



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BISHO)**

CASE NO.:CC20/2024

In the matter between:

THE STATE

and

XOLISILE NOJILANA

ACCUSED

JUDGMENT

ZONO AJ:

Introduction

[1] The accused was arraigned in this court on a charge of rape of a minor child, who was allegedly 12 years of age at the time of incident. The charge was said to be in contravention of section 3 read with section 1, 50, 55, 56(1) 56A, 57, 58, 59 and 60 of the Criminal Law (sexual offences and related matters) amendment Act 32 of 2007 read with section 256 and 261 of the Criminal Procedure Act 51 of 1977 . It is alleged that on or about the 30th

October 2021 and at or near Upper Ngqumeya, in the District of Kieskammahoek, the accused did unlawfully and intentionally commit an act of sexual penetration with I[...] N[...], a 12-year-old female, by inserting his penis into her vagina without her consent. The state invoked the provisions of section 51(1) read with schedule 2 of the Criminal Law Amendment Act 125 of 1997, relating to a discretionary minimum sentence of life imprisonment as the victim is a person under the age of 16 years of age. The accused who was legally represented pleaded not guilty to the charge of rape and elected not to disclose the basis of his defence. The state opened its case by calling the evidence of Z[...] N[...], who is the victim's aunt.

Z[...] N[...]

[2] The nub of her testimony is that; she was residing at their home with her mother and children including I[...] N[...], the victim. They were six members in the household, which is comprised of five roomed house and two roomed shack. The premises were properly fenced. They were all staying in the five roomed house. Accused was looking after the livestock (goats). The accused was spending a lot of time in their homestead as he would go to his house only to sleep and bath.

[3] On 30th October 2021 the accused and her (Z[...]) were sitting on the shade outside the house as it was hot but still inside the yard when the children, including I[...] N[...], were inside the house. Accused and Z[...] were watching the goats (on sight) when grazing at the veld. At that time Z[...] gave the accused her bank card to go and buy Drostdy wine, which he did and they drank it as they were used to do that. As they were drinking, two African young men arrived in a motor vehicle and stopped outside the yard. After an insignificant discussion Z[...] and the two youngmen agreed to attend a traditional ceremony at another local family house. Part of the wine was taken with as the other was

left in the Fridge for the accused consumption, and they left the premises at about 14h00.

[4] Whilst in the ceremony, Z[...] received a call from Nontsikelelo Maki rushing her to arrive at home. She then requested the motor vehicle to convey her to her home, which it did. On her arrival at home Z[...] found a lot of elderly women sitting perplexed and crestfallen in the sitting room. Upon enquiry, Nontsikelelo advised Z[...] to go to the bedroom and see for herself. When going to the bedroom, she was followed by I[...]2 and Luvano Soga. On her arrival at the bedroom, Z[...] found I[...] lying unconsciously on the bed and she frantically shook her. She saw a washing basin with water when simultaneously experiencing a strong smell of liquor in the bedroom. Z[...] further saw I[...]’s panty on top of the dressing table. She then uncovered I[...] and saw that she (I[...]) did not have her panty on. She then went to the sitting room for explanation by elderly women and I[...]2 (minor child) relayed the story as she had seen the events. I[...]2’s story directly implicated the accused. I will deal with her version when dealing with her evidence.

[5] After having heard the narration by I[...]2, Z[...] went to accused’s home to look for him. On arrival at accused’s home, Z[...] found the accused house door locked. She loudly called the accused demanding that he must open. Z[...] persistently knocked thereat; angrily banging the door and shouting as there was no response. That took place until Thobani, accused’s neighbour heard Z[...]’s noise and he enquired as to the matter. As she was narrating the story to Thobani, accused opened the door and Z[...] enquired from the accused about what he had done. She demanded that they must go to her home to answer about his deeds. Despite his resistance, Z[...] and Thobani took the accused to Z[...]’s home. On their arrival, accused was shown I[...] who was lying on the bed. Accused’s answer was that he only was trying to wipe I[...] as she had vomited

herself. The accused could not explain why I[...]’s panty that was found on the dressing table. In disbelief Z[...] went to report the matter to the sub headman, who, upon invitation came to the scene. On their arrival at the scene, they witnessed that I[...] still could not move, speak or do anything. The sub headman called the police, who quickly arrived. Before police arrival accused became aggressive and attempted to escape. During the police presence too, the accused became violent and aggressive and he was forcefully loaded into the police van.

