

SOUTH AFRICA / JUDGMENT

S v Madolwana (CC10/2021) [2021] ZAECHGC 63 (28 April 2021)

[2021] ZAECHGC 63

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Rusi

CASE / FILE NUMBER

CC10/2021

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REPUBLIC OF SOUTH AFRICA

EASTERN CAPE DIVISION

GRAHAMSTOWN

CASE NO.: CC10/2021

Dates Heard: 13 to 22 April 2021

Date Delivered: 28 April 2021

THE STATE

Versus

MELIKHAYA MICHAEL MADOLWANA

JUDGMENT

RUSI AJ:

- [1] In the afternoon of 31 March 2019, Ms N[...] M[.], a 21 year old female, was coming out of a tavern called the Midpoint in Sommerset East, going homeward to Bhongweni Street, 11th Avenue, when she encountered the accused. She got a lift home from the accused in a white Toyota Tazz. However, to her dismay, the accused drove the car to a secluded place near a cemetery where he raped her per vaginum. After the rape she ran home where she reported the rape to her mother, Mrs B[...] M[.]. She laid a criminal charge against the accused that same day; and was examined by Dr Nkosi at Andries Vosloo Hospital at 07h01 on 1 April 2019. The J88 Report on a Medico-Legal Examination by Dr Nkosi reveals that Ms Mosi had a

bruise on her neck; and a laceration on her right ankle area. There was evidence of penetration in her vagina.

- [2] On a diverse occasion in August 2019, at night, Ms A[...] M[...], a 28 year old female met the accused at a house where there was liquor drinking. She and the accused agreed to step outside the house at some point and kiss each other. This culminated in a further agreement later on between them to go to Ms M[...]’s

home to look for a place to sleep. When they could not find a place to sleep there, and it having appeared that Ms M[...]

was no longer going to leave with the accused, the accused pulled her by force out of her home and marched her to Coetzee Avenue, next to an electrical substation (“the danger box” as it was referred to by state witnesses in casu), where he raped her. She screamed for help and a woman appeared. The accused ran away, and Ms M[...] also went home where she went to sleep as it was at night. She only reported the rape to her mother in the morning of the next day. She decided not to open a criminal case against the accused.

- [3] On 4 January 2020, around 22h00, Ms M[...] was sitting at a corner of Coetzee Avenue with two males named Botie and Ouplaai, her companions at the time, when the accused came and forcefully took her away. They ended up in a yard in Rosary Street, where a certain Karara lives, and on the way to Karara’s yard the accused had been assaulting her with open hands. The assault continued when they got to the yard. As she was being assaulted by the accused in Karara’s yard, she suddenly lost consciousness, and when she came around she was in Adries Vosloo Hospital where Dr Kama examined her at 01h40 on 5 January 2020.

- [4] According to the medical report of Dr Kama, Ms M[...] had a laceration behind her left ear; and another laceration in the inner aspect of her upper lip. These injuries were consistent with both blunt and sharp trauma. Dr Kama’s gynaecological examination of Ms M[...] further reveals that she had tears in her vagina and was bleeding. There was also a laceration through her perineum, and a laceration on the anterior wall of her rectum as a result of which she had fecal incontinence. Dr Kama opined that the injuries were consistent with trauma into the posterior wall of Ms M[...]’s vagina. Ms M[...]’s injuries necessitated further treatment at Dora Nginza Hospital where she was treated by Doctors Mguga and Pillay on 5 and 27 of January 2020, respectively. According to the report of Dr Mguga, Ms M[...] was also in early stages of pregnancy at the time she sustained her injuries, and she miscarried the pregnancy. Dr Mguga further opined that Ms M[...] had sustained 4th degree injuries to her rectum and perineum which led to the fecal incontinence. Dr Mguga repaired the injuries surgically, and Ms M[...] was referred to rectal surgeons. Dr Pillay confirmed what Dr Mguga stated in his report, save that when she examined Ms Martin on 27 January 2020, she had been suffering from incomplete miscarriage, and in her opinion the miscarriage of Ms M[...]’s pregnancy was likely caused by the extensive trauma that she sustained. The foregoing are the facts that appear from the evidence adduced in casu.

- [5] The accused, Mr Melikhaya Michael Madolwana, a 35 years old male stands charged with three counts of rape emanating from the incidents set out above. He is represented by Mr Geldenhuis. Ms N[...] M[...] is the complainant in count 1, being the incident of 31 March 2019; and Ms A[...] M[...] is the complainant in counts 2 and 3, being the incidents of August 2019 and 4 January 2020, respectively. Mr Zantsi appears for the prosecution.
- [6] In respect of all 3 counts the accused was informed at the start of the trial as set out in the indictment, of minimum sentences applicable to the charges against him as set out in section 51 of Act 105 of 1997 (the Criminal Law Amendment Act). He was also informed of the applicable competent verdicts as provided in section 261 of Act 51 of 1977 (the Criminal Procedure Act).
- [7] The accused pleaded not guilty to each of the 3 counts of rape. His plea explanation in respect of counts 1 and 2 is that he had consensual sexual intercourse with the respective complainants on the occasions alleged in those counts. In respect of count 3, he states that he neither had any sexual intercourse with Ms M[...] nor assaulted her. The accused's plea explanation in typed form, signed by him, was handed to court as an exhibit in these proceedings. For the sake of completeness, the plea explanation can be summarized as follows:

[7.1] On count 1, the accused explained that when he met Ms M[...] outside the tavern, he had been with a certain Thanduxolo. Ms M[...] asked Thanduxolo for a lift homeward, and Thanduxolo in turn asked the accused to help Ms M[...] which request the accused accepted. When he and Ms M[...] got to the Toyota Tazz driven at the time by the accused, Ms M[...] sat in the front passenger seat. They then agreed that Ms M[...] would have sexual intercourse with him, and he would pay her money in turn. He and Ms M[...] went to a spot where there was a cross, and had sexual intercourse there, to which Ms M[...] had agreed. When he told Ms M[...] after the sexual intercourse that he did not have the money to give her, she became angry and took the car keys out of the ignition. He tried running after her, in vain. He did not notice any injuries on Ms M[...] when they were together, and has no knowledge how they came about.

