warn her that the accused was prowling her street and that she must access her place unobtrusively by using a back entrance. On her arrival Sandra waited for her to ensure she was safe. She was scared and whiled away time at Sandra's place. Later she ventured to her place to put away the stuff she brought from work and told Sandra she would be back.

32] Shortly after she had entered her dwelling the accused let himself in unannounced. He closed the door behind him. She told him he was unwelcome. He responded: "*Papa just want to talk.*" He asked Ms D to hug him. She refused. He hugged her against her will and clung onto her. She tried to push him away but was unable to. He pushed her on the bed and throttled her with both hands. She tried to scream but, understandably, could not. The accused vice-locked complainant's legs with his. She tigerishly clawed his face with her nails. His face bled and some skin-tissue lodged in her nails.

33] The accused, apparently after a brief respite, throttled the complainant again. This interlude must have allowed Ms D a brief scream. She heard a frothy sound as someone was filling a container from a tap next to her place. The accused must have heard that as well because he released his grip on her throat. She shouted as loud as she could: "*Sorry Papa*". As her vocal cords recovered she shouted. "*What are you doing!*" She then heard Tumi (Boitumelo), Sandra Pholo's daughter, calling out to Sandra : "*Ms D is inside her room with Frans, they are fighting.*"

34] As Sandra approached she spoke aloud and said: "Frans does not have ears. I don't know what he wants here. I told him

already that he must keep away from my premises.” The accused was very angry. He left Ms D’s dwelling. Sandra asked him what was happening. He said he had done nothing to Ms D. Sandra enquired why the accused’s face was full of scratches and complainant’s neck was blue. He told Sandra to ask the complainant what happened and left the premises through the backyard. The matter was reported to the police at Kagisho Police Station. Strange enough the police would not investigate the complaint and told Ms D that they deemed this to be a domestic violence issue for which she should obtain a restraining order.

35] Tumi and Sandra also testified. They confirmed the complainant’s version in all material respects on aspects which occurred in their presence. Sandra further testified on how the accused prowled their street earlier during the day of this incident; how she warned complainant to be vigilant and what measures were put in place to safeguard her on other days. Tumi and Sandra were good, credible and undiscredited witnesses. I accept their and Ms D’s evidence on this aspect without reservation.

36] The accused’s version is that in June 2009 he and Ms D were still in love and that he had visited her as his girlfriend. He denied assaulting her. He accused these three witnesses of having conspired to implicate him falsely. He has no explanation why he literally fled from the scene of crime and why he did not respond to Sandra on what took place between them. It is evident that he decamped because he did not want Sandra and Tumi to see the scratch marks to his face tattooed by Ms D.

37] The accused had no business being on the premises. He was a

jilted bitter former lover who trespassed on the premises. He certainly intended to cause Ms D serious bodily harm. She was fortuitously saved from serious harm by Tumi's tap running water. I reject his account as false. I am satisfied that the state proved its case on this count (Count 5) beyond a reasonable doubt.

VERDICT ON COUNT 5: Assault with the intent to do grievous bodily harm. Guilty as charged.

COUNTS 6 & 7 : Arson and Attempted Murder.

- 38] These counts will be treated together in that the Arson charge gave rise to the Attempted Murder allegation on the lives of Ms D and her boyfriend Mr CT. These incidents took place during the evening of 14 November 2009.
- 39] A bit of background on what transpired after the accused assaulted the complainant as described in Count 5 is necessary. The complainant testified that there was a period of about a month during which the accused did not phone or contact her or lurk around her premises. The phone calls then started pouring in from him. Shortly thereafter the accused had the temerity to text (SMS) her his full names, identity number and residential address and dared her to interdict him. After the lapse of sometime, apparently a matter of weeks, he enquired whether Ms D carried out her legal threat. The complainant never obtained the interdict. The reasons are not material for a decision in respect of Counts 6 and 7.
- 40] Ms D, feeling being stalked and harassed by the accused, who had also bombarded her with text messages and threats to her life, acquired a new cellphone number. The accused then sent

his friend, Mr Robert Edwards (who testified on these matters and the kidnapping charge in Count 9), and complainant's friend, Carol, to plead for forgiveness and to tell Ms D that he still loved her. He also sought her contact numbers through them, to no avail.

- 41] During November 2009, but before her place caught fire on 14 November, Sandra phoned Ms D over several days to alert her that the accused is back on the beat prowling her neighbourhood and cautioned her resultantly to watch her back. The complainant also saw the accused on several occasions in the vicinity when she was off duty. He was just loitering.
- 42] On the night to which the Arson and Attempted murder charges relate (14/11/2009) Ms D was in the company of her boyfriend, Mr CT, in her residence. It was before 20h00. She heard the distinctive knock of the accused on her door. The knocker did not identify himself/herself. She peeped through a window but saw no one. The couple immediately thereafter decided to visit Mr CT's mother in Madalane Section in the Kimberley area. Ms D reported to Sandra what had happened and told her they would be back later that evening.
- 43] At around 22h00 Tumi, referred to in Count 5, phoned Ms D and reported that her place was on fire. Complainant thought Tumi was joking. It took Sandra to nudge the pair into rushing back. On seeing the destruction of her property, Ms D had done fairly well in accumulating some assets, she passed out and regained her consciousness much later in Sandra's house. To add insult to injury the complainant paid for the refurbishment of her burnt out place, let alone replacing her own household goods.

- 44] The state relies on circumstantial evidence bolstered by an alleged confession the accused made to David Moshoeshoe, a fellow prisoner at Kimberley prison.
- 45] The state adduced evidence to show that the accused is passionately possessive. This was shown by the accused throwing tantrums at the Kimberley Show Grounds when Ms D merely exchanged greetings with her ex-boyfriend. Robert Edwards, his friend, says the accused shielded Ms D from him like an alpha-male even though he made no move on her. The evidence thus far adverted to and other instances that need not be canvassed, is demonstrative of the fact that the accused just about kept Ms D under 24/7 surveillance. If he could he would have kept her in a capsule to which only he had access.
- 46] The accused has threatened Ms D face-to-face that if he cannot have her no one would. He would kill her and commit suicide. He repeated this to Robert Edwards, prompting him to try and mend relations between the pair to avert such a catastrophe. It was common cause that before the arson incident, but after Ms D nullified their relationship, the accused saw her and Mr CT together in Ms D's room. He summoned Ms D's aunt to mediate. When she could or would not do so he used Ms D's cousin, Letlhogonolo (Tlhogi) as a ploy and decoy to gain access to her residence. Once he was inside he caused a scene and drew a knife on Mr CT.
- 47] State counsel argued vehemently that the accused had a strong motive and ample opportunity to eliminate both Ms D and Mr CT. She submitted that when he set the place on fire he was merely fulfilling his earlier threat.

- 48] This is where the evidence of David Moshoeshoe comes in on this subject-matter. David testified as follows:

PP: *Ja ==He mentioned a lady by the name of [Ms D]. He said Ms D was his ex-girlfriend and then he said Ms D was trying to spite him, so Ms D had to open another case against him. And then he said that previously he tried to burn Ms D inside the house where she was living, but [un]fortunately Ms D was not there in the house.*

PP: *He tried to burn Ms D in the house where she was living. == Ja, but Ms D was not in the house. That is what he told me.*

COURT: *But unfortunately she was not in the house? == Ja, unfortunately she was not in the house.*

PP: *Yes == And he said that if he can get bail, if he can go out on bail, he will kill Ms D. But from the facial expression that he gave me I could see that he meant what he said."*

- 49] David testified how he had gained the accused's confidence. The details on how he went about will emerge when the kidnapping case, Count 9, is dealt with. David proceeded to say that he did not know Ms D before the accused spoke about her. The accused was in his sound and sober senses and was not coerced or unduly influenced when he made this and other statements to be addressed in Counts 8 (the theft of a laptop) and Count 9.

- 50] Mr Van Tonder, for the accused, contended that the attitude or version or defence of his client is that all these statements attributed to his client, in particular by David, never took place. In elaboration he stated that his client was not and indeed could not have been forced or unduly influenced to make the statements that he was not the author of. The accused elected at the trial-within-a-trial stage not to controvert the evidence pertaining to the statements imputed to him. I accordingly

admitted the accused's statements in evidence.

- 51] At the close of the trial, having heard accused's evidence on this aspect as well, which amounts to a bare denial, I have no reason to change my earlier ruling having regard to the question of credibility on both sides. David was an impressive witness with a phenomenal memory and a head for detail. It will be seen much later that the state produced independent evidence to corroborate his evidence on a number of matters he testified to or there exists circumstances reducing the risk of a wrong conviction. See **S v Hlapezula and Others** 1965(4) SA 439 (A) at 440D - H.
- 52] Ms D and Mr CT testified that they had switched off the electric lights and the electric stove was also off when they left. There were no fuelled lights (candles, paraffin or gas lights) on.
- 53] The undisputed evidence of Captain Gerrie Steenkamp, a trained escort of a Fire Investigation Dog, testified that his dog did not detect or catch the scent of any accelerant like petrol, diesel, spirits, paraffin, turpentine or the like. The investigation by him was only carried out on 16 November 2009 (two days later) because he was the only trained/expert officer in the Northern Cape Province and was committed elsewhere. According to the captain the fire was started at the curtain of a broken window which caused the bed and bedding underneath it to catch fire, which fire engulfed the place and destroyed the contents.
- 54] There may be some discrepancy in the evidence of David and Capt Steenkamp. During the cross-examination of David by Mr Van Tonder the following emerged:
- PP:** *Did he tell you how he set fire to the house? == Ja. He did.*

PP: *How did he burn the house? == He said that he poured petrol around the house and lit it.*

PP: *Did he tell you the time that he set fire to the house, did he know whether Ms D was inside or not? == He didn't indicate, but it appeared to me that he did not know because for the fact that he mentioned that his intention was to burn Ms D. It simply meant that he did not know that she wasn't inside.*

PP: *Now I want you to comment on this if you can. The evidence regarding the arson case showed that the fire was started at a window of the house or the room. == I won't have knowledge of that because he did not mention that to me. All I know is just that he burned the house."*

In my view this discrepancy is not material because the accused admitted in the statement to David to burning the place with the specific intention to kill Ms D. Mr Van Tonder conceded that David's evidence on this point is fatal against his client if accepted.

