

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: SS38/2011

DATE: 22 MAY 2012

5 In the matter between:

THE STATE

and

STEPHEN ISAACS

10

J U D G M E N T

BOZALEK, J:

The accused faces the following four charges:

15 1. kidnapping read with the provisions of Section 51 and 52
of the Criminal Law Amendment Act 105/1997, ("the
Amendment Act", it being alleged that on 22 October
2010 in Darling the accused kidnapped nine year old
Perciazaan Solomons by dragging her to Boombos,
20 Darling.

2. a contravention of Section 3 of the Criminal Law (Sexual
Offences and Related Matters) Amendment Act 32/2007,
again read with the provisions of Section 51 and 52 of
25 the Amendment Act, in that between 22 and 23 October

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2010 and at Boombos, Darling the accused sexually penetrated Perciazaan Solomons by forcing her to suck his penis and penetrating her vagina with his penis without her consent.

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3. assault with intent to commit grievous bodily harm in that at the same time and place he wrongfully and unlawfully assaulted Perciazaan by dragging her into the bush, hitting her with his fists and repeatedly burning her with a cigarette.

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4. attempted murder in that the accused unlawfully and intentionally attempted to kill Perciazaan by strangling her until she lost consciousness and leaving her for dead in the bush.

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The charge sheet appraised the accused of the applicability of the minimum sentencing legislation in respect of the first three charges.

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The accused pleaded not guilty to all the charges and was represented by Mr P Barnard who advised that the accused's defence was a general denial and an alibi.

25 The State's case consisted of one direct witness, namely the complainant, medical evidence relation to the injuries which

the complainant sustained as a result of the assaults upon her as well as certain circumstantial evidence presented by various witnesses.

5 The accused testified in his own defence, but called no witnesses. The major, if not the sole issue, is the question of identity, namely, whether the State proved beyond reasonable doubt that it was the accused and not some other person who perpetrated the assaults upon the complainant.

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Before dealing with the evidence, I must make it clear that any press reports relating to this case or this judgment must for obvious reasons not directly or indirectly disclose the identity of the complainant in this matter.

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Perciazaan Solomons, known to all as Percy, was nine years old in October 2010 and is the middle daughter of Ms Henrietta Solomons. She has an older sister Lesley, also referred to as Lessie.

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On the night of 22 October 2010, which was a Friday night, Percy was due to sleep over with her aunt Susan in Old Azla, Darling. Unbeknown to all concerned Percy apparently changed her mind after darkness fell and began to walk back to look for her mother in Azla. She was not seen again until

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approximately midday on the following day when she stumbled out of the bush with serious injuries and was taken to hospital.

The evidence.

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It is appropriate to commence with the evidence of Maryke Warnick, who was 17 years old at the time of testifying and 16 years of age in October 2010.

10 She testified that on the relevant Friday afternoon she was playing with a group of girls in the road including Lesley and Percy. The accused told Lesley that her mother was calling for her but Maryke told him that this could not be so because Lesley's mother was not at home. The accused then played
15 with the children in the road. After some time all of the girls went to Maryke's mother's house while the accused remained where he was, sitting outside Percy's mother's house.

A little later the group passed the accused where he was
20 sitting whereupon he asked Maryke and Lesley to sit with him and he would give them R20,00 and R50,00 respectively. They did not accept the invitation. The group of girls, including Percy, continued playing in the street after dark and at some point Percy indicated that she wanted to go off to her mother
25 who was in Azla at someone else's house.

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The girls would not let her go, however, because it was already dark. Percy then said that she was going to the shop and walked off. After a while the girls went to the shop to look
5 for her since she had taken so long. When they got there they saw Percy walking away near the trees along the road in the direction of where her mother was in Azla. The girls turned back, on the way meeting the accused who was proceeding in the direction of Percy. Maryke did not see Percy again until
10 she was found the next day by two young boys with her face full of scratches and unable to walk unaided.

Under cross-examination Maryke stated that she did not see the accused join up with Percy but he was following her at a
15 distance of some 15 metres. She was recalled at the request of the defence and it was put to her that the accused would testify that he was never at or near the wall of Ms Solomons' house and nor did he ever offer any of the children money.

20 Maryke replied spontaneously that perhaps the accused could not remember these events because he was drunk at the time. This solicited no response from the accused.

Ms Yvonne Geneve is Ms Solomons' aunt and testified that the accused lodged with her and her husband, Abduragiem
25 Geneve, in Darling for six months in 2010. Just before her

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husband emerged from prison, he asked her whether the accused could stay with them when he was released from prison since he needed a permanent address for parole purposes.

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On Saturday 23 October 2010 she and her husband were travelling back from Atlantis in his taxi when she received a telephone call from Hetta Solomons, that is Henrietta Solomons, advising her that Percy was in hospital and that the
10 accused had done something to the child. A little later she gave her telephone to her husband who called Hetta and then the accused.

The previous night the accused had only come home at
15 approximately 8:30 pm to eat. He remained there for a while and then went out again. Later that evening, when she and her husband were sleeping, the accused knocked on a window to get the keys to the house and let himself in. She saw him the next morning, the Saturday at around 9:00 am. He usually
20 did his washing on Saturday by first soaking his clothes and then only washing them in the afternoon or the following day. That morning, however, when she got up he had done his washing and his clothing was already on the line. The accused then left saying he was going to town but he never returned.

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Under cross-examination Ms Geneve stated that the accused usually went out every Friday night but on that particular night he had been drinking and he came home much later than normal. When he arrived home he had been talking loudly and
5 her husband had to hush him.

The witness testified that on Saturday, following the first phone call, her husband had repeatedly telephoned the accused telling him to come home to sort out the allegations
10 but to no avail.