[7.2] It is the accused's version on count 2 that when he met the complainant there was an agreement between them to engage in kissing, which later culminated in sexual intercourse between them, to which Ms M[...] consented. Their sexual intercourse was interrupted by the arrival of his girlfriend, Ms Sinxolo Nqame, which was followed by an argument between the two women. He left them arguing and did not witness what eventually happened between them. He denies forcing Ms M[...] out of her home.

[7.3] The accused's explanation on count 3 is that when he met the complainant, she was standing alone at the corner of Rosary Street. He and Ms M[...] walked together out of Ms M[...]’s free will. When they came to a certain yard, they engaged in petting. At some stage Ms M[...] went to urinate, and that was when two men arrived. The one man held a knife to his back and moved him away from Ms M[,], as a result, he did not see what happened between Ms M[...] and the second man. He only heard Ms M[...] exclaim “no Melikhaya!”, and his suspicion was that the

second man must have attacked Ms M[...], but because it was dark in the yard, Ms M[...] must have thought

it was him that attacked her. When both man left the yard he tried to pick Ms M[...] up. That, according to him, is how he got Ms M[...]’s blood on him. He washed the blood off at a nearby tap. That was when other men found him and the complainant in the yard and assumed he attacked her. He was very traumatized and therefore did not say anything to these men. He was then arrested. The accused confirmed the correctness of the contents of his plea explanation statement.

[8] The State adduced evidence of twelve witnesses, including medical evidence as set out above, and photo albums with keys to photos depicting the scenes of the rape alleged in counts 1 and 3. They are Exhibits “C” and “F”, respectively. In light of the fact that such medical evidence is not disputed by the accused, it shall not be repeated henceforth, save to make reference to it when it is called for in this judgment. At the close of the case for the prosecution, the accused elected to testify under oath. He called as his only witness his girlfriend, Ms Sinoxolo

Nqame. I now turn to the evidence adduced by all witness in casu.

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

[9] Ms M[...] disputed that she actively sought a lift home from the accused as she came out the tavern on 31 March 2019. Her account of the events is, in essence, that as she left the tavern, the accused asked if she needed a lift home, saying at that same time that he could take her home because he knew where Ms M[...] lived. She was drunk at the time and was staggering. She accepted the offer; and she and the accused went and boarded a white Toyota Tazz that the accused drove at the time, and she occupied the back passenger seat directly behind the accused. Photographs 9-12 of Exhibit “C” depict the car seat where she was seated. To her surprise, instead of taking the route to her home, the accused deviated, driving through the township in 6th Avenue, and when she observed this she asked where the accused was going, to which he replied that he had something to pick up at 6th Avenue. This reply by the notwithstanding, the accused did not stop anywhere in 6th Avenue; he proceeded up to a secluded area nearby a cemetery.

[10] Ms M[...] attempted to escape from the moving car through the back passenger door where she had been sitting, but she was injured on her right ankle area, which then deterred her from trying to jump off the moving car. Ms M[...] told the Court that the blood stains depicted in photographs 9- 12 are from the blood that came from her ankle after she sustained the injury. When the accused finally stopped the car at the place near the cemetery, she ran away, but he chased and caught her. She and the accused struggled as she tried to free herself. The accused strangled her, causing her a bruise in her neck. She was subdued by the strangling, and the accused threw her to the ground, pulled down her pants and panties, forced her legs apart and raped her per vaginum. She screamed, telling the accused to stop while at the same time attempting to push him off her, all to no avail as

accused refused to stop, saying he will stop once he was finished doing what he was doing to her.

- [11] Once the accused finished raping her, he rose up and ran away, leaving behind a set of keys containing car keys. Ms M[...] picked up the keys and ran home where she reported the rape to her mother. She opened a criminal charge, and handed to the police the car keys she picked up at the scene of the rape. She was examined at Andries Vosloo Hospital by Dr Kama on the 1 April 2019 at 01h40. Ms M[...] vehemently denied the version of the accused put to her that there was at any stage an agreement between her and the accused that she would have sexual intercourse with him in exchange for money, and that she laid a rape charge against the accused because he failed to give her the money after the sexual intercourse.

B[...] M[...]

- [12] Mrs B[...] M[...] confirmed that when her daughter, Ms N[...] M[...] came home in the afternoon of 31 March 2019 her hair was covered in soil; and pants soiled with blood on her right ankle area. When Ms M[...] entered the house she said “Mother call the police, I have been raped”. Even though Ms M[...] reported that the name of her alleged rapist was unknown to her, it was someone whose face she knew. Mrs B[...] M[...] further confirmed that Ms M[...] narrated to her what happened as she left the tavern until the time of the rape. As for the neck bruise on Ms M[...], it was Mrs B[...] M[...]’s evidence that she only observed it when Ms M[...] returned from

Hospital on 1 April 2019.

