IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: A 58 /2021

In the matter between:

TARARIQ PHILLIPS **APPELLANT**

and

THE STATE **RESPONDENT**

Coram: Saldanha, Henney *et* Wille, JJ

Heard: 19th of July 2021

Delivered: 18th of November 2021

JUDGMENT

HENNEY *et* WILLE, JJ: (concurring and Saldanha J, dissenting)

INTRODUCTION

[1] This is an appeal essentially about 'evidential' criteria. Including, inter alia, the factual evaluation of the probabilities, credibility, bias, demeanour, appearance, behaviour and circumstantial evidence, coupled with the appellant's refusal to testify. Stratford CJ, defines the law of evidence as that part of the law which has a bearing on the manner of how facts are proved.1 Put in another way, the primary role of the law of evidence is the determination of which evidence may be put to a court to prove a fact, as well as to determine how and by whom the evidence may be presented.

1 *Tregea v Godart* 1939 (AD) 16, 30 -1.

[2] The appellant was convicted in the court of first instance on two counts of rape. This, as defined in the Act2. The appellant was acquitted on the charge of murder preferred against him and was sentenced to (10) years imprisonment.3 These sentences were ordered to run concurrently with each other.

[3] Leave to appeal was applied for and was refused. An application was piloted to the Supreme Court of Appeal.4 Subsequently, leave was granted against the appellant's convictions on the charges of rape. The appellant is now on bail pending the outcome of this appeal. The record of appeal is voluminous and certain aspects of the expert evidence remain complicated and are technical in nature. In our view, this matters not. We take the view that this appeal falls to be dealt with primarily on the facts. Most of the essential facts, are in our view, common cause, alternatively, undisputed.

[4] Besides, the appeal falls to be dealt with only on the issues that presented before us on appeal. As mentioned, this is a complex matter and accordingly, we have discussed in this judgment what seems to us to be of the greatest importance. It must not be inferred that from our failure to refer specifically to any argument or contention, that we were unaware of it, or that we ignored it.

2 Section 3 of Act 32 of 2007 (the 'Act').

3 Taken together for the for the purposes of sentence.

4 The 'SCA'

[5] The victim of the alleged rape is since deceased. She passed way in a local hospital about (18) hours after the alleged rape. The appellant and the deceased were in a romantic relationship for approximately (3) years, prior to her death. They, together with several of their friends attended a 'rave festival' in Paarl. Their intention was to overnight together in a small tent at a camping site nearby to the festival. Tragically things went awry and events took a turn for the worst culminating in the tragic death of the deceased.

THE GROUNDS OF APPEAL

[6] The judgment on the application for leave to appeal in the court *a quo*, succinctly sets out the grounds of appeal that were advanced by the appellant. The grounds of appeal are these: that it was argued that the court *a quo* wrongly interpreted the facts, specifically in not finding that it was 'reasonably possibly true' that the deceased's vaginal and anal injuries could have been self-inflicted and not caused as a result of any rape: that the court *a quo* wrongly rejected certain expert evidence regarding certain 'other' injuries to the deceased's body: that the evidence pointed away from non-consensual sex and finally that the evidence of one of the state witnesses was not credible and fell to be discarded and rejected outright.

[7] This. all in the context of the appellant having denied (to the respondents' witnesses), that any sexual intercourse occurred between him and the deceased. We accept that the respondent bears the onus of proof beyond a reasonable doubt in connection with all the elements of the crime as formulated in the indictment. That having been said, we hold the view that it was not

for the trial court to speculate on defences that may have been open to the appellant to have been advanced at the trial and even more so, it is not for this appeal court to speculate for any possible defences in favour of the appellant. This, particularly when these 'defences' are not squarely before us as 'issues' on appeal.

THE CASE FOR THE RESPONDENT

THE FACTUAL EVIDENTIAL MATERIAL

MS LALLOO

[8] Present at the venue were, *inter alia*, the deceased, the appellant, Ms Lalloo, Ms Martin and Mr Wagiet.5 The group made a decision to purchase certain recreational drugs at the venue.6 Ms Lalloo, the appellant and the deceased went to seek out the purchase of these drugs in the vicinity of the dance floor. The appellant approached an unknown man with a 'moon bag' and purchased what they 'assumed' to be these recreational drugs.

[9] This group again met up at the camp site. The deceased handed a piece of 'cardboard' to Ms Lalloo, which she assumed was the drug LSD. This because, it looked like a postage stamp,

5 The 'group'.

6 'LSD' and 'MDMA'.

was perforated, each portion depicted a different picture and one portion had already been removed from this sheet containing a number of portions. Ms Lalloo tore off a piece, placed it on her tongue and gave the remainder back to the deceased. Ms Lalloo testified that she assumed that the deceased had also consumed this drug. She never observed this, but mentioned that it was the plan that everyone would partake in the use of these recreational drugs that they had collectively purchased.

[10] Ms Lalloo testified that it was the first time she had consumed these recreational drugs and confirmed that the only effect that it had on her was that it brought to bear a 'numbness' to her tongue. Ms Lalloo also consumed some alcoholic beer during this time, but was unable to confirm whether the deceased had also consumed any alcohol during this time.

[11] This group then descended onto the dance floor. On route, they stopped at the restrooms before reaching the dance floor. The deceased complained that she felt unwell. The appellant then handed certain further drugs to the group.7 Ms Lalloo, consumed this drug with water and assumed everyone else also did so, but she did not specifically observe that everyone else in the group had consumed these drugs. Ms Lalloo testified that she felt 'energized' after having consumed these drugs.

[12] Moreover, she had injured her foot during the course of the evening and sought assistance at the medical tent. While she was at this medical tent, she observed the deceased being carried

7 They assumed that this was the 'MDMA' drug.

on a stretcher into the medical tent. She thereafter spoke with the appellant. The appellant stated that the deceased wished to have sexual intercourse with him but he refused because she was acting strangely. He showed her a scratch mark on his stomach. Thereafter, when she spoke to the appellant at the hospital, the appellant remarked that it appeared that the deceased had been raped.8 She asked the appellant if he had sexual intercourse with the deceased and the appellant stated that the last time they had sexual intercourse, was prior to Christmas.9

MR MARTIN

[13] He and his girlfriend, Ms Grey also attended the rave festival. They knew both the appellant and the deceased. He observed the appellant and the deceased nearby the restroom area in close proximity to the dance floor. He noticed that the deceased was unwell and the deceased said she was nauseas and felt 'dizzy'. The appellant told him that the deceased took 'acid' and that is probably why she was unwell. The deceased said she felt cold and wanted to return to their camping tent.10 The deceased was unable to walk by herself and they accordingly both assisted her to get to the tent.

[14] The appellant and the deceased entered into the tent and the tent door was closed. He, together with Ms Grey returned to the dance floor so to enjoy the celebrations. He admitted to having enjoyed alcohol, but denied having taken any drugs on the evening in question.

8 The undisputed evidence was that the appellant and the deceased were alone in their tent during this time.

9 This was not meaningfully engaged with or disputed.

10 If she felt cold, it was unlikely that she would have taken all her clothes off and remain naked in the tent.

Sometime later, when they returned to the tent, a crowd had gathered. He observed the deceased inside the tent and noticed that she was experiencing convulsions. The appellant was present during this time.

MR MANUAL

[15] He also attended this rave festival. His tent was located adjacent to the tent shared by the appellant and the deceased. He returned to his tent just after midnight. Upon his return, he heard noises coming from the deceased's tent. He made the assumption that they were having sexual intercourse as he knew they were in a relationship. He heard these noises for about (10) minutes before he returned to the dance floor.

[16] About an hour later he received a phone call and he immediately returned to the deceased's tent. He was requested to summon the paramedics as the deceased was lying naked on the tent floor and was experiencing convulsions. He alerted the paramedics and assisted them in placing the deceased onto a stretcher and taking her to the medical tent. The deceased did not sustain any injuries whilst being transported from her tent to the medical tent. The appellant was not present at that time and only he re-appeared about (30) minutes later.11 Certain other paramedics took over and loaded the deceased into an ambulance.

11 This absence remains unexplained.

MR INGLIS

[17] He was a friend to Mr Manual. He was at the deceased's tent when the paramedics were present. He assisted in the loading of the deceased onto a stretcher. He confirmed that the deceased did not sustain any injuries during this process and that the deceased was busy convulsing whilst in the medical tent and had to be restrained.

MRS DEVA

[18] The deceased was her mother. The deceased and the appellant were in a romantic relationship for about (3) years prior to this tragic event. The deceased was living at home as she was furthering her studies. The deceased was generally in good health. She received a phone call during the early hours of the morning of the 1st of January 2014 and she rushed to the local hospital in the area. Dr Franklin kept her informed of the deceased's medical condition from time to time. She had reason to be in discussion with the appellant. The appellant also told her that the deceased had consumed recreational drugs. A witness statement was taken from the appellant and he requested that she be in attendance during this process. The appellant showed her a scratch mark on his stomach and told her that the deceased had scratched him whilst they were inside the tent. Finally, she testified that she never recovered the deceased's bikini bottom after unpacking her clothes from her backpack.

MS GORDON

[19] She is a high ranking police officer. She received a phone call from the hospital and she dispatched police to attend at the hospital. She also visited the hospital and later attended on the scene. She made contact with the appellant and asked him to meet her at the campsite. At the tent the appellant informed her that the deceased had consumed recreational drugs and that the deceased had undressed herself and insisted on having sexual intercourse with him. The deceased rolled around inside the tent and then masturbated herself. She started having convulsions and he called for assistance. According to Ms Gordon, the tent was very neat and tidy inside with no indications that anybody had been rolling around inside the tent.

