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**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION MIDDELBURG (LOCAL SEAT)**

CASE NO: CC 17 2024

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

27/05/2026

DATE MANKGE M.T

SIGNATURE

In the matter between:

SIMPHIWE XOLANI MKHWANAZI

THE ACCUSED

And

THE STATE

JUDGMENT

MANKGE J

[1] The accused herein is Mr. Simphiwe Xolani Mkhwanazi an adult male who has been charged with different counts totaling to 10 in number. In the charge sheet the State in most of these charges, is relying on the provisions of section 51 of the Act 105 of 1997.

[2] The accused initially pleaded Guilty to all the charges and later changed his pleas to those of Not guilty, as a result his pleas in all the charges were changed to pleas of Not guilty in terms of section 113 of Act 51 of 1977.

- [3] There was no explanation tendered by the accused in all the counts, but placed on record the accused defence as follows:
- 3.1 On count 1 to 4, the accused placed on record that he denies all allegations against him, he admitted that he was in the company of E[...] D[...] at the tarven, but he left her there and that he does not know what happened thereafter.
 - 3.2 On count 5 to 6, the accused also denied all allegations against him.
 - 3.3 On count 7 to 8, he denied all allegations, and pleaded that he did not rob the complainant, he also did not rape the victim, he does not even know both these complainants.
 - 3.4 On count 9 to 10, he denied all the allegations and pleaded that he did not rob and rape the victim.
- [4] The State served the defence with the statements and documents in terms of section 212 and 213 of the Act, the documents are attached on the record of the proceedings and are marked as exhibits A-S were handed in by agreement.
- [5] The defence admitted all the documents as well as the statements and their contents. Mr. Mavhasa further placed on record that there will be no need for the State to lead evidence on the said statements.
- [6] After all the above formalities the State started leading evidence to support their case. The evidence from both the State and defence will be paraphrased in this judgment as same are clearly contained in the record.
- [7] The first witness for the State was **S[...] P[...] H[...]**, who testified that she is a resident of Ezamokuhle Amersfoort. On 7 August 2021, around 2am she was asleep at her parental home, she was sleeping together with her mom and her younger brother in one bed.
- [8] Whilst sleeping like that she saw the accused (pointing at the accused and calling him "*this boy*"). The accused at the time had a knife in his possession, when they wanted to scream, as they woke up the accused ordered them to keep quiet saying he insulted them telling them they were making noise.

- [9] The accused was holding her uncle with one hand and the other hand which had a knife was around her uncle's neck. The accused then asked her whether she was S[...], and she confirmed.
- [10] The accused ordered her to come out of the bed where she was, she complied, and he ordered her uncle to go inside the bed, the uncle also complied, he pulled her into the kitchen, pulling her by hand. When they reached the kitchen, and when the accused wanted to unbutton her trousers, she screamed for her mother, and her mother looked at the accused and told the accused that whatever he wanted to do to her child, he must rather do it to her. Her mother was still in the bedroom but because there was no door, the mother could still see the kitchen from where she was, as it was directly opposite the bedroom they were in.
- [11] The accused ordered her mother and uncle to cover themselves with the blankets. He then grabbed her and pulled her back to the same bedroom where the mother and uncle were.
- [12] The knife was continuously in the accused's hand. The accused first hit her with the handle of the knife on her side of the knife, causing her to kneel, she complied, at that time the accused had already taken out his penis. The accused proceeded to order her to perform a blow job on him, she complied, after some moments the accused instructed her to stand up as there was nothing she was doing.
- [13] He then instructed her to get into the bed where her mother and uncle were, he wanted to do a dog style on her, he continued to penetrate her, after that he further instructed her to lie on the same bed. He proceeded by penetrating her from the back, continued to have sex with her. She complied with the accused instructions as she was scared.
- [14] When the accused finished, he demanded their cellphones, the accused further demanded money, he told them that if the money is not enough, he will stab them. It was at that time that her mom directed her to go and get the money in the kitchen. He pulled her to the kitchen, when they got there, she took out the money where her mother directed her and gave the money to the accused. He ordered them to cover themselves with blankets and he left. When they woke up, they went to report the incident at the Amersfoort police station. The police took her for examination at the

hospital.

- [15] She saw the accused face clearly, and she testified that the lightning was provided by a mass-light which is outside their home and it illuminates light into the bedroom and the kitchen. She was with the accused estimating the total of 15 minutes.
- [16] She testified that she was in grade 10, her birth certificate was handed in, recording her date of birth to be 14 September 2004. In 2021 she was 16 years old, she was going to turn 17 in September.
- [17] She testified that she did not consent to sexual intercourse with the accused, she did not know him prior to the accident. And when asked why she was referring to him as "*Lomfana*" (This boy) she stated that it is because she does not know his name at all.
- [18] There was no cross-examination of this witness at all. Mr. Mavhasa for the defence asked this court to confirm this fact with the accused which the accused confirmed that he did not have any questions as per the accused instructions.
- [19] The next witness was **Celumusa Emmanuel Mbatha**, who testified that he is the resident of Dagakraal no 3, he knows a place called Etshanini tavern. He was at that place on 4 August 2023 around 19h00. He was in the company of Sbongiseni Hlatshwayo, his friend.
- [20] Whilst they were at the said tavern, an unknown lady asked to join them where they were drinking. He testified that he was seeing this lady for the first time in that area. The lady joined them and they proceeded to drink in this lady's company.
- [21] The accused arrived and he asked for a cigarette, he knew the accused before that day, as they live in the same neighborhood. After the accused's arrival Sibongiseni left the tavern, when Sbongiseni left he was left with the lady and the accused at the tavern.
- [22] They proceeded to drink together but he later left the accused and the lady inside the tavern went and warmed himself outside where there was fire. He stayed outside for some time, and when he entered the tavern again to buy more beers the accused and the lady were no longer there.

- [23] He had initially left the two of them inside the tavern, and at the time they were the only two inside except for the bar tender Njabulo. When he enquired from Njabulo the whereabouts of the accused and the lady, Njabulo informed him that they left together. He then went back outside to the fire.
- [24] That was the last time he saw them, around Monday or Tuesday there was a notice on the tavern notice board that the same lady is missing. In the notice there was a photo of this lady, and he testified that was the lady that he left in the company of the accused.
- [25] Between Wednesday and Thursday he met the accused in the street, and when he asked him about the whereabouts of the said lady, the accused denied knowledge of the lady, he then went further to inform the accused that "*there is nothing that is hidden which will not be revealed*".
- [26] When photos were shown to this witness on photos 35 and 36 the witness identified the skirt that had been worn by the deceased on the day he was with them at the tavern. This witness also upon being asked about the graveyard at Number 3 he testified that, he stays 2 minutes' walk from the said graveyard, he also confirmed that the accused also stays close to the said graveyard.
- [27] Mr. Mbatha is one of the few State witnesses which were cross-examined by the accused. In doing so the accused conceded that he was with the witness and the deceased at the tavern, but he stated that he left the witness and the deceased still drinking and that was the last time he saw the deceased. This proposition was denied by the witness. That was basically the only issue that the accused raised with this witness.
- [28] This witness upon being asked to clarify the relationship between him and the accused, he told the court that the relationship was fine, and they have known each other for more than three years. Mr. Mbatha further told the court that the reason he told the accused the word that what is hidden will be revealed it is because he did not believe the accused's version that he left the tavern using a different gate from the one that was used by the deceased.
- [29] Mbatha stated that there were only two gates, and that if the accused did not use the gate that was allegedly used by the deceased, he could have only used the gate that

he was standing on, and he would have seen the accused exiting if he used that gate, but he did not.

