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**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

**CASE NO: CC53/2019**

(1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED.

In the matter between

**THE STATE**

and

**ANDREW VUSI NDALA**

Accused

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**JUDGMENT**

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**MORRISON AJ**

[1] The accused, a 44 year old male, at the time of the alleged commission of the offences set out in Counts 1 to 17 of the Indictment had been living in Ekangala in the district of Ekangala, near Bronkhorstpruit for about 35 years. He moved to Marikana approximately a year before his arrest on 16 November 2018.

[2] The Accused was defended by Advocate J Kgokoane throughout the trial.

[3] Before judgment, on application, the State was granted leave to amend the indictment in respect of the counts mentioned *infra*, only opposed by the defence in respect of counts 4 and 16 in respect whereof *consensus* was ultimately reached, the said indictment not having specified the relevant sub-section of section 51 with which the contraventions of section 3 of Act 32 of 2007 had to be read. The indictment now reads in respect of counts 3, 5, 8, 10, 11, 12, and 13 that those contraventions must be read with section 51(1) and in respect of counts 4 and 16 those contraventions must be read with section 51(2) of the Criminal Law Amendment Act 105 of 1997.

[4] The accused stood trial on the following charges as set out in the indictment with the amendments to section 51 in the relevant counts as referred to *supra* :

"Count 1: KIDNAPPING

*IN THAT upon or about 18 December 2010 and at or near EKANGALA in the district of EKANGALA, the accused did unlawfully take away T[....] N[....], a 12-year old girl, the minor child of E[....] M[....], being her mother/lawful guardian with the intent to deprive the said E[....] M[....] of the lawful custody of T[....] N[....].*

Count 2: CONTRAVENTION OF SECTION 120(6)(a) READ WITH SECTIONS 1, 121, 122 AND 103 OF ACT 60 OF 2000.

*IN THAT upon or about 18 December 2010 and at or near EKANGALA in the district of EKANGALA, the accused did unlawfully and willfully point a firearm of which the make and model is unknown to the state, without good reason to do so, at another person to wit, T[....] N[....].*

Count 3: CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 42 AND 56 OF ACT 32 OF 2007 AND READ WITH SECTION 51(1) OF ACT 105 OF 1997.

*IN THAT upon or about 18 December 2010 and at or near EKANGALA in the district of EKANGALA the accused did unlawfully and intentionally have sexual intercourse with, T[....] N[....], a 12-year old girl, without her consent.*

Count 4: CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 42 AND 56 OF ACT 32 OF 2007 AND READ WITH SECTION 51(2) OF ACT 105 OF 1997.

*IN THAT upon or about 21 December 2010 and at or near EKANGALA in the district of EKANGALA the accused did unlawfully and intentionally have sexual intercourse with, M[....] M[....], an adult woman, without her consent.*

Count 5: CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 42 AND 56 OF ACT 32 OF 2007 AND READ WITH SECTION 51(1) OF ACT 105 OF 1997.

*IN THAT upon or about 16 July 2011 and at or near EKANGALA in the district of EKANGALA the accused did unlawfully and intentionally have sexual intercourse with, an I[....] L[....], a 13-year old girl, without her consent.*

Count 6: CONTRAVENTION OF SECTION 120(6)(a) READ WITH SECTIONS 1, 121, 122 AND 103 OF ACT 60 OF 2000.

*IN THAT upon or about 29 October 2012 and at or near EKANGALA in the district of EKANGALA, the accused did unlawfully and willfully point a firearm of which the make and model is unknown to the state, without good reason to do so, at another person to wit, NOMUSA SINDANE.*

Count 7: CONTRAVENTION OF SECTION 120(6)(a) READ WITH SECTIONS 1, 121, 122 AND 103 OF ACT 60 OF 2000.

*IN THAT upon or about 29 October 2012 and at or near EKANGALA in the district of EKANGALA, the accused did unlawfully and willfully point a firearm of which the make and model is unknown to the state, without good reason to do so, at another person to wit, VUYOKAZI SHELLY MPANDE.*

Count 8: CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 42 AND 56 OF ACT 32 OF 2007 AND READ WITH SECTION 51(1) OF ACT 105 OF 1997.

*IN THAT upon or about 29 October 2012 and at or near EKANGALA in the district of EKANGALA the accused did unlawfully and intentionally have sexual intercourse with, N[....] S[....], a 13-year old girl, without her consent.*

Count 9: CONTRAVENTION OF SECTION 21(1) READ WITH SECTIONS 1, 42 AND 56 AND 56A OF ACT 32 OF 2007 AND READ WITH SECTION 276 OF ACT 51 OF 1977.

*IN THAT upon or about 29 October 2012 and at or near EKANGALA in the district of EKANGALA the accused did unlawfully and intentionally compel or cause V[....] S[....] M[....], an 11-year old girl, to be in the presence of, or watch the accused while he committed a sexual offence, to wit having sexual intercourse with NOMUSA SINDANE, a 13-year old girl, without her consent.*

Count 10: CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 42 AND 56 OF ACT 32 OF 2007 AND READ WITH SECTION 51(1) OF ACT 105 OF 1997.

