NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

In the matter between: Case No: CC 17/2018

Date heard: 7 – 13 November 2018

Date delivered: 15 November 2018

THE STATE

And

DONOVAN HEUGH

WANDARAY RUITERS **Accused**

JUDGMENT

Goosen J:

[1] The accused are charged with kidnapping, rape and robbery with aggravating circumstances. In addition to these charges accused 1 is also charged with two counts of pointing an object likely to cause a person to believe that it is a firearm and a further count of robbery with aggravating circumstances.

[2] Accused 1 is a twenty-five year old male. Accused 2 is a child aged 17 years. He was assisted at the trial by his guardian.

[3] The events giving rise to the charges occurred in the early morning of 17 July 2017. Accused 1 was arrested and charged for the offences during the evening of 17 July 2017. Accused 2 was subsequently arrested and charged after handing himself in to the police investigators.

[4] Accused 1 pleaded not guilty to all the charges. Accused 2 pleaded not guilty to the charges but in respect of count 6, the charge of robbery with aggravating circumstances, he tendered a plea of guilty to robbery. A section 112(2) written statement was tendered on his behalf by Ms *Coertzen*, who represented him. The prosecution did not accept the factual basis of the tendered plea.

[5] The complainant resides in Bell Road, Gelvandale. She was, at the time of the incident, employed as a teacher at a Day Care Centre in Newton Park. In order to travel to and from work she made use of public transport. She would leave home at approximately 6:00 a.m. She would wait for a taxi at the corner of Bell Road and Human Street. She would stand at the steps leading from her home. She would usually travel in the same taxi every day.

[6] On the morning of 17 July 2017 she left her home shortly before 6:00 a.m. When she got to the corner she saw the taxi heading up the road where it would usually collect other passengers before returning to where she was waiting. It was still dark.

[7] She noticed a white VW Golf turn into Human Street from Zimdahl Street. It came to a stop directly in front of her. It was very close to where she was standing at

the bottom of the stairs. The left rear door opened and a man got out. He came towards her. He was carrying a firearm. She said she 'froze'. The man grabbed her by the neck. She tried to scream but nothing came out.

[8] Another man – a younger man – got out of the rear of the car on the driver's side. He came around the vehicle towards her and grabbed hold of her bag. The two men then forced her into the back seat of the car. The man with her bag got in so that she was seated between them. The man with the firearm pressed it against her left side. He told her to look down. The vehicle drove off. Although she was made to look down she could see where they were driving. Whilst they were driving the young man was rummaging through her bag. He asked her why she has so little money in her wallet, to which she replied that she only carries her transport money. They drove along Bell Road to Kobus Road and then drove to Stanford Road which they crossed, entering the Gelvandale Sports Grounds. She explained that the driver of the vehicle and the man with the firearm were arguing. She realised that the driver was saying that the plan had only been to rob her. He didn't want anything further to do with it.

[9] When they stopped at the Gelvandale Sports Ground, the two men at the back got out with her. She was taken out of the car. The VW Golf was driven off, leaving the three of them there. It was still dark. The sun had not yet risen. There were no other people around.

[10] The complainant provided a description of the two assailants who had accosted her while waiting for the taxi. She explained that the man carrying the firearm was wearing a black zip up jacket over a top with a hood. He had a 'beanie' on his head and the hood was pulled over his head. His face was not covered and

she could clearly see his features. She had never seen him before. She was able to identify him as accused 1.

[11] The complainant said that the second man to get out of the car was also wearing a 'beanie' on his head. His face was also not covered. He was a much younger man. She identified him as accused 2. The complainant stated that after the VW Golf had driven off she was made to walk into the bushes alongside the sports grounds. Accused 1 walked alongside her pressing the firearm, which she described as small and black (and cold), against her side. Accused 2 walked behind them. He was carrying her bag. She said they walked for some distance into the bush.

[12] According to her she realized what was going to happen. They stopped at a place some distance into the bush. Accused 2 said to accused 1 that they should leave her because they had got what they wanted. He said he wanted to go home. Accused 1 became angry. He said that they are both 'in this thing together' and that accused 2 was not going to leave him alone. Accused 1 then took off his jacket and lay it down on the ground. He told the complainant to take off her trousers and lay down. Accused 2 again said they must leave her. Accused 1 then said to him that he will do what he wants him to do otherwise he would shoot them both.

[13] Accused 1 then pulled the complainant's trouser leg off her one leg. He lowered his trousers and then lay down on top of her. He inserted his penis into her vagina. She did not resist. Whilst she was being raped by accused 1 he berated her for not responding. Accused 2 was standing watching.