MS MORRISON

[20] She is a police officer and she was initially the investigating officer. She went to the hospital and she, inter alia, obtained a 'witness statement' from the appellant. The witness statement made by the appellant was admitted into evidence and was recorded as an exhibit. The witness statement was admitted into evidence for a very limited and specific purpose. The statement was not admitted for the 'truth of the content' thereof and was admitted solely for the purpose of possible use in the cross-examination of the appellant. This, in the event that the appellant should elect to testify in his defence.

THE MEDICAL EVIDENTIAL MATERIAL

MR DRIESSEN

[21] He is a qualified paramedic and was on duty at the rave festival. He was at the medical tent when he was approached by a 'tall' man who requested urgent assistance. He identified the appellant as the person who approached him, but it is clear that this person was Mr Manual. He rushed to the tent and noticed that the deceased was naked on the tent floor, whilst having convulsions.

[22] The deceased was placed on a stretcher and conveyed to the medical tent. She did not sustain any injuries during this process. When the appellant was in attendance at the medical tent he uttered the words *'sorry baby, sorry baby'*. The appellant also said that the deceased '*conked in' w*hilst they were having sexual intercourse.

MR BARLING

[23] He was a third-year medical student at the time. He testified that he was also an advanced life-support paramedic. He was on duty at the festival, but not as a paramedic. He struggled to find a vein so as to administer certain drugs to the deceased. This medication

sedated the deceased and her convulsions subsided. He was the author of a written document12, which he confirmed as a true reflection of the treatment he administered and injuries that he observed to the deceased. The deceased had sustained injuries to her knees, hips and elbows.

MRS MAKIER

[24] She was a paramedic in the employ of the 'Metro Ambulance' services. The deceased was loaded into the ambulance, was sedated and did not suffer from any convulsions. She inserted an endotracheal tube into the deceased. She did not cause any injury during this procedure.

MRS BAM AND MRS TROSKIE

[25] These two nurses received the deceased from the ambulance. The deceased was wearing a pair of shorts which was far to big for her and was clearly not her clothing. She had injuries to her knees, elbows and hips. As they were washing the deceased they noticed vaginal injuries and this was reported to the attending physician.13 Blood and urine samples were taken from the deceased. The appellant advised that he was in the company of the deceased at all times, but denied having had sexual intercourse with her during the course of this incident. He advised that

12 Exhibit 'O'

13 Dr Franklin.

the deceased had consumed recreational drugs. In addition, he explained that the deceased fell outside the tent and that is how she sustained her injuries. Mrs Bam testified that the appellant had a rucksack with him and that he advised her that it contained the deceased's clothing.

MS BARTLEMAN

[26] She is a general practitioner and was on stand-by duty on the day of the incident. She examined the deceased both vaginally and anally and thereafter completed the medical legal form.14 She testified that the deceased was sedated and she conducted a very shallow vaginal swab. She did not cause any further injuries to the deceased.

MR FRANKLIN

[27] He was the main attending physician. The appellant informed him that the deceased had consumed recreational drugs, had felt hot, started rolling around on the ground in the tent, had visual disturbances, felt 'turned on' and had undressed herself. The appellant further stated that the deceased had fallen down a few times on her way to the tent. The appellant denied having had sexual intercourse with the deceased and stated that he never left her alone whilst they were in the camping tent. She had suffered from convulsions inside the tent and he then called upon the assistance of the paramedics.

14 The 'J88' that was entered into the record and marked as an exhibit.

[28] Significantly, there were bruises on the deceased's pelvis, knees and a small puncture mark in the vicinity of her neck. Above her pubic rim, on the left hand side, was a small bleeding spot. She had been sedated and there was no sign of 'brain death' upon her admission. However, neurologically, there were nevertheless some features of damage to her brain. Her potassium count was very high, she developed severe bleeding, exhibited signs of renal failure and she was sent for a scan which, in turn, rendered as normal.

[29] A urine test recorded positive for opioids. The opioids in her system were directly connected with the sedatives and other medication that was administered to her. She was tested for the presence of other narcotic drugs but only rendered positive for opioids. By noon, she had suffered some organ failure. She passed away at midnight and had suffered from no further injuries whilst she was under his care.

MS ABRAHAMS

[30] She conducted the post-mortem on the deceased on the 2nd of January 2014. She concluded, inter alia, that some drug usage may have played a contributory role in the cause of the deceased's death. In the final analysis she concluded that the cause of the deceased's death was consistent with manual strangulation and the consequences thereof. She explained that all the bruises and injuries to the neck of the deceased were as a result of manual strangulation.

There was severe pressure to the neck area which resulted in hypoxia. This, translated to a lack of oxygen to the brain and other organs of the body which, in turn, triggered a chain of events leading to the death of the deceased. She strongly denied that the injuries to the appellant could have been caused by the attending paramedics.

[31] In addition, she also made mention of the fact that the deceased had bruising to her arms, hips, knees and elbows. In connection with the knee and elbow bruising, she opined that this would be consistent with the deceased being on 'all fours'. The bruising of the upper arms is consistent with someone grabbing the deceased by the arms with a firm grip and holding on to the deceased.

[32] Most significantly, she testified about the vaginal and anal injuries and described the injuries as being due to tearing, friction abrasions and rubbing abrasions. According to her, the vaginal injuries to the deceased were not consistent with any self-inflicted masturbation. This, because it would be extremely painful and one would expect sufficient lubrication in the event of any self-inflicted masturbation. She described these injuries as typically being caused by forceful non-consensual sexual penetration.

[33] In connection with the anal injuries, she vehemently denied that this could have been caused by constipation. This would in turn, cause tearing to the inner and not the outer part of the anus. She also testified that the depth of the penetration to the vagina and the anus were (7) centimetres in extent and were most likely caused by the same object. She noted sand grains

deep into the vagina and explained that this was consistent with someone having sexual intercourse with the deceased whilst in the camping tent. In addition, she procured blood samples during the post mortem which she dispatched for analysis. Both were rendered negative for alcohol or narcotic drugs.

DR MARTIN

[34] She is a professor that specializes in forensic clinical medical examinations. She based her opinion on her clinical expertise and experience and has examined, inter alia, more than (2000) rape victims. Amongst other numerous achievements and accolades she penned the 'National South African Protocol' on the guidelines for the treatment of rape survivors. She was steadfast in her testimony that the injuries caused to the anus and genitalia of the deceased were caused due to blunt force trauma. Specifically, not blunt force trauma that could have been caused by self-inflicted masturbation, alternatively, by constipation.

MR SMITH

[35] He is registered with the Health Professions Council of South Africa as a Medical Biological Scientist and has been the director of the 'Clinical Pharmacology Drug Monitoring Laboratory' at Groote Schuur Hospital for the past (25) years. He received both a blood and

urine sample of the deceased. He found no objective evidence that the deceased had consumed any narcotic drugs.

MR BLOCKMAN

[36] He holds a Masters of Medicine from the University of Cape Town and is an Associate of the Fellow of the College of Clinical Pharmacologists. According to him, it was very difficult to verify whether the deceased actually ingested any narcotic drugs. This also because it was not clear what dosage the deceased may or may not have ingested. The finding which exhibited 'trace cocaine metabolites', could be indicative that cocaine was taken some days before the incident, alternatively, could indicate that the deceased may not have ingested any cocaine at all.

THE CASE FOR THE APPELLANT

THE MEDICAL EVIDENTIAL MATERIAL

MR NAIDOO

[37] He is a medical doctor and an expert witness. He opined that the deceased was not raped and that the deceased's vaginal injuries could have been caused due to self-inflicted masturbation and her anal injuries due to constipation. He could not explain the absence of any narcotic drugs

in the blood and urine samples of the deceased. Significantly, he conceded that the bruising on the arms of the deceased were consistent with somebody holding onto or grabbing the deceased by her arms.

THE FACTUAL EVIDENTIAL MATERIAL

MS MARTIN

[38] She was part of the group on the night in question at the camping site. She consumed alcohol and purchased what she assumed were recreational drugs. She felt unwell after she had consumed these recreational drugs. She did not observe the deceased taking any of the drugs that they had purchased, but noticed that the deceased took ill in the vicinity of the restrooms on route to the dance floor.

MS GRAY

[39] She was initially a witness for the respondent but, her statement was handed over and she was made available to the appellant, to testify in his defence. Some arguments followed at the hearing of the appeal and certain averments were made about the respondent's conduct in this connection. In our view, nothing turns on this and we find nothing untoward by the prosecutor in this connection. She testified she had consumed alcohol and was 'tipsy' as a result. She

approached the deceased while she was sitting down in the vicinity of the restrooms. She testified that the deceased said she was feeling nauseous. The deceased could not stand upright without assistance and stated that she wanted to go to the tent to have sexual intercourse with the appellant. She confirmed that the deceased was not in a physical state to have sexual intercourse, but that whilst at the tent, the deceased opined that the deceased was 'fine'.

[40] The appellant elected not to testify and elected to exercise his constitutional right to remain silent. The import and the possible consequence of this decision was meticulously and carefully explained to him by the trial judge in the court a *quo*. In any event, the appellant was legally represented and his clear instructions were that he elected not to testify. We mention this because at the hearing of the appeal, it was suggested that the appellant may not have enjoyed a fair trial. There is no merit in this, particularly in view of the fact that at all material times, the appellant was legally represented and himself made a positive election not to testify in this context.15

DISCUSSION

THE GROUNDS OF APPEAL

THE EVIDENCE POINTED AWAY FROM 'NON-CONSENSUAL' SEX

15 *R v Matonsi* 1958 (2) SA 450 (A).

