



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GQEBERHA**

CASE NO.: CC15/2018

In the matter between:

STATE

And

TIMOTHY OMOTOSO

Accused 1

LUSANDA SULANI

Accused 2

ZUKISWA SITHO

Accused 3

JUDGMENT

SCHOEMAN J

[1] The three accused have been charged either jointly or individually with 63 counts: contravening sections 2(1)(f) and 2(1)(e) of the Prevention of Organised

Crime Act 121 of 1998 (POCA); sexual assault in contravention of s 5(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Sexual Offences Act); rape in contravention of s 3 of the Sexual Offences Act; trafficking in contravention of s 71(1); and trafficking in persons for the purposes of sexual exploitation in contravention of s 4(1) of the Prevention and Combatting of Trafficking in Persons Act 7 of 2013, as well as alternatives to those charges.

[2] This judgment deals with the evidence presented in the trial as well as the relevant facts that were disclosed and came to the fore in different applications that were brought during the trial. More specifically the application to call advocate Cerfontein as a witness in terms of the provisions of section 186 of the Criminal Procedure Act 51 of 1977 (CPA) and the application for a mistrial.

Common cause facts.

[3] The version told by the complainants, with which the accused generally agreed, was that the first accused is the founder and head of the Jesus Dominion International Church (JDI). The JDI operates in various centres in South Africa and has branches inter alia in Johannesburg, East London and Gqeberha with the headquarters in Durban. The JDI's structure further consists of pastors, associate pastors' evangelists and secretaries. The income of the church is inter alia derived from donations, tithing and the TV appearances of accused 1. Accused 2 and accused 3 are personal assistants of accused 1. Accused 1 also had another personal assistant, Fizeka, who had left the country prior to the accused's arrest.

[4] In Umhlanga the JDI had a mission house where young girls would gather, pray together and practice choir, eat and stay.

[5] All the complainants joined the church at various times from different regions and branches. It is common cause that during services there were testimonies how accused 1 healed people and people had financial breakthroughs through his interventions.

[6] The complainants were either recruited to go to Durban by their local pastors, or Fizeka, or accused 2 and accused 3 after accused 1 displayed an interest in them. All the complainants became members of the church and went to Umhlanga where they stayed in the mission house to develop their music skills, to pray and healing. Some went there to complete their education or to further their studies. Their transport costs to Umhlanga were paid and transport was arranged by Fizeka or their local pastor or accused 2 and 3.

[7] Accused 1 is a self-taught musician playing different instruments he used in accompanying the choirs. He considered himself a prophet and he was seen as one by his congregation members. He professed to heal the sick and to perform miracles. Testimony was given that if one of the pastors died, he would tell the congregants that it was because the deceased had not listened to him. The JDI has branches in all nine provinces of the country. The church holds crusades in different centres of the country which crusades are attended by the members who come from all branches and regions to attend such crusades. Sometimes accused 1 preached live from Durban on televised services. At services the so-called miracles accused 1 performed were shown on TV screens. All the complainants were members or attended services in the different branches and in this way were persuaded to join the JDI. Once a complainant is introduced to accused 1 or given his cell phone number she is required to send text messages to him regularly. The complainants were given money or sent money to enable them to go to Umhlanga by bus or in exceptional circumstances to fly there. The complainants largely became members of singing groups, the Grace Galaxy or the Chrysalids that performed at the crusades and travelled with the accused to the various centres. At the mission house the complainants stayed in groups in different rooms and there were at times approximately 25 girls in the mission house. There they engaged in music and singing practice, prayer sessions, they played games and had individual appointments with accused 1. According to the complainants they were then individually summoned to his room by one of his personal assistants after being ordered to shower and clean themselves. In his room they were ordered to close the door and there they kneeled before him where he sat on the bed. They were then to massage his feet.

[8] The issues in the trial largely centred on what happened inside the room of accused 1 at the mission house and at other centres where they attended crusades. It is common cause that the complainants massaged his feet. According to the complainants it is generally during those appointments when he sexually assaulted them or raped them after coaxing them onto his bed. After the sexual assault he ordered them to his bathroom to clean themselves. These scenes repeated themselves and some of the complainants were repeatedly sexually assaulted or raped. It is a recurring theme that some of the complainants left the mission house but returned on their own volition.

The history of this trial.

[9] The trial commenced before me in July 2019. After initial applications for further particulars and an objection to the jurisdiction were dismissed as well as the applications to appeal against those orders were dismissed, the state commenced with the leading of evidence. It then became apparent that the evidence was not in line with the indictment. It is appropriate to mention at this stage that Mr Ntelwa, who was the lead prosecutor at the time, assured me that he had consulted with all the witnesses, for it seemed that he was not au fait with their evidence. He initially indicated that he was not going to apply for an amendment of the indictment, but he did bring such an application. Some of the amendments were granted but others were refused. It later transpired that the indictment served on the accused was not the same indictment that they were asked to plead to. This second indictment incorporated some of the amendments that was the subject matter of the application to amend.

[10] I was informed at one stage, after the first witness had testified, that Mr Ntelwa was being replaced as the main prosecutor and the matter was postponed enabling another prosecutor to come up to speed. However, Mr Ntelwa was placed on record again after May 2020 and he continued leading the evidence of the respective witnesses.