55] When the accused failed to secure the assistance of David to have the docket involving Ms D destroyed, he independently contacted an administration clerk at the Kimberley Magistrate's office, Ms Meschia Kedibone Boikanyo, several times with a view to having the docket disappear from the prosecutor's office for a fee. The accused conceded making the enquiry about the docket but claims that he did so just for his information.

56] As I pointed out earlier, David did not know Ms D and knew nothing about the arson and attempted murder. I am satisfied that the accused confessed to David concerning Counts 6 and 7. Taking into account all the evidence alluded to above, some pieces of which are very strong and others less so, the

cumulative cogency thereof ensnare the accused in a net from which he cannot escape.

VERDICT ON COUNT 6 AND 7 (Arson and Attempted Murder): The accused is found guilty as charged on both counts.

COUNT 8: Theft of a laptop computer.

- 57] The evidence against the accused, though circumstantial, is overwhelming. A substantial part of the evidence was adduced on whether the accused purchased the laptop from one Moliko or Moleko and whether this nebulous individual worked for Stuttafords Van Lines furniture removals or for an entity called Work Force Group that outsources its workers commercially to other employers for a specific or undetermined period. Said with due deference, most evidence on this count was presented *ex abundante cautela*.
- 58] It is common cause that the laptop belongs to the 14 year old Vera-Ann Van den Broek. That much was testified to by herself, her mother (Mrs Elizabeth Maria Meijers) and Const. Barend Christiaan Jovner, a forensic analyst of electronic equipment, attached to the Cyber Crimes Unit of the South African Police Service (SAPS). The latter examined the laptop forensically and linked its rightful ownership to Vera-Ann whose residential address was also sourced through this method. It is an Acer laptop valued at R10 000-00.
- 59] Vera-Ann, her mother and sister were relocating from Kimberley to Langebaan, Western Cape. During the morning of 04 December 2009 three employees of Stuttafords, among them the accused, were packing the goods and household effects

belonging to Mrs Meijers and her daughters. The naive and trusting Vera-Ann concealed the laptop underneath her underwear in a large sports bag. These garments were not a put-off to the thief who extricated it. No one saw the nimble-fingered thief.

- 60] The goods were stored at the Stuttafords warehouse for a few days, apparently because two different families co-ordinated their removal. When the truck arrived a few days later at Langebaan the laptop was gone. Mrs Meijers reported the loss. Stuttafords informed her that there was nothing that could be done for her because the goods were not insured. Mrs Meijers testified that she could not afford the insurance but was surprised at her daughter's naivety or immaturity.
- 61] Cathy Riet, Ronel Roderick, Christiaan de Lange, Joe Modikwane, Itumeleng Johannes Potele, Faried Camroodien, Tsholofelo Moncho and Tebogo Mokwena testified to effect that the accused had access to the laptop during the time that the goods were packed at Queens Road 5, Kimberley, and after they were temporarily off-loaded at Stuttaford Van Lines premises. It is common cause that when the goods arrived at Langebaan with the truck, the laptop was already removed or concealed where only the accused knew. None of the witnesses knew a Moliko or Moleko who worked at Stuttaford Van Lines or the Work Force Group. The accused adjusted his testimony by saying that the workers were known by their full names and not their nicknames at work as Moleko or Moliko was. The probability is that the accused furtively slid the laptop into the knapsack that, it was common cause, he carried with him.
- 62] The laptop was unwittingly discovered through David. Having

wormed his way into the accused's trust the accused confided in David that he wanted the dockets pertaining to the cases of the disappearance of Rehanna Moshoeshoe (Count 9) and, in particular, the one pertaining to charges layed by Ms D against him to disappear for a fee. David, playing along, offered to come to his rescue through some of his friends. David told him to produce an agreed amount of money for the bribe first.

- 63] Pursuant to this arrangement the accused wrote the following letter to his cousin, Philadelphia "Delfie" Paatjies: – Exhibit "D" (translated):

"Delfie it is Frans. Give the laptop to my friend Schweps please. He will sell it for me and bring the money. I will appreciate it thank you. Don't worry he will help me. I miss you [plural] and the children a lot. Please visit me.

540 E.K Banda Street, Retswelele

Case 234-02-2010: Kagisho Police."

"Schweps" is the name that David is popularly known by. It is a derivative of his surname "Moshoeshoe", not a coldrink.

- 64] David said the following under cross-examination by Mr Van Tonder:

"Van Tonder: *What did he tell you? == He said to me that he worked at Stuttafords.*

Yes? == So there was one couple somewhere in Kimberley whom they had to remove their furniture. Apparently according to him the couple had split or divorced. So the other one was heading to Cape Town. So the stuff that they packed into the truck, he managed to steal a laptop which was in a box.

Did he tell you what he did with the box that the laptop was in? == No. He didn't. He just told me that he took it home. He did

not tell me what he did with the box. But I assumed that maybe he destroyed it.

So he didn't tell you how he managed to steal the laptop?

== As I have said he told me that the laptop was in the truck. So he stole it and he hid it in the truck. So when they came back from Cape Town, that is when he took it home."

- 65] David gave the letter to Rehanna's mother, Mrs Moshoeshoe, who gave the letter to the police. The police recovered the laptop through the aid of the aforesaid Philadelphia Paatjies.
- 66] There is no doubt in my mind in light of the foregoing evidence, and the other evidence that need not be dealt with, that the accused stole the laptop. That explains why he did not keep it at his home. Moleko or Moliko is merely a ghost created by the accused. The state has therefore proved the theft of the laptop beyond a reasonable doubt.

VERDICT: COUNT 8 – Theft of the laptop: The accused is found guilty as charged.

COUNT 10: Assault with the Intent to do grievous bodily harm.

- 67] It is convenient to deal with this charge at this stage. On 06 March 2010 whilst the accused was being interrogated on various charges canvassed in this trial he attempted to commit suicide by cutting his wrist and trying to disembowel himself with a broken bottle during a break. Warrant Officer John Chris Seeley, who was upfront in a dash to prevent him from ending his life, narrowly avoided being struck by the broken bottle which the accused hurled at him. Warrant Officer Seeley and the

other police staunched the accused's profuse bleeding.

- 68] The shards which were caused by the bottle shattering against a wall in the interrogation room are clearly depicted in the photos taken of an undisturbed scene of crime.
- 69] The accused denies the allegation and falsely claims that he was tortured. He even, wonder upon wonder, denies that he tried to commit suicide! The evidence against him is overwhelming. No less than seven witnesses (including two Colonels) testified on the same aspect. Whereas the state must be commended for its endeavour to present a watertight charge the evidence on this aspect was a bit over the top.
- 70] In the end the state proved no more than an attempt to do grievous bodily harm. The intent was there. The missile, a dangerous weapon, did not find its mark. The apprehension of danger by Seeley and the instillation of fear in him was fleeting.

VERDICT: COUNT 10 – The accused is found guilty of attempted assault to do grievous bodily harm.

COUNT 9: The kidnapping of Rehanna Moshoeshe a 15 year old student of Girls High School, Kimberley.

- 71] The state charges that the accused abducted Rehanna on Sunday 21 February 2010 from Galeshewe, Kimberley. It is common cause that she has, after more than a year, not been found nor has she made contact with her loving, but divorced, parents or with her best friend, Keneilwe Grace Motaung, who gave the Court some insides on what Rehanna planned on doing on Sunday, 21 February 2010 when they communicated via Mxit deep into the night on Saturday, 20 February 2010.

72] For tactical reasons the state withdrew the charge of murder against the accused at the inception of the trial. Having listened to the evidence I appreciate the dilemma the state finds itself in. This is best illustrated by the people she is/was part of, namely her parents Mrs Moshoeshoe and Mr Moshoeshoe. Mrs Moshoeshoe would want us to speak of her vanished daughter in the present tense because she hangs on to her faith, a wing and a prayer that Rehanna is alive somewhere but unable to make contact. Her father maintains that he is a realist and heaps high praise on the police that they left no stone unturned to locate his daughter. In his own words, he says: *"I believe that Rehanna is no more."* The present tense it shall be because the accused is in no jeopardy of being convicted of murder.

73] The crime of kidnapping has been defined and described in the **South African Criminal Law Procedure, Volume II, Third Edition** by **Milton** as follows :

"Kidnapping consists in unlawfully and intentionally depriving a person of liberty of movement and/or his/her custodians of control.

*This definition was approved and followed in **S v Blanche** 1969(2) SA 359 (W) at 360D; **S v Els** 1986(1) PH H73 (A); **S v Mellors** 1990(1) SACR 347 (w) at 350i. The definition of *Snyman Criminal Law 437 is:**

'Kidnapping consists in unlawfully and intentionally depriving a person of his/her freedom of movement and/or, if such person is a child, his/her custodians of their control over him/her.'"

I also align myself with these definitions.

