

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)



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

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

DATE

SIGNATURE

CASE NUMBER : SS162/2016

In the matter between:

THE STATE

and

MTHUNDEDZI GANCA

ACCUSED

JUDGMENT

DOSIO AJ:

INTRODUCTION

- [1] The accused is arraigned on three counts. The first count is one of kidnapping. Count 2 is a charge of rape in terms of section 3 of the Sexual Offences and Related matters Amendment Act 32 of 2007, and count three is a charge of murder as envisaged in terms of section 51 (1) of the Criminal Law Amendment Act 105 of 1997 (hereinafter referred to as the Criminal law Amendment Act).
- [2] In respect to count one, the State alleges that on the 1st of January 2016 at or near Palm Ridge, in the district of Ekurhuleni Central, the accused deprived N. M. ("the deceased") of her freedom of movement. In respect to count 2, the State alleges that on the same date and place, the accused raped the deceased by penetrating her vagina with his penis without her consent. In respect to count 3, the State alleges that on the same date and place the accused killed the deceased.
- [3] Prior to the accused pleading, the court apprised him of the provisions of the minimum prescribed sentence of life imprisonment in respect to count 2 and 3. The court also apprised the accused of his right to have an assessor as count 3 was a charge of murder. The accused elected to proceed without an assessor.
- [4] The accused is represented by Mr Nobangule and the State is represented by Advocate Buitendag. The accused understood all 3 counts and pleaded not guilty in respect to all 3 counts. No plea explanation was made and neither were any admissions made.
- [5] At the inception of the trial the State handed in the following exhibits;
- 1.A set of photos, and a sketch plan compiled by Sergeant Vusumuzi Mfana Nkosi which was marked exhibit "A".
 - 2.An affidavit pertaining to the identification of the body of the deceased which was identified by her mother, namely, X. M. marked as exhibit "Bi".
 - 3.An affidavit in terms of section 212 (7) of the Criminal Procedure Act 51 of 1977 ("Act 51 of 1977"), compiled by David Makoropetse Thipa stating that the body of the deceased was pointed out to him by X. M.. This was marked as exhibit "Bii".
 - 4.An affidavit compiled in terms of section 212 (4&8) of Act 51 of 1977, in respect to the post-mortem report compiled Dr Emefa Abra Apatu, which was marked as exhibit "Biii".

5. An affidavit compiled by Khakhathi Ndivhuwo Nevondo, who received the body of the deceased from constable Ndlovu on the 2nd of January 2016, marked as exhibit "Biv".
6. An affidavit compiled by Hennie Moyane, who received the body of the deceased from the forensic officer Nevondo on the 4th of January 2016, marked as exhibit "Bv".
7. An affidavit compiled in terms of section 212 of Act 51 of 1977, in respect to the DNA results which was compiled by warrant officer Lureshni Naidoo, marked as exhibit "Ci".
8. An affidavit compiled by Selina Khelina Mahlangu in terms of section 212 of the Criminal Procedure Act stating that she received one sealed evidence bag with reference number PA5001810809 from constable Moloi. This statement was marked as exhibit "Cii".
9. An affidavit compiled by Michelle Pheiffer in terms of section 212 of Act 51 of 1977 stating that she received one sealed evidence bag with reference number PA5001810809. This statement was marked as exhibit "Ciii".
10. An affidavit compiled by Sihawusenkosi Ignatius Manzini in terms of section 212 of Act 51 of 1977 stating that he received various sealed evidence bags and guard boxes. This statement was marked as exhibit "Civ".
11. An additional affidavit compiled in terms of section 212 of Act 51 of 1977, in respect to the DNA results which was compiled by warrant officer Lureshni Naidoo, which was marked as exhibit "Cv".
12. A statement compiled by Geofrey Sipho Masanabo marked as exhibit "Di".
13. A copy of a SAP 13 register marked as exhibit "Dii".
14. A statement compiled by constable Gleden Phala marked as exhibit "Diii".
15. A statement compiled by Gladys Mbuyisa marked as exhibit "Div".
16. An abridged death certificate pertaining to Gladys Mbuyisa marked as exhibit "Dv".
17. A statement compiled by Gladys Mbuyisa marked as exhibit "Ei".
18. An affidavit compiled by Hennie Moyane pertaining to various specimens that were removed from the body of the deceased. This statement was marked as exhibit "Eii".
19. An affidavit compiled by Cornelius Johannes Nel stating that he removed various specimens and transported them to Lt.Col G.M Mbuyisa. This statement was marked as exhibit "Eiii".
20. An affidavit compiled by Lt.Col G.M Mbuyisa stating that she received various specimens on the 6th of January 2016 from C.J Nel. This statement was marked as exhibit "Eiv".
21. An affidavit compiled by Vusumuzi Mfana Nkosi stating that he handed over the exhibits in sealed bag number PA5001810809 to constable Melba Moratuwa Moloi on