[11] When Ms J[...] testified, he did not lead her evidence, but another prosecutor did so. During her evidence as she testified about the events that gave rise to the

charges against the accused, it became apparent that she deviated from her version as told to the expert, Professor Muller and the second indictment where the charge of sexual assault had been amended to rape. Thereafter Ms Cerfontein, who was previously in the prosecuting team, but had withdrawn, disclosed to Mr Daubermann that Ms J[...], during consultation, averred first accused put his fingers into her vagina and thereby raped her. This precipitated an application to call Ms Cerfontein as a witness. This application was refused. Thereafter, due to further facts that had been disclosed, an application for a mistrial was lodged by the accused wherein voluminous affidavits were filed. The application was dismissed but I also ordered that the prosecutor, Mr. Ntelwa, be replaced. After the trial recommenced the cross examination of Ms J[...] continued and her evidence was finalised. Just one further witness testified.

[12] During the trial and before finalization of the state case and a further application was brought for special entries in terms of section 317 of the CPA At a previous junction in the case an application was also brought for special entries to be made. The state and the defense agreed to the following special entries

(a) On 3 July 2019, the lead prosecutor in the case, Advocate Nceba Ntelwa, proposed to his supervisor, advocate Gounden, and his junior in the case, advocate Cerfontein, in an e-mail which he sent to them that certain state witnesses, namely Ms J[...]. Ms M[...] and Ms M[...] be suborned to commit perjury.

(b) Advocate Ntelwa, Advocate Cerfontein, Advocate Makasana and advocate Babulwa, full prosecutors in the case, intentionally failed to disclose to the court and/or the defence that Ms J[...] had made a previous inconsistent statement to advocate Cerfontein to the effect that the first accused had inserted his fingers into her vagina.

(c) Advocate Ntelwa's superiors Advocate Goberdan and Advocate Gounden allowed Advocate Ntelwa to continue to prosecute the accused in the knowledge that advocate Ntelwa had made the proposal referred to in paragraph (a) above.

[13] After an application in terms of the provisions of s 174 of the CPA, 31 of the charges were dismissed as no evidence was led in respect of those charges. Two other counts were also dismissed as I found that the witness Ms J[...]’s evidence could not be relied on.

[14] Eleven complainants testified on behalf of the state as well as two expert witnesses. After the application in terms of s 174 was partly dismissed, a further application was brought to have the evidence of the complainants ruled inadmissible on the basis that the trial was unfair. This application was also dismissed. All the accused testified in their own defence in respect of the remaining charges.

The State case

[15] It is a recurring theme that the complainants would be called for an appointment with accused 1 in his bedroom by either Fizeka or accused 2 or accused 3. It was during some of these appointments that accused 1 sexually assaulted them or raped them. The evidence was that when these assaults occurred accused 1 would tell them to lie on the bed after fetching a towel from his bathroom. He would lie on top of them with the lower part of his body naked and 'hump' them (as they described it) until he ejaculated. Then he would send them to his bathroom to clean themselves and send them out of the room after praying and asking for God's forgiveness as they have sinned. The complainants realised that the appointments they were called to was a euphemism for sex with accused 1.

[16] A[...] D[...] was 30 years old and resided in East London. She joined JDI in 2014 after she returned from Cape Town on her mother's insistence as she struggled with an alcohol addiction. She had seen videos of accused 1 where he healed people. One such video was about a child that was born without an oesophagus who was miraculously healed after accused 1 prayed for him. This video was played at church services and many of the other complainants testified about this as well. Ms D[...] started a business baking and selling cakes muffins and bunny chows. She attended crusades in other centres and in 2015, at a crusade in East London, she acted as an usher. She was standing at the back of the church when accused 1

walked towards her. He spoke to her and gave her his telephone number. Thereafter accused 2 and 3 took the complainant's cell phone number and accused 3 told her that accused 1 liked her and that she will contact the complainant later. At another crusade accused 3 told her to go and greet accused 1. She complied and accused 1 shouted at her for not texting him. He told her that her destiny is at the mission house in Durban, and she should never offend him because he was God's favorite child and she must be obedient to accused 1 when she arrives at the mission house. She went to Durban after receiving money from the accused and upon arrival at the house she was shown a room where six other girls also stayed. She was taken to the bedroom of accused 1 and he said that there were girls inside the house that were satisfying themselves sexually with a shower, but it will never be the same as this, while pointing at his penis. In the lounge she saw accused 1 touching the girls' breasts, backsides and lifting their skirts; she was shocked and scared. Later that evening she was called to his room where he took her on his bed and the scene as set out in para 15 supra played out and he gratified himself until he ejaculated. He then said a prayer 'Lord forgive us wash us with the blood of Jesus, write our names in the book of life.'

[17] She stayed at the mission house for a period of about 13 months where he sexually assaulted her repeatedly. The complainant and the other girls were instructed to undergo HIV tests, and the results were given to accused 2.

