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REPUBLIC OF SOUTH AFRICA



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

- (1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

DATE 29/7/2017

SIGNATURE _____

CASE NO: **SS149/2015**

In the matter between:

THE STATE

and

NDZIWENI: LAWRENCE ZAMILE

Accused

JUDGMENT

OPPERMAN J

INTRODUCTION

[1] Mr Ndziweni has been arraigned on one (1) count of housebreaking with the intention to rob and robbery with aggravating circumstances, four (4) counts of rape, three (3) counts of kidnapping, one (1) count of attempted kidnapping, four (4) counts of robbery with aggravating circumstances, one (1) count of attempted murder and four (4) counts of possession of unlicensed firearms. He pleaded not guilty and tendered no plea explanation as envisaged in terms of Section 115 of Act 51 of 1977 (“CPA”). The minimum sentences applicable in terms of Section 51(1) and 51(2) of Act 105 of 1997 (“**The Criminal Law Amendment Act**”) were explained.

[2] In terms of section 153(3)(a) of the CPA, it was ordered that all persons whose presence was not necessary, would not be present at the proceedings. The judgment in this matter shall not be delivered in open court as this court is of the opinion that the identity of the complainants would be revealed thereby. No person shall publish in any manner whatever any information which might reveal the identity of any complainant in these proceedings. Attention is drawn to the provisions of section 154(5) of the CPA which makes the publication of any information in contravention of orders granted in terms of sections 153(3) and 154(2), an offence. The aforesaid order shall not prevent the publication of information relating to the name and personal particulars of the accused, the nature of the charges against him (without disclosure of the identity of any individual mentioned in such charges), the plea and the verdict.

CHARGES AGAINST MR NDZIWENI

Counts 1 - 3: Complainant H R

Count 1 - Housebreaking

[3] The State alleges that upon or about 25 December 2012 and at or near Unit 74 Graceland Complex 5th Avenue in Norwood Randburg, the accused did unlawfully and intentionally break and enter into unit 74 Graceland Complex Cleveland 5th Avenue in Norwood Randburg with the intent to rob and did assault H R and did there and then with force take items which are at this stage unknown to the state from H R being her property or in her lawful possession, and did thereby rob her of same, the aggravating circumstances being that a firearm was used.

Counts 2 - Rape

[4] The State alleges that on or about 25 December 2012 and at or near Unit 74 Graceland Complex 5th Avenue in Norwood Randburg, the accused did unlawfully and intentionally commit an act of sexual penetration with H R, by inserting his penis into her vagina without her consent.

Counts 3 - Possession of an unlicensed firearm

[5] The State alleges that on or about 25 December 2012 and at or near Unit 74 Graceland Complex 5th Avenue in Norwood Randburg, the accused did unlawfully and intentionally possess a firearm of which the further specifications are unknown to the state, without being the holder of a license, permit or authorization to possess such a firearm.

Counts 4 - 7: Complainant Z N

Count 4 - Kidnapping

[6] The State alleges that on or about 27 June 2013, and at or near President Fouche Street, in the district of Johannesburg, the accused did unlawfully and intentionally deprive Z N of her freedom of movement, by forcing her to accompany him.

Count 5 – Robbery with aggravating circumstances

[7] The State alleges that on or about 27 June 2013 and at or near President Fouche Street, in the district of Johannesburg, the accused did unlawfully and intentionally assault, Z N and with force and violence take from her possession a Nokia C2 Cellular phone, her CAPITEC Bank Card and R 50. 00 cash her property or property in her lawful possession and did thereby rob her of same. Aggravating circumstances as defined in section 1 of Act 51 of 1977 being present, namely he threatened to shoot her with a firearm.

Count 6 - Rape

[8] The State alleges that on or about 27 June 2013 and at or near President Fouche Street, in the district of Johannesburg, the accused did unlawfully and intentionally commit an act of sexual penetration with 31 year old Z N, by penetrating her vagina with his penis, without her consent, in a gang rape situation, where more than one act of sexual penetration was committed without her consent by more than one person in that she was raped by the accused as well as other co-perpetrators.

Count 7 – Possession of an unlicensed firearm

[9] The State alleges that on or about 27 June 2013 and at or near President Fouche Street, in the district of Johannesburg, the accused did unlawfully and intentionally possess a firearm of which the further specifications are unknown to the state, without being the holder of a license, permit or authorization to possess such firearm.

Counts 8 – 10: Complainant S N**Count 8 - Kidnapping**

[10] The State alleges that on or about 16 December 2013, and at or near President Fouche Street, in the district of Johannesburg, the accused did unlawfully and intentionally deprive S N of her freedom of movement, by forcing her at knife point to accompany him.

Count 9 – Robbery with aggravating circumstances

[11] The State alleges that on or about 16 December 2013, and at or near President Fouche Street, in the district of Johannesburg, the accused did unlawfully and intentionally assault, S N and with force and violence take from her possession a Blackberry cellular telephone, and R 70 cash her property or property in her lawful possession and did thereby rob her of the same. Aggravating circumstances as defined in section 1 of Act 51 of 1977 being present, namely a knife.

Count 10 - Rape

[12] The State alleges that on or about 16 December 2013, and at or near President Fouche Street, in the district of Johannesburg, the accused did unlawfully and intentionally commit an act of sexual penetration with 21 year old S N, by inserting his penis into her vagina without her consent.

Counts 11 – 15: Complainant D S**Count 11 - Kidnapping**

[13] The State alleges that on or about 28 February 2014, and at or near President Fouche Street, in the district of Johannesburg, the accused did unlawfully and intentionally deprive D S of her freedom of movement, by forcing her at gunpoint to accompany him.

Count 12 – Robbery with aggravating circumstances

[14] The State alleges that on or about 28 February 2014, and at or near President Fouché Street, in the district of Johannesburg, the accused did unlawfully and intentionally assault, D S and with force and violence take from her possession a Nokia C3 cellular telephone, ABSA bank card and R 50 cash her property or property in her lawful possession and did thereby rob her of same. Aggravating circumstances as defined in section 1 of Act 51 of 1977 being present, namely a firearm.

Count 13 - Rape

[15] The State alleges that on or about 28 February 2014, and at or near President Fouché Street, in the district of Johannesburg, the accused did unlawfully and intentionally commit an act of sexual penetration with 29 year old, D S by penetrating her vagina with his penis, without her consent.

Count 14 – Attempted murder

[16] The State alleges that on or about 28 February 2014, and at or near President Fouché Street, in the district of Johannesburg, the accused did unlawfully and intentionally attempt to murder D S, by attempting to shoot her with the firearm.

Count 15 – Possession of unlicensed firearm

[17] The State alleges that on or about 28 February 2014, and at or near President Fouché Street, in the district of Johannesburg, the accused unlawfully and intentionally possess a firearm of which the further specifications are unknown to the state, without being the holder of a license, permit or authorization to possess such a firearm.

Counts 16 – 18: Complainant A N**Count 16 – Robbery with aggravating circumstances**

[18] The State alleges that on or about 20 May 2014, and at or near President Fouche Street, in the district of Johannesburg, the accused did unlawfully and intentionally assault, A N and with force and violence take from her possession a handbag, iPhone 5S and a Blackberry cellular telephone, and R 700 cash her property or property in her lawful possession and did thereby rob her of same. Aggravating circumstances as defined in section 1 of Act 51 of 1977 being present, namely a firearm.

Count 17 – Attempted kidnapping

[19] The State alleges that on or about 20 May 2014, and at or near President Fouche Street, in the district of Johannesburg, the accused did unlawfully and intentionally attempt to deprive A N of her freedom of movement, by attempting to drag her at gunpoint to bushes nearby.

Count 18 – Possession of unlicensed firearm

[20] The State alleges that on or about 20 May 2014, and at or near President Fouche Street, in the district of Johannesburg, the accused did unlawfully and intentionally possess a firearm of which the further specifications are unknown to the state, without being the holder of a license, permit or authorization to possess such a firearm.

EVIDENCE

[21] The evidence presented in this matter relates to events which occurred on five separate occasions. I intend summarising the evidence chronologically with reference to these dates and to deal with the forensic evidence separately.

Counts 1 to 3 – Ms H R

[22] Having given notice of its intention to do so in its section 150 of the CPA opening address, the State, just prior to the conclusion of its case, brought a successful application to admit the hearsay evidence of Ms Helena R in terms of the Law of Evidence Amendment Act 45 of 1988 (**'the Hearsay Act'**). The court allowed it and the reasons for this ruling were provided at the time. Such reasons are, accordingly, not repeated herein. The court ordered that the entire content of exhibit "S" be received for the truth of the content thereof, which was a commissioned statement of Ms H R. The court also and in terms of the same application, ruled that that which was communicated to Dr Van Aardt and which is recorded in the J88 received in evidence as exhibit "D," was also to be considered received for the truth of the content thereof. The ruling applied similarly to that which had been said to Ms Volschenk, a nurse at the Olivedale Clinic on 25 December 2012 and who made a contemporaneous note in the sexual assault documentation, which was received as exhibit "L". The summary of the evidence which follows, has been extracted from the foregoing three documents: On 25 December 2012, Ms R, 53 years of age at the time, was residing at [...], Northwold (**'the scene of the crime'**). She went to church and arrived home at 01h50 during the morning of 25 December 2012. She parked her car outside her flat and carried things from the boot into the flat. Whilst doing this, three men approached her, one was wielding a firearm. She was ordered not to scream and was escorted into the flat. They demanded money to which she explained that she did not have any but that she had a handbag, which was in the bedroom. They ordered her to open the bag and they checked the content. Her hands were tied with a tracksuit and they moved around taking goods. One of the

assailants ordered her into the bathroom and told her that if she did not co-operate he would shoot her. He had a gun, which he put on the rim of the bath. He started to undress Ms R and then proceeded to have sexual intercourse with her without the use of a condom even though she had begged him to use one. After the three attackers left the house, Ms R drove to the security guards at the complex and returned with them. She ascertained that her plasma television set to the value of approximately R 3 500, a computer to the value of approximately R 2 500, a Blackberry cellular telephone to the value of approximately R 3 500, another Nokia cellular telephone to the value of approximately R 300 and jewellery to the value of approximately R 30 000 had been taken. She did not have insurance in respect of such stolen items. There had been three perpetrators. The one had a firearm, the other a brown blanket which was wrapped around his chest and the other was wearing brown clothes. They were unclean. Ms R explained to Dr Van Aardt that the rapist had ejaculated when raping her.

[23] Certain formal admissions in terms of section 220 of the CPA were made in relation to this incident. They include:

- 23.1. That on 25 December 2012 Sergeant Thabiso Stephen Molefe from the local criminal records centre, Krugersdorp, had attended the scene of the crime and had compiled a photo album marked exhibit “C” which reflected the scene of the crime as it appeared on 25 December 2012. The correctness of the photographs as depicted in exhibit “C” were admitted.
- 23.2. That on 25 December 2012 Dr Michael Gustaf Van Aardt had examined the complainant Ms R at the Netcare Olivedale Hospital.

- 23.3. That Dr Michael Gustaf Van Aardt had recorded his findings and what was told to him on a J88 form, and the correctness and the truth of the contents of such J88 was admitted.
- 23.4. During the examination Dr Michael Gustaf Van Aardt had used a sexual assault evidence collection kit to take samples from the complainant. The samples were placed in the sexual assault evidence collection kit which was then sealed with seal number 11D1AA7196XX. During the course of the examination the panties of the complainant were also collected.
- 23.5. That in the early hours of the morning of 25 December 2012 Ms R had summoned the police to the scene of the crime.
- 23.6. That Constable Raedani had attended the scene of the crime. That the complainant Ms R had reported a rape and robbery at gunpoint to him and that such incident had occurred on 25 December 2012 at 02h00 am at the scene of the crime.
- 23.7. That Ms R's complaint led to the opening of case docket Honeydew Cas 1102/12/2012.
- 23.8. That the scene of the crime was 500m from the Total garage at corner Malibongwe and President Fouche Drive. That such complex was marked with "HR" on the Google Map which was received as exhibit "**B**".
- 23.9. That the police had received information that Ms R had emigrated to Portugal and that she was presently untraceable.