*IN THAT upon or about 15 November 2012 and at or near EKANGALA in the district of EKANGALA the accused did unlawfully and intentionally have sexual intercourse with, C[....] M[....], a 14-year old girl, without her consent.*

Count 11: CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 42 AND 56 OF ACT 32 OF 2007 AND READ WITH SECTION 51(1) OF ACT 105 OF 1997.

*IN THAT upon or about 10 October 2015 and at or near EKANGALA in the district of EKANGALA the accused did unlawfully and intentionally have sexual intercourse with, an, J[....] M[....], a 14-year old girl, without her consent.*

Count 12: CONTRAVENTION SECTION 3 READ WITH SECTIONS 1, 42 AND 56 OF ACT 32 OF 2007 AND READ WITH SECTION 51(1) OF ACT 105 OF 1997.

*IN THAT upon or about 4 December 2016 and at or near EKANGALA in the district of EKANGALA the accused did unlawfully and intentionally have sexual intercourse with, P[....] M[....], a 14-year old girl, without her consent.*

Count 13: CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 42 AND 56 OF ACT 32 OF 2007 AND READ WITH SECTION 51(1) OF ACT 105 OF 1997.

*IN THAT upon or about 12 December 2016 and at or near EKANGALA in the district of EKANGALA the accused did unlawfully and intentionally have sexual intercourse with, P[....] K[....], a 12-year old girl, without her consent.*

Count 14: CONTRAVENTION SECTION 21(1) READ WITH SECTIONS 1, 42 AND 56 AND 56A OF ACT 32 OF 2007 AND READ WITH SECTION 276 OF ACT 51 OF 1977.

*IN THAT upon or about 12 December 2016 and at or near EKANGALA in the district of EKANGALA the accused did unlawfully and intentionally compel or cause Z[....] T[....], a 12-year old girl, to be in the presence of or watch the accused while he committed a sexual offence, to wit having sexual intercourse with P[....] K[....] a 12-year old girl, without her consent.*

Count 15: KIDNAPPING

*IN THAT upon or about 8 October 2018 and at or near EKANGALA in the district of EKANGALA, the accused did unlawfully take away P[....] S[....] M[....], a 16-year old girl, the minor child of B[....] C[....] M[....], being her mother/lawful guardian with the intent to deprive the said B[....] C[....] M[....] of the lawful custody of P[....] S[....] M[....].*

Count 16: CONTRAVENTION SECTION 3 READ WITH SECTIONS 1, 42 AND 56 OF ACT 32 OF 2007 AND READ WITH SECTION 51(2) OF ACT 105 OF 1997.

*IN THAT upon or about 8 October 2018 and at or near EKANGALA in the district of EKANGALA the accused did unlawfully and intentionally have sexual intercourse with, an, P[....] S[....] M[....], 16-year old girl, without her consent.*

Count 17: CONTRAVENTION SECTION 3 READ WITH SECTIONS 1, 103, 117, 120 AND 121, SCHEDUL 4 OF ACT 60 OF 2000.

*IN THAT upon or about 18 December 2010 until 8 October 2018 at or near EKANGALA in the district of EKANGALA the accused did unlawfully have in his possession a firearm of which the make and the model is unknown to the state, without holding a licence, permit or authorization issued in terms of the said Act to possess this firearm.”*

[5] The summary of substantial facts in terms of section 144(3)(a) of the Criminal Procedure Act 51 of 1977 states the following:

- “1. On 18 December 2010 the complainant in COUNT 1, 2 and 3 was waiting on the stoop of her parental house as the house was locked. The accused told her that her mother was looking for her and that she must accompanying him. On their way he pulled her to a vehicle where two other males were waiting. The accused took out a firearm and threatened to shoot her if she does not board the vehicle. They drove with the complainant to a veldt where all three of them raped her.*
- 2. On 21 December 2010 the complainant in COUNT 4 was on her way to work when she was accosted by the accused and an unknown male. They tried to lure the complainant with a promise of money, but when she declined the offer, they dragged her into the bushes and raped her both.*

3. *On 16 July 2011 the complainant in COUNT 5 was requested by an unknown lady to assist the accused to take her groceries to her home. On their way the accused took out a knife and threatened to kill the complainant if she does not co-operate. He raped the complainant in the veldt.*
4. *On 29 October 2012 the complainants in COUNT 6 - 9 went to the shop to buy meat. On their way back, the accused requested them to assist him to search for his wheelbarrow. Immediately he tied the two complainants together. Two other males joined the accused and pointed the complainants with a firearm. They took the complainants into the veld where accused raped the complainant in COUNT 6 and 8. The complainant in COUNT 9 was compelled to watch while the accused was raping the complainant in COUNT 8.*
5. *On 15 November 2012 the complainant in COUNT 10 was from school when the accused accosted her. The accused threatened her with a knife, dragged her into the bushes where he raped her.*
6. *On 10 October 2015 the accused requested the complainant in COUNT 11 to fetch something for him. Instead he accompanied her to the veld with the request that she assist him to load wood into his wheelbarrow. In the veldt he assaulted the complainant and raped her.*
7. *On 4 December 2016 the complainant in COUNT 12 were playing with a friend when the accused requested the complainant to fetch wood for him. In the veldt he threatened her with a broken bottle and assaulted her. He then raped her.*
8. *On 12 December 2016 the accused requested the complainants in COUNT 13 and COUNT 14 to assist him with the gathering of wood. In the veld he tied the*



*complainants together. He then proceeded to rape the complainant in COUNT 13. The complainant in COUNT 14 was compelled to watch how the accused raped the complainant in COUNT 13.*

9. *On 8 October 2018 the complainant in COUNT 15 and 16 was walking in the street when the accused stopped next to her with a vehicle. He got out, grabbed her and pulled her into the vehicle. He drove to a secluded spot in the bushes. He took the complainant from the vehicle, assaulted her and raped her.*

10. *The accused at all times acted in common purpose with the other assailants.”*

[6] The accused pleaded not guilty to all the counts.