[6] At the police station Z[...] opened the case and I[...] was then awake and spoke to the police. Z[...] also spoke to I[...] about what happened and she narrated her side of the story. I will deal with that story when dealing with I[...]’s evidence. Having finished at the police station, I[...] and others were taken to SS Gida Hospital for I[...]’s medical examination. At that time I[...]’s panty was carried in a plastic bag. During her medical examination, I[...] was crying. They were released from hospital. On arrival at home, Z[...] realized that the wine that was left in the fridge was finished.

[7] During cross examination Z[...] explained why her statement made to the police was not detailed as compared to the testimony she made before this court. She mainly testified that on that day she was not feeling well. She maintained that she and the accused drank the wine outside when sitting on the shade. She utterly denied a version that she gave I[...] a wine to drink. She maintained that she went to the ceremony with Lerato and Lukhanyo and that she left the accused at home.

B[...] D[...]

[8] The next witness was B[...] D[...]. I[...] is her granddaughter and they were staying in the same homestead together with Z[...] and other

grandchildren. She testified that on 30th October 2021, she woke up early to the Nqumeya Primary School for special voter registration as she was a Deputy Presiding officer. She knocked off at 17H00 and went back to her home. Not far from the gate of her home, she met I[...]2 N[...] (granddaughter) who frantically came to her. She hysterically narrated the story of rape of I[...] as they allegedly saw it. I[...]2, informed, upon enquiry by Ms D [...], that the accused is in the house and Ms D[...] quickly went inside. Luvano also came and talked. It was difficult to follow what they were saying. She then met the accused in the lounge or sitting room. Before she could say anything the accused volunteered an explanation that I[...] was not well, she was vomiting and the accused tried to help her. That was frontally disputed by the young children, *to wit*, I[...]2 and Luvano. They directly told the accused that he was on top of I[...]. Without a denial of that assertion, the accused responded by saying “*how is like to help a person? I was helping and that turns with me and against*”. *Kunjani ukunceda umntu, mna bendimnceda ngoku lento ijika nam.*

[9] Ms D[...] proceeded to the bedroom to check I[...]. On arrival in the bedroom, she saw I[...] lying on her back, her dress was up to the level just below the stomach (waste area). She further saw I[...]’s panty on top of the dressing table. A strong smell of liquor pervaded the bedroom. He further saw a vomit, washing basin with clean water and a wash cloth. On the bed there were wipe marks or stains. She felt so bad to such an extent that she does not know how she carried herself. She then sent her friend and neighbour to be called. The neighbour and a friend called Z[...] and one of her daughters who works at Fort Beauford. Ms D[...] testified that, Z[...] on her arrival and having been confronted with the story and victim’s situation, went to look for the accused and she came back with him into the house. She further testified that I[...] was drunk as she was smelling liquor from mouth and was dizzy. She was not responding even if she was being shaken or talked to.

[10] Ms D[...] testified further that she knows the accused as he was assisting in her homestead in terms of looking after livestock and doing almost everything as any member of family would do, including collecting the wood and setting the fire and warming the house.

[11] During cross examination, no version was put to Ms D[...]. Whilst not disputing having made a statement to the police, she testified that she does not recall. Seeing that there are statements on which she appended her signature, she testified that she does not recall if the statements were read back to her. She attributed that forgetfulness to the life pressures and age. She was forgetful even before the incident, and now it is worse. Upon being confronted with her statements, she insisted that the washing basin in the bedroom contained clean water.

Luvano Soga

[12] The third state witness was Luvano Soga, a minor who testified through the services of an intermediary, Ms Agcobile Patricia Ngqokwini, a qualified social worker. Luvano testified that he is staying in the same homestead with I[...] and all other persons referred to above. On 30th October 2021 Luvano was at home when the accused was drinking with his mother, Z[...]. The accused was left with a liquor by Z[...]. The accused gave I[...] liquor to drink, which she did. I[...] then started with a running stomach. The accused boiled water to wash I[...]. The accused instructed them to go and look for the goats and they left. On the way he told I[...]2 to go back as he would walk alone to the veld. On his return he was called by I[...]2 to see the accused who was under the blanket and on top of I[...]. When his mother, Z[...], and his grandmother, Ms D[...] arrived, they told them what they saw the accused doing.

[13] He testified that his mother, Z[...], accused, Lerato and others were drinking outside the house. He testified that he was inside the house with I[...]² and I[...]. I[...]² was cleaning the dishes while I[...] was playing with the cell phone. He stated, in response to the question, that there was no television at home.