[41] One of the core issues advanced by the appellant at the hearing of this appeal was that the respondent failed to prove beyond a reasonable doubt, the lack of consent to the alleged rape of the deceased. This, because of the reasoning that the 'lack of consent' is an element of the crime of rape as formulated. Further, that the respondent bears the onus of proof, beyond a reasonable doubt, in order to sustain a conviction against the appellant. This is undoubtedly so, but this must be carefully analysed in view of the evidence by the respondents' witnesses to the effect that the appellant told them outright that he did not have sexual intercourse with the appellant at all on that fateful night. Also, the appellant was with her all the time whilst they were inside the tent. This issue bears more scrutiny in view of the fact that the appellant elected not to testify in his defence, which we nevertheless undoubtedly accept is his constitutionally enshrined right.

[42] It is apparent that the appellant and the deceased were in a romantic and consensual sexual relationship. According to the respondents' witnesses the last time that the appellant and the deceased had sexual intercourse was about a week before the tragic events that subsequently unfolded.

[43] It is common cause that the group decided to purchase these recreational drugs at the rave festival as they desired to experiment with these drugs. The appellant and the deceased (amongst others), specifically proceeded to the dance floor in order to purchase these recreational drugs. None of this group had used these drugs before and were not in a position to positively testify as to exactly what recreational drugs they had consumed. Significantly, those of the group who

took the drugs did not experience the 'usual' symptoms associated with the intake of these recreational drugs.

[44] Consent arises in various forms in our law. Consent in criminal law matters more so because to locate consent in connection with sexual intercourse is to locate the normative boundary between criminal rape and consensual sexual intercourse. Consent is not solely a generic concept. Generically, to have consented to sexual intercourse in law is to acquiesce to the sexual intercourse in some way whether by virtue of doing so subjectively or as a matter of law.

[45] I say this also because 'intention' is specifically indicated in the definition16, as a requirement for a conviction. However, it suffices to prove *dolus eventualis* in that it is sufficient to prove that the appellant, in these circumstances, foresaw the possibility that the deceased's free and conscious consent might be lacking, but nevertheless continued to have sexual intercourse with her.

[46] The (2) counts of unlawful sexual penetration in the indictment against the appellant allege that the appellant did so without the consent of the deceased or under circumstances when

16 In section 3.

the deceased was unable to give such consent. This concept of consent in relation to the offence is defined in section 1(2) of the Act17 as 'voluntary or uncoerced agreement'.

[47] Section 1(3) contains a provision dealing specifically with the interpretation of the words 'voluntary or uncoerced'. It indicates, inter alia, as follows:

'(3) Circumstances ... in respect of which a person ('B') (the complainant) does not voluntarily or without coercion agree to an act of sexual penetration ... include, but are not limited to, the following:

...

(d) where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act -

...

(iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B's consciousness or judgement is adversely affected;'

[48] In our view, taking into account the circumstances of this case, in order for the deceased to have consented to sexual intercourse with the appellant, her acquiescence must have been sufficiently free, informed and competent to enable her to take responsibility in the eyes of the law for her choice.

17 Act 32 of 2007.

THE COURT A *QUO* WRONGLY REJECTED EXPERT EVIDENCE REGARDING THE 'OTHER INJURIES' TO THE DECEASED

[49] The credibility of the respondents witnesses was not the subject of any dissent during cross examination on the following issues, namely: that the deceased never fell down at the restroom area adjacent to the dance floor: that the deceased did not sustain any injuries on the way to the tent: that the deceased had no visible injuries at midnight when she and the appellant entered the tent: that the appellant closed the tent and that Mr Manual heard noises of a sexual nature emanating from the tent. This evidence accordingly, as a matter of law falls to be accepted. Moreover, the appellant's 'alternative suggestions' on this score were never sufficiently indicated to these witnesses.

[50] The evidence presented by the paramedics and the nurses, viewed holistically, clearly demonstrates that the deceased did not sustain any injuries whilst in their care and the treatment which they administered to her. In addition, there is corroboration for their evidence in the testimony of the other medical experts called by the respondent. These experts independently indicated that they had not before witnessed the injuries described in the post-mortem report as being consistent with injuries caused by paramedics. The (2) nurses who testified made a good impression on the trial judge and their evidence was never the subject of dispute during cross-examination. They observed injuries in the vaginal and anal area of the deceased and that is precisely the reason why a physician was summoned to assist.

[51] It is so that the majority of the medical evidence that was tendered was inextricably linked to the 'rape homicide' crime with which the appellant was indicted. On the homicide charge he was acquitted. However, some of the medical evidence that was tendered in this connection, remains crucially relevant to the crimes upon which the offender was convicted.

[52] Ms Abrahams was clearly in the best position to render expert evidence in connection with the injuries to the deceased. Her evidence was supported and corroborated by Dr Martin. She testified about bruises sustained by the deceased to her arms, hips, knees and elbows. Specifically in connection with the bruising to the knees and elbows, she expressed the view that it was consistent with 'somebody being on all fours'.

[53] Significantly, she described the vaginal injuries as being *'tears, friction abrasion and rubbing abrasion'*. Further, that these injuries were not consistent with masturbation. She opined that the anal injuries could not have been the cause of constipation. This because, constipation would cause tearing to the inner and not the outer part of the anus. In addition, the depth of the penetration of both the vaginal and the anus is indicative of the fact that these injuries were most likely caused by the same object.

[54] Ms Troskie and Ms Bam confirmed that the deceased had injuries to her knees, elbows and hips. When they were washing the deceased, they noticed vaginal injuries and reported this to the attending physician, Mr Franklin.

[55] Mr Martin confirmed that when he took the deceased to the tent she was unable to walk by herself, but that she did not fall on her way to the tent and had no visible injuries. Mr Manuel also confirmed that the deceased did not sustain any injuries whilst being transported from the tent to the medical tent. This, in turn was also confirmed by Mr Inglis and Mr Driessen.

[56] Mr Barling confirmed that the deceased had injuries to her knees, hips and elbows when she was brought into the medical tent. She did not sustain any further injuries whilst in his care. Mrs Makier transported the deceased from the festival to the hospital. During this process the deceased did not suffer any further injuries.

[57] Mr Franklin confirmed that the deceased had bruises to her pelvis18 and also to her knees. Ms Martin also confirmed that in her opinion the injuries caused to the anus and the vagina of the deceased were due to blunt force trauma and not blunt force trauma that could have been caused by self-inflicted masturbation and/or by constipation.

THE RESPONDENT'S WITNESS MR DRIESSEN WAS NOT 'CREDIBLE'

[58] In a final throw of the dice the appellant contends for the position that the evidence of Mr Driessen was not credible and falls to be rejected. Again this evidence must not be viewed in isolation, but must be viewed within its proper context.

18 These injuries remain unexplained.

[59] After the deceased was placed on a stretcher and taken to the medical tent, Ms Lalloo and the appellant had a discussion. The appellant showed her a scratch mark on his stomach. The appellant stated that the deceased wanted to have sex, but he refused because the deceased was acting in a 'weird' fashion. Moreover, at the hospital the appellant told her that it appeared that the deceased had been raped. Furthermore, the appellant stated that the last time that the appellant and the deceased had sexual intercourse was before Christmas a few days before.

[60] Mr Manual testified that he heard noises from the tent solely occupied by the appellant and the deceased and he assumed that they were having sexual intercourse. He heard these noises for about (10) minutes. After the appellant had accompanied the deceased to the medical tent, Mr Manual testified that the appellant looked 'worried' and disappeared for about (30) minutes while the deceased was being treated by the paramedics.

[61] Mrs Deva testified that the appellant told her that the deceased had taken drugs. The appellant showed her the scratch mark on his stomach and told Mrs Deva that the deceased had scratched him while they were inside the tent.

[62] It is against this backdrop of evidence that the testimony of Mr Driessen needs to be critically evaluated. Mr Driessen identified the appellant as the person who approached him. This was incorrect. He was mistaken. He spoke to Mr Manual. Mr Manual is a very tall person, whilst the appellant is short in stature. Whilst at the medical tent the appellant uttered the words *'sorry baby, sorry baby'*. Mr Driessen recalls the appellant stating that the deceased *'conked in'*

whilst the appellant and the deceased were having sexual intercourse in the camping tent. Lastly, Mr Driessen remarked that the tent was very 'neat' on the inside thereof.

[63] Mr Driessen omitted to mention in his witness statement the fact that the appellant stated *'sorry baby, sorry baby'* and that the deceased had '*conked in'* during sex with the appellant. Despite this, the trial judge held that Mr Driessen made a good impression, this despite his error relating to Mr Manual. In addition, there was absolutely no reason apparent from the factual matrix and peculiar circumstances of this case, why Mr Driessen would deliberately fabricate evidence to falsely implicate the appellant.

THE TWO CARDINAL RULES OF LOGIC IN REASONING BY 'INFERENCE'

[64] In *Blom*, Watermeyer JA, eloquently set out the (2) cardinal rules of logic as follows:

'*In reasoning by inference there are two cardinal rules of logic which cannot be ignored:*

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

(2) *the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. It they do not exclude other*

reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct'19

[65] It was contended by the appellant that the deceased's vaginal and anal injuries could have been self-inflicted and not caused as a result of sexual intercourse. This, it was asserted was another reasonable inference which could not be excluded in an evaluation of the facts.