- [30] The next witness for the State was **Sbongiseni Hlatshwayo**, who testified that, on 4 August 2023 he was at Etshanini Tavern around 19h00. He went with Celumusa to drink. They purchased their beers and there was a lady who was inside the tavern drinking. The lady then approached them and asked them if she could join and drink with them.
- [31] After some time and while they were still drinking the accused arrived and joined them. He soon left them at the tavern to go and visit the mother of his child. When he left the tavern he left the accused, the deceased drinking together with Celumusa.
- [32] He knew the accused before the day as a neighbor and when they are at drinking places they do drink together.
- [33] This witness was cross-examined and only one question was posed to the witness. The accused denied that the witness left him at the tavern with the deceased, of which the witness insisted he left the accused with the deceased together with Celumusa when he left the tavern.
- [34] The next witness was **Njabulo Lincon Twala**, who testified that on 4 August 2023 he was working at Etshanini Tavern as a bartender. He testified that he saw the accused, Sbongiseni and Celi, drinking together with an unknown lady.
- [35] He testified that at some stage many people went out of the tavern to warm themselves in the fire outside as it was cold that night. Amongst the people who left the tavern was Sbongiseni, whilst the accused and the deceased remained behind in the tavern. He, however, realized after a short while that there was no longer anyone in the tavern and it was a bit late. The accused and the deceased had also left the tavern.
- [36] Twala was shown photos 35 and 36 from the exhibits, and he confirmed that the person he was being shown was the unknown lady that was with the accused at the tavern. There was no cross-examination for the witness.
- [37] The next witness for the State was **Menzi David H[...]**, who testified that he stays at

Zamokuhle, and that S[...] H[...] complainant in count 9 & 10 is his niece. They stay in one yard.

[38] He testified that on 6 August 2021 at around 2 a.m. he was in his room sleeping alone, when he was woken up by the person who was attempting to open his house window.

[39] He saw the accused carrying a knife, who then informed him that he was looking for his girlfriend there. He testified that the accused then proceeded to open the kitchen door forcefully with the knife he was carrying. He then instructed him to show him where S[...] was sleeping. He showed him the room. The accused ordered S[...] to wake up and get off the bed, whilst at the same time he ordered him to go into the bed where Sne had been sleeping and sleep in the bed where her sister and nephew were still sleeping at the time. There was no cross-examination

[40] Upon being question H[...] told the court that, he knew the accused only by sight. He also confirmed that the accused on that night, he raped his niece (S[...]) in his presence and in the presence of his sister (the complainant's mother).

[41] The next witness for the State was **M[...] I[...] H[...]**, she testified that she was the mother to the victim in count 9 and 10, and Mr. M[...] H[...] is her brother. On the day of the incident, she was with the complainant.

[42] She testified that, when the accused demanded money from them at knifepoint, she directed her daughter S[...] to go and take the money which she had kept in the kitchen, and her daughter gave it to the accused person as he was demanding it. She testified that the money was R500-00 and some few rands.

[43] She also confirmed to the court that the accused raped her daughter in her presence, and that she saw when he was raping her, but she could not assist as the accused had a knife on her daughter's neck.

[44] The State was in possession of a statement in respect of counts 1-4, the contents discussed with the defence, that they will admit the statement and the contents of this statement to be true and correct. Exhibit "T". This was a statement by the police officer who was present at the scene when the deceased's body was discovered and retrieved from a shallow grave at Daggakraal No. 3 cemeteries, and in the presence

of Mr. Nhlangulela (the deceased's husband).

- [45] The State placed the contents of this statement on record. The accused confirmed again after the statement was interpreted that it can be accepted with no need for cross-examination of this witness.
- [46] The next witness for the State was **Mzikhona Phenius Nhlangulela** who testified that he is a resident of Pietermaritzburg, the deceased was her spouse. He at some stage decided to start a family and a home in Daggakraal during 2022.
- [47] He testified that in August 2023, the deceased came on a Friday to do her routine monthly visit in their home in Daggakraal, whilst he remained in Pietermaritzburg for work.
- [48] He received a call from his son who was staying in their Daggakraal home to report to him that the deceased did not come back since she left home. He told the court that he found the deceased's behavior very strange as she has never failed to return home in their 21 years of marriage. On 7th August he eventually requested to be released at work so that he can go to Daggakraal and start searching for his wife.
- [49] On his arrival at Daggakraal he went around searching and asking about the whereabouts of his wife. He eventually established that she was seen on Friday at a tavern called Etshanini and that she was there drinking with some young men. He further obtained information that when his wife left the tavern, she was followed by Simphiwe that he did not know. He then went to the police station as he was certain that there were CCTV cameras in that tavern.
- [50] He requested that the police accompany him to go to accused's place. When he asked the police to enter that homestead, the police said they were afraid to get inside the homestead, they then left him and went back to the police station.
- [51] It took him 3 days to search, and on Friday he woke up the neighbors and they searched again. When he was next to the big dam which was very close to the accused place he found one shoe belonging to his wife.
- [52] They continued with the search, and he eventually received a telephone call from his neighbor, to come and see something. Upon arriving at the spot where his neighbor

was searching, the neighbor showed him a small heap of fresh soil. There was a visible knee under the soil, he could see the complexion of the knee that it was a woman, and it looked like a deceased's skin color, next to the body was black color underclothes. He told the court that the discovery of the body in that spot surprised him, as when he was searching in that place 2 days ago there was nothing.

[53] They called the police before opening the soil, and the police arrived in the company of the forensics. The forensic removed the soil, he was called and he identified the body as that one of his wife Ellen. He testified that his wife had a cow bone inside her mouth and she was dead. He observed that his wife had assault injuries and strangling injuries.

[54] This whole incident affected him immensely he also had to move his son to Soweto, as he did not have someone to look after him. This witness was also not cross-examined by the accused.

[55] The next witness was **E[...] Nomvula Nkosi** who testified that, she resides at Daggakraal. On 10 June 2023, around 20h30 she was at tavern Etshanini, drinking, she was in the company of her friend Jabhile Mbatha who however left the tavern a bit earlier than her.

[56] She also eventually left the tavern and arrived at her place around 22h30. On arrival at home, she took out the key from the bag and opened the burglar, when she was opening the door, someone grabbed her on the shoulder she turned and looked at the person.

[57] Upon turning she saw three male persons. She saw Simphiwe who was well known to her, she pointed at the accused in the dock as Simphiwe. She testified that the accused and his friends assaulted her, she fell, they dragged her to the other spot in the yard, a shack where she was using it to store coal. Before they dragged her on the ground they had covered her mouth with a black cloth.

[58] They dragged her to the said shack, and whilst inside she was lying down, and after that she cannot remember what happened but the person she saw last when she could see was the accused. She testified that maybe the reason she did not see what happened after that might be because she was intoxicated and she was being strangled.

- [59] When she woke up, she was outside the shack, and she discovered that her under clothes were missing. Her tight pants, panty and her string that she used to tie around her hip, as well as her cellphone were missing. When she woke up, she was naked, she stood up and proceeded to open the door of the house.
- [60] She went out and called the neighbor, and the matter was later reported to the police.
- [61] The police took her to the doctor the same day she reported the incident.
- [62] When asked, she testified that the accused was in front when she turned, he was the first person who was next to her. She told the court the lighting was provided by a light bulb in the veranda which was on at the time.
- [63] Her testimony was further that, when she turned around, she saw the accused face, head and jacket he was wearing, and it was tracksuit top black and red in color. She also told the court that she even knows where the accused stays. She had known him for almost 3 years, she used to see him at the tavern or when she is going to the shops, standing there.
- [64] She suffered injuries on her forehead, her neck and her lower legs. She previously had no sexual relations with the accused. There was also no cross-examination of this witness.
- [65] The Next witness **C[...] Nonhlanhla Mnisi** who testified that, she stays in Amersfoort. On 31 July 2021, around midnight she was coming from a party and walking towards China 1. She was in company of her friend Siphesihle Msibi. Whilst walking there a male person that surfaced, he had a knife in his possession, he asked where they come from, and that they must go back to where they were coming from.
- [66] This male person whilst still holding the knife, ordered Siphesihle to take off his Nike sneakers, and took Siphesihle's cellphone and he further demanded money from Siphesihle, he had only coins in his possession and he handed them over to the man as per instruction.
- [67] The said man, whom the witness later identified as the accused, then instructed Siphesihle to run away and not look back. After Siphesihle left the accused then

instructed her to come with him, and she complied. He took her to the walls or furrow on the side of the road as they had been walking on the tar road. He instructed her to hold a rock, she complied and bow and touched the rock, the accused instructed her take off her trouser, and he proceeded to penetrate her from behind. It was Ms. M[...]’s evidence that when the accused penetrated her, he had the knife pressed on the side of her upper body.