23.10. That the sexual assault evidence kit with seal number 11D1AA7196XX had been booked into the SAP13 register of the Honeydew SAPS on 25 December 2012 and that such kit was in an exhibit bag number PAD000130486R.

23.11. That on 14 January 2013 Warrant Officer Ngubeni had taken the crime kit with seal number 11D1AA7196XX which had been sealed in the evidence seal bag with seal number FSG634080 to the forensic science laboratory and that the said bag had been received into the administration system of the forensic science laboratory in Pretoria by Mr Maswanganye.

Dr Van Aardt

[24] Dr Van Aardt, a medical doctor since 2008, testified that he had been on duty on 25 December 2012 at the Netcare Olivedale Hospital. He explained that he had completed the J88 in respect of Ms R (the truth of the content which had been formally admitted). He had also brought his consulting notes to court which was received as an exhibit. He testified that he had completed the J88 and that Ms R had told him that her last consensual intercourse had been on 22 December 2012. He found quite a lot of ejaculate present in her vaginal vault. He explained that ejaculate was sperm. He said that blood and urine samples were taken and pregnancy tests were done. He concluded that there was evidence of forced vaginal penetration with ejaculation.

[25] He said that four swabs were taken by him. Each swab was individually sealed and placed in a kit but he could not testify about the placing of the swabs into such kit as this function was performed by the nurse who had assisted him. He did

not have an independent recollection of the nurse sealing the sexual evidence kit but because his signature appeared on the hospital notes under the heading “Evidence collection”, he must’ve witnessed the sealing of the kit. He confirmed that the evidence collection kit would have been sealed in front of the patient.

[26] The J88 reflected under section “F”, that the evidence collection kit had been sealed with seal number 11D1AA6551. This, he explained, was not done in his handwriting.

Dominique Volschenk

[27] Ms Volschenk, a qualified nurse since 1993, explained that she had been employed as such at the casualty unit at the Olivedale clinic on 25 December 2012 when, in the early hours of the morning Ms H R had presented as a patient. She explained what a crime kit was, how it contained individual swabs which got sealed individually and that it was only opened once the doctor was ready to examine the patient. She had taken down the history from Ms R and had recorded such version in the hospital notes which document was received as exhibit ‘L’. She testified that she had recorded accurately that which had been narrated to her. She testified that she had been trained to record these facts very carefully as she might be required to testify in court. It was the first time she had met Ms R.

[28] She had assisted Dr Van Aardt. She had opened each swab, handed it to him and sealed it again. After all the swabs were taken, she sealed the sexual assault crime kit. An inventory form accompanied the kit. She explained that she had given this to the constable who had collected the kit. This piece of evidence appears to have been a mistake as it was ultimately received by the forensic laboratory having been sealed into the sexual assault crime kit. She testified that Ms R had received

pregnancy preventative medication in addition to anti retrovirals. She had to receive tests for a period of one year after the rape to ensure that she had not been infected with the HIV virus. The anti retroviral medication makes a patient nauseous which nausea persists for about three weeks. Medication to counter this effect was also administered to Ms R.

Cst Mubaya

[29] Prince Mashudu Mubaya, testified that he was a constable at the FCS Unit (Family Violence, Child Protection and Sexual Offences Unit) in Honeydew. On 25 December 2012 his duty was to collect a crime kit from the Olivedale Clinic and to take it to the Honeydew police station. He explained that he had erroneously written the 'serial' number rather than the 'seal' number in the space provided for such number, on the J88 of Ms R (exhibit 'D'). He had collected the J88 form and the sexual crime kit and had given it to the policeman on duty who had booked it into the SAP13 under entry 2532. He had penned his signature to the relevant entry in the SAP13. A copy of the SAP13 was handed in and his signature appears on this document. The person who received these items took the J88 and the crime kit, placed it in a bag and used crime bag number PAD000130486.

W/O Ngubeni

[30] Mr Makomani Joel Ngubeni ("**Mr Ngubeni**") testified that he was a member of the SAPS stationed at Honeydew and that he had the rank of Warrant Officer. He had 24 years' experience and was attached to the FCS Unit. He had been stationed at that unit for 12 years. He testified that he took the crime kit which was in a bag with number PAD000130486R, opened the bag, removed the original J88 which was

inside the bag and sealed the sexual crime kit in a new bag with seal number FSG634080. He testified that he hadn't tampered with the crime kit and if he had, the forensic laboratory in Pretoria would not have received the bag or kit.

[31] He explained further that from 25 December 2012 until 14 January 2013, the kit was stored in a cabinet to which only he held a key. No one else had access to this exhibit during this period.

[32] The SAP13 (which was received as exhibit "T") reflected that Constable Mashiane had booked out the kit. He testified that he had received it from Mr Mashiane and had then placed it in this locked cabinet to which only he had access.

Lufuno David Nekhwalivhe

[33] Sergeant Nekhwalivhe testified that he had 12 years' experience in the SAPS and that he was on duty on 25 December 2012. During the early hours of the morning on 25 December 2012 he was called to the scene of the crime. He went there because the police had received a complaint of house robbery. They were the first officers on the scene. It was him and Constable Marumo. He found Ms R and established from her that a robbery had occurred where a firearm had been used and that she had been raped. He then contacted the officers who work with rape matters. He also informed the LCRC officials, these are the officials who take photographs and uplift fingerprints. They arrived and he pointed out what had occurred and where it had happened. Prior to them arriving, he took a statement from Ms R. He identified the statement that had been taken from her and stated that it had been done in his handwriting. It was handed in as an exhibit. He explained that it was taken down as Ms R was narrating. He also explained that after it had been written down he had

given her the opportunity to read the document. He had asked her whether she confirmed the correctness of the content and that she had done so. She had appended her signature to the statement in his presence. He said that he had an independent recollection of this incident because a firearm had been used and that an old lady had been raped. He looked at the content of exhibits “C” and confirmed that the photographs depicted Ms R’s apartment as it appeared on 25 December 2012.

Constable Raedani

[34] He testified that he had been a Constable in the SAPS on 25 December 2012. That he had joined the SAPS on 23 May 2003 and had resigned on 6 February 2014. In the early hours of the morning on 25 December 2012 he had been called to the scene of the crime. He found Ms H R, some uniformed police officers as well as the complex security officers. Ms R was seated in her sitting room busy explaining what had happened. He recalls that she was 53 years old at the time. Two days later, he was appointed the investigating officer in the case. He had regard to the photographs which form part of the album received as exhibit “C” and he recognised the property he had gone to on 25 December 2012. He explained that this complex was approximately 500 meters away from the corner of Malibongwe and President Fouche Streets. He said that the drawers had been opened and the apartment had clearly been ransacked. There was a candle from which a finger print had been lifted. He noticed that a computer had been taken and that the television set had been removed. He had interviewed the victim who was in a state of shock. She spoke English to him. By virtue of what was communicated to him the fingerprint experts and the photographer were summoned. He said the precast wall was photographed

and forms part of the album. He explained that it had been broken to gain access to the complex and that is why it was photographed. One of the photographs, photo 12 depicted a shoe which he said Ms R identified as being hers. Being the investigating officer in the case, he saw and read her statement which had been taken down by Constable Nekhwalivhe. After he interviewed Ms R, he drove her to the Olivedale Clinic for purposes of having her examined and swabs taken as she had told him that three male persons had been involved in the robbery and that one of them had raped her.

[35] He explained that a Sibao Thabo Tshabalala had been linked to the robbery by fingerprints which were found at the crime scene but that the DNA results had excluded him as the perpetrator of the rape. He was sentenced for the house robbery.

[36] Ms R told him that she had come back from church during the early hours of the morning of 25 December 2012. She had some items in her vehicle, which she had placed in the kitchen. On her way back to the vehicle to fetch the remaining goods, three men accosted her. One had a firearm. They took her to her bedroom. They instructed her not to make a noise and to co-operate. One of them tied up her hands and put her in a cupboard. They then started to ransack the house. Before they left, one fetched Ms R from the cupboard and took her to the bathroom. He had a firearm with him, which he put on the rim of the bathtub. He undressed her, made her bend forward and raped her. She asked him to put on a condom but he did not. The firearm was used to frighten her. She had described that it was a small handgun. He explained that Ms R had taken him through the house to show him where everything had happened and she had shown him where the gun had been placed

on the bath rim. Constable Raedani was the person who had taken her to the clinic and he had made a list of the missing items. He explained that there was no hesitation when Ms R had explained to him what had occurred. He had compiled a check list which was received as evidence and marked as exhibit “P”. Mr Raedani’s scene statement was put to him during cross examination and it was received as evidence and marked as exhibit “Q”. It was put to him that none of the detail of what had occurred to Ms R was contained in either the checklist compiled by him or in his scene statement and that he had clearly read the statement of Ms R as taken down by Constable Nekhwalivhe, to refresh his memory in preparation of giving evidence. He admitted that he had read through Ms R’s statement. During re-examination Constable Raedani was referred to the covering sheet of exhibit “D” which is the covering sheet to the J88. This was a document Constabel Raedani had completed on 25 December 2012 in which he had recorded the following:

“On 2012-12-25 at about 02h00, the complainant came home from church, as she took stuff from the car, she was approached by three black males who forced her into the house and robbed her items, and one of them took her to the bathroom and raped her.”

Counts 4 to 7 – Z N

[37] Ms Z N testified that on 27 June 2013 she was [...] years of age. She said that she was going home from work when she alighted from the taxi at the Total garage, corner Malibongwe and President Fouche Streets. She had phoned her brother who ordinarily walks her home, but on this day had decided not to do so. She was walking along President Fouche Street. A person approached her from the opposite direction, walked past her and then grabbed her from behind and threw her

into the veld. Another person crossed the road and also grabbed her. One assailant had a knife, the other a firearm. They ordered her to walk. They crossed the river. They instructed her not to scream. Both assailants had knives. One assailant was wearing a balaclava. They put the gun to her head. The taller one then demanded money. He took her bag and threw the contents on the ground. They noticed her Capitec gold card and demanded the PIN code. Ms Z N complied. The perpetrator who wanted the PIN code opened her shirt to take her jewellery. She had none, whereupon she was instructed to take off her trousers. One of the perpetrators then had sexual intercourse with her without wearing a condom and he ejaculated. The second perpetrator then had sexual intercourse with her without the use of a condom and he ejaculated. Both the first and second perpetrators then again raped her. The first perpetrator left whilst the second perpetrator guarded her. A third person arrived. The third perpetrator moved her to another spot in the veld and he proceeded to have sexual intercourse with her, not wearing a condom and ejaculating. This third person told her that they had been looking for her as she is a person who always walks past. They also wanted to know where her boyfriend was who always accompanies her. She explained that that was her brother. The third person then asked whether she was going to make disclosures at home about what had occurred to her and she said that she wouldn't. He said that if she did, he would shoot at her during the day when she past that route. The third perpetrator instructed the second perpetrator to accompany Ms Z N out of the veld. She came upon a woman with children and they assisted her. She was taken to the Honeydew Police Station.