[14] After a while accused 1 stood up apparently because he was not satisfied. He then told accused 2 that it was his turn. Accused 2 lay down on her and penetrated her. According to the complainant she had asked the accused to use condoms. She

could not say though whether they had. Accused 2 did not rape her for long. When he got up, accused 1 then raped her again. Whilst he was raping her for a second time she saw accused 2 leave.

[15] After accused 1 had raped her for the second time she dressed. They sat and talked. The complainant was wearing a 'beanie' and earrings. The accused told her to take them off and give them to him. She also gave him her watch. The complainant said she tried to keep calm. She wanted to earn his trust so that he would let her leave. It was light by then and she could hear people nearby. She did not want to attract attention because she was afraid that the accused would cause them harm. Whilst they were sitting there her telephone rang. It was in the accused's possession. He answered. She could hear that it was her employer, *Cindy*, on the phone. The accused said '*Liezel* is in die hospital sy kom nie werk toe nie.' When *Cindy* asked who was speaking he said he was *Liezel's* boyfriend. When *Cindy* said that can't be he put the phone down. *Cindy* phoned again. The accused switched off the phone.

[16] They continued to sit and talk. The black jacket was still on the ground. The accused asked her why things did not work out with her and her baby's father. He referred to him by name. He also knew her name. The complainant said she had no idea how he knew information about her. They continued to sit there for some time. Eventually they left. They walked through the veld in the direction of Algoa Park. She walked freely alongside him. He had the firearm in his pocket. When they got to a road they turned and walked in the direction of Stanford Road. When they got to Stanford Road they boarded a taxi. At Kobus Road the accused alighted. In Bell Road the complainant got off the taxi and went home.

[17] When she got home the complainant immediately told her mother that she had been raped. Her father was called home and when he arrived they went to the police station to report the rape. The police took her to the scene which she pointed out to them. A black jacket was recovered from the place where the rapes had occurred. A photograph album depicting the scene of the abduction and the rape was compiled and submitted in evidence as an exhibit[1]. The complainant was examined and received medical treatment at the Dora Nginza Hospital.

[18] Later, on the evening of 17 July 2017 several police officers came to her home. One of the officers was in possession of a red backpack type bag. The complainant immediately recognised it as her bag and asked where they had found it. The complainant explained that the bag – which was red with a white flower design – was something she had bought. It was expensive and out of the ordinary. The police said that they may have a suspect. They asked her to provide a description. The complainant said she described accused 1 as having a piercing mark on his right eyebrow; as wearing a nose-ring on the right side of his nose and as having markings on his right hand between the thumb and forefinger. In regard to the nose-ring, the complainant explained that she had knocked it out at some stage during the incident. The accused had reacted angrily to this and had called her stupid.

[19] The complainant was taken to the Gelvandale Police Station. She was taken in the charge office, to a window through which she could see into another room. She saw accused 1 and identified him as one of the assailants. Some days later she was again taken to the police station. On that occasion she identified accused 2 as the other assailant.

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[1] Exhibit "B"

[20] The state called *Desiree Muller*, the complainant's mother who confirmed that on the morning of 17 July 2017 the complainant had arrived home shortly before 10:00 a.m. The complainant had come into her bedroom, collapsed to the floor, and told her that she had been raped. She did not provide any details, Mrs *Muller* immediately called her husband who returned from work and took the complainant to the police station. Mrs *Muller* remained at home. She was ill and on medication for flu. She stated that she had heard her daughter leave for work early that morning, although she had not seen her. She said the complainant would lock the front door and then toss the key in through the window.

[21] Dr *Moodeley*, a medical doctor employed at the Thuthuzela Care Centre at Dora Nginza Hospital, conducted an examination of the complainant on the afternoon of 17 July 2017. He recorded his findings in a J88 medico-legal report submitted as exhibit "E". On examination Dr *Moodeley* found the complainant to be distressed and traumatized. In regard to the gynaecological examination he noted bruising on the para-urethral folds, the posterior fourchette and fossa-navicularis. He also noted a vaginal discharge. These clinical findings, he stated, were consistent with forced vaginal penetration.

[22] In the medical history furnished by the complainant he recorded that she had two prior pregnancies and had delivered the children and that she had last had sexual intercourse four years prior. Dr *Moodeley* described the injuries as having been sustained within a period of twenty-four hours prior to examination. This was consistent with the allegation of assault given by the complainant. When asked to express an opinion as to whether the injuries might be explained by vigorous but consensual sexual intercourse, Dr *Moodeley* said that such injuries would not be expected. He explained that the complainant was of child bearing age. The tissues of

the vagina are naturally lubricated. During consensual intercourse the parties generally facilitate penetration. Sexual activity and stimulation increases lubrication rendering penetration easier. The position and nature of the injuries suggests resistance and that the penetration was forced. He stated that even passive resistance – i.e. by not facilitating penetration, could give rise to such injuries.