[66] The main difficulty with this argument is the lack of any evidence, or at the very least, a substantiated version, from the appellant. The appellant is and was the sole person who could actually give evidence to the effect that these injuries were inflicted due to self-masturbation by the deceased.

[67] Moreover, the condition wherein a body's bleeding mechanism is out of control and there is a lot of bleeding for no apparent reason, which in this case eventually happened to the deceased, was fully taken into account in the court *a quo*, when determining the cause of the vaginal and anal injuries to the deceased.

[68] Besides, the factual evidence supports the fact that these injuries amounted to tears and abrasions which were caused by blunt trauma. In addition, this is supported by the factual evidence of Mr Manual and Mr Driessen as to what they say transpired between the deceased and the appellant, this whilst they were in the tent.

19 *R v Blom* 1939 (AD) 188 page 202-203.

[69] The appellant never contended for the position of consensual sexual intercourse with the deceased. What was suggested to the respondents' witnesses was that there was no sexual intercourse between himself and the deceased. Furthermore, it was never suggested to Mr Manual that the noises he heard were those of the deceased indulging in self-masturbation.

[70] The argument that little or no probative weight may be attached to the evidence of Mr Driessen because of his mistaken identity of Mr Manual for the appellant is not sustainable because, this confusion occurred during their first meeting and not what the appellant said at the paramedics tent. Further, when this statement was made by the appellant, Mr Manual without hesitation uttered the words *'Nai Bru'*. This euthanizes the mistaken identity issue.

[71] Moreover, the factual evidence to the effect that Mr Manual heard the sounds of people having sexual intercourse in the tent, does not exclude the inescapable inference of sexual intercourse with someone who is incapable of giving consent thereto.

[72] The reasonable inference contended for by the appellant is the position where no intercourse occurred between the appellant and the deceased and all her vaginal and anal injuries were inflicted due to self-masturbation. This, against the canvass of the fact that the appellant declined to offer up any evidence in this connection and the nature and severity of the injuries found on the deceased exhibit an inherent probability that these injuries could not have been self-inflicted.

THE FAILURE OF THE APPELLANT TO TESTIFY

[73] Circumstantial evidence supplies proof in an indirect manner. The distinction between direct and circumstantial evidence is of crucial importance in cases where an appellant does not testify himself.20

[74] It is undoubtedly so that an accused person enjoys the right to remain silent, and not testify during any criminal proceedings against him or her. Does this decision not to testify mean that the decision so made is devoid of all legal consequences. We say in this case – 'No'.

[75] In *Boesak*21, the following penchant observation was made namely, that if there is evidence at a trial calling for an answer and an appellant person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient, in the absence of an explanation, so as to prove the guilt of the appellant. This, bearing in mind always that such a failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt.

[76] What is stated above is totally consistent with the remarks by Madala, J in *Osman.*22 Writing for the court, he said the following:

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20 S v *Mthetwa* 1972 SA 766 (A) 769.

21 *S v Boesak* 2001 (1) SACR 1(CC).

22 *Osman and Another v Attorney-General,* Transvaal 1988 (4) SA 1224 at para [22].

'An accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice'

[77] Of significance and relevant to the facts and circumstances of this case is precisely what was indicated by Diemont JA, in *Sauls*23, as follows:

'The State is, however, not obliged to indulge in conjecture and find an answer to every possible inference which ingenuity may suggest any more than the Court is called on to seek speculative explanations for conduct which on the face of it, is incriminating'

[78] Put in another way, this does not mean, as has sometimes been suggested, that the trier of fact is entitled to speculate as to the possible existence of facts which, together with the proved facts, would justify a conclusion that an accused person may be innocent.

[79] In *Mlambo*24, Malan JA, set out in our view the true test to be applied in the circumstances of this case, namely:

23 *S v Sauls and Others* 1981 (3) SA 172 (A) at 182 G – H.

24 *R v Mlambo* 1957 (4) SA 727 (A) at 738 B.

'*In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged'*

[80] These features of logical reasoning in circumstances similar to the legal reasoning required in this case, were echoed in *Boesak*25, as follows:

'It is clear law that a cross-examiner should put his defence on each and every aspect which he wishes to place in issue .....a criminal trial is not a game of catch-as-catch can……'

WHAT DO WE MAKE OF THE 'SUGGESTIONS' PUT TO THE WITNESSES FOR THE RESPONDENT?

[81] It is trite law that any exculpatory suggestions or explanations that may have been put to the respondents' witnesses by the appellant's legal team, do not amount to 'evidence' and to this attaches no probative weight.

[82] The enquiry however does not end here. We say this because certain material statements were made by the appellant to the respondents' witnesses who testified about these statements. This 'evidence' was not engaged with or subject to any material challenge. These 'statements'

25 *S v Boesak* 2000 (1) SACR 633 (SCA) at 647-C.

may be properly defined as an acceptance by the appellant of the certain facts which may be prejudicial to him.

[83] When judging these 'statements'26, the question arises whether it should be done objectively (in other words, whether one should assess what the words intended to convey), or whether the declarant meant something, but did not say it expressly, in other words 'subjectively'. The solution is found in an objective approach where provision is made for subjective factors in certain instances.27 Most significantly, if it does appear that the statements made are or may be exculpatory, judged from the words and the intention of the declarant, then these statements amount in law to informal admissions.

[84] Ludorf J, in *Motara*28, indicated this approach most eloquently as follows:

'Surrounding circumstances may be looked at, but only those circumstances which help to ascertain the true meaning of the words used'

[85] Besides, even if the appellant tried to give an exculpatory explanation, it can still for the purposes of - *evidential material* - amount to an informal admission.29 The acceptance of an informal admission can occur by means of words, conduct, action or demeanour. The testimony

26 There are many of them prejudicial to the appellant.

27 If the statement has a detrimental result, it should be construed subjectively.

28 *S v Motara* 1963 (2) SA 579 at 585A.

29 *S v Barlin* 1926 AD 439.

by the respondents' witnesses of statements made by the appellant indicate clearly that these statements were made by the appellant, absent any restraint.

[86] The following material statements, were inter alia, made by the appellant to the respondent's witnesses which were not materially engaged with by the appellant: that the appellant told Ms Lalloo that the deceased wanted to have sexual intercourse, but he refused because the deceased was acting weird30: that when Ms Lalloo asked the appellant at the hospital how the deceased was doing, the appellant remarked that it appeared as if the deceased had been raped31: that Ms Lalloo asked the appellant if he had sexual intercourse with the deceased and he replied that the last time that they had sexual intercourse was before Christmas: that the appellant told Mr Martin that the deceased had taken acid and that is why she was unwell32: that Mr Manual testified that the appellant looked 'worried' at the medical tent and disappeared for about (30) minutes: that the appellant, whilst at the medical tent, uttered the words '*sorry baby, sorry baby'*: that the appellant stated that the deceased had *'conked in'* while they (the deceased and appellant) had sexual intercourse inside the tent: that the appellant told Mrs Deva that the deceased had taken drugs and that the appellant told Mrs Deva that the deceased had scratched the appellant on his stomach while they were inside the tent.

30 This goes to lack of consent.

31 This euthanizes his theory that the injuries to the vagina and anus of the deceased were self-inflicted.

Further, the appellant was the only person in the tent with the deceased for (1½) hours prior to her hospitalization.

32 This goes to lack of consent.

[87] Moreover, the appellant told Mr Franklin that the deceased felt hot, started rolling around in the tent, the deceased had visual disturbances, felt 'turned on' and undressed herself. Further, the deceased fell down a few times on the way to the tent33. The appellant denied having sexual intercourse with the deceased, but never left her alone for a period of about (90) minutes, this whilst they were both inside the tent with no other person present.

[88] These statements by the respondents' witnesses were not materially engaged with by the appellant. Accordingly, in our view the correct test to be applied in the evaluation of these statements is what was indicated by Grosskoff J, in *Cloete*34, as follows:

'*Of course, even if an exculpatory statement has no evidential weight, it may still serve its primary purpose of indicating the line of defence on which the accused relies. A court would clearly have to bear the statement in mind for this purpose when evaluating the evidence before it'*

THE WRITTEN STATEMENT BY THE APPELLANT

[89] The appellant's legal team at the hearing of the appeal, abandoned their efforts to in any manner or form rely on the written statement made by the appellant. We agree with this wise course of action. Accordingly, we do not deem it necessary to deal with this 'issue' in this judgment.

33 All this goes to lack of consent.

34 *S v Cloete* 1994 (1) SACR 420 (A) at 428 G

CONCLUSION

[90] Of equal importance is that the appellant's legal team chartered the issue of the 'defence' of the lack of the proof of consent with vigour for the first time on appeal. On this score, the respondent is not required to:

'...plug every loophole, counter every speculative argument and parry every defence which can be conceived by imaginative counsel without a scrap of evidence to substantiate it'.35

[91] In our view, it is clear from the mosaic of circumstantial evidence presented by the respondent, that undoubtedly the appellant was solely to blame for what happened to the deceased inside the camping tent on that fateful night. The medical evidence demonstrably shows that the deceased was forcefully raped both vaginally and anally. The statements made by the appellant to the respondents' witnesses indicate undoubtedly that the deceased was not in a position to consent to sexual intercourse as indicated in Section 1(3) (d) (iii) of Act, 32 of 2007.

[92] At some stage the deceased was grabbed by the arms and must have been on 'all fours' inside the camping tent. Mr Manual heard noises indicating sexual intercourse. The appellant subsequently disappeared from the medical tent for approximately (30) minutes and the deceased's bikini bottom was never recovered. The tent was found neat and tidy inside and exhibited no signs of any person rolling around inside the camping tent.