[18] L[...] M[...] testified that at the time of her joining JDI in 2012 she had a heart condition and was homeless. Her pastor arranged and financed her trip to Durban to attend a crusade. At another crusade in Secunda Fizeka ordered her to get into a motor vehicle. Accused 1 was inside the vehicle with 2 members of the Grace Galaxy choir. They went to a hotel in Sandton where accused 1, later in the evening, in his room, instructed her to take off her panty. She was scared and shaking and accused 1 told her to relax and he dismissed her from his room. She was later instructed to attend a crusade in Durban and was sent money to go to Durban. At the mission house she was instructed to go for an appointment with accused 1. There she had to massage his feet, and the same scenario followed as set out previously as he sexually assaulted her. After accused 1 ejaculated he placed his hand on her

forehead and prayed: 'Forgive our sins, we have sinned.' M[...] stayed at the mission house for 3 weeks and after every appointment he would recite the same prayer.

[19] M[...] went to different mission houses (as they had moved to a different house) from 2012 until 2016 where sexual assaults happened regularly. After an incident where a girl was pregnant and she took her to see accused 1, and the girl came back crying, she decided to expose accused 1 and attempted to lay a charge with the police. She also contacted other girls that had been at the mission houses. The police advised her to go back to the church to resolve the issue. One of the other girls later contacted her to say that she had successfully laid a charge, and the police will contact her.

[20] The twin sisters, A[...] and L[...] M [...], were participants in the South singing competition Idols. They wished to join the Grace Galaxy choir but were rejected due to their age of 17 years. Later, another member of the choir contacted them and thereafter Fizeka called them and informed them that they are part of the Grace Galaxy. They were told that they had to go to the mission house in Umhlanga to rehearse with the group. They were still attending school and accused 1 paid their school fees. They were in the same way individually called to an appointment where they were sexually assaulted. After the sexual assault accused 1 prayed 'God have mercy on us'. This happened more than once to each of them. When they went to accused 1 to tell him that they intended to leave the mission house, he cursed them and told them that their body parts will be scattered all over and that dogs will drink their blood in the streets. He also said that one of the sisters will get pregnant and both will marry the same man.

[21] What distinguishes their evidence is that after accused 1's arrest, they were at the front of a group of young girls protesting his innocence that was broadcast on television. They that it was because accused 2 told them always to protect accused 1. N[...] came forward and reported the abuse as she could not live with the guilt anymore.

[22] G [...] R [...] M [...], the mother of the twins testified that she knew all the accused from the JDI church. Fizeka came to her and asked her to send the twins to

accused 1 to be, trained in music. She refused to do so. However, the twins begged her to go and eventually they went. They were supposed to return as they were still attending But she was not allowed to see her children and when she saw her children at church, they ran away when accused 1 appeared. She went to report the matter to a Brigadier in the South African Police Service. The latter told her that there is nothing they could do about it. She had seen that the police feared accused 1, for in church they went as far as taking off their uniforms and laid it on the floor so that accused 1 could walk on it. She found accused 1's number and phoned him and told him to let her children come home. He called her stupid and ungrateful, but the next day the twins came home.

[23] H[...] V[...] F[...] joined JDI in 2009 in East London. In 2013 a flight was booked for her to go to Durban for an audition for the Grace Galaxy choir. The first night she was there she was called to accused 1's room by Fizeka. Accused 1 told her to lock the door and h asked her to lock the door. He asked her what she wanted him to be. He was dissatisfied when she replied a father figure, he said he is not there to play father. When she responded 'mentor' he said he does not like slow people and she can be his girlfriend. When she reiterated that she wanted him to be a father figure he instructed her to call Fizeka. The latter told her accused 1 does not want to be a father figure and she must listen to him. She went back to his room and the sexual assault by accused 1 followed the same pattern as previously set out. Afterwards he prayed God have mercy on us. Accused told her to move to Durban permanently as he will pay for her studies. She did so in December 2013. When she refused to go for appointments to his room he would curse her and he told her she will die. The sexual assaults and oral sex she had to perform happened regularly and he would pray after such sessions. When she refused to go for further appointments accused 1 chased her away in December 2014.

[24] S[...] N[...] M[...] became a member of JDI in 2012 when she was 17 years old. In December 2013 she met accused 1. After she received her matriculation results in January 2014 her pastor asked her if she wanted to share her testimony about the said results in Durban. Shortly afterwards she received a call from accused 1 during which call asked her if she had a boyfriend and he told her he will be her boyfriend. After sending him photos of her, at his request, she received a call from Fizeka. The

latter mentioned sent her money and she went to Durban by bus. When she arrived at the mission house, she was taken to accused 1's room. He asked her what she wanted, and she said she wanted to further her studies as she was an orphan and lived with her grandparents. He said she was in good hands and she went back to her room. That night at about 2 am Fizeka woke her and took her to accused 1's room. When he wanted her to take off her panties she lied and said she was menstruating. Accused 1 became angry and called Fizeka who said that she made God angry. Fizeka said she must apologize which she did. She was given money to go home to Secunda. A few days later she received money again and was told that she must return to Durban. On her return accused 1 told her she must be obedient if she wanted to survive. God had shown him that she must go into business and not study further. At the time there was an article in the newspaper where the mother of the twins alleged that accused 1 had kidnapped her children. For a period of 3 weeks all the girls and accused 1 stayed in a hotel and afterwards they all moved to a house in Royal Palms in Umhlanga. There she was summoned to accused 1's room by Fizeka. She was sexually assaulted by accused 1. Afterwards he prayed 'God forgive our sins, wash us with the blood of Jesus, be with us in Jesus name.' Thereafter the sexual assaults occurred regularly and he also instructed her to have oral sex. She testified how the congregants, which included police officials, idolised accused 1. She was contacted by Ms J[...] regarding a program that was broadcast about accused 1 on Special assignment.