[23] In regard to so-called vigorous intercourse he stated that the vigour with which the parties engage in intercourse would not naturally cause injury. If the penetration is facilitated the vigour would likely result in a greater degree of lubrication and therefore no injuries would result. In this instance the injuries are consistent with forced penetration.

[24] The state called two further witnesses who were involved in the arrest of accused 1. Constable *Kivido* and Sergeant *Stowman* were conducting crime prevention patrols on the evening of 17 July 2017. They received a dispatch via Radio Control regarding the presence of a suspect in a rape complaint at a house at 90A Fitchard Street, Helenvale. They were provided with a description of the clothing he was wearing and his name, being *Daneevan*. They were told that the suspect was wearing a red t-shirt, blue jeans and a brown leather jacket.

[25] Three police vehicles went to the address in Fitchard Street. The police were directed to the rear of the property. *Kivido* said he heard noises emanating from an outside toilet. The door to the toilet was ajar. He identified himself as a police officer and requested the person(s) to come out. Three men emerged from the toilet. One of the men was dressed as described. He was carrying a red bag in his hand. *Kivido* asked him his name to which the suspect replied *Leeroy*. He asked a second time and was given the same response. *Kivido* said that the other policemen who were

present searched the toilet. Sergeant *Stowman* searched the suspect and the red bag. In it he found a grey pencil case and pen.

[26] *Kivido* told the suspect that they were following up on a complaint and requested him to accompany them to the police station. The suspect was not placed under arrest. At the police station the suspect was placed in what was referred to as the parade room alongside the charge office. Some other police officers were asked to 'keep an eye on him'. *Kivido* then consulted the case register and obtained the complainant's address. He said he and *Stowman,* together with another two police officers went to the complainant's house. The reason for doing so was to confirm the information before effecting an arrest.

[27] *Kivido* asked the complainant to give a description of the suspect. According to him the complainant said the suspect had a patterned hairstyle, had a nose-ring and tattoos on his arm. This was confirmed by *Stowman*. According to *Kivido* the description fitted that of the suspect at the police station. He requested the complainant to come to the station. He and *Stowman* drove ahead to ensure that the suspect was in the parade room and that the door was closed.

[28] When the complainant was asked to look through the one-way glass at the suspect she immediately identified him as one of the assailants. It is common cause that the person identified was accused 1. *Kivido* thereafter arrested and charged accused 1.

[29] Both accused testified in their defence. No further witnesses were called. Accused 1 testified that on the night of Sunday, 16th July 2017 he was in the company of accused 2. They are near neighbours and accused 2, although he is

much younger, is well known to him. They are friends. He said they had spent the day together and, that evening, they had been together at a tavern.

[30] At some time after midnight they were in Zimdahl Street. Accused 1 saw the complainant, whom he knew, walking alone in the street. He went to her and asked why she was alone. She told him that her boyfriend *Cardo* had started a row at her house and she did not want to be there. She asked him if he had a place where she could 'chill' until the next day when she had to be at work. He offered her his place. He then took her bag and gave it to accused 2 to carry.

[31] The three of them then walked to his house. Accused 2 was walking behind them. When they got to his house he went around the back and knocked. While waiting for someone to open he took the bag from accused 2 and told him he would see him the next day. A person called *Barbie* opened up and let them in. Accused 1 set out a mattress and blankets on the floor. He and the complainant sat talking. After a while they became intimate and they had consensual intercourse. They fell asleep and woke later that morning. The complainant asked him for her bag and looked inside for her phone. She discovered it missing. When she asked about it he said that perhaps accused 2 would know what happened to it.

[32] They then went to accused 2's house nearby. They saw him near the corner. Accused 1 asked him about the phone but accused 2 claimed to know nothing about the phone. The complainant was upset and said she was not going to leave the matter there. While they were standing alongside the road a taxi approached. Accused 1 stopped the taxi. He recognised the conductor as someone he knew. He asked the taxi driver to take the complainant to her home in Kobus Road. He kissed her goodbye and gave her a hug. He did not see her again that day.

[33] Later that evening police officers arrived at his house while he, *Gato* and another friend were smoking mandrax in the back toilet. They were ordered out and he was asked to identify himself. He said that Sergeant *Stowman* twice asked him his name. He gave his name as *Deneevan Heugh* and his mother also pointed him out. He denied that he had given a false name. He also denied being in possession of the complainant's red bag. He stated that earlier that day after the complainant had left he gave the bag to *Gato* to keep. *Gato* had brought it along with him. The police retrieved it when they searched the toilet.

[34] Accused 1 denied that he had been in the company of accused 2 that morning; that he had abducted the complainant; that he was in possession of a firearm and that he and accused 2 had raped the complainant. He denied that he had worn a nose-ring or had piercing marks on his eyebrows. The scar evident on his eyebrows was caused when he was struck with a stone and when he cut himself whilst trimming his eyebrows.