- [68] The accused continued to have sexual intercourse with her without her consent. She pleaded with him not to kill her. He also ordered her to do blowjob on him, she complied, and after he insulted her and instructed her to leave. She ran to Hlatshwayo’s place for assistance.
- [69] When Siphesihle arrived with her brothers she related a story to him and the brothers, who went around the area looking for the accused, but could not find him.
- [70] They proceeded to the police station, she was taken to the hospital at the same time by the police, and it was early hours of the morning at the time. She was examined by the doctor, and she was bleeding on her private parts. Her panties were taken by the police for further investigation.
- [71] On Photos 1,2 and 3 of Exhibit P, she identified a rock and she testified it is the one that he was instructed to hold. She did not consent to sexual intercourse. She testified that she knew the accused and at that time he had a small dreadlocks, and she stated that as she sees in court the accused has removed the dreadlocks.
- [72] She further testified that she saw the accused clearly as, there was an Apollo light which was illuminating, and that when she was with the accused, they were 1 meter away from the said light, they were just under the apollo.
- [73] Ms. M[...] further told the court that she is also identifying the accused with a scar in his face, that she can still see in the dock.
- [74] Ms. M[...] was cross-examined by the accused, on cross-examination the accused put to her that he is seeing her for the first time in court, she never met her and never had sexual intercourse with her. This proposition was vehemently denied by Ms. M[...] who in turn put to the accused that, he must look at her properly and remember what he did to her on the day he raped her. This court noted how Ms. M[...] looked when he

was saying those words to the accused, she completely changed her look, she looked like a disgusted person. The cross-examination of Ms. M[...] ended on that note.

- [75] The next witness for the State was **Siphesihle Truth Msibi**, who testified that he knew C[...] M[...] and that she was his friend. On 31 July 2021 when she was walking with Ms. C[...] around 00h00 on the tarred road, someone emerged from the path, he approached them in possession of a 30cm knife. Siphesihle identified the accused as the person in question.
- [76] He testified that the accused placed a knife on his neck, and demanded his Nike sneakers, as well as his cellphone and money. He took off his sneakers, (valued R1500-00) and took out his cellphone as well as the coins and gave them to the accused as he was afraid as the accused was pointing at him with a knife.
- [77] Siphesihle testified also that the accused proceeded to grab Ms. C[...] whilst he was ordering him to run and not look back, he ran towards a Hlatshwayo homestead, he screamed asking for help from them, he later went to fetch his brothers as well and Ms. C[...]’s brothers. They all together went back to look for Ms. C[...] and they found her at Hlatshwayo’s homestead. When the brothers went to search for the accused, Ms. C[...] reported to him that the accused forced her to suck his penis and further raped her.
- [78] Siphesihle testified that he was seeing the accused for the first time on the day, but he identified him in the dock, stating that he is identifying him with a scar on his left side of the face. He told the court that on the day when the accused accosted them, he could see him clearly and that there was enough lighting which was provided by streetlights in the tar road. He stated that he was seeing that person for the first time and he does not know his name, but the witness pointed at the accused as that person.
- [79] According to Siphesihle the streetlights in the tar road, were 2 metres away from the point they were approached by the accused.
- [80] He was at the presence of the accused for about 5 minutes from the time he stopped them until he ordered him to run away. When he instructed him to take off the shoes, the accused was at arm’s length.

- [81] After the incident, he saw him again after a month at Khethelo, a drinking place. He was scared when he saw him and told other people that this is the person who raped his friend. Siphesihle told the court that the event of that day had an impact in his life he is not feeling safe walking at night, and he was also scared that if the accused could see him again, he might hurt him.
- [82] The next witness **Mpendulo Welcome Twala**, a Constable and a member of South African Police Services, attached at Crime Investigation Services at Daggakraal, and an investigating officer of the matter where the deceased is E[...] D[...].
- [83] He attended the scene at graveyard no.3, where the body of the deceased E[...] D[...] was retrieved. On arrival at the scene, a certain spot was pointed at him by the deceased husband, and when looking at the ground he saw a human body protruding from the ground.
- [84] They called the Local Criminal Record Centre in Ermelo who proceeded to dig a shallow grave where the body was protruding, and they confirm it was human female person who was buried there. In the mouth of the body, there was a cow bone that was protruding as if it had been pushed to the deceased mouth.
- [85] It was Twala's evidence that, where the body was retrieved it was not far from the suspect's homestead, he identified the said suspect as the accused in the dock, and he called him by his surname Mkhwanazi.
- [86] He testified that from the graveyard to the accused homestead it is about 500 meters and one could see the accused homestead when one is at the spot where the body was retrieved. Before the deceased was found she had been reported as a missing person, and he was investigating that missing person's case.
- [87] There were witnesses who gave a statement that, the last time the deceased was seen, she was together with the accused. After the deceased was declared dead, he went to accused's homestead, as he was the last person to be seen with the deceased. He knocked at his home, found the accused sleeping and next to his bed there were clothes covered with blood. He testified that he had known the accused for about 3 years, and when he asked him about the blood on clothes, the accused was shaking and replied by stating that it was the blood from a horse.

- [88] He took his clothes to exhibit bag and sealed it in front of him, he then placed him under arrest. The clothes were sealed in a bag and booked in SAP 13. There was also no cross-examination of this witness.
- [89] The next witness was **Bongani Edward Khumalo**, who testified that he works for South African Police Services attached in Sexual Violence Unit, and a current investigating officer of this case. He attended the post-mortem investigation of E[...] D[...] on 17 August 2023, that was being conducted by Dr Kolodi.
- [90] At this post-mortem investigation, he handed to Dr Kolodi, two (2) crime kits. Dr Kolodi extracted samples from the body of the deceased and when he was done, he handed back the sealed kit to him. The first crime kit was the adult sexual assault collect kit with reference number 19D1AC8058TF, Exhibit E8, the second one was the DNA EVIDENCE from body collection KIT 13D2AA7310TF, Exhibit E7. Also, DNA Collection kit E9 22DBBD8255TF, (according to Khumalo this was samples that were obtained by Const Twala from the accused,) and was a reference sample taken from the accused.
- [91] The first Daggakraal CAS 17/08/2023 on count 1-4, there is also Exhibit G4” DNA Ref 22DBBG1763TF buccal swap taken by Mavuso from the accused (previous I/O in another rape).
- [92] The results from Forensic Laboratory, on the first 4 counts, in terms of section 212 statement by Rampela, Exhibit “F1”, on CAS 17/09/2023 which was compared with Mkhwanazi S.X under 22DBBD8255, it was Khumalo’s evidence that the reference sample matches the one found on the deceased E[...] D[...].
- [93] Daggakraal CAS 15/06/2023 on count 5-6 the reference sample 22DBBG1763, sample exhibit G4, where the complainant is E[...] N[...]. Adult Sexual Assault J88, Exhibit “M” Reference 20D1AA6654TF 15/06/2023 22DbbG1763 matches vaginal swap taken on a case under Daggakraal CAS1 5/06/2023.
- [94] Khumalo testified further that in Amersfoort CAS 19/08/2021 in respect of count 9-10 where the victim S[...] H[...] J88 marked Exhibit “R”, which refers to sample of Mkhwanazi S.X with Ref number 21DBAC4742, these samples on Exhibit “R” from Amersfoort CAS 19/08/2021 also matches DNA of buccal swabs that were retrieved from Mkhwanazi S.X.

[95] He testified that the only outstanding results are regarding charges in count 7 where the complainant is C[...] M[...]. All the other victims, the accused buccal swabs are matching all the swabs that were retrieved from these victims. There was no cross-examination of this witness.

The Defence Case

[96] The accused testified in his defence, his evidence like that one of the State witnesses will be paraphrased. The accused on count 1-4 of the deceased E[...] D[...], he testified that on 4 August 2023 he was with the deceased E[...] D[...]. He denied that he kidnapped her, raped and killed her.