the 19th of January 2016. This statement was marked exhibit “Fi”.

22. An affidavit compiled by Melba Moratuwa Moloi stating that a sealed package was handed over to S.K Mahlangu on the 19th of January 2016. This statement was marked as exhibit “Fii”.

THE EVIDENCE

- [6] The State called 11 witnesses. They were as follows; Detective Segeant Makfe Seroke, X. M., Philasande Jennelee Mbane, Mbekiseni Justice Cebekhulu, Doctor Emefa Abra Apatu, Neo Lebeko, Constable David Sphiwe Ndlovu, Constable Geoffrey Sipho Masanabo, Constable Matlou Gleden Phala, warrant officer Lureshni Naidoo, and Khakhathi Ndivhuwo Nevondo.
- [7] This court will summarise the evidence of the witnesses by dealing with each of the witnesses who were at the scene first and then I will summarise all the chain evidence pertaining to the conveyance of the body of the deceased from the scene to the government mortuary, as well as the chain evidence pertaining to the DNA, blood, buccal and DNA evidence obtained and examined.
- [8] Detective Seroke testified that he has 19 years experience in the SAP and is stationed at Eden Park SAP. On the 2nd of January 2016, he was on duty as a detective and attended a scene where a girl was found raped and murdered. When he arrived at the scene which was in extension 3, Palm Ridge, a group of people had already gathered there. Members from the uniform branch of the police were also there. He entered a shack and saw the body of a child lying supine with her legs spread apart. Next to her was a used condom. The child’s underwear was found next to her body. The official photographer was contacted. The uniform branch of the police had already cordoned off the scene with a tape. When he arrived there, the accused had already been apprehended and taken to the police station.
- [9] X. M. testified that on the 1st of January 2016, she took the deceased with her to go and fetch her grants and returned in the late morning around 12h00. On arrival, she heard that the accused had come past to borrow a spade. The deceased went out to play with the children outside. She last saw the deceased around past three that afternoon.

- [10] When her live in partner was getting ready to go to work, around 16h00, she asked him to call the deceased so that she could bathe her. Her live-in partner went out to look for her and returned, stating he could not find her. She then requested the deceased's younger brother, Simphiwe, to go out and look for her. He too returned stating he could not find her. She then bathed herself and went out to look for the deceased. She went to the deceased's paternal family as she thought maybe her father had come past and taken her to extension 1. At the paternal house they stated they had not seen the deceased. She then went to the accused's sister's place who is called Nokuzula, as the deceased used to play with Nokuzula's child. The burglar door was still locked at Nokuzula's house.
- [11] She then met up with Philasande Mbane who told her she last saw the deceased standing next to the fence talking to the accused. They then found Mbekiseni Justice Cebekhulu ("Cebekhulu") and related the story to him. They decided to phone the police instead of going to confront the accused. Cebekhulu later approached the boyfriend of the accused's sister, whose name is Koleka, who lived in the adjoining shack to that of the accused. The boyfriend was asked if they could search the shack belonging to the accused, as the accused was not there. After the door of the accused's shack was opened she went to lean against a wall as she felt weak. She then heard people screaming in the shack and she was prevented from entering the shack. She was later told her child was naked and was not breathing. She then went home to fetch clothes for her child as she was under the impression her child was still alive. The police arrived and entered the accused's shack. When they exited they did not tell her anything. It is only once she saw the government mortuary vehicle arriving that she concluded that her child was no longer alive. She later visited the mortuary to identify the body of the deceased. She stated no one was given permission to remove her child out of her custody.
- [12] Philasande Jennelee Mbane testified that on the 1st of January 2016, she was coming back from work when she saw the accused from a distance. He was holding the deceased and then put her down, after which the deceased followed the accused in the direction where the accused resides. This witness was standing 30-40 meters away from the accused when she observed this. She estimated the time as being around 16h30. She then proceeded to her place of residence. This witness knew the deceased well as she used to play with her daughter. Later that day, the deceased's mother came to her looking for the deceased. This witness told the deceased's mother that she had