[38] She explained that her bankcard, her money (approximately R 50) and her Nokia cellular telephone, had been taken from her. She said that on the following day

when she went to the scene of the crime with the police officer, she had found her Capitec bank card. She explained that she was emotional, she was crying and that she was taken to the Olivedale Clinic where she was examined by a doctor. She hadn't bathed or changed her clothing before going there and that she had a vaginal examination done where specimens were taken. She explained that she had to go back for almost a year for HIV prevention medication. Ms Z N was not cross examined at all.

[39] Certain formal admissions in terms of section 220 of the CPA were made.

They include:

- 39.1. That on 28 June 2013, Constable Ithumeleng Tshetlthane from the local criminal records centre had attended the scene of the crime at corner of Malibongwe and President Fouché Streets and had compiled a photo album which was received as exhibit "F" which reflected the scene as it appeared on 28 June 2013.
- 39.2. That on 28 June 2013 and on the scene of the crime a Capitec card belonging to Ms Z N had been recovered. It was photograph number 4 on exhibit "F". The correctness of the photographs as depicted in exhibit "F" was admitted.
- 39.3. On 28 June 2013 Dr N S C Van Der Merwe had examined Ms Z N at the Netcare Olivedale Hospital.
- 39.4. Dr N S C Van Der Merwe had recorded his findings and what was told to him on a J88 form. The original was received as evidence marked as exhibit "G" and the correctness and truth of the contents was admitted.

- 39.5. That during the examination by Dr N S C Van Der Merwe a sexual assault evidence collection kit with seal number 13D1AB3890 had been taken and the samples were sealed with such number.
- 39.6. That panties and a pair of tights were collected from Ms Z N.
- 39.7. That Sergeant M J Bowane had received crime kit 13D1AB3890 in respect of Ms Z N from Dr N S C Van Der Merwe on 28 June 2013.
- 39.8. That such crime kit was sealed in evidence bag with seal number PA4001715744.
- 39.9. That Sergeant Bowane kept the sealed evidence bag PA4001715744 in a lockable facility to which only he had access from 28 June 2013 to 2 July 2013 when it was conveyed to the forensic science laboratory in Pretoria.
- 39.10. That on 2 July 2013 the sealed evidence bag was received into the administration system of the forensic science laboratory by M R Sasa.
- 39.11. That on 8 July 2013 the sealed evidence bag with seal number PA4001715744 containing the crime kit was received by Warrant Officer Dikeleti Emily Tladi, a forensic analyst at the forensic science laboratory. She had opened the aforementioned evidence bag and found crime kit 13D1AB3890 therein. The crime kit had the seals intact and was not tampered with.

[40] The J88 reveals that Dr Van Der Merwe concluded that there was some evidence of traumatic intercourse. There was some vaginal trauma consisting of superficial tears to the fosa navicularis.

Counts 8 to 10 – S N

[41] Ms N testified that on 15 December 2013 she was [...] years of age and was working at the [...] in Boskruin. She reported on duty at 05h00 on 15 December 2013. Her shift was supposed to end at 15h00 but because they were short staffed, she worked until 23h00. She needed to get to Malibongwe Street where she would find a taxi at the Total garage situated at the corner of Malibongwe and President Fouche Streets. Whilst walking along Malibongwe Street, a man appeared almost from nowhere and asked for her phone. She responded that she did not have one. He then said he wanted her bag. He grabbed it and she tugged on the other end. The perpetrator then produced a knife from his right trouser pocket. He put the knife blade to her neck and demanded her handbag. He then ordered her to accompany him. He pushed her in front of him, held the knife at her neck and guided her where to walk. He was very close to her. They walked for about 10 minutes, until they reached a river with rocks. He opened her handbag and threw the content on the ground. He took her cellular telephone and some cash. Thereafter he instructed Ms N to undress. She refused but he threatened her with the knife. She thought he was going to inflict injuries upon her and consequently undressed. He ordered her to lie down. He pulled his trousers and underwear down to his knees and proceeded to have sexual intercourse with her without a condom and ejaculated. During this time she was crying. He then dressed himself and instructed Ms N to get dressed as well. He said she could leave. She said that she didn't know the way and that she couldn't see anything. He showed her the way to the garage. She took her bag as well as the items that had been thrown out. He took the R 70 and her phone. When she reached the garage she explained to a man and a woman what had happened to her. They

phoned the police and Ms N waited until the police arrived. She made a statement and then she was taken for medical treatment to the Olivedale Netcare Clinic where specimens were taken. She received HIV preventative medication. She received follow up treatments. She was unable to identify the perpetrator. Certain formal admissions in terms of section 220 of the CPA, were made, which include:

- 41.1. That on 16 December 2013 Dr Bongiwe Manyathi examined Ms N and recorded her findings and what was told to her on a J88 form, the original of which was received as evidence and marked exhibit “H”. The correctness and the truth of the content of the J88 was admitted.
- 41.2. That Dr Manyati used a sexual evidence collection kit with seal number 13D1AC8887JJ.
- 41.3. That Warrant Officer M J Bowani received the crime kit 13D1AC8887JJ in respect of Ms N from Dr Bongiwe Manyati on 16 December 2013.
- 41.4. That the crime kit was sealed in evidence bag with seal number PA4000977956.
- 41.5. That Warrant Officer M J Bowani kept the sealed evidence bag PA4000977956 in a lockable facility to which he had access until same was conveyed to the forensic science laboratory in Pretoria.
- 41.6. That on 19 December 2013 the sealed bag with seal number PA4000977956 was received into the administration system of the forensic science laboratory by N M W Ntansi.

41.7. That on 6 January 2014 the sealed evidence bag with seal number PA4000977956 containing the crime kit was received by Sihawusenkosi Ignatius Manzini a forensic analyst at the forensic science laboratory. He opened the aforementioned evidence bag and found crime kit 13D1AC8887JJ therein. The crime kit had the seals intact and was not tampered with.

Counts 11 to 14 – D S

[42] On 28 February 2014 Ms S was [...] years of age and working at [...] in Boskruin. At 05h15 on the morning of 28 February 2014, Ms S was walking along President Fouche Street on her way to her place of employment. The taxi dropped her off at the corner of President Fouche and Malibongwe Streets. She wanted to cross the street to the Total garage where she would catch another taxi. Just as she crossed the road, she felt a firearm being placed on the back of her neck and a man said that if she made a noise she would be shot. He forced her to walk quite fast by pushing her with his hand on her back whilst the gun was held to her head. He took her under a bridge where there were tall trees and some rocks. She fell on the rocks and her shoes were left behind. The perpetrator grabbed her, lifted her and pushed her to the middle of the bridge. She had a handbag. He demanded her cellular telephone and money. She gave him her handbag. He threatened to shoot her and pointed the firearm at her. He opened the handbag and in the wallet was the change she had received from the taxi. It was about R 50. It also contained a small Nokia phone which belonged to her sister. He demanded more money and said that he wanted to search her breasts as this is where women concealed money. She had indeed rolled R 1 000 in tissue paper together with her ABSA bank card. He found it.

He then said that he wanted to rape her as it had been a long time since he had been with a woman. He also told her that when he was done raping her, he would kill her. She explained that she was very scared at this stage. He told her to pull down her pants and to lie on the ground, which she did. He took off his pants. With one hand he pointed the firearm at her and with the other, he shone the light of his cell phone. He then had sexual intercourse with her without the use of a condom. At that very moment a person walked on the bridge above them. The unknown person's cell phone rang. This disturbed the perpetrator. He ejaculated and then jumped off her. In the motion of him jumping off her, Ms S rolled to one side and the perpetrator fired a shot at the place where she had moments before been lying. She explained that the shot was fired at the spot where her buttocks had previously been positioned. She said that she heard the sound. It had been right next to her. She explained that, had she stayed where she were, a bullet would have hit her. She said it was still dark at the time. After he had fired the shot, he ran away. She ran in the opposite direction. She walked to her place of employment, which took about 30 minutes. She said that her hair was untidy, her trousers were wet and muddy on the lower part and that she was emotionally shocked and traumatised. When she arrived at her place of employment she started crying and related the story to her manager. The police fetched her and after she had opened a case, she was taken to the Netcare Clinic in Olivedale. They gave her pills to prevent pregnancy and other illnesses and specimens were taken from her. She was given anti retrovirals and her panties were also sent off for analysis.

[43] She explained that it was dark under the bridge. She could not see the perpetrator's face but she could see his body structure and height.

[44] On 29 June 2014 she participated in an identity parade in Randburg. Constable Seeti had called her at her place of employment and requested her to attend the parade. He fetched her from her place of employment and dropped her off at the place where the parade was to be held. A woman constable had received her and took her to a room where another woman was also waiting. An officer came and asked who would go first. The other lady started crying so she volunteered. The officer said she should walk backwards down a passage and then turn around, when she would see another officer. She did as she was instructed and got to a glass wall. She was asked to point at a person who was involved in the robbery. She found about 7 to 8 people standing there. They were all holding numbers in front of their chests. She pointed at number 3 because his height and body build structure was similar to the person who had robbed and raped her. She explained that she had only pointed out one person. She said that nobody told her to point him out.

[45] She explained that when she had fallen in the river, she had seen his body structure and his height. She said the person whom she pointed out was in court and was the accused.

[46] Constable Seeti took her back to her place of employment.

[47] She said the items, which were taken from her, was the Nokia phone, her ABSA bank card, the R 1 000 cash and approximately R 50 which was in her wallet. During cross-examination she conceded that she couldn't see at the time of the commission of the crime as it was dark. It was put to her that nothing had prevented the perpetrator from killing her. She responded that before he had raped her he had told her that he was going to rape her and then kill her because she would go to the police and come back to this place under the bridge with the police. The place would

be searched and that was the place from which he worked. She also said that after the incident she went to the scene of the crime with the police where she found the shoes that she had been wearing. She was asked whether she found a cartridge case and she said that she hadn't searched for that.

[48] Certain formal admissions in terms of section 220 of the CPA were made which include:

- 48.1. That on 28 February 2014 Dr Sharon Lynne Kay examined Ms S and recorded her findings in a J88 form which was received as evidence as exhibit "1" and had also collected panties of Ms S as an exhibit.
- 48.2. That the sexual assault evidence collection kit and panties were handed over to Warrant Officer Seeti.
- 48.3. That the sexual assault evidence collection kit and the panties were sealed in evidence bag with seal number PAD000718254.
- 48.4. That Warrant Officer Seeti had received the sexual assault evidence collection kit 13D1AE9638 in respect of Ms S from Dr Kay on 28 February 2014.
- 48.5. That the sexual assault evidence collection kit was sealed in evidence bag with seal number PAD000718254.
- 48.6. That Warrant Officer Seeti kept the sealed evidence bag PAD000718254 in a lockable facility to which only he had access, until same was conveyed to the forensic science laboratory in Pretoria.

48.7. On 7 March 2014 the sealed bag with seal number PAD000718254 was received into the administration system of the forensic science laboratory by M E Maswanganye.

48.8. That on 11 March 2014 the sealed evidence bag with seal number PAD000718254 containing the sexual assault evidence collection kit was received by Shannon-Lee Fortuin a forensic analyst at the forensic science laboratory. She opened the aforementioned evidence bag and found crime kit 13D1AE9638 therein. The crime kit had the seals intact and was not tampered with.