Loyiso Ngqoza

- [13] Mr Ngqoza told the court that he is the owner of the Toyota Tazz car in which the accused gave Ms M[...] a lift on 31 March 2019. He had given the car to the accused earlier that day. The court was told by Mr Ngqoza that when he gave his car to the accused earlier on 31 March 2019, it did not have the blood stains depicted in photograph
9. When he went to collect the car from the accused, he noticed that it did not have its original key. The accused’s explanation in this regard was that he lost the key as it was in his pocket and got the alternative key from one Pieter Baartman. Mr Ngqoza denied the accused’s version that he found the alternative key in the cubby hole of the car stating that there would never have been any reason for Pieter Baartman’s car key being in the cubby hole of his car.
- [14] It was Mr Ngqoza’s testimony that he only noticed the blood stains at the back passenger seat of his car on the Tuesday following the incident when forensic experts came to collect evidence from the car. Asked why he never observed the stains when he fetched the car from the accused, Mr Ngqoza explained that he was angry with the accused for delaying to return his car.

A[...] M[...]

[15] Ms M[...] testified that when she met the accused on a certain night in August 2019 at a house where there was liquor drinking, she and the accused engaged in kissing. They later agreed to leave the house where they met and go to Ms M[...]’s home to find a place to sleep. On arrival at her home her mother refused to accommodate them, saying she did not want the accused there. They went to her brother’s room where they found her brother sleeping. It

became clear that they would not be able to sleep at her home; and her mother forbade her from leaving with the accused. When she was forbidden by her mother from leaving with the accused, the accused forcefully pulled her out of the yard. Her mother was watching but said nothing. The accused took her to the electrical substation (“the danger box”) in Coetzee

Avenue where he tripped her to a fall; pulled down her pants and panties and raped her vaginally. Ms M[...] screamed for help, and when a woman that spoke isiXhosa arrived the accused rose up and ran away.

[16] Because it was dark at the danger box Ms M[...] did not see who this woman was. She then went home and slept as it was at night, and only reported the rape to her mother in the morning of the next day. She sustained no visible injuries as a result of the rape, except backache which her mother helped heal. She did not lay a criminal charge of rape, nor was she examined by a medical practitioner. Asked why she did not lay a charge of rape against the accused, Ms M[...] explained: “I knew that no one would believe me because I am a drunkard. I did not want to report it”. Ms M[...] denied that she had consented to sexual intercourse with the accused at the danger box.

[17] Regarding the incident of 4 January 2020 alleged in count 3, Ms M[...] told the court that she had been sitting with two males, Boetie (Mr Denver Blou); and Ouplaai (Mr Playton Du Plessis) on the corner of Coetzee Avenue when accused came and grabbed her forcefully; and took her by force to up Rosary Street, and was assaulting her on the way with open hands on her face. They ended up in a house Ms M[...] referred to as Karara’s home, the accused was still assaulting her. There was no one else in the yard of Karara’s home and it was dark. The accused assaulted her behind the left

ear and on her face. She lost consciousness at some stage and regained it in hospital with injuries in her anal area and vagina.

[18] She was told that she had been raped and had lost her pregnancy that was at its early stages when the rape occurred. She testified that when she woke up in Hospital she had fecal incontinence and was told by the Doctor that examined her that the condition was as a result of the injury to her rectum. Asked what she remembers was happening between her and the accused before she lost consciousness, Ms M[...] testified that the accused had been assaulting her even though she does not recall what the accused used in assaulting her. Ms M[...] told the court that she was moderately drunk, and did not witness the rape alleged in count 3 because she became unconscious.

M[...] B[...]

[19] Mrs B[...] is Ms A[...] M[...]’s mother. Her testimony relates to the report she received from Ms M[...] regarding the incident alleged in count 2 (“the danger box incident”). According to Mrs B[...], Ms M[...] and the accused came to her house that night, but she never spoke with them. They left, only to come back again, and this time she told Ms M[...] to go to bed, which Ms M[...] did not do. Instead, Ms M[...]

left again with the accused. Later that night Ms M[...] returned home but did not speak with her. In the morning of the next day Ms M[...] told her that she had been raped by the accused.

[20] When Mrs B[...] was confronted in cross examination with Ms M[...]’s version of events regarding how the accused forced her out of her home, it was only then that she explained that she had forgotten some of the events, otherwise she witnessed the accused pulling Ms M[...] forcefully out of her home. Mrs B[...] made no mention of a backache that Ms M[...] had sustained from the rape incident. It was Mrs B[...]’s evidence that when she told Ms M[...] to lay a charge of rape against the accused Ms M[...] said she was afraid. She did not ask what she was afraid of, as she put it “she just left it like that”. With regards to the incident of 4 January 2020, Mrs B[...]’s

evidence relates to the condition she found Ms M[...] in when she was called to the scene of the incident. I do not find it necessary therefore, to regurgitate her evidence in this regard as it is not in dispute.

Mr Denver Blou (“Boetie”)

[21] Boetie confirmed that he and Ouplaai were sitting on the corner of Coetzee Avenue around 22h00 on 4 January 2020 when the accused came and asked for Ms M[...]. When Ms M[...] refused to go to the accused, he grabbed her forcefully and went up to Rosary Street with her. He lost sight of them as they went up Rosary Street. When the accused forcefully grabbed Ms M[...], he and Ouplaai did not say anything. Asked why they never acted when they saw this, Boetie replied that it was because he did not have knowledge of what was happening between the accused and Ms M[...], therefore, he decided not to interfere. It was Boetie’s testimony that he was sober when this happened, and he refuted the accused’s version that he and Ouplaai were not present to begin with when he and Ms M[...] met at the corner of Coetzee Avenue.