[97] He further denied the evidence of three witnesses and the bartender that he is the one who was last seen with the deceased. He testified that he did not know the deceased prior to that day. He testified that because he knew Sibongiseni and Chili who were with the deceased, he decided to go and join them as they were drinking and that is how he met the deceased and found himself drinking with her on that night.

[98] They eventually parted ways with her when he walked out of the tavern, he does not know what happened to her, up until he heard the following morning that they were looking for her. He did not see her outside the tavern, he saw her inside the tavern.

[99] On count 5-6 pertaining to E[...] N[...], he denied kidnapping her together with his friends, he further denied raping her together with friends. He further denied being in her house on that night at all and he told the court he never had any sexual intercourse with her.

[100] On count 7- 8, Mr. Mkhwanazi denied raping Ms. C[...] M[...] and robbing Siphesihle of his sneakers and his cellphone. He stated that he was not even at Amersfoort, he however agreed that their evidence was never disputed when they testified in court.

[101] On count 9-10, he denied that on 7 August 2021, he raped S[...] H[...] at her house in the presence of her mother and uncle. He also denied that he robbed S[...] of her money on the day. He further testified that the lady who testified in court is not S[...]’s mother. He however conceded that this was never disputed when the said lady testified in court.

- [102] On count 1- 4, (of the deceased E[...] D[...]) he stated that he does not know how his DNA, semen was found in her vaginal area. He further conceded that specimens were taken from him by the police, but he states he does not know why the semen found in the deceased's body matches that one taken from him. He told the court that there was, however, a lady that he once slept with, and he suspects that she is the one who might have taken his semen and gave them away.
- [103] He also does not know how his semen was found in the vagina of N[...] E[...] N[...].
- [104] On count 9 -10 he does not know how his sperms were found in S[...]. He stated that he had a relationship with her, the police even arrested him in her presence at some stage in year 2021. They once had sexual intercourse, and this was during those months after he was accosted by the community alleging that he raped her.
- [105] He testified further that S[...] was her girlfriend since 2020 and they met at Mjeko's tavern, he stated they are no longer in a relationship, it ended in June 2021, because she wanted him to separate with the mother of his child.
- [106] He saw her again in 2021 in winter, she came with a Forum and they started assaulting him, he tried to run away, he was eventually saved by the police officer, they were accusing him of raping her. He told the people that he had sexual intercourse with S[...] because she was his girlfriend.
- [107] Mr. Mkhwanazi proceeded to tell the court that he was once kidnapped by the people who arrested him. He was taken to a hostel in JHB pointed with firearms and was told about these murders and that he should admit them and admit the stock theft cases against him.
- [108] The cross-examination of Mr. Mkhwanazi was a complex one, wherein the accused continued to dispute that he committed the offences levelled against him. For the reason that this cross-examination yielded only the denials I do not intend to spend much time dealing with each question and answer that unfolded during his cross-examination, save to record that the accused was disputing that he committed all the 10 offences.
- [109] When asked during cross-examination to clarify whether he appreciates the

seriousness of the allegation against him, and why he is legally represented, he confirms that he appreciates and confirmed that he did not tell his counsel everything. He further confirmed that every time the witness testifies the attorney will approach him for instruction and that still he did not cross-examine most of the witnesses.

[110] He further conceded that even on witnesses who implicated him, he was not instructing his attorney to question those witnesses.

[111] The accused confirmed during his cross-examination that when he was arrested on 13 August 2023, the police drew buccal swap from him and he stated it was done by Const Twala, and Sgt Mavuso, though they did that on different dates. He further told the court that Sgt Mavuso told him that he was being suspected of raping someone whilst he was together with Zikhali brothers.

[112] He stated on cross-examination that he disputes that the swaps taken from him were properly handled for testing, he mentioned that he disputes that because he knew the people from the Skebhe forum were fighting him. He further highlighted that the forum even came to his home and took him and his brother to the mountain to point at him with firearms wanting them to admit something he did not do.

[113] He was asked on Count 5 and 6 whether he knew the complainant E[...] N[...], he confirmed, he knew her and that she was his father's girlfriend, he confirmed that Ms. E[...] had known him since he was young. He confirmed he knew her place, and that it is less than 2 kilometers from his place. He confirms he grew up in front of her.

[114] On Ms. E[...]’s evidence that she was attacked on 10 June 2023 in her yard, and that she identified him threw an electric light in the verandah he confirmed that he heard Ms. E[...] but stated instead that he knows her place and that there is no electricity light outside but only inside the house. The accused further confirmed that if Ms. E[...] says he saw him at her home the night of the incident, she would not be making a mistake as she knows him very well.

[115] On count 7- 8 on Ms. M[...], the accused put told the court that he used to see her in town and is familiar with her face. When asked why he stated he was seeing her for the first time in court, the accused did not have a proper answer to this. That in a nutshell was the accused evidence and cross-examination. He called one (1) witness, Sergeant Twala.

- [116] The defence witness Sergeant **Mpendulo Welcome Twala**, confirmed that he testified on behalf of the State. He stated that he understands that he was called by the accused to testify on his behalf, and that he consulted with the accused and his counsel. The less I say about the evidence of this witness the better. This witness in my view did not give evidence that corroborate, support or favour any of the accused versions he pulled-up in court. Twala contradicted most of the things that was put to him by the accused.
- [117] The one example I want to highlight is when the defence's counsel put to Twala that, when he came to arrest the accused, he found him with his girlfriend S[...], Twala disputed this, and he instead stated that the accused was lying as he was alone lying in bed.
- [118] On the assault of the accused, Twala confirmed that the accused came to open a case of assault but, he only knows what is contained in his statement, where the accused wrote that he was taken by Skebhe Community Forum to Vosloorus in relation to stock theft cases, Twala stated that in the statement the accused wrote that he was assaulted by this Skebhe on 2023/08/05 but he reported the case only on 2023/08/11.

The submissions (same will also be paraphrased).

- [119] The State asked this court to convict the accused on all the charges are per the indictment, and that on count 1-4 the link against the accused lies in DNA results semen which were extracted from labia majora of the deceased. The State counsel submitted that the accused does not have an explanation of his semen found in the body of the deceased. The State asked the court to consider that; the accused was the last person to be seen in the presence of the deceased. The State submitted that when DNA remain undisturbed the only inference to be drawn on the death and rape of the deceased in count 1-4 is that the accused is the one who is guilty of committing the offences in counts 1-4.
- [120] On count 5-6, the State wanted this court to consider that the accused was properly identified by the witness, and that the witness knew him very well even before the incident. The accused was identified under an electric light, also that even though the witness could not remember what happened after she was assaulted and became unconscious, the State argued that we know from proven facts that after she regained

consciousness, she did not have her panties on and her tight was also not in her body. In J88 Exhibit "M" the doctor made clinical findings that she had bruises on her face and forehead, neck, laceration on right leg, and vaginal injuries. State asked for conviction on counts 5-6.

[121] The State also asked for conviction on counts 7-8 they were relying on the identification of the two witnesses, Siphesihle and C[...] M[...], submitting that they both identified the accused very well, and that according to the State both these witnesses had no reason to falsely implicate the accused, and it was submitted that, there was enough corroborative evidence that the accused perpetrated these offences in count 7-8.

[122] On counts 9-10, the State submitted that the evidence of both mom, uncle of the complainant, as well as the complainant herself identified the accused as the person who committed these crimes. The State wanted the court to consider that the accused version that the alleged love relationship with the complainant according to the accused own evidence it ended in June 2021, and yet the rape of S[...] took place in August 2021, when according to the accused own version the alleged love relationship had ended. The Argument was also that S[...] was the first witness to testify and her entire testimony was not placed in dispute by the accused at all. The State submitted that the accused should be found guilty in counts 9-10 as charged.

DEFENCE

[123] The defence on the other hand argued for an acquittal of the accused especially with regard to counts 5-6 of Ms. E[...]. Also, that this complainant did not even know that she was raped, there is no explanation why her evidence was not challenged by the accused. The defence argued further that the three others who were with the accused might have been interested only in robbing Ms. E[...] and since there is no evidence that they raped her, this court must acquit the accused on counts 5-6, by giving the accused a benefit of the doubt.