Counts 15 to 17 – A N

[49] On 20 May 2014 when Ms A N was [...] years of age and at 12h15, she was walking along Malibongwe Drive. She came from Suikerbos Street and intended to walk down President Fouché. Ms A N was walking in a westerly direction towards the intersection of Malibongwe and President Fouché Streets. She was walking on the northerly side of Malibongwe Drive. She explained that at the place where she was walking there is a bridge, and a pavement where pedestrians walk. Two men were approaching her, walking towards her in the same pedestrian path. The one person kept turning his head to look at the robot, to see whether it had changed colour and this made her suspicious. Prior to that she had been texting her friend on her cellphone. She then decided to put her cellphone away. She was carrying her handbag over her left shoulder and saw the one man putting his hand on his waist. He produced a firearm. The one with the firearm grabbed her handbag. He tugged at it and she fell to the ground. The other one, Mr Ndziweni, grabbed one foot and started pulling her down a steep embankment towards the river. Mr Ndziweni was in

possession of a stick. The person at the intersection of Malibongwe and President Fouche Street who was distributing pamphlets, was attracted by the commotion and came running to assist Ms A N. Mr Ndziweni and his co-perpetrator then fled the scene with Ms A N's belongings. Mr Ndziweni had said to his co-perpetrator, when the pamphlet distributor came running to assist Ms A N, that they should leave her as they had the handbag. She explained that the two assailants were about 60 cm away from her. She said that when this happened she was screaming and that is how the pamphlet distributor was made aware of her plight. They took her handbag, which contained an iPhone and a Blackberry, approximately R 700, her purse, her passport and her identity document. She explained that it was midday. The sun was shining and that she had the opportunity to see the perpetrators very clearly. She could see them properly as they were approaching her and was in very close proximity to Mr Ndziweni when he was pulling her foot. He also spoke, so she could hear his voice.

[50] She went to the Total garage where she narrated her ordeal to the employees. She went home and did not have transport to the police station but reported the incident the following day.

[51] On 24 June 2014 she was in the same vicinity again, walking down Malibongwe Drive in a westerly direction on the northerly side of Malibongwe Drive. At the intersection she crossed Malibongwe Drive to the easterly side of President Fouche, opposite the Total garage. She was wearing a rather short skirt and one of the two men sitting opposite the Total Garage said to her: "Hey sister". She said she recognised the voice as the voice of one of the assailants who had attacked her. She said that she didn't respond and that they had turned their faces towards her looking at her. She recognised Mr Ndziweni and his co-perpetrator. She was there to buy

bread, which she didn't do. She bought a recharge voucher and phoned the investigating officer, Constable Mabasa, immediately. She told him that she was looking at her two assailants. He said that he was on his way. She then sat on a bench positioned on an elevated area where those, who wait for their cars to be washed, sit. She could see Mr Ndziweni and his co-perpetrator very clearly. After about 10 minutes Constable Mabasa arrived. He was in the company of other police officers. They were driving two Polo cars, which were unmarked. The police were clad in civilian clothes. Upon his arrival she pointed out her assailants. The one vehicle drove across Malibongwe Drive to cut off the escape route on that side and the other vehicle blocked the escape route in President Fouche Street. She remained seated on the bench where she had waited for Constable Mabasa. The one vehicle approached the two assailants and the one man jumped up and ran into the trees. Mr Ndziweni was too slow and the policeman was able to exit the vehicle and grab him. The police then apprehended him and placed him in a vehicle. Both vehicles drove around to find the other person and both vehicles came back to where Ms A N was seated. The police asked her whether he was the man who had attacked and robbed her and she confirmed that he was. She was asked whether the person who was arrested at the garage was at court and she confirmed that he was. She said that she noticed him immediately when she walked into court. She was asked what had happened at the garage. She said that he had said "ousie ngiyaxolisa" which means "sister I apologize". It is a mixture of languages, "ousie" can be Sesotho or Afrikaans and "ngiyaxolisa" is Zulu. She said she didn't respond to this but that she had just moved away from the vehicle. The vehicle then drove off with him. The second vehicle transported her to her residence.

[52] She said that when she crossed the road, she recognised Mr Ndziweni by his voice and by his face. She said the other perpetrator was wearing the exact same outfit as he was wearing on the day of the incident. She said that there was nothing that hindered her from seeing their facial features, both on 24 June 2014 and on 20 May 2014. She explained that on the first incident, Mr Ndziweni had been wearing a yellow sweater and the co-perpetrator, a balaclava hat, which was rolled up, and thus only covering his head and not also his face. This was the exact same balaclava hat that he had been wearing on the day of the robbery. She described the firearm and it sounded like she was describing a pistol. It was put to Ms A N that had she told the police that she was able to identify her assailants then identity kits would have been drawn. She responded that had the police requested her to do so she would have done so, unfortunately, she was never requested. She confirmed that Constable Mabasa did not take Mr Ndziweni to the Honeydew Police Station. It was the other vehicle. Constable Mabasa had taken her home. She also explained that it was a busy intersection and that whilst she was waiting for Constable Mabasa to arrive, many taxis drove past.

[53] Siza Godfrey Mabasa testified that he is a member of the SAPS stationed at Honeydew. He explained that he was a Constable and that currently he has 7 years experience. He explained that during 2014 he was the investigating officer in Cas 947/05/2014, the complainant in this case was Ms A N in which he was investigating a charge of armed robbery, possession of unlicensed firearm and attempted kidnapping. The incident involving Ms A N had occurred on 20 May 2014 and he had visited the scene with her on Malibongwe Drive. He explained that there was a bridge and river and that people slept under the bridge illegally. After Ms A N had pointed

out where the incident had occurred, he furnished her with his contact details. He then explained that Ms A N had contacted him on 24 June 2014 and had reported to him that she had just seen the two perpetrators of the crime committed on 20 May 2014. She said that they were at the robots at Malibongwe and President Fouche Streets. She said that she was at the Total garage at the intersection of Malibongwe and President Fouche Streets. He told her that she should stay at the garage and he took Constable Motelo, who has since passed away having been involved in a motor vehicle accident, and they drove to the garage. On his arrival he asked her to point out the assailants. They were facing in the opposite direction but they were sitting together. There was a garbage bin next to where they were seated. She had told Mr Mabasa that she had recognized them by their faces when she had walked past them. Mr Mabasa explained that they had left the car at the garage and that he and Constable Motelo walked to them where they were seated. He said they were not dressed in police uniform and that his vehicle was not marked. He said that as he introduced himself the one stood up and ran away. He said that this occurred at about 15h00 and that it was a sunny day. The person who he arrested that day was Mr Ndziweni and he explained that he had introduced himself as the investigating officer in a case involving armed robbery. He explained all his rights to him at that juncture. He was then arrested and cuffed and they walked back with him to where Ms A N was standing. At the garage Ms A N confirmed that Mr Ndziweni was the person who had robbed her. Mr Ndziweni then said to her that he regretted robbing her. He just volunteered these words. They then took him to Honeydew Police Station where he signed for his rights that had been explained to him. He then drew case number 1424/02/2014 where the complainant was D S. This was a rape matter.

After arresting Mr Ndziweni, Constable Mabasa phoned his informant and furnished his informant with the name of Mr Ndziweni and that is why he had drawn the case of Ms S. The investigating officer was Warrant Officer Seeti. Constable Mabasa phoned Officer Seeti and advised him that he had arrested a suspect that might also be a suspect in the case of Ms S. His commanders then instructed him to combine the two dockets. The case of Ms A N was handed to Warrant Officer Seeti. During cross examination it was put to Constable Mabasa that four police officers had effected the arrest and not only two. Mr Mabasa was adamant that there were only two police officers present. It was put to him that Mr Mabasa was inside a vehicle when he got out and effected the arrest. This too Mr Mabasa disputed. It was also put to him that Mr Ndziweni's rights weren't explained to him at the time of his arrest. He was asked what Mr Ndziweni had chosen in respect of his rights after they had been explained to him and Constable Mabasa said that he had opted to say that he regretted his actions. He was asked what Mr Ndziweni had elected to do in respect of his right to legal representation and Constable Mabasa responded that he said that he would make a phone call and inform his family. He was asked to quote verbatim what Mr Ndziweni had said to Ms A N and he had said "ngiyazi sola ngalento engiyenzile kuwe", which means "I regret what I have done to you". He said that it was said in the Zulu language. It was put to him that in the statement he had made shortly after the incident he had not recorded that Mr Ndziweni had apologized to Ms A N. He said that he wasn't allowed to write about it because it amounted to a confession and that had to be done by a superior. It was suggested that the reason he didn't write it was because it never happened. It was put to him that he never took Mr Ndziweni to the Honeydew Police Station. He was adamant that it was him and Constable Motelo. It

was put that it was Constable Motelo who had placed him in the holding cells. It was put to him that it wasn't him and that if it were him, his signature would appear on the 14A statement which was received in evidence and is marked exhibit "DD". Constable Motelo's signature appears on such 14A statement.

DNA EVIDENCE

RX Mdepa

[54] Remembrance Xoliswa Mdepa testified that she was a Warrant Officer in the South African Police Service attached to the biology section of the forensic science laboratory as a forensic analyst and a reporting officer. She explained that she was in possession of a B.Sc. honours degree majoring in microbiology obtained from the University of Kwa-Zulu Natal. Included, as part of such degree is a course in Molecular and Cellular biology. She has been attached to the biology section of the forensic science laboratory since 15 February 2007. Since that time she has received training in serological and DNA techniques which has afforded her the knowledge and skills needed for forensic biological analysis. In total she has 12 years of experience in the biological sciences. She explained that she was the author of an affidavit which she deposed to and which was done in terms of section 212 of the CPA. The affidavit was received as evidence and marked as annexure "E". The document comprised 5 pages. The summary of her evidence, which follows, includes both her viva voce evidence and that which she deposed to in the affidavit. The import of her evidence was the following:

[55] DNA is the abbreviation for Deoxyribonucleic Acid. DNA is a complex chemical found in cells throughout the human body. DNA is constant for an individual and does not change during a person's lifetime. Each person's DNA is the same in all

of their cells, so DNA recovered from blood cells will be the same as that found in other tissues and body fluids, such as semen or hair roots. Each person's DNA is unique, except for identical twins and therefore indicates differences between individuals.

[56] Short Tandem Repeat ("**STR**") profiling is a form of DNA analysis. DNA analysis starts off where evidence recovery and presumptive testing is carried out on crime scene exhibits which are received sealed. The basic procedure occurs as follows: The Police deliver the samples to reception at the forensic laboratory. The person receiving the sample ensures that the information reflected on the sample corresponds with the information contained in the letter accompanying the sample. If the samples appear to have been tampered with in any way at this stage, the laboratory will not accept the sample. An acknowledgement of receipt is issued to the delivering person. Samples removed for DNA analysis are cut and allocated a unique barcode which the reporting officer uses to follow the progress of the DNA analysis. DNA is isolated from the cells contained on the exhibits received from both the crime scene and the reference samples. Crime samples are samples obtained from the victim or the crime scene and reference samples are samples from a suspect. DNA amplification called Polymerase Chain Reaction ("**PCR**") follows in which specific areas of DNA, which are known to vary in size between people, are targeted and copied many times by using a Geneamp 9 700 Thermal Cycler.

[57] STR profiles are produced by amplifying different areas of DNA that contain a STR. The area, known as amelogenin indicates the sex (gender) of the donor. A person will have two bands (alleles, numbers) for each STR, one inherited from each parent. If the same band is inherited from both parents then only one band will be

seen. It is the combination of bands at all the STR's together and not the result of a specific STR locus on its own which makes an individual's profile unique.

[58] Next, the lengths of DNA are separated by electrophoresis, where the amplified DNA is placed in a ABI Prism 3130XL Genetic Analyser. Electrophoresis uses charge to separate the different lengths of DNA as they move through a medium which retards movement. As the lengths of DNA pass a specific point in the instrument, a signal is captured by computer software and converted into numbers known as data analysis made possible by Genemapper ID and IDX software. The reporting officer now examines all the DNA results obtained from the crime scene samples and compares these to DNA results of the reference samples and tabulates only the relevant results in a section 212 of the CPA affidavit, when a match is made.