Mr Abduragiem Geneve, known as "Giem", testified that Percy was the daughter of his wife's sister's daughter and visited their home regularly. He confirmed that he had met the
15 accused in prison where they had shared a cell. The witness was released from prison in March 2010 and the accused in April of that year from which date he had lodged with them.

While driving back from Atlantis on Saturday 23 October 2010,
20 he noticed his wife's face change after taking a telephone call. He took her phone and called Henrietta Solomons who told him that the accused had raped Percy. He then rang the accused on his cell phone and asked what he had been up to and told him to come home, but he had never seen the accused again
25 until the trial.

When he phoned the accused again on the Saturday his phone had been turned off. He only got hold of the accused again on the Sunday by using his friend's phone to telephone the
5 accused. On that occasion, when he asked the accused where he was, he replied that he was in Darling and that he was coming home.

Geneve testified that on the Friday night in question, 22
10 October 2010, he and his friends had smoked dagga in his back yard. The accused arrived asking for food. He ate his supper late and after a short while went out again. The accused only returned later that night, gaining entry to the house by getting the keys from his wife through the bedroom
15 window.

Under cross-examination the witness testified that the accused had stayed with him and his wife for six months and that he had supported him, that is the accused, by purchasing
20 toiletries, cigarettes and finding him a job as a machinist. He testified that the accused had been under the influence of alcohol when he came home late to eat supper. He confirmed also that the community in Darling had been in uproar after Percy was raped and had been searching for the accused
25 armed with spades, picks and panga's.

Lucien Engelbrecht, who was 11 years old in October 2010, testified that he had been playing in the road with his friend Darryn Carstens one afternoon when they saw Percy crawling
5 out from near the marshes. She was clothed but wearing only one shoe. They came to her assistance. She had marks on her face, under her chin and on her arm. She could not talk, but they knew who she was. The two boys carried her towards her home but only got as far as the shop because they could
10 carry her no further. They then ran off to fetch Percy's mother.

Darryn Carstens, 15 years old and aged 14 at the relevant time, testified that he knew Percy and remembered the day
15 when they found her in the afternoon whilst he and Lucien Engelbrecht were playing near the trees. She emerged from the bush staggering and alternately walking and crawling. At first he could not recognise her. She had marks and sores on her face and arms. When they asked her what was wrong with
20 her, she said that she had been hit by a motorcar. The two boys helped carry her, but she collapsed in 10th Avenue and they ran to call her mother.

Ms Henrietta Solomons, Percy's mother, testified that she
25 knew the accused through the Geneve's and that she had left

Percy playing outside her auntie Susan's house in Porterville Avenue at about 8:00 pm on 22 October 2010 after Percy indicated that she would sleep there that night.

5 Later the witness fell asleep before being able to check whether Percy was indeed safely sleeping over. When Percy did not return the following morning Ms Solomons assumed that Percy had gone off with friends and her attempts to find her by sending Lesley to look for her were unsuccessful. At
10 about 1:00 pm two young boys called her to where Percy had collapsed. When she asked Percy, then surrounded by other children, where she had been she replied that she had been knocked over by a car down by the trees.

15 At the Swartland Hospital in Malmesbury Percy had given the same answer to the doctors. When the doctors left Ms Solomons had asked Percy what had really happened whereupon she told her mother that "Uncle Steven" had raped her.

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The witness then rang Yvonne Geneve to ask where the accused was. Giem Geneve rang her back and she told him what Percy had told her. At this stage Percy was apparently recovering and talking fluently. On the Monday morning

25 Dr Botha, now Dr King, performed various tests on Percy and

had photographs of her taken.

Prior to this on the Saturday evening, the accused had sent her a sms on her phone which she gave to Constable Ludick
5 who was then the investigating officer. It became common cause in the trial that the sms read as follows:

“Hetta, watter soort stories is jy besig om te
versprei? Vra vir Lessie voor of agter my of ek
10 haar verkrag het. Moenie andermense se kak op
my afsmeer nie.”

On the Sunday the accused called her phone which was answered by her friend who put it on loudspeaker. She heard
15 the accused tell her friend that she, the witness, must be at the police station at Darling at 12:00 pm on the Tuesday in order to meet him there. She immediately called Constable Ludick who in due course picked her up on the Tuesday and took her to the Darling police station well before 12:00 pm.
20 They waited for two hours but the accused did not arrive.

On Monday after Dr Botha's tests, Percy was still well and could walk and talk. On Tuesday however Percy told her mother that she could no longer see. Her condition began to
25 deteriorate rapidly and she began to have convulsions

screaming "los my, los my". She was transferred to Tygerberg Hospital where she was placed on a drip and underwent further tests. She could not see, could not walk or talk and did not eat.

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After two or three weeks she began to get a little better every day. She was in Tygerberg Hospital for some two months until she was transferred back to the Swartland Hospital and from there to Red Cross Children's Hospital in Cape Town. Percy's vision returned but she could not walk or talk properly. She had to be fed every day with a spoon.

In January 2011 she was discharged home and after a month or two her vision came back fully. She began to talk a little and could move her hands a little but she could not do much for herself. She initially wore nappies. It was difficult to understand her speech at first, but it improved. At present Percy did not speak as well as she did before the incident. At Tygerberg she had been placed under the care of Dr Van Toorn.

At present Ms Solomons was able to make out what Percy said and her sight was good. She had acquired some mobility but she still crawled and couldn't walk and is now confined to a wheel chair. She is in a special school in Atlantis and tries to

write left handed because she can no longer manage to write right handed.

Ms Solomons testified that when Percy mentioned "Uncle
5 Steven" as her assailant, she immediately thought of the accused. Asked whether she had herself asked Percy which Steven it was, she replied that Percy had told her it was Steven who lived with Giem. Ms Solomons had not herself seen the accused on the day in question.