seen the deceased with the accused earlier that afternoon. They both then approached Cebekhulu to accompany them to the premises of the accused. They then found a man in the shack adjoining that of the accused who gave them permission to search the accused's shack. The shack was opened and Cebekhulu lifted the bed and the deceased's body was found underneath. She did not see the accused later that evening.

[13] Cebekhulu testified that at 9pm on the 1st of January 2016 he was on his way to his place of residence when the deceased's mother sent one of her children to enquire if the deceased had come to his place. He then came across the deceased's mother and Philasande Mbane. They approach Koleka and her boyfriend. Koleka and her boyfriend lived in the shack adjoining the accused's shack.

They knocked on the accused's door but there was no response. Koleka then pushed the door open. This witness lifted the bed cover and he found a palm protruding from under the bed. He then removed the cover of the bed and lifted the bed, after which the body of the deceased was found lying on the floor beneath the bed. The accused was found by the police at a tavern and was brought back to the scene.

[14] Neo Lebeko testified that on the 1st of January 2016 he saw the accused returning a spade to the deceased's house at 3pm. This witness then left to go and see his girlfriend. He returned at 6pm. The deceased's mother asked him if he had not seen the deceased. He said "no" and left. He returned at 8pm where he was informed the body of the deceased had been found. The accused was not present. A certain man knew where the accused could be found and they went to this tavern. The accused was in that yard and when he saw them he ran into the house, however the owner of the house chased him out. The time was past twelve pm. This witness personally enquired from the accused what he had done and the accused answered "he did not know what he was doing". The accused was smelling of alcohol but he was not showing signs of being drunk.

[15] During cross-examination of this witness, he agreed that the community did assault the accused, in fact he admitted he also slapped the accused. The version put to this witness is that the accused denied having answered this witness when he was asked what had he done, or that he had run into the house. This witness did not change his version.

[16] Doctor Apatu testified that she qualified with a medical degree in 2005 at the University

of Pretoria. Whilst employed at the forensic pathology services in Germiston, she conducted a post-mortem report on body Dr12/2016 on the 4th of January 2016. The body was pointed out to her by officer Moyane of the government mortuary. The body was that of a female child and she was informed the death had occurred on the 2nd of January 2016. The child was partially clothed with abrasions on the right side of the neck and there was evidence of trauma to the genitalia. The cause of death was consistent with pressure on the neck. There was a 2cm x 1 cm linear abrasion on the right upper neck and a 3cm x 0.2cm linear abrasion on the right lower neck. These abrasions were possibly caused by a thin item or rope that was wrapped around the neck. The abrasions are clearly seen on photos 13, 14 and 15 of exhibit "A". A deep haemorrhage in the right anterior of the tongue was also noted. Doctor Apatu stated that when there is pressure on the neck, the tongue is forced against the teeth or gums which would have caused this haemorrhage. The lungs were intact and showed multiple subpleural petechiae. There were haemorrhages in the inferior upper and lower lobes of the right lung. Doctor Apatu testified that the petechiae are pin point haemorrhages that are caused by pressure on the neck. The haemorrhage in the right lung was also caused by pressure on the lung and rib cage disallowing the child to exhale. The hymen was not intact and showed a fresh tear at the 7 o' clock position. This tear would have been caused by trauma to the genitalia, which was caused either by a penis, or penetration by some other object. There was bruising of the labia minora which would have been caused if the penetration was rough. According to doctor Apatu, the penetration would have been painful.