[35] Accused 2 testified that on the morning of Monday, 17 July 2017, before sunrise, he was in the company of a friend sitting outside a butchery in Kobus Road. He and his friend had been collecting bottles to sell. He saw accused 1 walking along the road and asked him where he was going. Accused 1 said he was going up the road. Accused 2 decided to join him. While they walked along Bell Road they saw the complainant coming towards them. Accused 2 said he decided to rob her. As they got to her accused 1 said to her. "Kom haak in" – meaning she should link arms with him. The complainant got a fright and was so shocked she apparently wet herself.

[36] They started walking first along the road towards the police station and then via another road towards the Gelvandale Sports Grounds. Accused 2 grabbed the complainant's bag as they walked and he rummaged through it. He found a small phone which he took and pushed into the front of his trousers. Accused 1 saw this and asked him what he had. Accused 2 took out the phone and gave it to accused 1. Accused 2 again rummaged in the bag. He found R50-00 in cash and an electronic tablet. The tablet had a cover which he took off and discarded. They continued walking in the direction of the Sports Grounds. As they approached accused 2 said to accused 1 that he wanted to go home. He said this because he realized what was going to happen. At the Sports Grounds, in the vicinity of an electrical substation, he asked accused 1 to leave the complainant, not to hurt her. He said he wanted to go home. According to him the complainant asked him not to leave. He told her he would stay but said to accused 1 that he was leaving. He then left and returned to the place where he was then sleeping, near his home.

[37] He admitted that he had robbed the complainant of certain items and that he had used the R50-00 to buy flavouring for a Hookah pipe and that he had subsequently pawned the tablet for R200-00. This money he also used. He denied any knowledge of a firearm and he denied having raped the complainant. He said in his evidence that later that morning he had again seen accused 1 in the company of the complainant. They had come to the place where he was staying. He was outside. He heard the complainant say to accused 1 that he had her phone. He saw accused 1 hail a taxi and give the complainant a kiss and hug when she boarded the taxi.

[38] Accused 2 denied that he was in the company of accused 1 on the night of Sunday, 16th July 2017. He denied that they had then met the complainant and that she (they) had gone to accused 1's house. Regarding the circumstances of his

arrest accused 2 stated that his aunt confronted him about his alleged involvement in the theft of certain items with accused 1. She told him the police were looking for him. He agreed to accompany her to the police station. He told her about the tablet he had pawned with his cousin and his aunt was able to retrieve it and they handed it over to the police.

Assessment of the Evidence

[39] The complainant is a single witness in relation to the commission of the offences by the accused. Her evidence must, for this reason, be treated with caution. In order to convict on the evidence of a single witness whose evidence is uncorroborated the court must be satisfied that the evidence is satisfactory in all material respects.

[40] In this instance the complainant's evidence relating the sexual assault finds corroboration in the medico-legal evidence presented by Dr *Moodeley*. His evidence was that the injuries noted during his examination of the complainant are consistent with forced vaginal penetration. He expressed the opinion that such injuries as he noted cannot be accounted for by the alleged consensual sexual intercourse pleaded by accused 1. Her evidence as to the fact that she was abducted and robbed of her bag, R50-00 in cash; a tablet and a cell phone in Bell Road is corroborated by accused 2's evidence and admissions. So too is her evidence that she ended up at the Gelvandale Sports Grounds in the company of accused 1 and 2. Her testimony that a black jacket was placed on the ground at the place where she was raped is supported by the objective evidence of what was recovered from the scene.

[41] Counsel for both accused readily conceded that the complainant was an impressive witness whose credibility they could not impugn. She gave a wholly consistent and coherent account of the events of Monday, 17 July 2017. She was supported in her testimony regarding the reporting of the rape immediately after she returned home by her mother. Her evidence that she left about 6:00 a.m. finds support from the evidence of her mother. She was honest and fair in her account. In respect of both accused 1 and 2 she presented evidence which was favourable to them. This was particularly so in relation to accused 2, to whom she referred as the young one, and whom she described as being reluctant to proceed with what she knew would happen in the bush. She said he twice indicated he wanted to leave; that he said to accused 1 not to hurt her; that they had only wanted to rob. She said that accused 1 threatened him. This all redounds to her credit as a witness and points to her honesty. The cross-examination of the complainant elicited no contradictions or inconsistencies which could be said to reflect upon the reliability of her evidence.