[14] During cross examination he re iterated that the accused was on top of I[...] when she was lying on the bed. He maintained that they reported to his mother and grandmother who respectively arrived at home and they told them what had happened when they were not at home. He denied the accused version put to him *inter alia* that: the accused went to the veld and on his return he found that Z[...] had left the homestead; That on his arrival from the veld he found the victim vomiting inside the house as she was drunk and that he went to clean up the victim, and he finished cleaning up I[...] when Ms D[...] had arrived. He reiterated that the accused had been in the same bed with I[...], that he had been on top of I[...] under the same blanket, and that he drank liquor outside. He clarified his statement made in his evidence in chief that there was no TV to mean that there was TV in the house but it was not working.

I[...]² N[...]

[15] The fourth state witness was I[...]² N[...] who also testified through the services of the same intermediary. On 30th October 2021 she was at home. Her aunt Z[...], Lerato and the accused were sitting outside drinking, while she and Luvano were watching television. Her aunt, Z[...] was taken by a certain motor vehicle. At some point she was washing dishes while I[...] was drinking what was given to her by the accused. I[...] got drunk and they took her to bed to sleep. I[...] requested them to accompany her to the toilet, which they did. The accused then sent them to look for the goats. When they could not find the goats they came back and went to check I[...] in the room. They saw the accused on

top of I[...]. When they confronted and questioned the accused about what he was found doing, the accused remonstrated them to go and look for the goats and they told him that they could not find the goats. The accused directed them as to which direction the goats went. As they were going Luvano said to I[...]² that she must remain at home as he would go alone.

[16] I[...]² went to look for the accused. Accused instructed her to boil water to wash I[...]. She placed on the kettle and went out to look for Luvano when the accused went in to switch off the kettle. Luvano and I[...]² came back and peeped through the door and saw the accused on top of I[...] as his trousers were down. They shouted asking as to what the accused was doing. They saw their grandmother, Ms D[...]. They then ran to her and reported the matter. As they were coming in they met the accused coming out of the house. They all went to the room where I[...] was. I[...] was half naked as her dress was up to the level of the chest. The panty was lowered to the level of the knees. Their grandmother, Ms D[...] shook or pat I[...] who did not respond. Ms D[...] then sent them to call people who later came into the house.

[17] I[...]² testified that her aunt, Z[...] and others were drinking outside. When Z[...] and others left they left some wine in the fridge. She was adamant that Z[...] left leaving the accused at home not the other way round.

[18] During cross examination I[...]² denied accused version that the accused was never on top of I[...] with his trousers lowered. She emphasized and reiterated her version in chief. She further denied that Z[...] gave I[...] a glass of wine. She reiterated that the accused gave I[...] a glass of wine.

Dr Momoza

[19] The fifth state witness was Doctor Ivo Gcina Thina Momoza who medically examined I[...] at SS Gida Hospital on 30th October 2021. She confirmed having completed a medico legal examination form, colloquially known as J88. She painstakingly explained its contents as it was duly admitted as exhibit D.

[20] Under *general condition*, (condition of clothing) it is recorded that I[...]’s dress was dirty with what looked like mud stains. On clinical findings it is recorded that no evidence of bruising or abrasion. Vulva and labia appears normal. It further recorded a small tear over the vaginal orifice on posterior aspect of opening; hymen not visualized; whitish fluid seen on the opening of the vaginal vault. Under mental health and emotional status, it recorded that the child (I[...]) was crying during examination and sample taking. Clinically no evidence of drug and alcohol. The conclusion under general examination was that “*sexual assault cannot be excluded*”.

[21] Under the topic “*History in case of alleged sexual offence*” the following is recorded: Pregnancies and deliveries and contraceptives were nil. The date and time of last intercourse with consent is none. Consensual sexual partners were none. Under *Gynaecological examination* “everything is recorded as appearing normal. Posterior fourchette had no scarring, tears, bleeding and increased friability. Fossa Navicularies appeared normal. Hymen not seen; no swelling, bumps, clefts, synachiae and bruising. There was a fresh tear on the vaginal orifice. Vagina had bleeding on posterior wall vaginal orifice; small tear on the posterior wall vaginal orifice; discharge of whitish fluid seen in the vaginal vault. Cervix not visualized, erosion not visualized, discharge not visualized. Perineum appears normal and no tears seen. Conclusions are as follows: Hymen not visualized; small tear on the vaginal orifice posteriorly with blood; not active bleeding; white fluid at the opening of the vaginal vault.

Sexual assault cannot be excluded. Anal examination disclosed that everything was normal. Dr Momoza testified that I[...] came before her without an underwear; but only with dirty dress with mud stains. The likely cause of the tear on the Vaginal orifice was any form of trauma, stretch of vagina or its tissues- pulling force causing the tissue to tear or penetration. She testified that the age of the tear was few hours old.