35 *S v Ntsele* 1988 (2) SACR 178 (SCA).

[93] It is trite that in the absence of demonstrable and material misdirection a trial court's findings of fact are presumed to be correct and that they will only be disregarded on appeal if the recorded evidence shows them to be clearly wrong. It is against this principle that the credibility and factual findings made by the trial court, and decried by the appellant, must be considered. In our view, the inferences drawn by the judge in the trial court were correct. This, based on the factual, medical and circumstantial evidence. On this score it is significant to once again emphasize that marked difference in the legal concepts of an inference as opposed to conjecture or speculation. We find that the what is contended for by the appellant amounts to speculation and conjecture. Put in another way, there are no positive facts underpinning or in favour of the position and stance chartered by the appellant. We find that the appellant had sexual intercourse with the deceased at a time when she was unable to consent thereto.

[94] In the result the following order is granted, namely:

1. That the appeal against the appellants convictions is dismissed.

2. That the convictions and sentences imposed upon the appellant are hereby confirmed.

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HENNEY, J

WILLE, J

SALDANHA J, dissenting

[1] This is a matter in which a young woman lost her life in tragic circumstances. The appeal relates to the question as to whether she had been raped by the appellant several hours prior to her unfortunate death. I have had the benefit of considering the judgment by the majority in this appeal. I respectfully dissent therefrom. In my view, the appeal turns upon the central issue as to whether the deceased, at the time of sexual intercourse both vaginally and anally, was able to have consented thereto.

[2] The evidence tendered by the State in the court a quo failed, in my view, to establish beyond reasonable doubt that the deceased was not able to have consented to sexual intercourse with the appellant. To the contrary, the State in the court a quo relied on a theory bolstered by various expert witnesses called by it , in particular, Dr. Deidre Abrahams and Dr. Lorna Martin, that the appellant had strangled the deceased in an attempt to subdue her while forcefully having sexual intercourse with her against her will. Central to the State's case was the claim of the alleged strangulation of the deceased, at the hands of the appellant, in order to subdue her. Nowhere in the State's evidence in the court a quo did it seek to prove that the deceased lacked the mental capacity to consent to sexual intercourse. On appeal the State adopted the same

theory as it had in the court a quo, as was apparent from the heads of argument filed by counsel for the State, much of which again concentrated on the evidence that related to the alleged strangulation and the alleged injuries associated therewith found on the deceased. When I asked counsel for the State, during argument on appeal, as to what the State's actual position was, given that very little of the contents of the heads of argument dealt with the actual analysis and findings of the court a quo, relating to the issue of consent, and what appeared to be no more than a regurgitation of the argument on conviction in respect of the count of murder in the court a quo, counsel for the State submitted that it remained of the view that the strangulation of the deceased and the alleged injuries associated therewith 'was intertwined' with the claim that the deceased had been raped by the appellant. Notwithstanding the finding by the court a quo that the consumption of drugs by the deceased may have played a role in her death, the State maintained, in its heads of argument on appeal, that it had 'proved beyond a reasonable doubt that there was no drugs in the blood or urine of Sarisha. There is no objective or subjective evidence to support that. Five different tests were done which were all negative'. In this regard counsel for the State referred the court on appeal, as she had done in the court a quo, to the 5 point tests done by Dr. Craig Franklin, that of PathCare, that of the UCT laboratory, and the tests conducted by the Department of Health and the state laboratory.

[3] The State also maintained that Dr. Segaran Naidoo, who testified on behalf of the appellant, was unable to explain the absence of drugs. The State contended that the effect the

'so-called LSD and MDMA' had on Ms Vanika Lalloo and Ms Lameez Martin, was also not consistent with what would have been expected (sic) based on the evidence of Professor Marc Blockman.

[4] At the outset I wish to state that this dissenting judgment is based on what I regard as the correct findings by the court a quo, that, based on the circumstantial and other evidence, there had in fact been sexual intercourse between the appellant and the deceased and that the injuries sustained by the deceased, both vaginally and anally, were as a result of penile penetration by the appellant. The state had on the evidence, both direct and indirect in nature, prima facie proved that there was sexual intercourse between the appellant and the deceased. The point of departure with the findings of the court a quo relates to the evidence presented at the trial, as to whether the State had in fact proved that the deceased, when entering the tent with the appellant, had not been in a mental condition to have consented to sexual intercourse with him. This dissenting judgment of course flies in the face of what appeared to have been the avowed version of the appellant throughout the trial, notwithstanding his failure to testify. That version, put to the various witnesses for the State, and which also emanated from some of the state witnesses themselves, such as Dr. Franklin, Ms Manakshi Deva, Ms Vanika Lalloo, Inspector Marissa Gordon and Sergeant Ronel Morrison, amongst others, and so too that of Dr. Naidoo, was that the appellant denied that he had had sexual intercourse with the complainant, but rather that the deceased had self-inflicted the injuries to both her vagina and anus in the course of masturbation

while in a state of heightened sexual arousal. Dr. Naidoo further contended that the injuries to the anus could be attributed to a constipated condition on the part of the deceased.

[5] For the purpose of this judgment, it is not necessary to repeat all of the evidence tendered in the court a quo, inasmuch as such evidence has been extensively set out in the judgment of that court. There are, however, crucial aspects of the evidence relating to the question of consent which this judgment will refer to, and which, in my view, had not been adequately dealt with and considered by the court a quo, in arriving at its findings. Moreover, the court a quo had, correctly in my view, meticulously dealt with the evidence relating to the alleged strangulation of the deceased by the appellant and all of the injuries which may have been associated therewith.

[6] In relation to the question of consent the court *a quo* relied principally on the evidence of Mr Pallo Manual, that shortly after midnight he had heard sounds of sexual intercourse coming from the tent occupied by the accused and the deceased. The court also relied on the evidence of Mr Sebastiaan Driessen, who claimed that he had heard the appellant say to Mr Manual that the deceased had ‘conked’ out while they were having sexual intercourse.

[7] The court also relied on the testimony of Ms Jade Gray who, albeit in regard to a different physical context, testified that 'she did not think that the deceased was in a position to have consented to intercourse.' The court also relied on a view expressed by Dr. Naidoo, that if the deceased had been under the influence of LSD and MDMA, as was the appellant`s version, 'her confused and disorientated state rendered it highly questionable whether she could consent to intercourse.' Moreover the court sought to rely on its finding with regard to the state of consciousness of the deceased as 'described by the accused (second-hand) and by those who were with her before she entered the tent and who assisted her from the dance floor to the tent, together with the evidence given by the various experts on the effects of a drug such as MDMA', all of which, the court found, brought the deceased squarely within the category set out in section 1 (3) (d) (iii) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ("the Act") which provides:

'(d) where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act-

…

(iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B's consciousness or judgment is adversely affected;. . .'

[8] The common law definition of rape, which was applicable until the adoption of the Act, was the 'unlawful, intentional sexual intercourse with a woman without her consent.'36 Snyman37 points out that the definition of rape in the Act does not contain anything new as far as the legal rules relating to sexual offences are concerned. He states though, that the Act merely codifies the law in respect of the absence of consent which applied in the previous common law crime of rape. Likewise, Schwikkard38 correctly points out that the definition of consent as voluntary or uncoerced agreement, does not appear to constitute a substantive departure from the common law definition of consent, and no more than highlights the presence of coercion and the absence of consent. Section 1(3) consolidates and expands the common law in providing a list of circumstances in which consent will not be found to exist.39

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36 J Burchell: *Principles of Criminal Law* 5 Ed (Juta, 2016) p613.

37 Snyman: *Criminal Law* 7th Ed (LexisNexis, 2020) p316:

'Section 1(3)(d) deals with cases in which Y is "incapable in law of appreciating the nature of the sexual act". Once again these provisions contain no principles which have not already been recognised previously under the common law. There is no valid consent if X performs an act of sexual penetration in respect of Y if Y is asleep, unless, of course, Y has previously, whilst awake, given consent. The same applies to a situation where Y is unconscious. Paragraph (iii) of subsection (3)(d) provides further that consent is not valid if Y is "in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent the (Y)'s consciousness or judgment is adversely affected".'

Footnote 41 to the text: 'For the recognition of this principle under the previous common law, see *Ryperd Boesman supra*, K 1958 3 SA 420 (A) 422, 424-426.' (Remainder of footnotes omitted.)

38 PJ Schwikkard: 'Rape: An unreasonable belief in consent should not be a defence' (2021) *SACJ* 76.

39 Ibid, paragraph 2.1 'Lack of consent retained.'

[9] The State, as under the common law, retains the burden under the Act of proving the absence of consent beyond reasonable doubt. The evidential burden on accused, to show that they believed that the complainant consented, will only arise once the prosecution has established a prima facie case that the complainant did not consent.

[10] In *Otto v S* (988/2016) [2017] ZASCA 114 (21 September 2017) the Supreme Court of Appeal held:

'The onus rests on the State to prove all of the elements of the offence of rape, including the absence of consent and intention. That is so even where, as in this case, the version put to the complainant by the appellant's legal representative was a denial of any sexual contact with her. That false version makes the State's task a great deal easier, as does the fact that the appellant decided not to testify40.' (Internal footnotes partially omitted.)

[11] The case law is however sparse on the relevant subsections, i.e. section 1 (2) of the Act, which defines consent as voluntary and uncoerced agreement, and section 1 (3) which provides the list of circumstances in which consent will be involuntary and coerced and in particular (d) (iii). The State would nonetheless have to prove that the complainant/victim of a sexual assault had both the ability to consent (conative) and the ability to exercise her free will in making such a choice.