74] First, how Rehanna came to know the accused. The day that

Rehanna's parents would wish to curse is Saturday, 23 January 2010. This is Keneilwe Motaung's account. She was in the company of Rehanna, walking in Galeshewe. A black BMW 1C of the latest model drove past them. They just loved the car, and were not interested in its occupants, who turned out to be the accused and the aforesaid Robert Edwards. Of importance is that Rehanna supplied her cellphone number to the accused, who tested the correctness thereof by phoning the number. This is how she captured his number: +2782 488 7854. The vehicle was driven by Robert. It was his car.

- 75] The accused introduced himself as Thabo, a fictitious name that he used to deceive those who did not know him. Whether Robert and Keneilwe exchanged contact numbers is of no consequence because they were never subsequently in touch. The accused asked whether he could phone Rehanna later. She agreed. Keneilwe and Rehanna walked to their original destination whilst the accused and Thabo drove off. Later that same afternoon (Keneilwe estimates it could have been 17h00) Thabo (the accused) called Rehanna and said they were in Green Street, West End suburb, and enquired whether they could meet. The issue was left hanging.
- 76] Around 20h00 – 21h00 whilst these girls were watching movies (films) at the home of a girlfriend, Nanase, the accused phoned Rehanna again. Rehanna reported this to Keneilwe and suggested that they should go out. Keneilwe testified: "Hey man, I was like – we are not going there." Rehanna's brother, Hussain Moshoeshoe, who was present, vehemently opposed the meeting. In the end Rehanna's father took the siblings and Keneilwe home. Little did Hussain know or suspect that he will hear a lot in two months' time about Thabo/Frans Oliphant. The

calls that accused made to Rehanna on 23 January 2010 will be dealt with at a convenient stage.

77] Keneilwe never met Thabo after this initial encounter nor did she and Rehanna ever speak about him until Saturday 20 February 2010 – a day before her disappearance. They spent the whole eve of Rehanna’s disappearance together at church and later watching TV, chatting and just relaxing. Rehanna made no mention of the accused (Thabo) until later during the night when they were at their respective homes. A few snippets from Keneilwe’s evidence relating to the Mxit chat she had with her best friend Rehanna and what Rehanna’s thinking was follows:

78.1 *"And why and when did she mention Thabo? ==*

She mentioned Thabo at night. She asked me to guess who is taking me shopping. Then I guessed wrong and then she told me it was him.

COURT: *I missed something there. It was at night? == At night on mxit. She asked me I should guess who is taking her shopping and I guessed wrong and then she told me that it was him.*

It was Thabo? == Thabo."

78.2 **"Ms JANSEN:** *And what was your reaction when she said Thabo was taking her shopping? == I put a face, like an astonished face.*

Sorry? == I put a grim face, like a shocked face on and then I was like really! And I asked her when?

And what was Rehanna’s reaction? === She told me we are leaving tomorrow. I did not question like why is he taking you there or what are you going to do. I only asked

her when and she told me tomorrow and then after that she told me that they were going to Identity and he will give her R800-00.

COURT: *They are going to Identity and what about R800-00? == And he was going to give her the R800-00 for the clothes.*

Identity is a clothing store? Is it? == Yes.

Ms JANSEN: *Where is this Identity Store? == There are two of them. She did not mention – she was not specific. She just said Identity.*

There is one in town and there is one in the mall?==She did not like – be specific.

Yes. == And then she asked me like do I not want to go with her, to go shopping tomorrow.

COURT: *This is the following day now? == This is the same night.*

No, she said do you not want to go with her the following day. == The following day.

Ja. == And then after that I told her by then that okay cool, we could go together. And then later on we started to make jokes of what could happen, like I told her that they are going to rape us and kill us.”

[79] Rehanna told Keneilwe that the accused was going to buy her clothes for the Lira Concert to be staged on Saturday 27 February 2010 (Lira is a popular South African lady singer). Keneilwe thought that she had persuaded Rehanna to defer the shopping to Friday 26 February 2010, a day prior to the Lira Concert. The girlfriends stopped chatting on Mxit between 23h00 and 24h00 because Keneilwe says she felt drowsy.

80] On Sunday 21 February 2010, the eventful day, Keneilwe spent

the day at home. She did not attempt to speak to Rehanna for the entire day. Before she went to school on Monday, 22 February 2010, Rehanna's mother arrived at Keneilwe's parental home and enquired whether Rehanna had slept over there the Saturday night. She gave a negative answer. When asked where Rehanna could be or what could have happened to her Keneilwe said she had no idea. She thought she was covering up for her missing friend to avoid conflicting versions when Rehanna shows up.

- 81] Rehanna, who was her school mate, did not show up at school that Monday morning. Enquiries were pouring in to the principal, staff and learners from various quarters. The enormity of the situation sunk in and Keneilwe co-operated fully with the authorities and Rehanna's mother in particular, as her evidence reflects. On Wednesday, 24 February 2010, Keneilwe called Rehanna on her cellphone without any success. She then sent messages on Rehanna's Mxit page and on her facebook, which messages went unanswered.
- 82] Keneilwe says that Rehanna was her parents' pride and joy. Her mother spoiled her a lot. Her father, she says, was a bit strict but was apparently fair and loving. Asked about Rehanna's personality she says: *"Wow okay, she is very trusting with everyone. She was the kind of person like if – between me and her, I am the one who always had the bad attitude. She was quite always happy and should you cry, she cries with you."*
- 83] Keneilwe displayed such a mature and calm disposition. Occasionally swallowing hard when she spoke of her friend's disappearance or when she put her foot down as when she told Rehanna that was not the route to follow. Keneilwe spoke

directly in English and did not use an interpreter. She was an exceedingly good witness. Indeed Mr Van Tonder, accused's counsel, stated in cross-examining Keneilwe:

"Now, the accused agrees with rather a lot of your testimony. I am just going to tell you or show the points where he disagrees with you."

- 84] The only aspect of significance that counsel probed was whether Keneilwe was certain that the "*Thabo*" that Rehanna referred to was the same Thabo that they had met on 23 January 2010. Keneilwe said it was because that was the only Thabo that the two of them knew. This aspect subsequently became a *non sequitur* (non-event) as the accused himself or through his counsel conceded at least that there was an agreement to meet Rehanna for shopping the following weekend (26/27 February 2010). The accused also admitted (there was no way past the phone records) that he was in telephonic contact (verbally) and via SMS with Rehanna until after 23h00 during the eve of her disappearance (Saturday, 20 February 2010).
- 85] Rehanna was staying with her mother, only. Hussain, her brother, stayed with his father elsewhere. Mrs Moshoeshoe testified that on Saturday, 20 February 2010, Rehanna arrived home at 18h00 from the afternoon session of the Seventh Day Adventist Church (a Saturday Church) which she attends with Keneilwe. Rehanna did not leave home that evening. Mrs Moshoeshoe knew nothing about the many calls Rehanna received or communications she was involved in that Saturday evening.
- 86] The Sunday morning, 21 February 2010, Mrs Moshoeshoe woke up first and did some household chores. She relates Rehanna's

last moments with her:

Ms JANSEN: Yes you can continue. == And now and then when I went into the house I heard her phone ringing in the bedroom. And then at about past 08:00 she woke up. She went to wash herself and in-between her phone was ringing. So at the time when she went out it was around past 09:00, but I am not sure, but it's after 09:00. I was still outside watering the lawn. She stood at the door saying then Mums I am coming back now. I asked her where she was going to.

Ms JANSEN: Yes? == She said she is going to town. I asked her what she was going to do in town. She said she was meeting Keneilwe. I asked her what were they going to do in town, herself and Keneilwe. She said there's someone that deposited money for her in Keneilwe's bank account. I asked who was it and she said its just someone. I asked her, how do you know that that person has deposited [the money] in the bank. She said Keneilwe called her saying she should come now to town. I said to her, since you know that we are busy with a funeral, you must come back and cook; go to my bag, take out the electricity card and R100-00 and buy electricity.

Ms JANSEN: Yes? == She took them and went out of the gate, and before she went out I asked her why is her phone so busy so early in the morning. Then she said to me it is Keneilwe calling her.

Ms JANSEN: Mrs Moshoeshoe are you fine, can we continue? == Yes, that was the last time I saw her."

- 87] Rehanna only carried a lady's bag with her. With the aid of the police (basically using a check list) it was established that she took no change of clothes or a tooth brush or make up or washing rag or additional money, apart from the R100-00 to purchase the electricity coupon. Mrs Moshoeshoe stated that

she had more money in her own bag and Rehanna did not pilfer any. This is strongly indicative thereof that Rehanna expected to be home sooner than later, as she promised.

- 88] What is immediately apparent from the evidence of Rehanna's mother and Keneilwe, whose evidence I both accept to this point, is that Rehanna was reticent to inform her mother who this secret person was whom she expected money from or she was meeting with.
- 89] Mrs Moshoeshoe assisted with the funeral arrangements of her aunt on that fateful Sunday. That is the funeral she reminded her daughter of. When Mrs Moshoeshoe left for the funeral at 13h00 Rehanna had not returned. Mrs Moshoeshoe returned home at 17h00 but Rehanna was still not home. She thought Rehanna was still with Keneilwe and went back to the place of the funeral at 18h00. When Mrs Moshoeshoe came home at 21h00 the house was in darkness. She became concerned and phoned Rehanna but her phone was off. She phoned Keneilwe but her phone was also off. She waited and later went to sleep. At 04h00 the following morning when she woke up Rehanna was still not home. She called Rehanna's father and brother to enquire whether she put up with them. The answer was in the negative. The search was on. The family spread out, starting with all Rehanna's friends and family.
- 90] Rehanna's parents obtained the accused's cellphone number from Cell C as a received call (a person that phoned Rehanna) as well as the number that Rehanna called on Sunday 21 February 2010. On advise Rehanna's father phoned the accused's number from a public phone. His evidence will be dealt with separately later on.