[22] During cross examination Dr Momoza testified that, and gave this paradox, I paraphrase, *“The absence of the hymen is not the evidence that a female had sexual intercourse or had penetration; but the presence of the hymen is the evidence that a female had never had sexual intercourse or vaginal penetration.”* She listed some few example which are likely causes of hymen rapture, *to wit*, cycling, horse riding etcetera. However, penetration is a trauma that causes pulling of muscles or tissues. She could not tell the likely causes of the whitish discharge in Imnage’s vaginal vault. She further testified that there was no reason to assume infection given the history referred to above.

I[...] N[...]

[23] The last state witness to testify was I[...] herself. She testified through the services of the same intermediary who assisted in respect of other minor witnesses. She confirmed that in 2021 she was staying at her home with her aunt, grandmother, I[...]2, Likuwe and Luvano.

[24] On 30th October 2021 she woke up at about 6 am when her grandmother, Ms D[...] had already left for voter registration. At about 15h00 when she was watching a movie, the accused offered her to drink a glass of cold goldish liquid. They were together in the sitting room as Luvano and I[...]2 were playing outside. She then felt dizzy after taking a glass and drank it. She then decided to go and sleep in the bedroom. As she was sleeping the door was

opened and the accused entered. She said so because, when she was opening her eyes the accused was already in the room standing on top of her next to the bed she was sleeping on. The accused then took his pants to the knee level, pulled her dress up and undressed her of her underwear. He then attempted to get on top of her and she tried to push the accused away and she did not have sufficient strength to push him away and she started vomiting and she then fell unconscious when the accused was wiping her mouth to remove the vomit. She regained her consciousness when her grandmother, Ms D[...] and the police officers had arrived.

[25] She testified that when the accused was offering her the drink, her aunt, Z[...] was at local traditional ceremony. She disputed that her aunt gave her the drink, she insisted that it was the accused who gave her the drink.

[26] She noticed that she was wearing the clothes she was wearing during the day and were dirty and that she was not wearing an underwear and it was on top of the bed. She restated that she did not permit the accused to take off her underwear and that when she was pushing the accused she was very weak and was laying on her back and the accused was on his knees on the edge of the bed. She pushed him because the accused was coming close to her with his chest area and she suspected that there is something the accused wanted to do on her as her dress and underwear had already been removed and his trousers were lowered. She testified that she did not know what happened thereafter. Upon gaining the consciousness and noticing the presence of the *inter alia*, her grandmother and the police she was then taken to SS Gida hospital where she was examined by a doctor and then taken back to her home by the police. In the hospital I[...] was still weak and was still vomiting and the doctor inspected her private parts.

[27] During cross examination, she repeated what she said in her evidence in chief and confirmed that after taking the drink offered to her by the accused she had a running stomach. When asked about her failure to shout when the accused, with lowered pants, was undressing her, she answered that she was lost and very weak. When the accused was coming to wipe her vomit his trousers were still lowered at knee level. She disputed the accused version that he did not give her the drink and that she was given the drink by her aunt. She did dispute that the accused did not follow her to the bedroom with lowered pants. She further refuted that the accused did not take off her panty. She testified that the accused took her underwear off completely, but do not recall if she did wear it again. The state's case was then closed and the defence opened its case by calling the accused as he was one of the two defence witness.

Accused: Xolile Mashumi Nojilana

[28] Accused made common cause with the fact that he was an acquaintance at N[...] or D[...] family as he was assisting there with feeding dogs, pigs and looking after the goats. He confirmed that he was spending a lot of time in that homestead as he was treated as a member of family.

[29] The accused testified that on 30th October 2021 he was at the same homestead in the morning and he fed the dogs and pigs and around 10 am he took the goats to the grazing veld. He then came back from the grazing veld to stay with Z[...] and they stayed together watching television. Z[...] sent him to buy a box of wine (Drosty) which he did. When he came back they then drank it inside the house. Before they could finish the wine Z[...] took a glass of wine and gave it to I[...] to share it with others, which they did. Lerato and others then arrived in a motor vehicle asking Z[...] why she did not go to the local traditional ceremony. Lerato and Lukhanyo stopped their vehicle next to the gate and called out Z[...] and Z[...] as they were talking, was little outside the

house in front of the door. Lerato and Lukhanyo said they would come back and take Z[...]. They did not take her with instantly. They poured and took the wine into two litre container and the remainder was left in the fridge; and the accused then left to the grazing veld. He stood in the grazing veld for a while watching the goats and on his return Z[...] had already left. On his return the accused was advised by I[...]2 that there was a wine left in the fridge for him. Accused was told, although not clear at what stage, that I[...] was vomiting and I[...]2 shouted saying Z[...] had left for traditional ceremony.