- [17] Various specimens were obtained by Dr Apatu for DNA analysis. Blood was obtained which was marked with seal number PMK261297. A paediatric sexual assault evidence collection kit was obtained and marked with the following numbers; 13D7AC7917, PAD000680926, and PA4001461355. A sexual assault evidence collection kit was also obtained with seal numbers 15D2AB0905 and PA4002317172. An anal swab marked with seal number PA4001461355 was also obtained. Doctor Apatu testified that although she did not mention that there was anal penetration, she still took a swab from the anus of this child. She explained that when she does the sexual assault kit, she will start by taking a swab in the anus because there may be contamination from the vagina if semen leaks out of the vagina. She stated that even though a condom was possibly used by the perpetrator, often, due to the size difference between an adult's penis and a child's vagina, when the adult removes his penis, the condom can partially dislodge and the contents may leak into the anal area. The foam coming out

of the child's nose, which is seen clearly on photo 13 of exhibit "A", was caused by pressure on the neck, resulting in a decreased return of blood to the heart. This would have caused that the lungs would have filled up with fluid and the fluid would come out of the airways.

- [18] The cause of death was consistent with pressure to the neck which would have occurred due to pressure on the carotid bodies of the neck. If these carotid bodies were stimulated hard enough, they would send a signal to the heart which would slow down the beating of the heart. In addition there would also be decreased blood and oxygen to the brain which would cause the death. In this case pressure must have been applied to the neck for a few minutes.
- [19] The witness constable David Sphiwe Ndlovu testified that he is employed at the Eden Park SAP and he has 9 years experience. On the 1st of January 2016 he was called out to a scene at Izindlebe street where he was informed the body of deceased, was discovered. He was shown a condom on the floor. He guarded the body at the scene and it did not sustain any further injuries and no one tampered with the scene. He handed the body of the deceased over to the forensic officer Nevondo.
- [20] The witness constable Geoffrey Sipho Masanabo, testified that he is a detective and has been employed in the SAP for 9 years. On the 4th of January 2016 he took the buccal samples from the accused and then immediately placed them into an evidence bag with seal number PA4000210814C and sealed it. He then booked it into the SAP 13 register.
- [21] The witness constable Matlou Gleden Phala testified that he is employed at the Eden Park detective branch and has 7 years experience. He testified that on the 13th of January 2016 he received an exhibit from captain Mbuyisa and prepared it for forensics. He took it to forensics on the 14th of January 2016. It was 1 exhibit bag with seal number PA4001461355 with a sexual kit, 1 exhibit bag with seal number PA4002317172 with blood DNA analysis, 1 exhibit bag with seal number PAD000680926 containing clothing, and 1 exhibit bag with seal number PMK261297 containing blood DNA, 1 exhibit bag with seal number PA4001739839 containing a panty and T-shirt, 1 exhibit bag with seal number PA4000210814C containing a buccal swab sample, and 1 exhibit bag with seal number 1104AA44331EB. All were taken to the forensic science laboratory. This witness testified Captain Mbuyisa is no longer alive and he handed in a certified copy of the death certificate of Captain

Mbuyisa.

- [22] The State brought an application in terms of section 3 (1) (a) and 3(1) (c) of the Law of Evidence Amendment Act 45 of 1998 to allow constable Phala to read in the statement of Captain Mbuyisa. The court granted the application.
- [23] Constable Phala read into the record the contents of the statement of Captain Mbuyisa which stated that on the 6th of January 2016 at 13h00 she received exhibits from CJ Nel of the Government mortuary. These exhibits were (i) blood DNA analysis with seal number PA4002317172, (ii) Sexual assault kit with seal number PA4001461355, (iii) blood DNA with seal number PMK261297 and (iv) clothing with seal number PAD000680926. Constable Phala then read into the record another statement of Captain Mbuyisa which stated that on the 7th of January 2016 at 11h20, she received exhibits from Captain Mhlophe which was a DNA kit with seal bag number PA4000210814C and with seal number 11DBAH4215XX. She handed them over to detective constable Phala on the 13th of January 2016. The exhibits were kept safely in a locked safe.
- [24] The State handed in section 212 statements pertaining to the chain statements relating to the DNA evidence. The first statement was a section 212 (8) (a) of Act 51 of 1977 statement compiled by Selina Khelina Mahlangu which states that she received 1 sealed bag with seal number PA5001810809 marked with "Eden Park 12/01/2016" from constable Moloi which she handed over to the Forensic Science laboratory. The seal was still intact. The second statement was a section 212 (4)(a) statement compiled by warrant officer Michelle Pheiffer, a forensic analyst, which states that she received 1 sealed evidence bag with reference number PA5001810809 marked with "Eden Park 12/01/2016" from the administration component of the Biology Section of the Forensic Science Laboratory which contained 1 condom. She examined the exhibit and detected the presence of semen therein. The third statement was a section 212 (4)(a) statement compiled by warrant officer Sihawusenkosi Ignatius Manzini, a forensic analyst, which states that he received various sealed evidence bags and guard boxes. Due to the fact that this statement was handed in purely for the chain pertaining to DNA samples, only point 3.2.2 of his report and 3.6.1 were of importance. These two points state that he received 1 sealed swab guard box with reference number 13D7AC7917 marked "Anal" containing 1 swab and 1 sealed DB trans buccal reference sample kit with reference number 11DBAH4215XX containing 1 reference sample. He examined the exhibits and