Playton Du Plessis (Ouplaai)

[22] Ouplaai confirmed Boetie’s testimony concerning how the accused forcefully took Ms M[...] away. Ouplaai added that when the accused approached as they sat on the corner of Coetzee Avenue, he had been with a friend of his named Dilan, but when the accused came over to where he was sitting with Boetie and Ms M[...], Dilan proceeded on his way. He only heard of what transpired after the accused took Ms M[...] away from a neighbor. Ouplaai also testified that when the accused grabbed Ms M[...] and took her away by force, he did not interfere because he had no knowledge of what connected the accused and Ms M[...].

[23] When it was put to Ouplaai that he colluded with Boetie on their testimony concerning the circumstances under which the accused met Ms M[...] on the night of 4 January 2020, Ouplaai explained that when he and Boetie were in front of a police officer on 7 April 2021 (a week before the trial of the case – My Emphasis), his and Boetie’s statements that the police officer was reading from a laptop did not contain some of the things they had told the police about the incident, hence he asked Boetie some questions on this disparity. I note that this concession by Ouplaai notwithstanding, his previous written statement was not proven, hence the court has no way of assessing at the relevant stage herein, to what extent, if at all, Ouplaai and Boetie can be said to have colluded against the accused. I will revert to this aspect later in this judgment.

Mabhuti Toto

[24] The Court heard from Mr Toto that on 4 January 2020 he was residing with Karara at his great uncle’s house in Rosary Street where Ms M[...] was attacked. Mr Toto’s account of the events of this day is that around 22h00 he left the tavern called “The Shed” or “eSkirini” going to his great uncle’s house after a scheduled power outage (“load shedding”). On arrival at his residence he saw the accused washing himself at the tap. As he asked the accused to identify himself since it was dark, asking him what he was doing in his yard, the accused instead invited him to identify himself as well. Mr Toto then recognized the accused as a local taxi driver as he took the accused’s phone and shone its light on him. He chased him away without further ado and instinctively went to look at the water tap where the accused was washing himself; and he saw bloody water.

[25] At that moment Mr Toto heard a person groan behind the house, he went to look and saw Ms M[...] lying on the ground. The accused followed him and spontaneously said “this is my girlfriend”. He took the accused’s phone once more and shone its light on Ms M[...]. Her pants were lowered to the knees and there was a pool of blood around her lower body. Mr Toto called out for his friend Dumisani. Perturbed by what he saw Mr Toto asked the accused “Melikhaya what are you doing, why are you leaving her behind then”. He asked the accused to take Ms M[.] with him but the accused ignored him and went away. It was at moment that Mr Melikhaya Gavin, his neighbor, came to the scene and apprehended the accused and phoned the police.

Melikhaya Gavin

[26] Mr Gavin confirmed that he rides in Rosary Street as well. He too was leaving the Shed tavern around 22h00 going to his residence when he heard his name being called out. At the time he was three houses away from his residence. He recognized the voice of the person calling out his name as that of Mr Toto because he knew him well since they grew up together. On arrival at Mr Toto’s premises he met the accused close to the gate. Because he was not used to seeing the accused at Mr Toto’s residence, and had heard Mr Toto say “what are you doing Melikhaya”, he grabbed the accused. Otherwise he had not known the accused’s name at the time. He went with the accused to where Ms M[...] lay and made the

same observations of Ms M[...]’s condition as Mr Toto, adding that he also saw that Ms M[...]’s eyes were swollen, face covered with blood, and she was bleeding from the nose and mouth. He is the one that phoned the police using the accused phone. This concludes the state’s case.

Case for the accused

- [27] The accused did not dispute evidence adduced by state witness on matters that are common cause. In this regard he confirmed that he met Ms M[...] and Ms M[...] on the diverse occasions alleged in counts 1 to 3, and that it was only on the occasions mentioned in counts 1 and 2 that he had sexual intercourse with complainants in each of the two counts respectively. Concerning the incident alleged in count 3, the accused confirmed that while at Karara’s home where the alleged attack on Ms M[...] took place, Misters Toto and Gavin arrived, and he had been washing off Ms M[...]’s blood that was on him. He also did not dispute medical evidence of Doctors Kama; Mguga and Pillay on any of their clinical observations, findings and conclusions on their examination of Ms M[...] and Ms M[...] respectively.
- [28] It is worth noting that the accused did not challenge Dr Kama’s evidence that in his observation Ms M[...] was very drunk and could not speak for herself, she was mumbling, hence he could not obtain from her, her relevant personal history as at the time of the alleged sexual assault. The accused maintained his version under oath that he did not cause any of the injuries forming the subject of the medical reports compiled by the three Doctors respectively.
- [29] The accused’s account of the events on all 3 counts of rape is as follows: When he gave a lift to Ms M[...] on 31 March 2019, Ms M[...] occupied the front passenger seat of the car. As they drove off from the tavern in the white Toyota Tazz, Ms M[...] asked him if he had money to give her so that she may buy alcohol. He informed her that he did not have any money on him at that moment, and gave no indication whether he would have the money at a later stage; and/or where he would obtain it. Ms M[...] then offered to have sexual intercourse with him, and when he asked where they would have the sexual intercourse, Ms M[...] replied that they could have it at any place of his choosing. At this the accused assured Ms M[...] that they would go to a safe place for them to have sexual intercourse. Ms M[...] raised no objection to this, and the accused drove the car through the township until a place near the cemetery where there is a cross. Once they arrived at this place they engaged in consensual sexual intercourse.
- [30] After the sexual intercourse the accused went to relieve himself nearby, leaving Ms M[...] behind as she was getting dressed. He told Ms M[...] as he went to relieve himself that he would find her in the car. To his surprise, when he returned to the car Ms M[...] was nowhere to be found, and she had taken the car keys off the ignition. He concluded that she took the key from the ignition because while he was relieving himself he heard her close the car door. Otherwise when he left Ms M[...] to go relieve himself after the sexual intercourse, she

was not angry.