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Under cross-examination Ms Solomons explained that when Percy had first told her that she had been knocked over by a car, she did not believe her. That Saturday afternoon Percy had explained to her that she hadn't told the truth at first
15 because there were too many people around her when she was first asked what had happened to her. Percy later also explained that her mother knew how people would talk. Percy had used the word *verkrag* when she first gave the truthful explanation and had spoken also of being made *ougat*.

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Ms Solomons rejected the suggestion put to her by the accused's counsel that he had at no stage arranged to meet her at the police station.

25 Mr Gert Carstens, a neighbour of Ms Solomons who knew

Percy and the accused, testified that on the Friday in question he had seen the accused playfully chasing Percy's sister Lesley into Maryke's mother's house in Ninth Avenue, Darling. A little later he walked down Ninth Avenue again when the street was very quiet. He noticed that the accused was sitting against the wall of Hetta Solomons house. When, under cross-examination, it was put to him that the accused would deny the incident in question he rejected this and described the accused as having worn a black top and jeans.

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Warrant Officer Saayman testified that he arrested the accused in Strand which is about 100 kilometres away from Darling on Sunday 7 November 2010 two weeks after Percy was found. The arrest had taken place only after a task team had been set up to track down the accused using inter alia his cell phone records. The accused had been harboured by his sister who had lied to the police regarding his whereabouts.

Constable Ruth Ludick, the first investigating officer, testified as to the content of the sms which Ms Solomons had received from the accused. She confirmed that she had taken Ms Solomons to the Darling police station on the Tuesday following the accused message to the latter that he would meet her there at 12:00 pm. The accused had not arrived however.

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Before considering the evidence of Percy Solomons, it is appropriate to set out the medical evidence which preceded that. Dr Jean-Marie King, formerly Botha, testified that she examined Percy on the Monday morning 25 October 2010 and
5 completed the J88 report. She noted inter alia that Percy was slightly built and had deep abrasions on her chin and right cheek, a small wound on the left forehead and a swollen blue left eye. She had multiple abrasions on her entire body, especially her front, and scratch marks and abrasions on the
10 buttocks. There were three small round lesions suggestive of cigarette burns on the right bilateral abdomen and two deep abrasions on the left elbow and arm and a swollen lump behind her left ear. Dr King concluded that Percy's injuries fitted in with the history given of her being dragged with her face on
15 the ground.

On examination Percy's clitoris was red and swollen as was her urethral orifice. There was a discharge as well as sub-cutaneous bleeding in this region. Her hymen was not intact
20 and there were fresh tears and bruising present. Although there were abrasions on the buttocks and perineum there was no sign of anal penetration.

Dr King's conclusion was that her findings were consistent with
25 vaginal assault / penetration which was "most likely forced
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(evidenced) by the lesions suggestive of trauma." A set of photographs taken of Percy on the Monday was handed in by agreement and they showed the extensive injuries which Dr King observed and recorded.

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Dr King explained that vaginal swabs had been taken but that the DNA results had been negative. She gave a range of possible reasons why no positive DNA results were obtained, the most important of which being that samples are best taken
10 within at most 72 hours after the incident.

Percy had initially co-operated well and had been talkative and behaved in an adult fashion. On the Tuesday however Dr King noted that Percy was apathetic and had a dilated pupil.
15 Suspecting cranial bleeding, she arranged for her immediate transfer to Tygerberg Hospital.

In cross-examination Dr King testified that she had noted no injuries consistent with strangulation but these would not be
20 inevitable if only hands were used in the strangulation. She was well acquainted with the nature of cigarette burns and testified that the lesions she saw were consistent with injuries inflicted in this manner.

25 By agreement the reports of the SAPS Forensic Science
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Laboratory were handed up. It appeared therefrom that no male DNA was obtained from either the vulva, intra-vaginal or panty swabs taken from Percy. Whilst a female DNA profile had been obtained from her left and right fingernails, 5 underneath her left and right fingernails, this profile had not been further tested.

The report records further that due to numerous factors which could lead to the negative DNA results the possibility of 10 penetration and/or ejaculation could not be excluded.

Dr Ronald Van Toorn, a senior specialist at Tygerberg Children's Hospital specialising in paediatrics and paediatric neurology, testified that he had treated Percy from 25 October 15 2010. Upon her admission a CAT scan had been taken in the light of the convulsions and declining consciousness which the patient was experiencing. Unexpectedly the report on the scan appeared normal, so a more sensitive MRI scan was arranged which produced a very abnormal picture but one which 20 correlated with Percy's symptoms. The scan revealed extensive cytotoxic oedema in the brain which is a manifestation of brain injury and which affected both halves of the brain. The injury pattern suggested that there had been a lack of oxygen and blood flow to the brain and furthermore that 25 there had been a sudden cessation thereof such as was seen

in a child who had nearly drowned, a drug overdose victim, a newborn child stuck in the birth canal or someone who had suffered suffocation or smothering.

5 The areas of Percy's central brain which were affected were important for language and could explain why she struggled to speak. They also controlled movement and Percy's involuntary movements conformed with the injuries noted. Damage to the occipital area of the brain was consistent with the vision
10 difficulties which Percy experience. Her relapse had been a delayed response which was unusual but which is well documented in medical literature. It occurred in less than one percent of such cases and is referred to as delayed post-anoxic encephalopathy. Percy's condition had deteriorated in
15 hospital initially. She had an epileptic fit and the treatment which she received was anti-epileptic medication and a range of therapies.