40 *S v Boesak* 2001 (1) SACR 1 (CC) para 24; *S v Vilakazi* 2009 (1) SACR 552 (SCA) para 48.

[12] The authors in the Sexual Offences Commentary41, in dealing with the issue of consent, correctly point out that valid consent cannot be given by a person who is in a state of intoxication or whose senses are numb as a result of drugs or hypnosis. That is uncontroversial and will always be the case where a complainant has been reduced to a state of insensibility as a result of intoxication, whether voluntarily or not.42 The authors point out that depending on the facts of the case, it might also be that the complainant was so drunk that she/he was not fully capable of consenting, since as 'a matter of practical reality, capacity to consent may evaporate well before a complainant becomes unconscious'43. The phrase in the Act 'to the extent B's consciousness or judgment is adversely affected' illustrates that either cognitive (consciousness) or conative (judgment) can be lacking for a presumption of lack of consent to operate. They further point out that when deciding whether intoxication vitiates consent, the courts would have to look at all of the surrounding circumstances and draw inferences from the facts. They reference the matter of S v Hammond44 where, amongst other considerations and evidence, the combination of the complainant's drunkenness at the time of the incident, and her irrational behaviour earlier that

41 D Smythe & B Pithey: 'Sexual Offences Commentary', Chapter 2 Section 3: Rape.

42 *R v K* 1958 (3) SA 420 (A). To borrow the terminology from *S v Chretien* 1981 (1) SA 1097 (A), decided in a different context of the defence of intoxication, where the complainant is 'dead-drunk' she/he is clearly incapable of consenting to sexual intercourse.

43 *R v Benjamin Bree* 2007 EWCA Crim 804, para 13.

44 2004 (2) SACR 303 (SCA) at para 25.

day led the court to find consent. Similarly, they refer to *R v K45 where* the court found that the complainant's alcohol consumption and untruthfulness created a reasonable doubt about a lack of consent. The writers add that in cases decided under the Act, intoxication will not lightly lead to a reasonable doubt of lack of consent. The wording of subsection 1 (3) (d) (iii) will require a court to look beyond whether the complainant was reduced to a state of insensibility, to whether the complainant lacked capacity to consent on the facts. Arguably, the writers contend, in circumstances involving intoxicants there is now a greater responsibility on the accused to have clearly established consent before proceeding with the sexual encounter.46

[13] It is in the context of these codified provisions of the Act relating to mental capacity, and the sparse case law on the issue, that the court a quo had to consider whether the deceased had the necessary mental capacity to consent to sexual intercourse and, moreover, in circumstances in which there was a paucity of evidence relating to consent, and where the State, to the contrary, sought to prove that the deceased was not under the influence of any intoxicant that affected her mental condition.

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45 1958 (3) All SA 420 (A)

46 Sexual Offences Commentary, Chapter 2, fn 110 to the text: 'This will also potentially affect the consideration of the accused's mens rea. An accused will lack intention if s/he did not foresee the possibility that the complainant was not consenting: Burchell *Principles of Criminal Law* (2014) 713. Where significant intoxication is involved it may be harder for an accused to argue that s/he did not foresee a possibility that consent was lacking in the absence of clear positive indicators of consent.'

[14] The evidence tendered by the State in respect of the two counts of rape was circumstantial and of a medical nature and, as pointed out by the court a quo, not exclusively so. The further circumstantial evidence was that from a number of non-medical witnesses, such as Mr Manuel, Mr Driessen, Ms Lalloo and Ms Deva, and that of the statements made by the appellant to the various police officers and others who testified.

[15] The dicta in *R v Blom* 1939 AD 188, at 202-203, applicable to the findings of the court a quo in respect of the murder charge, were in my view equally applicable to the two counts of rape. The two cardinal rules of logic could not be ignored when considering the circumstantial evidence; firstly, that the inferences sought to be drawn must be consistent with all the proved facts; and secondly, the proved facts should be such that 'they exclude every reasonable inference from them save the one sought to be drawn'. In this regard the remarks of Davis AJA in *R v De Villiers* remain instructive:

'The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way; the

Crown must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence.'47

The court a quo was alive to the application of these principles, inasmuch as it also referred to the decision in *S v Reddy and Others* 1996 (2) SACR (1) (A), which also dealt with circumstantial evidence and in which the following was stated:

'In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether its excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft quoted *dictum* in *R v Blom*. . .'

It is equally trite that the State bears at all times the onus of proving the accused's guilt beyond reasonable doubt, although, as it was put in *S v Ntsele* 1998 (2) SACR 178 (SCA) 'nie bo elke sweempie van twyfel nie'48.

47 R v De Villiers 1944 AD 493, at p 508-509. See record page 4594.

48 See record page 4595.

‘[237] In performing the exercise of evaluating the evidence and determining whether the State has discharged its onus a Court must approach the evidence holistically. See *S v Van Aswegen* 2001 SACR 97 (SCA) and *S v Chabalala* 2003 (1) SACR 134 (SCA) at 139H:

> “The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State so as to exclude any reasonable doubt about the accused’s guilt. The result may prove that one scrap of evidence or one defect in the case for either party . . . was decisive but that can only be an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch onto one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence.”

[238] Finally, it must be borne in mind that an accused’s failure to testify does not necessarily fill all gaps in the State’s case. As was stated by Holmes AJA (as he then was) in *S v Khoza* 1982 (3) SA 1019 (A) at 1043 C-E:

> “The fact that the appellant did not give evidence does not result in proof beyond reasonable doubt that he murdered or attempted to murder the deceased. I say this because, before the absence of gainsaying testimony from an accused can be said to carry the day against him, there must first be a prima facie case against him.’’.

[239] And further:

> "The mere fact that the accused has been prosecuted, or shown to have behaved suspiciously, does not make it necessary for him to elect to deny the charge under oath and his failure to testify cannot be treated as an independent item of evidence capable of curing the deficiency in the prosecution's case. Furthermore, in considering what weight may be given to the accused's failure to explain, it is important to consider whether an explanation could reasonably have been expected. For example, if the accused is shown to have committed some act not ordinarily done except with a guilty state of mind, it will normally be reasonable to expect the accused to explain why he did it and, in the absence of explanation, to draw an inference of guilt – depending, of course, on the quality of evidence and the weight to be given to that evidence by a Court".' (Own emphasis added.)

[16] The question arises as to whether the circumstantial evidence tendered by the State on the rape charges excludes, firstly, that the appellant and the deceased had sexual intercourse, and secondly, whether such sexual intercourse could have occurred with her consent. It is the second question, which in my view and as already indicated, that is central to the determination of the outcome of the appeal. In this regard the evidence relied upon by the court a quo, of Mr Pallo Manual, must be considered in its proper context and as testified to by him. When led by the State in chief Mr Manuel stated:

‘Ms Erasmus: And what happened on your way to your tent?

Mr Manuel: Well, when I got back to my tent I heard what sounded as though people were having sex inside the tent next to mine.’49

The evidence goes on further:

‘Ms Erasmus: Then coming back to what you heard. Can you describe to the Court what you heard?

Mr Manuel: I heard moaning and groaning from a male and a female, and to me that – I assumed that it sounded like they were having sex.’50

[17] In cross-examination he explained that he had been about ten minutes in his tent while changing his clothes, and the following was asked of him:

‘Mr Moses: And during that time, did you hear – or, well, from what you understand, you didn’t hear anybody crying or shouting for help.

Mr Manuel: No.

Mr Moses: And it clearly didn’t sound as if somebody was being assaulted in any way in the tent from the sounds that you’ve heard and what you have described here to Court.

Mr Manuel: No.’51

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49 See record page 320.

50 See record page 320-321.

[18] It was apparent from Mr Manuel's evidence that the noises that he had heard emanating from that of the appellant's and the deceased's tent, was not evidence or indicative of non-consensual sex taking place. For that reason, he said that it did not bother him and he went on his way back to the dance floor.

[19] The second non-medical witness the court a quo sought to rely upon for the appellant having had sexual intercourse with the deceased, was that of Mr Sebastian Driessen. He claimed that the appellant had said to Mr Manuel that he and the deceased were having sex, and at some stage she had 'conked in'. It was not clear from his evidence as to exactly what was meant by the words 'conked' out, as he himself seemed unfamiliar with the term. Nonetheless, it is not evidence that the deceased had been assaulted or was coerced during the sexual intercourse. I might at this stage also point out some difficulties that I had with the evidence of Mr Driessen. He was the senior security officer appointed as the safety officer at the rave event on the night. He was therefore responsible for ensuring that neither alcohol nor any drugs were brought onto the premises. He explained in his evidence how motor vehicles of patrons were searched on entry to the site, with the use of sniffer dogs, but that this had proved inadequate given the limitations on the use of the dogs as the searches progressed. What was particularly significant

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51 See record page 342-343.

about his evidence, was that he had not recorded in his written statement the alleged utterance by the appellant to Mr Manuel. Neither had Mr Manuel himself testified about such an utterance made to him by the appellant. Needless to say it would not have been something that would have easily slipped the mind of Mr Manual, to have recorded it in his statement shortly after the incident and notwithstanding the effusion of time since the incident. In fact, during the course of the oral argument on appeal, counsel for the State (who was the same counsel that had appeared in the court a quo) informed the court that Mr Driessen had not disclosed to her in a preparatory consultation that the appellant had claimed that the deceased had 'conked in' while they were having sexual intercourse. Needless to say, the State was as surprised as the defense about his claim by Mr Driessen. It was also put to counsel for the State that Mr Driessen had not been an entirely credible witness when considering his testimony overall, given the circumstances in which he found himself, as the safety officer relating to an event in which someone had tragically died as a result of the use of illicit drugs, and the very concerns raised by Dr. Franklin himself about the prevalence of such substances at the rave events in that area on the very night. Counsel for the State's response to the court was that she had 'taken the evidence of Driessen with a pinch of salt'.52 Clearly the version that he proffered with regard to the appellant having sexual intercourse with the deceased and that she had 'conked in' was not in line with the theory

52 Despite this claim in argument by counsel for the State, she had nonetheless in her Heads of Argument on appeal contended that the evidence of Mr Driessen was credible.

of the State. Nonetheless, the court a quo accepted the evidence of Mr Driessen, somewhat uncritically, despite the critique put to Mr Driessen by the defence counsel that he was in a compromised state as the safety officer at the event at which the incident occurred. Even so, nothing much turns on this critique of Mr Driessen's evidence, inasmuch as his claims were not supportive of a finding of any lack of consent on the part of the deceased to have had sexual intercourse with the appellant.