[30] After having been told that I[...] was vomiting and enquired about their failure to assist, the accused instructed I[...]2 and others to come for them to wipe and clean up I[...]. The accused then wiped I[...] on the mount as he was continuing to vomit. He then advised that they (all of them) must go and sit in the front room (voorhuis). When Ms D[...] arrived, the accused was coming to check I[...] and he met, Ms D[...] in the front room and he informed her that I[...] was vomiting. Ms D[...], just passed the accused to where I[...] was. He stated that he does not remember that I[...] requested I[...]2 and Luvano to take her to toilet, but confirm that they took I[...] to the toilet. As they were taking her to the toilet he suggested that they should take a face cloth with and deep it in the water for them to wipe and clean up I[...]. He denied having instructed I[...]2 and Luvano to put water in the kettle and having instructed them to look for the goats. He denied that he was ever on top of I[...] with her pants on the knee level. He denied having been under the blanket with I[...] and that he gave I[...] a liquor to drink. He did not follow I[...] and stood at the edge of the bed in the bedroom. He denied that he pulled I[...]’s dress up and removed her panty. He did not notice if I[...] passed out. Accused testified that he became aware of the alleged incident on the same day when Z[...] went to fetch him from his home.

[31] During cross examination the accused person denied having inserted his penis into I[...]’s vagina, at all. He accepted that he was treated in I[...]’s homestead as a family member and he accepted that he was the only male figure in the household as Ms D[...]’s husband would, from time to time, arrive the at the homestead accused present with his family. He stated that he waited a bit after meeting Ms D[...] in the sitting room and thereafter went to collect the goats. However, he agreed that he did not talk to Ms D[...] about the incident. He testified that he went to the bedroom because I[...]² informed him that I[...] was vomiting. However, he denied that the children were left in his care. He testified that he was drunk on that day but could still appreciate and understand and differentiate between what is right and what is wrong. He testified that he did not notice that there was a water bowl or basin that was in the bedroom or he did not see as suggested by Ms D[...]. He used only a face cloth to wipe and clean up I[...]. He said he did not notice that I[...]’s dress was up and her panty was on the dresser as suggested by Ms D[...].

Nombuyiselo Zwelenda

[32] The witness that was next called was Nombuyiselo Zwelenda, a Police Officer who took Ms D[...]’s statement. She testified that in 2021 she was still a sergeant as she now is a warrant officer. She works with rape and protection of children. She confirmed that Ms D[...]’s statement, which was A9 was taken in her hand writing, meaning that she took the statement as the statement was a two-page statement. At the foot of each page it was signed by Ms D[...] and at the end her signature appears as a Commissioner of Oath. She confirmed that the statement is undated and she did not recall when the statement was taken. She regarded that omission as a human error. She testified that when taking a statement, she introduced herself to Ms D[...] and requested her to narrate the story as she was recording the story. After they finished, she read the statement back to Ms D[...] and translated same in Xhosa as she wanted to ensure that

there is nothing omitted. After Ms D[...]’s confirmation that the statement was correct, she requested Ms D[...] to sign same as she did. She concluded by saying that what is in the statement was received from Ms D[...].

[33] That concludes the summary of evidence that was adduced during the current criminal proceedings. It is on the basis of this evidence that this matter has to be decided.

Legal Principles

[34] There being criminal proceedings the guiding principle was set out very succinctly in Shackell¹ as follows:

“30. 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's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true. On my reading of the judgment of the Court a quo its reasoning lacks this final and crucial step. On this final enquiry I consider the answer to be that, notwithstanding certain improbabilities in the appellant's version, the reasonable possibility remains that the substance thereof may be true. This conclusion is strengthened by the absence of any apparent reason why the appellant would, without any motive, decide to brutally murder the deceased by shooting him in the mouth at point blank range. As a consequence, the matter must be decided on the appellant's version. According to the appellant's version he never intended to fire a shot. On the acceptance of this version there is no room for a finding of dolus in any of its recognised forms. It follows that the conviction of murder cannot stand.

[35] It is now incontrovertible that in criminal proceedings the onus lies with the state to prove that all element of the offence are satisfied².