[124] The defence acknowledged that the evidence of most of the witnesses was not challenged. The defence conceded further that, the accused did not contradict himself but acknowledge that he only contradicted himself on counts 1-4, where he stated when he left the tavern he used the different door, the contradiction is when he was testifying when he said he left all of them at the tavern when he left them.

- [125] The defence wanted this court to consider the accused version that his semen might have been planted, by his ex-girlfriend who had a protection order against him, she might have taken semen from her genitals and place it to the victims, and it was argued that this court must find that his explanation is reasonable and possibly true to acquit the accused.
- [126] The evidence in counts 7-8 was also not contested until they said he does not know them, it happened under high-mask electric light, which made them to see who the perpetrator was, they even called him by name in their testimony, they both identify him with a scar, and we say anyone can have a scar.
- [127] On counts 9-10, it was submitted that the accused says S[...] was his girlfriend and that the accused also stands to be acquitted on these counts.
- [128] After the arguments the State applied to open the State's case to correct the evidence on DNA regarding count 5-6, the State wanted to make clarity about DNA results applicable to these two counts. After the agreement the application to open the State case was granted as this court was of the view that this will not cause any prejudice to the accused.
- [129] The new State witness was called, by agreement between the parties, it was **Ontiretse Keabaka Lorato Rapheeha**, she was testifying to the document Exhibit "F1", she testified that on the following case files Amersfoort CAS 19/08/2021, Daggakraal CAS 17/08/2023, and Daggakraal Cas 15/06/2023 she received case files and DNA results.
- [130] Ms. Rapheeha testified that the sample from Labia Majora was compared with reference samples from all the cases mentioned above. The reference samples from Mkhwanazi S.X all matched the labia majora swap obtained from victim in Daggakraal 17/08/2023.
- [131] Ms. Rapheeha also testified that, at para 5.4, of her report she noted that the same reference sample in respect of Exhibit (b), Mkhwanazi S.X is excluded as a donor from the one found in exhibits in Daggakraal 15/06/2023.
- [132] Ms. Rapheeha explained to the court the possible reasons of the exclusion, I don't intend to register them here as I will not be basing my finding on them, in my view

they were just possible reasons as viewed by the forensic laboratory analyst, I find that it would be unfair to consider and used them against the accused, when Ms. Rapheeha mentioned them as just possibilities.

[133] In respect of Count 7 and 8 Amersfoort CAS 90/07/2021, She confirmed that the document was done by her. She also analyzed the case files and DNA results. He stated in Amersfoort 90/07/2021, there was no DNA obtained from the swaps, and that what was extracted was not meeting the requirement for the purposes of analyzing and matching. She stated that she attributes this to the offender maybe not ejaculated or the offender having maybe used a condom or it could have been limited physical contact. There was no cross-examination of this witness.

[134] Ms. Rapheeha confirmed that she is the author of the report and that it is true and correct.

[135] After this witness evidence the defence did not opt to open their case, nor to make any submissions. Mr. Mavhasa only asked the court to acquit the accused on counts 5-6.

[136] The state argued that the accused is guilty with respect to the counts relating to E[...] N[...], and that the accused was identified as one of the assailants, he was part of the group who assaulted her. The State argued further that the evidence in terms of Exhibit "M" establish that she was penetrated, and she later found herself without panties, also that she suffered vaginal injuries. The State also argued that the doctor who examined her also concluded that she suffered forceful penetration and that the court can conclude that there was penetration without consent.

[137] In arguing common purpose, the State relied on **S v Tshabalala**, a Constitutional case on common purpose, as well as the case of **Mosia v the State** another Constitutional case. The State argued that this court must also consider that the accused did not withdraw from the plan with his friends, if he withdrew before the rape happened, he failed to tell the court when testifying in his defence, and that if anyone tells the court that he withdrew this will be pure speculation.

Discussion

FACTS WHICH ARE COMMON CAUSE

[138] The following facts were common cause:

- The accused had sexual intercourse with S[...] H[...];
- The accused knew Ms. E[...] N[...] before the day of incident, 10 June 2023;
- The accused was together with the deceased Ms. E[...] D[...] at Etshanini tavern and two others on 04 August 2023.

FACTS WHICH WERE IN DISPUTE:

[139] The following facts were placed in dispute:

- That the accused is the one who committed all the offences as outlined in the indictment. The accused disputed committed the kidnapping, rape, murder and hiding the body of the E[...] D[...] in a shallow grave, thereby allegedly defeating the administration of justice.
- That the accused kidnapped and raped N[...] E[...] N[...].
- That the accused raped C[...] M[...].
- That the accused committed robbery against Siphesihle Msibi.
- That the accused raped and committed robbery against S[...] P[...] H[...].

BURDEN OF PROOF:

[140] The above at paragraph 142 are the only points that remains in dispute, the rest of the things having been fallen off the list, after the defence admission (not formal admissions I must stress) The accused did not make any formal admissions in this trial, but the defence admitted all the statements in terms of section 212 and section 213 of the Criminal Procedure Act, as well all the documentary evidence that were submitted by the State. The admission incorporate content in these statements and documents.

[141] Mr. Mavhasa unambiguously placed on record that there will be no need for the State to lead evidence on the said statements, even though the State on its own decided to call one forensic analyst towards the end of the trial to clarify one point which the State was of the view that it needed clarity.

[142] It is trite that in criminal prosecutions the onus to prove the guilt of the accused beyond reasonable doubt rests with the State. Equally trite is the legal principle that there is no burden upon an accused to prove his innocence.

[143] When it comes to the accused, all that is required is that the accused explanation be reasonably possibly true. **S v V 2000(1)**¹. Also, in **S v Sithole**² the court stated as follows (which I subscribe to) *“There is only one test in a criminal case, and that is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that an accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he has proffered might be true. These are not two independent tests, but rather the statement of one test, viewed from two perspectives”*

[144] It was this court’s duty to evaluate all the evidence holistically, in this regard I reference the Supreme Court of Appeal decision when it emphasized the proper approach to be adopted in **Mia v S**³ where it was held, *“The proper approach in a criminal case, is that evidence must be considered in its totality. It is only in doing so that a court can determine if the guilt of an accused person has been proved beyond reasonable doubt”*.

[145] I also want to reference the principle on the approach, which in my view, the Supreme court of Appeal in **Mia** was emphasizing 10 years after. That the correct approach to the evaluation of evidence as stated in **S v Van der Meyden**⁴ is: *“The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond a reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable, and some of it might be found to be only possibly false or unreliable but none of it may simply be ignored”*. It is important to reiterate that this burden of proof which was on the State did not denote **“beyond every shadow of doubt” (S v Ntsele 1998(2)SACR 178(SCA))**

[146] It is clear in this matter that the accused did not place in dispute most of the issues that were testified to by the State. To this end, the defence placed on record that

¹ SACR 453 SCA at 455.

² 1999 (1) SACR 585 (W).

³ 2009 (1) All SA 447 (SCA) at para 12.

⁴ 1999 (1) SACR 447 (W).

there would be no need for the State to lead any evidence regarding most of the documents submitted.

Counts 1-4

[147] The accused throughout the trial did not cross-examine most of the State witnesses. In respect of count 1-4 pertaining to E[...] D[...], the accused, when cross-examining the State witnesses, he only really denied that he was left alone with the deceased at the tavern. That is all that he placed in dispute, and that was really the only thing about these counts that he was stating in his attempt to disassociate himself with the deceased.

[148] The accused's denial was against the evidence of three people who proved through their evidence that the accused is the last person to be seen with the deceased at Etshanini tavern. This was the evidence of Celumusa Mbatha "Mbatha", who in a nutshell testified that he left the accused and the deceased drinking together when he went to warm himself up outside, and upon his return they were both gone, when he enquired from the bartender, he was informed that they left the tavern together.

[149] The accused's denial is also against the evidence of Bongani Hlatshwayo "Hlatshwayo", that he left the accused drinking with the deceased together with Mbatha. This denial was also against the evidence of Njabulo Twala "Twala" the bartender, who testified that after Mbatha and Hlatshwayo left the tavern, the accused was left only with the deceased, and they remained in the empty tavern drinking, but after some time he saw them no more. There is another evidence by Twala in the statements that were taken from the witnesses, after a missing person case was opened, he was investigating what the bartender wrote in his statement that, when the deceased left the tavern, the accused followed her.