- 91] Mrs Moshoeshoe called a family friend, Mr Themba Ngwenya, where Rehanna sometimes puts up with his daughter with her (Mrs Moshoeshoe's) permission. She gave him the accused's cellphone number on Monday 22 February 2010. She listened in on part of the conversation between the accused and Ngwenya. How this was contrived is explained by Ngwenya at a later stage.
- 92] Both Mrs Moshoeshoe's cellphone and Rehanna's were registered in Mrs Moshoeshoe's name because they were contract phones. She and Rehanna exchanged phones because Rehanna preferred the phone her mother was using. After the investigation had been underway Mrs Moshoeshoe, in desperation, phoned the accused's number that she had received from Cell C earlier. What popped up is that Rehanna had saved accused's number under the name: "Stalker!!" (Note the two exclamation marks).
- 93] Mrs Moshoeshoe had in the meantime located Rehanna's bank card that Rehanna was unable to locate on Saturday 20 February 2010 and the day thereafter. No unauthorized withdrawals have been made from Rehanna's account nor has Rehanna since operated on the card.
- 94] Mr Moshoeshoe confirmed Mrs Moshoeshoe's evidence on aspects of the case relating to him. He is the one who phoned the cell number supplied by Cell C from a public phone. He asked who was talking. The voice on the other side identified himself as "Frans". He asked this "Frans" whether he had "any knowledge of a girl by the name of Rehanna. And then that person on the other side dropped the phone and when I tried again, the phone was on voice mail." The voice mail said something like: I am Frans Oliphant, please leave your name

and number etc. The matter was then reported to the police.

- 95] On 27 February 2010 Mr Moshoeshoe received his daughter's cellphone from a young man called Itumeleng Booysen who told him that he had picked it up with the electricity card in the veld. It was common cause that it was Rehanna's phone and that the electricity card, with a distinctive number (which need not be reflected here) which Mrs Moshoeshoe identified in court, was hers. Booysen explains in due course where and when he picked up the phone and how he linked it to the missing Rehanna.
- 96] Rehanna's parents explained how they were rudely rebuffed by the accused when, after following all the proper channels, and as a last-ditch effort to trace their daughter, they attempted to speak to him in prison. His rights were fully explained to him by the prison authorities (a Mr Malgas) on his right to remain silent and the implications of what he may disclose. The accused would not even greet them or shake their hands. He told them that if they had come to see him about their daughter's case then he should be returned to his cell, which he was. Despite being rude I will treat this incident as one in which the accused was merely exercising his constitutional right to remain silent, with no adverse inference.
- 97] I must bring in the family friend, Mr Ngwenya, at this point. He is a blind businessman, very articulate, intelligent and possessed of a retentive memory. He testified that Mrs Moshoeshoe supplied him with what turned out to be the accused's cell number on Monday, 22 February 2010. This was done after Mr Moshoeshoe had already spoken to the accused. That the accused spoke to both of them on the phone is common cause. What was discussed is not always consonant between the two

camps.

- 98] Ngwenya testified that he phoned the accused's cellphone number (082 488 7854). The *"recipient on the other side answered. I introduced myself as Ngwenya and requested his name. He then said his name is John. I said John may I speak to Kwena. [Kwena is Rehanna's Setwana name]. He then said Rehanna is not with him at that stage. I immediately realized that indeed he does know who I am speaking about, therefore I can continue and find out where she is. He said to me that he was busy at work and that he would call me later to tell me where Rehanna is or was. I then insisted to say no, no, no just tell me where, because I need to speak to her quickly, I really need to. He said his supervisor was "streng", he could not speak to me. But I insisted to say, just tell me where she is. I need to speak to her and then in haste he said to me: 'Thabo my friend', and he hung up."*
- 99] Ngwenya called Rehanna's mother and told her he spoke to John, the person whose contact number she supplied. She reminded him that he was misled because the voice mail speaks of Frans Oliphant. Ngwenya says he was annoyed with himself because Mrs Moshoeshoe had given him the name *"Frans Oliphant"* but it had slipped his mind. He redialed the number using both his cellphone and his landline and asked Mrs Moshoeshoe to listen in to their conversation. He said to him: *"Hallo, Mr Oliphant --- you are Mr Oliphant, and he confirmed. I said to him I am looking for the child, I want to speak to the child. He said to me this time round he did not know where the child was."*
- 100] Ngwenya said he changed his approach and asked the accused:

"When last did you speak to the child, when did you see the child? He said to me he spoke to the child on the 19th, I think it was on a Friday. And I said to him no, no, it's not the last time that you spoke to the child. Mr Oliphant, no it was not so, just when did you speak to the child the last time, if anything? I said, no, no I have records that you did not speak to her only the last time on the 19th like you are presenting to me, like you are saying. He then said no, he spoke to the child the last time, to Rehanna, the last time on the 19th, or the 20th. And I said to him no, no, that still is not true, that can't be correct because I mean you spoke to the child at least, according to the records, on the 21st of Sunday. And he was very evasive, he did not admit to that."

101] Ngwenya asked him how he got to know "the child". The accused said he met her in January (2010) in Nobengula Street, Vergenoeg. Rehanna and a friend asked for a lift and he dropped them off in Number 5 Section. He said he was with his friend. Ngwenya enquired whether the friend was Thabo that he referred to earlier and accused said yes. The accused repeated that his boss was strict and that he would phone back later. He then hung up. Ngwenya tried several times to call him but his calls went unanswered. It is common cause that the accused never returned Ngwenya's call. The phone records and the various experts who spoke to the records back-up Ngwenya that the last call he made to the accused was registered on Tuesday 23 February 2010 at 10h33:22.

102] Mrs Moshoeshoe confirmed listening in to the conversation between Ngwenya and the accused. She says she was too stressed and anxious to focus on the exchanges or to recall all that was said. She recalls that the accused acknowledged that

he was Oliphant; that he claimed that his boss is strict and he could not talk; that Ngwenya tried very hard to have him disclose the whereabouts of Rehanna and he said she was not with him; that he promised to revert to Ngwenya and hung up and that Ngwenya redialed without success.

103] Neither Mrs Moshoeshoe nor Ngwenya were discredited as witnesses and I accept their evidence as credible. Ngwenya was relaxed and Mrs Moshoeshoe remarkably composed under the circumstances. I detected no rancour in them. Their evidence was not embellished or adapted. I therefore accept their evidence as truthful.

104] **Now about the discovery of Rehanna's cellphone and her mother's electricity card.**

Itumeleng Booysen did not strike me as a particularly bright young man. At age 22 he was still in grade 11 (old Standard 9). He is a deeply religious person and I am satisfied that he was honest with the Court and gave credible testimony. I asked Colonel Perumal, the Provincial Commander for the Anti Corruption Task Team who headed the Task Team investigating the disappearance of Rehanna, the following question:

"Court: *In your interview with Itumeleng Booysen, did he strike you as a particularly clever person? === My Lord, the first thing that I considered is whether there was a possibility that he was actually involved in Rehanna Moshoeshoe's disappearance because if I would refer My Lord to the charts that have been handed in behind me, My Lord would notice that at one point on the way to church, he comes very close to one of the persons who was a suspect in the investigation at the time, Mr Frans Oliphant – he actually comes very close to passing near Mr Frans Oliphant's house and that was my first consideration: Is there a*

possibility that he might be involved in the disappearance of the girl and I must say, My Lord, the interview we had with him, the follow-up with Gideon Rossouw, that short space [of time] later, within a matter of 15 minutes, showing the phone to somebody in church, let me to believe that there cannot be a possibility that he could have been involved in the disappearance of the girl, My Lord. To be involved and in a few minutes, show an item that you took from the victim to somebody else and tell them you found it, My Lord, that didn't sit well with me, and I then drew the conclusion, My Lord, that he could not have been involved. But he doesn't strike me as a very intelligent person as well, My Lord. He appeared to be of average intelligence, My Lord."

- 105] Booyesen says that on Sunday 21 February 2010 he was on his way to church; the Moria Apostolic Church in Zion. He was running late. The Church service starts at 11h00. It is not too clear whether he checked his time although he suggested that he may have. The church is some distance away, so he was running. He took a short route, a footpath, that traverses an expanse of open veld behind the Provincial Legislature building. He first picked up Mrs Moshoeshoe's electricity card just next to the footpath, clearly visible, and a short distance away Rehanna's cellphone – similarly exposed.
- 106] In my view the person or persons who discarded these articles either wanted them to be discovered or were surprised by Booyesen or another pedestrian. This view is strengthened by the evidence of Mr Lionel Khiba, Rehanna's uncle. It is convenient to interpose his evidence at this point. He testified that Rehanna's mother, his cousin, asked him to run some errands pertaining to their aunt's funeral. He lost his way in collecting an equipment

elsewhere required for the funeral. He phoned Rehanna for directions. It was Sunday 21 February 2010 at 10h37. The phone rang, it was picked up for about 10 seconds and then dropped. He says: *"No, no one was talking. I just kept on saying Rehanna, Rehanna, but there was no response and then it was dropped. I tried calling it again, but it just rang after that."* Mr Khiba did not disconnect but Rehanna's phone did.