[7] The provisions of Section 51 of the Criminal Law Amendment Act 105 of 1997 and the schedules thereto were explained to the accused and the Court confirmed that the Accused understood the provisions thereof.

[8] The Accused declined to make a statement in terms of section 115(1) of the Criminal Procedure Act 51 of 1977 setting out the basis of his defence, elected to remain silent and put the State to the proof of all the allegations in respect of all the counts.

[9] A bundle of admissions in terms of section 220 of Act 71 of 1977 was prepared by Adv Kgokoane and the accused confirmed that he was making these admissions, set out in exhibit “A”, admitting the contents of the documentation appended to Exhibit “A”, which are as follows:

**Ad counts 1 – 3:**

Exhibit “B”: The J88 completed by Dr J Sambo at Cullinan Hospital in respect of T[....] N[....] who displayed all the signs of having been raped with bruises and tears to her vagina, with an accompanying report to the doctor that she had been gang-raped.

Exhibit “C”: A first report affidavit of P[....] K[....] to whom T[....] N[....] had reported she had been raped on 18 December 2010.

**Ad count 4:**

Exhibit “D”: The J88 completed by Dr T V N[....]i at Cullinan Hospital in respect of M[....] G[.....] M[....] finding that her injuries were consistent with recent blunt per vaginal penetration with no vaginal trauma which is to be expected in sexually active females. Account noted that she had reportedly been overpowered at gunpoint and sexually assaulted.

Exhibit “E”: Statement admitted as to first report by victim to Constable Mahlangu.

**Ad count 5:**

Exhibit “F”: Statement admitted as to first report by victim to N[.....] L[....].

**Ad counts 6 – 9:**

Exhibit “G”: The J88 completed by Dr K L Magana at Rayton Clinic on 30 October 2012 in respect of N[....] S[....] showing fresh vaginal tears and bruising. Report of threat with knife.

Exhibit “H”: Statement admitted as to first report by victim to K[....] N[....].

**Ad count 10:**

Exhibit “I”: The J88 completed by Dr T M P Magoro at Cullinan Hospital on 15 November 2012 in respect of C[....] M[....] showing vaginal tears. Soiled clothing at back and report of knife at her throat.

Exhibit “J”: Statement admitted as to first report by victim to T[....] M[....].

**Ad count 11:**

Exhibit “K”: The J88 completed by Dr K Masoga at Dark City Clinic on 10 October 2015 in respect of J[....] M[....].

Exhibit “L”: Statement admitted as to first report by victim to Morris Msiza.

**Ad count 12:**

Exhibit “M”: The J88 completed by Dr J Sambo at Dark City Clinic on 5 December 2016 in respect of P[....] M[....] , vaginal bruises and tears evident. Report of death threats.

Exhibit “N”: Statement admitted as to first report by victim to S[....] M[....].

**Ad counts 13 – 14:**

Exhibit “O”: The J88 completed by Dr B B Moloto at Dark City Clinic on 12 December 2016 in respect of P[....] K[....] a 12 year old female.

Exhibit “P”: Statement admitted as to first report by victim to C[.....] K[....].

**Ad counts 15 – 16:**

Exhibit “Q”: The J88 completed by Dr M Schele at Dark City Clinic on 8 October 2018 in respect of P[....] M[....] a 16 year old female, recording dusty clothes with grass on them and vaginal injuries in keeping with blunt force trauma.

Exhibit “R”: Statement admitted as to first report by victim to B[....] M[....].

[10] State Counsel handed in two affidavits in terms of section 212 of the Criminal Procedure Act 51 of 1977 deposed to by Warrant Officer Phokela Apollonarius Comet Mogashoa attached to the Biology Section of the Forensic Science Laboratory in Arcadia, Pretoria. These DNA analyses, admitted as Exhibits S1 and S2, indisputably match the Accused’s DNA sample with those of the nine complainants’ DNA samples. The most conservative occurrence for the DNA result obtained from the exhibits in the two DNA reports is 1 in 19 billion people. Counsel for the accused did not dispute the contents and had explained the content of the reports to him.

**Counts 1 – 3: Kidnapping, Pointing of a firearm and Rape offences.**

[11] The State called the mother of the victim in counts 1 – 3, E[....] M[....]. She testified that her daughter, T[....] N[....], was born on 5 June 1998 and was 12 years old at the time of the alleged rape on Saturday 18 December 2010. E[....] M[....] had attended a wedding on that date and had left T[....] with her brother at home. On the same date she was informed by her neighbour P[....] K[....], to whom T[....] had reported the rape and who had come to the wedding to find her and tell her that T[....] had been raped. The matter was reported to the police and T[....] was examined by a doctor the next day.