[42] There are several details in the complainant's account which are indicative of a truthful account. She described what she called an argument between accused 1 and the driver of the vehicle at the Sports Grounds. According to her the driver made it clear that he did not want 'to be part of this'. His words were, "Ons moes net geroof het en gelos". When they got out of the car, the driver left. She explained that accused 1 walked alongside her as they walked into the bush. Accused 2 was walking behind them. This accords with accused 1's version, albeit in apparently different circumstances. As they were walking into the bush she knew what was going to happen. It is in this context that accused 2 said he wanted to leave. The complainant said accused 1 became angry and said, "My broer, ons is saam in die ding, jy gaan my nie los nie." When they had got deep into the bushy area, the

complainant begged them to leave her. She said accused 1, referring to her said, “Jy laaik jou windgat hou, jy gaan sien wat gaan gebeur met jou.” It was then that accused 2 had said, “Kom los haar, ons het reeds gekry wat ons wou hê.” Accused 1 then threatened that, “As jy nie doen wat ek wil hê, sal ek julle albei skiet.”

[43] It was argued that notwithstanding the complainant’s honesty and credibility it must also be found that her evidence is reliable. In this respect it was submitted that the complainant’s identification of accused 1 leaves room for honest mistake. As I understood the argument, it was that the nature of the identification at the police station is unreliable. This is so because the identifying elements which the complainant gave in her description differ from those to which Constable *Kivido* and Sergeant *Stowman* testified. It was submitted that the ‘hairstyle’ description could not have been provided because the assailant was said to have worn a beanie. Since his unique hairstyle could only have been observed at the time of the parade it raises some doubt as to the propriety, so I understood, of the identification.

[44] The fallacy in the argument lies therein that the complainant did not state that she provided the police with a description of the suspect’s hairstyle – she also did not refer to tattoos on his arms. She referred to a mark on his right eyebrow – one she associated with a piercing; to a nose-ring (which she said she had dislodged) and to a mark on his right hand. It is common cause that accused 1 has two small marks on his right hand. The fact that he has extensive and obvious tattoos on his forearms is of no moment. She did not see this because he was wearing a long sleeved top. He has a mark/scar on his right eyebrow (although he claimed it was a result of being struck with a stone). Significantly, Constable *Kivido* testified that he observed, at the time of the arrest, that accused 1 had a mark on his nose which was like a nose-ring hole.

[45] The complainant's testimony regarding the identification of accused 1 must be considered in the light of her evidence as whole. It was dark when she was confronted by the two men. They both wore beanies. Accused 1 had on a 'hoody'. Their faces were however not covered. She explained that as the events progressed she had opportunity to observe the men. The complainant testified that accused 1's face was in close proximity to her. She looked directly into his face when she was raped. The rape occurred sometime after 6:00 a.m. It was dark but getting light. She remained in the company of accused 1 after the rape and thereafter they walked out of the bushy area and along the road towards Stanford Road. They were together in a taxi. She got home about 10:00 a.m., as was confirmed by her mother.

[46] The complainant was therefore in the company of accused 1 for a few hours, most of which was in daylight. She had considerable opportunity to identify the perpetrator. She provided a description of distinguishing features on his face. These features, the evidence establishes, are features of the accused's face. It was not the complainant's evidence that she identified him at the charge office parade room based on these features. Her evidence was that she saw him through the one-way glass and immediately recognised him as one of the assailants. Both *Kivido* and *Stowman* stated that her identification was immediate.

[47] A week later she correctly identified accused 2 as the second perpetrator. Accused 2 had handed himself in and admits to being in the company of accused 1 when the robbery occurred and at the Gelvandale Sports Grounds early on the morning of 17 July 2017. Having regard to all these factors there is, in my view, no room for error or honest mistake in her identification of accused 1. In any event the participation of accused 1 in the robbery and abduction of the complainant to the Sports Grounds and accused 1's presence there is confirmed by accused 2.

[48] I am satisfied that the complainant's single evidence was satisfactory in all material respects. It is also corroborated in relation to the crucial question as to forced sexual penetration. Furthermore support is to be found in the version of accused 2.

[49] Accused 1 was, is my view, not an impressive witness. His version of events is not only contradicted by the evidence of accused 2, it is also wholly improbable and far-fetched. His evidence, in effect, was that the complainant had left her home sometime after midnight because of a row caused by the father of her child. He came across her in the street and she asked him for a place to stay. Accused 2 was with him. He then took her bag gave it to accused 2 and they walked to his home. The complainant stayed over and they had sexual intercourse. She left the next day at about 10:00 a.m., after accused 2 had been confronted about a lost phone. The complainant 'left' her bag with accused 1.