[20] The State, in reliance on the evidence of Ms Vanika Lalloo, sought to raise a suspicion about the appellant, in the context of a conversation he had with her in which he had said that 'it appeared that the deceased had been raped.' In this regard the transcript read as follows:

'Ms Lalloo: I asked him how she was and he said it appeared that she had been raped. So . . . (intervention).

Ms Erasmus: Just stop there. Yes.

Ms Lalloo: And then I asked him if they did have sex that night and he replied saying that they didn't and the last time that they did have sex was before Christmas, around that time.

Ms Erasmus: Was that the extent of the conversation?

Ms Lalloo: Yes.'53

53 See record page 1683.

[21] It is not clear on what basis the State sought to raise any suspicion about an utterance by the appellant, who would in all probability have heard from the medical staff that there were injuries found to the vagina of the deceased which had made them suspicious about a possible sexual assault. More importantly, even before Ms Lalloo was able to continue with the conversation about the comment, she was interrupted by the State itself. In my view there is no basis for any suspicion to have been cast upon the appellant arising from that conversation, which incidentally also seems to be relied upon in the majority judgment.

[22] The State in its heads of argument also sought to suggest suspicious conduct on the part of the appellant, because of the deceased's bikini bottom not having been recovered. The majority likewise finds support in that suggestion. Ms Deva had testified that the deceased's bikini bottom had not been recovered. Clearly that could not have been indicative of any suspicious conduct on the part of the appellant, and the circumstances in which he had found himself when he went to pack up at the tent. It is not even clear as to whether the deceased had her bikini bottom on, given that earlier in the day she, together with the appellant and their other friends, had gone for a swim in the river. The suspicion sought to be cast upon the appellant with regard to the bikini bottom was, in my view, equally without any merit.

[23] In the evidence of Ms Manakshi Deva, the deceased's mother, she explained that the accused had said to her that he and the deceased had taken drugs for the first time and that the deceased had been sexually aroused by it. She claimed that the deceased and the appellant had

been in an intimate relationship and she was not aware of an abuse on his part. The appellant also denied to Ms Deva that they had sexual intercourse and explained that the deceased had scratched him on his stomach. The scratch mark had also been shown to Ms Lalloo by the appellant. With regard to the mental state of the deceased on entering the tent, the State led no direct evidence. The defence, however, led the evidence of Ms Jade Gray, who had been poised to be called as a witness by the State and with who the State had consulted in preparation for her testimony. In her testimony for the defence, Ms Gray stated that when she initially saw the deceased near the toilets sitting on the ground, the deceased did not 'look herself'. She claimed that the deceased was completely different and had said to her that she was not feeling well; 'she told me that she felt like she was melting'. She also explained that the deceased was wobbly on her legs, could not stand and had repeatedly fallen down. The recordal of her evidence is as follows:

'Mr Moses: And what else happened? What did she tell you?

Ms Gray: She said to me that she wanted to go to the tent, and I told her it's not a good idea. She seemed completely out of it when I was talking to her. She told me that she wanted to go to the tent and have sex with her boyfriend.

Court: Just one moment. She said she wanted to go to the tent and have sex with her boyfriend.

Ms Gray: Yes.'54

54 See record page 3174.

Ms Gray's utterance with regard to the deceased having said that she wanted to have sex with the appellant, was not contained in her written statement. She was cross-examined at length by the State with regard to this omission in her written statement, to which she claimed that she had been scared to have told that to the police. She also explained that at that stage she had been young, when pressed by the State as to why she had been scared. Interestingly, this very utterance was conveyed to the State during their consultation prior to the State deciding not to call her as a witness. Needless to state it would not have supported the State's case. Moreover, the utterance of Ms Gray was not communicated to the defence team by the State, and it appeared that they only got wind of it after the State made Ms Gray available to the defence and only during the course of the defence case. In fact, it was only put to Dr. Naidoo during the course of his re-examination by the defence, as that was what they had heard from Ms Gray that the deceased was alleged to have said. In response to a question from the court about the utterance and its source, counsel for the defence assured the court that such evidence would be led from Ms Gray. The exchange is recorded as follows:

'Court: Ja, I don't want to hear about statements. You say such evidence is going to be led that the deceased told Jade Gray what you've just heard. And the question then is?

Mr Moses: In the context of Your Lordship's question and the answer that the witness has given, what would his response then be in the context of that evidence which I have referred to now, M'Lord.

Court: Yes.

Mr Naidoo: M'Lord, my response would be if that was submitted as evidence, it would reconcile with what [I] know has been reported, I don't have any experience of it, [indistinct] experience, but being reported has the effects of stimulant drugs, mainly MDMA, that's Ecstasy, or is slight derivatives, MDEA, MDA and also cocaine and, of course, the combination of cocaine and LSD – MDMA and LSD, where there is increase sexual arousal.

Court: That would reinforce what you know . . . [intervenes].

Mr Naidoo: It would just tie in.

Court: . . . what we've heard that MDMA can lead to, I don't know, social disinhibition or sexual creased(?), hyper sexuality or whatever you want to call it, is that right?

Mr Naidoo: Yes, it would just tie in with that, yes.'55

[24] There is, however, in my view, a more crucial aspect to the evidence of Ms Gray, which was not contested by the State, and which read as follows:

'Ms Gray: We got to the tent and she looked quite fine, actually, she was calm.

Court: You got to the tent and she looked quite fine, you say?

Ms Gray: Ja. She – at that stage she could stand and she could walk.

Court: She was calm, you say, and she could stand and walk?

Ms Gray: Ja, ja.'56

55 See record page 3091.

56 See record page 3174.

[25] In response to questions by counsel for the State in the cross-examination of Ms Gray, the following is recorded:

'Ms Erasmus: Then at the tent, did she go inside the tent?

Ms Gray: Yes, she went inside the tent?

Ms Erasmus: And Taariq, what happened to him?

Ms Gray: They were both inside the tent.

Ms Erasmus: And what time was it then?

Ms Gray: I can't remember what the time was.

Ms Erasmus: Did you guys leave them there?

Ms Gray: We did, yes.

Ms Erasmus: Why is that?

Ms Gray: Sarisha was quite calm, and I was confident leaving her there. She looked okay.

Ms Erasmus: So all of a sudden she looked okay, compared to what you've just described? Was there any difference, like in a miraculous difference now as to how she looked the previous 15 minutes?

Ms Gray: Yes, there was a difference. She was very calm. I asked her if she was okay, and she said she was.

Ms Erasmus: And was – did she sit in the tent? What did she do?

Ms Gray: She was sitting in the tent, yes.'57

57 See record page 3188-3189.

[26] Also, in the further cross-examination of Ms Gray, when asked about the utterance which the deceased made with regard to having sex with the appellant, the questioning is recorded as follows:

'Ms Erasmus: Right. And then you said she was – her legs were jelly. Then you said that she, according – she said she wanted to go to the tent and have sex with Taariq.

Ms Gray: Yes, that's what she said.

Ms Erasmus: Did she just say that out of the blue, or how did it come about that she said it?

Ms Gray: I asked her what she wanted to do, and that's what she said to me.

Ms Erasmus: Was she at that stage still confused.?

Ms Gray: I wouldn't say she was confused.

Ms Erasmus: How was she then?

Ms Gray: She just seemed . . . I don't know, she just seemed like she wasn't herself.

Ms Erasmus: So she wasn't confused then?

Ms Gray: Confused is not a word that I'd use to describe her.

Ms Erasmus: But then what would you use?

Ms Gray: I'd say she was under the influence of something. I don't know. Ja.

Ms Erasmus: Is that it? You can't describe it any other way?

Ms Gray: That's it, ja.'58

58 See record page 3186 to 3187.

[27] From this exchange it appears that the witness was of the view that the deceased was not confused, or at least that's not how she would describe it, but that she was, as she put it, under the influence of 'something'. This was her observation while the deceased was still seated near the toilets when she first encountered her. Ms Gray's response to the question by the court, referred to earlier, was also made in the context of what she observed at the toilet area.

[28] The State had also taken her at length through her written statement, regarding the incident while still at the toilets, and what she had meant by stating that the appellant had been stressed out, to which she explained that she thought that he was 'worried about her', in reference to the deceased.