[12] T[....] N[....], now 21 years of age, testified in chief that she was alone at their home at Ekangala, playing with stones when the accused came and wanted tap water. After drinking water he stated that her mother is B[....] K[....], which T[....] confirmed.

[13] The accused then said that her mother was up the road and needs help carrying plastic bags and he will lead her to where her mother is. T[....] stated that she believed him owing to his knowing her mother's full names.

[14] She walked up the road with the accused to a tuck shop where there was a red Toyota Tazz with tinted windows. He produced a firearm and threatened her to get into the car. She got into the back of the car as she was scared of the firearm and sat on the backseat together with the accused who told her that she must not make a noise as she would get hurt. She testified that there were two other males in the car and the driver also had a firearm.

[15] They drove to the veld where there were bushes near the Ekangala police station. They drove deep into the bushes where they alighted. She was told to get out the car and undress.

[16] After T[....] undressed she testified that the accused was the first one to rape her. She was lying on top of her T-shirt. When he removed his penis from her vagina he ejaculated on her T-shirt that she had been lying on. She was then raped by the other two men who took turns and they both wore condoms.

[17] They then left her in the veld. She testified that she struggled to walk as she was experiencing pain in her private parts. She walked to her neighbour and told her neighbour what had happened. The neighbour fetched her mother from the wedding. They then went to her uncle who drove them to the police station, the same day in the afternoon. She was examined by a doctor the next day.

#### Cross-examination

[18] She stated that she had not seen the accused before 18 December 2010 and did not know him. The whole incident she estimated took between 20 to 25 minutes. On the day of the incident the weather was hot and the visibility good.

[19] She saw the accused once thereafter in 2011 while cleaning the house, she saw the accused passing in the street. She informed her mother and the accused ran away when her mother alerted her brothers to chase him. The police were informed about this. She was only alerted about the accused's arrest in 2019 and did not attend an identity parade.

[20] She identified the accused in the dock on the day of her testimony. When questioned she stated that the accused and the driver both had firearms. The accused had a silver one and the driver a black firearm. She became scared when she saw the firearms.

[21] It was put to her that the accused denied that he was the person whom she described in taking part in the kidnapping and rapes perpetrated to which she disagreed. When it was further put to her that he has never seen her in his life before

until she testified in court, with which she disagreed. The second time to see him was in 2011. She identified him by his large eyes, short height and dark complexion.

Count 4: Rape offence.

[22] M[...] G[...] M[...] testified regarding the allegation of rape in count 4. She is now 42 years of age and 33 years old at the time of the incident. She was living in Ekangala and worked at a biscuit factory there.

[23] On Tuesday 21 December 2010 at about 13h00 she was on her way to work when she was accosted by two men, one of whom she pointed out in court as the accused. She described what they were wearing. Accused was the male who had raped her.

[24] She was told by them when she met them that they had robbed Chinese persons who had a gambling business. She stated that the accused threatened her with a fire-arm. Both men dragged her into the bushes and the accused told her to take off her panty. She refused and tried to run away and fell down. The accused pulled her back to the bushes and took off her panty.

[25] The accused removed his trousers and penetrated her private part with his and raped her once while the other man just stood there. He then let go of her and said she could go.

[26] She went to work and informed her manager that she had been raped. He advised her to go to the police, which she did and made a report to Constable

Mahlangu regarding the rape. She was taken to Cullinan Hospital and was examined by Dr T V N[....]i.

[27] She saw the accused some time later in December 2010 at her sister's house where people were praying at a funeral wake. The accused was there, a member of the ZCC participating in the prayers.

#### Cross-examination

[28] When cross-examined by counsel for the accused she disagreed with the accused's contention that he had not raped her or had sexual intercourse with her. She testified further that when she saw the accused at the prayer meeting he also saw her and went outside with the pastor.

[29] Her landlord, after she had talked to him, said that the person who raped her was called Vusi and took her to show her where he lived. She took the police there who arrested him, however did not handcuff him so he managed to run away and escape. She disagreed when it was put to her that the accused denies that the incident ever happened.

[30] She was never told by the police that the accused had been arrested, but she was shown his photograph from his identity document which she confirmed was that of the accused.



Count 5: Rape offence.

[31] I[...] L[...] testified that on Saturday 16 July 2011 when the alleged rape occurred she was 13 years old, her birthday being 1 August 1997.

[32] She testified further that she was at home at Ekangala and at about 12h00 her mother sent her to the shop. There she was approached by a woman and the accused, whom she pointed out in Court, who were carrying plastic bags. They asked her for assistance in carrying the bags, she did so and went with them. On the way the woman stated that she had forgotten something but that the accused knows where she lives so she should go with him.

[33] Near the police station the accused suggested that they take a short cut through the bushes. Deep in the bushes, with nobody in sight, he grabbed the complainant by the hand, said she must not scream and produced a knife. She tried to fight him off, but he slapped her with an open hand on her face and tripped her. She fell and hurt her head.