- [31] When the accused was asked what he thought may have led Ms M[...] to leave in that manner, the accused speculated that it may be because he had told her that he did not have the money to give her for alcohol. The accused denied that Ms M[...] tried to escape from the car or from him at any stage from the time they left the tavern until they reached the cross. He denied that he struggled with Ms M[...] and strangled her. He further denied throwing her to the ground. When hard pressed on where he believed the blood at the back passenger seat came from, and how the right ankle injury; and neck bruise on Ms M[...] came about, the accused speculated that Ms M[...] may have fought at the tavern, even though he never took notice of any such injuries and blood on Ms M[...] when he gave her a lift from the tavern.
- [32] Regarding Mr Ngqoza's denial of the fact that he got the alternative car keys in the cubby hole of his car, the accused testified that he had obtained the key from Baartman when Mr Ngqoza once locked the original car key inside the car, and asked accused to help him open the car.
- [33] On the occasion alleged in count 2, the accused denied that there was a stage where, on arrival at Ms M[...]’s house, he pulled her by force. His evidence was that from Ms M[...]’s home they walked together after Ms M[...] followed him as he walked away when they could not find a place to sleep. The accused told the court that Ms M[...]’s mother was not even present when they arrived. When he and Ms M[...] left the house, they went to Coetzee Avenue where they had consensual sexual intercourse behind the danger box. Their consensual sexual intercourse was interrupted by the arrival of his girlfriend Sinoxolo Nqame. The two women engaged in an argument in the Afrikaans language, he left them and went to Ms Nqame’s house where he stayed at the time together with Ms Nqame.
- [34] He denied that he raped Ms M[...] at the danger box. On the charge in count 3, the accused repeated what he had stated in his plea explanation statement, save for the following new facts that emerged for the first time during the trial of this matter: He saw that she was very drunk, and out of concern he told her that he was going to take her home. Ms M[...] said nothing and they proceeded along. When asked what may have caused her injuries, accused speculated that he thought that the man that remained with her attacked her and hit her against the wall rendering her unconscious.
- [35] On the score of what took place when Mr Toto arrived, the accused further added that when Mr Toto proceeded to where Ms M[...] laid on the ground, he told Mr Toto that Ms M[...] was his girlfriend and she was attacked. When hard pressed on the difference in what he said under oath and what had been put to the state witnesses as his version that he was so traumatized and in state of shock that when Mr Toto and Mr Gavin arrived he did not say anything to them, the accused told the court that indeed he said nothing, and the reason was the harshness of Mr Toto when he asked him to identify himself as he found him in the yard. He saw no point in asking Mr Toto for help, more so when he called other people to the

scene.

Sinoxolo Nqame

- [36] Ms Nqame testified for the accused in respect of the incident at the danger box. A conundrum occurred when Ms Nqame testified that the incident took place on 15 October 2019, not in August as the court had heard from Ms M[...] and the Accused, as well as Ms M[...]’s mother. She told the court that she remembers the date because it was the accused’s birthday. I digress to mention that the accused did indeed confirm that he was born on 15 October 1985. Ms Nqame confirmed that he found the accused and Ms M[...] having sexual intercourse at the danger box in Coetzee Avenue. They were both shocked by her arrival, she then grabbed Ms M[...] and assaulted her with a can of alcohol on her back. The accused was present at the time and he intervened, meanwhile Ms M[...] ran away.
- [37] I pause to note that the Defence and Prosecution submitted that, in spite of the difference in the dates of the danger box incident as testified by the state witnesses; the accused and Ms Nqame, it can be accepted that there was one incident of sexual intercourse between the accused and Ms M[...] at the danger box. I agree with this concession, and I hasten to say that there is no prejudice on the accused if evidence of the date other than August 2019 is accepted. I am fortified in this view by provisions of section 92(2) of the Criminal Procedure Act 51 of 1977[1]. Suffice to say that Ms Nqame gave a completely different description of what took place at the danger box. This concluded evidence of the defence and prosecution respectively.

The Issues

- [38] From the foregoing, the issue to be determined is whether in respect of count 1 and 2 complainants consented to the sexual intercourse with the accused. On count 3 the accused denies that he had sexual intercourse with Ms M[...] and that he assaulted her at any time after he met her. The Court must determine whether is the person that raped Ms M[...] on 4 January 2020 and caused here the injuries already mentioned in the course of the rape.

The Law

- [39] It is trite that in criminal proceedings evidence must be weighed holistically against the onus that the Prosecution bears, of proving accused’s guilt beyond reasonable doubt. Where the accused puts forward a version in his defence, a conviction can only be sustained if on a consideration of all the evidence, his version of events cannot reasonably possibly be true. In *S v Shackell*[2] , Brand AJA as he then was, said:

“... The court does not have to be convinced that the 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 that version against 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”.[3]