[50] The improbabilities are legion. Firstly, the complainant testified that her relationship with her child's father – *Cardo* – had ended three years prior to the incident. The complainant lived with her parents. It is highly improbable that a young woman would wander into the streets, apparently all ready to go to work the next day, without any idea where she might spend the night. And furthermore, that she would decide to stay with a person entirely unknown to her. It was accused 1's version that he had only seen her once before. It is further highly improbable if not simply ludicrous that the complainant would then without demure 'become intimate' and have sexual intercourse with accused 1. According to accused 1 the complainant was going to work the next day, yet she was content to leave him at 10: 00 a.m. boarding a taxi to go home.

[51] In respect of her rucksack bag his evidence was patently contrived. He said he took it from her because he was being gentlemanly and because a girl should not carry her bag. This evidence, it should be said, served on his version, to explain accused 2's possession of stolen items. This because he gave it to accused 2 to carry. His retrieval of the bag from accused 2 and the allegation that the complainant 'inadvertently' left it when she left that morning serves to explain his possession thereof when arrested.

[52] The versions of the complainant and accused 1 are mutually destructive versions. There is no room for finding that accused 1's version is reasonably possibly true if the evidence presented by the complainant is accepted. As noted in ***S v Van der Meyden***[2]:

> "The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, R v Difford 1937 AD 370 especially at 373, 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other."

[2] 1999 (2) SA 79 (W) at 80H-J

The court went on to state[3]:

> "Purely as a matter of logic, the prosecution evidence does not need to be rejected in order to conclude that there is a reasonable possibility that the accused might be innocent. But what is required in order to reach that conclusion is at least the equivalent possibility that the incriminating evidence might not be true. Evidence which incriminates the accused, and evidence which exculpates him, cannot both be true - there is not even a possibility that both might be true - the one is possibly true only if there is an equivalent possibility that the other is untrue."

In this instance for the reasons set out in relation to the nature of the complainant's evidence and that of the accused, there is no 'equivalent possibility' that the version of the complainant is untrue.

[53] Furthermore accused 2's evidence directly contradicts accused 1 on every aspect of his version except one, namely that he saw accused 1 and the complainant together near his house before she boarded a taxi. Accused 2 is young and apparently suffers some learning disability. Notwithstanding this he was not a poor witness. He gave an account which corresponds with that of the complainant in important respects. Thus he confirmed that the incident had occurred very early on the morning of Monday, 17 July 2017 before sunrise. It had occurred in Bell Road. He had grabbed the complainant's bag while accused 1 had taken hold of the complainant. The complainant's response was shock and fear. He removed items from the bag. The complainant was taken to the Gelvandale Sports Grounds.

[3] At page 81E-G

[54] Accused 2's version of events differs from the complainant only in respect of the mode of travel to the Sports Grounds; the presence of a firearm; the involvement of a third person and the involvement of accused 2 in the rape. Accused 2 came to be arrested and charged as a result of his aunt confronting him about allegations of his involvement in the crimes. He admitted that he had been involved in stealing certain items and that he had pawned the tablet with a family member for R200-00. His aunt took him to the police and was instrumental in returning the tablet.

[55] In my view his admissions in the evidence given by him, are to be seen in this light. His denial of involvement of another person; the use of a motor vehicle and the rape of the complainant are self-serving and seek to lessen both his and accused 1's role. Accused 2 confirmed that he had been told by a certain Pietertjie to place the blame on accused 1. Counsel for accused 1 rightly did not seek to make anything of this. Accused 2 did not in fact seek to place the blame on accused 1. If anything he sought to provide some support for accused 1's contrived version regarding the complainant boarding a taxi the following morning.

[56] For the same reasons as set out above there is no possibility that accused 2's exculpatory version in respect of the rape charge can be true. As observed by Nugent J in ***Van der Meyden*** (*supra*)[4], "It is difficult to see how a defence can possibly be true if at the same time the State's case with which it is irreconcilable is 'completely acceptable and unshaken'." That is the case in this instance. The state's case founded upon the complainant's version is completely acceptable and, it was conceded, remained unshaken.

[4] Page 81I

[57] I have already indicated that the complainant gave an honest account of what occurred. Her account provides considerable exculpatory support for accused 2. Her evidence as to his state of mind; his reluctance to participate in what she knew was coming i.e. that she would be raped; and the threat directed at him demonstrate her honesty. If indeed accused 2 had not participated as he claimed, then her further damning evidence about him watching whilst she was raped by accused 1 and thereafter himself raping her, would suggest a malicious fabrication. This would be entirely inconsistent with her otherwise fair and sympathetic account of accused 2's role.

[58] For reasons I have already indicated accused 1's account may be safely rejected as false. In so far as accused 2's evidence is concerned, where it is in conflict with that of the complainant it must also be rejected as false.

The Charges

[59] Accused 1, as indicated at the outset, was charged with six counts, two of which relate to pointing of an object which is likely to lead a person to believe it is a firearm. He is also charged with two counts of robbery with aggravating circumstances.