[150] The medical evidence confirms that the accused was also linked with his DNA to the sexual assault on this woman who was later found dead and her body hidden in a shallow grave.

[151] The accused's version of disputing his DNA in the body of the deceased, is not only improbable, it is absurd. It was noted also in one of the accused's many versions that, he also put up a defence that his DNA might have been implanted by his other estranged girlfriend on the deceased. This court heard through the evidence of the experts that this is not possible. In any event, on the improbabilities alone this

defence is rejected as illogical and false.

[152] The witnesses, Mbatha, Hlatshwayo and Twala gave very straightforward evidence. They did not contradict themselves in any way when they were testifying that the accused is the one who was last seen with the deceased before she was found dead by her husband in a shallow grave. All three of them testified that there was no animosity between them and the accused, in my view indicating that they had no reason to collude and form a story against the accused.

[153] The accused, when these witnesses took the stand he even attempted to intimidate them with his facial expressions, he was reprimanded from doing so, but even with this, these witnesses did not contradict themselves. It was clear that they had nothing against the accused, but only in court to tell what they observed. I found them to have been very sincere and truthful in communicating to this court what happened. They are all found not only to be trustworthy but also to be reliable witnesses. I have no reason to doubt that they told the truth.

[154] In these charges 1-4, the State does not have direct evidence of how the deceased was raped and killed, however, it led evidence of a circumstantial nature, in this regard it based its case on the evidence of the witnesses as mentioned above.

[155] The state relied on this evidence in persuading this court to draw as the only reasonable inference that the accused is the one who kidnapped, raped and killed the deceased, and that the accused also obstructed justice by hiding her body in a shallow grave.

[156] The circumstantial evidence in this case supports the established facts which I highlighted above through the scientific evidence (DNA results), evidence of Mbatha, Hlatshwayo and Twala. The only inference to be drawn from this is that the accused is the last person who was left with the deceased from Etshanini tavern, and that the crimes of rape and murder did not happened at that tavern (otherwise at least Twala the bartender would have testified to this) but that it happened at a place where the deceased was taken to without her will, hence the rape and murder that followed.

[157] The proved facts in my considered view exclude every reasonable inference save the one sought to be drawn, that the accused is the one who committed the offences against Ms. E[...] D[...]. This is supported by the DNA evidence which linked the

accused with the swabs that were obtained from the deceased by Dr. Kolodi when he was doing post-mortem examination on her body. Same was later handed in its sealed form to officer Khumalo.

[158] Circumstantial evidence provides a basis from which a fact in dispute can be inferred. (*Mahlalela v S*⁵, the circumstantial evidence still needs to pass the test in *R v Blom*⁶ in which it was held that:

- (a) *The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.*
- (b) *The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct”*

[159] In this case after considering all the evidence mentioned above, in particular that one of Mbatha, Hlatshwayo, Twala and DNA evidence, as well as Mr Mkhwanazi’s own improbable version, the cumulative effect of all the items of the evidence leads to only one reasonable inference to be drawn from the facts, and which is that Mr Mkhwanazi is the one who kidnapped, raped, killed and hid the body of the deceased in a shallow grave as alleged and proved by the State.

[160] In my view, the State has used the most powerful tool, (circumstantial evidence) in proving the existence of the only issue which remained in dispute, as highlighted in para 142 above.

[161] In this case all the relevant facts having gone into the melting pot, and the only inference that is extracted from this pot is that the kidnapping, rape and the death of Ms Dlamini was caused by the accused. (*Smit v Arthur 1976 (3) SA 378 (A)*).

[162] I conclude, on counts 1-4, by mentioning that the mere fact that the deceased was first raped before she was murdered, only points to one conclusion that she was forced to a certain spot so that she can be raped, proving kidnapping in my firm view. The last thing that happened was the digging of the grave and her body hidden there is a clear indication of well-orchestrated plan by the accused to commit the crimes of murder and rape. I am mentioning all this to make a point that, in my view, this shows

⁵ (396/16) [2016] ZASCA 181 (28 November 2016).

⁶ 1939 AD 188, at pages 202 and 203.

that at least the murder and rape of the deceased was not a spare of the moment thing. It was premeditated and these facts prove this much. Accordingly, I am satisfied that this murder is the one which should be read with the provisions of section 51(1) as per the indictment.

[163] I am accordingly satisfied that the State have successfully proved that the accused is the one who committed the crimes of kidnapping, rape, murder against the deceased Ms. E[...] D[...], and that the accused is the one who hid her body in the shallow grave where her body was discovered by Mr. Nhlangulela.

Counts 5-6

[164] What I consider next is the evidence pertaining to the charges relating to Ms. E[...]. I choose to deal with this next for a simple reason that it also deals partly with circumstantial evidence. In the charges relating to Ms. E[...] the State relied on both direct and circumstantial evidence.

[165] The evidence of the complainant which is common cause was not placed in dispute as she identified only the accused as a person that she knew when she was attacked at her home. Her evidence is that after she was attacked, she collapsed and when she woke up, she was naked, she was not wearing even her panties. There was evidence (J88) and DNA evidence which proves that she was sexually assaulted. The doctor's observation was that "*There was 9 O'clock tear and bruises in her vagina*". The doctor also noted that this complainant had "*multiple bruises on the face, neck, forehead and laceration on the right leg*".

[166] The injuries that were noted by the doctor following early hours of an attack by the group are also found to be consistent with the evidence of Ms. E[...] that she was assaulted and further confirmed that she was sexually violated as contained in the medico-Legal examination by the medical doctor on 11 June 2023. It is further noted that the same day following a night of her attack that Ms. E[...] when making a report to the doctor she already, on the day registered with the medical doctor that she was "*sexually assaulted by a known person*" this is contained in paragraph 5 of the said examination report. This demonstrates that the complainant when she appeared before the doctor for examination, she remembered well that the person known to her was a perpetrator, and this court heard that she knew the accused amongst the group. (**emphasis underlined**).

- [167] Ms. E[...] on her own testified that she did not see anyone raping her. The last time she remembers is when she was attacked by the accused and 3 of his friends. She testified that they dragged her to a different spot, assaulted her whilst they had closed her mouth with a black cloth. When she woke-up, she was naked, and her items were missing.
- [168] Ms. E[...] was found to be a very frank and honest witness. She easily told the court that she did not see the accused or anyone raping her. The last time she saw the accused and his companions was when they were assaulting her. This court was impressed with her honesty. She could have easily exaggerated her version, but she chose to be honest enough to tell the court that she did not see. She was unbiased and was not trying to blame the accused unnecessarily. She was a single witness who in my firm view gave credible testimony and proved to this court with her honesty alone that she is a reliable witness.
- [169] The picture that I have painted above proves that the evidence, if any, against the accused and his companions is circumstantial in nature.
- [170] The above having been said, I also need to state that the above common cause facts in this matter also serve as proven facts. All I will now do is to consider whether these facts, together with the evidence tendered by Ms. E[...] and the documentary medico-legal evidence, (which was admitted by agreement) including the evidence from the accused himself, answer the question that I have highlighted on issues in dispute as a question which must be answered in this trial. ("Whether the accused kidnapped and raped Ms. E[...] as alleged by the State?").
- [171] In answering the above question I deem it necessary that my starting point be the accused own evidence, or rather his version that has been presented throughout this trial. This approach in my view will give proper context as to the conclusion that is arrived at later.
- [172] The accused version (which was not presented to Ms. E[...] for her to either admit or dispute it) is briefly that: he knows Ms. E[...] as his father's girlfriend, and that he knows that at her house there is no light in the verandah but only inside the house. When this version is looked at together with the evidence of Ms. E[...] and medical

evidence, it confirms that the accused is known to E[...] as she testified to, and that there was no problem with this witness identifying the accused. It also confirms that the accused knows Ms. E[...]’s house, that is why he could testify about the lighting in her house. Ms. E[...]’s evidence is also supported by the medico-legal examination report where she reported to the doctor who examined her that she was sexually assaulted by a known person.