[25] Z[...] M[...] was 25 when she testified in 2021. She was a member of JDI from 2011 until 2016. In 2012 her pastor told her there was an opening in Grace Galaxy and she must phone accused 1. She sent him an sms and he called her. He wanted to know if she knew anyone in the mission house and she said J[...]. The latter phoned her and said accused 1 said she must send him photos of herself. She did so. Accused 1 phoned her and told her he wanted her to come to Durban. Her mother refused as she was in grade 12 and attending school. In August 2012 she attended a crusade in Durban after she informed accused 1 that she wanted to go. She travelled to Durban with the church transport after Fizeka sent her money. After the church service she went to the mission house on instructions of Fizeka. She slept in a room with Fizeka, saw accused 1, but went home after the weekend without incident. In December 2012 she attended a two week long service in Durban and she travelled

with five other girls. After the service she went to the mission house and there were approximately 30 girls there. She slept in an outside room with 10 other girls. She was called to his room where he got on top of her while she was clothed as she stopped him from removing her pyjamas. He ejaculated and afterwards prayed for mercy and for God to forgive them. After a week she went home without further incident.

[26] She went to Durban twice after that. She went to the mission house in August 2013. She was called to his room where he asked her if she had a boyfriend and what she wanted from him. She said she needed a mentor and father. He then told her that he can see she was not serious. Thereafter he ordered her onto the bed and followed the same routine as set out earlier until he ejaculated. In August 2014 she was again called to the mission house. She and another girl went to accused 1's room after they were called. They indicated to him that they wanted to go home the following day. The next day he preached in church that people who leave him will die. She and the other girl became scared and stayed for a further 3 weeks. During Eastern 2016 she travelled from Secunda to Durban. At the mission house accused 1 told her that she had penis written all over her face. She left after two days. She feared accused 1 for what he predicts does happen and he is able to perform miracles.

[27] D[...] V[...] N[...] was 26 at the time she testified in 2023. In 2009 when she was 12 years old, she attended JDI with her stepmother. She joined the church choir, Hosana Voices, and she knew accused 1 as the person who leads the Grace Galaxy group. She attended a crusade at the Motherwell Sports Centre where someone told her that accused 1 wanted to see her. She went to him and he asked her whose child was she. She called her stepmother and accused 1 told her stepmother that he wanted to take over the complainant's life. The stepmother agreed. She was still in grade 10 and did not have a cell phone after which accused 1 gave her R1000 to buy a cell phone. She sent a sms to thank him from the new cell phone. She was called to a crusade in Cape Town where accused 1 asked her how close does she want to be to him. She said she wanted him to be her spiritual father. Accused 1 told her she must go and think about her answer and dismissed her. She did not send him messages and did not call him. He called her at 3 am one morning and shouted

at her that she is misbehaving, busy with boys, not listening to him and not cooperating.

[28] Fizeka booked a flight for her to Bloemfontein as there was going to be a crusade there. She was taken to accused 1's hotel room where he sexually assaulted her. In the lounge of the hotel accused 1 told Fizeka she is fire-fire. She realised that she was taking the man of God in the wrong way. When she was in grade 11 there was a crusade in Gqeberha. As she walked, accused 1's car stopped and he instructed her to get in. He asked her to move to Durban and he promised to pay for her schooling. She asked her biological mother's permission and thereafter Fizeka told her that she is booking a flight to Durban. In Durban she was taken to the house where accused 1 stayed with other girls. Fizeka told her to wash and took her to accused 1's room. There accused 1 instructed her to take off her clothes and he sexually assaulted her after he told her that she is his girlfriend now and is fire-fire.

[29] The group Grace Galaxy was formed and she was one of the members. They moved into a different house where accused 1 also came to stay. He continued his sexual assault every night. She accompanied accused 1 to Nigeria to attend a crusade. She was called to his room one night where she had to perform oral sex and thereafter he sexually assaulted her as well. They flew back to South Africa.

[30] D[...] N[...] also accompanied accused 1 to Israel in 2013 or 2014. He told her and the other church members that were accompanying him that they can see the life he is introducing them to if they were to stick with him. After a church service she was called to the room of accused 1 where he again sexually assaulted her. On their return she was diagnosed with tuberculosis and admitted to hospital. When she was discharged about 3 to 4 weeks later accused 1 told her that she must return to Gqeberha. He called her again and they left for Nigeria with the twins and V[...] F[...] where they recorded a music video before they returned to South Africa. Back in South Africa accused 1 verbally abused her. In 2015 the girls decided as a group they wanted to go tell him they wanted to go home. They did so and at a night vigil that evening he called them to the front of the church and told the congregation that they are ungrateful and they will never get better and he will see where they ended up. They left by bus that night. In 2015 the complainant relocated to Cape Town. She

was called by accused 2 who told her that accused 1 said she must go back to Durban. In 2018 Fizeka called her and told her that there is a journalist asking questions and she should not divulge what happened in Durban.