[59] For the ten regions used at the laboratory, one region is a gender marker. Male equals XY and female equals XX. The remaining nine regions are where the unique DNA comes in.

[60] She also explained that a kit number stayed constant but that the last 2 digits changed, depending on the following: a J88 would be indicated with "JJ"; an inventory form would be indicated with "IF" and the sexual assault evidence kit will be indicated with "XX". She further explained that the forensic laboratory did not receive the J88 but that they did receive the inventory form which is completed by the doctor or the nurse attending to the crime sample or the reference sample.

[61] Ms Mdepa then proceeded to testify in respect of specific swabs received. As far as the laboratory is concerned, the process is "blind" but by virtue of the formal admissions made, the court is able to link a specific complainant to her evidence for purposes of this summary.

Z N – Honeydew CAS 1225/06/2013

[62] She explained that a “vaginal vault” swab was received from sexual assault kit 13D1AB3890 and that this crime kit was sealed in evidence bag with seal number PA4001715744. She explained that the sexual assault kit had contained many swabs. It was brought to the forensic science laboratory in Pretoria by Sergeant Bowane on 28 June 2013. She said that the swab contained semen.

[63] She explained that this swab and the results from the DNA analysis obtained from this semen swab were compared to reference sample kit number 11DBAN3071XX which had come in an evidence bag with seal number PA4000181040A on 2 July 2014 and that it had been brought in by Warrant Officer Seeti. She explained that the “vaginal vault” swab had come in a long time before the reference sample. The DNA result which was obtained from the victim sample was stored in the data base. The data base then picked up that the DNA of the reference sample is the same as that of the victim sample. This reference sample matched up with three other samples which had previously been received. These samples were in relation to CAS1424/02/2014, CAS 676/12/2013, CAS 1102/12/2012 all from Honeydew. All three of these cases matched the perpetrator whose reference sample was received and provided under CAS 1225/06/2015

Ms S

[64] The forensic science laboratory in Pretoria had received a cervical swab in crime kit sealed with number 13D1AE9638 on 7 March 2014 by Warrant Officer Seeti. When it was received the crime kit was intact and the bag was sealed in bag number PAD000718254. There were other samples handed in as well. The reference sample which was handed in by Warrant Officer Seeti was sealed with seal number

11DBAA1002XX and had been placed in evidence bag PA4000283227K. The reference sample and the sample obtained from the cervical swab were a match.

S N – CAS676/12/2013

[65] She testified that she had received a vaginal swab in sexual crime kit bearing seal number 13D1AC8887 bagged in evidence bag with seal number PA4000977956. It was brought by Warrant Officer Bowane. Warrant Officer Seeti had brought a reference sample on 12 November 2014, sealed with seal number 11DBAA1001XX in bag number PA4000283226J. The DNA of the vaginal swab and the reference swab was a perfect match.

H R – CAS1102/12/2012

[66] She had received a vaginal vault swab from crime kit bearing seal number 11D1AA7196XX sealed in evidence seal bag FSG634080, which had been delivered to the forensic science laboratory by Warrant Officer Ngubeni on 14 January 2014. The reference sample was bagged in evidence bag with seal number PA40002832251, containing the buccal reference sample marked with seal number 11DBAA1003XX which had been brought in by Warrant Officer Seeti on 12 November 2014. There was a perfect match.

[67] She explained that the next step in the process was to assess how common or how rare this match is within the particular population group. All statistical calculations are based on accepted population genetics theory and are utilised according to the specifications of the “National Research Council Committee of Forensic DNA Analysis”, USA, 1996. The statistical calculations are processed by

using the National DNA Statistics Database for the four main population groups in the RSA, namely; Black, Caucasian, Coloured and Asian. The most conservative occurrence of the DNA result in the four population groups is recorded in the affidavit. Ms Mdepa had recorded and testified that the most conservative occurrence for the DNA result obtained in the exhibits, the four swabs she had compared with the reference samples, is 1 in 210 billion people.

Lieut. Mathye

[68] Lieut. Mathye testified that she is stationed at the forensic science laboratory and working as a senior forensic analyst with a B.Sc having, majored in biochemistry and microbiology. She had deposed to an affidavit in terms of section 212 of the CPA which was received as evidence and marked as exhibit “R”. She confirmed the content thereof which related to the receipt of a sealed evidence bag with reference number FSG634080 dealing with Honeydew CAS1102/12/2012 being the sexual crime kit obtained from Ms R the complainant in counts 1 to 3. She confirmed that the bag had been brought in on 14 January 2013 and that it was received by M E Maswanganye. She had received it from administration and everything was in tact. She personally cut the seals and placed them in the docket, nothing had been tampered with. She said that she did preliminary testing of the swabs to see whether there was semen and that is where her role in respect of Ms R’s swabs had ended.

TAKING OF THE BUCCAL SAMPLES

Warrant Officer Seeti

[69] Warrant Officer Seeti testified that he was a member of the SAPS stationed at the FCS unit at Honeydew Police Station. He testified that Mr Ndziweni had been arrested on 24 June 2014 whereafter he had taken over the investigation of all the

cases against Mr Ndziweni. He explained that on 26 June 2014 he had taken Mr Ndziweni to the Discoverer clinic. Mr Ndziweni was to appear at the Roodepoort Court when Warrant Officer Seeti had approached the control prosecutor and had explained that he was taking him to the Discoverers clinic. Warrant Officer Seeti testified that he had explained to Mr Ndziweni the reason for taking him. He had told him that it was suspected that Mr Ndziweni was involved in certain crimes and that he wanted to take Mr Ndziweni to the clinic so that buccal samples could be taken and the results would then be kept at the laboratory in a database and his DNA could then be compared with crime samples obtained from victims. Warrant Officer Seeti said that Mr Ndziweni understood. He also told him that he had the right to legal representation if he so wanted. He explained that Mr Ndziweni had no problem. Mr Ndziweni said that he hadn't committed any offence so he didn't have any problem doing this. Warrant Officer Seeti identified exhibit "**Z2**", a so-called SAP308(a) being a request form, requesting a medical examination of a person with regard to a physical condition. Warrant Officer Seeti explained that he had completed Z2 and he had appended his signature to it. This form is completed in terms of section 37 of the CPA. He was also shown another exhibit "**Z1**" being a form which is completed by the person taking the buccal sample. This document was referred to as a "DB" form.

[70] He explained that he was present when Ms Mvelase had taken the buccal sample. The "DB" form contains the following acknowledgement:

"I hereby give informed consent in writing, to the taking of a non-intimate sample, after the sample collector has informed me of the following:

- (a) the way in which the non-intimate sample is to be taken;
- (b) that the forensic DNA profile (this is an alpha numeric code which contains no medical information or information about my predisposition) derived from it will be used for

forensic comparison purposes it may produce evidence that might be used in a court of law;

- (c) that the forensic DNA profile derived from the sample will be retained on the National Forensic DNA Database (NFDD), together with my identity;
- (d) that the sample taken, the forensic DNA profile derived from it or any other information stored on or within and associated with the NFDD, may only be used for purposes related to the identification of missing person, the identification of unidentified human remains, the identification of an alleged offender, the detection of crime, the investigation of an offence or the conduct of a prosecution or for elimination purposes;

the following is to volunteers only:

- (e) that I as a volunteer am under no obligation to give a sample;
- (f) that the consent given by me can only be withdrawn after submitting the sample in writing and in accordance with legislative prescripts.

I also confirm that the information provided by me is true and accurate. “

[71] He explained that Ms Mvelase had read the content of the foregoing to Mr Ndziweni in his presence, he had understood and that Mr Ndziweni had thereafter appended his signature in the space provided for on the DB form. After the buccal sample had been taken, the kit was properly sealed and handed to Warrant Officer Seeti.

[72] Warrant Officer Seeti said that on 7 November 2014 and on a date when Mr Ndziweni again appeared in court, he had again taken Mr Ndziweni to the Discoverers clinic for the same purpose. He explained that he wanted to confirm the results which they had received which had linked Mr Ndziweni to several offences. He again completed an SAP308(a) form. On this occasion his colleague, Warrant Officer Tsoka, accompanied him. He again told Mr Ndziweni that they were going to the Discoverers clinic and explained that he wanted to have samples taken for the same purpose. Mr Ndziweni did not refuse or protest and said that he understood. He explained that after the samples were taken they were properly sealed and handed

over to him. During cross examination Warrant Officer Seeti disclosed that he had told Mr Ndziweni that he had already been linked to other matters by DNA on 7 November 2014. It was placed in dispute that he had appended his signature to any of the DB forms which had been received in evidence (four DB forms were ultimately received by the court all of which are alleged to have contained Mr Ndziweni signatures). It was stated that he couldn't have signed as he was cuffed. Warrant Officer Seeti explained that when the samples were taken he was uncuffed as well as when fingerprints were taken. It was put to Warrant Officer Seeti that Mr Ndziweni never consented to either Ms Mvelase or Dr Dawood taking any samples. He also testified that he had spoken to Mr Ndziweni in English and Xhosa. It was put to him that he was spoken to in the Tswana language which is the language spoken by Warrant Officer Seeti. It was put that after about three weeks after his arrest he had received a lawyer and had legal representation. Warrant Officer Seeti explained that his attorney was present at court when it was explained to Mr Ndziweni why he was going to be taken to the Discoverers Clinic. This was disputed.

[73] A statement was handed to Warrant Officer Seeti in terms of which he had stated under oath that he had interviewed a suspect who had told him that she would be unable to describe the suspect as he had threatened her. Because Warrant Officer Seeti had said that the suspects had said that they would be able to describe the assailant, this statement was put to him and the statement was received as evidence and marked as exhibit "**BB**". During re-examination it was clarified that he had not conducted an interview or had had a conversation with Ms A N as this had been done by Constable Mabasa. It transpired that the statement which was received

as exhibit “**BB**” dealt with the interview Warrant Officer Seeti had conducted with Ms Z N under Honeydew CAS1225/06/2013.

Warrant Officer Vincent Tsoka

[74] Warrant Officer Tsoka testified that he was a Warrant Officer and a member of the SAPS stationed at Johannesburg West FCS unit. He has been a police officer for 24 years and on 7 November 2014 was on duty. He was asked by Warrant Officer Seeti to accompany him to take a suspect to the doctor. He was shown a DB form (X3) and recognised his signature on the form where he had appended his signature as a witness. He was asked what he had witnessed and he explained that after the doctor had taken the samples from Mr Ndziweni, he had signed to witness the signature of Mr Ndziweni. He added that he had also signed in a similar fashion on other DB forms, which had been received as Y2 and AA1. Warrant Officer Tsoka explained that the person taking the samples had explained to Mr Ndziweni why it was being done and he hadn't asked any questions. According to w/o Tsoka Mr Ndziweni had clearly voluntarily submitted himself to the taking of the samples. He had also witnessed his signature being placed on such DB forms. He was asked whether Mr Ndziweni had been hand cuffed during the process and he explained that he was hand cuffed when he was taken from the cell but when they arrived at the Discoverers clinic, the handcuffs were taken off. After the samples had been taken he was handcuffed again. He couldn't recall whether fingerprints had been taken. He also explained that after the samples were taken, that all kits were given to Warrant Officer Seeti. Mr Ndziweni had never refused to provide samples. It was put to Warrant Officer Tsoka that neither Dr Dawood nor Ms Mvelase had given Mr Ndziweni any information. It was also put to him that he was hand cuffed during this

entire process and it was further put to him that the keys to the cuffs had been left at court. It was further disputed that he had been one of the people who had been taken to the clinic. It was also put to him that his fingerprints were taken whilst handcuffed.