in respect to the “Anal” swab, semen was detected.

- [25] The witness warrant officer Lureshini Naidoo testified that she is employed by the SAP attached to the Biology Section of the Forensic Science Laboratory. She has a BSc honours degree obtained from the university of the Free State. She stated that warrant officer Manzini received the exhibits and checked that the seals were intact. If he was satisfied that everything corresponded with the case files he would break the seal and test the samples for the presence of semen. If they tested positive then they would be placed into the DNA system and the machine would test the DNA. Once a result was received on the system, then this witness would extract it and compile a DNA report. From the time the sample was handled by warrant officer Manzini to when she examined it, no one had tampered with it.
- [26] This witness explained that she evaluated the results and used nine (9) areas to compare the DNA. The nine (9) areas were given scientific names which were referred to as “D3S1358”, “vWA”, “FGA”, “D8S1179”, “D21S11”, “D18S51”, “D5S818”, “D13S317”, and “D7S820”. Each region has two DNA pieces of fragment sizes. One region is from the mother and the other region is from the father. The combination of all these short pieces of DNA, including the gender marker, constituted a unique DNA profile of an individual.
- [27] This witness proceeded to explain the first line of table 1 on page 2 of exhibit “Ci”. She stated that the gender marker X:Y referred to the male gender, whereas the X:X referred to the female gender. The reference sample taken to the laboratory was X:Y, therefore it referred to the male gender. The “Anal” swab also depicted the gender marker X:Y, therefore it matched showing it was also a male donor.
- [28] In respect to the nine (9) STR-LOCI regions, the same results for both the reference sample and the “Anal” swab were obtained in 7 of the 9 regions. The first region, namely D3S1358 was 14:15. The second region, namely vWA was 15:15. The third region, namely FGA was 19:25. The fourth region, namely, D8S1179 was 11:13. The fifth region, namely D21S11 was 28:29. The seventh region, namely, D5S818 was 12:13. The eighth region, namely D13S317 was 11:13. The sixth and ninth region, namely, D18S51 and D7S820, only had results for the reference sample. This witness explained that because there was an absence of results at the sixth and ninth region, it was a partial DNA result. This would occur when they have DNA of a poor quality or quantity.

Although this diminishes the stats, she stated that they need a minimum of 7 results including the gender marker according to international standards to compile a conclusive result.