[31] C[...] Z[...] had testified in the trial that had commenced before Makaula J before he recused himself. She joined the JDI in 2009 when she was 13 years old. Initially she was a member of another church, but she attended a service of the JDI; at this service the video of the boy born without an oesophagus and was healed by accused 1 was shown. This, as well as other videos of accused 1, impressed her so that she joined JDI as a member. She went to a crusade in Durban where she saw accused 1 surrounded by beautiful girls and saw the Chrysalides sing. She decided she also wanted to be like those beautiful girls. Accused 1 accompanied the singers on a keyboard and the pastor said anyone who wanted to sing must put their names down. She had been singing from the age of 3 and put her name down. After she sang the pastor told her that accused 1 really liked her. T[...], one of the beautiful girls, gave her accused 1's telephone number and said that she must phone accused 1 daily. She did so and told him everything that she was doing. She felt that she was chosen by God. In 2010 she was invited to Durban, where accused 1 was going to train singers. When she told accused 1 she was coming he said she can come and stay at his house. After the service Fizeka told her that accused 1 was waiting for her and when she got outside he was waiting in his Lexus. They went to the mission house. She was called to his room and he wanted her to get on the bed with him. He asked her about her love life and how close she wanted him to be. She could sense that the answers she gave was not what he wanted and he told her to go. She was again called to his room. There he masturbated and was on top of her with his lower body naked. She could feel his penis on her clitoris and entering her vaginal opening slightly. After ejaculating he told her to go wipe herself and get back into bed. He fell asleep on top of her. When he woke up he rolled off and started praying 'God have mercy on us for we have sinned'. After instructing her to get dressed he told her what had happened between them was a covenant between them and God and she should not tell anyone. If she broke the covenant the punishment will be death. He asked her again how old she was and she told him she was 14. He said the man of God cannot go to jail and she assured him that she will not tell anyone. She also

went to Nigeria and Israel with accused 1. She was repeatedly sexually molested on those trips.

[32] Two experts testified on behalf of the state, Professor Karen Muller and Karen Hollely. It was not in issue that they were in fact experts. Dr Muller is a leading international expert on crimes of sexual and gender based violence against children and other vulnerable groups. Karen Hollely has been working with the Child Witness Institute for 25 years and her focus is on issues around trauma in cases of violence against children specifically and other vulnerable groups and disclosure processes and reasons for delay in reporting.

[33] They interviewed the complainants and found that accused 1 manipulated the complainants by fear and threats. He continuously asked them what they wanted from him while he knew they wanted to be close as he professed to be a man of God. In this way he made them complicit in his predatory behaviour. He made them believe that he had direct contact with God and had unlimited power.

The defence case

[34] The first accused confirmed that he is the founding president of the JDI. The church has mission houses that are places where religious activities occur e.g. prayer sessions, music rehearsals and 'biblical things'.

[35] Girls who were members of the church stayed in the mission houses. He had his own room at the mission house where he spent nights when he was too tired to go home to his wife and children. He provided financially for the women and girls who stayed there as he gave money for them to buy food. Accused 1 denied that he raped or sexually assaulted any of the women or girls that stayed in the mission house or any of the church members.

[36] Accused 1 likewise denied that he trafficked any person for sexual purposes or was involved in such trafficking. He also denied that he was managing an enterprise conducted through a pattern of racketeering activity or participated in the conduct of an enterprise through a pattern of racketeering. Accused 1 meticulously

testified about the charges against him relating to the statutory crimes and the elements of those crimes. He denied that he committed any of those crimes.

[37] Accused 2 joined the JDI church in 2006. She first moved to Pretoria with her husband in 2007 and then to Durban in 2010 or 2011. She lived with her husband and children. Ms Sulani was an active volunteer and when she started visiting the mission house she asked to join the women who were ironing accused 1's clothes. She sometimes stayed over but did not live there permanently. She travelled to Nigeria and Israel with accused 1 and the church. She denied that she recruited any girls for the mission house or threatened anyone to stay there. Ms Solani denied while going through the elements of the crimes that she participated in the conduct of an enterprise through a pattern of racketeering activity or trafficked in persons for sexual purposes or was involved in trafficking in persons for sexual purposes. She likewise denied raping or sexually assaulting any of the complainants or conspiring with another to commit a sexual offence.

[38] Accused 3 testified that she is a married housewife with two young daughters. She joined JDI in 2005 and was a secretary of the church from 2006 until the arrest of accused 1 in 2017. Her duties entailed inter alia driving accused 1 in Gqeberha when he was in the city, calling people out for prayer according to their requests, transcribing accused 1's sermons and reading chapters of his book to the congregation.

[39] She would visit the mission house in Umhlanga once a month on her own costs and would join the girls for prayers. She also attended crusades in different provinces when she could. She did not accompany accused 1 on his overseas visits. When she went to the mission house in Umhlanga she would stay in a hotel with her husband. However, when her husband did not accompany her, she stayed at the mission house and shared a room with accused 2. She also went to accused 1's room for counselling and saw girls there, massaging accused 1's feet. She did not massage his feet. He never acted inappropriately to her. Nobody reported any sexual assault or behaviour to her and she did not encounter a culture of fear in the mission house. She did not recruit people for accused 1 or contacted anyone to come to Durban or prevented anyone from leaving the mission house.