- 107] The phone records of Cell C, testified to by Mrs Sibongile Makhubu, a compliance administrator, whose evidence was not challenged, confirms that at 10h37:27 Rehanna's phone (084 607 3773) received a call, recorded as "MTC", which stands for Mobile Terminating Call – this relates to an incoming call, and that this call was from Mr Khiba's cellphone (073 2987 157) and the duration was indeed 10 seconds and the date was also in fact 21 February 2010 (Exh H, Annexure A, p6 of 6).
- 108] The picture that this set of facts conjures up is that when Mr Khiba phoned Rehanna she either deliberately chose not to answer the phone or she was not in control of the situation. She was in some danger and her assailant would not let her answer the phone. Mr Booysen and/or a pedestrian surprised them – hence the hurriedly discarded phone and electricity card. Rehanna's assailant also removed her sim-card. Booysen says he discovered the phone without it. The motive for removing the sim-card was plainly sinister and suggests itself.
- 109] Booysen says he looked around (not he searched around) but saw no one. He went to church and was a bit late for the service. He immediately informed his friend, a fellow worshipper, Mr Thabo Rossouw, whom Colonel Parumal alluded to earlier (para 104) of his discovery. A statement to this effect

was obtained from Mr Rossouw. As Booysen scrolled through Rehanna's phone (evidently using a substitute sim-card) he saw some photos and deleted them. He says he did so because he wanted to keep the phone for himself. He thought it was his good fortune to have picked it up. He fortunately also retained Mrs Moshoeshoe's electricity card.

110] The following day, Monday 22 February 2010, Booysen showed one of his school mates, Tsholofelo, the phone. She also scrolled through it and noticed a photo of Rehanna that had been stored and was overlooked by Booysen. She enquired whether Booysen knew her. He said he did not. Tsholofelo informed him that the girl had gone missing. (The probabilities are that it may have been on another occasion, Wednesday 24 February 2010, when Tsholofelo alerted him to the missing girl in the photo).

111] Booysen says it took him long (several days) to believe Tsholofelo. In fact it took an announcement on Radio Teemaneng, a local radio station, on Saturday (27/02/2010) to prod a person of his uptake into action (no disrespect intended). This is when and how he traced Rehanna's father (a school principal) with the aid of some of his friends.

112] We dwell on the probable scene of crime. Col De Waal, the Provincial Commander of Organized Crime, Northern Cape, testified about plotting out the routes taken by and points pointed out by Booysen and also mapped out other points of relevance. He used the Global Pointing System (GPS) for this purpose. It is a satellite driven system which plots or maps out or tracks the path one walks or follows.

113] The distance from Booysen's home to his church is 3.7km. The

electricity card and Rehanna's phone were 46 metres apart when discovered. The accused's and Rehanna's respective homes were identified to De Waal by the investigating team. The measured distance from accused's home to the point where the cellphone was located (as the crow flies) is 608 metres, but following the meandering footpath works out at 750 metres. Rehanna's home does not feature on Col De Waal's google map but the distance from her home to where her cellphone was discovered is a mere 1.2 km. (This latter distance was omitted from De Waal's evidence but it was common cause during argument that that was in fact his evidence. The explanation for the omission can be ascribed to the fact that he probably gave the distance whilst facing the google map on the wall behind him).

114] From the above dimensions it is clear that the probable scene of crime is within walking distance from the homes of both the accused and Rehanna. Based on the accepted evidence of the complainant Ms D in Counts 1 -7 it is evident that the accused is familiar with the general area where Rehanna's phone and the electricity card were found. Besides, the area is in the immediate vicinity of his house.

115] The evidence of Lerato Mampe, elaborate, detailed and credible as it may be, shows no more than:

- 115.1 The accused has a predilection for young attractive woman;
- 115.2 When he has set his sights on such women he pursues them relentlessly, and bombards them with phone calls and/or text messages;
- 115.3 That he gains their trust, buys them small gifts and promises them "a better life", but delivers nothing to

that end;

115.4 That he is a sexual predator and goes to great lengths to create an opportunity to have sex;

115.5 That on Sunday, 21 February 2010, when Rehanna went missing the accused was certainly in the company of Ms Mampe and his friend Robert Edwards after 13h00;

115.6 That during that period he did not have a vehicle of his own and used Robert's vehicle to transport him and Lerato. Lerato was taken home around 17h00.

115.7 That Ms Mampe was unwittingly used as a decoy by the accused to deflect attention away from the plight of Rehanna Moshoeshoe.

116] Robert Edwards describes the accused as his friend and vice versa, although the accused later suggested that "friend" did not really mean a friend. Robert corroborates Keneilwe's evidence in broad outline on what took place on 23 January 2010 when he and the accused met Rehanna for the first time. He confirmed that he was the owner of the black BMW that Keneilwe and David Moshoeshoe spoke about. The latter two testified before Robert. Before Robert testified the accused had given his counsel false instructions that he did not have a friend with a black BMW. As a result it was canvassed with all the accused's relatives, about five of them, and acquaintances whether the accused did not have such a friend. Of particular significance is that David was portrayed as a liar when he testified that the accused confided in him that his "friend with a black BMW left with Rehanna."

117] Robert and the accused have known each other from their teens and became friends from that time. The accused owned what is

termed a Juice Den, which he sold to Robert when he (accused) ran into financial trouble. It is also at that stage that Robert came to know Ms D. The accused did not trust Robert in the company of Ms D who, Robert says, dressed provocatively. The accused complained to Robert that Ms D has another lover, Mr CT. He said he had done so much for her but all that he gets from her is unrequited love. He threatened to murder Ms D and commit suicide. Robert mediated but Ms D was in mortal fear of the accused. She showed and read to Robert threatening SMS texts that she received from the accused.

118] Concerning Rehanna's kidnapping, Robert testifies that the accused contacted him telephonically during the late afternoon of Saturday 20 February 2010 and told him that he has a date with a girl who remained anonymous. He enquired whether the house of Robert's friend, one Jean, in Green Street, that Robert looks after is available. Robert confirmed the availability. The accused undertook to contact him the following day (Sunday 21 February 2010).

119] On Sunday 21 February 2010 Robert was from his home on his way to switch off the lights of Jean's house in Green Street. He decided to call in at the accused's home en route because the accused promised to phone him in any event. It was then past 09h00. The accused's wife informed him that the accused had gone to cut his hair in town. He left a message with her that the accused must phone him as his airtime had expired. The phone records show that the accused phoned Robert after 09h00, which is indicative of the fact that the accused left his home before Robert arrived.

120] At about 13h00 the accused phoned Robert and requested him

to collect him at 17h00 to honour his appointment with his aforementioned date. Robert and the accused had a change of plans and drove to Green Street in Robert's car at 15h00. They watched TV and at 17h00 collected the aforesaid Lerato Mampe. No mention was made of Rehanna. The accused's hair was uncut.

121] On Friday, 26 February 2010, the accused's wife phoned Robert and informed him that the accused has been arrested. Robert and the accused's wife visited the accused at Witdam Police Station on Sunday 28 February 2010. The accused informed him that he has been charged with Rehanna's kidnapping, not Lerato Mampe's as he suspected. The accused told Robert that the reason for his arrest was that he was the last one who had "contact" with Rehanna.

122] Robert enquired from the accused where he had been from the time that he (Robert) was at his home around 09h00 until 13h00 when the accused phoned him. Robert assumed that accused phoned him from his (accused's) home. The accused informed him that he was unable to cut his hair at a place called Last Stop Taxi Rank at Kentucky in town (Kimberley). Robert asked him whether no one saw him in town or did he not withdraw money at an ATM there, in which event he could produce the ATM receipt (which bears a date and time) as proof. The accused told him no one saw him because he walked to town. Robert asked him: "Frans, you had money with you, how come you had to walk such a long distance?" The accused did not answer him.

123] Robert tried to speak to the accused before his arrest on Friday 26 February 2010 but his phone was off. On Sunday 28 February 2010 at Witdam Police Station he asked the accused

why he was unavailable on his phone before his arrest. The accused informed him that he dropped his phone and it shattered. He destroyed the sim-card accidentally by stepping on it. Robert told him: "You must have destroyed your sim-card deliberately because you were aware that the police are on your tail." The accused did not answer him. It must not go unnoticed that co-incidentally the sim-cards of both Rehanna and the accused have now disappeared.

124] Robert testified further that the accused warned him that the police will be interviewing him in due course and that he must tell them everything. Of course the accused knew that Robert does not have any implicative evidence against him. The accused also asked Robert personally and through a released prisoner to arrange legal representation for him. Robert says he declined on the basis that he appeared to be "a semi-suspect" in that mention was made of his black BMW having been involved in Rehanna's transportation. Robert co-operated fully with the police and satisfied them that before, during and after Sunday 21 February 2010 Jean was in Cape Town with his BMW and was even caught speeding and produced the speeding summons.

125] I am satisfied that Robert Edwards was a frank and credible witness. He is a no-holds-barred witness whose evidence came out warts and all. He confronted the accused when he thought he was dishonest. For example with the sim-card destruction story and the incredulity that he could have gone to town, far off, on foot; that although he claimed that he went to cut his hair he had done nothing of that sort.