As far as Percy's prognosis was concerned Dr Van Toorn
20 testified that although a young person could recover from such injuries to a certain extent with early therapy, there would be permanent consequences and she would always have trouble speaking and her movements would be affected. When he last saw Percy four months after the incident, she was still in a
25 wheel chair and had poor co-ordination. Her vision could be

effected and she was at lifelong risk of epilepsy. Her intelligence may also have been affected but an educational psychologist would have evaluate this area. Percy needed special schooling and the hospital had initiated a care dependents grant. Dr Van Toorn confirmed that Percy's injuries were consistent with the alleged trauma which she had suffered. He added that the intensity of the strangulation which she suffered must have been profound to have arrested the supply of oxygen and to have caused the brain injury which the MRI scan indicated.

Warrant Officer Willem Miggels, the investigating officer, testified that he had interviewed the accused after his arrest on 7 November 2010. After advising the accused of the charges and of his rights the accused had signed a warning statement to the following effect:

"I have no recollection of any incident involving Percy or the act of rape. At the same time, I am not accusing Percy (victim) of lying."

The accused had said nothing further about the matter and had at no stage indicated that he had an alibi for the night in question. Miggels testified that he had earlier successfully applied for the accused cell phone records and these were

handed in by agreement.

In support of an application for Percy to testify from a separate room and through an intermediary, the State led the evidence of Captain Benham, a forensic social worker in the employ of the SAPS who had interviewed Percy extensively. Amongst the findings in her report was that Percy was able to understand questions but struggled at times with the verbalisation of her answers. She was able to distinguish between right and wrong and realised the implications of telling a lie. Percy had on several occasions corrected Captain Benham when incorrect information was being transferred. Her attention span was good and she was able to give information in a chronological order. Nonetheless, her answers were limited to a few words and her speech was sometimes difficult to understand.

Finally in this regard, a report on Percy's cognitive functioning from the Dawn Special School which she attends was handed in by agreement. It records that Percy has difficulties with writing skills and performs most of her tasks verbally, that she has the ability to reason and that her scholastic progress is on par and that she has good memory, problem solving and concentration skills.

Perciazaan Solomons testified through an intermediary, Mr Ivan Marco, from a separate room but was televised in the courtroom. It soon became evident that recalling and testifying about the events of 22 October 2010 was an ordeal
5 for her. Percy's answers to the questions posed often had to be coaxed out of her by the intermediary with, it must be said, great skill and empathy. Even for a 10 year old child her evidence was given in a childish fashion in answers and sentences comprising very few words.

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Her evidence was as follows: the events had taken place on a Friday night when she was making her way to her mother. She had not reached her mother however nor had she gone to another place. She came across the accused, Steven, in the
15 road. She knew him and he had the same skin colour as her. That was light skinned. He lived in Azla with her aunt Yvonne, whose husband was uncle Giem. The accused found her on the road and took her hand telling her that they were going to go and buy sweets. She did not know where they went but it
20 was not to the shop. She had not walked the full road and the accused had dragged her by both hands. She had been injured on her face. She had not wanted to go with the accused but she did not know where he had dragged her except that it was into the bush. The accused had removed
25 her school clothes and her pants and said that she must lick

his penis. She had refused to do so and the accused had then hit her with his hand in her face and had choked her. At this point Percy indicated with her own hand around her throat how she had been choked. She knew what a penis was and she
5 called it a *piel*. The accused had burnt her arms with cigarette ends or butts. He had then lain on top of her. His clothes had been on, black jacket, blue jeans and a shirt, but he had dropped his pants and his underpants to his knees. He had then forced his penis into her vagina, her *koekie*. She had
10 then gone to sleep but she did not know what had caused her to sleep. She had woken on the Saturday afternoon to find herself still in the bush. The accused was not there. She had been naked but her clothes were alongside her. She had dressed herself and then stumbled out of the bush until she
15 found the two young boys. They had asked her what had happened and she had told them that she had been struck by a motor vehicle. Asked why she had told them this, Percy answered only that they were cheeky, *voorbarig*. She testified that car had not knocked her over. One of the boys called her
20 mother and by the time her mother arrived there was a crowd of persons around her.

Her mother had then asked her what had happened and she also told her mother that she had been knocked over by a car.
25 The ambulance had then taken her to hospital, but she could

not remember which one. Asked what she had told her mother when she told her what had actually happened, her answer was that the accused had raped her.

- 5 Under cross-examination when it was put to Percy that the accused would say that he had not assaulted her, Percy answered with conviction that it was not so and that he was lying. Asked again whether she might not be making a mistake, Percy became very upset and tearful, saying "*dis hy, dis hy*". Asked again why she had given the false motor vehicle accident explanation to her mother on the first occasion, she explained that "*daar het mense rondom my gestaan*". She confirmed that she had used the word *verkrag* in relation to the accused and had also used the term *ougat*.
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- 15 Finally she confirmed that her face had been on the ground when she was being dragged by the accused.

The accused is a 41 year old divorced man with a grade 12 education. In his testimony he confirmed that he had lodged with the Geneve's in Darling from 6 April 2010 until the incident and had found employment in mid-June of that year as a machinist at a brick making concern. He knew Percy well and she knew him as *oom Steven*.

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- 25 On Friday 22 October he had not worked because the staff at

his employer had been placed on short time for more than a week because the business had reached its quota. He had gone into town at about 11:00 am that day to do some shopping in the course of which he had purchased a six pack
5 can of beers. On his way home he had met a friend and consumed the six beers on his own. He returned to his lodgings at about 2:00 pm, paid his weekly board and lodging to Yvonne Geneve and then went off to visit a friend in Third Avenue in the old section of Darling.