The conduct of the prosecutors.

[40] Unfortunately in this matter there have been problems, some of which can be classified as unethical conduct or incompetence of the prosecution, even from before the trial commenced, which only came to the fore during the trial. The following matters can be used as examples.

- An indictment was served on the accused which started the proceedings against them. The indictment that the accused were required to plead to (the second indictment), differed from the indictment served, without informing the court or the defence of this fact. This only became apparent at a later stage of the proceedings.
- Ms Cerfontein, one of the initial prosecutors in the case, consulted with some of the witnesses. She established that the witnesses' police statements differed from their versions during consultation or differed from the indictment. She advised Mr. Ntelwa, the lead prosecutor in the case, advocate Goberdan and advocate Gounden of the discrepancies. Instead of obtaining the correct version by way of written affidavits, Mr. Ntelwa wrote in an e-mail that the witnesses should be persuaded to stick to their version as set out in their police statements to prevent a possible postponement. Ms Cerfontein brought this email to the notice of Advocates Goberdan and Gounden. But, instead of censuring Mr. Ntelwa, despite realizing the unethical suggestion, the second indictment was drawn incorporating some of the amendments in accordance with the witnesses' statements to Ms Cerfontein.
- As set out earlier, the actions of Advocates Ntelwa, Goberdan and Gounden amounted to irregularities.
- Further consultations with the other witnesses by Ms Cerfontein were cancelled without her being given any reason for such cancellation. A probable inference is that Mr Ntelwa did not want other witnesses to deviate from their police statements that could be exposed during consultation.

- When Mr Ntelwa was going to be replaced as prosecutor in the trial, after the first witness had testified, Ms C[...] Z[...], the only complainant who had testified in the trial before Makaula J, wrote a letter to Ms Batohi complaining about the decision that Mr Ntelwa would be replaced. She also objected to Advocate Cerfontein and included the names of witnesses in the matter who also petitioned 'against the assignment of Ms Cerfontein'.
- This letter was forwarded to Mr Sekata, the Acting Director of Public Prosecutions in Makhanda (Grahamstown) for his comments. I have not been furnished with any comments he might have made, but it is after this that Mr Ntelwa rejoined the prosecuting team. This was done while Mr Ntelwa's superiors knew of the suggestion he made that the witnesses should be persuaded to stick to their police statements and thereby commit perjury.
- During the trial Mr Ntelwa, while one of the witnesses were being cross-examined, during an adjournment, went into the witness room and spoke to the witness. He claimed that it was to comfort her. As he was an officer of the court, such assurance was accepted. However, due to the lie he later told in court that I will refer to infra, I am not sure that it was in fact innocent. If he did consult with the witness, it amounts to unethical behaviour.¹
- When Ms J[...]s testimony commenced, it was not Mr Ntelwa that led her evidence but Mr Matakana. It became obvious when cross-examination started why that was the position, for then the contradictory statement she had made to Ms Cerfontein was disclosed. Ms Cerfontein had then, as an ethical prosecutor should, disclosed to Mr Daubermannn that the witness had made a contradictory statement to her.
- When I .pertinently asked Mr Ntelwa whether he knew that Ms J[...] had made a contradictory statement, he denied that he knew.

¹ CODE OF PROFESSIONAL CONDUCT & ETHICS OF THE NATIONAL BAR COUNCIL OF SOUTH AFRICA. Rule 26.2.

- The emails between the prosecutors were then disclosed to the defence after requested by the defence to do so. However, there were large portions of such emails that had been redacted and blocked out. When the unredacted emails were disclosed, it referred to further discrepancies between the statements of further witnesses and the consultations with Ms Cerfontein. The fact that there had been redactions is indicative of the attitude, despite what had been disclosed at that stage, that the prosecutors still did not play open cards with the court and the defence.
- These emails showed that the assurance that Mr Ntelwa gave to the court that he did not know of the contradictory statements, was false. For he was informed by Ms Cerfontein after her consultations at the same time that she informed his seniors.
- The defence brought an application for a mistrial where copious affidavits were filed. Mr Ntelwa averred in one of such affidavits that he did not know that digital penetration of the genitalia constituted rape. It is inconceivable that a prosecutor with 14 years' experience, that is involved in a case where rape is one of the crimes accused 1 faced, does not know what the definition of rape is. He was either extremely incompetent or dishonest when deposing to such an affidavit.
- Mr Ntelwa also established a WhatsApp group where all the complainants were connected. When this was revealed, Adv Gounden, Mr Ntelwa's senior, confronted Mr Ntelwa about this. Mr Ntelwa informed Adv Gounden that it was purely for logistical reasons. Instead of investigating this, all the WhatsApp messages were deleted. There had been an application to have this action of Mr Ntelwa and the lack of action by Mr Gounden declared a special entry. I refused, however, it is factor that should be considered when assessing the question whether the state has proved its case beyond reasonable doubt.

The legal position

The burden of proof.