Rosaline Sisane Mvelase

[75] Ms Mvelase testified that she was a professional nurse who commenced her career during 2006. During 2014 she was employed at Discoverers clinic. As part of her job she took buccal samples. She had made copies of the DB forms and had kept them under lock and key at the discoverers clinic where, when called upon to testify at court, she had retrieved them and brought copies to court. The copies brought to court in respect of that which had transpired on 26 June 2014 consisted of a SAP308(a) form, completed by Warrant Officer Seeti (Z2), a DB form (Z1) and an affidavit deposed to by Ms Mvelase in terms of which she had recorded, amongst other things, the seal number of the crime kit of the buccal sample taken from Mr Ndziweni, such seal number being 11DBAN3071XX. She identified her signature at the top of the DB form and explained that she needed an SAP308(a) form before she could take a buccal sample. She said that at the time of the taking of the buccal sample, there was one other person present, being one Sylvia. She said that she had read from paragraphs (a) to (d) of the informed consent paragraphs as quoted in paragraph 70 hereof to Mr Ndziweni, who intimated that he understood, that he consented and that he had thereafter appended his signature to the DB form (Z1) in her presence. She had handed the reference sample kit to Warrant Officer Seeti. She recalled that he was handcuffed upon entering but was uncuffed as soon as he sat down. She also explained that on 7 November 2014 she had gone through the same procedure. Had received an SAP308(a) (AA2) and had taken a buccal swab after she

had explained paragraphs (a) to (d) of the informed consent part of the DB form to Mr Ndziweni (AA1). She had again deposed to an affidavit, stating that she had obtained this sample and had sealed the crime kit with number 11DBAA1002. She added that she appended her signature at the top of the DB form (AA1) and after the buccal sample had been taken. She handed the crime kit to Warrant Officer Seeti. She explained that during the taking of the second sample, Warrant Officer Tsoka was present. She was adamant that he was not cuffed during this procedure.

Dr Dawood

[76] Dr Dawood testified that she obtained her medical degree in Cape Town during 2004 and has practised ever since in the field of clinical forensic medicine. She is employed by the Department of Gauteng stationed at Baragwanath. She offers her services to the Discoverers clinic from time to time.

[77] On 7 November 2014 she was on duty when she was requested to see a patient, Mr Ndziweni, who was an alleged perpetrator in a rape case. She explained that the police issues a form 308. The form 308 is signed by a policeman. She says that she gave Mr Ndziweni a summary of what was contained in paragraphs (a) to (d) of the informed consent portion of the DB form. She explained to him that she would be taking a swab from his mouth and that this would be compared to swabs taken from rape victims. She took two samples. The one was sealed with seal number 11DBAA1003 and the other with seal number 11DBAA1001. She said the third sample was taken by sister Mvelase as Dr Dawood had expressly requested her to do it so no questions could be asked later. She said that she had kept copies of the documentation and that when called upon to come to court, she had retrieved them. The documents so produced comprised a SAP 308(a) (X1) form in respect of Mr

Ndziweni, a DB form dated 7 November 2014 (X3) and an affidavit deposed to by Dr Dawood confirming that the crime kit had been sealed with seal number 11DBAA1001 (X2). She testified that her signature was appended on X3 and that Mr Ndziweni had signed the document in her presence. Dr Dawood was very affronted by the suggestion that she had not explained to Mr Ndziweni what was about to happen to him. Dr Dawood considered this an affront to her integrity as a medical practitioner and expressed this quite forcefully and in no uncertain terms.

EVIDENCE OF MR NDZIWENI

[78] Mr Lawrence Zamile Ndziweni testified that he was arrested on 24 June 2014 at the corner of Malibongwe Drive and President Fouché whilst waiting for a taxi. He saw the police when they were next to him. He was instructed to lie down. There were two other people. The one ran away.

[79] After he was cuffed, he was assaulted by Cst Mabasa. He was then asked who the friend was who had run away. Cst Mabasa put Mr Ndziweni into the car and drove with him to the garage. They stopped next to another vehicle from which Ms A N alighted. She said, this is the person and that he didn't have a fire-arm at the time of the robbery but that the friend did. He said that he did not speak to her at all. He was then driven to Honeydew police station with two other officers, not Cst Mabasa.

[80] On 26 June 2014 he was at Roodepoort court when warrant officer Seeti arrived at his holding cell. He was taken to an office where he waited outside and a woman told warrant officer Seeti to have Mr Ndziweni back by 13h00. In that office, he was handcuffed and the keys were left behind.

[81] He was taken to the clinic by two woman and warrant officer Seeti. At the clinic a doctor took swabs from his mouth and thereafter his fingerprints were taken

whilst his hands were still cuffed behind his back. He denied that Ms Mvelase had explained to him what she was about to do and that he had appended his signature to the DB forms. He said it would not be possible to sign as his hands had been cuffed behind his back. He said the same in respect of Dr Dawood.

[82] He said that he had learnt what the purpose was of these samples after he returned to prison, that is, after the first buccal sample had been taken on 26 June 2014. He knew what was going to happen the second time round as he was driven along the same route.

[83] He explained that by the end of July 2014 he had legal representation. He denied that his legal representative was present as warrant officer Seeti had testified during the explanation prior to the departure to Discoverers clinic the second time that, is on 7 November 2014.

[84] Mr Ndziweni denied any involvement in any of the crimes. He also, surprisingly, and for the first time during his evidence in chief, raised an alibi defence for the offences committed on 25 December 2012 against Ms R. He said that he was in the Eastern Cape during this time.

[85] During cross examination it emerged that Mr Ndziweni resided in Diepsloot and that he used to use that route, being dropped at that intersection, quite often. He had been using that road for about 4 – 5 years prior to his arrest. He didn't know Ms A N prior to the day of his arrest. Said he also didn't know the man who had run away. He said he was standing on his own when the police walked right up to him and arrested him. He was told to lie down and then he was assaulted.

[86] He testified that before he was put into the cells he was given a document to sign in which his rights were explained to him. This had occurred at 15h50 on 24

June 2014. He was left with a copy of this document. He conceded that when warrant officer Seeti fetched him from the holding cells at court on 26 June 2014, he knew what his rights were as he had been left with a copy of the document explaining his rights to him.

[87] During his evidence it also became apparent that he had been arrested before. He conceded that due to this fact, he knew what his rights were at the time of his arrest on 24 June 2014.

[88] He confirmed that it was not his evidence that he refused to give swabs nor was it his evidence that he had a problem giving swabs.

[89] He said he didn't ask any questions. He was asked to open his mouth which he did. He co-operated. He said he asked when he got to prison what the purpose of taking these samples was and he was told that his DNA could be linked to a crime/s. Thus, prior to going to the Discoverers clinic on 7 November 2014, he had been told that the purpose of the swabs was to in- or exclude him as a perpetrator in respect of certain crimes.

[90] His evidence was that there was no agreement with nurse Mvelase but that he had no problem with her taking the samples.

[91] The court asked Mr Ndziweni about him being in the Eastern Cape during the December of 2012. He said he had also been to the Eastern Cape for family gatherings during 2009, 2011, 2012 and 2013. He was asked why it wasn't put to any of the witnesses during cross examination. He responded that Mr Bosiki had never asked him about his whereabouts during December of 2012 and he had never volunteered such information to Mr Bosiki either.

[92] Upon further questioning by the state Mr Ndziweni was asked whether any of his family members could confirm whether he had been at the family gathering. He mentioned Richard Ndziweni and Mlungiso Ndziweni. He was asked about the specifics relating to his visit and when asked why such visit was so special that he could remember so much detail, he responded, because it was the last time he had visited the Eastern Cape. When confronted with the dates previously provided to the court, he said he had made a mistake. It was put to him that he was lying.

[93] Mr Bosiki requested that Mr Ndziweni be afforded an opportunity to locate these witnesses. The court then stood the matter down from 29 March 2017 to 31 March 2017 in order to establish whether the witnesses could be traced. On 31 March 2017 no further application was made to postpone the matter for the evidence of such witnesses. The case for Mr Ndziweni was closed.

ISSUES IN DISPUTE

[94] The sole issue for determination by this court is the identity of the perpetrator of the crimes that Mr Ndziweni is charged with. The fact that the crimes were committed has not been disputed and can be accepted as common cause.

[95] In respect of counts 1 to 3 (Ms R), counts 4 to 7 (Ms Z N) and counts 8 to 10 (Ms S Ncobo), the state sought to link Mr Ndziweni to the crimes by, primarily, DNA evidence. In respect of counts 11 to 15 (Ms S), the state sought to link Mr Ndziweni to such crimes relying, primarily, on the evidence of identification at the identity parade, the dock identification in court and the DNA evidence. In respect of Counts 16 to 18, the state sought to link Mr Ndziweni, primarily, with reference to the evidence of a single witness' identification.

APPROACH TO THE EVIDENCE

[96] In *S v Nyembe*, 2014 (1) SACR 105 (GSJ) Van Oosten, J held as follows at para [8] –

“...In *S v Sithole* [2012] ZASCA 85 the Supreme Court of Appeal held:

'A court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt nor does it look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true. The correct approach is set out in the following passage from *Mosephi and Others v R* LAC (1980 – 1984) 57 at 59F – H:

The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful guide to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual parts of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.”

EVALUATION OF THE EVIDENCE

Informed consent

[97] In respect of the DNA evidence, Mr Ndziweni disputed that he had given informed consent for the Buccal samples taken from him.

[98] Section 36D of the CPA was inserted into the CPA by section 2 of Act 37 of 2013 which came into operation on 31 January 2015.

[99] This section should be read with section 225 of the CPA which reads as follows:

(1) Whenever it is relevant at criminal proceedings to ascertain whether-

(a) any fingerprint, body-print or bodily sample, as defined under Chapter 3, or the information derived from such prints or samples, of an accused at such proceedings corresponds to any other fingerprint, body-print, bodily sample, crime scene sample or the information derived from such samples; or

(b) the body of such an accused has or had any mark, characteristic or distinguishing feature or shows or showed any condition or appearance, evidence of the fingerprints or body-prints of the accused or that the body of the accused has or had any mark, characteristic or distinguishing feature or shows or showed any condition or appearance, including evidence of the result of any blood test of the accused, shall be admissible at such proceedings.

(2) Such evidence shall not be inadmissible by reason only thereof that the fingerprint, body-print, or bodily sample as defined in Chapter 3, in question was not taken or that the mark, characteristic, feature, condition or appearance in question was not ascertained in accordance with the provisions of sections 36A, 36B, 36C, 36D, 36E or 37, **or that it was taken or ascertained against the wish or the will of the accused concerned.** (emphasis provided)

[100] The presumption against retrospectivity would militate against a finding that this case is governed by section 36D as the samples were taken prior to 31 January 2015.

[101] The evidence of Mr Ndziweni, unassessed and accepting the truth of the content thereof for the moment, reveals the following:

101.1. He had previously been arrested. He knew he had the right to legal representation and knew he could insist on legal advice in respect of the taking of the buccal sample. He did not request such legal assistance.

- 101.2. After his arrest and prior to being incarcerated at the police station, he was issued with a document containing an explanation of his rights, which included his right to legal assistance. He made no request for legal assistance.
- 101.3. Thus, on the day of his arrest, being 24 June 2014, Mr Ndziweni knew what his rights were. Later in the day and at the police station, he was again reminded verbally and given a document in which such rights were explained to him.
- 101.4. After the taking of the buccal sample and upon return to the prison, he learnt that the samples were taken to compare his DNA to DNA isolated in respect of other crimes. When he returned to the Discoverers clinic for a second time on 7 November 2014, there could be no doubt in his mind as to the purpose of his visit yet he made no attempt to voice an objection nor to request legal assistance.