- [29] This witness stated that the DNA result for the “Anal” swab 9PA4001461355[13D7AC7917] “DR12/2016” matched the DNA result from the reference samples (PA4000210814C [11DBAH4215XX] “Mthondezi” and (11D4AA4431EB) “Gangca M” at the corresponding loci. This witness stated that the most conservative occurrence for the DNA result from the “Anal” swab (PA4001461355 [13D7AC7917] “DR 12/2016” is 1 in 520 million people. Accordingly, the chances that the same DNA would be found in another individual would be 1 in 520 million people, accordingly, it was very unlikely that this DNA belonged to another person other than the accused.
- [30] This witness was recalled by the State in terms of section 166 of the Criminal Procedure Act. The reason being is that she had received a condom which when she tested it, it was positive for the presence of semen. However, the results of the DNA were not for tabulated. Accordingly, this witness was given an opportunity to formulate the results in a table and was recalled for this purpose. She returned after compiling an additional table which was incorporated and marked as exhibit “Cv”. In this instance DNA was obtained at all 9 areas as well as the gender marker. Both the condom with seal number (PA5001810809) as well as the reference sample with seal numbers (PA400021814C), [11DBAH4215XX] “Mthondezi” and (11D4AA4431EB) “Gangca M” showed the gender marker X:Y which denoted the male marker and it was a match. The nine STR-Loci also matched at all nine regions in both the condom and the reference samples. The first area namely D3S1358 was 14:15, the second region, namely vWA was 15:15, the third region, namely FGA was 19:25, the fourth region, namely, D8S1179 was 11:13, the fifth region, namely D21S11 was 28:29, the sixth region, namely, D18S51 was 17:20, the seventh region, namely D5S818 was 12:13, the eighth region, namely D13S317 was 11:13, and the ninth region, namely S7S820 was 8:9 in both samples. Accordingly the DNA result from the condom matched the DNA of the reference sample. The statistical analysis of the results reflected that an individual who had this DNA would be 1 in 460 billion people. This witness stated there are only between 7 to 8 billion people in the world, so accordingly, there is no chance that this DNA could belong to anyone else, but the accused.

- [31] This witness impressed this court.
- [32] The witness Khakhati Ndivhuwo Nevondo testified that he is employed at the Germiston Forensic Pathology Services as a forensic officer and has 7 years service. He stated that on the 2nd of January 2016 he received the body of the deceased from constable Ndlovu and conveyed the body to the mortuary and attached the number 12/2016 to the body. He identified the body to the forensic pathology officer Moyane.
- [33] The witness Hennie Moyane testified that he is forensic officer based at the Germiston pathology services. He stated that on the 4th of January 2016 he received the body of the deceased with number 12/2016 from the forensic officer Nevondo. He also stated that on the 4th of January 2016 he received the following specimens from Dr Apatu which was removed from the body with serial number 12/2016. These specimens were blood DNA with seal number PA4002317172, a sexual assault kit with seal number PA4001461355, a further blood DNA specimen with seal number PMK261297 and clothing marked with seal number PAD000680926. He placed all these specimens into a sealed container and deposited them in the locked specimen store room for safe keeping.
- [34] The State closed their case.
- [35] The accused elected not to testify. He did not call any witnesses to testify on his behalf and closed his case.

EVALUATION OF THE EVIDENCE

- [36] There is no direct evidence to the crimes committed, however, the State has presented evidence that on the afternoon when the deceased disappeared, the accused was seen returning a spade to the deceased's mother's house and later was seen holding the deceased. In addition, the deceased was seen following the accused in the direction where he lived. The deceased was found raped and murdered in the shack which belongs to the accused. The post-mortem results establish that the deceased was vaginally penetrated. A used condom was found next to the deceased's body. The marks on the neck of the deceased, as per the evidence of Dr Apatu, is indicative of a ligature being used to put pressure on her neck. The semen found in the anal swab and the used condom, conclusively matches the DNA found on the buccal sample taken from the accused.

[37] In the case of *R v Blom* 1939 AD 188 at 202 – 203 Watermeyer, JA stated the following:

“In reasoning by inference there are two cardinal rules which cannot be ignored:

- (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
- (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.”

[38] In *S v Reddy and others* 1996 (2) SACR 1 (A) at 8 - 9 the court stated that;

“In assessing circumstantial evidence...The evidence needs to be considered in its totality...”

[39] The law as expressed in *S v Reddy (supra)* was referred to with approval by the Supreme Court of Appeal on 1 June 2015 in *Modiga v The State* (20738/14) [2015] ZASCA 94.

[40] This Court has considered the circumstantial evidence presented by the State holistically, and no other inference can be drawn from it, except that the accused is the person who kidnapped, raped and murdered the deceased. The accused never testified, neither did he challenge the evidence presented from the State, accordingly, there is no evidence from the accused to gainsay the State's case. No explanation was given how the deceased entered his shack and was found raped and murdered under his bed. No explanation was given how it was possible that his semen was found in the anus of the deceased and also in the used condom. Accordingly, a very heavy burden was created against the accused by the evidence presented by the State and this heavy burden was not relieved in any way by the accused.