126] In my view if Robert was complicit in Rehanna's kidnapping he would have pulled his punches to avoid antagonizing himself

against the accused. I accept his evidence and reject the accused's where same is at variance. I point out that the police had nothing adverse or incriminatory to say about Robert. In Court the accused never pointed an accusing finger at Robert. I nevertheless treated Robert's evidence with caution where he was a single witness and because the accused seems to have implicated Robert in his statement to David Moshoeshoe. In **S v Hlapezula** 1965(4) SA 439(A) at 440 D-E Holmes JA warned:

"It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors. First, he is a self-confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description – his only fiction being the substitution of the accused for the culprit. Accordingly, even where sec. 257 of the Code has been satisfied, there has grown up a cautionary rule of practice requiring (a) recognition by the trial Court of the foregoing dangers, and (b) the safeguard of some factor reducing the risk of a wrong conviction, such as corroboration implicating the accused in the commission of the offence, or the absence of gainsaying evidence from him, or his mendacity as a witness, or the implication by the accomplice of someone near and dear to him; see in particular R v Ncanana 1948(4) SA 399 (AD) at pp. 405-6; R v Gumede, 1949(3) SA 749 (AD) at p 758; R v Nqamtweni and Another 1959(1) SA 894 (AD) at pp. 897G – 898D."

127] **I now deal with the evidence of David Moshoeshoe, Rehanna's uncle.** He and Rehanna's father are brothers. David and the accused know each other because they stayed in

the same neighbourhood. They clearly did not know each other's full names. The accused knew him as Schwepps, his popular name, and he knew the accused as Frans. At one stage in their lives David was the accused's customer when the latter owned a Juice Den and the roles were reversed when David owned a Vodacom Container dispensing public phone facilities.

128] David testified that during February 2010, shortly after the disappearance of Rehanna, he stood behind the accused in a queue to register their names to use the public phones located in the courtyard of the Kimberley prison precinct. Both of them were awaiting trial prisoners. Prison warder Colin Matthews supervised the registration. Matthews asked the accused why he kidnapped Rehanna. The accused's response was that Rehanna left with his (accused's) friend in a black car. Matthews then said he learned that Rehanna's remains were discovered in a black plastic bag, to which the accused responded by denying that her remains were found. Matthews asked how the accused knew because he had been incarcerated. The accused said he just knew.

129] After Matthews' departure the accused approached David and told him that he looks familiar. David reminded him where the familiarity emanates from. They discussed frankly what each one of them was in for. David asked the accused what linked him to the kidnapping of Rehanna. The accused alluded to the phone calls he made to Rehanna. The accused asked David to devise a plan which could exculpate him in court. The accused suggested getting rid of the dockets. David decided to lead him on in order to glean information from him that could unravel Rehanna's case.

- 130] David created a legend around two of his prisoner friends who he said had connections in high places who could assist in defeating the ends of justice along the lines suggested by the accused. He told the accused that he needed to produce money upfront to pay for the favours. The accused then wrote exhibit D which solved the theft of Vera-Ann's laptop. See paras 57 – 66 (above). To show that the accused was determined to have the dockets (including the one relating to Ms D) destroyed the evidence of Kedibone Boikanyo, the administration officer at the Kimberley Magistrate Court, is highly significant. Her evidence lends veracity to the evidence of David on this aspect.
- 131] The accused also mentioned to David that his friends Robert (Edwards) and Shaun would raise the required amount and that his wife, whom he said worked at the "soup Kitchen", would contribute R1000-00.
- 132] As David was probing further, the accused somewhat opened up and told him that the police are aware that on a previous occasion he and his friend gave Rehanna a lift and dropped her off at Section Number 5, Galeshewe. He repeated to David that on the day of Rehanna's disappearance his unnamed friend left with Rehanna in a black BMW (only on this occasion he specified the make of the car). All this information was transmitted onward to the police.
- 133] David also explained that the accused informed him that on the morning of Rehanna's disappearance he told his wife that he was going for a haircut in town, but found the salon closed. David asked him whether he did not know that the salon does not open on a Sunday. The accused intimated that that Sunday was the exception as he usually has his hair cut in Galeshewe (where he

is resident). The accused informed David that the hair-cut story was a bother regard being had to his alibi as there was a one-and-a-half lapse that he could not account for when the police questioned him. He needed David to assist him to plug that gap.

134] David, to keep the façade alive, promised to contact his friend who, in reality, owns a phone shop to backdate a receipt to the day on which Rehanna went missing to take care of the lacuna. The transaction would pretend to show that his phone had been repaired or he bought a phone. The accused only had to furnish him with an obsolete phone number and advance money for the favour. The plan was put on hold because the accused failed to provide the money for the bribe.

135] David testified that during the accused's bail application in June 2010 it emerged that he (David) was related to Rehanna. The accused, in evidence, made a feeble attempt to persuade the Court that he knew David and his family tie to Rehanna well before Rehanna's disappearance and would not have entrusted him with such implicative evidence. Mr Van Tonder, his counsel, fairly sums his client's case up by conceding that the letter, Exhibit D, that accused gave to David when he thought David would be acquitted in the robbery case, was deadly against the accused.

136] I refrain from dealing in detail with two further discussions David had with the accused. The one relates to the analogy drawn between the accused's case and an episode in a soapie called "Scandal" where the main protagonist, David Nyathi, is accused of his wife's murder and the second discussion relates to a scene in TV on a programme called "Medical Detectives". The first reason for this approach is that the accused's utterances are of

dubious relevance; secondly, the discussion was too vague and general and thirdly; the body of the victim was never found in the "Medical Detectives" episode but the perpetrator was nevertheless convicted of the murder. The evidence is too tenuous to be held against the accused. In any event, the accused has not been charged with murder. See **R v Nhleko** 1960(4) SA 712 (A) at 721 E -722B where **Schreiner JA** held as follows:

*"It has been held by this Court that the fact that no body or part of a body had been found is not an insuperable bar to finding a person guilty of murder. Such were the circumstances in **R v Sikosana** which is unfortunately only reported briefly in 1950(2) PH H 148 [Footnote: see full report at 1960(4) SA 723]. In that case the appellant was charged with the murder of his wife and there was a large body of evidence relating to their relations and the circumstances immediately prior to her disappearance. It is clearly wrong to hold that in such cases the Crown must prove the corpus delicti, the fact of an unlawful killing, according to a higher standard of certainty than that required to identify an accused as the killer, and this is made clear in the judgment of Van den Heever JA in Sikosana's case. But the absence of a body may be a very good reason for holding that the Crown has not proved its case beyond reasonable doubt, for it lets in the possibility that the person in question may still be alive. We were referred to articles in 68 LQR 391, and 73 SALJ 181 where similar cases are collected and discussed.*

But whatever may be the position in such cases, we were informed by counsel for the appellant that no reported case has been traced, and I have found none, in which, not merely has no body or part thereof been found, but no person has been shown to have been missing. This clearly introduces another wide range of possible sources or error. Where the evidence of

supposed eye-witnesses to the murder is alone available it must indeed very rarely be the case that the tiers of fact can properly be convinced beyond reasonable doubt of the accused's guilt. Take the one factor of motive. It is true that a crime, even murder, may be proved without the motive being established. But it is always very important to consider whether the accused had or may well have had a particular motive for killing the deceased. And if nothing is known about the person who is said to have been killed the tiers of fact are without an important field of information. They cannot say whether there was any association between the accused and the deceased which made the killing of the latter by the former likely or not unlikely, or whether some other person would be antecedently a more probable perpetrator.

From various angles it would be most exceptional for proof of a murder beyond reasonable doubt to be reached where no body or part of one is found and no person is shown to have disappeared."

This to my mind, informed the state's approach.

137] Of relevance though is that the accused informed David with reference to Rehanna's case that he has done a "clean job" and that the police have nothing against him. What the clean job is unclear. What is clear is that he claimed to have done a "job" on Rehanna. The furthest that this statement can be taken is that the accused knew and had something to do about the disappearance of Rehanna. This knowledge and conduct by him is consistent with what Ngwenya testified to and what the phone records reveal.

138] As pointed out earlier the accused's counsel conceded that David Moshoeshoe was a very good witness. I agree. I choose to deal

with only one aspect of the evidence of the only defence witness, apart from the accused's, Mr Collin Matthews. The police evidently only made contact with Matthews when they were alerted by David to the conversation Matthews had with the accused relating to the disappearance of Rehanna. Matthews' statement was only obtained on 28 April 2010 whereas the conversation took place on 19 March 2010. The statement is a cryptic one-paragrapher. Matthews testified that he informed the accused that he learned that "the child's body" was discovered in a plastic bag and that the accused responded that he knew nothing about it.

139] Matthews was parochial. He said he and David "*het gesels*" (they discussed). However, what stands in the statement is hardly a discussion (*geselskap*). Matthews states that the prisoners usually approach the telephone booth in the sequence (*volgorde*) in which they have been registered. However, he disputes the fact that "*volgorde*" constitutes a "*queue*", a word used by David. Matthews says he called the accused aside but cannot dispute that David stood a pace or so close-by and that there was nothing that could have prevented David from eavesdropping. David was certain that he did not conflate the conversation that he heard Matthews had with the accused and his follow-up inquisition in the absence of Matthews. What is paramount is that what took place is not a thumb suck by David. Indeed Mr Van Tonder was constrained to concede that if David wanted to inculcate the accused seriously he could have done so, but never did so throughout his evidence.

140] I caution myself that David was a single witness, had an interest in the outcome of the case and was presented with a fertile motive to subvert the truth due to his close family tie to

Rehanna. I have already dealt with the circumstances which reduce the risk of a wrong conviction, like the laptop question (ExhD), the docket issue which was backed up by Ms Boikanyo and even (though peripherally) Mr Matthews' evidence. See **R v Mokoena** 1956(3) SA 81 (A) at pp 85 - 86.

- 141] On the probabilities on the discussion that the accused had with Mr Matthews I therefore prefer the evidence of David, in conjunction with how David followed up the issue. The worth or relevance of this evidence is that whereas the accused exculpates himself from being complicit in Rehanna's disappearance he does betray knowledge that he saw her on Sunday 21 February 2010.