“57. It is trite that the State bears the onus of establishing the guilt of the appellant beyond reasonable doubt, and the converse is that he is entitled to be acquitted if

¹ *S v Shackell* 2001 (2) SACR 185 (SCA) at 194 G-H Para 30; 2001 (4) all SA 279; 2001 (4) SA 1 (SCA) Para 30

² *S v Mbuli* (1) SACR 97 (SCA) Para 57

there is a reasonable possibility that he might be innocent (R v Difford 1937 AD 370 at 373, 383). In S v Van der Meyden 1999 (2) SA 79 (W), which was adopted and affirmed by this Court in S v van Aswegen 2001(2) SACR 97 (SCA), I had occasion to reiterate that in whichever form the test is applied it must be satisfied upon a consideration of all the evidence. Just as a court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt so too does it not look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true. In similar vein the following was said in Moshephi and Others v R (1980-1984) LAC 57 at 59 F-H, which was cited with approval in S v Hadebe & Others 1998 (1) SACR 422 (SCA) at 426 f-h:

"The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees."

[36] There is only one test in a criminal case, and that is whether the evidence established 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 preferred might be true³.

[37] In Chabalala ⁴

"15. The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of

³ *S v Sithole* 1999 (1) SACR 585 (W) at 590 G-591C.

⁴ *S v Chabalala* 2003 (1) SACR 134 (SCA) Para 15.

evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence.

[38] In parenthesis for what I will be dealing with regarding Mr Giqwa's criticism of the evidence of I[...]2 I lay out the principle as outlined in the case of *Miller*⁵ where Beadle CJ held

“It is well accepted rule of evidence that the mere fact that a witness is a liar does not mean that all his evidence must be disbelieved. Liars tell the truth sometimes. As far as this particular matter is concerned, not only must each case be examined in relation to its own particular circumstances, but every individual item of evidence which the court is asked to accept or reject must be so examined. The court must consider on the probabilities whether each item of evidence is credible or whether it is not.”

[39] With regard to inferences that must be drawn from the facts of this case both parties requested the court, on different aspects of the case to embark on such exercise. Mr Giqwa in his well prepared, researched and reasoned heads of argument relied for this proposition on the oft-quoted case of *Blom*⁶. The principle in *Blom* was relied upon by the full court of this Division in *Tom*⁷ where Van Zyl DJP held:

“[10]. The principles in relation to inferential reasoning are well established. The standard of proof beyond a reasonable doubt in criminal proceedings requires the application of, what the court in the oft-quoted case of R v Blom (Blom) referred to, as the two “cardinal rules of logic”:

“In reasoning by inference there are two cardinal orders of logic which cannot be ignored:

(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.

⁵ *S v Miller* 1972 (1) SA 427 (Rad) at 428H-429B.

⁶ *S v Blom*, 1939 AD188 at 202.

⁷ *Tom v S* 2023 (2) SACR 283 (ECMK) Para 10-11.

(2) 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.”

[11] Some of the key principles underlying the test in Blom, as amplified in R v De Villiers are the following: the facts from which the prosecution seeks to draw the inference of guilt must not also be reasonably consistent with a hypothesis other than the one relied upon, in other words, the inference of guilt must be the only reasonable inference; there must be some evidential foundation to support the inference to be drawn, and speculation, conjecture or a bare possibility will not be sufficient; as the inferential conclusion sought to be drawn is determined against the strength of the factual premise provided by the context of the facts of the case, all of the circumstances established by the evidence are to be considered and weighed in deciding whether the inference is consistent with the proved facts. The evidence must be considered as a whole, and not by a piece-meal approach; and, following from the fact that the burden of proof rests on the State throughout criminal proceedings to prove the guilt of the accused beyond a reasonable doubt, the accused person is not required to establish that some other inference should be drawn, or to prove particular facts which are to support such other inference.

[40] In the same judgment of Tom Van Zyl DJP relied on R V Taylor weaver and Donovan 21 CR App R20 at 21 to make a point about the reliability of the circumstantial evidence as follows:

“[12] Circumstantial evidence is not considered to be inherently less reliable than direct evidence. Wigmore laments the use of the term “circumstantial” to denote evidence that does not in any way derogate in value from direct evidence.

[16] In R v Taylor Weaver and Donovan Hewart LCJ appositely said the following about the value of circumstantial evidence:

“It has been said that the evidence against the applicants is circumstantial: so it is, but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undesigned coincidence, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.

Discussion and Analysis

[41] It is a common cause that the accused was in the D[...] premises and not only in the premises but also interacted with I[...], as I shall explain hereinafter.

It is also a common cause that I[...] was highly drunk and as a result of that she vomited herself. The accused admitted that, after having been told by I[...]2 about I[...]’s condition, he took a cloth and prepared it and thereafter went to the bedroom where I[...] was sleeping. He then wiped and cleaned up I[...] around the mouth area as she had vomited herself. He admitted that he was the only male person in the premises.