[173] Now if we know in terms of the above facts that the accused knows Ms. E[...] and that they actually know each other, also that the accused can give evidence about the house of the accused, if this particular undisputed evidence is considered together with the documentary medical evidence which says “this woman was sexually assaulted” then the accused version that, he did not go to Ms. E[...]’s place and that he does not know her place cannot be reasonable possibly be true.

[174] The accused’s problems with these offences committed against Ms. E[...] do not end with the above. The accused’s problems against the evidence of the State begin, in my view, with the accused failing dismally to challenge the evidence of Ms. E [...], as mentioned above. The accused made up a version when Ms. E[...] was long gone, having taken the stand and leaving without her being cross-examined by the accused.

[175] The accused, when he put up his defence later, went on to raise a defence of an *alibi*; he told the court that he was not at Ms. E[...]’s house on the night she was attacked. As highlighted above, this is found to be highly improbable when looked at against the undisputed evidence, the accused version included.

[176] I accept that the improbability is not the sole reason for rejecting the accused’s version. The State, which bore the onus, proved through the undisputed evidence of Ms. E[...] that, *A*: the accused was there not alone but with three other people, *B*: he knew the accused very well before the night in question. This, whilst it was not disputed during Ms. E[...]’s evidence, was later and spontaneously mentioned by the accused during his evidence in chief.

[177] Ms. E[...] was found by this court to be a credible and unbiased witness. The question is now with all the above, can it be said that the accused’s version is reasonably possibly true, that he was not at Ms. E[...]’s house with three others on the night in question? The answer in my view is a clear *NO*. The improbabilities in his version are so glaring and his version is untenable.

- [178] Having concluded as above, the next question is whether this court is satisfied that the State proved the kidnapping and rape charge against the accused? In answering this question, I proceed to consider the following: Since I have found that the accused version that he was not at Ms. E[...]’s place is physically impossible. Also considering the accused’s own evidence about his knowledge of Ms. E[...]. Therefore, I find that Ms. E[...]’s identification of the accused is not questionable.
- [179] There was lightning enough to enable Ms. E[...] to see the accused, whom she knew before the night of the incident. If I accept this, I also accept that the accused was with the three people as mentioned by Ms. E[...], and that this group attacked, kidnapped and assaulted the complainant. As mentioned above, the accused did not place this evidence in dispute at all during Ms. E[...]’s evidence.
- [180] There is medical evidence that reveals that Ms. E[...] was sexually violated and disclosed that she sustained a 9 O’clock tear in her vagina, and some bruises in her body and face. There is also undisputed evidence that her panties were off when she gained consciousness after an attack by the accused and three others. There was also undisputed evidence that she was dragged from a place where she was initially attacked, to a different spot where she was assaulted until she was unconscious.
- [181] Even though the scientific evidence excludes the accused as a donor of semen, the proven facts are that he was amongst the attackers, and he in fact participated in the attack and the kidnapping of the complainant, who was later found to have been sexually violated.
- [182] When weighing the strength and the weaknesses, the probabilities and improbabilities of both the State and the accused’s case, I am of the view that the improbabilities in the accused version tip the balance in favour of the State, establishing the guilt of the accused beyond reasonable doubt that the accused was in common mind with the person’s or people who had sexual intercourse with Ms. E[...] after she was kidnapped and attacked on that particular night. The court heard from the undisputed evidence of Ms. E[...] that she did not consent to any sexual intercourse that evening.
- [183] The evidence of the accused being excluded by DNA, I apply it in the doctrine of common purpose in the following manner. The evidence from the State is that after

Ms. E[...] was assaulted, she was raped, and the medico-legal examination confirms this fact.

[184] It is tried that there is no duty on the accused person to prove anything, but in this case, where the accused is identified through undisputed evidence that he was amongst the group that attacked the complainant at home and left her unconscious, and when the accused has raised a defence of *alibi*. The accused's failure to provide a plausible explanation for the proven facts left the State's case as the only reasonable inference to accept. The proven facts also logically exclude every other reasonable conclusion besides guilt.

[185] I need to mention at this juncture that, the accused counsel tried several times when each time the witness finished the evidence in chief, to approach his client and attempt to take instructions from him. This court watched with interest when each consultation, the accused would smile at his counsel, give his response, and he would be seen smiling and shaking his head. His counsel will then, each time after that, ask this court to confirm with the accused whether he confirms that he has no questions, to which the accused will respond to the court by confirming that he has no questions for the witness.

[186] This happened with most of the witnesses except for Mbatha (on count 1-4), Ms. C[...] M[...] (count 7), where only one question was put to the witness, that the accused does not know the witness. The rest of the witnesses, the accused did not dispute their evidence nor ask any questions from them, effectively confirming the improbabilities in his version that he belatedly attempted to pull out. This I have no doubt that it weakened his defence of *alibi* in the case of Ms. E[...].

[187] On the charges with respect to Ms. E[...] as mentioned above, the defence in their submissions asked this court to find him Not guilty on the charge of rape, because he was excluded as the donor of the reference sample that was matched with the result from the DNA from labia majora swab that was taken from Ms. E[...].

[188] I now highlight hereunder why this submission by the defence cannot stand, which effectively means it cannot lead to an acquittal that the defence is proposing. As mentioned above, there is undisputed evidence from Ms. E[...] that the accused was at her house with three others on the night she was later sexually assaulted. Her evidence was also clear that the accused was leading the pack; he is the one who

first approached the complainant and the first to touch her. Ms. E[...]’s evidence proceeded to mention that the accused was actively participating together with the three whilst she was being assaulted and dragged to a different spot. This remained undisputed until the accused took the stand and led an inherently improbable defence as articulated above.

[189] The accused further failed to dispute Ms. E[...]’s evidence that the accused was amongst the people who assaulted, dragged her to a different spot in the yard, and later found out after she gained consciousness that she had been raped.

[190] The scientific evidence also revealed that a sample was subjected to the DNA analysis system, which matched the labia majora swab taken from Ms. E[...] a day after her attack. The evidence from Warrant Officer Rapheeha of the Biology Section of the Forensic Science Laboratory is that, though semen was found, it did not match the reference swab from the accused.

[191] Officer Rapheeha gave clarity as to why this happens. She stated that, amongst other reasons, it is possible that the offender may not have ejaculated internally or that the condom was used, or that there was a brief action which might have been interrupted and caused the offender not to ejaculate.

[192] Whilst the accused was excluded as a donor as per the evidence of Officer Rapheeha, as highlighted above, the proven facts are that he attacked the complainant together with the three other males on the night she was sexually assaulted. There was no evidence either from the accused himself or from Ms. E[...] that the accused dissociated himself with the group in any way; the evidence established the opposite instead that, he was leading this group when the complainant was accosted, kidnapped and injured.

[193] When I use guidance from the Constitutional Court case of ***Tshabalala S Ntuli v State*** (CCT 323/18; CCT69/19 [2019] ZACC 48, 2020 (3) BCLR 307 (CC), 2020 (2) SACR 38 (CC), 2020 (5) SA 1 (CC) 11 December 2019) (“*Tshabalala*”), like in “*Tshabalala*” case the accused and his companions acted as a ‘cohesive whole’ entering the complainant’s home together, approaching the complainant together, dragging her body into the ground to a different spot after blinding her eyes with a black cloth. It is clear in this case of Mr. Mkhwanazi, like in *Tshabalala*, that the violence against Ms. E[...] N[...] was committed in a systematic pattern.