[29] Later, in questions for clarity from the court, about when she returned to the scene of the tent, whether she had been surprised to see the deceased naked, she claimed that she had not been, because 'I was under the impression that they were going to the tent to go and have sex so I wasn't surprised that she was naked when I saw her'. She was also asked by the court with regard to her impression that the deceased had been under the influence of drugs, and what had given her that impression, to which she responded:

'Ms Gray: When I saw her outside the toilets, she really didn't look herself. I looked into her eyes, and she just didn't look like the Sarisha that I know. And when she said that she felt like she was melting and she kind of fell down – not fell down, but she kind of went down like that, it was kind of consistent with what she said. It looked like . . . it literally looked like she was melting. That's why I was under the impression that there was something else going on.

Court: I take it . . . [intervenes]

Ms Gray: She was . . .

Court: You didn't ask her about that?

Ms Gray: No, I didn't ask her.

Court: You've said somewhere in this statement . . . I'm just looking for it. Yes. In paragraph 7, you say here: "Tried to get up, but couldn't. I asked her to give her hands to me so I could help her stand up, but she couldn't. She was beginning to get . . ."

It says "exited", but I take it, it means "excited". What did you mean when you told that to the police?

"She was beginning to get excited".

Ms Gray: I don't remember why.

Court: Can you not give any sense to what you were saying there?

Ms Gray: Possibly because she wanted to go to the tent, and we were about to take her to the tent. But I . . . I don't know why.'59

59 See record page 3218-3219.

[30] In reliance on the testimony of Dr. Naidoo with regard to whether the deceased could have consented to sexual intercourse, the following passage appears from Dr. Naidoo's evidence:

'Court: If you're (sic) theory that this is a drug induced death is accepted, then it would follow, I presume, that before – would it follow before unconsciousness and convulsions, the deceased must have been in a very disorientated state.
Mr Naidoo: Yes, M'Lord, agitated, disorientated, confused, incoherent, restless, that's the typical picture of a person who is under the influence of such a drug and possibly . . . [intervenes]
Court: And you've already told the court that in those situations a large question mark is raised about questions of consent, if there was sexual intercourse.
Mr Naidoo: Yes.'

[31] Dr. Naidoo, of course, while maintaining that the deceased had consumed drugs which had subsequently led to her condition and subsequent death, was as unable as any of the other witnesses to testify with regard to exactly what drugs the deceased had consumed, the quantity and the effect that such drugs would have had with regard to her ability to consent to sexual intercourse.

[32] The State had not led any medical evidence with regard to the deceased's state of mind at the time when she entered the tent, or whether she had been able to consent. Neither the

evidence of Dr. Abrahams, nor that of Dr. Martin, supports any theory that the deceased had not been able to consent to sexual intercourse. In fact, all of them, based on the toxicology reports, were adamant that the deceased had not been under the influence of any intoxicant and that the use of drugs had not in any way contributed to her physical condition.

[33] The State, however contended in it heads of argument that it was clear from the evidence 'that she [with reference to the deceased] was in no physical state to have sexual intercourse and that she was grabbed by the arms and must have been on all fours at some stage inside the tent'. The State then goes on to refer to the evidence of Mr Manual, that he heard sexual noises and contends that 'the hand of the appellant had to have been covering the mouth of Sarisha in order to have caused to (sic) the injuries to the inner mouth and lips. The only reasonable inference to be drawn from this is that he wanted to cover her mouth in order to prevent her from crying for help'. Needless to say, that theory was not sustained by the court a quo in its findings nor by the evidence of Mr Manual.

[34] The State, on appeal, persisted in its view that the appellant had raped the deceased, and in the process had strangled her in an attempt to prevent her from crying out. The contention by the State that the deceased would have been able to cry out for help further undermines the

notion that she lacked the mental ability to consent to sexual intercourse and the physical ability to have resisted the alleged assault.

[35] The accused elected not to testify. Suffice to say, as the court a quo correctly remarked, he was in a dilemma. Had he entered the witness box he would have been confronted with the evidence of the deceased's injuries which he would have been required to explain.

[36] The court a quo however makes the following remarks:

'[283] As stated previously there is no direct evidence from the accused that no sexual intercourse took place. Nor is there any apparent reason why the accused did not give this evidence or, if this was not the case, and he did have consensual intercourse with the deceased, why he did not testify to this effect. He was in a long term relationship with the deceased and by all accounts it was an intimate relationship. If he had testified the he had had consensual sex with the deceased there could have been no one who could have testified directly to the contrary.'60

60 See record page 4615.

[37] With regard to the injuries which the deceased had sustained, the court a quo was of the view that it was only the deceased who could testify first hand as to what had happened in the tent during the critical period. Such an explanation, the court a quo was of the view, was expected from the accused. The court remarked further:

'Moreover, had the injuries been caused by the accused during consensual intercourse or sexual activity with the deceased no adverse consequences could follow nor any adverse inference be held against him: he was in an intimate relationship with the deceased and were he to testify that there was consensual sexual intercourse between them in the tent no witness would be able to directly contradict him.'61

[38] Clearly the court a quo was of the view that all the appellant had to do was to explain how the injuries took place, and if his version that it was during the course of sexual intercourse no witness, in the court's view, would have been able to have directly contradicted the appellant.

[39] The court a quo deals at length in its judgment, somewhat rhetorically, with the question as to why the appellant did not testify. It was clear that the appellant would have been confronted with the statement that he had made to the police and also all of the medical evidence.

61 See record page 4621.

Needless to say, in the absence of him admitting to having had sexual intercourse with the deceased, the appellant would have had great difficulty in explaining the injuries. It bears mention though that the injuries described by Dr. Abrahams were exacerbated by the DIC condition which the deceased suffered prior to her death. The court a quo was of the view that if there was 'some credence in the evidence that the ingestion of MDMA can lead to such behaviour modification it must not be forgotten that all the evidence suggests that the accused himself ingested MDMA and would therefore be equally prone to inappropriate sexual conduct or hyper sexuality. If this were the case it would go some way to explaining his sexual assault upon the deceased notwithstanding that she was no longer in no state to consent to intercourse.'62

[40] In my view it was nothing more than speculative on the part of the court a quo that the appellant himself was equally prone to 'inappropriate sexual conduct or hyper sexuality.' There was no evidence tendered by the State, through any of its witnesses, that the accused himself at the scene appeared to be under the influence of a drug that had altered his behavior, or that he appeared to have acted aggressively, to have warranted the court a quo`s speculative conclusion of a "sexual assault". It does not help to speculate on the effects of psychedelic drugs (such as MDA and LSD) and its experimental use without proper expert evidence to assist a court on its use(for amongst others, in quantity and form) and its likely impact.

62 See record page 4623.

The State also relied on the decision, as did the court a quo, in *S v Boesak* 2001 (1) SACR 1 (CC), in which the court found that an adverse inference could be made against an accused where, in the case of a prima facie case, he failed to testify. Langa DP (as he then was) stated at paragraph 24:

'The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used in evidence against that person. It arises again at the trial stage when an accused has the right to be presumed innocent, to remain silent, and not to testify during proceedings. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence.' (Internal footnotes omitted.)

In this regard the court a quo also referred to the decision of *Osman and Another v Attorney General, Transvaal* 1998 (2) SACR 493 (CC), where the following was stated at paragraph 22:

'Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a *prima facie* case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an

accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice. The circumstances in which it would be constitutionally permissible for a court to draw an adverse inference from the failure of an accused person to testify personally is not a matter which we are called upon to decide in this case and therefore I expressly refrain from doing so.'

[41] In my respectful view, the circumstances in which the applicant in the matter of *S v Boesak* found himself are very different to that of the appellant in this matter. Needless to say, each case must be judged on its own facts. In this matter is was evident why the appellant had elected not to testify, given his dilemma, and he may probably have been advised not to have done so by his legal team, who sought to argue in the court a quo that the statement that the appellant had made to the police and admitted into evidence was sufficient evidence of his version. The court a quo, correctly in my view, dealt with why that statement was not evidence before the court. That, an adverse inference was to be drawn against the appellant for having failed to have testified did not in my view trump or displace all of the other evidence relating to the element of the lack of consent that the state was required but failed to have proved. While the state had established a prima facie case that the appellant had sexual intercourse with the deceased it had in my view not established that the deceased was not able to have consented thereto. All of the evidence and the inferences to be drawn (both adverse and that favourable to the appellant) had to be considered in the determination as to whether the state had proved

beyond reasonable doubt the lack of the ability of the deceased to have consented to sexual intercourse with the appellant.

[42] In my view, the evidence with regard to whether the deceased was able to consent to sexual intercourse, in the circumstances of this matter, was wholly inadequate to sustain a conviction of the rapes beyond a reasonable doubt. There remained no onus on the appellant, given the circumstances, and the evidence tendered by the State, in particular that of Mr Manual and Ms Jade Gray to have had to literally plug the hole in the state's case. The state had not at any stage contended that the deceased was not mentally able to have consented to sexual intercourse and, to the contrary, the State maintained (even on appeal and despite the findings of the court a quo) that the deceased was not under the influence of any drugs based on its toxicology evidence.

[43] In conclusion, in my view and on the application of the principles in *R v Blom* and on the direct evidence of Mr Manual and Ms Gray and all of the other relevant evidence and the inferences to be drawn therefrom, it cannot reasonably be ruled out that the deceased was in a position to have consented to sexual intercourse with the appellant. Moreover, the appellant was in my view entitled to the benefit of the doubt that existed on the evidence with regard to what exactly the mental condition of the deceased was when she entered the tent, and whether she was

in fact able to have consented to sexual intercourse. I would have upheld the appeal on the conviction on counts 1 and 2.

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V C SALDANHA

JUDGE OF THE HIGH COURT