[42] Doctor Momoza, gave evidence which was entirely not gainsaid by the accused. Of great significance is a “*small tear over the vaginal orifice on the posterior aspect of the opening – bleeding that was not active*” and a “*whitish fluid seen on the opening of the vaginal vault.*” On the basis of these clinical findings the Doctor concludes that “*sexual assault cannot be excluded*” The doctor explained that the tear on the vaginal orifice can only be caused by any form of a blunt trauma-external object which induced the pulling force or cause vaginal tissue pulling. She further testified that the small fresh tear on the vaginal orifice was with fresh blood and there was no active bleeding. The blood was consistent with the tear mentioned above.

[43] Another aspect that was not gainsaid is the fact that, on arrival of Ms D[...] and Z [...], and when presented for medical examination I[...] was without an underwear or panty. They found it on top of the dresser in the same bedroom I[...] was sleeping in. There is no evidence, especially from the accused, that I[...] did not wear an underwear or panty on that day, instead the evidence suggests that I[...] had worn her underwear or panty on that day. It is not gainsaid that I[...] wore her underwear or panty during the course of that day.

[44] This matter is capable determination only on the common cause facts, without engaging with the disputed fact of rape. The common cause facts outlined above raise many adverse questions against the accused. What is

singularly unclear is the cause of the fresh small vaginal tear on the posterior aspect of the vaginal orifice or opening with blood that is consistent with that tear. The Doctor clearly testified that it might have been caused by blunt trauma which is an external object which caused the pulling force of the tissue. Whatever that object or trauma might be, it was an object or trauma that was penetrating I[...]’s vagina from outside her vagina. Secondly, the presence of a whitish fluid in the vaginal vault of I[...], is something that boggles one’s mind, especially in the light of the Doctor’s evidence during cross examination that there is *no reason to assume infection in the light of the history of the victim.*” The history demonstrates *inter alia*, that there was no relevant medical history and medication and that there was no date and time of last intercourse with consent. The common cause facts are very much congruent and complementary to the ensuing evidence:

[45] Both I[...]2 and Luvano testified that they saw the accused on top of I[...]. I[...] testified that the accused took off or removed her underwear as his accused pair of trousers were lowered to and or below knee level. According to I[...] the accused came close to her, especially with the chest area. As I[...] was trying to push the accused away as she was lying on the bed, she felt so weak and thereafter blacked out. The question of underwear is corroborated by the fact that Ms D[...] and Z[...] saw I[...]’s underwear or panty on the dresser and I[...] was not wearing her underwear. The Doctor testified that I[...], when presented for medical examination was without an underwear and was crying. I accept that the tear with blood on I[...]’s vaginal orifice and the presence of the whitish fluid on I[...]’s vaginal vault was caused by the sexual penetration at the instance of the accused. The sexual intercourse was without I[...]’s consent as she was highly intoxicated and ultimately passed out and could not know what could have happened onto herself.

[46] Looking holistically on the evidence adduced before this court, there is no explanation at all at the instance of the accused as to what might be the possible cause of the tear in I[...]’s vaginal orifice and the presence of whitish fluid in her vaginal vault. The tear and the presence of the fluid are two distinct elements that possibly might have been caused by one single act of an intercourse. There was no evidence at all to suggest that the blunt trauma or external object which caused the tear aforesaid could not be the accused’s penis. The weight of the evidentiary material before me was met with a bare denial from the accused that he did not rape I[...]. The accused bare denial is rejected for it is not reliable, uncreditworthy and the accused was not a convincing and trustworthy witness as he avoided to answer the weight of evidence against him frontally and blow by blow. When giving his own evidence the accused was not coherent and was difficult to be followed.

[47] Another mind bogging aspect of this matter is the manner in which the accused conducted himself when meeting Ms D[...] for the first time at the lounge or sitting room after the incident. He met Ms D[...] and made a very terse statement that I[...] had vomited herself and he tried to clean her up (I paraphrase). He said that when passing Ms D[...] towards the exit door and Ms D[...] went only with her grandchildren to the bedroom where I[...] was. Thereafter there was no trace of the accused in the premises. The answer that he waited a bit and went to collect the goats was a knee jerk reaction to the serious question asked to him during cross examination. What is again important in that same cross examination, the accused confirmed that after he volunteered that terse statement to Ms D[...], he did not go and follow up on what had transpired after Ms D[...] had been in the bedroom in which I[...] was sleeping. He did not proffer any explanation for that failure to follow up.