The telephonic contact between the accused and Rehanna.

- 142] I now reflect the full catalogue of the telephone contact and text messages between the accused and Rehanna from 23 January 2010 (the first contact) and 21 February 2010 (the day of Rehanna's disappearance):

- 140.1 On 23 January 2010 between 18h10:06 and 20h46:54 the accused made seven calls to Rehanna. Rehanna made only one call to him at 20h27 (a call-back or please call me) to him in that period.
- 140.2 On 24 January 2010 at 15h01 the accused called Rehanna and at 17h45 on the same day he sent her an SMS. Rehanna made no call to the accused.
- 140.3 On 27 January 2010 between 07h12:52 and 19h55 the accused called Rehanna three times and sent her an SMS at 22h55. No call from Rehanna to the

accused was made.

- 140.4 On 29 January 2010 the accused called Rehanna twice. She did not call him.
- 140.5 On 31 January 2010 the accused called Rehanna seven times and sent her three text messages. No communication went the other way from Rehanna.
- 140.6 On 02 February 2010 at 07h06 the accused sent Rehanna an SMS, to which she did not respond.
- 140.7 On 03 February 2010 at 16h58 the accused called Rehanna. She made no call to him on that day. A lull followed until the storm broke on 19 February 2010.
- 140.8 On Friday, 19 February 2010 the accused phoned Rehanna four times between 06h23 and 23h14:29. He also sent her six text messages, the last of which was recorded at 23h17. Rehanna's responses were made at 06h30 when she phoned him and 17h42 when she sent him an SMS.
- 140.9 On Saturday, 20 February 2010, the eve of Rehanna's disappearance, the accused phoned Rehanna on three occasions. The telephone billing system reflects that on this Saturday the accused was the only person who phoned Rehanna. The calls were made between 22h10 (this first call lasted over 8 minutes) and 23h02 (this last phone call lasted 71 seconds). For the first time ever the pattern of

SMSes reflect that there was in fact a sustained text message dialogue between the accused and Rehanna. In other words Rehanna was responsive or receptive to what accused conveyed to her:

- (a) Accused: SMS at 22h21 and 22h23: Rehanna SMS at 22h24.
- (b) Accused: SMS at 22h26: Rehanna SMS at 22h28;
- (c) Accused: SMS at 22h31 (at 22h51 he phones Rehanna, the second of the three phone calls – and speaks to her for 59 seconds).
- (d) Accused: SMSed at 22h51:42; 22h51:50 and 22h56. There is no response from Rehanna. The communication for the evening is concluded by the accused phoning Rehanna at 23h02, as pointed out already.

140.10 The fateful day, Sunday 21 February 2010, commences at 07h47:56 when the accused phoned Rehanna and spoke to her for 74 seconds. At 09h19 he phones her again and speaks to her for 13 seconds. At 09h52 Rehanna phones the accused and speaks to him for 27 seconds.

140.11 In summary: From 23 January 2010 to 21 February 2010 Rehanna phoned the accused on only three occasions and dispatched only four text messages to him. Otherwise it was the accused snowing her under phone calls and SMSes.

143] What must be brought into reckoning at this pivotal stage is that Rehanna's uncle, Lionel Khiba, phones her at 10h37:27 on

Sunday 21 February 2010 for directions to a particular destination. The phone is picked up for 10 seconds but no one answers. Coincidentally the accused's wife also phoned him at 10h37:39 and 10h38:58 but her phone calls also went unanswered. The accused's explanation that he did not pick up his wife's calls because he was at a noisy area at the time is fiction. He must have been highly occupied by preventing Rehanna from answering her uncle's call. Itumeleng Booysen's presence at that crucial juncture exacerbated the situation for the accused.

144] It should further be borne in mind that none of the calls made by or received by the accused or Rehanna were registered to any power station or reception station (also referred to by the cellphone experts as "*base stations*") in Kimberley town, where Rehanna said she was heading to purchase clothes or draw money and where the accused claimed he had gone in a vain attempt to cut his hair. More pertinently, the evidence show that they were in and around Galeshewe and West End which are in close proximity to where Booysen picked up Rehanna's cellphone and her mother's electricity card.

145] This evidence also destroys the accused alibi. This is more so the case if regard is had to the fact that the accused told Robert that he walked to town. At 07h47, 09h19, 09h52, 10h37 and 10h38 (the latter when his wife phoned him) he was certainly not in town. This is what the base stations demonstrate. Even on the accused's own admission at 10h37 when Rehanna was accosted, he was not in town but at a mini market in John Daka street in Galeshewe.

146] According to Colonel Parumal and Colonel Luis, the investigating

officer, none of the CCTV footage that was painstakingly traversed showed that the accused or Rehanna was in town or the shops mentioned by Keneilwe Motaung where Rehanna would be making the purchases from. The shop assistants were also interviewed with the same result. The police, in great numbers, "got down to brass tacks" in their quest and search for clues. Nothing positive turned up. Sniffer canines were employed and the accused's clothing that he was wearing on that fateful Sunday proved negative. The clothes had already been laundered. The sewerage manholes located in the vicinity of the probable scene of crime were inspected and turned up no positive clues. The evidence does not exclude the possibility that they may have swallowed Rehanna.

The accused's defence in respect of Rehanna's kidnapping.

147] The accused say he phoned Rehanna on Saturday 20 February 2010. He explains (translated):

"In between our conversation there were interruptions. There were calls that she (Rehanna) received, messages that she received. She would first respond to them. I would be required to drop the call and call back later. This happened over different times (verskillende tye)."

148] The accused continues: "Rehanna asked me whether I liked festivals. She wanted to know whether we could attend on [27/02/2010]. I said it would depend on Robert [Edwards]. He does not like festivals. If Robert was interested then we will attend."

149] The accused says he phoned Rehanna on Sunday 21 February

2010 because they had a wonderful conversation the previous evening but were disrupted by the Mxit chat she had with someone else. "I joked with her and said you and your Mxit." He asked Rehanna whether she did not go to church and Rehanna reminded him that she attends church on Saturdays. The inescapable conclusion is that Rehanna communicated contemporaneously with the accused and Keneilwe. This appears to be common cause.

150] The accused says he had already at 09h58 boarded a taxi to town when Rehanna phoned him. "She sounded uncomfortable (ongemaklik) to make her request. She asked me to buy her airtime." He told her he had no money. *"The reasons why I say she sounded uncomfortable is because she used the Afrikaans word 'tog' (please)."* The accused contradicts himself here because he told Robert that he walked to town. It is difficult to fathom why Rehanna could have been desperate for airtime when her father gave her a monthly allowance of R500-00 and her mother explained that Rehanna's phone was on contract. Rehanna also left some money untouched in her mother's handbag when she left that Sunday morning, plainly to meet the accused. She would nevertheless not phone him for airtime when they were due to meet in a short while.

151] The accused's alibi is not only incomprehensive but also muddled. At the bail hearing, the proceedings of which forms part of the record, the following exchanges emanate from the accused's cross-examination by the state:

"PP: Riana made a call to you round about 09:52.. I believe that you are now in town and she already left her place of residence. What was the conversation all about? == I do not remember the details.

PP: *But you admit that she called you? == Yes, I received a call from her.*

PP: *And I believe that you are already in town now? == I do not know where I was.*

PP: *Because you left - when did you leave your place of residence, what time? == It must be to 08:00, past 08:00.*

PP: *So you will agree with me that when this call from Riana came, you were already in town? == When what call came? 09:52 sir? == Riana's call?*

PP: *Yes, when she called you, you were already in town? == No I was on my way back home by that time.*

PP: *You were not in town? == I was on my way back home.*

PP: *Where were you? == I went back home with a taxi, so I must be in the taxi. Because I arrived at past 10:00 to 11:00 at home."*

- 152] During the course of this trial the accused said he left his home for a haircut in town just before 10h00 or around 10h00. If that is the case Robert would have found him at home. Robert testified acceptably that he popped in at accused's home around 09h00 and found only his wife. Robert left a message with her that the accused should call him as his (Robert's) airtime had expired. This explains why the accused phoned Robert at 09h48 (according to the phone records).
- 153] During this trial accused had a difficulty to explain where he was when Rehanna phoned him at 09h52 – four minutes after he had allegedly phoned Robert from a taxi ostensibly bound for town. He therefore had to retain himself in the taxi because he could not have been on his way back from town in four minutes after seeking to cut his hair. The accused was also aware that none of his calls were made or received in town according to the

cellphone experts who testified before him. The accused therefore materially contradicted his evidence at the bail proceedings. This is also in conflict with what he told Robert: that he walked to town. I am therefore not surprised that the accused approached David Moshoeshoe and requested him to assist him to devise a fraudulent alibi.

- 154] Asked by state counsel to reconcile the contradictions and inconsistencies at the bail proceedings and now at trial stage the accused said he was "not himself" and he "was depressed." He implied that his evidence at the bail proceedings be therefore ignored. In doing so the Court would be allowing and countenancing the accused to perjure himself. A court is not at liberty to discard or ignore admissible evidence. See **S v Nomzaza** 1996(2) SACR 14 (SCA). In **S v Dlamini**; **S v Dladla**; **S v Joubert**; **S v Schietekat** 1999(2) SACR 51 (CC) at 98c-f the Constitutional Court, per **Kriegler J**, held:

"There is no warrant for creating a general rule which would exclude cogent evidence against which no just objection can be levelled. The trial court must decide whether it is a valid objection, based on all the peculiar circumstances of the particular case, not according to a blanket rule that would throw out good and fair evidence together with the bad."