[41] The state must prove its case beyond reasonable doubt. There is no onus on the accused to prove his or her innocence or convince the court of the truthfulness of any explanation proffered. It is apposite to set out what such evaluation entails.

In *S v V² Zulman* JA set it out as follows:

"It is trite that there is no obligation upon an accused person, where the State bears the onus, 'to convince the court'. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true but whether one subjectively believes him is not the test. As pointed out in many judgments of this Court and other courts the test is whether there is a reasonable possibility that the accused's evidence may be true."

In the oft quoted case of *R v Difford*³ it was set out as follows by Greenberg J:

'...no onus rests on the accused to convince the court of any explanation which he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal.'

In *R v M⁴ Davis* AJA said:

'...The court does not have to believe the defense story, still less does it have to believe it in all its details; it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true.'

² 2000(1) SACR 453 (SCA) para 3.

³ 1937 AD 370 at 373

⁴ 1946 AD 1023 at 1027

Furthermore, Brand AJA said in *S v Shackell*⁵:

'It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected based on inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.'

Cross-examination

[42] Mr Daubermannn on behalf of the accused argued that the cross-examination of the accused came to no cross-examination whatsoever. It is thus necessary to address the purpose and the consequences of such failure.

[43] The object of cross-examination has been defined in these words⁶:

'It should be borne in mind that the objects of cross examination are three, the first positive, and the other two negative. They are: to obtain evidence favourable to your client, to weak n evidence that has been given against your client, and finally, if nothing of value which is favourable can be obtained, to weaken or destroy the value of the evidence by attacking the credibility of the witness.'

[44] In Principles of Evidence (5th Edition) a Jutastat e-publication⁷, the following is said.

⁵ 2001(2) SACR 185 (SCA) para 30

⁶ Eric Morris: *Technique in Litigation* p134

'A party has a duty to cross examine on aspects which he disputes. The failure to cross examine may in appropriate cases have evidential consequences in that an adverse inference may be drawn against that party. The duty to cross examine on evidence that is disputed exists so that the witness is afforded an opportunity to answer points supposedly unfavourable to them. Generally the failure of the prosecutor to cross examine an accused may be decisive and an acquittal will likely result.

[45] In *S v Boesak*⁸ the following was said regarding cross-examination:

'[50] In the context of the dispute now under discussion, i.e. proof of the authenticity of the letter of 30 March 1988, but also in the wider context of the outcome of this appeal and the conduct of the defence in the trial court. it is clear law that a cross-examiner should out his defence on each and every aspect which he wishes to place in issue explicitly and unambiguously. to the witness implicating his client. A criminal trial is not a game of catch-as-catch-can. nor should it be turned into a forensic ambush.

[51] In this respect, we are in full agreement with the comments made by the Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at 36 J - 37 E.

"[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the

⁷ By PJ Schwikkard and TB Mosaka 5th ed, 2023, Ch 18, para 18.7 4

⁸ [2000] ZA.SCA 24 (12 May 2000) para 51 to 53

witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. (My emphasis)

[46] One of the goals of cross-examination by the state is to obtain favourable facts, concessions, inconsistencies or improbabilities. The importance of cross-examination is evident in the judgment of *S v van der Westhuizen*⁹ where the following was said:

'In our practice it is not the function of a prosecutor disinterestedly to place a hotchpotch of contradictory evidence before a court and then leave the court to make of it what it wills. On the contrary, it is the obligation of a prosecutor firmly but fairly and dispassionately to construct and present a case from what appears to be credible evidence, and to challenge the evidence of the accused and other defense witnesses with a view to discrediting such evidence, for the very purpose of obtaining a conviction. That is the essence of a prosecutor's function in an adversarial system and it is not peculiar to South Africa.'(my emphasis)

[47] The cross-examination of the accused was desultory in the extreme. No thought went into it. The trial was set down for 9 days to deal with the evidence of the defence. Accused 1 testified for a whole day, setting out his defence. But the cross-examination of accused 1 lasted less than a morning session. He was not cross-examined on his denial with reference to the complainants' testimonies. No attempt was made to elicit inconsistencies or improbabilities. His cross-examination consisted of putting a very limited synopsis of the respective complainant's evidence to him. Which evidence the accused denied. Then putting it to him that what they testified about is correct. It is not that there had been little scope for cross-examination, there was ample evidence that the veracity of his evidence could have been tested against. The cross-examination was shallow and lacking the intention to uncover the truth.

⁹ 2011(2)SACR 28 (SCA) para 11.

[48] Similarly ineffectual and superficial was the cross-examination of accused 2 and 3 that amounted to no cross-examination at all. They did not deviate from their respective versions or contradict themselves.

In the instant matter Mr. Dauberrmann is correct that the questions asked by the prosecutors in the instant matter did not amount to cross-examination at all.

Evaluation

[49] In evaluating the evidence it is incumbent on me to assess the evidence of the state and the accused to determine whether the state had proved its case beyond reasonable doubt. In doing so I must keep in mind that the evidence of single witnesses must be approached with caution. Furthermore, it would be wrong to say that I believe the complainants and therefore the accused's defence must be rejected as false.