[48] Mr Giqwa, Counsel for the accused was constrained to accept that that conduct was concerning. The accused, a 57-year-old man could not thoroughly explain the incidents coherently and cogently to Ms D[...], from beginning to the end; the role he, as a parent himself, played when confronted with a child presenting with high intoxication resulting in the running of a stomach and severe vomiting. His cavalier attitude and apathy leaves much to be desired and renders his evidence not reliable and trustworthy and thereby susceptible to rejection. When examining accused conduct, it is unavoidable to come to a conclusion that he engaged in that evasive conduct to ease his conscience of what he had done.

[49] Mr Giqwa sought refuse on the cautionary rules to impugn the evidence of I[...]², I[...] and Luvano, the minor children who gave evidence as eye witnesses. Age cannot on its own avail defence to the acquittal. Their evidence was coherent, easy to understand and sincere notwithstanding that they were minor children. Their evidence was corroborated in material respects. For instance, the fact that they saw the accused on top of I[...] is in synch or consistent with the Doctor's evidence that there was a fresh tear with blood on I[...]’s vaginal orifice and that there was whitish fluid in I[...]’s vaginal vault. Their power of observation cannot be impugned. They knew the accused as Mashumi who used to spend a lot of time at their home. They could not mistake him for any other person. There is no explanation as to why they could lie to this court about such an important and crucial thing in human life. I[...]’s evidence was so reliable and trustworthy because, she was forthcoming and truthful to tell this court that she does not know what happened after she passed out. She did not manipulate her evidence to say she was raped by the accused. She did not manufacture any facts to pin the accused onto the charge of rape.

[50] I accept that although there are minor incongruities in the evidence of I[...]2 and Luvano about the Television, these incongruities are immaterial and did not change the substance of their evidence. I was satisfied with their demeanour as compared to that of the accused. It is also immaterial whether Luvano and I[...]2 went once or twice in the grazing veld. What is important they corroborated each other to say the accused sent them to look for the goats. When they came back from the veld the accused was in the bedroom where I[...] was sleeping. The accused accepts that he wiped and cleaned up I[...] on the mouth area as she vomited herself. That is congruent with I[...]’s version. I [...], in her version did not conceal good things the accused did, hence her evidence is trustworthy and reliable. On the other hand, accused version that he did not notice that I[...] passed out is unbelievable. I[...] testified that she passed out when the accused was wiping her.

[51] Almost all the factual state witnesses testified to the effect that I[...] passed out. Accused version to that effect leaves much to be desired and it is inexplicable that he could not see that which everybody saw especially that she passed out when she was in his hands. The accused testified that Z[...] gave the minor children a wine to share and they drank. Surprisingly, there is no other child who was drunk except I[...]. There is no explanation at the instance of the accused as to why other children were not drunk when they had consumed liquor. The children corroborated each other that accused gave I[...] liquor to drink as opposed to accused version that Z[...] gave them. I am therefore satisfied that the state has proved its case beyond reasonable doubt.

[52] On the conspectus of all the evidence, I am satisfied that the accused turned I[...]’s home, which is meant to be a place of her safety and security into a place of horror and traumatic experience. It now serves as reminder of horrific and traumatic encounter she had with the accused, who was supposed to be a

parent and a protector of I[...] and who should have played an accruistic role as a father figure. He turned that home into a crime scene which is an antithesis of what a home should be to a child where he or she should be moulded and educated.

[53] Referring with approval to the work of Ellen G White Education, page 7, Mbenenge J⁸ (as he then was) made the following dictum with reference to the education and home:

“22..... In its broadest sense, true education is well defined as the harmonious development of all faculties – the hand, the heart and the head. It is in early years in the home and in the formal schoolwork that the mind develops, a pattern of living is established, and character is formed....”

Accused reprehensible conduct has devastating effects to all the members of that family in which he was placed on the position of trust, which effects will have long lasting social, immotional and mental or psychological consequences. They will for the longest of times be unable to trust any male human being.

Order

[54] In the result I make the following:

1. **The accused is found guilty of rape in contravention of section 3 read with section 1, 50, 55, 56, 56(1), 56A, 57, 58, 59 and 60 of Criminal Law (Sexual offence and related matters) Amendment Act 32 of 2007.**

⁸ *M.A.N v L.M.M; In re A.S.K.M* (1278) [2016] ZAECMHC 33 (5 July 2016) Para 22.

A.S ZONO

JUDGE OF THE HIGH COURT (ACTING)

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Matter heard on

: 6 July 2026

Delivered on

: 25 August 2026