- 155] I fully comprehend Mr Van Tonder's sensible approach in argument that the accused's alibi cannot stand. It now boils down to what offences the state has proved against the accused. The consequences of a failed alibi have been comprehensively stated in **S v Thebus and Another** 2003(2) SACR 319 (CC) at 349C – 354B. In **S v Nkomo** 1966(1) SA 831 (AD) at 833C-D the Court held:

"By falsely denying all connection with the burglary, accused No.

*2 not only failed to give any explanation exculpating himself from complicity in the murder but, if anything, tended to confirm the above indicated inference against him. In this regard I am in entire accord with the observations of MALAN JA, in **Rex v Mlambo**, 1957(4) SA 727 (AD) at p. 738, namely:*

'If an accused deliberately takes the risk of giving false evidence in the hope of being convicted of a less serious crime or even, perchance, escaping conviction altogether and his evidence is declared to be false and irreconcilable with the proved facts a court will, in suitable cases, be fully justified in rejecting an argument that, notwithstanding that the accused did not avail himself of the opportunity to mitigate the gravity of the offence, he should nevertheless receive the same benefit as if he had done so.'

In **S v Shabalala** 1986(4) SA 734 (A) at 736 C-D the Court held that the "effect of the falseness of an alibi on an accused's case is to place him in a position as if he had never testified at all. See also **R v Dhlomo** 1961(1) PH H54."

In summary this is what happened to Rehanna.

- 156] During the evening of Saturday 20 February 2010 the accused convinced Rehanna that he would buy her clothes in Kimberley the following day and was prepared to disburse R800-00 for this purpose. Rehanna would wear the clothes to the Lira concert.

- 157] Rehanna confided this offer by the accused in her best friend Keneilwe Motaung. Keneilwe cautioned against going out with the accused unchaperoned and dissuaded her instead to defer the shopping to the following weekend when she (Keneilwe) would accompany them.

- 158] The Persuasive guile of a sex predator clicked into gear. The

gullible, trusting Rehanna, who was overtaken by the folly of youthful excitement, was unable to discern the bait to the trap laid by the accused. On Sunday 21 February 2010 at 07h47:56 the accused calls Rehanna. Evidently pursuant to the previous evening's promise to do the shopping. At 08h00 Rehanna's mother noticed Rehanna having a bath. Rehanna was clearly receptive to what the accused told her a mere 13 minutes before and was preparing herself.

159] At 09h19 the accused phones Rehanna again to ascertain progress and her whereabouts. This is roughly the time that Rehanna's mother sees her leave. At 09h52, in other words 33 minutes later, Rehanna phones the accused. At 09h19 the accused's reception station (base station) from which he makes the call, is recorded as Kimberley West 3 (it is in Galeshewe). At 09h52 when Rehanna phoned the accused the call is transmitted from the same base station (Kimberley West 3). Incidentally when the accused's wife phoned the accused at 10h38 from the common home she shares with the accused in Galeshewe the call was transmitted from the same base station (Kimberley West 3). This is merely to illustrate that none of these calls were made from town.

160] What is stated hereinbefore demonstrates that between 09h19 and 09h52 the accused and Rehanna were in fairly close proximity to each other. At 10h37 and 10h38 the phone calls by both Mr Khiba and the accused's wife, made respectively to Rehanna and the accused, (twice at 10h37 and once at 10h38), went unanswered. In respect of Rehanna this happened 45 minutes after she had phoned the accused.

161] After Rehanna's call at 09h52 there is no phone record that the

accused ever phoned Rehanna or communicated with her. The converse is also true. At the bail proceedings the accused ascribes his abrupt loss of interest in Rehanna variously to the fact that he did not know her personally or she was not his girlfriend or lover. In this Court he was basically indifferent. He says the reason was that there was no relationship of any kind between them or there was no need for him to phone her, even in the face of the whole broader Kimberley community running helter-skelter to locate her, fearing the worst.

162] It is unthinkable and improbable that Rehanna could have gone to meet someone else in the veld that she did not even communicate with. The phone records show that on the Sunday of her disappearance she only communicated (orally) with the accused by phone and no one else. In my view the accused lured her surreptitiously to the open stretch of veld to have sexual intercourse with her. She must have repelled his unwelcome advances. The situation must have gone out of hand, much to Rehanna's peril.

163] This reconstruction is not far-fetched conjecture because her attacker, the accused, prevented Rehanna from speaking to her uncle Khiba. They must have been at the place where Rehanna's phone was found by Booysen. The accused twice did not pick up his wife's calls which followed closely on Khiba's call. The accused removed Rehanna's sim-card from her phone. He therefore decided to make her disappear fearing that she will press charges against him. As David Moshoeshe says: He made a clean job of it. When Rehanna's phone was examined by the police it was discovered that he had deleted Rehanna's name from it and all the calls he made to her and she to him. He did not try to contact Rehanna because according to Mr Ngwenya he

betrayed knowledge on Monday 22 February 2010 that he knew where Rehanna was. He knew that she was unable to communicate because of what he did to her.

164] The conclusion to which I come is consonant with the authorities referred to by the Supreme Court of Appeal in **S v Reddy and Others** 1996(2) SACR 1 (SCA) at 8c -9f:

*"In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted dictum in **R v Blom** 1939 AD 188 at 202-3, where reference is made to two cardinal rules of logic which cannot be ignored ---. The matter is well put in the following remarks of Davis AJA in **R v De Villiers** 1944 AD 493 at 508-9: 'The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way; the Crown must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence.'*

Best on Evidence 10th ed 297 at 261 puts the matter thus:

'The elements, or links, which compose a chain of presumptive proof, are certain moral and physical coincidences, which individually indicate the principal fact; and the probative force of

the whole depends on the number, weight, independence, and consistency of those elementary circumstances.

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

*Lord Coleridge, in **R v Dickman** (Newcastle Summer Assizes, 1910 - referred to in *Wills on Circumstantial Evidence* 7th ed at 46 and 452-60), made the following observations concerning the proper approach to circumstantial evidence:*

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

- 165] The correct approach which a court should adopt in evaluating evidence, not merely circumstantial evidence, has been lucidly stated as follows in **S v Chabalala** 2003(1) SACR 134 (SCA) at 139i – 140b (para 15):

*"[15] The trial court's approach to the case was, however, holistic and in this it was undoubtedly right: **S v Van Aswegen** [2001 \(2\) SACR 97 \(SCA\)](#). The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the*

accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence. Once that approach is applied to the evidence in the present matter the solution becomes clear."

166] Rehanna appropriately dubbed the accused a "stalker!!". Ms D graphically depicted the accused as a stalker. Ms Mampe completed the picture. Very poignant are the words of Sting, the frontman of a music band called "The Police" who wrote a song about an obsessive stalker. The lyrics in the first two stanzas read:

"1. Every breath you take. Every move you make. Every bond you break. Every step you take. I'll be watching you.

2. Every single day. Every word you say. Every game you play. Every night you stay. I'll be watching you. O, can't you see. You belong to me. How my poor heart aches with every step you take."

The accused, under false pretences, made Rehanna take her last known steps to her disappearance.

167] I reject the accused's versions (he had several versions) of events on the kidnapping charge. I am satisfied that the state has proved its case beyond a reasonable doubt that the accused abducted Rehanna Kwena Moshoeshoe on Sunday, 21 February 2010, after rendering her malleable over a period of time.

168] I am not called upon to decide what ultimately happened to the

hapless girl. A note of caution must be sounded, though, that a crime of murder does not prescribe. The time will come, maybe in the distant future, if Rehanna does not resurface alive, in order for the family to get closure, that an application will be made to presume her to have died. At that stage the accused may then be indicted for murder by the prosecution authority. See generally **Bothma v Els & Others** 2010(1) SACR 184 (CC).

VERDICT: Count 9: Kidnapping – The accused is found guilty as charged.

169] **I recapitulate my orders:**

COUNT 1: Assault with the intention to do grievous bodily harm:

THE ACCUSED IS FOUND GUILTY OF COMMON ASSAULT.

COUNT 2: Rape :

THE ACCUSED IS FOUND NOT GUILTY AND IS ACQUITTED.

COUNT 3: Rape:

THE ACCUSED IS FOUND GUILTY AS CHARGED.

COUNT 4: Rape:

THE ACCUSED IS FOUND NOT GUILTY AND ACQUITTED.

COUNT 5: Assault with the intent to do grievous bodily harm:

ACCUSED IS FOUND GUILTY AS CHARGED.

COUNT 6: Arson:

THE ACCUSED IS FOUND GUILTY AS CHARGED.

COUNT 7: Attempted Murder:

THE ACCUSED IS FOUND GUILTY AS CHARGED

COUNT 8: Theft of a laptop computer:

THE ACCUSED IS FOUND GUILTY AS CHARGED.

COUNT 9: The kidnapping of Rehanna Moshoeshoe a 15 year old student of Girls High School, Kimberley:

THE ACCUSED IS FOUND GUILTY AS CHARGED.

COUNT 10: Assault with the Intent to do grievous bodily harm:

THE ACCUSED IS FOUND GUILTY OF ATTEMPTED ASSAULT TO DO GRIEVIOUS BODILY HARM.

F DIALE KGOMO
JUDGE PRESIDENT
Northern Cape High Court, Kimberley

On behalf of the State:
 Instructed by:

Adv C G Jansen
 Director of Public Prosecutions

On behalf of the Accused:
 Instructed by:

Mr A Van Tonder
 Legal Aid Board