[102] It is clear from a reading of section 36D(2)(3), that a person falling within the persons identified in section 36D(2)(a) to (v) is obliged to submit a sample – the only choice such a person has is that she may request to take it herself. A refusal to submit a sample is not an option catered for in the section. There exists no specific provision on the question whether reasonable force can be used to take the sample. Referring to cases such as *S v Orrie & another*, 2004 (1) SACR 162 (C) and *Minister of Safety and Security & another v Gaqa*, 2002 (1) SACR 654 (C), Meintjies, Van der Walt & Knoetze (2015) 28 SACJ 131 at 149 conclude; ‘In both cases.....infringement of the persons’ rights [was] far greater than in the case of a buccal swab. It therefore goes without saying that the [forced] taking of a buccal swab will be reasonable and justifiable’

[103] It is not insignificant that Mr Ndziweni does not challenge the accuracy of the findings. He did not have a fundamental objection to the taking of the buccal samples, see *S v R and others*, 2000 (1) SACR 33 (W) at 43D

[104] Prof Theophilopoulos in the January 2010, Vol 127, Issue 1 of SALJ concluded in her article '*The Privilege against Self-Incrimination and the Distinction between Testimonial and non-Testimonial Evidence*' at p 135:

'All South African cases uphold the taking of blood, DNA, semen, urine and skin scraping samples, whether they were acquired with or without a person's voluntary co-operation.¹⁴⁴ The taking of such samples for the purpose of chemical comparison with traces found at the scene of a crime or on a victim, or even for the purpose of establishing a medical condition or blood alcohol/drug level, is a reasonable limitation of the person's constitutional rights to privacy, dignity and bodily integrity, even though it may involve a certain degree of violent intrusion of the person's body.¹⁴⁵ Sampling is entirely passive and non-testimonial in the sense that a person is not required to make a volitional or affirmative assertive self-incriminatory communication. The person also need not make a choice between lying and telling the truth and therefore is not being subjected to a cruel trilemma.'

[105] Although she was not discussing section 36D, I agree with her conclusion ie that voluntary cooperation is not required for purposes of admissibility of DNA evidence in terms of section 36D nor was it a requirement prior to the enactment of section 36D, see *S v Monyane and others*, 2001 (1) SACR 115 (TPD) at 130 c - d where Borchers J held as follows:

'The appearance of an accused as a suspect at an identification parade cannot in my view be equated with a situation where he is invited to make a statement or a pointing out which may be incriminatory. At an identification parade, an accused is required to stand mute and passive amongst other people of similar appearance while a witness scrutinises the line-up with the view to identifying the person who

has allegedly committed a particular crime. An identification parade does not invite self-incrimination. Its aim is the obtaining of real evidence against the accused, similar to the position where a finger-print is taken with the intention of comparing it with a finger-print found at the scene of a crime, or with the taking of a blood sample from an accused with the view to analysing it to ascertain its alcohol content. I entirely agree with the approach adopted'

[106] DNA evidence obtained from a buccal sample, meaning a sample of cellular material taken from the inside of a person's mouth, is one of the most non-invasive procedures known to man. The taking of a buccal sample does not invite self-incrimination. It could, as was the case with Mr Tshabalala, exclude a suspect as the perpetrator in respect of the alleged offence.

[107] Assuming, without finding, that consent to the taking of the buccal sample was to be read into section 36D of the CPA and that consent was a requirement prior to the enactment of section 36D, section 225(2) of the CPA provides expressly that non-compliance with the provisions of section 36D would not render the evidence inadmissible by reason only of it having been taken against the wish or will of the accused concerned. This section seems to be incorporating the provisions of section 35 of the Constitution. The admissibility of evidence obtained through a breach of a constitutional right, is regulated by the provisions of section 35(5) of the Constitution, which reads:

'(5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.'

[108] In considering whether the admission of the evidence would be to the detriment of the administration of justice, the Court should consider whether the violation was *bona fide* or *mala fide*. If the Police acted in good faith it would be a

factor in favour of the inclusion of the evidence and if the facts show that the violation did not consist of a serious and flagrant breach of the accused's rights it would also be a factor in favour of admissibility. See *S v Pillay and Others, 2004 (2) SACR 419 (SCA) at 434G-I; S v R (supra) at 43E and S v Nel (supra) at 43G*. In *S v Tandwa 2008 (1) SACR 613 (SCA)* at paragraph [116], Cameron JA, Mlambo JA and Hancke AJA, formulated the test to be applied when considering the exclusion of evidence obtained in violation of the Constitution as follows:

“[116] The notable feature of the Constitution's specific exclusionary provision is that it does not provide for automatic exclusion of unconstitutionally obtained evidence. Evidence must be excluded only if it (a) renders the trial unfair; or (b) is otherwise detrimental to the administration of justice. This entails that admitting impugned evidence could damage the administration of justice in ways that would leave the fairness of the trial intact: but where admitting the evidence renders the trial itself unfair, the administration of justice is always damaged. Differently put, evidence must be excluded in all cases where its admission is detrimental to the administration of justice, including the subset of cases where it renders the trial unfair. The provision plainly envisages cases where evidence should be excluded for broad public policy reasons beyond fairness to the individual accused.”

[109] What needs to be balanced are the needs of maintaining pre-trial procedural standards and having all relevant and admissible evidence brought in against an accused person. The facts and surrounding circumstances must be considered in order to determine the fairness of a trial, see *Key v Attorney-General, Cape Provincial Division and Another 1996 (2) SACR 113 (CC)* at 121A.

[110] Fairness is also not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment. A fair trial also requires fairness to the public as represented by the State. The public needs to be filled with

confidence in the criminal justice system. See *S v Shaik, 2008 (1) SACR 1 (CC)* at para [43]

[111] Mr Ndziweni has not alleged that any of his Constitutional rights have been infringed. Had he identified these rights as his rights to dignity, privacy and bodily integrity, I would have found that taking a buccal sample under the circumstances sketched by Mr Ndziweni, would have constituted a justifiable and reasonable infringement of such rights. The admission of such evidence would not give rise to an unfair trial nor would it bring the administration of justice into disrepute.

[112] However, I need not go that far as I find, on the facts, that Mr Ndziweni did indeed give his informed consent. I accept, unreservedly the evidence of Dr Dawood and the registered nurse Ms Mvelase, that Mr Ndziweni was informed of the procedure to be performed on him and that on each occasion that a sample was taken from him (ie once on 26 June 2014 and three times on 7 November 2014 – thus on four separate occasions), he had given his informed consent and had communicated this by appending his signature to the DB forms received into evidence as exhibits ‘X3’, ‘Y2’, ‘Z1’, ‘AA1’. Not only were these acts of consent witnessed by the medical practitioners, but also by warrant officer Seeti on all occasions, and by warrant officer Tsoka, on three occasions. These DB forms were locked up by Dr Dawood and retrieved three years later when she and Ms Mvelase were called upon to testify. None of the state witnesses, other than Dr Dawood and Ms Mvelase, had access to these documents. They constitute contemporaneous notes of what had occurred on the days in question and I find that Mr Ndziweni’s evidence in relation to the taking of the buccal samples, in so far as such evidence

conflicts with that of the state witnesses, is rejected, as false, beyond reasonable doubt.

Circumstantial evidence – DNA evidence

[113] Evidence that the DNA profile of an accused person matches that of a sample taken from a victim, or can be included therein, is circumstantial evidence. The weight thereof depends on a number of factors listed by Van der Merwe AJA (as he then was) in *S v SB*, 2014 (1) SACR 66 (SCA) at para [18]:

“Evidence that the STR profile of an accused person matches that of a sample taken at the scene, or can be included therein, is circumstantial evidence. The weight thereof depends on a number of factors. These include:

- (i) The establishment of the chain evidence, ie that the respective samples were properly taken and safeguarded until they were tested in the laboratory.
- (ii) The proper functioning of the machines and equipment used to produce the electropherograms.
- (iii) The acceptability of the interpretation of the electropherograms.
- (iv) The probability of such a match or inclusion in the particular circumstances.
- (v) The other evidence in the case.”

[114] The form of DNA analysis used in this matter is called STR (Short Tandem Repeat) profiling. The unchallenged and undisputed evidence given by Ms Mdepa, read with the affidavits received in terms of section 212 of the CPA which include an appendix (confirmed under oath by Ms Mdepa) amplifying the science behind the process and the formal admissions made, reveal the following:

114.1. The respective samples were properly taken and safeguarded until they were tested in the laboratory – this relates to the forensic specimens taken from the complainants as well as the Buccal samples taken from Mr Ndziweni.

114.2. There is no suggestion in this case that the machines and equipment used in this case were not functioning properly;

114.3. Ms Mdepa correctly interpreted the results and such results were correctly recorded in the section 212 of the CPA affidavit received as evidence.

[115] In assessing the DNA evidence it should be born in mind that if there is a match or an inclusion, it means no more than that the accused person cannot be excluded. It is useful to quote paras [20] and [21] of *S v SB* (supra) –

“[20] If the STR profile of an accused person in fact differs from the profile retrieved from the sample taken at the scene, even in respect of only one allele, the accused person must be excluded as a source of the crime-scene DNA. However, the converse is not true. Because only a limited number of STR loci are analysed, an STR profile cannot identify a person. Therefore the weight to be attached to evidence of an STR profile match or inclusion in the first place depends on the probability of such a match or inclusion occurring in a particular population. Without such evidence the STR profile match or inclusion means no more than that the accused person cannot be excluded as a source of the crime-scene DNA.

[21] If the profile in question may be found in many individuals, a match between the profile of the accused person and the crime-scene DNA will have little or no probative value. This is of particular importance where the crime-scene DNA is a mixture, which increases the likelihood that the profiles of other members of the population can be read into the mixture. On the other hand, an extremely rare profile will strongly point to the involvement of the accused person. This essential component of DNA evidence is usually presented in the form of statistical analyses of a population database. ”

[116] All statistical calculations are based on accepted population genetics theory and are utilised according to the specifications of the ‘*National Research Council Committee of Forensic DNA Analysis*’, USA, 1996. The statistical calculations are processed by using the National DNA Statistics Database for the four main population groups in the RSA, namely: Black, Caucasian, Coloured and Asian. The

most conservative occurrence of the DNA result in the four population groups is recorded in the section 212 of the CPA affidavits.

[117] The statistical analysis and results found to exist, were not challenged or disputed. Ms Mdepa had recorded and testified that the most conservative occurrence for the DNA result obtained in the exhibits, the four swabs she had compared with the reference samples, is 1 in 210 billion people.

[118] The incidents the complainants describe bear striking similarities. They include:

118.1. All of the incidents occurred within a 500 meter radius of the intersection of Malibongwe and President Fouché Streets.

118.2. In three of the incidents the victims were taken to the river close to or under a bridge.

118.3. In three of the incidents the perpetrators had guns.

118.4. In two of the incidents the perpetrators had a knife in addition to a gun.

118.5. In four of the incidents handbags had been taken.

118.6. In all the incidents cellphones and money were demanded;

[119] Mr Ndziweni had used this route on and off for 4 to 5 years prior to his arrest. He worked as a plumber, only when needed, in Centurion and would use the route that took him past the intersection of President Fouché and Malibongwe Streets. His employer lived in that area.