- [194] The evidence points to the fact that the attack and the dragging of the complainant to a different spot and later raped was clearly planned by the group that was being led by the accused. The planning and the common purpose were evidently devised before she was accosted at her home, hence the systematic pattern. This was also evidently formed, and the rape was executed pursuant to this prior planning, and the group agreed to sexually assault her in furtherance of the common purpose.
- [195] The fact that someone else's semen other than the accused's semen was found in Ms. E[...]s DNA, in my view, does not exonerate the accused, who was furthering the common purpose with three others. The accused must have known or been aware of the group's mode of operation to commit the crimes at Ms. E[...]s home.
- [196] The accused did not dissociate himself from the actions of the group; he instead subjugated the victim to being sexually assaulted, and this is clear from his conduct of failing to dispute or contest Ms. E[...]s evidence, where he could have easily done so when she was still on the witness stand.
- [197] The presence of the accused (leading the pack). His failure to dissociate himself with the actions of the group, confirms that he was part of the prior agreement to commit the two crimes, rape and kidnapping that Ms. E[...] testified to.
- [198] The agreement between the accused and the group might not have been an expressed one, but it can be inferred from the following: the accused's continuous presence in that scene, his failure to dissociate with the group's actions, and the undisputed evidence that Ms. E[...] did not consent to any sexual intercourse, that the accused participated in all this.
- [199] The above was proven beyond reasonable doubt in my view, through undisputed evidence of Ms. E[...] and through the medical evidence supporting her bodily injuries and vaginal examination, and the conclusion by Dr. Zulu in Exhibit "M".
- [200] I find, therefore, on the facts, that the kidnapping and the rape of the complainant cannot be an independent act of the person whose DNA was linked with the swabs taken from Ms. E[...]s labia majora.

- [201] I align myself with the observation by the Constitutional Court in “***Tshabalala***” at para [51], that “*It is necessary that the relationship between rape and power must be considered when analyzing whether the doctrine applies to the common law crime of rape to characterize it simply as an act of a man inserting his genitalia into a female’s genitalia without her consent is unsustainable. In instances of a group rape the mere presence of a group of men result in power and dominance being exerted over woman victim*”.
- [202] At para [54] the court further remarked as follows which I find apposite in the case before me “*The instrumentality has no place in our modern society founded upon the Bill of Rights. . . . it ignores the fact that rape can be committed by more than one person for as long as the others have the intention of exerting power and dominance over the woman just by their presence in the room*” (**Own emphasis**).
- [203] The case before me is, in my view, a clear example of men having an intention of exerting power and dominance over Ms. E[...], who was not only a woman but an obviously vulnerable woman at the time, as she was clearly under the influence of alcohol (as she confessed in the witness stand), having been drinking liquor at Etshanini tavern. The accused’s presence at her home when she was attacked and later found to have been raped confirms that his intention was similar to the intention of the one whose DNA was matched with Ms. E[...]'s swabs.
- [204] Lastly, the Constitutional Court at para [59] stated as follows, which I also find appropriate in the case before me, “. . . *it is not only a male anatomy that is critical, the presence of the co-perpetrators who encouraged and facilitate the commission of the crimes is equally important*”.
- [205] With all the above, I am satisfied that the proven facts outlined above exclude every reasonable inference, except the guilt of the accused of Rape, as well kidnapping of Ms. E[...]. There is no other reasonable inference that exists save that the accused, by his presence and participating together with three others, committed crimes (in particular that one of Rape) against Ms. E[...] on 10 June 2023.

- [206] On the rape of Ms. C[...] M[...], the accused was properly identified by Ms. M[...]. She told the court there was enough light which was provided by the streetlights, and that they were too close to the said lights when the accused accosted her and her friend Sphesihle.
- [207] Siphesihle corroborated the evidence of Ms. M[...] in all material respects on the identity of the accused. He also gave a first witness testimony in that when she met up with Ms. M[...] after he came back with the assistant, Ms. M[...] reported to him that the accused raped her, after he left the scene where he had left her with the accused.
- [208] Both Ms. M[...] and Siphesihle impressed the court as witnesses. They gave their evidence in a straightforward manner, where they did not see they were honest enough to say so. Their evidence was not disputed by the accused (on material issues), except that the accused denied knowing Ms. C[...], which was vehemently disputed by Ms. C[...], who reminded the accused that he must just try to remember well what he did to her on the day of the incident when he raped her.
- [209] Ms. M[...]’s and Siphesihle’s evidence corroborated each other on the identity of the accused, where both testified that there were streetlights that were illuminating the place where the accused accosted them. Ms. M[...] on the other hand testified that where the accused raped her after Siphesihle left, there was also visibility, which was provided by an Apollo light, which was 1 meter away from them when the accused was raping her. Both Ms. C[...] and Siphesihle identified the accused with his features, and they both identified the accused with a big scar on his face.
- [210] The evidence of these two placed the accused at the scene where Ms. M[...] was sexually violated, it also placed the accused at the scene where Siphesihle was robbed of his items (Nokia 03 cellphone, Airforce Nike shoes and cash). They both also gave corroborative evidence in that they both confirmed that the accused committed offences against them whilst he was always pointing at them with a knife. Siphesihle was no longer available during the rape of Ms. C[...], but his evidence corroborates that of Ms. C[...] that when he left her with the accused, she was still pointed with the knife.
- [211] This evidence was also not placed in dispute by the accused, except that he only denied knowing Ms. M[...]. I am satisfied that the State successfully proved the case

of Rape of Ms. M[...] and that one of Robbery with aggravating circumstances against the accused as outlined in the indictment.

On counts 9-10

[212] The evidence of the State regarding counts 9-10 is straightforward. The accused is not placing in dispute that he had sexual intercourse with Ms. S[...], he told the court later that she was his girlfriend. Even though he did not put this version to S[...], the accused repeated it when he gave his evidence in chief. It is strange that the accused was always comfortable with this version when he was alone, but could not repeat it when faced with the same alleged girlfriend, and in my view, this says a lot about the accused's realness and his trust in this version. This version will be considered later against the probabilities.

[213] This defence cannot stand at all fronts. The accused's own evidence is at odds with itself, the accused himself told the court that the 'love relationship' with S[...] ended in June 2021, and that was the end of their intimacy. The undisputed evidence from the State is that the rape of S[...] took place in August 2021. Meaning even if for a moment, it can be accepted that the accused and S[...] were in a love relationship, it is clear that any sexual interaction between them beyond June 2021 cannot be a consensual one.

[214] The undisputed evidence is also that the complainant was raped by the accused in the presence of three other people, her mother, her uncle and her younger brother. Two of these people testified in court and corroborated S[...]s evidence in all material respects.

[215] They are S[...]s family, this court was therefore required by law to apply extra caution when considering their evidence, which could have easily be biased due to the nature of the relationship between them. What, however, made this court's job easy in this exercise is that the accused did not dispute their evidence at all. The accused even failed to place his initial version, which he put up in his plea explanation when S[...] was testifying in court. S[...] was not cross-examined by the accused at all, leaving her testimony unchallenged.

[216] On the other hand, there was Ms. H[...] (the complainant's mother) and Mr. H[...] (the complainant's uncle), who impressed this court as honest witnesses. They did not exaggerate issues with the aim of strengthening a case against the accused. They

also both corroborated each other that the accused performed the rape on S[...] and robbed her of the money whilst the accused was pointing a knife at her. The complainant's mother also confirmed that the amount that was taken by the accused at knifepoint was an amount of R590-00. The sexual intercourse, whilst pointed with a knife on its own, demonstrates that there could not have been any consent between the people who are engaging in the intercourse.

[217] The accused's defence that S[...] was his girlfriend and he had sexual intercourse with her as his girlfriend, is found to be improbable, based on, amongst other reasons (as highlighted above) that the accused when he entered the room where S[...] and her mother were sleeping, he did not even know who in the room was S[...]. His first question according to the undisputed evidence was to ask amongst the ladies who "Sine" (*sic*) is. This in so many ways, verifies that the accused did not even know how S[...] looked like. For this reason alone, his defence falls by the wayside, and it is rejected as beyond reasonable doubt untrue.

[218] This court's conclusion on count 9-10 is that the accused is guilty of rape of S[...] H[...], and of robbing her of her cash, on 07 August 2021.

[219] After all the above have been considered I am satisfied that the State proved its case against the accused, beyond a reasonable doubt on all the 10 charges that were levelled against him. The accused is accordingly found guilty as charged.

MT Mankge
Judge of the High Court
Middelburg

DATE OF HEARING: 11 May 2026 – 27 May 2026

DATE OF JUDGMENT: 27 May 2026

For the State:

Adv Lusenga

For the defence:

Mr. Mabasa