[34] He then took off her trousers and panty. He took off his pants and took out his penis. While she was on the ground he spread her legs and climbed on top of her, penetrated her vagina and raped her. He then stood up and shortly thereafter climbed on top of her again and raped her again. When he had finished he stood up, dressed himself and told her to get dressed. He instructed her to run and not look back. She could not run as she was in pain and walked home where she told her mother what had happened (*cf.* Exhibit "F").

[35] Her mother took her to the police station and the police took her to the hospital at Mamelodi. When she thinks of what happened she can see his face and remembers the accused, whom she pointed out in court as stated above.

[36] She saw him again at a carwash ATM at Dark City just hanging around. She told her mother that she had seen him.

#### Cross-examination

[37] Under cross-examination by counsel for the accused she stated that it was in 2017 at about 18:30 when she was coming from work, that she had seen the accused at the carwash ATM. She made a statement to the police but had not told the police in 2017 that she had seen the accused again, as she did not know where he lived or where to find him. If they went back to look for him he would be gone. In any event she said the police said that they would come back to them about the case.

[38] It was put to her that the accused denies that he raped her and that the reason she did not report that she had seen him again is because she could not recognise him as the perpetrator. She replied on oath that she was very sure that he is the person who raped her. She did not attend an identity parade.

#### Counts 6 – 9 : Pointing of firearm (2 counts), Rape and Compelling or causing a child to witness a sexual offence

[39] N[....] S[....] testified about the events on 29 October 2012 at which stage she was 13 years old and living at Ekangala. She is now 20 years old.

[40] On the day in question her mother sent her to the shop for meat. She and her friend V[....] S[....] P[....], who was seven years old at the time, went to the shop, but could not find what they had been sent to buy. They decided to go to a friend of N[....]'s house to fetch text books.

[41] The accused approached them and asked for directions to the police station, which they gave him. They then walked away but the accused followed them. She testified that she thought he was a good person as he had asked how to get to the police station.

[42] They took a short cut through the bushes to her friend's house, noticed the accused following them. He caught up with them and threatened them with a firearm, pointing it at them. She testified that it looked like a police firearm about 8 centimetres long, black and old. He instructed them to walk in front of him.

[43] At a certain spot he pushed them to the ground and tied one of her hands to one of V[....]'s hands with a shoelace. He was alone and unzipped his trousers. He spread her legs and penetrated her vagina with his penis while V[....] watched as she was still tied to the complainant. Afterwards he dressed and left.

[44] They cut the shoelace off with a broken bottle and ran to her house. She reported what had happened to her mother. Her mother and sister took her to the police station and reported the matter. She was told not to bath as she would be taken to a doctor at Cullinan the next day.

Cross-examination

[45] Defence counsel cross-examined the complainant on the statement she made at the time and pointed out differences between her statement and that of her mother, especially as to the involvement of two other of the accused's alleged friends who pointed firearms at them. Defence Counsel put it to her that the accused denies that he had raped her, to which she replied that it was he who had raped her.

[46] V[....] S[....] M[....] testified in respect of the same counts. She pointed out the accused in the dock in Court as the person who had raped N[....] in her presence. She moreover mentioned the involvement of another two men at the scene at a stage, corroborating N[....]'s statement to the police. She also deposed to having watched the accused rape N[....] while she was tied to N[....] with a shoelace. She stated that N[....] was bleeding when the accused finished with her.

Cross-examination

[47] Questions were put to V[....] regarding her statement she made when she was 7 years old, but assisted by her mother. According to her statement two other men came to the scene and pointed firearms at them. She said the accused is lying if he says that he did not have sexual intercourse with N[....], did not tie them together with a shoelace and knows nothing about the incident.

[48] It was noted however she did not testify about the accused having pointed a firearm at her and N[....], but mentioned that two other males came to the scene and pointed firearms at them.

Count 10: Rape offence

[49] C[....] M[....] testified by video link in respect of the charge of rape committed on 15 November 2012 at Ekangala upon her when she was 14 years old. She is now 21 years of age.

[50] She testified that during the evening in question she was walking with a friend called T[....] near the mountain coming from school. A person came from nowhere and he followed them trying to catch up to them and was getting closer to them.

[51] She told T[....] that they should run. (The witness started crying at this stage of her testimony and the Court waited until she had composed herself). Her shoes were loose and she wanted to take them off when the man apprehended her. T[....] had run away. It was still light and not yet dark.

[52] The man pushed her to the ground and she fell. He told her not to make a noise. She tried to move away as she was in a sitting position. He produced a pocket knife and told her that he would stab her if she made a noise. (Witness started crying again and the Court waited until she had composed herself).

[53] She testified further that the man then got on top of her and took off his trousers. He held a knife to her throat. She was wearing a skirt and he removed her panty. He then put his penis in her vagina and raped her. After that he told her not to tell anyone or else he would kill her. He would come to her school. He then left.

[54] She went straight home, told her aunt what had happened who then told her mother (Cf Exhibit "J"). She went to the police with her mother, aunt and sister and a charge was laid. She was examined by a doctor the same day. She never saw the man who had raped her again.

[55] There was no cross-examination.