Evidence of Mr Ndziweni

[120] Mr Ndziweni denied any involvement in the crimes. His evidence did not impress me at all. A number of things were not disputed when the witnesses

testified. This despite an express warning by the court that Mr Ndziweni should listen very carefully to every word said by the witnesses and that he should tell his legal representative if he differed from their versions. They include:

- 120.1. Constable Mabasa testified that he had spoken to Mr Ndziweni in both English and Zulu. During constable Mabasa's evidence it was never disputed that these were the languages used. Yet, for the first time during cross-examination, Mr Ndziweni raised the fact that he was talking to him in the Tsonga or Venda languages.
- 120.2. Constable Mabasa and Ms A N had both testified that Mr Ndziweni was in the company of another person. For the first time when Mr Ndziweni was cross-examined he revealed that there was another person but such person was not with him, rather such person was with the sweet seller.
- 120.3. It wasn't put to warrant officer Seeti that on both occasions that he had been taken to the Discoverers clinic he was handcuffed. Only put to him in respect of the first visit.
- 120.4. During cross examination Mr Ndziweni explained that prior to the identity parade, two policemen had taken about 15 photos of him and these very same policemen had travelled with Ms S on the day of the identity parade thus implying that they had shown Ms S who to point out. This had not been put to either warrant officer Seeti (who had transported Ms S) or to Ms S herself. He also testified that he had seen her at court for the first time. How could he have known that

these men, possessed of the 15 photographs, had transported her if he had seen her at court for the first time in his life?

[121] Further difficulties with Mr Ndziweni's evidence includes:

121.1. Initially during cross examination Mr Ndziweni conceded that after his arrest and whilst at the police station his rights were explained to him and he was given a copy of the document embodying such rights. This admission was later retracted and confined to receipt of the document only.

121.2. The state spent weeks leading the evidence relating to the charges against Ms R. Not once during this time did it occur to Mr Ndziweni that he should be telling his legal representative that he has an alibi in respect of such defence. This is simply not plausible. The raising of an alibi defence at a very late stage in the trial is not a neutral factor and is indeed something a court can and should have regard to in assessing an accused's version, see *S v Thebus*, 2003 (6) SA 505 (CC) at paras [67] and [68].

[122] The court is conscious of the caution heeded in *Ndwambi v The State* 611/2013 [2015] ZASCA 59 at para [30] -

"It is, however, trite that the fact that the accused is an unsatisfactory - even a lying witness - does not necessarily justify the conclusion of his guilt. Care must be exercised in not drawing an inference of guilt merely because he was lying. Ultimately, guilt is about the inferences that, as a matter of logic, may be drawn. Inference must carefully be distinguished from conjecture or speculation."

Approach to circumstantial evidence

[123] The State's case rests, in respect of many of the counts, on circumstantial evidence. Courts, where a case is based on circumstantial evidence, are guided when determining the issues, by well-known principles of logic set out in the case of *R v Blom* 1939 AD 188 at 202-203. These are that:

- “(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. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct ”.

[124] Zulman AJA (as he then was) in *S v Reddy & others*, 1996 (2) SACR 1 (A) at 8 h - j said:

“A number of circumstances, each individually very slight, may so tally with and confirm each other as to leave no room for doubt of the fact which they tend to establish...Not to speak of greater numbers, even two articles of circumstantial evidence, though each taken by itself weigh but as a feather, join them together, you will find them pressing on a delinquent with the weight of a millstone”.

[125] Wills on Circumstantial Evidence, 7th ed. at 46 and 452-60 is quoted with approval in *S v Reddy (supra)* at 9d:

“That network may be a mere gossamer thread, as light and as unsubstantial as the air itself. It may vanish at a touch. It may be that, strong as it is in part, it leaves great gaps and rents through which the accused is entitled to pass in safety. It may be so close, so stringent, so coherent in its texture that no efforts on the part of the accused can break through. It may come to nothing-on the other hand it may be absolutely convincing...The law does not demand that you should act upon certainties alone....In our lives, in our acts, in our thoughts we do not deal with certainties; we ought to act upon just and reasonable convictions founded upon just and reasonable grounds....The law asks for no more and the law demands no less”.

Single witness identification evidence

Ms A N (counts 16 – 18)

[126] Section 208 of the CPA authorises a court to convict on the evidence of a single witness alone. A court is required to find that the evidence was clear and satisfactory in all material respects, see *R v Mokoena* 1932 OPD 79 at 81; *S v Webber* 1971 (3) SA 754 (A); *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E-G and *S v Janse van Rensburg and Another* 2009 (2) SACR 216 (C) at 220G.

[127] Ms A N identified Mr Ndziweni both on the day of his arrest (24 June 2014) and in court. Ms A N struck this court as a confident and brave young woman. Her honesty is, of course, not the only thing that should move this court to accept her evidence. The true issue which falls for determination is whether her evidence is reliable.

[128] The 20th of May 2014 was a sunny day and Ms A N was approached by two assailants. She had some opportunity to see the two men approaching her. She could give the court a description of their clothing, the role Mr Ndziweni played and whether he was armed (he was carrying a stick). She had an unobstructed view of his face when he walked towards her, she was looking at him when he was pulling her by her foot, she heard him speak and she listened and looked at him during the ordeal. When she saw him a month later, there was no hesitation, she phoned the police immediately. She kept watching him. She had a view of his face and she heard his voice, which she recognised. The corroboration came in the apology he tendered to her. I am satisfied that her

evidence identifying Mr Ndziweni as the person who robbed her on 20 May 2014 and who attempted to kidnap her by pulling her down the slope to a place of fear and torment, is reliable.

Ms S (counts 11 to 15)

[129] I attach very little, if any, weight to the evidence of the positive identification at the identity parade. Ms S admitted that she could not identify Mr Ndziweni on his facial features as it was dark at the time of the commission of the offence. Mr Ndziweni said that he had been afforded the opportunity to choose men of similar build to stand with him on the identity parade. That being so, an identification based on his build and shape can only have limited value.

Assessment of all the pieces of evidence

[130] The State must prove the guilt of an accused person beyond reasonable doubt. If the accused's version is reasonably possibly true he must be given the benefit of the doubt and be acquitted. The accused's version should not be rejected only because it is improbable. The Court, however, is entitled to reject such version if it is evident that the version is improbable and beyond doubt false. See *R v Difford* 1937 AD 370 at 373; *S v Van der Myden* 1999 (1) SACR 447 (W) at 448 and *S v V* 2000 (1) SACR 453 (SCA) at 455A-C.

[131] Mr Ndziweni's DNA was found in the most intimate parts of 4 complainants. He has no explanation for this. He was unable to furnish any explanation whatsoever for the presence of his DNA found within the bodies of 4 complainants who, on his version, he does not know at all and who do not know him. The court is entitled to, and indeed does, have regard to Mr Ndziweni's inability to provide an explanation for this, see *S v SMM*, 2013 (2) SACR 292 (SCA) at para [11].

[132] Upon a consideration of the totality of the facts and circumstances of this matter which includes, the DNA results obtained, the absence of an explanation by Mr Ndziweni for his DNA being present in 4 of the victims, the statistical probabilities, that all of the incidents occurred within a 500 meter radius of the intersection of Malibongwe and President Fouché Streets, that in three of the incidents the victims were taken to the river close to or under a bridge, that in four of the incidents the perpetrators had guns, that in two of the incidents the perpetrators had a knife in addition to a gun, that in four of the incidents handbags had been taken, that in all the incidents cellphones and money were demanded and that Mr Ndziweni had frequented the intersection for a period of 4 to 5 years prior to his arrest, I find that the state has proved beyond a reasonable doubt that Mr Ndziweni was the perpetrator in all the counts.

[133] In respect of the possession of fire-arm counts, counts 3, 7, 15 and 18, the following: Ms S testified how the assailant told her that he was going to rape her and then shoot her because, if he did not do so, she would bring the police to that place and such place was where he worked. Even though the pedestrian on the bridge interrupted the rape, the perpetrator made good on his threat and attempted to shoot Ms S. Had she not moved, she would've been shot in her abdomen. In my view these facts quite evidently prove the offence of attempted murder. However, what it also does, is it evidences the fact that the gun used by Mr Ndziweni was functional. I infer from this incident that the firearm used in the commission of all the other offences (counts 1 to 18) were executed with a fully functional firearm. In respect of count 18, the evidence was that Mr Ndziweni's accomplice was holding the firearm, and in respect of count 7, it was one of the three rapists who was holding the firearm. It

bears mentioning that Mr Ndziweni conceded that he is not the holder of a firearm licence.

[134] In *S v Mbuli* 2003 (1) SACR 97 (SCA), the appellant in that case and his two co-accused were charged with and convicted of being in possession of a hand grenade that had been found in their vehicle shortly after they had robbed a bank. Nugent JA found that the evidence did not establish that the appellant and his co-accused had possessed the hand grenade jointly and that accordingly it was possible that the hand grenade had been possessed by only one of them. Nugent JA concluded with these words:

[72] In the present case the trial court found, as a matter of inference, that those requirements had been fulfilled in respect of all the accused in relation to the hand grenade. Although the correctness of that finding was placed in issue when the accused appealed, it was not dealt with expressly by the Court a quo. I do not agree that the only reasonable inference from the evidence is that the accused possessed the hand grenade jointly. It is equally possible that, like the pistols, the hand grenade was possessed by only one of the accused. Mere knowledge by the others that he was in possession of a hand grenade, and even acquiescence by them in its use for fulfilling their common purpose to commit robbery, is not sufficient to make them joint possessors for purposes of the Act. The evidence does not establish which of the accused was in possession of the hand grenade and on that charge, in my view, they were entitled to be acquitted.'

[135] In *S v Kwanda* 2013 (1) SACR 137 (SCA) the appellant had been convicted of being in possession of a firearm. Immediately prior to his arrest the appellant had been the driver of a white Nissan Maxima vehicle. Two passengers, Isaac Zikalala and Sipho Mahlenche, were with the appellant in the vehicle. Mahlenche was seated next to the appellant in the front passenger seat. It was common cause that Mahlenche was in possession of an AK-47 rifle, the subject matter of the appeal.

There was some dispute as to whether the appellant was aware of the firearm in Mahlenche's possession. Mahlenche absconded during the course of the trial. It was further common cause that the appellant at no stage had physical possession of the firearm and its ammunition. The only question on appeal was whether the State had established that the appellant possessed the firearm jointly with Mahlenche.

Theron J held the following at 139, para 5:

'[5] The fact, that the appellant conspired with his co-accused to commit robbery, and even assuming that he was aware that some of his co-accused possessed firearms for the purpose of committing the robbery, does not lead to the inference that he possessed such firearms jointly with his co-accused.'

[136] In the case of Ms Z N, all three perpetrators raped her. They used the gun and the knives to subdue her. It formed part of their arsenal to commit their heinous acts. The facts of counts 4 to 6, in my view, establish joint possession of a firearm and a finding in respect of count 7 is accordingly competent. The one rapist was holding the gun jointly and on behalf of the other rapists so that their objective could be achieved, being the rape of Ms Z N. Similarly, in respect of count 18, I find that Mr Ndziweni possessed the firearm jointly with his co-perpetrator ie his co-perpetrator was holding the gun on behalf of both himself and Mr Ndziweni to facilitate the offence.

[137] In so far as it is necessary to say so expressly, I find that Mr Ndziweni's testimony, insofar as it conflicts with that presented on behalf of the state, is rejected as false beyond a reasonable doubt.

[138] In the result I make the following order:

138.1. Mr Ndziweni is found guilty on counts 2 to 18 as charged.

138.2. Mr Ndziweni is found guilty on count 1 of robbery with aggravating circumstances.

I OPPERMAN
Judge of the High Court
Gauteng Division, Johannesburg

Heard: 1 March 2017 to 5 April 2017

Judgment delivered: 29 June 2017

Appearances:

The State: Adv Kowlas

For the Accused: Adv Bosiki