[41] The accused gave his legal representative no instructions to cross-examine the State witnesses. In fact after each witness was finished, this court asked the accused if he had had understood the evidence of the witnesses and whether he was accepting their evidence as being correct. This Court advised him of the negative inferences the court

could draw if he did not challenge the evidence presented. The accused stated he understood the evidence of the State witnesses, but he had no questions.

[42] In the case of *S v Boesak* 2001 (1) SA 912 (CC) the court held at paragraph [24] that;

“The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer and an accused chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence.”

[43] In the case of *S v Hlongwa* 2002 (2) SACR 37 (TPD) the court referred to the case of *S v Brown en 'n Ander* 1996 (2) SACR 49 (NC) and stated that;

“...the failure of an accused to testify on relevant matters within his knowledge constituted a factor to be taken into account as adding strength to the case against the accused.”

[44] In *S v Katoo* 2005 (1) SACR 522 (SCA) at 529e the Supreme Court of Appeal made the situation clear:

“[if] ...the respondent failed to place any version before the Court by means of evidence, the Court’s verdict should have been based on the evidence of the prosecution only.” [my emphasis].

[45] It is not for the court to speculate or conjecture a version for the accused. All the State witnesses impressed this Court. They were honest and reliable. This Court accepts their evidence as the true version of events. All the chains in respect to the conveying of the deceased’s body to the government mortuary, as well as the buccal samples of the accused, the DNA results of the blood, the anal swap from the deceased and well as the clothing were all complete and there was no evidence or suggestion of tampering of any of these chain statements. The accused’s legal representative also did not dispute or challenge same.

- [46] In light of the above and in the absence of a version presented on behalf of the accused, this Court will accordingly base its verdict on the evidence presented by the State. On a conspectus of all the evidence presented, a *prima facie* case has been made out against the accused. In the absence of an explanation by the accused, the evidence presented by the State becomes proof beyond reasonable doubt.
- [47] By remaining silent, the accused has tacitly admitted either that he was guilty or that he had no answer to the evidence against him. The accused's silence leaves the prosecution's case undisturbed, as there is no evidence to challenge it or explain it away.
- [48] The proven facts and conclusive DNA evidence, together with the injuries sustained to the deceased's gynaecological area, point towards the accused as being the person who kidnapped, raped and murdered the deceased on the 1st of January 2016. Accordingly, the State has proven its case beyond reasonable doubt.
- [49] Count 3 murder
The accused has been charged with murder read with the provisions of Section 51(1) and Part 1 of Schedule 2 of the Criminal Law Amendment Act which relates to a planned or premeditated murder. Dr Apatu testified that use was made of a ligature of some sort of string or rope to strangle the deceased. It is clear to this Court that the accused had to find this ligature in order to strangle the deceased. Whether he had the ligature at hand or had to go and find one after her rape, the end result is the same, he pre-meditated killing his victim using this ligature. The use of this ligature, together with the luring of the deceased into his shack, and the concealing of the deceased's body under the accused's bed, are all indicative that the accused planned to kidnap, rape and murder the deceased. Even if this Court is wrong in this respect, the fact that the death of the victim was caused by the accused whilst committing the offence of rape, the offence would still fall within the ambit of a part 1 of schedule 2 offence.
- [50] Accordingly this court finds that the accused did deprive the deceased of her freedom of movement, and raped her by inserting his penis in her vagina. This Court also finds that the accused murdered the deceased. There are no grounds of justification for the accused's actions and the court finds that he had the intention in the form of *dolus directus* to kidnap, rape and murder the deceased.

FINDINGS

[51] In respect to count 1 the accused is found guilty of kidnapping. In respect to count 2 the accused is found guilty of rape. In respect to count 3 the accused is found guilty of murder as envisaged in terms of section 51 (1) of the Criminal law amendment Act.



D DOSIO
ACTING JUDGE OF THE HIGH COURT

Date Heard	6 February 2018
Judgment handed down	7 February 2018

Appearances:

On behalf of the State	Adv T. Buitendag
On behalf of the Accused	Mr Nobangule