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Instead he ran into another friend called "Bommel" with whom he spent the better part of the afternoon and evening drinking beer in Bommel's backyard and later at a shebeen across the road called Aunt Santjie's. He estimated that he drank eight
15 or nine quarts of beer, 750 millilitres each, which resulted in him becoming "pleasantly drunk". He returned home between 7:00 and 7:30 pm and ate supper. He then again left to go to the shops to buy some cigarettes but decided to go to another shebeen called Victoria's in old Azla where he consumed
20 another two or three beers although he was not sure how long precisely he stayed there. He then returned home to find the house in darkness and gained entry by knocking on Yvonne Geneve's window and obtaining the key. Although he was not sure of the time he returned it was no later than 10:00 pm or
25 11:00 pm. He then went to bed and slept through the night.

The following morning he got up and did his washing. Although it was true that he normally soaked his washing first he hadn't done so that day as his clothes had not been stained
5 with red dye from the red bricks made by his employer since he had not been working the previous week.

The accused then left his lodgings at about 10:00 am to visit a friend "Kintie", Rachel Koopman, and remained in her company
10 throughout the day. At about 6:00 pm he received a phone call from Yvonne Geneve's cell phone but with Giem on the line. From this point on the accused cross referenced his evidence of telephone calls, which he made or received, to his cell phone records, exhibit J. In that phone call Giem had
15 asked him what trouble he had caused and then told him that he, the accused, knew that he had raped Hetta's child. The accused then denied this. At this stage he was sitting with Kintie and another woman called Theresa and told them he was going home. He didn't return however because he
20 panicked. He kept thinking about the rape of the child and that this meant prison for him but he didn't want to go the prison for something he hadn't done. He phoned Yvonne Geneve to speak to Giem, but she could give him no further details and had told him to come home to discuss the matter.

He refers to the second call as taking place at 18:18 on the Saturday, but the cell phone records reveal that it was only of a 20 second duration. The accused testified that his mind was in turmoil so he just started walking and ended up in the Strand where he stayed with his sister until he was arrested some two weeks later. During those two weeks however he worked for his sister's boyfriend, a bricklayer.

On Sunday 24 October he had received a phone call from Giem at 2:15 pm asking him to return home. He lied to Giem saying that he was still in Darling. At that time he was scared and didn't want to be found. Asked by his counsel why he had not returned to Darling, his answer again was that he was scared and didn't want to go to prison for something he hadn't done. He was also fearful of the community taking the law into their own hands. After his arrest he was taken to Malmesbury where he indeed gave a statement to which Warrant Officer Miggels had testified. In doing so he was trying to stay on the good side of the police since he was scared that they would assault him. When it was put to him that he had never told Miggels that his defence was an alibi his reply, somewhat disingenuous, was that he didn't know what it means that his defence would be an alibi, but he confirmed that he discussed nothing further after giving this written statement to the investigating officer.

The accused testified that he knew Percy well and that listening to her evidence his impression was that she truly believed it was him who raped her but that didn't necessarily
5 make it true. He denied having any contact with Percy on the night in question or assaulting or raping her. The accused confirmed that he had telephoned Hetta Solomons on the Sunday, adding with reference to the cell phone records that it was a call made at 18:54. He had phoned to ask her what the
10 allegations were and told her that it was not him who had raped her child.

He had indeed sent her an sms, as recorded by Ludick, the following day or that day. He had referred to Lessie in that
15 sms because no one had said to him which child of Hetta's had been raped and he assumed that it was the older girl. It was only later when he spoke to Hetta's sister, Roweta Solomons, that he learned that he was accused of raping Percy. The accused denied Maryke Warnick's evidence of him being in the
20 vicinity of Hetta's house or playing with the children. He denied that that evidence was true.

Under cross-examination the accused agreed that he had lodged with the Geneve's because he needed a fixed address
25 for parole reasons. Before fleeing he had realised that he was

violating his parole conditions but he had wanted to avoid going back to jail. He knows Hetta Solomons and her children and had been at their house on a number of occasions. He knows Gert Carstens, although only by sight, but denied
5 Carstens' evidence of seeing him twice on the night in question in Ninth avenue. He denied that that evidence was true.

He agreed that to all intents and purposes he was a friend of
10 the Solomons family and that there were no reasons for the witnesses Warnick and Carstens to have testified that they saw him sitting against the wall of her home if this was not true. All he could remember of the clothing which he wore that night was that he was wearing jeans. He conceded it was
15 possible that the two witnesses could have seen him and that he had a black top on that night but insisted that he had had no direct contact with either of them.

The accused took issue with Yvonne Geneve's evidence that
20 he had come home late and on this and other occasions attempted to buttress his evidence by referring to the statements of witnesses in the police docket which he appeared to have read from cover to cover.

25 The accused conceded that he had given money to Percy in
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the past as one did when sending children to the shop. He agreed too that Percy would have trusted him. Attempting to explain her evidence incriminating him he pointed out that Percy must have suffered great trauma and that he could only
5 surmise that she had been or was confused and somehow led to believe that he was her attacker. He even went so far as to suggest that she could have been put up to saying that her attacker was him.

10 Again he denied making any arrangement with Hetta Solomons or her sister to meet the former at a police station. He agreed however that he had received a telephone call from a policeman and had agreed that he would meet him at the Darling police station on the Monday. In making this promise
15 he had lied, however, again because he did not want to go to jail for something that he did not do. When asked to explain why he was calling no alibi witnesses he explained that the people in question were not friends but only acquaintances and that he did not have the friendships or standing in the
20 community to have any witness stand up against the community wrath. The accused testified that he was a smoker at the relevant time.

Discussion and evaluation of the evidence:

25 There was no challenge to the evidence of Lucien Engelbrecht
/RV /....

and Darryn Carstens which I accept without reservation. The evidence of the two witnesses who put the accused in the near vicinity of Percy in the late afternoon and early night on Friday 22 October 2010 Maryke Warnick and Gert Carstens was
5 challenged by the accused who denied this evidence. Both witnesses however stuck to their evidence and were unshaken in cross-examination. Both witnesses knew the accused. Neither had any apparent reason to falsely incriminate him and nor was any such reasons suggested.