[60] The complainant's evidence was that accused 1 was in possession of what she described as a firearm (a small, black, cold object) throughout. She saw it when accused 1 got out of the car; she felt it pressed against her side whilst driving and again when they walked into the bush and he had it in his hand when he threatened to shoot her and accused 2.

[61] Section 120(6)[5] of the ***Firearms Control Act***[6] provides that:

> "(6) It is an offence to point-
>
> (a) any firearm, an antique firearm or an airgun, whether or not it is loaded or capable of being discharged, at any other person, without good reason to do so; or
>
> (b) anything which is likely to lead a person to believe that it is a firearm, an antique firearm or an airgun at any other person, without good reason to do so."

[62] Whether the object referred to by the complainant was in fact a firearm is irrelevant, for purposes of counts 1 and 5 of the indictment. It suffices that the complainant believed that it was. Her evidence establishes that she did.

[63] Accused 1 is charged with two counts of contravention of s 120(6). The complainant's evidence was that the firearm was pointed at her at various stages during her ordeal: when she was in the car; while they were walking in the bush and when they sat talking after she had been raped. As I understood her evidence the firearm was constantly present and visible, at least until they walked back towards Stanford Road later that morning.

[64] In these circumstances, it seems to me, that there is no basis to differentiate instances when the object was pointed at the complainant. There is certainly no

[5] Subsection (6) was substituted by s 39(d) of Act 28 of 2006 and came into operation on 17 August 2007 by Proclamation. Government Gazette No. 30210 Vol. 506 dated 22 August 2007.
[6] Act No, 60 of 2000

basis to find that accused 1 had formulated a separate intention in relation to the pointing of the object on separate occasions. Accordingly the accused can only properly be convicted of a single count of contravention of s 120(6).

[65] In respect of the robbery charge, accused 2 is, on his version, guilty of robbery. The question relates to whether there were aggravating circumstances present. Accused 1 was charged with two counts. Count 6 relates to the robbery which occurred prior to the rape. The complainant's evidence establishes that accused 2 took possession of her bag. Accused 1 was given her phone and he remained in possession of it. It was not recovered. Accused 1 was later found in possession of her handbag and the tablet was recovered when accused 2 was arrested. The accused clearly made common cause in the carrying out of the robbery. Accused 1 was in possession of a firearm. The complainant was physically overwhelmed and deprived of her possessions.

[66] In ***S v Mbele***[7] it was held that:

> "The wording of the relevant enactment is clear and it says that aggravating circumstances in relation to robbery mean and include a threat to inflict grievous bodily harm. It is, to my mind, a question of fact whether the accused in any given case actually threatened to inflict grievous bodily harm. If he did, then the requirements of the section are complied with. There is no doubt that threats can be made not only by words but also by conduct; a man who points a fire-arm at another and says - 'Hand over your money' does not need to add - '. . . if you don't I shall shoot you'. The pointing of the fire-arm is as eloquent as any words could be. There can clearly be a threat by conduct and by implication for the purposes of the section."

[7] 1963 (1) SA 257 (N) at 260A-C

[67] In this instance accused 1 carried the firearm openly; grabbed the complainant around the neck and forced her into the car. He then pointed the firearm at her both in the car and thereafter. This conduct – even in the absence of words conveying a threat of grievous bodily harm – is sufficient to establish the existence of aggravating circumstances present at the time of commission of the offence of robbery in terms of s 1(b)(iii) of the ***Criminal Procedure Act***[8] (see ***R v Zonele and Others*** *1959 (3) SA 319 (A)*; ***S v Mbele*** (*supra*); ***S v Hlongwane*** *2014 (2) SACR 397 (GP) at par [28]).*

[68] The pointing of the firearm also constitutes aggravating circumstances in terms of s 1(b)(i) of the ***Criminal Procedure Act***. In ***Hlongwane*** (*supra*) the court (at paragraph [26]) cited with approval the following passage from ***S v Mthembe***[9] where the court stated that:

> "'Notionally the word wield signifies some form of physical application (use) of the object which is wielded. It seems to suggest something more than merely referring to it, or possession of it by the robber.
>
> There appears to me to be some logic attendant upon that interpretation, in that the wielding of a firearm, in the sense of pointing, brandishing, flourishing it, et cetera, would carry with it a more poignant threat to life or to do grievous bodily harm, thus bringing about a circumstance which may aptly be described as an aggravating circumstance.'"

The court in ***Hlongwane*** went on to hold:

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[8] Act No, 51 of 1977
[9] 2004 JDR 0454 (W)

> "[30] In order to give effect to the intention of the legislature as discussed earlier, the first subparagraph of the definition of 'aggravating circumstances' seeks to describe the actus reus by reference to the external manifestation of a deliberate action involving a weapon where, by such action or other appearance, the assailant indicates that he would be prepared to use it. No proof beyond an action which amounts to 'wielding' a dangerous weapon during the course of a robbery (as defined) is required in order for aggravating circumstances to be present under subpara (i)."