[50] Where there are two mutually destructive versions before court the matter must be approached as was set out in *National Employers' General Insurance Co Ltd v Jagers*¹⁰ where the court remarked as follows:

'It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiffs allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff,

¹⁰ 1984 (4) SA 437 (E)

then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiffs case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.

[51] There are certain problems with the evidence of the complainants. No corroborating evidence was presented for the complainants' evidence. There must have been witnesses with regard to the first reports they made which the state did not call. First reports do not prove that the victim was raped or sexually assaulted, but it does prove consistency and that it was not a recent fabrication. There would have been telephone records that could have corroborated the witnesses' evidence that they had to call or text accused 1 daily. No such evidence was presented.

[52] If the evidence of the complainants is analysed, it cannot be ignored that there is proof that some of them deviated from their police statements. The possibility cannot be ignored that Mr Ntelwa had a much bigger influence on the witnesses' testimony, but the opportunity to test that had passed, as his attempted influence only came to the fore after they had testified so there was no opportunity to cross-examine them on the possibility of interference.

[53] Ms J[...], whose testimony was found not to be credible, was the person who indicated that she had laid a charge and that the police will contact the witnesses. It seems it was after this that the investigation into the conduct of the accused commenced.

[54] What casts a shadow over the evidence of the twins is that even after the arrest of accused 1, the twins still publicly professed his innocence and danced in front of television cameras to show their support for him. They were not minors at the time.

[55] S[...] M[...] was 19 years old when she testified that she lied to accused 1 that she was menstruating and was sent home. However, she returned to the mission house despite knowing what would be expected of her.

[56] Mr Daubermannn is correct in his argument that it cannot be established what the influence of Mr Ntelwa was on the evidence of the witnesses as the suggestions by Mr Ntelwa was not known at the time they testified.

[57] Mr Sesar, on behalf of the state, argued that I should accept the similar fact evidence of the state witnesses. In *S v Nduna*¹¹ the following was said:

"[17] It is settled law that whilst similar fact evidence is admissible to prove the identity of an accused person as the perpetrator of an offence, it cannot be used to prove the commission of the crime itself. This legal principle operates, in addition, to exclude such similar fact evidence from being confirmatory material on another count.

[18] However, the application of the rule is not to be confused with the situation where the rule is invoked to establish the cogency of the evidence of a systematic course of wrongful conduct in order to render it more probable that the offender committed each of the offences charged in respect of such conduct (*S v Gokool* 1965 (3) 465 NPD at 475A-D). The appellant's argument, if it were to be accepted, would be tantamount to excluding evidence of the modus operandi of the appellant merely because he had been charged with more than one count of robbery.'

[58] Witnesses in the instant matter were in contact with each other and discussed the case before charges were laid, but it was not disclosed to what extent. There is the additional problem in this case that there had been a WhatsApp group where all the complainants were part of; Ms Z[...] took the lead in complaining about the appointment of advocate Cerfontein as the prosecutor in the matter and proposing that Mr Ntelwa remains. Furthermore, Mr Ntelwa was the prosecutor who indicated that witnesses should be influenced to stick to their police statements. This case can be distinguished from the *Nduna*-matter where there were 2 robberies months apart

¹¹ [2010] ZASCA 120

with a similar *modus operandi*. The similar fact evidence cannot be taken into account in the instant matter in light of the fair trial principle.¹²

[59] The primary factor, unfortunately, is the lack of cross-examination of the accused. As indicated earlier, if there is no cross-examination on issues in dispute, it would be unfair to reject an accused's evidence if he or she has not had the opportunity to explain such issue. As the cross-examination of the accused was of such poor quality it had the effect that the accused's evidence was not placed in dispute at all and therefore it did not necessitate the calling of corroborative witnesses who might have bolstered their defence.

[60] A further factor that I have to take into account is the conduct of Mr Ntelwa and the irregularities that his conduct precipitated. If he had been removed at the time the prosecuting authority intended to remove him, the outcome might have been different. Furthermore, I am of the view that it is highly undesirable that a complainant can dictate who should prosecute in a trial, especially where a decision has been made to remove a prosecutor.

[61] In the instant matter there are two mutually destructive versions. On the one hand the evidence of the state witnesses of what had happened in the bedroom of accused 1 and on the other hand, the denial of accused 1 as to what had transpired in his bedroom.

[62] I am of the view that although there are aspects of the complainants' evidence that are unsatisfactory, I cannot find that their evidence is incredible. However, I cannot find that the evidence of the accused falls to be rejected as false either. This is especially so as the accused's evidence was not really placed in dispute through proper cross-examination. When deciding whether the state has proved its case beyond reasonable doubt, this matter falls in the category where, in my view, the explanations of the accused are improbable and I don't subjectively believe them. However, due to the uncertainty of the effect of the actions of Mr Ntelwa and the lack of proper cross-examination, I cannot find that the accused's versions are so

¹² Ferreira NO 1996(1) SA 894 (CC) para 153.

improbable that they cannot reasonable possible be true. The accused bore no onus to convince the court of their innocence.

[63] I am of the view, in the light of all the circumstances of the case that the state has not proved its case beyond reasonable doubt. The accused are found not guilty and are discharged on all the charges.

Irma Schoeman
Judge of the High Court