10

Carstens' description of the accused clothing that night matched Percy's description and was not challenged by the accused. Of particular significance was Maryke's unsolicited and innocently tendered evidence that the accused might not
15 have remembered that he had been at Henrietta Solomons' house and playing with the group of children as he had been drunk that day. That evidence was not disputed by the accused and on his own evidence by this time he had consumed copious amounts of alcohol.

20

The accused did not challenge the evidence of Constable Ludick, Warrant Officer Saayman or Warrant Officer Miggels, the salient aspects whereof were the sms sent by the accused to Henrietta Solomons on the Sunday or the Monday after the
25 assault, the accused fleeing from Darling and being arrested in

Strand in hiding two weeks later and the warning statement he made to the police. I accept the evidence of these three witnesses.

5 The main thrust of the evidence of Henrietta Solomons was what Percy told her in the hours after she was found concerning the cause of her injuries and the identity of the person who attacked her. This evidence was not disputed by the accused and nor did he dispute the sms. What he did
10 challenge was Solomons' evidence that he arranged to meet her at Darling police station on the Tuesday. Her evidence however was partly corroborated by that of Constable Ludick and the obvious question is why would Ms Solomons convey this message to the investigating officer and then, although
15 attending at her daughter's hospital bed full time, go to the trouble of waiting at the police station at the arranged time if this is not what the accused had conveyed to her? Ms Henrietta Solomons was a credible witness and I therefore accept her evidence.

20

As far as the evidence of the Geneve's is concerned only minor details thereof were disputed by the accused. Both witnesses gave credible evidence which can in my view safely be accepted.

25

The balance of the State's witnesses, notably Dr Van Toorn and Dr King, gave medical evidence which was not challenged on behalf of the accused. Again, I accept their evidence in all material respects.

5

That leaves the crucial evidence of the only witness who directly implicated the accused, the complainant Percy Solomons. Clearly her evidence must be approached with caution in as much as she was a nine year old, she was nine
10 years old when she suffered the trauma of a vicious assault and rape which left her with the brain injuries which have been described. See in this regard the authorities quoted in S v Alam 2011(2) SACR 553 para 30 – 32.

15 As all the medical and related evidence suggested however, Percy retained her memory, her ability to reason and to distinguish between truth and falsehood all of which conclusions were borne out by her evidence. It was a painful experience to hear and witness Percy giving evidence. Quite
20 clearly doing so was a traumatic experience for her and one from which she shied away. This had the ironic effect of emphasising the sincerity of her evidence. It must be noted that the accused challenged only one element of her evidence and that is whether she correctly identified him as her
25 attacker.

As the accused himself noted in his evidence, Percy appeared to be utterly sincere when she testified that he had attacked her and it was clear that she had undergone enormous trauma.

5 In maintaining his innocence the accused however suggested that Percy was either confused in pointing him out as her attacker or that she may have been put up to this. There was, however, no evidence at all that Percy was either confused or that she had been manipulated to falsely identify the accused

10 as her attacker.

Although given in very simple terms, the complainant's evidence was quite clear and tied in in various respects with the evidence of her mother, with that of Maryke Warnick and

15 with that of the two young boys who found and assisted her.

Her evidence is substantiated, furthermore, by important elements of the medical evidence namely how she had sustained injuries to her face by being dragged through the bush with her face on the ground, that she had been burnt by

20 cigarette ends and that she had been choked.

Percy knew the accused well and there is no doubt that she identified him as her attacker. This is therefore not a standard identity case where the questions is whether a witness had

25 adequate opportunity to identify the accused person in certain

conditions. The only question is whether Percy has falsely and intentionally or mistakenly identified the accused as her attacker? Of significance in this regard is the manner in which Percy identified the accused, the manner in which she initially
5 identified the accused as her attacker. This information had to be coaxed out of her by her mother after she initially gave a transparently untruthful account of how she had come to sustain her injuries. Seen in this context this serves to strengthen Percy's identification of the accused.

10

Her evidence was further that she had not initially given the true reason for her injuries because there were too many strangers around her and she knew how people would talk. In my view this was an entirely natural response from a young
15 child who found herself in the position which she did.

Listening to Percy's insistence that the accused was her abductor and attacker and witnessing her evident distress when it was put to her that she could be mistaken in this
20 identification, during what must be said was sympathetic cross-examination by the accused's counsel, were telling moments which powerfully underscored her sincerity. At no stage was any other person identified by Percy as her attacker and she had no reason to falsely implicate the accused, nor
25 was there any evidence or indication in her evidence

suggesting that she did not have a clear recollection of what happened to her.

The only substantive criticism which Mr Barnard could make of
5 Percy's evidence was the discrepancy between her testifying
that she did not lick the accused's penis and the suggestion in
the charge sheet and in the summary of material facts that she
had been forced to do so. I do not regard this as a material
discrepancy in all the circumstances and, notwithstanding
10 Percy's various disabilities, her youth and the trauma which
she suffered, I have no hesitation in accepting her evidence as
satisfactory and credible in all material respects.

This of course does not dispose of the matter because if the
15 accused's version could reasonably possibly be true he is
entitled to the benefit of the doubt and to his acquittal.

The accused's defence rests on evidence that, although in the
general area that afternoon and that night, he had no dealings
20 at all with the complainant and spent the better part of the
afternoon and the night consuming alcohol with friends or at
shebeens.

The accused was completely at ease in the witness box and
25 for the most part gave evidence with great confidence. He is

clearly an intelligent person with a fluent command of the English language who chose his words with care. He comes across as a cool, rational person, as well as quick witted and he was seldom at a loss for an answer. It was notable that he
5 had studied the police docket and his cell phone records in detail, using the latter as beacons in his evidence.