- [40] In casu, the state was required to adduce credible evidence that would render the version of both complainants more likely that sexual intercourse took place without their consent; and the accused's version less likely that there was consent.
- [41] As a starting point, it is apposite, in light of the defence put forward by the accused on counts 1 and 2 respectively; and in the context of section 1 of the Sexual Offences and Related Matters Amendment Act 32 of 2007, to re-state that for the purposes of the offence of which the accused stands charged, consent means voluntary or uncoerced agreement. In this regard it is to be noted that while consent might be implied by conduct, or be express, mere submission to sexual intercourse is not enough. In *S v S*
- [4] the Court, with reference to *S v Swiggelaar* 1950 (1) PH H61 (A) stated as follows:
- "Submission by itself is no grant of consent, and if a man so intimidates a woman as to induce her to abandon resistance and submit to the intercourse to which she is unwilling, he commits the crime of rape".*
- [42] It is indeed axiomatic that the offence of rape, by reason of the fact that it very often involves the perpetrator and the victim only, renders it a particularly difficult task for the Prosecution to prove beyond reasonable doubt that there was no consent. It is against this background that presence of bodily harm on the alleged victim of the crime of rape will, on a proper analysis of evidence in each case, rebut consent. It is worth noting that in terms of section 1(3)(c) of the Sexual Offences Act, consent is also excluded where it is obtained under false pretenses.
- [43] What is abundantly clear in the present case is the fact that evidence of what transpired, at least on the occasions alleged in counts 1 and 2 against the accused rests on the two complainants as single witnesses. While I am mindful of the provisions of section 60 of the Sexual Offences Act to the effect that this court may not treat evidence of the complainants in casu with caution on account of the nature of the offence, I respectfully align myself with the view considered by the Court in *S v Jackson*[5] when it said (quoting with approval guidelines set out by Lord Taylor CJ in *R v Makanjuola*, *R v Easton*
- [1995] 3 All ER 730 CCA at 733 c-d):
- "In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting on the unsupported evidence of a witness. This will not be so because the witness is a complainant of a sexual offence... There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestions by cross-examining counsel".*
- [44] It is further without any doubt so, on the facts of the present case, that a determination of these issues will rest not only on the evidence given by the two complainants on all counts as well as medical evidence adduced in casu, but also on the web of other circumstantial evidence as the facts may permit of this Court to consider such circumstantial evidence. The cardinal rules of inferential reasoning as set out in *R v Blom*[6] are trite; the inference sought to be drawn must be consistent with all the proven facts; and the proved facts should

be such that they exclude every reasonable inference from them save for the one sought to be drawn.

[45] I pause at this stage to make a pertinent observation: when the accused gave his evidence at the close of the state's case, he introduced a substantial amount of new facts on material and disputed aspects of the case that were never put to the state witness. The Court is enjoined in the evaluation of evidence in these proceedings to consider what effect his failure to put those facts to the witnesses will be.

[46] It must be remembered that in as much as the accused is not expected to put to the state witnesses every minute detail of his version, where the facts are of a material nature as to show that the witnesses' evidence is not reliable, witnesses for the prosecution must be confronted with such facts. A failure by the accused to do so may affect the weight to be attached on evidence that is introduced by him belatedly. In *President of the Republic of South Africa v South African Rugby Football Union and others*[7], the Court stated as follows:

"The institution of cross-examination not only constitutes a right; it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's

attention to the fact by putting questions in cross-examination showing that the imputation is intended to be made, and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct".[8]

I am respectfully in agreement with the principle enunciated in these cases. It was important that the accused put the facts he belatedly introduced, to the witnesses implicated by them, so that the witnesses concerned may comment thereon.

[47] An application of the above principles to the facts in the present matter necessitates the Court to consider the following: On count one, Ms M[...]’s testimony was consistent, she was frank and did not try to embellish her testimony. She made concessions where same needed to be made: when asked about her state of sobriety she readily admitted that she was drunk as she left the tavern to the point that she was staggering. Where she forgot certain facts she did not attempt to improvise her testimony. Ms M[...] was asked whether she had any money on her when the accused gave a lift, or whether she recalls if she had used all of it at the tavern. It is not difficult to understand that the question was asked to buttress the accused's version that she was in need of the money. Ms M[...] frankly answered that she cannot remember how much she had or if she had used all of it at the tavern or not. Be that as it may, nothing in evidence suggests that her testimony should not be believed. Neither has it been demonstrated that her state of being drunk in any way affected her ability to observe and understand what was happening around her.

- [48] No credible evidence was adduced to suggest that Ms M[...] may have sustained her undisputed injuries before or after the alleged rape. The accused speculated that she may have fought at the tavern, and this speculation has no factual basis when viewed in light of the conspectus of evidence adduced in these proceedings. It is indeed so that in the realm of possibilities anything is possible. But this is not the standard of assessment of evidence. To elevate speculation to evidence would be a travesty of principles on evaluation of evidence. No plausible explanation was put forward by the accused of how then, the blood stains at the back passenger seat came about if not from Ms M[...]’s injury, nor did the accused rebut evidence of Mr Ngqoza regarding the condition of the car when he gave it to him; and the fact that the blood stains could not have come about while the car was in possession of Mr Ngqoza after he took it back from the accused.
- [49] Evidence of Mrs B[...] M[...] as to the report by Ms M[...] of the rape in the manner set out above must indicate consistency on the part of Ms M[...]. Evidence of both Ms M[...] and her mother can therefore not be faulted. It is unfortunate, on the other hand, that the accused introduced an almost totally new version only when he gave evidence under oath, with which none of the state witnesses were confronted. The Court heard for the first time when the accused gave evidence at the close of the case for the prosecution that when he and Ms M[...] left the tavern in the Toyota Tazz, Ms M[...] asked him for money to buy alcohol, and that at that stage he told her that he did not have money on him at that moment.
- [50] Equally new to the Court was accused’s evidence that it was in fact Ms M[...] that offered to have sexual intercourse with him. The Court heard for the first time when the accused testified in his defence that after he had sexual intercourse with Ms M[...], which on his version was consensual, he went to relieve himself and told Ms M[...] that he would meet her in the car. The same is to be said about accused’s further evidence that he heard Ms M[...] close the car door as he was relieving himself. It is perhaps apposite to note that the Toyota Tazz in which the accused gave Ms M[...] a lift is a right hand motor vehicle, and if Ms M[...]’s evidence is believed, as it is indeed believed, that she sat at the back passenger seat directly behind the accused, it is axiomatic, as it is in fact Ms M[...]’s evidence, that the foot she pushed out in order to escape from that same seat was the right foot. This, coupled to the blood stains