Count 11: Rape offence

[56] J[....] M[....] who was 14 years old at the time of the incident on 10 October 2015 at Ekangala and is now 18 years old gave evidence regarding the rape.

[57] She was on the way to her grandmother's house with her brother, who was about 11 or 12 years old, when she met an unknown man looking for someone to help him collect wood. She pointed out the accused in the dock in Court because she stated that she cannot forget his face.

[58] The accused did not want her brother to help. She went with him and walked to an outlying area. When they arrived at a spot she asked him where the wood was. She was surprised when he then slapped her with an open hand on her face and told her to undress. She refused and he pushed her to the ground and spread her legs open. She resisted and he hit her on her thighs with a piece of wood. She was hurt and opened her legs and took off her panty when he told her to. She saw a white substance on her thighs coming from the accused as he was trying to penetrate her with his penis.

[59] He then inserted his penis in her private parts and she told him he was hurting her and pushed him and he stopped. He had managed to penetrate her but not deeply. He opened her thighs again, slapped her for a second time and hit her thighs. He then inserted his penis again into her vagina and continued despite her pleas that he was hurting her. She pushed him and he got up, put on his trousers and left.

[60] She then went to a sewerage plant and found a security lady there and told her that she had been raped. She phoned the police. She went to the police and a charge was laid. She was taken to the clinic the same day to be examined.

[61] About two years later when living at Marikana she saw the accused in Marikana.

#### Cross-examination

[62] The witness testified under cross-examination on the aspect of having seen the accused in Marikana and she testified that she went with the police to the accused's home in Marikana not far from where she was then living. He had moved there about a year or a year and a half earlier according to her testimony. She was present at his arrest on 15 November 2018.

[63] When put to her by defence counsel that the accused says that she was falsely implicating him and that she had waited a year before reporting to the police as to where he lived. Her reply was that she had told her mother that she had seen him but that her mother wanted to wait until they were sure he lived there.

[64] It was further put to her that the accused denies having sexual intercourse with her and denies the rape incident *in toto*. She replied that he did.

[65] There was no re-examination.

Count 12: Rape offence

[66] P[....] M[....] was 14 years old at the time of the incident on 4 December 2016 at Ekangala and 18 years old when she gave evidence regarding the rape.

[67] Initially she started testifying via closed circuit TV but became distraught at the experience and the State then with the co-operation of her mother called her to testify in court with her mother sitting with her in the witness stand. The Court orderly stood in front of the accused in the dock.

[68] On the day in question she was playing in the street with a friend called T[....]. T[....]'s grandmother called them and sent them to Joe's place to fetch money. They returned later at about 16h00 to T[....]'s house.

[69] A man, short and dark, called out to them and want to drink water from the tap. It was her first time to see him. She described his clothes. He wanted assistance to carry wood. They went with him to the bushes which were not far from there. He left Thabisile next to a tree and took the complainant with him.



[70] The man said he was looking for a piece of rope. He picked up a bottle which he broke and called her to him. He threw the bottle away and asked her if she wanted to die or whether she wanted to live. She replied that she wanted to live.

[71] He then pulled her by her clothing and told her to undress and put her jersey on the ground. He instructed her to lie down which she did. He slapped her face took off his trousers and put his penis in her vagina and raped her. Afterwards he told her to get dressed, to walk away and not look back.

[72] She went to T[...] where they had left her and first went to her house and thereafter went home. She reported to her mother what had happened and they went to the police. They went to the doctor for an examination the following day.

[73] The witness when asked by State Counsel if she was up to the task of identifying whether the accused before Court was the person who had raped her and in consultation with her mother stated that she was prepared to do so. When the court orderly moved so that she could see the accused, without hesitation she stated that it was the accused before Court who had raped her.

#### Cross-examination

[74] The witness was cross-examined on her dock identification of the accused the purport of her evidence in reply was that it was the accused who had raped her, as she had had a good look at his face at the time.

#### Count 13 – 14: Rape and Compelling or causing a child to witness a sexual offence

[75] P[....] K[....] was 12 years old at the time of the incident on Monday 12 December 2016 at Ekangala and 16 years old when she gave evidence in Court regarding the rape. Her date of birth is 14 March 2004.

[76] On the day in question she was walking with her friend, Z[....] K[....], and others when they met a man whom she did not know. When asked if she could identify him she stated that she did not remember him properly and maybe would be confused.

[77] This man appeared to be talking on his phone. Once done, he came to them, greeted them and wanted assistance carrying luggage. Since they were older than the other youngsters in their group he asked the witness and Z[....] to help him.

[78] They walked with him to a stadium next to the bushes and he picked up a rope that was lying on the ground. He wanted to show them a game using the rope. They walked towards the middle of the bushes and he went off while they waited for him. When he returned he took them to a spot, next to a tree where there was a pillow lying in the ground.

[79] He told the witness and Z[....] to face one another. He picked up a broken bottle and then tied one of her hands to one of Z[....]'s hands. He used the bottle to scratch them on their hands to demonstrate how sharp the edges were. He warned them not to scream and informed them that there was no luggage to help carry and that he had brought them there to rape them, starting with the witness.