Although it cannot be said that the accused fared poorly in cross-examination his evidence contained a number of
10 unsatisfactory features and his evidence as a whole is filled with improbabilities. One such an unsatisfactory feature of his evidence was his repeated description of his state of sobriety on the afternoon and night in question as "pleasantly intoxicated" or "pleasantly drunk". This is very difficult to
15 reconcile with the accused's own evidence that he drank six cans of beer around lunch time, then followed this with eight or nine quarts later that afternoon and into the evening and finally, after eating supper, another two or three such beers. In effect he drank continuously for more than six hours. When
20 it was put to him that he must have been very intoxicated, his rather glib reply was to deny this and to explain that he had been drinking since he was 13 years of age.

Another unsatisfactory feature of his evidence is when he was
25 asked to clarify why, if he had never played with a group of

children in the street that afternoon or evening, would Maryke Warnick have noticed that he was drunk. Again his quick and glib reply was that he was usually drunk and that is how people in Darling knew him. There was no evidence to this effect before he presented this answer. This reply illustrated in my view the accused's facility for adapting his evidence whenever he found himself in a tight spot.

One of the themes of the accused's evidence was that he panicked when he heard he was accused of raping Hetta's child and that is why he lied about his whereabouts and fled from Darling. As was put to him by State counsel, this was nonetheless strange behaviour on his part given that he was breaking parole conditions and when he could have surrendered himself to the police and maintained his innocence. Instead, on his own admission, the accused lied to Giem that he would be returning home in the afternoon. He lied to Giem again on the Sunday saying that he was in Darling when he was already in the Stellenbosch area and he lied a policeman a day or two later that he would present himself at Darling police station.

If the evidence of Henrietta Solomons and Constable Ludick is to be believed, the accused promised to be at the Darling police station on the Tuesday and therefore he lied in that

regard as well.

The accused fled from Darling. He made his way to Strand and spent the next two weeks there until his arrest even going
5 so far as to take up a new job with his sister's boyfriend. Although the accused may well have panicked initially, that state of mind could not have lasted longer than a few days and it is clear that from that point onwards, he decided to evade the authorities.

10

Then there is the matter of the sms which he sent Henrietta Solomons on the Sunday. Its tone and content do not appear to be that of a man who was in panic at false accusations made against him. Rather its tone and content was
15 intimidatory and, insofar as it refers to Lessie, obfuscatory. The phone records reveal that by 11:00 on the Sunday when the sms was sent, the accused had already fled Darling. The accused testified to a phone call he allegedly made to Henrietta Solomons on the Sunday evening at 18:54 when he
20 phoned to ask her what the allegations against him were and told her that it was not he who had attacked her daughter. This is the phone call that Ms Solomons denies.

When it was put to him that a call of that content was unlikely
25 inter alia because it was of such a short duration, eight

seconds according to the cell phone records, his response was to state that it was not eight seconds but eight units. He had no answer when it was pointed out to him that this was not borne out by the key to the cell phone records indicating that
5 the call duration was recorded in seconds.

Another most unsatisfactory feature of the accused's version was his failure to call any witnesses to support his alibi. According to the accused he drank for a considerable time with
10 one Bommel and then later with him and three other people he knew at Aunt Santjie's shebeen. Presumably he would also have been able to call someone from Victoria's shebeen to the effect that he was there later that night drinking three beers. However, according to the accused, he had not even attempted
15 to approach any potential alibi witnesses. He had a ready answer when taxed with this saying that he had not even been able to furnish name or telephone numbers to his counsel because these people were not friends but acquaintances.

20 He also contended that no witnesses in the community would stand up for him in the face of the wrath of the community but in fact the accused had been living and working in the community for more than six months and, faced with the seriousness of the charges against him, it is highly
25 problematic that he did not approach Bommel or one of the

witnesses that he had drunk with for hours that afternoon and night to support his version of events. In this regard the question also arises why he would not have surrendered himself to the police at an early stage so that they could be
5 apprised of these alibi witnesses and follow up on them.

Finally, there is the matter of the statement which he made to the police two weeks after the incident, shortly after he was arrested. It significantly does not contain an unequivocal
10 denial that he raped Percy. Instead the accused stated that he had "no recollection of any incident involving Percy or the act of rape". As I have mentioned the accused is most articulate in English and chose his words with care when testifying. This makes the unequivocal nature of his statement even more
15 significant. Reinforcing this point is the fact the accused stated in the same breath that he was not accusing Percy of lying. This is not a statement which one would readily expect from an intelligent man who has been arrested two weeks after he is first accused of raping a child and he is told that he
20 faces charges of kidnapping, rape and attempted murder which he denies and of which he has absolutely no knowledge.

Then, on the other hand, there is the unshaken evidence of the complainant who knew the accused well, who had no reason to
25 falsely accuse him and who testified that he abducted, raped

and choked her. Nor is it in any dispute that the complainant was abducted, raped and choked. The complainant's evidence is furthermore supported by circumstantial evidence, namely, that of Maryke Warnick and Gert Carstens who placed the
5 accused in the near vicinity of the complainant late that afternoon and that night. In fact acceptance of Maryke's evidence establishes the accused as someone who was inappropriately engaging with young girls that afternoon and who was the last person in Percy's near vicinity prior to her
10 disappearance. Again, both of these witnesses are credible, knew the accused and had no apparent reason to falsely implicate him. On his own evidence, the accused was in that general part of Darling on the afternoon and the night in question.

15

When he was first confronted with the allegation that he had raped the child, the accused repeatedly lied that he was coming home and, notwithstanding his denial that he was in any way involved in the incident, he fled Darling without ever
20 returning. The accused presents an alibi evidence in Court but calls no witnesses to substantiate it when his defence suggested there are such witnesses. He does not even go to the trouble to try and contact or track down any witness who could corroborate his alibi.