as depicted in photographs 9-12 of Exhibit “C” renders improbable the accused’s version that Ms M[...] sat at the front passenger seat of the Toyota Tazz. An ineluctable conclusion to be made is that the accused tailored his evidence to fit the case put forward by the Prosecution on count 1. Consequently, accused’s version cannot be said to be reasonably possibly true. Even if Ms M[...] had, for argument’s sake agreed to sexual intercourse with the accused for money in return, and I am not here saying she did, accused would still have obtained such consent by fraudulent means when regard is had to his version put to Ms M[...], that it was only after sexual intercourse that he told her that he did not have the money to give her (section 1(3)(c) of Sexual Offences Act). Ms M[...]’s evidence is accepted by this Court as the truth, and that of the accused is rejected as improbable and not reasonably possibly true.

- [51] On count 2, Ms M[...]’s testimony was not consistent on material facts, this was exacerbated by the material contradictions between her evidence and that of her mother on the aspect of accused forcefully taking Ms M[...] away. I find it incongruous with human nature, and indeed improbable, that a parent would watch passively as her child is treated with aggression by a stranger. It is further not without consequence that Ms M[...] was not forthright regarding how she sustained her backache after the alleged rape at the danger box. Similarly disconcerting is how Ms M[...] shied away from evidence of her encounter with accused’s girlfriend when she arrived at the danger box and found her and the accused having sexual intercourse.
- [52] The material contradictions in the evidence of Ms M[...] and her mother in respect of count 2 tend to render their evidence doubtful regarding the incident alleged in that count. In as much as the accused himself gave inconsistent evidence regarding what transpired when his girlfriend Sinoxolo Nqame arrived, he must, in terms of the law, benefit from the doubt created in so far evidence of state witnesses on count 2 is concerned. I am not satisfied that his guilt on count 2 has been proven beyond reasonable doubt, and the prosecution correctly conceded that it has fallen short in discharging its onus on count 2.
- [53] In respect of count 3, I find the following facts to be proven: The accused was with Ms M[...] at Karara’s home on 4 January 2020, and Ms M[...] arrived at this house with the accused. The injuries sustained by Ms M[...] as set out in the J88 report of Dr Kama were inflicted within a period of not more than 12 hours before the time of examination; and the ones on her vagina and anal region in particular were, in the opinion of Dr Mguga, 4th degree injuries which he said means serious injuries in layman’s terms. Ms M[...] was very drunk at the time of examination by Dr Kama at 01h40 on 5 January 2020, to a point that she could not speak, and was smelling of alcohol. It had been approximately three hours since Ms M[...] was injured when Dr Kama examined her.
- [54] On Dr Kama’s opinion, Ms M[...]’s injuries on her vagina were likely to have been caused by an erect penis that penetrated someone who was not ready for sexual intercourse; and the nature of her injuries was consistent with trauma into the posterior wall of the vagina. The accused had Ms M[...]’s blood on him, and had gone to a water tap at Karara’s yard, or nearby, to wash the blood off. Mr Mabhuti Toto is a resident at Karara’s house, and was the first person to arrive at the scene of the incident alleged in count 3 and saw the accused wash himself at the water tap; and as the member of that household, he investigated the accused’s presence in that yard. Mr Melikhaya Gavin arrived after Mr Toto and he too enquired from accused why he was at those premises. The accused did not ask Mr Toto, or Mr Gavin for help with Ms M[,], nor did he call out for help at any time before the arrival of Mr Toto and Mr Gavin.
- [55] Mr Toto and Mr Gavin’s evidence of their respective interactions with the accused is not out of place with logic. It can hardly be said that Mr Toto was to be passive when he saw a stranger in his yard. Hence it is indeed probable that when he found the accused in his premises, he became suspicious. What is improbable is that accused, whose girlfriend, on

his version, was brutally attacked, would remain mum about the incident when the first person came to the scene. The accused explanation in this regard, that he saw no point of asking Mr Toto for help because he was abrasive when he asked him who he was, lacks any form of credibility or reason. The same is to be said of the accused's version that he was so traumatized and in shock that he kept his silence. A person in the situation he describes in his version would be expected to raise alarm even before the arrival of Mr Toto.