[80] The complainant took off her clothing and had to lie on top of the pillow. Z[...] was still tied to her and sat next to her. He lay down on top of her, he unzipped his trousers, took out his penis and opened her legs. He put on a condom and tried repeatedly to penetrate her, took off the condom and succeeded in penetrating her and raped her.

[81] He then told the witness to get up, get dressed and go as he was not going to rape Z[...] to whom she was still tied. He untied them and took them through the bushes via another route and took them half way.

[82] She was too scared to tell her mother what had happened because the man threatened to kill her if she told anyone. Z[...] told her mother and she herself was busy crying. Her mother took her to the clinic where she was examined and they advised her mother to take her to the police. On the way they saw the police in a van who told them to wait and then came back for them. Charges were laid.

[83] There was no cross-examination.

[84] Z[...] T[...] corroborated P[...] K[...] in all material respects. She was the complainant in count 14 of the indictment. She testified that the man had called the game he wanted them to play "God and Satan". He also told P[...], whom she called S[...], that if she screamed he would stab her and she would die. Her description as to how the man tried to penetrate Precious and how he had tried to kiss her and fondled her breasts and that when he removed his "thing", after raping her, sperm

came out, was graphic. She had to sit and watch the whole rape and sexual encounter because she was tied to Precious and facing them.

[85] There was no cross-examination.

Count 15 – 16: Kidnapping and Rape.

[86] P[....] M[....] was 16 years old at the time of the incident on 8 October 2018 at Ekangala. and 17 years old when she gave evidence in Court regarding the rape. Her date of birth is 17 July 2002.

[87] The witness testified that she was on the way to her grandmother's place next to the community hall. A blue car appeared and stopped next to her. A man alighted and grabbed her by the throat and forced her into the back of the car. He then drove off with her sitting behind him.

[88] He then took her to a place near a rock where hitch hikers normally would stand. He then drove off the tar road, stopped and pulled her out of the car. He told her to undress and when she refused to do so he slapped her with an open hand.

[89] She undressed. She was a virgin. He lowered his trousers and underpants to his knees. He touched her vagina and inserted his penis in her vagina. It was painful and she cried. He had sex with her lying on top of her. When he got off he kicked her while she was lying in the ground.

[90] He then drove off in his car, leaving her there. She walked home which was painful after what had happened and it took her a long time to get home. She told her brother who saw her and asked her what was wrong that she had been raped. She went inside and told her mother. They called the police and then went to the police station. She saw a doctor the same day.

[91] While the accused had his penis in her vagina he made up and down movements.

[92] There was no cross-examination.

Count 17: Possession of unlicensed firearm.

[93] This count pertains to the charges on 18 December 2010 and the alleged possession by the accused of a firearm used to threaten T[....] N[....].

[94] The State closed its case.

**Defence case**

[95] The accused testified in his own defence. He gave evidence that he was 44 years of age and that on the 9 counts of contravening section 3 of Act 32 of 2007, to wit Rape, he had nothing to say to the Court. <sup>1</sup>

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<sup>1</sup> In terms of section 3 of the CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT 32 OF 2007 “Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape.”

[96] Several witness had pointed him out in court and he has no knowledge as to the allegations made by them.

[97] He testified about his arrest on 16 November 2018. The investigating officer told him to go back ten years in his life and try to remember if he had committed any crimes. He gave an account of how he was arrested and stated that the complainant in count 11 was with the police.

[98] As regards all of the counts 1 – 17 he stated he was not the perpetrator. He added that he had never carried a firearm in his life as regards count 17. In a nutshell his defence was that it wasn't him.

Cross-examination by Counsel for the State.

[99] The pertinent aspects of cross-examination were the following:

99.1 It was put to him that several witnesses point him out as the rapist to which he replied that he did not know them.

99.2 He was familiar with Ekangala and the people there. He had lived there for between 30 – 35 years.

99.3 He did not have employment.

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99.4 When asked if he knew what DNA was he stated that he knew nothing about DNA or medical things.

99.5 It was explained to him by State counsel that DNA came from bodily fluids such as saliva and sperm, to which he replied that he now understood.

99.6 It was put to him that his bodily fluids were found on the victims and their clothing, to which he replied that he cannot explain. He does not know how his sperm got on them.

99.7 It was put to him that he took them to the bushes to which he replied that this was the first time that he hears that.

99.8 It was put to him that he had used a gun and bottle to threaten them to which he replied that he heard that but knows nothing about that.

99.9 It was put to him that the ladies were young and virgins, to which he answered that he had heard that.

[100] That concluded the cross-examination by the State and defence counsel closed the case for the defence.

[101] State and defence counsel submitted heads of argument on the merits of this case.

[102] State counsel in her heads of argument emphasised *inter alia*:

102.1 The fact that the evidence established a specific *modus operandi* on the part of the accused and set this out in her heads.

102.2 Furthermore all his victims were very young females and virgins, with the exception of the victim in count 4.

102.3 As regards the DNA evidence this was conclusive that the accused was the person who had raped the victims in the nine counts of contravening section 3 of the Criminal Law (Sexual Offences and related matters) Amendment Act 32 of 2007, Rape.