25

In my view, given the strength of the State's case implicating him directly, and indirectly through circumstantial evidence, and given the unsatisfactory aspects of his evidence and the inherent probabilities, the only conclusion I can reach is that
5 the accused's evidence, where it conflicts with that given by the State witnesses, must be rejected as false.

In my view, the accused's general denial of any involvement in the kidnapping and assault of Percy Solomons and his alibi
10 defence can be rejected as false beyond any reasonable doubt.

I find that the accused did indeed kidnap, rape and choke the complainant leaving her for dead in the bush. It was only the
15 next day after Percy, against all the odds, regained consciousness and emerged from the bushes to tell her mother what had happened to her and who had raped her, that the accused must have panicked and fled from Darling and hid until he was found and arrested.

20

His evidence of having no dealings with Percy that evening and of his actions of the next day or two is a tissue of lies interwoven with those events or facts which he cannot deny.

25 I turn now to an examination of each of the charges against

the accused against the backdrop of my acceptance of the State's evidence and rejection of the accused's version.

The first charge which the accused faces is that of kidnapping
5 which, in the case of a child, consists of unlawfully and intentionally depriving either the child of his or her freedom of movement and/or the parents of the parental control of the child.

10 In the present matter it was alleged that accused deprived Percy Solomons of her freedom of movement by dragging her to Boombos, Darling. Percy testified that the accused first lured her with the promise of buying her sweets but that at a certain stage he dragged her, holding her by both hands, and
15 that she did not want to go with him. She also testified that at one stage she was dragged with her face on the ground and the photographs taken in hospital on the following Monday graphically illustrate the injuries this caused.

20 In the circumstances I am satisfied that the State has proved the accused guilt on this count beyond reasonable doubt.

The second charge is that of contravening Section 3 of the Criminal Law (Sexual Offences and Related Matters)
25 Amendment Act 32/1997 by unlawfully and intentionally
/RV /....

sexually penetrating the complainant by forcing her to suck his penis and then penetrating her vagina with his penis, all without consent.

5 The complainant testified however that although the accused wanted her to, she had refused to lick his penis. She testified that he had inserted his penis in her vagina while lying on top of her. This evidence is substantiated by the injuries to the complainants genitalia found when she was examined by
10 Dr King on Monday 25 October 2010.

This evidence establishes that the accused affected a sexual penetration as defined in the Act and, together with the fact that there was no consent on the part of the complainant,
15 which consent she could not in fact have given, provides proof of all the elements of the crime.

For the sake of clarity it should be observed that the accused is in effect being found guilty of rape, an offence which is now
20 treated as statutory rape in terms of Section 3 of Act 32/2007. It follows that the State has proved the accused's guilt on count 2 beyond reasonable doubt and he is so **CONVICTED**.

The third charge which the accused faced was assault with
25 intent to commit grievous bodily harm in that the accused

dragged the complainant into the bush, hit her with his fists and repeatedly burnt her with a cigarette. As far as dragging the complainant into the bushes, this conduct is already covered by the conviction for kidnapping.

5

This leaves the accused's assault upon the complainant by hitting her with his fists and burning her with a cigarette. The complainant testified that when she refused to perform a sexual act upon the accused, he hit her as described above.

10 He also choked her and burnt her arm with a burning cigarette. All of these assaults, apart from the ultimate choking or strangulation, appear from the complainant's description of what took place when he intended to force her to submit to a sexual penetration of one sort or another and raises the
15 question of whether a duplication of convictions or splitting of charges is not present. With regard to the rationale and test for the duplication of convictions or the splitting of charges, see S v Davids 1998(2) SACR 313(c).

20 Applying the intention test the enquiry is whether the criminal acts charged, namely the assault and then the rape were not done with a single intent and thus constitute one continuous criminal transaction. In my view what evidence there is, suggests that the accused's dragging the complainant into the
25 bush, hitting her with his fists and burning her with a cigarette

was in all probability intended to force her to submit to the one or the other sexual penetration. It follows then that if the accused is convicted of assault with the intent to do grievous bodily harm as well as rape this will amount, in my view, to a
5 duplication of convictions.

A further reason for not duplicating the conviction is that if criminal conduct such as that charged in the present matter is broken down into component criminal offences its meaning and
10 gravity can be lost, the sum of the parts becoming less than the whole.

For these reasons I consider that the accused must be **ACQUITTED** on the charge of assault with intent to do
15 grievous bodily harm. Such conduct already been covered in effect by count 2.

The final charge which the accused faces, count 4, is one of attempted murder in that he choked the complainant until she
20 lost consciousness and left her for dead in the bush.

The complainant graphically testified how the accused choked her and her evidence is corroborated by the brain damage which she suffered as the result of the cessation of the flow of
25 blood and oxygen to her brain.

Dr Van Toorn testified that the intensity of the strangulation must have been profound to have arrested the supply of oxygen as it did.

5

In these circumstances the only reasonable inference to be drawn, and one which accords with all the proven facts, is that in strangling the complainant the accused intended to kill her and thus eliminate the only witness to his crimes.

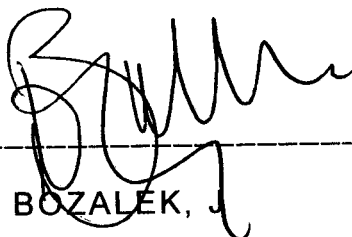
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In all the circumstances I am satisfied that the State has proved beyond reasonable doubt that the accused attempted to murder the complainant by strangling her and he is found **GUILTY** on this count as well.

15

In the result, the accused is **CONVICTED OF COUNTS 1, 2 AND 4 BUT IS ACQUITTED ON COUNT 3.**

20



BOZALEK, J