[69] I am satisfied that in respect of count 6, for which both accused are charged, aggravating circumstances are established.

[70] In respect of count 7 – the robbery which occurred after the rape of the complainant and for which accused 1 alone is charged, I am also satisfied that aggravating circumstances are established. That is so because the complainant's evidence establishes that accused 1 continued to wield the firearm. It was pointed at her whilst they sat talking. In any event, the threat of grievous bodily harm continued throughout. The complainant said that when she was asked to give her beanie and earrings to him she did so 'because he had already taken so much from me'. This was clearly a reference to the fact that she had already been raped. The prior threat of violence and the actual violence perpetrated upon her and the continued threat posed by the pointing of the firearm clearly establish aggravating circumstances.

[71] Finally, there is the kidnapping charge and the rape charges preferred against the accused. The complainant's evidence establishes beyond doubt that she was abducted under threat of violence and was deprived of her freedom. She was then transported under compulsion to the Sports Grounds where she was raped by both

accused and by accused 1 on more than one occasion. Having regard to all of the evidence these charges are proved beyond a reasonable doubt as against accused 1.

[72] Ms *Coertzen*, for accused 2, conceded that the charge of kidnapping is proved, even on his version. Ms *Coertzen* argued however that even accepting the state's version the onus of proof in respect of the rape charge had not been discharged. In this regard Ms *Coertzen* argued that the complainant's evidence was that accused 2 did not wish to participate in the rape; that he was threatened with violence by accused 1; that he was clearly scared and that he left immediately after the offence was committed.

[73] In order for an act to be justified on the ground of necessity it must be established,

(a) that a legal interest of the accused was threatened or endangered;

(b) the threat must have commenced or was imminent;

(c) it must not have been caused by the accused's own fault;

(d) the accused must be aware of the threat;

(e) the act must have been necessary in order to avert the threatened harm; and

(f) the means used must have been reasonable in the circumstances.[10]

[10] See CR Snyman, Criminal Law 4th Ed, p 117-119; S v Goliath 1972 (3) SA 1 (A)

[74] In this instance the only evidence as to the circumstances of compulsion is that of the complainant. Accused 2 denied that accused 1 threatened him at any stage. He did not therefore testify to the effect that the threat had upon him; that he believed it would be carried out and that there was no means of averting the threatened harm other than to rape the complainant.

[75] There is accordingly no evidence upon which it can be found that he was not only aware of the threat but that he believed that it would be carried out and that his conduct was reasonable in order to avert the danger. The complainant only testified to accused 2's reluctance and the resultant threat in respect of the rape. Until that stage accused 2 was an enthusiastic participant. Indeed his own evidence was that he had decided to rob the complainant when he and accused 1 saw her in Bell Road. Again on his own version the complainant was held under threat of harm and taken to the deserted bushy area adjacent to the Sports Grounds. No explanation was given for this in the light of the apparent intention only to rob the complainant.

[76] In ***S v Lungile and Another***[11] it was stated[12] that:

> "A person who voluntarily joins a criminal gang or group and participates in the execution of a criminal offence cannot successfully raise the defence of compulsion when, in the course of such execution, he is ordered by one of the members of the gang to do an act in furtherance of such execution. As was said by Holmes JA in S v Bradbury 1967 (1) SA 387 (A) at 404H:
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> 'As a general proposition a man who voluntarily and deliberately becomes a member of a criminal gang with knowledge of its disciplinary code of

[11] 1999 (2) SACR 597 (SCA)
[12] At page 601E - F

vengeance cannot rely on compulsion as a defence or fear as an extenuation.'"

[77] In the light of the facts of this case it is doubtful that a plea of necessity could properly be raised. However, that need not be decided. It is sufficient to find that the available evidence does not meet the requirement for a finding that the accused's rape of the complainant was justified by necessity. In the circumstances the charge of rape by accused 2 is proved beyond a reasonable doubt.

[78] In the result I make the following orders:

1. Accused 1 is found guilty on counts 1, 2, 3, 6 and 7. He is found not guilty on count 5.

2. Accused 2 is found guilty on counts 2, 4 and 6.

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G.G. GOOSEN

JUDGE OF THE HIGH COURT

Appearances:

Obo the State: *Adv. M. Driman*
National Director of Public Prosecutions

Obo Accused 1:	*Prof. D. Erasmus*
Instructed by:	*Legal-Aid South Africa, Port Elizabeth*
Obo Accused 2:	*Adv J. Coertzen*
	Legal-Aid South Africa, Port Elizabeth