[103] Defence counsel in his heads argued that the accused ought to be acquitted on all the counts:

103.1 Ad count 2: The State failed to prove that the accused pointed a firearm at T[.....] N[....] in that at no stage in her testimony did she testify that a firearm had been pointed at her, although she did give evidence that the accused and the others in the car had firearms.



- 103.2 Ad counts 6 and 7: The claim that a firearm was pointed at N[....] S[....] and V[....] M[....] is contradicted in S[....]'s statement and her mother's statement, as well as V[....]'s statement.
- 103.3 Ad count 17: It was averred that there is no evidence that the object the witnesses saw was a firearm as defined in Act 60 of 2000.
- 103.4 Ad counts 4 and 16: The rapes proved fall within the ambit of section 51(2) of Act 105 of 1997.
- 103.5 Ad counts 3, 4, 5, 8, 10, 11, 12, 13 and 16: It was argued that dock identification carried little weight as the most obvious person to be identified is the accused sitting in the dock. For the rest the criticism was levelled at the victims' ability to identify the accused, a person who is dark of complexion. Furthermore it is improbable it was submitted that the State witnesses owing to time lapses, ages, not knowing the alleged rapist before the time, trauma, failure to identify distinguishing features of the rapist and that the perpetrator and the witness have through time have developed physically and did not look the same as they did 3 – 9 years ago.
- 103.6 Moreover the accused's denial of his DNA it was argued puts a challenge to the process that led to the birth of Exhibits S1 and S2.

[104] On a *conspectus* of all the evidence which is overwhelming, more in particular the DNA evidence, the ageless distinguishing feature left behind by the accused in *casu*, I find that the State has proved its case against the accused beyond a reasonable on all of these counts set out below and I find him guilty on all of these counts:

104.1 Count 1: Kidnapping

104.2 Count 3: Contravening section 3 of the Criminal Law (Sexual Offences and related matters) Amendment Act 32 of 2007, Rape.

104.3 Count 4: Contravening section 3 of the Criminal Law (Sexual Offences and related matters) Amendment Act 32 of 2007, Rape.

104.4 Count 5: Contravening section 3 of the Criminal Law (Sexual Offences and related matters) Amendment Act 32 of 2007, Rape.

104.5 Count 8: Contravening section 3 of the Criminal Law (Sexual Offences and related matters) Amendment Act 32 of 2007, Rape.

104.6 Count 9: Contravening section 21(1) of the Criminal Law (Sexual Offences and related matters) Amendment Act 32 of 2007, Compelling or causing a child to witness sexual offences or sexual acts.

- 104.7 Count 10: Contravening section 3 of the Criminal Law (Sexual Offences and related matters) Amendment Act 32 of 2007, Rape.
- 104.8 Count 11: Contravening section 3 of the Criminal Law (Sexual Offences and related matters) Amendment Act 32 of 2007, Rape.
- 104.9 Count 12: Contravening section 3 of the Criminal Law (Sexual Offences and related matters) Amendment Act 32 of 2007, Rape.
- 104.10 Count 13: Contravening section 3 of the Criminal Law (Sexual Offences and related matters) Amendment Act 32 of 2007, Rape.
- 104.11 Count 14: Contravening section 21(1) of the Criminal Law (Sexual Offences and related matters) Amendment Act 32 of 2007, Compelling or causing a child to witness sexual offences or sexual acts.
- 104.12 Count 15: Kidnapping
- 104.13 Count 16: Contravening section 3 of the Criminal Law (Sexual Offences and related matters) Amendment Act 32 of 2007, Rape.

[105] Ad Counts 2, 6 and 7: I find the Accused not guilty on these counts. I find that there is no acceptable evidence that the accused pointed a firearm at the witnesses in counts 2, 6 and 7.

[106] Ad count 17: I find that the State has not proved that the accused was in possession of a firearm as defined in the Firearms Control Act 60 of 2000 and find him not guilty on this charge as well.

*"firearm" means any-*

- (a) *device manufactured or designed to propel a bullet or projectile through a barrel or cylinder by means of burning propellant, at a muzzle energy exceeding 8 joules (6 ft-lbs);*
- (b) *device manufactured or designed to discharge rim-fire, centre-fire or pin-fire ammunition;*
- (c) *device which is not at the time capable of discharging any bullet or projectile, but which can be readily altered to be a firearm within the meaning of paragraph (a) or (b);*
- (d) *device manufactured to discharge a bullet or any other projectile of a calibre of 5.6 mm (.22 calibre) or higher at a muzzle energy of more than 8 joules (6 ft-lbs), by means of compressed gas and not by means of burning propellant; or*

(e) *barrel, frame or receiver of a device referred to in paragraphs (a), (b), (c) or (d),*

but does not include a muzzle loading firearm or any device contemplated in section 5;"

[107] The accused is accordingly convicted of the offences set out in counts: 1,3,4,5,8,9,10,11,12,13,14,15 and 16 and acquitted on counts 2,6,7 and 17.

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**MORRISON AJ**

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

**DATE OF HEARING: 22 NOVEMBER 2019**

**DATE OF JUDGMENT: 25 NOVEMBER 2019**

**APPEARANCE FOR THE STATE: ADV A VAN DEVENTER AND ADV A ROOS**

**APPEARANCE FOR THE DEFENCE: ADV J KGOKOANE**