- [56] Surely, it must have been important to the accused that the two men who attacked him and Ms M[...], on his version, be apprehended and brought to book. Instead, it seems, on his version that he nonchalantly went and took care of the blood on him first, while contemplating seeking help for Ms M[...]. It is mind boggling that the accused told the Court for the first time in his evidence under oath at the close of the state's case, that when he met Ms M[...] at the corner of Coetzee Street, she was very drunk; and that out of concern, he told her that he was going to take her home. Even though Ms M[...] herself admitted that she was drunk, save that she said she was moderately drunk, it was important that she be confronted with the fact that the accused in fact wanted to take her to the safety of her home.
- [57] The accused contradicted himself on material aspects of what took place at Karara's house when Mr Toto arrived. At first it was put to Mr Toto and Mr Gavin that when they came to the Karara's house the accused was so traumatized that he said nothing to them. However, when he gave evidence in his defence, he oscillated between this same version; and saying that he told Mr Toto that Ms M[...] was his girlfriend, and had been attacked. That the accused introduced these new facts is indicative of someone who is mendacious. His defence that some men came and attacked him and Ms M[...] is opportunistic. Mr Toto and Mr Gavin's evidence, on the other hand, of what happened on their arrival at Karara's house, was not shaken in cross examination, and therefore cannot be assailed.
- [58] It was argued by Counsel for the State and Defence, respectively, that because of the concession by Mr Playton Du Plessis (Ouplaai) that he discussed the case with Mr Denver Blou (Boetie), their evidence is tainted. While I respectfully agree with both Counsel that collusion by witnesses should bear negatively on their credibility, it is my view, on the facts of this case, that the two witness's evidence cannot be said to be tainted for the following reasons: their written witness statements were not proven in court. It was not placed on record how it came about that the two witnesses sat together as their statements were being read from a Laptop computer a week before the trial of this case commenced, nor has it been shown that the two witnesses were generally untruthful in their testimony. In fact, it is my view that an honest explanation was given by Mr Du Plessis regarding what made him ask Mr Blou some questions about his statement.
- [59] It must be remembered that it had been Ms M[...]’s testimony as well that she was with the two witnesses when the accused arrived, and they did nothing when he grabbed her and forcefully took her away. What defence Counsel sought to impugn, inter alia, was the two witnesses' evidence that they were present when accused came and took Ms M[...] away. It is

my view that discarding Mr Du Plessis's evidence on this issue would necessitate discarding that of Mr Blou as well, even though it was not put to Mr Blou that there was collusion between him and Mr Du Plessis. The two witnesses testified on the same day, one after the other. Had it been the intention of Mr Geldenhuis for the Defence, to illustrate that Mr Denver Blou and Mr Playton Du Plessis are not trustworthy witnesses, an application would have been made to re-call Mr Blou who had already given evidence when Ms Du Plessis made the concession. Even were it to be said, at most, because they were passive in the face of the potential danger that Ms M[...] faced, that they lack sense of social cohesion, still, that does not make them dishonest witnesses in these proceedings.

[60] Finally, it has not been shown that Ouplaai and Boetie had any benefit to gain from colluding against the accused on this aspect because the same witness clearly told the court that after the accused took Ms M[...] away, they did not see where they ended up. On this basis, I have no reason not to accept the two witnesses' evidence as the truth.

[61] There is only one inference to reasonably be drawn from the facts I have set out above: it is the fact that accused is the person that raped Ms M[...] on 4 January 2020 and inflicted on her the grievous bodily harm set out in the uncontroverted medical evidence. This is the only inference that is consistent with the proven facts on count 3.

IN THE RESULT:

On count 1- The accused is found guilty of rape as charged.

On count 2- The accused is acquitted.

On count 3- The accused is found Guilty of rape as charged.

In respect of count 3, is ordered that the provisions of section 51 (1) of Act 105/1997 shall apply.

RUSI L.

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

Appearances:

Counsel for the State:

Adv. P. Zantsi

Office of the Director of Public Prosecutions,

Grahamstown

Counsel for the Accused:

Adv. D. Geldenhuis

Legal Aid South Africa, Grahamstown Local Office

[1] Section 92(2) of the Criminal Procedure Act provides: “If any particular day or period is alleged in any charge to be the day or the period during which any act or offence was committed, proof that such act or offence was committed on any other day or during any other period not more than three months before or after the day or period alleged therein shall be taken to support such allegation if time is not of the essence of the offence: Provided that— (a) proof may be given that the act or offence in question was committed on a day or during a period more than three months before or after the day or period stated in the charge unless it is made to appear to the court before which the proceedings are pending that the accused is likely to be prejudiced thereby in his defence on the merits; (b) if the court considers that the accused is likely to be prejudiced thereby in his defence on the merits, it shall reject such proof, and the accused shall be deemed not to have pleaded to the charge.”.

[1] Section 92(2) of the Criminal Procedure Act provides:

“If any particular day or period is alleged in any charge to be the day or the period during which any

act or offence was committed, proof that such act or offence was committed on any other day or during any other period not more than three months before or after the day or period alleged therein shall be taken to support such allegation if time is not of the essence of the offence:

Provided that—

- (a) proof may be given that the act or offence in question was committed on a day or during a period more than three months before or after the day or period stated in the charge unless it is made to appear to the court before which the proceedings are pending that the accused is likely to be prejudiced thereby in his defence on the merits;
- (b) if the court considers that the accused is likely to be prejudiced thereby in his defence on the merits, it shall reject such proof, and the accused shall be deemed not to have pleaded to the charge.”.

[2] *S v Shackell* [2001] ZASCA 72; [2001] 4 All SA 279 (A); 2001(2) SACR 185 SCA at 194 g-i.

[3] See also *Shusha v S* unreported case 609/10 [2011] ZASCA 171, (delivered on 02 September 2011).

[4] *S v S* 1971

(2) SA 59 (A), at 596 G.

[5] *S v Jackson* 1998(1) SACR 470 (A) at 476 e.

[6] *R v Blom* 1939 AD 188 at 202-203.

[7] President of the Republic of South Africa v South African Rugby Football Union and others
2000

(1) SA 1 (CC) 1 at 36 j -37 b.

[8] See also: S v Boesak

[2000] ZASCA 112; 2000 (3) SA 381 (SCA).

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